

SUBJECT: Penal Code, state jail felony changes

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Place, Talton, Greenberg, Nixon, Pickett, Pitts, Solis

0 nays

2 absent — Farrar, Hudson

SENATE VOTE: On final passage, April 4 — voice vote

WITNESSES: No public hearing

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 be 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 may require offenders to be confined in 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 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.

Under certain circumstances the punishments for state jail felonies can be enhanced to those imposed for other felonies.

Persons guilty of a state jail felony may be punished for a third-degree felony if a deadly weapon was used or exhibited during the offense or if they had been previously finally convicted of one of the violent felonies listed in art. 42.12 (3g) of the Code of Criminal Procedure or for any felony for which the court enters a affirmative finding that a deadly weapon was used or exhibited.

The punishment for a state jail felony may be enhanced to the punishment for a second-degree felony if the offender has a previous felony conviction *and* used or exhibited a deadly weapon, was previously finally convicted of a felony offense with a deadly weapon finding or was previously finally convicted of a violent "3g" offense.

First-degree felonies are punishable by life in prison or five to 99 years in prison and an optional fine of up to \$10,000. Second-degree felonies are punishable by two to 20 years in prison and an optional fine of up to \$10,000. Third-degree felonies are punishable by two to 10 years in prison and an optional fine of up to \$10,000.

DIGEST:

CSSB 15 would change the punishment enhancements for repeat and violent state jail felons, would allow judges the option to suspend or order executed some state jail felony sentences, extend the allowable maximum probation term for some state jail felons with previous felonies, and make changes in the allowable "up front" jail time for state jail felonies.

The bill also would make numerous other changes including changes in the admissibility of evidence in the prosecution of sex crimes against children, references to prison capacity in the prison management act and in statutes concerning the institutional division population. Sexual assault of a child would be added to the list of violent offenses requiring offenders to serve one-half of their sentences before being eligible for parole. The bill would create Penal Code offenses for preventing the execution of civil process and for tripping a horse.

Other provisions of the bill would make changes in the statutes governing hindering the apprehension of a juvenile, the reduction of probation terms for some persons convicted of intoxicated offenses, assault on a public servant, penalties for offenses committed in drug-free zones, parole of

capital felons, theft of livestock, and peace officers carrying weapons. CSSB 15 also would add definitions of cable television, subscription television, devices related to cable television and gambling devices to the Penal Code. CSSB 15 would apply to offenses committed on or after January 1, 1996, the effective date of the bill.

State jail felony punishments and enhancements. CSSB 15 would change the current requirement that for all state jail felonies judges suspend a state jail sentence and place the offender on community supervision to allow judges to either suspend the sentence or order it executed for offenders who have been previously convicted of a felony.

The bill would allow the current maximum term of probation of five years to be extended to 10 years for persons previously convicted of two or more felonies.

The maximum amount of up front time in a state jail that can be ordered for persons without a previous felony conviction would be changed from 60 days to 90 days. Up front time for offenders with one previous felony would have to be a minimum of 90 days and a maximum of 180 days. The bill would remove a current provision that limits up front jail time for persons convicted of two or more felonies to one year.

Requirements for minimum and maximum confinement terms as a condition of community supervision for state jail felons would apply to persons placed on probation after pleading guilty or no contest to a state jail felony. CSSB 15 would allow state jails to confine persons given deferred adjudication and required by a judge to serve a term in a state jail and would allow courts to suspend or impose a sentence on persons given deferred adjudication for a state jail felony.

CSSB 15 would make changes in the enhancement of punishments for state jail felons. If on conviction of a state jail felony in which the punishment is not automatically enhanced to that for a third-degree felony, the offender: has previously been finally convicted of two state jail felonies, punishment would be that for a state jail felony *or* for a third-degree felony; has previously been convicted of two felonies other than unenhanced state jail felonies, punishment would that imposed for a state jail felony; has

previously been convicted of three felonies, punishment would be life in prison or a term of 25 years to 99 years.

CSSB 15 would exclude persons whose current offense is a state jail felony from the current enhancement to life in prison or a term of 25 years to 99 years for persons convicted of a felony and who have two previous felony convictions that followed each other.

The current requirement that only state jail felony convictions for which the punishment was enhanced to a third degree felony could be used for enhancement purposes would be changed so that state jail felony convictions that were not enhanced could be used in some situations to enhance later state jail felony convictions.

Repeat and 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.

