



First Draft of Report #32 -
Tampering with a Detection Device

SUBMITTED FOR ADVISORY GROUP REVIEW
December 28, 2018

DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
441 FOURTH STREET, NW, SUITE 1C001 SOUTH
WASHINGTON, DC 20001
PHONE: (202) 442-8715
www.ccrc.dc.gov

First Draft of Report #32 - Tampering with a Detection Device

This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at www.ccrdc.dc.gov.

This Draft Report has two parts: (1) draft statutory text for an enacted Title 22 of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and addresses the provision's relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

The deadline for the Advisory Group's written comments on this First Draft of Report #32 - *Tampering with a Detection Device*, is March 1, 2019 (nine weeks from the date of issue, which includes a two-week extension from the initial deadline due to the federal shutdown). Oral comments and written comments received after March 1, 2019 may not be reflected in the next draft or final recommendation. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

RCC § 22E-3402. Tampering with a Detection Device.

- (a) *Tampering with a Detection Device.* A person commits tampering with a detection device when that person:
- (1) Knows he or she is required to wear a detection device while:
 - (A) Subject to a protection order;
 - (B) On pretrial release;
 - (C) On presentence or predisposition release;
 - (D) Incarcerated or committed to the Department of Youth Rehabilitation Services; or
 - (E) On supervised release, probation, or parole; and
 - (2) Purposely:
 - (A) Removes the detection device or allows an unauthorized person to do so;
 - (B) Alters, masks, or interferes with the operation of the detection device or allows an unauthorized person to do so.
- (b) *Penalties.* Tampering with a detection device is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (c) *Definitions.* In this section:
- (1) The terms “knows” and “purposely” have the meaning specified in § 22E-206; and
 - (2) The term “detection device” means any wearable equipment with electronic monitoring capability, global positioning system, or radio frequency identification technology; and
 - (3) The term “protection order” means an order issued pursuant to D.C. Code § 16-1005(c).

COMMENTARY

Explanatory Note. This section establishes the tampering with a detection device offense for the Revised Criminal Code (RCC). The offense prohibits purposely removing or interfering with the operability of a wearable monitoring device, such as a GPS bracelet. It replaces D.C. Code § 22-1211, *Tampering with a detection device*.

Subsection (a)(1) specifies that for criminal liability to attach, the person must know she was legally required to wear a detection device at the time the elements of the tampering offense were completed. The term “knowingly” is defined in the general part of the revised code¹ and here means the person must be practically certain that compliance with electronic monitoring was required. The monitoring may be required as a condition of release or as a sanction for noncompliance with other release conditions.² The requirement must be valid at the time of the offense.³

¹ RCC § 22E-206.

² D.C. Code § 22-1211 was amended in 2016 to include sanctions, following the D.C. Court of Appeals decision in *Hunt v. United States*, 109 A.3d 620, 621 (D.C. 2014).

³ Electronic monitoring, like any release condition, may only be authorized by a judicial officer or by the United States Parole Commission (“USPC”). See *Hunt v. United States*, 109 A.3d 620, 621-22 (D.C.

First Draft of Report #32 - Tampering with a Detection Device

Subsections (a)(1)(A)-(E) establish five categories of people who are prohibited from tampering with a detection device. Namely, the revised statute applies to persons who must wear the device while subject to a protection order; while on pretrial release; while on presentence or predisposition release;⁴ while incarcerated or committed to the Department of Youth Rehabilitation Services; or while on supervised release, probation, or parole. The revised statute does not apply to persons who are required to wear a monitoring device before a court proceeding is initiated or after a sentence is completed.

Subsection (a)(2) specifies that the person must purposely tamper with the detection device. The term “purposely” is defined in the general part of the revised code⁵ and here means the person must consciously desire that the device be removed or that the device’s capability be compromised.

Subsection (a)(2)(A) prohibits purposely removing the wearable monitor or allowing another to remove it.⁶ An unauthorized person is a person other than someone that the court or parole commission authorized to remove the device.

