

SUBJECT: State jail, Penal Code revisions

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 8 ayes — Place, Talton, Farrar, Greenberg, Nixon, Pickett, Pitts, Solis

0 nays

1 absent — Hudson

WITNESSES: *(On original version)*

For — None

Against — Jim Allison, County Judges and Commissioners Association;
Donald Lee, Conference of Urban Counties

On — Sherri Wallace, for Dallas County District Attorney John Vance; Bill Lewis, Mothers Against Drunk Driving; Betty Blackwell, Texas Criminal Defense Lawyers Association; Becky McPherson; Ken Anderson

BACKGROUND: The 73rd Legislature, in SB 1067 and SB 532 by Whitmire et al., created a new category of felonies called state jail felonies, punishable by confinement in a state jail facility for 180 days to two years and a fine up to \$10,000. State jail sentences are automatically suspended, and offenders are placed on community supervision (probation) for two to five years. Fines may suspended in whole or in part. During this time defendants may be required to submit to periods of confinement in a state jail. If an offender's community supervision is revoked, the sentence is to be served in a state jail facility. State jail sentences are served day-for-day with no good conduct time and no parole.

As a condition of probation, judges can require offenders to be confined in a county jail or a state jail at the beginning of the probation term. Offenders with no prior felonies can be given "up-front" jail time of up to 30 days in a county jail or up to 60 days in a state jail; offenders with one prior felony can be given "up front" jail of time of up to 60 days in a county jail or up to 180 days in a state jail; and offenders with two or more

prior felony convictions or certain drug offenses can be given "up front" jail time of up to one year in a state jail.

State jail felonies carry the penalties for a third-degree felony if they involve use of a deadly weapon or if the offender had been previously convicted of a felony listed in art. 42.12 (3g) of the Code of Criminal Procedure or a felony using a deadly weapon.

DIGEST:

CSHB 2727 would increase penalty options for state jail offenders who are repeat offenders and make other changes in the statutes governing community supervision.

The bill also would make numerous other changes, including changes in the statutes governing the parole of capital felons, assault by and of public servants, peace officers carrying weapons burglary and penalties in drug-free zones. CSHB 2727 also would add definitions of cable television, subscription television and gambling devices to the Penal Code. CSHB 2727 would take effect September 1, 1995.

State jail felonies. CSHB 2727 would increase to 10 years the maximum community supervision term (currently two years to five years for all state jail felons) for state jail felons with two or more felonies. The maximum "up front" state jail time for state jail felons who have previously been convicted of one felony would be increased from 180 days to one year.

CSHB 2727 would require that time spent in state jail facilities count toward the current 24-month cap on terms in community correction facilities and county jails served as part of community supervision conditions.

CSHB 2727 would outline procedures for requesting and sending copies of offender's state jail or county jail facility records to judges who are considering suspending a state jail sentence and placing an offender on community supervision. Offenders would be required to send prosecutors a copy of their motion requesting suspension of a sentence and placement on community supervision. Judges would be authorized to deny the motion without a hearing but would have to have a hearing to grant the motion.

Modification of community supervision CSHB 2727 would eliminate a requirement that modifications of community supervision be governed by procedures required when changes are made in community supervision terms when a probationer violates the terms of probation and procedures outlining the jurisdiction of courts over community supervision terms.

Deferred adjudication. CSHB 2727 would specify that a judge's failure to inform a defendant given deferred adjudication of the possible consequences of violating community supervision is not grounds for reversal unless the defendant was misled or harmed.

Payments into crime victim's fund. CSHB 2727 would allow judges to order as a condition of community supervision a maximum payment of \$50 for misdemeanants and \$100 for felons if they have not otherwise been required to reimburse the fund for payments made to a victim.

Reducing community supervision terms. CSHB 2727 would repeal a provision that makes offenders convicted of some intoxicated offenses, including driving while intoxicated, ineligible to have their community supervision terms reduced by a judge after they have completed one-third of their term or two years, whichever is less. Judges would be prohibited from dismissing charges for some intoxicated offenses.