Reduction of state jail, third-degree felony to misdemeanor punishment. CSSB 15 would replace the current authority of a court to reduce the punishment for a state jail felony to that for a Class B misdemeanor with authority to reduce the punishment to that for a Class A misdemeanor. The bill would eliminate the authority of a court to punish a person convicted of a third-degree felony with the confinement allowed for a Class A misdemeanor.

Admissibility of evidence in prosecution of sex crimes against children. CSSB 15 would allow evidence of other crimes or acts committed by a defendant against an alleged child victim of certain sex crimes to be admitted as evidence.

Prison capacity. CSSB 15 would change the statutory thresholds that can trigger actions by the attorney general, criminal justice board and the board of pardons and paroles in response to emergency overcrowding situations in the institutional division of the Texas Department of Criminal Justice (TDCJ). The bill would require at least 99 percent of capacity, instead of 94 percent, to result in weekly capacity reports and require 100 percent, instead of 95 percent, to define an emergency overcrowding situation. CSSB 15 would change from 95 percent to 100 percent the statutory reference to how much the institutional division population may not exceed the combined capacities of each unit.

Drug-free zones. The enhancements for offenses committed in drug-free zones would be changed from a doubling of the minimum term of confinement and the maximum fine for all offenses to punishment as a third-degree felony if the offense was otherwise punishable as a state jail felony and punishment as a first-degree felony if the offense was otherwise punishable as a second-degree felony.

CSSB 15 would remove manufacture, delivery or possession of a miscellaneous substances from the drug-free zone enhancements.

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.

Sexual assault of a child. CSSB 15 would add sexual assault of a child to the list of offenses found in Code of Criminal Procedure art. 42.12, sec. 3(g) that prohibits offenders from receiving judge-ordered probation and make offenders ineligible for parole until their good time served, without consideration of good conduct time, equals one-half of their maximum sentence or 30 years, whichever is less, and a minimum of two years.

Parole for capital felons. CSHB 15 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 apply to capital felons regardless of when the offender was sentenced.

Assault on a 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 against someone the offender knew was a public servant who is lawfully discharging duties or in retaliation for those official duties.

Carrying of weapons by police officers. CSSB 15 would stipulate 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 courts, 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.

Payments into crime victims' fund. CSSB 15 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 crime victims compensation fund for payments made to a victim.

Intoxication offenses. CSSB 15 would make changes concerning the reduction of community supervision terms for persons convicted of driving, flying or boating while intoxicated to:

- allow judges to reduce or terminate community supervision terms for persons convicted of driving, flying or boating while intoxicated after the person has served one-third of the term but prohibit judges from setting aside the verdict in the case;
- allow judges to reduce or terminate community supervision terms for persons convicted of driving, flying or boating while intoxicated who have a previous conviction for one of those offenses only after persons have completed two-thirds of their terms; and
- prohibit persons convicted of felony violations of the intoxication and alcoholic beverage offenses chapter of the Penal Code from having their community supervision reduced.

Theft of livestock. CSSB 15 would change the current Penal Code provisions making theft of livestock, or any part of livestock, worth less than \$20,000, a state jail felony and making theft of livestock worth more than \$20,000 punished according to the penalties applied to most other types of property, to make theft of:

- less than 10 head of cattle, horses or exotic livestock or fowl or any part of them valued under \$20,000 or less than 100 head of sheep, swine or goats or any part of them valued under \$20,000 a state jail felony; and
- 10 or more head of cattle, horses or exotic livestock or fowl stolen during a single transaction and having an aggregate value of less than \$100,000 or 100 head or more of sheep, swine or goats stolen during a single transaction and having an aggregate value of less than \$100,000 a third-degree felony.

Horse tripping. CSSB 15 would add tripping a horse to the items that constitute cruelty to animals, making it a Class A misdemeanor.

Preventing execution of civil process. CSSB 15 would create an offense of a Class C misdemeanor for intentionally or knowingly preventing the execution of a civil process.

First-degree felony burglary. Provisions that make burglary a first-degree felony if it is committed at a habitation and with the *intent* to commit a felony other than theft would be amended to include burglary to a habitation and if a felony other than theft were actually *committed or attempted*.

Theft of cable, subscription television. CSSB 15 would add definitions of cable television, subscription television and device to the definitions included in Penal Code sec. 31 on theft. Cable television service and subscription television service would have a value of at least \$20 but less than \$500 unless there was proof that it was worth more, making theft punishable as a Class B misdemeanor.