Subsection (a)(2)(B) prohibits altering the operation of the device, masking the operation of the device, interfering with the operation of the device, and allowing an unauthorized person to do so.⁷ “Alter” means changing the device’s functionality, not its appearance.⁸ “Mask” means changing the device’s detectability, not its appearance.⁹ “Interfere” includes failing to charge the power for the device or allowing the device to lose the power required to operate.¹⁰ An unauthorized person is a person other than someone that the court or parole commission authorized to alter, mask, or interfere with the device.

Subsection (b) provides the penalties for the revised offense.¹¹ [RESERVED.]

Subsection (c) cross-references applicable definitions located elsewhere in the RCC and provides definitions for “detection device” and “protection order.” A detection device is any technology installed on a person’s body or clothing that is capable of

2014). Accordingly, if a supervision officer employed by the Pretrial Services Agency, Court Services and Offender Supervision Agency, or Court Social Services were to require electronic monitoring without authorization from the court or USPC, the requirement would be invalid. Additionally, if the period of release specified by the court expires before the tampering occurs, criminal liability does not attach.

⁴ “Predisposition” refers to minors who have been adjudicated delinquent and are awaiting the juvenile equivalent of sentencing.

⁵ RCC § 22E-206.

⁶ A person may violate this statute by an act or by an omission, provided that the person behaves purposely. See RCC §22E-202.

⁷ A person may violate this statute by an act or by an omission, provided that the person behaves purposely. See RCC §22E-202.

⁸ Unless it changes a device’s functionality, a person does not “alter” for purposes of the revised statute by decorating the device or by applying a case to make it waterproof or by applying a substance to make it more comfortable to wear.

⁹ Unless it changes a device’s detectability, a person does not “mask” for purposes of the revised statute by decorating the device or by applying a case to make it waterproof or by applying a substance to make it more comfortable to wear.

¹⁰ See D.C. Code § 22-1211(a)(1)(C).

¹¹ [The Commission will reassess specific merger issues for this offense at a later date, when more offenses have been reviewed. At this time, D.C. Code § 23–1329, violation of conditions of release, criminal damage to property, as defined in § 22A-2503; obstruction of justice, as defined in § 22E-[XX]; and offenses committed on release, as defined in § 22E-808 have each been identified as necessarily merging with tampering with a detection device when arising from the same course of conduct.]

monitoring the person's whereabouts. It includes mechanisms such as bracelets, anklets, tags, and microchips. It explicitly includes the global position systems ("GPS") that are currently used by the Pretrial Services Agency, Court Services and Offender Supervision Agency, and Court Social Services. It also explicitly includes the radio frequency identification technology ("RFID") that is currently used by the Department of Corrections.¹² It is also intended to capture other wearable equipment that may be developed in the future. It does not include surveillance devices that are not worn, such as video cameras, infrared cameras, and international mobile subscriber identity-catchers (which intercept cellular phone traffic). The term refers to the physical device itself and does not include the records or reports that it generates.¹³ The term "protection order" means an order issued pursuant to D.C. Code § 16-1005(c). It does not include civil injunctions or extrajudicial orders.

Relation to Current District Law. The revised tampering with a detection device makes two substantive changes to existing District law, to improve the consistency and proportionality of revised offenses and to describe all elements, including mental states, that must be proven.

First, the revised statute requires knowing and purposeful conduct. The current tampering statute does not specify a culpable mental state for the circumstance of being under court-ordered detention or supervision that requires electronic monitoring, and there is no case law on point. Current D.C. Code § 22-1211 requires that the defendant "intentionally" remove, alter, mask, or interfere with a device. However, the term "intentionally" is not defined in the statute or in case law. By contrast, the revised statute requires that the person know that are required to wear a detection device. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.¹⁴ The revised statute also specifies that the person must act purposely and explains that someone acts purposely with respect to a result when they consciously desire to cause the result.¹⁵ This change improves the revised offenses by describing all elements, including mental states, that must be proven in a clear, consistent manner.

Second, the revised statute punishes an attempt to tamper with a detection device in a manner consistent with other revised offenses. Current D.C. Code § 22-1211 punishes an attempt to interfere with or mask the operation of the device the same as a completed tampering.¹⁶ By contrast, the revised code relies on the general part's

¹² See Report on Bill 18-963, the "Criminal Code Amendment Act of 2010," Committee on Public Safety and the Judiciary (December 6, 2010) at Page 3.