Assault by, against public servant. Assault (intentionally, knowingly or recklessly causing bodily injury to another) would be raised from a Class A misdemeanor to a third-degree felony if it was committed by a public servant acting officially or against someone the offender knows is a public servant who is lawfully discharging duties or in retaliation for those official duties.

Punishment for drug-free zone violations. CSHB 2727 would double the maximum fine for state jail felonies that violate the drug-free zone statutes and allow second-degree felonies to be enhanced to first-degree felonies, instead of the current provision doubling the minimum confinement term and the maximum fine for drug-free zone offenses.

Theft of cable, subscription television. CSHB 2727 would add cable television and subscription television to the definition of services included in Penal Code sec. 31 on theft. Cable television service and subscription television service would have a value of between \$20 and \$500, unless there was proof that it was worth more, making theft punishable as a Class B misdemeanor with a maximum penalty of 180 days in jail and a \$2,000 fine.

First-degree felony burglary. Provisions that make burglary a first-degree felony under certain circumstances would be amended to add *committing or attempting to commit* a felony other than theft to the two current provisions (the premises being a habitation and entering the habitation with *intent to commit* a felony other than felony theft).

Possession of a dangerous drug. The penalty for possession of a dangerous drug would be lowered from a third-degree felony to a Class A misdemeanor.

Habitual misdemeanor offenders. In addition to the current punishment of a jail term of 90 days to one year, persons convicted of a Class A misdemeanor who have been previously convicted of a Class A misdemeanor or any felony could be punished by a fine up to \$4,000 or both a fine and a jail term.

In addition to the current punishment of a jail term of 30 days to 180 days, persons convicted of a Class B misdemeanor who have been previously convicted of a Class A or Class B misdemeanor or any felony could be punished by a fine up to \$2,000 or both a fine and a jail term.

Parole for capital felons. CSHB 2727 would stipulate that the statute allowing the Board of Pardons and Paroles to grant parole to capital felons only on a two-thirds vote of the entire board membership applies to capital felons, regardless of when the offender was sentenced.

Carrying of weapons by peace officers. CSHB 2727 would specify that Penal Code sec. 46.02, making it illegal to carry on or about one's person a handgun, illegal knife or club, and sec. 46.03, making it illegal to carry a firearm, illegal knife, club or prohibited weapon at specified places such as

schools, polling places and government offices, do not apply to peace officers and would eliminate the peace officer defense to prosecution in these sections. Peace officers would not be prohibited from carrying a weapon whether or not they were carrying out their duties.

Proof of mental state for intoxication offenses. CSHB 2727 would amend the Penal Code to state that proof of a culpable mental state is not required for conviction under the section dealing with intoxication and alcoholic beverages.

Definition of a gambling device. The definition of gambling device would be amended to include any electronic, electromechanical or mechanical device. The definition would include devices that operate solely or partially on chance and record the awarding and cancellation of the free games or credits. The definition would specifically include games of bingo, keno, blackjack, lottery, roulette and video poker.

The following would be excluded from the definition: electronic, electromechanical or mechanical games used solely for amusement purposes if players win noncash prizes, toys or novelties or something redeemable for those items. The prizes would have to have a wholesale value of no more than 10 times the cost of the game or \$5, whichever is less.

Miscellaneous. CSHB 2727 would make other changes including:

- renumber sections of the Health and Safety Code sections dealing with the illegal expenditure or investment of money derived from the commission of drug offenses.
- specify that contacting or retaining a lawyer could not be used against a defendant unless it falls within an established crime-fraud exception.
- move prohibitions against reducing community supervision terms for state jail felons and certain intoxication offenses (driving while intoxicated, boating while intoxicated, intoxication assault and intoxication manslaughter) into the Penal Code section dealing with reducing or terminating community supervision.

SUPPORTERS
SAY:

CSHB 2727 would fine-tune the state jail felony sentencing system developed in 1993 when the Penal Code was revised within the fiscal constraints of the state budget, address many of the procedural problems that have come to light as the new system has come on line, clean up many Penal Code provisions that were left unclear after the code revisions and add several provisions that were left out of the Penal Code recodification.

