

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1397 CS

Drug Offenses

SPONSOR(S): Harrell

TIED BILLS:

IDEN./SIM. BILLS: SB 2352

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	7 Y, 0 N, w/CS	Billmeier	Kramer
2) Justice Appropriations Committee			
3) Justice Council			
4) _____			
5) _____			

SUMMARY ANALYSIS

Chapter 893, Florida Statutes, defines criminal offenses and provides penalties for illegal use of controlled substances. Section 893.135, F.S., relates to trafficking in controlled substances and provides for increased penalties based on the amount of a controlled substance that the defendant sells, purchases, manufactures, delivers, or brings into the state. HB 1397 allows the state to aggregate the amount of a controlled substance sold, purchased, manufactured, delivered, brought into the state, or actually or constructively possessed pursuant to a single course of conduct over a 90 day period in order to determine whether threshold amounts have been met.

This bill amends two sections of law relating to pretrial release for drug offenses. First, this bill requires a defendant to prove, as a condition of release for a felony violation of chapter 893 involving the sale, delivery, cultivation or manufacture of any controlled substance; the possession with intent to sell, deliver, cultivate or manufacture any controlled substance; or the trafficking of any controlled substance the source and legitimacy of any funds intended to be used to obtain release. If the release is to be guaranteed by a criminal surety bond, the defendant must prove the surety's purpose and intention to secure the appearance of the defendant to answer the charges.

Finally, this bill requires the court to revoke pretrial release of a defendant who is granted pretrial release for a felony violation of chapter 893 involving the sale, delivery, cultivation or manufacture of any controlled substance; the possession with intent to sell, deliver, cultivate or manufacture any controlled substance; or the trafficking of any controlled substance if that defendant is subsequently arrested for another such felony violation of chapter. 893. The defendant may obtain pretrial release on the second charge if the defendant proves that he or she is not a danger to the community.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility – This bill limits pretrial release for persons charged with a specified felony violation of chapter 893 who are subsequently arrested for another specified violation of ch. 893.

Provides limited government - The bill allows for the aggregation of the amount of a controlled substance sold or purchased over a ninety day period for the purpose of determining whether the threshold amounts for trafficking purposes have been met.

B. EFFECT OF PROPOSED CHANGES:

HB 1397 amends chapter 893, F.S., relating to drug offenses and ch. 903, F.S., relating to pretrial release for certain drug offenses.

Penalties for Violations of Chapter 893

Section 893.13, F.S., provides penalties for any person who sells, manufactures, delivers, or possesses with the intent to sell, manufacture, or deliver certain controlled substances. Schedule I substances have “a high potential for abuse” and “no currently accepted medical use in treatment in the United States.”¹ Schedule II substances have “a high potential for abuse and [have] a currently accepted but severely restricted medical use” in the United States.² Schedule III substances have “a potential for abuse less than the substances contained in Schedules I and II and [have] a currently accepted medical use in treatment in the United States.”³ Schedules IV and V substances have a lower potential for abuse.⁴ Generally, Florida law provides for increased penalties for violations relating to schedule I and II substances and lesser penalties for schedules III, IV, and V⁵ and provides for increased penalties for sale, manufacture, delivery of controlled substances, or possession of controlled substances with the intent to sell, manufacture, or deliver compared to penalties for simple possession.⁶

Section 893.135, F.S., relates to trafficking in controlled substances and provides for increased penalties based on the amount of a controlled substance that the defendant sells, purchases, manufactures, delivers, or brings into the state. In simple terms, the difference between the offense of trafficking and the offenses of sale, purchase or possession is the quantity of the substance involved. Penalties for violations of s. 893.135, F.S., are based on the type of controlled substance and the amount involved. Section 893.135, F.S., provides for mandatory sentences of 3 years, 7 years, 15 years, 25 years, or life, depending on the amount and type of substances possessed, sold, purchased or manufactured. For example, the statute provides a 3 year minimum term for selling more than 28 grams, but less than 200 grams of cocaine.⁷ The offense is a first degree felony and requires the imposition of a \$50,000 fine. If the sale involved less than 28 grams of cocaine, the offense would be punishable under section 893.13 as a second degree felony and would not require the imposition of a minimum mandatory sentence.⁸

¹ Section 893.03(1), F.S.

² Section 893.03(2), F.S.

³ Section 893.03(3), F.S.

⁴ Sections 893.03(4) and (5), F.S.

⁵ See e.g. section 893.13, F.S.

⁶ See section 893.13, F.S.

⁷ See s. 893.135(1)(b)1.a., F.S.

⁸ s. 893.13(1)(a)1, F.S.