¹³ A person does not commit tampering with a detection device by destroying or manipulating the data generated by the device after it has been transmitted. Consider, for example, a person who hacks into his supervision officer's computer and deletes or alters the monitoring records. Such conduct may, however, constitute tampering with physical evidence, in violation of D.C. Code § 22-723.

¹⁴ See, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

¹⁵ RCC § 22E-206.

¹⁶ D.C. Code § 22-1211(a)(1)(B).

common definition of attempt¹⁷ and penalty for an attempt.¹⁸ This change improves the consistency and proportionality of revised offenses.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised statute amends the word “committed” in subsection (a)(1) of the current statute to the phrase “committed to the Department of Youth Rehabilitation Services.” This clarifies that the statute refers to minors who have been adjudicated delinquent and not to adults who are civilly committed to the Department of Behavioral Health for psychiatric services.

Second, the revised statute clarifies that the term “alter” means alter the device’s operability and not its appearance. Current D.C. Code § 22-1211 does not precisely define the term “alter.” The revised statute makes clear that decorating a device or applying a salve to make it more comfortable does not amount to tampering, unless such conduct is also done with the purpose of interfering with the device’s monitoring functions.

Third, the revised statute strikes language in D.C. Code § 22-1211(a)(1)(C). This meaning of this provision is potentially ambiguous in light of the possibility of changing technology, the lack of any standard for measuring a “failure to charge,” and differing responsibilities of a person to maintain charges for different devices. Moreover, the provision appears to be superfluous. Failing to adequately charge a device’s battery may be one means of interfering with the operability of the device, in violation of RCC § 22E-3402(a)(2)(B).

Fourth, the revised statute clarifies the term “protection order” refers to the civil protection orders that are issued after formal notice and hearing under Title 16 of the D.C. Code.

Relation to National Legal Trends. *The revised tampering statute’s above-mentioned changes to current District law have mixed support in national legal trends.*

Twenty-nine states (hereafter “reform jurisdictions”) have comprehensively modernized their criminal laws based in part on the Model Penal Code.¹⁹

Twelve reform jurisdictions specifically criminalize tampering with a detection device as a form of escape or as a stand-alone offense.²⁰

¹⁷ RCC § 22E-301(a).

¹⁸ RCC § 22E-301(c)(1).

¹⁹ The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

²⁰ Alaska Stat. Ann. § 11.56.330; Ariz. Rev. Stat. Ann. § 13-3725; Ark. Code Ann. § 12-12-923 (applies only to people labeled “sexually dangerous persons”); Colo. Rev. Stat. Ann. § 17-27.5-104; Ind. Code Ann. § 35-44.1-3-4; Ky. Rev. Stat. Ann. § 519.070; Minn. Stat. Ann. § 609.485; Mo. Ann. Stat. § 575.205; 18 Pa. Stat. and Cons. Stat. Ann. § 5121 (as interpreted in *Com. v. Wegley*, 829 A.2d 1148, 574 Pa. 190, Sup.2003); Tenn. Code Ann. § 40-39-304; Wash. Rev. Code Ann. § 9A.76.130; Wash. Rev. Code Ann. § 9A.76.115 (applies only to people labeled “sexually violent predators”); Wis. Stat. Ann. § 946.465; see also Conn. Gen. Stat. Ann. § 53a-115 (requiring damage to the device).

First Draft of Report #32 - Tampering with a Detection Device

Seven reform jurisdictions' statutes specifically require knowing or intentional conduct.²¹ The other statutes are silent as to the applicable culpable mental state.

No reform jurisdictions include attempts to interfere with the operation of the device as a completed offense.²²

²¹ Ark. Code Ann. § 12-12-923; Colo. Rev. Stat. Ann. § 17-27.5-104; Ind. Code Ann. § 35-44.1-3-4; Mo. Ann. Stat. § 575.205; Tenn. Code Ann. § 40-39-304; Wash. Rev. Code Ann. § 9A.76.130; Wis. Stat. Ann. § 946.465.

²² *But see* Wash. Rev. Code Ann. § 9A.76.130 (prohibiting knowingly violating the terms of an electronic monitoring program, which may include attempts to tamper).