The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL:	SB 1276
INTRODUCER:	Senator Latvala
SUBJECT:	Hiring, Leasing, or Obtaining Personal Property or Equipment with Intent to Defraud
DATE:	January 19, 2012 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Pre-meeting**
2.			JU	
3.			BI	
4.				
5.				
6.				

I. Summary:

The bill amends s. 812.155, F.S., which sets forth the criminal law violations related to leased or hired personal property or equipment, in the following ways:

- Provides that a courier service with tracking ability is authorized to deliver notice of rental agreement noncompliance to a lessee under the statute;
- Revises a 5 day waiting period which allows for a prosecution to be initiated sooner;
- Creates a rebuttable presumption with regard to proof of offenses;
- Provides that a defendant may not rely upon the defense that he or she is not in possession of the leased or hired property in prosecutions under the statute; and
- Makes organizational and stylistic changes.

This bill substantially amends section 812.155 of the Florida Statutes.

II. Present Situation:

Section 812.155, F.S., prohibits certain acts with regard to rented personal property or equipment. Depending upon the value of the property the crimes are punishable as either a second degree misdemeanor or a third degree felony.[1]

[1] The crimes set forth in subsections (1)-(3) are misdemeanors of the second degree, punishable by up to 60 days incarceration and a $500 fine, if the value of the item is less than $300. If the value of the item is $300 or more, the crimes are third degree felonies, punishable by up to 5 years incarceration and a $1,000 fine. *See* s. 812.155(1)-(3), F.S.

Section 812.155(1), F.S., prohibits obtaining custody of personal property or equipment, with the intent to defraud the owner, whether through trickery, deceit, or fraudulent or willful false representation. Section 812.155(2), F.S., prohibits the hiring or leasing of personal property with the intent to defraud the owner of the rent payable for the possession or use of the property. Paragraph (4)(a) of the statute provides that evidence of fraudulent intent may be proven by showing that a person obtained the property under false pretenses; absconded without payment; or by removing or attempting to remove the property from the county without the owner's permission.[2]

In order for there to be a prosecution for the conduct prohibited by s. 812.155, F.S., the rental agreement (or an addendum to the agreement) must contain the following statement and the statement must be initialed by the person hiring or leasing the property:

> Failure to return rental property or equipment upon expiration of the rental period and failure to pay all amounts due (including costs for damage to the property or equipment) are evidence of abandonment or refusal to redeliver the property, punishable in accordance with section 812.155, Florida Statutes.[3]

Section 812.155(3), F.S., specifically prohibits a person from knowingly abandoning or refusing to return the leased personal property or equipment to the owner (or his or her agent), as agreed, at the end of the rental period.

The statute allows for a demand for return of the property to be made in person, by hand delivery, or by certified mail (return receipt requested) addressed to the lessee's address shown in the rental contract.[4]

Evidence of abandonment of the property or refusal to return it can be shown if the property is not returned within 5 days of the delivery of notice to the lessee by certified mail, or within 5 days of the return receipt from the certified mailing.[5] Abandonment of or refusal to return the property may also be shown through evidence that the lessor has not paid any amounts due after a demand for return of the property has been made.[6]

III. Effect of Proposed Changes:

The bill provides an additional method by which the owner or agent of the owner of leased personal property or equipment may make a demand for return or provide notice to a lessee, such that the lessee's failure to respond to the demand or notice may be evidence of the abandonment of or refusal to return the leased property. Subsection (4) of s. 812.155, F.S., is amended by the bill to allow for delivery by courier service with tracking capability to the address of the lessee as it appears on the rental contract.

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[2] s. 812.155(4)(a), F.S.
[3] s. 812.155(6), F.S.
[4] s. 812.155(5), F.S.
[5] s. 812.155(4)(b), F.S.
[6] s. 812.155(4)(c), F.S.

The bill eliminates the 5 day waiting period currently given the lessee to comply with the mailed notice or be prosecuted for a criminal law violation under s. 812.155, F.S. The bill provides that the 5 day time period for compliance with the rental agreement begins to run upon the mailing of the notice, rather than the delivery or failed delivery that current law provides.[7]

A new subsection is added to the statute providing that possession of personal property or equipment by a third party is not a defense for failure to return the property. This language appears to allow for a trial court to restrict a defendant's potential testimony and may be construed as a Due Process or access to the courts issue.

