

SUBJECT: Allowing court to maintain jurisdiction over absconding probationer

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 5 ayes — Keel, Riddle, Ellis, Denny, Talton

4 nays — Dunnam, Hodge, P. Moreno, Pena

WITNESSES: For — Bruce Curry; Robert Gage; Julian Ramirez, Harris County District Attorney's Office

Against — None

BACKGROUND: Code of Criminal Procedure, art. 42.12 governs community supervision (probation), under which a court places a defendant under a continuum of programs and sanctions and imposes conditions for a specific period.

In deferred adjudication, a judge defers further criminal proceedings without an adjudication of guilt and places the defendant on community supervision. Art. 42.12, sec. 5(b) provides that when an offender on deferred adjudication violates a condition of community supervision, the defendant may be arrested and detained. The defendant is entitled to a hearing to determine whether the court will proceed with an adjudication of guilt on the original charge. Neither the state nor the defendant can appeal this determination.

Under Art. 42.12, sec. 21, at any time during the period of community supervision the judge may issue a warrant for violation of any of the conditions of the community supervision and can order the defendant arrested. The defendant may be detained in the county jail or elsewhere until he or she can be taken before the judge. If the defendant has not been released on bail, the defendant may file a motion for a hearing and is entitled to a hearing before the judge within 20 days of filing the motion. After the hearing, the judge may continue, extend, modify, or revoke the community supervision. If the motion to revoke alleges only that the defendant violated the conditions of community supervision by failing to pay appointed counsel, fees, court costs, or restitution, the defendant's inability to pay is an affirmative defense to revocation.

Since the Court of Criminal Appeals decision in *Stover v. State*, 365 S.W.2d 808, in 1963, courts have held that, in order for the trial court's jurisdiction to extend beyond the expiration of community supervision, a motion must be filed and a warrant issued before the expiration, followed by "due diligence" to apprehend the probationer.

DIGEST:

CSHB 1634 would specify that a court retained jurisdiction to hold a hearing and to proceed with an adjudication of guilt, regardless of whether the period of community supervision had expired, if the prosecutor filed a motion to proceed with the adjudication and issued a warrant for the defendant's arrest before the community supervision period expired. Similarly, a court would retain jurisdiction to hold a hearing and to revoke, continue, or modify community supervision, regardless of whether the period of community supervision had expired, if, before the expiration, the prosecutor filed a motion to revoke, continue, or modify community supervision and issued a warrant for the defendant's arrest.

A supervision officer or peace officer would satisfy the due-diligence requirement if, not earlier than the 45th day before the filing of a motion to adjudicate or a motion to revoke or not later than the 45th day after the motion was filed, the officer contacted or attempted to contact the defendant:

- by U.S. mail directed to the defendant's last known residence or employment address, or
- by telephone at the defendant's last known residence number.

This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2003.

**SUPPORTERS
SAY:**

CSHB 1634 would ensure that a court could maintain jurisdiction over an offender who absconded while on probation. As long as the prosecutor filed a motion to adjudicate or revoke and issued a warrant before the term of community supervision expired, the court would maintain jurisdiction if the officer tried to contact the offender by certified mail or telephone at his or her last known address.

Current law rewards offenders who abscond by imposing a duty on the state to exercise due diligence in apprehending a defendant who has violated the terms of community supervision. When a defendant raises the issue during a revocation hearing, the state must prove due diligence by a preponderance of the evidence. The state is penalized if it does not make continual efforts to locate and arrest the absconder, because either the trial court will deny the motion to revoke or the appellate court will overturn the revocation. CSHB 1634 would ensure that a defendant is not rewarded for absconding and thereby escaping the court's jurisdiction.

Due diligence is costly and burdensome. Counties lack sufficient resources to send officers over and over to try to locate and serve warrants on probation absconders. Urban counties have tens of thousands of outstanding warrants and too few officers to serve them. Probation absconders tend to be low on the priority list, particularly if the defendant fled to a county other than the one where the original case was heard. By allowing the state to satisfy due diligence in a simplified manner, this bill would help counties preserve their limited resources.

CSHB 1634 also would enhance public safety. Offenders who abscond during community supervision are not taking probation seriously and are not complying with counseling or other conditions imposed by the court. Without necessary supervision, they are likely to commit more crimes, and prosecutors should not be prevented from bringing them to justice simply because the state does not have the resources to exercise due diligence. Offenders who move have a duty to report their new address to their community supervision officer, and they should be aware if they have violated the terms of their community supervision even if they are not served with a warrant.

CSHB 1634 would not increase revocations for technical violations. The state still would bear the same burden of proof at revocation hearings, and the defense of inability to pay still would exist.

The bill would impose a reasonable requirement on the state to exercise due diligence but would not remove the court's discretion to decide if the state had satisfied due diligence in the specified manner or by means other than those outlined. Also, the court would retain discretion over the ultimate decision of whether to revoke a defendant's probation. To the extent that

CSHB 1634 would limit a court's discretion, it would be worthwhile to remove this unnecessary burden on counties and the state.

**OPPONENTS
SAY:**

Due diligence ensures due process, and CSHB 1634 would set the threshold for due diligence too low. Just as a defendant should not benefit from absconding, the state should not benefit by doing nothing meaningful to locate a defendant or to execute a warrant. Under this bill, an officer could satisfy the due-diligence requirement simply by calling the defendant and would not even have to leave a message. It would be unfair to drag a defendant to court 10 years after the defendant's probation expired if the defendant simply had moved without notifying the probation office and did not realize that a warrant had been issued for his or her arrest, or mistakenly believed that he or she had completed probation successfully. With the passage of time, it becomes more difficult for a defendant to locate witnesses and other evidence to defend against a revocation.

CSHB 1634 would not enhance public safety. If probation absconders posed a danger to the public, counties would devote more resources to finding them. Probationers who commit other crimes after absconding are arrested and brought to justice. CSHB 1634 would target low-level offenders who have been law-abiding and do not deserve to be brought back to court for a revocation hearing long after their period of probation has expired.

The bill would lead to more revocations, which would be costly for counties and the state. Motions to revoke and to adjudicate that otherwise would have been dismissed for lack of jurisdiction would be maintained under CSHB 1634, for no good reason. State prisons already face a shortage of beds for offenders, and incarcerating more probation violators would exacerbate that problem.

CSHB 1634 would remove the court's discretion to determine the level of due diligence that the state must exercise. Different kinds of notification might be appropriate in urban versus rural districts, and courts should have the flexibility to decide what is sufficient.

HB 1634
House Research Organization
page 5

NOTES: The committee substitute added the section specifying how the state may satisfy the due-diligence requirement.