STATE OF NEW YORK

3682

2017-2018 Regular Sessions

IN ASSEMBLY

January 30, 2017

Introduced by M. of A. CUSICK -- read once and referred to the Committee on Codes

AN ACT to amend the penal law, in relation to criminalizing organized retail theft and establishing the crime of leader of an organized retail theft enterprise (Part A); to amend the penal law, in relation to the authorization of jurisdiction and venue and authorized sentences for a pattern of criminal offenses (Part B); to amend the penal law, in relation to the aggregated value of stolen merchandise (Part C); to amend the penal law, in relation to the use of emergency exit in the theft of property (Part D); to amend the penal law, in relation to the possession of anti-security items (Part E); to amend the penal law, in relation to retail sales receipt and universal product code label fraud (Part F); to amend the general business law, in relation to itinerant vendors (Part G); and to amend the penal law, in relation to theft with intent to resell on an online marketplace (Part H)

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known and may be cited as the "anti-organized retail theft act".

§ 2. This act enacts into law major components of legislation which are necessary to implement the anti-organized retail theft act. Each component is wholly contained within a Part identified as Parts A through H. The effective date for each particular provision contained within such Part is set forth in the last section of such Part. Any provision in any section contained within a Part, including the effective date of the Part, which makes reference to a section "of this act", when used in connection with that particular component, shall be deemed to mean and refer to the corresponding section of the Part in which it is found. Section four of this act sets forth the general effective date of this act.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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PART A

Section 1. Legislative intent. Organized retail theft is a growing problem for retailers in this state and throughout the United States. It is committed by professional theft rings which move across communities and states to pilfer merchandise from supermarkets, chain drugstores, independent pharmacies, mass merchandisers and convenience stores, then resell that merchandise over the internet, at flea markets and to the stores from which it was stolen. Popular items include infant formula, skin care products, heartburn medications and shaving products. According to the Federal Bureau of Investigation, organized retail theft losses have amounted to as much as $30 billion. This act is intended to provide an additional tool to retailers to fight back against these shoplifting gangs.

§ 2. The penal law is amended by adding two new sections 155.50 and 155.55 to read as follows:

§ 155.50 Retail theft.

1. Definitions. The following definitions apply to this section:

(a) "shopping cart" means pushcarts of the type or types which are commonly provided by grocery stores, drugstores or other retail mercantile establishments for the use of the public in transporting commodities in stores and markets and, incidentally, from the stores to a place outside the store;

(b) "store or other retail mercantile establishment" means a place where merchandise is displayed, held, stored or sold or offered to the public for sale;

(c) "merchandise" means any goods, chattels, foodstuffs or wares of any type and description, regardless of the value thereof;

(d) "merchant" means any owner or operator of any store or other retail mercantile establishment, or any agent, servant, employee, lessee, consignee, officer, director, franchisee or independent contractor of such owner or proprietor;

(e) "person" means any individual or individuals, including an agent, servant or employee of a merchant where the facts of the situation so require;

(f) "conceal" means to conceal merchandise so that, although there may be some notice of its presence, it is not visible through ordinary observation;

(g) "full retail value" means the merchant's stated or advertised price of the merchandise;

(h) "premises of a store or retail mercantile establishment" means and includes but is not limited to, the retail mercantile establishment; any common use areas in shopping centers and all parking areas set aside by a merchant or on behalf of a merchant for the parking of vehicles for the convenience of the patrons of such retail mercantile establishment;

(i) "under-ring" means to cause the cash register or other sale recording device to reflect less than the full retail value of the merchandise;

(j) "anti-shoplifting or inventory control device countermeasure" means any item or device which is designed, manufactured, modified, or altered to defeat any anti-shoplifting or inventory control device; and

(k) "organized retail theft enterprise" means any association of two or more persons who engage in the conduct of or are associated for the purpose of effectuating the transfer or sale of shoplifted merchandise.

2. Shoplifting. Shoplifting shall consist of any one or more of the following acts:

(a) for any person purposely to take possession of, carry away, transfer or cause to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise or converting the same to the use of such person without paying to the merchant the full retail value thereof;

(b) for any person purposely to conceal upon his or her person or otherwise any merchandise offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the processes, use or benefit of such merchandise or converting the same to the use of such person without paying to the merchant the value thereof;

(c) for any person purposely to alter, transfer or remove any label, price tag or marking indicia of value or any other markings which aid in determining value affixed to any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment and to attempt to purchase such merchandise personally or in consort with another at less than the full retail value with the intention of depriving the merchant of all or some part of the value thereof;

(d) for any person purposely to transfer any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment from the container in or on which the same shall be displayed to any other container with intent to deprive the merchant of all or some part of the retail value thereof;

(e) for any person purposely to under-ring with the intention of depriving the merchant of the full retail value thereof; and

(f) for any person purposely to remove a shopping cart from the premises of a store or other retail mercantile establishment without the consent of the merchant given at the time of such removal with the intention of permanently depriving the merchant of the possession, use or benefit of such cart.

