

SUBJECT: Sentencing for multiple intoxication assaults and certain sexual offenses.

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 5 ayes — Keel, Riddle, Pena, Denny, Reyna

2 nays — Escobar, Hodge

2 absent — P. Moreno, Raymond

WITNESSES: For — John Bradley

Against — None

BACKGROUND: In most cases, when a defendant is convicted of more than one offense arising out of the same criminal episode, the defendant serves sentences for each offense concurrently. Penal Code, sec. 3.03(b), outlines some possible exceptions to this rule. A defendant may serve consecutive, instead of concurrent, sentences if each sentence is for a conviction of:

- intoxication manslaughter;
- indecency with a child;
- sexual assault committed against a victim younger than 17 years of age at the time the offense is committed;
- aggravated sexual assault against a victim younger than 17 years of age at the time the offense is committed; or
- prohibited sexual conduct against a victim younger than 17 years of age at the time the offense is committed.

Penal Code, ch. 49 outlines the penalties for intoxication assault and intoxication manslaughter. Under sec. 49.07, a person who causes serious bodily injury to another while operating a motor vehicle, aircraft, watercraft, or amusement ride, or assembling an amusement ride, while intoxicated, may be charged with a third-degree felony. A person who kills another individual under these circumstances may be charged with a second degree felony under section 49.08.

Sec. 43 punishes the possession or promotion of child pornography. This offense is punishable as a third-degree felony if the person knowingly or

intentionally possesses material that visually depicts a child younger than 18 years of age engaging in sexual conduct. The offense is punishable as a second-degree felony if the person knowingly or intentionally promotes or possesses such material with the intent to promote it.

The Penal Code also makes it an offense, punishable as a state jail felony, to photograph or visually record another without the person's consent and with the intent to arouse or gratify the sexual desire of another person, and to promote such material knowing its content.

Sec. 3.04 gives defendants the right to severance of offenses when two or more offenses have been joined for trial. This right does not apply to certain sexual offenses unless the judge determines that the defendant or the state unfairly would be prejudiced by a joinder of offenses.

A first-degree felony is punishable by imprisonment for 5 to 99 years and a fine not to exceed \$10,000. A second-degree felony is punishable by imprisonment for 2 to 20 years and a fine not to exceed \$10,000. Third-degree felonies are punishable by 2 to 10 years in prison and a fine not to exceed \$10,000. A state jail felony is punishable by 180 days to two years in jail and a maximum \$10,000 fine.

DIGEST:

CSHB 904 would amend Penal Code, sec. 3.03(b), to authorize consecutive sentences for individuals convicted of intoxication assault, whether or not the individual was convicted of the same offense more than once or was convicted of violations of both offenses.

The bill also would authorize consecutive sentences for individuals convicted of improper photography or visual recording, or of possession or promotion of child pornography, whether or not the individual was convicted of the same offense more than once or was convicted of violations of both offenses.

CSHB 904 would make a defendant's right to severance inapplicable to any offense under Penal Code, sec. 3.03(b), unless the judge determined that the defendant or the state unfairly would be prejudiced by a joinder of offenses.

The bill would take effect on September 1, 2005, and would apply only to offenses committed on or after that date.

**SUPPORTERS
SAY:**

CSHB 904 would extend judges' ability to join offenses into a single trial for child pornography and improper photography. In doing so, the bill would give judges the discretion more strictly to enforce the violation of these crimes and create a stronger deterrent. It also would make the prosecution of these crimes more efficient and less costly by avoiding the need for multiple trials.

Internet-related sex crimes have grown dramatically due in part because of the accessibility of the Internet and other enhancements in technology. Child pornography has become more easily accessible and sexually explicit images of individuals are secretly recorded and spread on the Internet.

In 1997, the Texas Legislature gave judges the discretion to join certain offenses involving multiple victims into a single trial and to stack the offenses. This saves the state the cost of multiple trials while leaving discretion in sentencing in the hands of the judge. Stacking sentences is particularly important in these crimes because they frequently involve multiple victims.

The bill would add intoxication assault to the list of stackable offenses. Consecutive sentencing already applies to intoxicated manslaughter and should apply equally to multiple victims who are seriously injured by drunk driving. Tough penalties for certain offenses do deter crime and serve as a form of retribution. Many of those convicted of intoxication offenses are repeat offenders who have been warned before, yet still refuse to comply with the law.

CSHB 904 would not have a significant impact on prison overcrowding problems. According to Legislative Budget Board projections, the increased workload and demand on resources would not be substantial.

**OPPONENTS
SAY:**

This bill would give prosecutors too much power over plea bargains and could lead to sentences that were vastly disproportionate to the harm. Child pornography and improper photography offenses usually involve a number of illegal images. Charging for each offense separately could result in ridiculously long sentences. These potentially lengthy sentences would give prosecutors enormous leverage in plea bargaining, whether or not the offender actually was guilty.

Stacking sentences for intoxication assault has no purpose but to turn an offender into a hardened criminal and to further clog Texas' prisons. Consecutive sentencing for this crime would serve no purpose because drunk driving is an impulsive act. The offender usually has no intent to harm, nor does the offender have the intent to harm multiple victims. The number of individuals harmed in a drunk driving accident usually is determined by chance. Distinguishing between an intoxicated driver who harmed four victims and a driver who harmed just one would have no deterrent or rehabilitative value.

CSHB 904 would increase costs to taxpayers and further exacerbate an already serious prison overcrowding problem. Texas correctional facilities are pressed to their limit, and Texas is struggling to find enough space for those already imprisoned. If Texas continues to enhance penalties, taxpayers will bear the burden. It costs about \$500,000 per biennium to add 10 people to our prison system. While the fiscal note indicates no immediate anticipated fiscal impact, it is the combined result of all the various enhancement measures that inevitably would impact costs and prison space.

NOTES:

The substitute would make the right to severance inapplicable to offenses described by Penal Code, sec. 3.03(b).