

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 845 Sexting

SPONSOR(S): Criminal Justice Subcommittee; DuBose and others

TIED BILLS: None **IDEN./SIM. BILLS:** SB 1112

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Cunningham	Cunningham
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Section 847.0141, F.S., specifies that a minor commits sexting if he or she knowingly:

- Uses a computer, or any other electronic device, to transmit or distribute to another minor any photograph or video of any person which depicts nudity and is harmful to minors; or
- Possess a photograph or video of any person that was transmitted or distributed by another minor which depicts nudity and is harmful to minors.

Currently, a first sexting offense is a noncriminal violation punishable by community service or, if ordered by the court in lieu of community service, a \$60 fine. Subsequent violations of the statute are criminal offenses.

In January 2015, Florida's Fourth District Court of Appeal (DCA) held that because a first offense of sexting (a noncriminal violation) does not fit within the definition of "delinquent act" or "violation of law," the state could not use a petition for delinquency to prosecute such offense. As a result, it is unclear how a minor can be prosecuted for a first-time sexting violation.

The bill changes the penalties associated with first-time violations of the sexting statute to address the Fourth DCA's holding. The bill specifies that first-time sexting violations remain a noncriminal violation. However, a minor who commits a first-time sexting violation must sign and accept a citation indicating a promise to appear before the juvenile court. In lieu of appearing in court, the minor may complete 8 hours of community service work, pay a \$60 civil penalty, or participate in a cyber-safety program, if such program is locally available. The minor must satisfy any penalty within 30 days after receipt of the citation. A minor who fails to comply with the citation waives his or her right to contest it, and authorizes the court to:

- Order the minor to perform 8 hours of community service, pay a \$60 civil penalty, or participate in a cyber-safety program (or any combination thereof); or
- Issue an order to show cause.

If the minor opts to appear in court (rather than complete community service, etc.) and the court finds that the minor committed the noncriminal violation, the court may order the minor to perform eight hours of community service, pay a \$60 civil penalty, or participate in a cyber-safety program (or any combination thereof).

Upon a finding of contempt, the court may impose additional penalties, which may include issuance of an order to the Department of Highway Safety and Motor Vehicles to withhold issuance of, or suspend the driver license or driving privilege of, the minor for 30 consecutive days. The court may not impose incarceration.

The bill may have a positive fiscal impact on state and local government because it allocates specified percentages of all civil penalties received by a juvenile court pursuant to the citation process to the clerk of court and to the county commission. See fiscal section.

The bill is effective upon becoming a law.

FULL ANALYSIS

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0845a.CRJS

DATE: 3/18/2015

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Sexting

The act of electronically sending sexually explicit messages or photos of oneself to another is generally referred to as sexting. Sexting among youth is more prevalent than previously thought, according to a new study from Drexel University that was based on a survey of undergraduate students at a large northeastern university.¹ More than 50 percent of those surveyed reported that they had exchanged sexually explicit text messages, with or without photographic images, as minors.

2011 Legislation

In 2011, the Legislature passed HB 75,² which created s. 847.0141, F.S., relating to sexting. This statute specifies that a minor commits sexting if he or she knowingly:

- Uses a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another minor any photograph or video of any person which depicts nudity³ and is harmful to minors⁴; or
- Possess a photograph or video of any person that was transmitted or distributed by another minor which depicts nudity and is harmful to minors.

A minor who *possesses* a prohibited photograph or video does not commit sexting if:

- The minor did not solicit the photograph or video;
- The minor took reasonable steps to report the photograph or video to the minor's legal guardian or to a school or law enforcement official; and
- The minor did not transmit or distribute the photograph or video to a third party.⁵

The statute specifies that the transmission or distribution of multiple photographs or videos is a single offense if the photographs or videos were transmitted or distributed within the same 24-hour period. Additionally, the possession of multiple photographs or videos that were transmitted or distributed by a minor is a single offense if the photographs or videos were transmitted or distributed within the same 24-hour period.⁶

The following penalties apply to sexting:

- A minor's first violation is a noncriminal violation punishable by 8 hours of community service or, if ordered by the court in lieu of community service, a \$60 fine. Additionally, the court may order the minor to participate in suitable training or instruction in lieu of, or in addition to, community service or a fine.
- A minor commits a first degree misdemeanor, punishable by up to one year in jail and a \$1,000 fine, for a violation that occurs after being found to have committed⁷ a noncriminal sexting offense.

¹ *Sexting among youth more prevalent than thought? Minors unaware of harsh legal consequences, survey shows*, Science Daily, June 18, 2014, <http://www.sciencedaily.com/releases/2014/06/140618122259.htm> (last visited March 13, 2015).

² Ch. 2011-180, Laws of Florida.

³ Section 847.001(9), F.S., defines the term "nudity" as "the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. A mother's breastfeeding of her baby does not under any circumstance constitute 'nudity,' irrespective of whether or not the nipple is covered during or incidental to feeding."

⁴ The term "harmful to minors" is defined by s. 847.001, F.S., as any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it predominantly appeals to a prurient, shameful, or morbid interest; is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

⁵ s. 847.0141(1)(b), F.S.

⁶ s. 847.0141(2), F.S.

⁷ Section 847.0141(5), F.S., defines the term "found to have committed" as a determination of guilt that is the result of a plea or trial, or a finding of delinquency that is the result of a plea or an adjudicatory hearing, regardless of whether adjudication is withheld.

- A minor commits a third degree felony, punishable by up to five years imprisonment and a \$5,000 fine, for a violation that occurs after being found to have committed a first degree misdemeanor sexting offense.⁸

State v. C.M.