3. Gradation. (a) Shoplifting constitutes grand larceny in the second degree if:

(i) the full retail value of the merchandise is fifty thousand dollars or more; or

(ii) the offense is committed in furtherance of or in conjunction with an organized retail theft enterprise and the full retail value of the merchandise is one thousand dollars or more.

(b) Shoplifting constitutes grand larceny in the third degree if:

(i) the full retail value of the merchandise is at least three thousand dollars but is less than fifty thousand dollars; or

(ii) the offense is committed in furtherance of or in conjunction with an organized retail theft enterprise and the full retail value of the merchandise is less than one thousand dollars.

(c) Shoplifting constitutes grand larceny in the fourth degree if the full retail value of the merchandise is at least a thousand dollars but is less than three thousand dollars.

(d) Shoplifting constitutes petit larceny if the full retail value of the merchandise is less than one thousand dollars.

(e) The value of the merchandise involved in a violation of this section may be aggregated in determining the grade of the offense where the acts or conduct constituting a violation were committed pursuant to one scheme or course of conduct, whether from the same person or several persons, or were committed in furtherance of or in conjunction with an organized retail theft enterprise.

(f) Any person who possesses or uses any anti-shoplifting or inventory control device countermeasure within any store or other retail mercantile establishment is guilty of a class B misdemeanor.

4. Presumptions. Any person purposely concealing unpurchased merchandise of any store or other retail mercantile establishment, either on the premises or outside the premises of such store or other retail mercantile establishment, shall be prima facie presumed to have so concealed such merchandise with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof, and the finding of such merchandise concealed upon the person or among the belongings of such person shall be prima facie evidence of purposeful concealment; and if such person conceals, or causes to be concealed, such merchandise upon the person or among the belongings of another, the finding of the same shall also be prima facie evidence of willful concealment on the part of the person so concealing such merchandise.

5. Apprehension. (a) A law enforcement officer, or a special officer, or a merchant, who has probable cause for believing that a person has willfully concealed unpurchased merchandise and that he or she can recover the merchandise by taking the person into custody, may, for the purpose of attempting to effect recovery thereof, take the person into custody and detain him or her in a reasonable manner for not more than a reasonable time, and the taking into custody by a law enforcement officer or special officer or merchant shall not render such person criminally or civilly liable in any manner or to any extent whatsoever.

(b) Any law enforcement officer may arrest without warrant any person he or she has probable cause for believing has committed the offense of shoplifting as defined in this section.

(c) A merchant who causes the arrest of a person for shoplifting, as provided for in this section, shall not be criminally or civilly liable in any manner or to any extent whatsoever where the merchant has probable cause for believing that the person arrested committed the offense of shoplifting.

§ 155.55 Leader of an organized retail theft enterprise.

1. A person is a leader of an organized retail theft enterprise if he or she conspires with others as an organizer, supervisor, financier or manager, to engage for profit in a scheme or course of conduct to effectuate the transfer or sale of shoplifted merchandise. Leader of organized retail theft enterprise constitutes larceny in the second degree. Notwithstanding the provisions of section 80.00 of this chapter, the court may impose a fine not to exceed two hundred fifty thousand dollars or five times the retail value of the merchandise seized at the time of the arrest, whichever is greater.

2. Notwithstanding the provisions of section 70.35 of this chapter, a conviction of leader of an organized retail theft enterprise shall not merge with the conviction for any offense which is the object of the conspiracy. Nothing contained in this section shall prohibit the court from imposing an extended term pursuant to article seventy of this chapter; nor shall this section be construed in any way to preclude or limit the prosecution or conviction of any person for conspiracy under article one hundred five of this chapter, or any prosecution or conviction for any other offense.

3. It shall not be necessary in any prosecution under this section for the state to prove that any intended profit was actually realized. The trier of fact may infer that a particular scheme or course of conduct was undertaken for profit from all of the attending circumstances,

including but not limited to the number of persons involved in the scheme or course of conduct, the actor's net worth and his or her expenditures in relation to his or her legitimate sources of income, the amount of merchandise involved, or the amount of cash or currency involved.

4. It shall not be a defense to a prosecution under this section that any shoplifted merchandise was brought into or transported in this state solely for ultimate distribution in another jurisdiction; nor shall it be a defense that any profit was intended to be made in another jurisdiction.