It would be a Class A misdemeanor to, for pay, intentionally or knowingly manufacture, assemble, modify, import or export in Texas, distribute or sell

a device that intercepts, descrambles or decodes cable television service with the intent to aid in the theft of cable service.

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. The bill would make numerous other changes including:

- specifying that Title 4 of the Penal Code dealing with criminal attempt, conspiracy and solicitation applies to drug offenses in the Health and Safety Code;
- adding aiding juveniles accused of committing felonies to the current offenses for hindering apprehension or prosecution of persons;
- adding to the current offense of unauthorized absence from a community corrections facility the unauthorized absence from county correctional centers or a community service or program required by a court, probation department or facility in which a person is detained or treated;
- amending the Penal Code to state that proof of a culpable mental state is not required for conviction under the chapter dealing with intoxication and alcoholic beverages;
- specifying 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;

- eliminating 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;
- specifying that contacting or retaining a lawyers could not be used against a defendant unless it falls within an established crime-fraud exception;
- requiring that time spent in state jail facilities count toward the current 24-month cap on terms in community correction facilities and county jails that are served as part of community supervision conditions;
- outlining procedures for requesting and sending copies of offenders' state jail or county jail facility records to judges who are considering suspending a state jail sentence and placing an offender on community supervision;
- eliminating the option of courts to order offenders to make restitution to victims *in lieu* of fines and retain the court's authority to order restitution *in addition* to fines;
- requiring the Criminal Justice Policy Council to report annually to the governor, lieutenant governor and the speaker of the house, on the projected capacity and population during the remainder of the biennium for TDCJ and Texas Youth Commission; and
- renumbering sections of the Health and Safety Code sections dealing with the illegal expenditure or investment of money derived from the commission of drug offenses.

**SUPPORTERS
SAY:**

CSSB 15 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 and get tougher on repeat offenders, address many of the procedural problems that have come to light as the new system has come on line and clean up many other Penal Code revisions. Many of the

provisions of CSSB 15 have previously been approved by the House in HB 2727 by Place and in numerous other bills this session.

State jail felony punishments and enhancements. CSSB 15 would increase flexibility in the punishment of state jail felons by allowing judges the option of not suspending state jail sentences for offenders with a previous felony conviction. Currently, all sentences must be automatically suspended and the offender put on community supervision. In the cases of persons with previous felonies this may not be an appropriate punishment, and it could be best to send the offender to a state jail.

It would be unwise to make a drastic change in the state jail punishment system by requiring that all sentences to be executed. CSSB 15 would retain the suspension requirement for persons *without* previous felonies so that the goal of diverting nonviolent, low-level property offenders from incarceration can be met. Judges would still have the full range of possibilities for sanctions with these offenders, including "up front" jail time.

CSSB 15 would allow the maximum probation term to be extended for state jail felons with previous felony convictions so that repeat offenders can be subjected to longer terms of supervision. CSSB 15 would change the "up-front" jail time allowable for offenders without previous felonies to ensure all can spend at least 90 days in a facility to take advantage of the jails' programs. The bill would impose a minimum term for offenders with one previous felony to ensure that all of these offenders serve an appropriate minimum term if given up-front time.

CSSB 15 would give courts flexibility to punish an offender who repeatedly commits state jail felonies as a third-degree felony, or, if the case warrants it, imposing another state jail punishment. This would allow repeat offenders whose crimes are escalating in nature to "graduate" to the prison system but also allow persons to stay in the state jail system instead of taking up an expensive prison bed that may be better utilized by a violent felon, if appropriate. Other enhancements that would allow persons with previous felonies who commit a state jail felony would get tougher on repeat offenders who show no sign of stopping their crimes.

Admissibility of evidence in prosecution of sex crimes against children.

Expanding the admissibility of evidence in child sex abuse cases is necessary to restore 80 years of law that allowed children to testify about previous sexual assaults by family members. A 1992 court ruling has restricted the admissibility of evidence in these limited cases. It is important to restore the previous interpretation of the law so that children who have been sexually abused by family members are not forced to testify only about one incident that may seem out of context and make it difficult for juries to make a fair evaluation of the history between a child and the adult.

Prison capacity. Changes in the statutory thresholds in the prison management act would ensure that if the act is used in response to an overcrowding situation it would not be until the system is at 100 percent of capacity. There is no need for statutory restrictions on capacity that are less than 100 percent because prison capacity and the ability to change it are governed by other statutes. The statutory changes relating to prison capacity would give the prison system maximum flexibility to manage its population.