State jail felonies. The state jail system was designed to give courts sentencing options for persons convicted of low level, nonviolent property and drug offenses, which were designated state jail felonies, and allow violent offenders to spend more time in state prisons. By increasing the maximum community supervision term and increasing maximum "up front" jail time for state jail felons who are repeat offenders, CSHB 2727 would allow tougher sentences for repeat felons but would keep them in the state jail system, which is designed for nonviolent offenders, and not send them to the prison system.

It would be unwise and expensive to change the state jail system to increase punishment ranges or to allow repeat state jail felons to go to prison. The state jail system was created to deal with nonviolent offenders and it should be used for that. State jail felons, even repeat offenders, should not be sentenced to expensive prison beds that should be reserved for violent offenders. The carefully crafted Penal Code and the state jail system should be allowed to operate for a while without drastic changes.

Putting state jail sentences under the 24-month cap on probation in community corrections or jails would ensure that offenders are not subject to unreasonable confinement, perhaps longer than their sentence, at additional cost to the state.

Modification of community supervision. CSHB 2727 would authorize judges to modify community supervision terms without having to follow the procedures used when a probationer has violated the terms. For example, this would let judges change a state jail felon's community supervision terms and order the offender into drug rehabilitation without having to wait months to hold a hearing. Judges need this flexibility so they can choose from the full range of probation options and quickly modify probation to fit the needs of probationers.

Deferred adjudication. CSHB 2727 would limit judicial reversals by ensuring that defendants cannot get a reversal simply if they are not told about *all* possible consequences of revoking community supervision given as a part of deferred adjudication unless they can show they were misled or harmed.

Payment into crime victims fund. CSHB 2727 would make it clear that as a condition of community supervision judges can require offenders to make payments into the crime victims fund even if the offender's victim has not received reimbursement from the fund.

Assault by, against public servant. An enhanced penalty for assault by or against public servants would help give special protection to public employees such as prison guards and teachers who have risky jobs while at the same time holding public servants responsible for their official actions. Prior to the Penal Code revisions in 1993 the code had several individual provisions for assault against specific types of public servants. After these provisions were eliminated there were rumors that prison inmates thought they could assault prison guards and be charged only with a misdemeanor.

Punishment for drug-free zone violations. Instead of allowing the doubling of confinement for offenses in drug-free zones, as current law does, CSHB 2727 would allow second degree felonies to be punished as first degree felonies, which carry a maximum penalty of 99 years in prison and a \$10,000 fine. The bill also would allow fines for state jail felons to be doubled, a more effective means of punishment than doubling a state jail probation term.

Theft of cable, subscription television. CSHB 2727 would add needed definitions of cable and subscription television to the Penal Code sections dealing with theft of services and assign a minimum value to the services. Because it is hard to put a value on cable or subscription television, it is important to have a minimum value in the Penal Code making theft of the services at least a Class B misdemeanor.

First-degree felony burglary. CSHB 2727 would clarify that a burglar of a habitation can be charged with a first-degree felony not only for *intent* to

commit a felony other than theft but also if the burglar *committed or attempted* to commit a felony other than theft.

Possession of a dangerous drug. Lowering the penalty for possession of a dangerous drug to a Class A misdemeanor would put this offense one step lower than the penalty of a state jail felony for delivery of a dangerous drug that was enacted in the 1993 Penal Code revisions. Possession of a drug should be considered a lower offense than delivery of a drug, a more serious crime.

Reducing community supervision terms. State jail felony sentences are designed to be flat time, with no early release or reduction in the period of community supervision. Last session the state jail policy was inadvertently applied to DWI offenses as well, which was not the original intention. CSHB 2727 would simply restore to judges the discretion to release DWI offenders from probation conditions after an offender has served one-third of the community supervision period or two years, whichever is less. The state jail system is entirely different and was never meant to apply to DWI cases, where more flexibility is often justified. However, CSHB 2727 would bar judges from dismissing the charges for DWI offenses even if offenders were discharged early from community supervision.

Habitual misdemeanor offenders There has been some confusion over whether habitual misdemeanor offenders can be fined as well as receive a jail term. CSHB 2727 would clarify that habitual misdemeanor offenders can be treated like first-time misdemeanants and receive *both* a sentence and a fine as punishment. The maximum fines for habitual misdemeanor offenders in CSHB 2727 are the same maximum fines for first-time offenders.

