Ohio Prosecuting Attorneys Association

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Senate Bill 100
Proponent Testimony
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Chairman Wilson, Vice-Chair Hackett, Ranking Member Smith and members of the Senate Financial Institutions and Technology Committee, thank you for the opportunity to offer proponent testimony on Senate Bill 100 to prohibit the use of tracking devices and tracking applications without the consent of the person being tracked.

In February 2022 the Bureau of Justice Statistics release the results of a 2019 Supplemental Victimization Survey about their experiences with stalking during the 12 months preceding the survey.[1] This was a follow-up to a survey conducted in 2016.[2] Key findings from this survey show that about 3.4 million people age 16 or older were victims of stalking in 2019, that women were stalked more than twice as often as men, and that an estimated 67% of victims were fearful of being killed or physically harmed.

Most significantly here, the report distinguishes between 'traditional' stalking – things like watching the victim and showing up at or driving by places where the offender had no business being – and stalking with technology – things like unwanted phone calls or text messages, monitoring using social media and tracking the victims whereabouts with an electronic device or application. In the 2016 survey, 283,630 respondents, or 9.2% of victims, indicated that they had been tracked with an electronic device or application. In the 2019 survey, 394,000 respondents, or 14.4% of victims, indicated the same. Notably, both surveys preceded the release of Apple AirTags in April 2021 and the increase in tracking with an electronic device occurred despite an overall decrease in stalking between 2016 and 2019.

Use of this type of technology to track or stalk victims is a growing problem and it is incredibly dangerous for the victim. As this bill recognizes, however, tracking a person in this way is not, on its own, a criminal offense. Our menacing by stalking statute, R.C. 2903.211, prohibits engaging in a "pattern of conduct" that knowingly causes another person to believe that the offender will cause physical harm or mental distress to the other person or a family or household member of the other person. Two or more actions or incidents must be closely related in time in order to constitute a "pattern of conduct." This is where there is a gap in the law. If someone shows up at their ex-girlfriend's home and follows her to work one day, and then shows up at her work and follows her somewhere else the next, they have arguably committed menacing by stalking because they've engaged in two or more actions that could be expected to cause mental distress. If, however, the same person places an Apple AirTag or some other tracking device on the ex-girlfriend's car or in her purse, or without her knowledge installs an app on her phone,

[1] https://bjs.ojp.gov/content/pub/pdf/sv19.pdf
[2] https://bjs.ojp.gov/content/pub/pdf/sv16.pdf

and then sits at home and tracks everywhere she goes this almost certainly doesn't count as two or more actions. It is, however, at least as dangerous as traditional stalking. That's the gap this bill addresses and we are fully in support of addressing this issue.

That said, we are seeking several changes to the bill that we have been in contact with the sponsors about and I'd like to bring those to the committee's attention as well. I've attached them separately to my testimony. They are primarily changes that we feel will bring clarity to this law and avoid litigation over things like what the 'primary purpose' of the application or device is and whether or not it was 'installed.'

The one recommended change I feel is important to discuss briefly is the recommendation that there be an enhancement to a felony when the offender has a history of violence or violent acts toward the victim or any other person, or if the offender has been determined to represent a substantial risk of physical harm to others as manifested by evidence of homicidal acts or other violent behavior or threats that placed another in reasonable fear of violent behavior. This would be consistent with division (B)(2)(e) and (i) of the menacing by stalking statute and recognizes that these are more dangerous individuals. An offender should not be able to avoid this higher penalty by using a tracking device as a workaround to engaging in a "pattern of conduct" that would otherwise subject them to the penalty enhancement.

I appreciate the committee's and bill sponsors' time and attention to this important issue. We urge the committee's favorable consideration with our recommended changes. I would be happy to answer any questions.

1) The definitions of "tracking application" and "tracking device" should be amended to reflect that this type of behavior is not necessarily the "primary purpose" of the application or device. We recommend these terms be defined as follows:

   "Tracking application" means any software program ~~the primary purpose of which is to track or identify the location or movement of an individual~~ that permits a person to remotely determine or track the position and movement of another person or their property.

   "Tracking device" means ~~any device the primary purpose of which is to reveal its location or movement by the transmission of electronic signals~~ an electronic or mechanical device that permits a person to remotely determine or track the position and movement of another person or their property.

2) There is a question what it means to "install" a tracking device or tracking application as provided in R.C. 2903.211(B). We suggest that division (B) be amended to say:

   "(B)Except as otherwise provided in division (D) of this section, no person shall knowingly do either of the following:

   (1) Install a tracking device or tracking application on another person's property without the other person's consent or cause a tracking device or tracking application to track the movement or location of another person or another person's property without the other person's consent."

3) The presumptions for revoking consent in divisions (C)(1) and (2) should be removed. If someone has consented to having a tracking device on their car or installed in their phone, they should revoke the consent. A person who has filed for divorce, for example, could be driving a vehicle that is titled in their spouse's name or that has a loan in the spouse's name. This is an issue for the DR court not a criminal issue. There could also be an issue with presuming consent has been revoked when someone seeks a protection order. Under the bill, the revocation occurs upon filing rather than upon issuance of the protection order and there may need to be some notice requirement to the respondent that the order has been issued.

4) Division (D)(1) should also include probation, parole and other supervised release.

   We recommend this be amended to say "A law enforcement officer, or any law enforcement agency, that lawfully installs a tracking device or tracking application on another person's property as part of a criminal investigation, or a probation officer, parole officer, or employee of the Department of Rehabilitation and Corrections, when engaged in the lawful performance of official duties.

5) In division (D)(2), the use of the term "minor child's property" in lines 84-85 could be problematic because the car/phone/etc. is most often the adult parent's property, not the minor child's. We recommend that this say that the section does not apply to "A parent or legal guardian of a child who installs or uses a tracking device or tracking application to track their minor child if any of the following apply: …"

   Second, divisions (D)(2)(c) and (D)(2)(d) conflict with each other. We think division (D)(2)(d) should be removed or made clear that it applies only when there is a joint custody.

6) Finally, there should be some enhancement to a felony when the offender has a history of violence or violent acts toward the victim or any other person or if the offender had been determined to represent a substantial risk of physical harm to others as manifested by evidence of homicidal acts or other violent behavior or threats that placed another in reasonable fear of violent behavior. This is consistent with (B)(2)(e) and (i) of the menacing by stalking statute, R.C. 2903.211, and recognizes that these are more dangerous people.