**OPPONENTS
SAY:**

State jail felony punishments. It is too soon to make major changes in the state jail punishments and enhancements. The system has only been in operation since September 1994, less than a year, and should be given a chance to operate before significant changes are made. These changes could increase the demand for prison beds and increase the county jail backlog.

It is too soon to make changes in the punishment scheme for state jail felons that would eliminate the automatic suspension of all state jail sentences. One of the original concepts behind the state jail system was that persons who commit nonviolent, low-level offenses should be judged on those offenses and stay in the state jail system and should not be sent to prison to take up a bed that could be better filled by a violent felon. Mandating a minimum up front jail term for state jail felons would decrease the flexibility of judges, who can order up front time if it is warranted.

Admissibility of evidence in prosecution of sex crimes against children.

The Legislature should not adopt provisions to overturn the recent court

decision relating to testimony on extraneous acts in child sexual abuse cases that involve a family member. The decision, along with current rules on evidence, can restrict some evidence of extraneous acts that could strip defendants of their presumption of innocence. The provisions in CSSB 15 are not needed because modern juries readily believe that family sexual assault can happen and because extraneous acts are admissible in other, more appropriate, ways.

Prison capacity. The statutory changes relating to prison capacity should not create the mistaken impression that they would result in more available prison beds. The changes would not make any significant difference in the daily operation of the Texas prison system because capacity is governed by other statutes and findings and the inmate population already is generally about 95 percent to 99 percent of capacity. Changes to the capacities that would trigger the prison management act also would not make any significant difference because prison capacity has been expanded to meet the state's needs and county jails, instead of the prison management act, have been used for the overflow if prisons are filled to capacity.

OTHER
OPPONENTS
SAY:

State jail felony punishments. CSSB 15 does 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 felons.

The requirement that state jail sentences automatically be suspended and the offender placed on community supervision should be eliminated so that judges and juries would have sentencing discretion to place offenders on probation or have sentences executed, as warranted. Community supervision is not appropriate for all offenders and should not be mandated.

The punishment range for state jail felons should be increased so that state jail felony minimums would be higher and the maximum could be longer. Requiring punishments to be minimum of one year would ensure that all offenders are given an appropriate minimum sentence. Allowing maximum sentences to be up to three years would give judges flexibility to impose stiff sentences on serious offenders.

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

State jail felons who have at least two prior felonies or one prior violent felony should be punished as at least as third-degree felons, without an option to use a state jail punishment.

NOTES:

Rep. Place plans to offer a floor amendment changing the provisions dealing with enhancements of the punishments for state jail felonies that would eliminate some of the enhancements in CSSB 15 and add an enhancement for persons convicted of a state jail felony who have previously committed non-"3g" felonies.

The Criminal Justice Policy Impact Statement estimates that CSSB 15 would result in an increase in demand for state jail capacity of 525 in 1996, 3,955 in 1997 and 5,280 in 1998 an increase in the demand for prison capacity of 349 in 1997 and 905 in 1998.

The committee substitute made numerous changes in the Senate version, including:

- eliminating provisions that would have changed the punishment range for state jail felonies to a minimum of one year and a maximum of three years in a state jail;
- eliminating a punishment enhancement for persons convicted of state jail felonies who had two previous felonies of any category or one felony that was either an enhanced state jail felony or a "3g" felony to the punishment for a third-degree felony and provisions for persons who had previous felonies in addition to those used to enhance a state jail felony;
- eliminating a requirement that the TDCJ board receive criminal justice policy impact statements and a letters about the fiscal impact of proposed rules before adopting a rule;

- eliminating a ban on beginning new state jail construction between June 1, 1995 and September 1, 1997, and authority for the institutional division to contract with counties for beds; and
- changing the minimum and maximum amount of time state jail felons can spend in a state jail and eliminating an increase in the time state jail felons can spend in county jail.

The House eliminated provisions relating to sexual exploitation by a mental health provider; making assault *by* a public servant a third-degree felony; the unauthorized use of television or cable decoding and interception devices; and insurance claim fraud.

Among the provisions the House added are ones relating to the theft of livestock; hindering the apprehension of juveniles accused of committing felonies; the unauthorized absence from correctional centers; suspension of driving while intoxicated probation terms; the definitions of gambling devices; consultation with a lawyer; and making sexual assault of a child a "3g" offense.