The bill creates a rebuttable presumption in paragraphs (4)(b) and (c) of s. 812.155, F.S., that would give the evidence of abandonment or refusal to return the personal property or equipment greater weight than it has under the current language found therein.

Currently, proper notice or a demand for return of property (not responded to) may be considered simply as evidence of the crimes of abandonment of or refusal to return leased property. Considering (or not considering) the fact of the unresponded to notice or demand does not require a finding that an element of the crime has been proven. In other words, it is evidence a jury is *free to consider or to dismiss* as it determines whether the facts presented by the prosecution prove the crime beyond a reasonable doubt.

The bill would elevate that same evidence (unresponded to notice or demand for return) to a fact that the jury *should presume* proves an element of the crime of abandonment of or refusal to return leased property. Simply, the jury *must infer* that one fact or element of the offense (abandonment or refusal to return the property) *is proven* from the fact of the unresponded to notice or demand. The presumption (inference) may be *rebutted* by other facts presented to the jury (by the defense).

The bill also makes organizational and stylistic changes to subsections (1)-(3) of s. 812.155, F.S. These changes are not substantive in nature.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[7] *See* s. 812.155(4)(b), F.S.

D. Other Constitutional Issues:

A rebuttable presumption may impermissibly shift the burden of proof of the elements of an offense from the prosecution, where it lies in a criminal trial. This could give rise to a constitutional claim based upon Due Process grounds.

If such a claim is brought, and the court finds the rebuttable presumption in the bill to be a "mandatory presumption," the Due Process analysis of the statute will be based upon whether it violates due process "on its face." Essentially, this means that the presumption in the statute cannot pass constitutional muster in *any defendant's* case. If the court finds the rebuttable presumption to be a "permissive inference," the statute will be analyzed "as it applies" to the case against *a particular defendant*.[8]

As pointed out in the *Rygwelski* case, when the Florida Supreme Court applies the U.S. Supreme Court framework regarding permissive inferences and mandatory presumptions, it has construed mandatory statutory language as creating a permissive inference numerous times.[9]

For example, in *State v. Kahler*, 232 So.2d 166 (Fla.1970), the court reviewed a statute which provided that possession of an improperly labeled drug was *prima facie evidence* that such possession was unlawful. The court opined that "constitutional guarantees are not violated as long as there is a rational connection between the fact proven and the ultimate fact presumed and reasonable opportunity is afforded to rebut the presumption." The court further stated that statutory language providing that proof of one fact is "prima facie evidence" of another fact does not relieve the State of its burden of proof.

According to the *Rygwelski* court's reading of *Kahler*: "*Kahler* establishes that such language creates only a permissive inference (an evidentiary device that does not relieve the State of its burden)."[10]

The meaning and application of a provision from s. 812.155, F.S. (2005), was at issue in the *Rygwelski* court. The statutory language at that time stated that the failure to redeliver property within five days after receipt of, or within five days after return receipt from, the certified mailing of the demand for return "is prima facie evidence of fraudulent intent."[11] The court found that the language created a *permissive inference* according to existing Florida precedent like the *Kahler* case mentioned above.[12]

[8] *See* the discussion of the U.S. Supreme Court's treatment of inferences and presumptions found in *State v. Rygwelski*, 899 So.2d 498 (Fla. 2nd DCA 2005), quoting *County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).
[9] *State v. Rygwelski*, 899 So.2d 498, 502 (Fla. 2nd DCA 2005).
[10] *Id.* at 502.
[11] s. 812.155(4)(b), F.S. (2005).
[12] *State v. Rygwelski*, 899 So.2d 498, (Fla. 2nd DCA 2005). *See also State v. Higby*, 899 So.2d 1269 (Fla. 2nd DCA 2005) and *Smith v. State*, 9 So.3d 702 (Fla. 2nd DCA).

In 2006 s. 812.155, F.S., was amended at which time the term "prima facie" was deleted from the statute, as was the requirement that the state prove the element of "fraudulent intent" in cases prosecuted under subsection (3).[13]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The amendments made to s. 812.155, F.S., are likely to result in a quicker and more positive resolution of criminal cases for owners of leased or hired personal property or equipment.

C. Government Sector Impact:

The bill does not create any new criminal offenses. Although the amendments made by the bill could result in a greater number of prosecutions under s. 812.155, F.S., that end in convictions, it is unlikely that there would be a prison bed impact as the felony offenses in the statute are unranked third degree felonies.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[13] s. 3, ch. 2006-51, Laws of Florida.