HB 1397 allows the state to aggregate the amount of a controlled substance sold, purchased, manufactured, delivered, brought into the state, or actually or constructively possessed pursuant to a single course of conduct over a 90 day period in order to determine whether threshold amounts have been met. This would allow imposition of penalties for the increased amount if it can be shown that over a 90 day period, the defendant trafficked a total amount that exceeded the statutory amounts.

Pretrial Release

Article I, section 14, Fla. Const., provides:

Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

As explained in State v. Paul,⁹ the Legislature implemented this constitutional provision in s. 907.041, F.S. Section 907.041(4)(c), F.S., provides:

(4)(c) The court may order pretrial detention if it finds a substantial probability, based on a defendant's past and present patterns of behavior, the criteria in s. 903.046, and any other relevant facts, that any of the following circumstances exists:

1. The defendant has previously violated conditions of release and that no further conditions of release are reasonably likely to assure the defendant's appearance at subsequent proceedings;
2. The defendant, with the intent to obstruct the judicial process, has threatened, intimidated, or injured any victim, potential witness, juror, or judicial officer, or has attempted or conspired to do so, and that no condition of release will reasonably prevent the obstruction of the judicial process;
3. The defendant is charged with trafficking in controlled substances as defined by s. 893.135, that there is a substantial probability that the defendant has committed the offense, and that no conditions of release will reasonably assure the defendant's appearance at subsequent criminal proceedings; or ...
5. The defendant poses the threat of harm to the community. The court may so conclude, if it finds that the defendant is presently charged with a dangerous crime, that there is a substantial probability that the defendant committed such crime, that the factual circumstances of the crime indicate a disregard for the safety of the community, and that there are no conditions of release reasonably sufficient to protect the community from the risk of physical harm to persons.
6. The defendant was on probation, parole, or other release pending completion of sentence or on pretrial release for a dangerous crime at the time the current offense was committed; or
7. The defendant has violated one or more conditions of pretrial release or bond for the offense currently before the court and the violation, in the discretion of the court,

⁹ 783 So. 2d 1042 (Fla. 2001).

supports a finding that no conditions of release can reasonably protect the community from risk of physical harm to persons or assure the presence of the accused at trial.

The pretrial release statute requires the court to consider s. 903.046, F.S., relating to bail criteria. Section 903.046(2), F.S., provides:

(2) When determining whether to release a defendant on bail or other conditions, and what that bail or those conditions may be, the court shall consider:

(a) The nature and circumstances of the offense charged.

(b) The weight of the evidence against the defendant.

(c) The defendant's family ties, length of residence in the community, employment history, financial resources, and mental condition.

(d) The defendant's past and present conduct, including any record of convictions, previous flight to avoid prosecution, or failure to appear at court proceedings. However, any defendant who had failed to appear on the day of any required court proceeding in the case at issue, but who had later voluntarily appeared or surrendered, shall not be eligible for a recognizance bond; and any defendant who failed to appear on the day of any required court proceeding in the case at issue and who was later arrested shall not be eligible for a recognizance bond or for any form of bond which does not require a monetary undertaking or commitment equal to or greater than \$2,000 or twice the value of the monetary commitment or undertaking of the original bond, whichever is greater. Notwithstanding anything in this section, the court has discretion in determining conditions of release if the defendant proves circumstances beyond his or her control for the failure to appear. This section may not be construed as imposing additional duties or obligations on a governmental entity related to monetary bonds.

(e) The nature and probability of danger which the defendant's release poses to the community.

(f) The source of funds used to post bail.

(g) Whether the defendant is already on release pending resolution of another criminal proceeding or on probation, parole, or other release pending completion of a sentence.

(h) The street value of any drug or controlled substance connected to or involved in the criminal charge. It is the finding and intent of the Legislature that crimes involving drugs and other controlled substances are of serious social concern, that the flight of defendants to avoid prosecution is of similar serious social concern, and that frequently such defendants are able to post monetary bail using the proceeds of their unlawful enterprises to defeat the social utility of pretrial bail. Therefore, the courts should carefully consider the utility and necessity of substantial bail in relation to the street value of the drugs or controlled substances involved.

(i) The nature and probability of intimidation and danger to victims.

(j) Whether there is probable cause to believe that the defendant committed a new crime while on pretrial release.

(k) Any other facts that the court considers relevant.

Bail

Chapter 903, F.S., deals with bail. Section 903.045, F.S., provides that it is the policy of the state that a criminal surety bail bond "shall be construed as a commitment by and an obligation upon the bail bond agent to ensure that the defendant appears at all subsequent criminal proceedings."