In January 2015, Florida's Fourth District Court of Appeal (DCA) decided *State v. C.M.*⁹ The case involved a minor who was charged via a delinquency petition with committing a first-time violation of the sexting statute – a noncriminal violation. At trial, the defense filed a motion to dismiss arguing that because the minor did not commit a delinquent act, she could not be subject to prosecution through a petition for delinquency. The trial court agreed and granted the motion.¹⁰

On appeal, the Fourth DCA recognized that under the delinquency statutes, the state attorney files a petition for delinquency to obtain a finding that a child has committed a delinquent act or violation of law.¹¹ The court held that because a first offense of sexting (a noncriminal violation) does not fit within the definition of “delinquent act” or “violation of law,” a petition for delinquency was not the proper method to prosecute such offense.¹²

The state argued that the trial court's dismissal left them without a remedy, and asserted that the court should authorize the use of a petition for delinquency because it was the only method to determine if a noncriminal first offense of sexting occurred.¹³ The Fourth DCA disagreed reasoning that courts “are not at liberty to add words to statutes that were not placed there by the Legislature.”¹⁴ The court went on to state:

[O]nly the legislature can add to the sexting statute to set out the procedure for the prosecution and determination if there has been a violation of the first offense. Until that is effectuated by the legislature, we are bound to the letter of the law and “must apply a statute as [we] find it, leaving to the legislature the correction of assorted inconsistencies and inequalities in its operation.”¹⁵

Effect of the Bill

The bill addresses the holding in *State v. C.M.* by amending s. 985.0301, F.S., to specify that a circuit court has exclusive original jurisdiction of proceedings in which a child is alleged to have committed a noncriminal violation that has been assigned to juvenile court by law.

The bill also addresses the holding in *State v. C.M.* by making a multitude of changes to the penalties associated with a first-time violation of the sexting statute.¹⁶ For example, the bill specifies that first-time sexting violations remain a noncriminal violation. However, the bill requires a minor who commits a first-time sexting violation to sign and accept a citation indicating a promise to appear before the juvenile court. If the citation is contested and the court determines that the minor committed a noncriminal violation, the court may order the minor to perform eight hours of community service, pay a \$60 civil penalty, or participate in a cyber-safety program (or any combination thereof).

In lieu of appearing in court, the minor may:

- Complete 8 hours of community service work;
- Pay a \$60 civil penalty; or
- Participate in a cyber-safety program, if such a program is locally available.

The minor must satisfy any penalty within 30 days after receipt of the citation. A minor who fails to comply with the citation waives his or her right to contest it, and authorizes the court to:

⁸ s. 847.0141(3), F.S.

⁹ 154 So. 3d 1177 (Fla. 4th DCA 2015).

¹⁰ *Id.*

¹¹ *Id.* at 1179.

¹² *Id.* at 1179-1180.

¹³ *Id.* at 1180.

¹⁴ *Id.*, (citing *Bay Holdings, Inc. v. 2000 Island Blvd. Condo. Ass'n*, 895 So. 2d 1197, 1197 (Fla. 3d DCA 2005)).

¹⁵ *Id.* (citing *Guilder v. State*, 899 So. 2d 412, 419 (Fla. 4th DCA 2005) (quoting *State v. Aiuppa*, 298 So. 2d 391, 404 (Fla.1974)).

¹⁶ The penalties associated with second and subsequent sexting offenses remain unchanged.

- Order the minor to perform 8 hours of community service, pay a \$60 civil penalty, or participate in a cyber-safety program (or any combination thereof); or
- Issue an order to show cause.

Upon a finding of contempt, the court may impose additional age-appropriate penalties, which may include issuance of an order to the Department of Highway Safety and Motor Vehicles to withhold issuance of, or suspend the driver license or driving privilege of, the minor for 30 consecutive days. The bill prohibits the court from imposing incarceration.

The bill requires the citation issued to a minor to be in a form prescribed by the issuing law enforcement agency, be signed by the minor, and to contain:

- The date and time of issuance;
- The name and address of the minor to whom the citation is issued;
- A thumbprint of the minor to whom the citation is issued;
- Identification of the noncriminal violation and the time it was committed;
- The facts constituting reasonable cause;
- The specific section of law violated;
- The name and authority of the citing officer; and
- The procedures that the minor must follow to contest the citation, perform the required community service, pay the civil penalty, and participate in a cyber-safety program.

The bill also requires 80% of all civil penalties received by a juvenile court pursuant to the citation process outlined above to be remitted by the clerk of the court to the county commission to provide training on cyber safety for minors. The remaining 20% must remain with the clerk of the court to defray administrative costs.

B. SECTION DIRECTORY:

Section 1. Amends s. 847.0141, F.S., relating to sexting; prohibited acts; penalties.

Section 2. Amends s. 985.0301, F.S., relating to jurisdiction.

Section 3. Provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill requires 20% of all civil penalties received by a juvenile court pursuant to the citation process outlined above to be retained by the clerk of the court to defray administrative costs.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill requires 80% of all civil penalties received by a juvenile court pursuant to the citation process outlined above to be remitted by the clerk of the court to the county commission to provide training on cyber safety for minors.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This 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:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 16, 2015, the Criminal Justice Subcommittee adopted one amendment and reported the bill as favorable as a committee substitute. The amendment removed the provision requiring records relating to noncriminal sexting violations to be confidential. The amendment also made the bill effective upon becoming a law.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.