§ 3. Section 155.40 of the penal law, as amended by chapter 515 of the laws of 1986, is amended to read as follows:

§ 155.40 Grand larceny in the second degree.

A person is guilty of grand larceny in the second degree when he or she steals property and when:

1. [~~The~~] the value of the property exceeds fifty thousand dollars; [~~or~~]

2. [~~The~~] the property, regardless of its nature and value, is obtained by extortion committed by instilling in the victim a fear that the actor or another person will (a) cause physical injury to some person in the future, or (b) cause damage to property, or (c) use or abuse his or her position as a public servant by engaging in conduct within or related to his or her official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

3. the person is a leader of an organized retail theft enterprise as provided in section 155.55 of this article.

Grand larceny in the second degree is a class C felony.

§ 4. This act shall take effect on the ninetieth day after it shall have become a law.

PART B

Section 1. The penal law is amended by adding a new section 70.16 to read as follows:

§ 70.16 Sentences of imprisonment or fines for a pattern of criminal offense.

1. Definition of pattern of criminal offense. A "pattern of criminal offense" means two or more criminal offenses are committed and:

(a) are part of the same plan, scheme or adventure;

(b) are a sequence of two or more of the same criminal offenses committed and are not separated by an interval of more than thirty days between the first and second offense, the second and third, and so on; or

(c) each proceeds from or possesses an antecedent element of a prior incident or pattern of fraud, robbery, burglary, theft, identity theft, receipt of stolen property, false personating, false pretenses, obtaining property by trick or deception, using a credit card or debit card without consent, or the making, transferring or receipt of a false or fraudulent identification card.

2. Authorized sentence. When the court has found that a person has engaged in a pattern of criminal offenses in two or more counties in this state or who attempted or conspired with others to engage in a pattern of criminal offenses, the court may impose:

(a) a sentence of imprisonment in the department of corrections for a term not exceeding two years;

(b) a sentence of imprisonment in the county jail for a term not exceeding one year;

(c) a fine in an amount not exceeding twenty-five thousand dollars; or

(d) both, a fine in an amount not exceeding twenty-five thousand dollars and imprisonment.

Such punishment shall be in addition to any penalty imposed for any offense involved in the pattern of criminal offenses.

3. Jurisdiction and venue. (a) A person may be prosecuted for criminal actions with respect to each of the alleged criminal offenses included within a pattern of criminal offenses as defined in subdivision one of this section, in any county where at least one alleged criminal offense has occurred and such offense is part of the alleged pattern of criminal activity. One district court may possess jurisdiction over all criminal offenses, persons and property that are part of, or are directly related to, each or all of the alleged criminal offenses forming the alleged pattern of criminal offenses.

(b) Subdivision two of this section shall be enforced in any county where at least one alleged criminal offense has occurred and such offense is part of the alleged pattern of criminal activity.

§ 2. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.

PART C

Section 1. Section 155.30 of the penal law is amended by adding two new subdivisions 1-a and 1-b to read as follows:

1-a. The property is stolen from a retail mercantile establishment as defined in section two hundred seventeen of the general business law and the aggregated value of price tags, sticker prices, or otherwise advertised retail prices of such property exceeds one thousand dollars; or

1-b. The property is stolen by one person, or by two or more persons working in association, from one or more than one retail mercantile establishment as defined in section two hundred seventeen of the general business law within a period of thirty days or less between the first and second episode, the second and third episode, and so on, and the aggregated value of price tags, sticker prices, or otherwise advertised retail prices of such property exceeds one thousand dollars; or

§ 2. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.

PART D

Section 1. Section 155.30 of the penal law is amended by adding a new subdivision 14 to read as follows:

14. The property is stolen from a retail mercantile establishment and, to facilitate the theft, the person leaves the retail mercantile establishment with such property by use of a designated emergency exit. For the purposes of this subdivision, the term "retail mercantile establishment" shall mean a place where goods, wares or merchandise are offered to the public for sale.

§ 2. This act shall take effect on the ninetieth day after it shall have become a law.

PART E

Section 1. Section 155.30 of the penal law is amended by adding a new subdivision 15 to read as follows:

15. The property is taken by a person who is in possession of an anti-security item. For the purposes of this subdivision an "anti-security item" is defined as an item designed for the purpose of overcoming detection of security markings or attachments placed on property offered for sale at such an establishment.

§ 2. Section 170.47 of the penal law, as added by chapter 580 of the laws of 1983, is amended to read as follows:

§ 170.47 Criminal possession of an anti-security item.