HB 1397 requires a defendant charged with a felony violation of chapter 893 involving the sale, delivery, cultivation or manufacture of any controlled substance; the possession with intent to sell, deliver, cultivate or manufacture any controlled substance; or the trafficking of any controlled substance to prove as a condition of pretrial release on appearance or a criminal surety bond:

- the source and legitimacy of any funds intended to be used to obtain release;
- the surety's purpose and intention to secure the appearance of the defendant to answer the charges.

Section 903.046(2)(f), F.S., already requires the trial court to consider the source of a defendant's funds used to post bail. This bill requires the defendant to prove the source of those funds.

This bill also amends s. 903.0471, F.S., to require, as a condition of pretrial release, that the defendant prove by a preponderance of the evidence that he or she would not be a danger to the community if:

- the defendant has been granted pretrial release on a charge of any felony violation of chapter 893 involving the sale, delivery, cultivation or manufacture of any controlled substance; the possession with intent to sell, deliver, cultivate or manufacture any controlled substance; or the trafficking of any controlled substance; and
- the defendant is subsequently arrested for a new felony violation of chapter 893 involving the sale, delivery, cultivation or manufacture of any controlled substance; the possession with intent to sell, deliver, cultivate or manufacture any controlled substance; or the trafficking of any controlled substance

This bill takes effect on October 1, 2005.

C. SECTION DIRECTORY:

Section 1. Amends s. 893.135, F.S., relating to the amount of a controlled substance that may be considered when determining the penalty.

Section 2. Amends s. 903.047, F.S., relating to pretrial release for certain drug offenses.

Section 3. Amends s. 903.0471, F.S., relating to pretrial release for persons accused of committing multiple drug offenses.

Section 4. Provides an effective date of October 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference has not met to consider the prison bed impact of this bill on the Department of Corrections. The bill allows the state to aggregate the amount of a controlled substance sold, purchased, manufactured, delivered, brought into the state, or actually or constructively possessed pursuant to a single course of conduct over a 90 day period in order to determine whether threshold amounts have been met. To the extent that this results in offenders being convicted of trafficking instead of the offense of sale or purchase of a controlled substance, there will be a indeterminate prison bed impact on the department.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill places new restrictions on pretrial release. If these restrictions result in fewer defendants being granted pretrial release, local governments will have increased costs for housing the defendants prior to trial.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

See above.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

Right to Pretrial Release

Article I, section 14, Fla. Const., provides:

Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

Sections 3 and 4 of this bill place new restrictions on the right to pretrial release by requiring a defendant to prove the source and legitimacy of funds used to post bail, to prove the surety's purpose and intention to secure the appearance of the defendant at trial, and prove that he or she is not a danger to the community in certain situations. Currently, the trial court may deny bail pursuant to criteria in s. 907.041, F.S. and s. 903.046, F.S. if it finds there is a "substantial probability" that

certain circumstances exist. This bill shifts the burden to the defendant to prove that certain circumstances exist before the trial court may grant pretrial release.

The United States Supreme Court has held that a person may be detained prior to trial to prevent danger to the community.¹⁰ Section 4 of this bill shifts the burden to the defendant only in situations where a defendant has been granted pretrial release for one felony and been subsequently arrested for another felony. It can be argued that this bill only requires pretrial detention to prevent danger to the community. Federal law¹¹ creates a rebuttable presumption that no conditions will assure that a defendant will return for trial if the defendant has been charged with certain drug crimes. It can be argued that this bill simply creates a presumption that can be rebutted by the defendant.

Florida courts do not appear to have addressed the bill's requirement that the defendant prove the source of the funds use to post bail. However, the requirement that the court consider the source of the funds already exists in Florida law. The Rhode Island Supreme Court held that a provision requiring a defendant in a drug case to prove the source of funds violated the state constitution.¹² However it can be argued that the bail provision of the Rhode Island Constitution is narrower than the Florida Constitution.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 3 of the bill requires the defendant to prove a surety's "purpose and intention to secure the appearance of the defendant to answer charges." This is arguably duplicative of the provision in s. 903.045, F.S., providing that it is the policy of the state that a criminal surety bail bond "shall be construed as a commitment by and an obligation upon the bail bond agent to ensure that the defendant appears at all subsequent criminal proceedings."

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

As originally filed, HB 1397 would have required the imposition of a three year minimum mandatory sentence for a third felony drug conviction. The Criminal Justice Committee amended the bill and removed this provision. The amendment also provided that the pretrial release provisions apply to felony violations under chapter 893 involving the sale, delivery, cultivation or manufacture of any controlled substance; the possession with intent to sell, deliver, cultivate or manufacture any controlled substance; or the trafficking of any controlled substance.

¹⁰ See United States v. Salerno, 481 U.S. 739, 749-750 (1987)

¹¹ 18 U.S.C. 3142

¹² See State v. Zorillo, 565 A.2d 1259 (Rhode Island 1989).