



Legislative Testimony

Oregon Criminal Defense Lawyers Association

March 6, 2017

The Honorable Floyd Prozanski, Chair
Senate Judiciary Committee, Members

Re: Testimony in Opposition to SB 2

Dear Chair Prozanski and Members of the Committee:

The Oregon Criminal Defense Lawyers Association is an association of attorneys who represent juveniles and adults in delinquency, dependency, criminal prosecutions, appeals, civil commitment and post-conviction relief proceedings throughout the state of Oregon. Thank you for the opportunity to submit the following comments in opposition to SB 2.

SB 2 proposes to criminalize both holding an “electronic mobile device” in one’s hand while driving and/or using the device. This proposed law increases the penalty from a traffic violation to a Class A Misdemeanor for the first offense which could result in up to one year in jail and a \$6,250 fine. This bill proposes to ultimately make the third offense within 10 years a “level 6” felony punishable by up to 5 years in prison and a \$125,000 fine. **The Oregon Criminal Defense Lawyers Association opposes SB 2 for the following reasons:**

Disproportionate Impact: This proposed law outlaws using a cellphone or other “mobile communication device” for any reason while in a vehicle including to make phone calls or for GPS navigation. This will have a disparate impact on people who cannot afford newer cars with built in GPS or Bluetooth capabilities. This will likely impact marginalized communities including people of color and the poor.

Reduces Legal Standard for Stop: Criminalizing cellphone use rather than imposing a violation reduces the grounds for a stop from probable cause for a traffic violation to reasonable suspicion that a crime has been or is being committed. What this means is that instead of an officer being required to see the motorist violating the law by visibly holding the cellphone in their hand or visibly touching the device, the officer will only need to articulate their reasonable suspicion that a device is being held or used—for example, seeing the glow of what they presume to be a mobile communication device or seeing a motorist glance down at their lap. This will result in more investigative stops that are often a pretext for unrelated investigations.

Racial Profiling and Pretext Stops: In addition to the lower legal standard for stops, SB 2 opens the door for more pretextual or “pretext” stops. A pretext stop is when law enforcement initiates a stop of an automobile for a traffic infraction, often minor, with the intent to investigate a separate and unrelated crime. This type of stop is often a fishing expedition resulting in a search of a motorist’s automobile. Law enforcement has wide discretion in who they stop, and in

many cases, people of color are profiled and stopped at higher rates than others. This proposed law adds yet another reason that law enforcement can rely on when justifying a traffic stop.

Deterrence and Strict Liability: This proposed law is highly punitive, and it does not allow for any type of first time warning or diversion. Many citizens are unaware of law changes, and it is not difficult to foresee that many people will be caught off guard when they believe they are using their hands-free device correctly, but are then subject to arrest for holding the cellphone on their lap or switching the device off with their hand. This proposed law does not require a mental state such as “intentional” or “knowing,” rather it is a strict liability crime, meaning the people who believe they are complying but are not, will still be subject to arrest and prosecution.

Disproportionate Penalty: This proposed bill’s penalties are disproportionate to the alleged harm caused. This bill proposes to impose a class A misdemeanor conviction up front which could result in up to a year in jail and a \$6,250 fine as well as a mandatory fine of a \$1,000. If a person has been convicted of the crime at least 3 times within a 10-year period, the next conviction is to be classified as a “level 6” on the Oregon Sentencing Guidelines. To give context, other “level 6” felonies are incredibly serious crimes including Child Neglect in the First Degree, Assault on a Public Safety Officer, and Discharging a Firearm at a School.

Collateral Consequences: In addition to the serious jail and prison time as well as the mandatory fines, having a criminal conviction subjects a person to hundreds upon hundreds of collateral consequences.¹ Collateral consequences are often unintended or unknown barriers that people face when they are convicted of a crime such as inability to pass a background check, inability to find a home to rent, and difficulty finding employment. A conviction for either a misdemeanor or a felony will result in many collateral consequences that will continue to impact the person long after they have served their time and paid their fines.

Applicable Crimes on the Books: Lastly, there are many crimes already in statute that cover unsafe behavior that this bill is aiming to prevent. If a person is driving in a way “that endangers or would be likely to endanger any person or property,” they can be cited for a traffic violation called careless driving². If a person “recklessly drives a vehicle upon a highway or other premises...in a manner that endangers the safety of persons or property,” they can be cited for the crime of Reckless Driving.³ Reckless Driving is a serious class A misdemeanor that could result in jail time of up to a year and a \$6,250 fine. Law enforcement already has the tools necessary to police unsafe and distracted driving without SB 2.

For the reasons outlined above, OCDLA strongly urges a “no vote” to SB 2. Thank you for your consideration.

For questions or comments contact Mary A. Sell, OSB # 111401
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¹ <https://niccc.csgjusticecenter.org/search/?jurisdiction=40>

² <https://www.oregonlaws.org/ors/811.135>

³ <https://www.oregonlaws.org/ors/811.140>