A person is guilty of criminal possession of an anti-security item, when with intent to steal property at a retail mercantile establishment as defined in article twelve-B of the general business law, he **or she** knowingly possesses in such an establishment an item designed for the purpose of overcoming detection of security markings or attachments placed on property offered for sale at such an establishment.

Criminal possession of an anti-security item is a class [~~B~~] **A** misdemeanor.

§ 3. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.

PART F

Section 1. The penal law is amended by adding four new sections 165.80, 165.81, 165.82 and 165.83 to read as follows:

§ 165.80 Definitions; application to offenses regarding retail sales receipts and universal product code labels.

As used in sections 165.81, 165.82 and 165.83 of this article, the following terms have the following meanings:

1. The term "retail sales receipt" means any handwritten or machine or computer produced document as properly issued by a retailer to acknowledge payment received by a customer.

2. The term "uniform product code label" means any bar code or other coding system designed to be read by computer which contains pricing information and other related information used by a retailer and read by a computer at point of purchase for purposes of establishing sale price of a good.

§ 165.81 Retail sales receipt or universal product code fraud in the second degree.

A person is guilty of retail sales receipt or universal product code fraud in the second degree when, with intent to deceive or defraud a person or persons engaged in the retail sale of goods or services, he or she uses, transfers, makes, alters, counterfeits or reproduces a retail sales receipt or universal product code knowing such to be counterfeit.

Retail sales receipt or universal product code fraud in the second degree is a class A misdemeanor.

§ 165.82 Retail sales receipt or universal product code fraud in the first degree.

A person is guilty of retail sales receipt or universal product code fraud in the first degree when, with intent to deceive or defraud a person or persons engaged in the retail sale of goods or services, he or she uses, transfers, makes, alters, counterfeits or reproduces fifteen or more retail sales receipts or universal product codes or combination thereof knowing such to be counterfeit.

Retail sales receipt or universal product code fraud in the first degree is a class E felony.

§ 165.83 Possession of a fraudulent retail sales receipt or universal product code manufacturing device.

A person is guilty of possession of a fraudulent retail sales receipt or universal product code manufacturing device when, with intent to deceive or defraud a person or persons engaged in the retail sale of goods or services, he or she possesses a device that manufactures fraudulent retail sales receipts or universal product code labels.

Possession of a fraudulent retail sales receipt or universal product code manufacturing device is a class E felony.

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

PART G

Section 1. Section 38 of the general business law, as added by chapter 282 of the laws of 1995, is amended to read as follows:

§ 38. Prohibited sales. No itinerant vendor, except for a manufacturer, an authorized manufacturer's representative, or authorized distributor, shall offer for sale any of the following items:

1. [~~Food manufactured and packaged for sale for consumption by a child under the age of two years; or~~

~~2. Drugs as defined in section three thousand three hundred two of the public health law~~] Baby food, which shall include any food manufactured and packaged specifically for consumption by a child under two years of age. The term shall include infant formula;

2. Nonprescription drugs, which shall include any non-narcotic medicine or drug that may be sold without a prescription. The term shall include any drugs commonly known as "over-the-counter drugs," herbal products, dietary supplements, botanical extracts, and vitamins and substances recognized as drugs in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to such publications;

3. Cosmetics, which shall mean merchandise, other than soap, but including razor blades, that is intended to be rubbed, poured, sprinkled, or sprayed onto, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance of the human body or any part thereof; or

4. Batteries, which shall mean a device consisting of one or more cells, each cell consisting of a positive electrode, a negative electrode and an electrolyte, which is used to provide stored electrical power.

§ 2. This act shall take effect immediately.

PART H

Section 1. The opening paragraph of section 155.30 of the penal law, as amended by chapter 515 of the laws of 1986, is amended to read as follows:

A person is guilty of grand larceny in the fourth degree when he or she steals property or fraudulently obtains property and when:

§ 2. Section 155.30 of the penal law is amended by adding two new subdivisions 12 and 13 to read as follows:

12. The value of the property or aggregated value exceeds one thousand dollars and the person had the intent to resell such property on an online marketplace.

For the purposes of this subdivision and subdivision thirteen of this section, "online marketplace" shall mean an internet site used to facilitate the sale of goods and services, including any internet site used for auctions that are operated by any buyer, seller, or third-party intermediary.

13. The person sells, attempts to sell, or possesses stolen or fraudulently obtained property with an intent to resell such property on an online marketplace, and such person knew or should have known that such property was stolen.

§ 3. This act shall take effect on the ninetieth day after it shall have become a law.

§ 3. Severability clause. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

§ 4. This act shall take effect immediately provided, however, that the applicable effective dates of Parts A through H of this act shall be as specifically set forth in the last section of such Parts.