Parole of capital felons. CSHB 2727 would clarify the intent of the provisions requiring a two-thirds vote of the full Board of Pardons and Paroles for the parole of capital felons. Provisions such as the one proposed by CSHB 2727 governing parole are considered by courts to be procedural acts and do not present any questions about *ex post facto* action.

Peace officers carrying of weapons. Since the 1993 Penal Code revisions there has been confusion and concern about the authority of peace officers to carry their weapons when they are off duty. CSHB 2727 would clear up that confusion by stating that the prohibitions against carrying weapons does not apply to peace officers, on or off duty.

Proof of mental state for intoxication offenses. CSHB 2727 would place current law provisions concerning the proof of mental state for intoxication offenses in the statues on intoxication offenses.

Definition of a gambling device. The provisions in CSHB 2727 were approved by the 73rd Legislature but were not included in the 1993 Penal Code revisions and so were law until the code took effect September 1, 1994. CSHB 2727 simply restores the language clarifying the current definition of gambling device to ensure that some purely amusement games would not be considered gambling devices and to ensure that some video poker games and other games would fall under the gambling device definition.

OPPONENTS
SAY:

CSHB 2727 would not go far enough in proposing needed changes to the state jail felony punishment system. The system has been in operation long enough to make clear what changes are needed, especially for repeat offenders.

State jail felonies. While the state jail punishment system was designed for low-level, nonviolent offenders, it needs to be changed to increase the punishment options to deal with repeat offenders and those committing the more serious state jail felonies.

The punishment range for state jail felons should be increased so that state jail felony sentences could be longer. Allowing punishments to be up to three years would give judges flexibility to impose stiff sentences on serious offenders.

The requirement that state jail sentences automatically be suspended and the offender placed on community supervision should be eliminated so that judges and juries can have sentencing discretion. Community supervision is not appropriate for all offenders and should not be mandated.

Prosecutors should be authorized to enhance the penalty to send repeat state jail offenders to prison.

Increasing the maximum community supervision term for state jail felons with two or more felonies to 10 years would not be a significant toughening of the penalty because most probationers who are going to reoffend or break community supervision do so within five years.

A state jail term should remain a term independent of the 24-month cap on probation time spent in community corrections facilities or jails.

Reducing community supervision terms. CSHB 2727 would allow judges to reduce or terminate the community supervision of DWI offenders who have served at least one-third of the community supervision period or two years. This would send the wrong message to DWI offenders and could dilute the impact of the community supervision terms, especially for repeat offenders.

Assault by, against public servant. It is unnecessary to enhance the penalty for assault by or against a public servant. Public servants should be held to, and protected by, the same statutes as other persons. Other laws such as obstruction and retaliation, a third-degree felony, can be used to prosecute someone assaulting a public servant such as a prison guard.

Punishment for drug-free zone violations. CSHB 2727 does not go far enough in toughening penalties for offenses in drug-free zones. The bill only allows for the doubling of fines and no change in confinement or incarceration for state jail felonies, those that most likely would apply to street dealers with small amounts of drugs. Also, while the bill would increase punishments for second-degree felonies, it would not do the same for third-degree felonies.

Peace officers carrying weapons. Current law already adequately protects off-duty peace officers who may be carrying a gun by providing a defense to prosecution for peace officers in the statutes making it illegal to carry some weapons and to bring firearms into some places.

OTHER
OPPONENTS
SAY:

It is too soon to make changes in the state jail system. The system has only been in operation since September 1994 and should be given a change to operate before any changes are made.

NOTES:

The committee substitute eliminated provisions in the original bill that would have allowed state jail felons to be sentenced to terms in county jails and would have allowed judges to forego the automatic suspension of state jail sentences for repeat offenders. The committee substitute added numerous provisions including those dealing with the crime victims compensation fund, fines for habitual misdemeanants and other felonies committed during burglary.

SB 15 by Whitmire, which would also make numerous changes in the state jail system and the Penal Code, passed the Senate on April 4 by voice vote.