

SUBJECT: Use, reporting, auditing of assets seized and forfeited to law enforcement

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 9 ayes — Gallego, Christian, Fletcher, Kent, Miklos, Moody, Pierson, Riddle, Vo

0 nays

2 absent — Hodge, Vaught

SENATE VOTE: On final passage, April 23 — 30-0, on Local and Uncontested Calendar

WITNESSES: For — (*Registered, but did not testify*: Katrina Daniels, Bexar County District Attorney Susan D. Reed; Kristin Etter, Texas Criminal Defense Lawyers Association; Ballard C. Shapleigh, 34th Judicial District Attorney Jaime Esparza)

Against — None

On — Shannon Edmonds, Texas District and County Attorneys Association

BACKGROUND: Code of Criminal Procedure (CCP), ch. 59 makes property that is contraband subject to seizure and forfeiture.

Under CCP, art. 59.03(a), property may be seized by a peace officer with a warrant, and it may be seized without a warrant if certain conditions are met, including if the owner consents, if the seizure was incident to a search to which the owner knowingly consented, or the property was incident to a lawful arrest, lawful search, or lawful search incident to an arrest. After property is seized, prosecutors have 30 days to begin forfeiture proceedings in civil district court.

Peace officers who seize property may not at the time of the seizure request, require, or induce anyone to sign a document waiving their interest in or rights to property under CCP, Art. 59.03(d).

CCP, art. 59.06 requires forfeited property to be administered by the prosecutor, under a local agreement between the prosecutor and law enforcement agencies. Under CCP, art. 59.06(c), funds staying at the local level can be used for three purposes: official purposes of the prosecutors office; municipal law enforcement purposes such as salaries, overtime, officer training, investigative equipment and supplies, and items use by officers in direct law enforcement duties; or for law enforcement purposes for a county law enforcement agency. CCP, art. 59.06 also includes exceptions to these general restrictions.

CCP, Art. 59.06 (d) allows proceeds awarded to prosecutors or law enforcement agencies to be spent after a budget for the expenditures has been submitted to the commissioners court or the governing body of the city. The budget must be detailed and list and define the categories of expenditures.

Under CCP art. 59.06(g)(1), law enforcement agencies and prosecutors must account for contraband proceeds and property in an annual audit by the commissioners court or city. The audit must be completed on a form provided by the attorney general. Certified copies of the audit must be delivered by the prosecutor or agency to the comptroller and the attorney general.

DIGEST:

CSSB 1529 would impose new restrictions on the use of contraband proceeds and property, authorize the state auditor to conduct audits and investigations relating to seized assets, and authorize the attorney general to file suits for injunctive relief relating to and civil penalties for violating statutory provisions concerning the disposition of property.

Prohibiting waivers. Peace officers would be prohibited from requesting, requiring, or inducing persons to sign a document waiving their interest in seized property.

Prosecutors could not, at any time before they filed a notice of a forfeiture proceeding for seized property, request, require, or induce someone to sign a document waiving their rights to seized property. This would apply to property seized on or after the bill's effective date.

Restrictions on the use of contraband proceeds and property. Law enforcement agencies and prosecutors would be prohibited from using contraband proceeds or property to:

- contribute to a political campaign;
- make a donation to any entity, except ones specified in the bill;
- pay expenses for judicial training or education;
- pay travel expenses for training or education seminars, if the expenses violated generally applicable restrictions established by commissioners court or city;
- purchase alcoholic beverages; or
- make any expenditures not approved by commissioners court or a city's governing body, if the head of a law enforcement agency or prosecutor held elective office and was not running for reelection or if these elected officials were finishing a term in office for which they had not won reelection.

CSSB 1529 would allow law enforcement agencies and prosecutors to use the funds to make donations to entities that assist in:

- detecting, investigating, or prosecuting criminal offenses or abuse, as defined by the Family Code;
- providing of mental health, drug, or rehabilitation services or services for crime or abuse victims or witnesses; or
- training or education related to one of the above purposes.

CSSB 1529 would require that any post-judgment interest from money, securities, stocks, bonds or other things of value be deposited in the same accounts as the principal.

Audits and investigations. The currently required annual audit of contraband funds would have to include a detailed report and explanation of all expenditures, including salaries and overtime officer training, investigative equipment and supplies and other items.

At any time, the state auditor would be authorized to perform an audit or conduct an investigation related to the seizure, forfeiture, receipt, and specific expenditure of contraband proceeds and property. The state auditor would be entitled to access any information maintained under the requirements in the statute for the disposition of forfeited property. However, if the release of the information was restricted by state or federal law, the auditor could access the information only with court or federal agency approval.

If the results of an audit or investigation indicated that a law enforcement agency or a prosecutor had knowingly violated or was violating the law relating to the disposition of contraband proceeds or property, the auditor would have to promptly notify the attorney general so that enforcement proceedings could be initiated.

Enforcement. The attorney general would be authorized to file lawsuits for injunctive relief and to recover civil penalties if audit results indicated that a law enforcement agency or prosecutor had or was knowingly violating a statute relating to the disposition of contraband proceeds or property.

Law enforcement agencies or prosecutors that knowingly committed a violation would be liable to the state for a civil penalty of up to \$100,000. CSSB 1529 would establish criteria for courts to consider when determining a penalty, including previous violations, the seriousness of the violations, the demonstrated good faith by the agency or prosecutor, and the amount necessary to deter future violations.

Civil penalties collected by the state would have to be used to fund drug court programs. If a civil penalty was imposed, the attorney general could recover related expenses. Penalties and the attorney general's expenses would have to be paid from funds established to administer contraband proceeds or property.

Agencies and prosecutors would be immune from liability if they had reasonably relied on the advice, consent, or approval of an entity that audited them or a related written opinion of the attorney general.

The bill would take effect September 1, 2009. Provisions in CSSB 1529 that relate to audits and enforcement would apply to audits performed on or after the bill's effective date. Certain provisions dealing with the disposition of funds would apply to dispositions on or after the bill's effective date, regardless of when the property was received.

**SUPPORTERS
SAY:**

CSSB 1529 would bring more oversight, transparency and accountability to the state's asset forfeiture laws. State law places only broad restrictions on the use of these seized funds by local law enforcement agencies and prosecutors, requires only minimal reporting, and has no mechanism to enforce statutory requirements on the seizure and use of the funds. This has led to problems, including the use of the assets for purposes unrelated

to law enforcement and law enforcement authorities abusing the law by coercing motorists into giving up their rights to their property in exchange for freedom or a promise that no criminal charges will be filed.

Current law has been stretched and sometimes ignored by law enforcement agencies that used seized asset funds for parties, liquor, campaign contributions, and extravagant trips. The bill would address such misuses by specifically prohibiting certain expenditures, including expenditures for alcohol, judicial training or education, certain travel expenses, political contributions, and most types of donations. It also would prohibit elected officeholders who are on the way out of office from spending the funds without approval by a commissioners court or a city's governing body. The bill would result in more transparency in the use of asset forfeiture funds by requiring agencies to report in detail how they were used. The bill would not infringe on local control, but would clarify the current restrictions and list some unacceptable expenditures.

In other cases of abuses, the law has been used to seize the property of persons who were never charged with, much less convicted of, a crime. One newspaper account reported that between 2006 and 2008, the east Texas town of Tenaha, with a population of 1,000, seized property from at least 140 motorists, with criminal charges filed against fewer than half. Motorists told of being coerced and threatened until they waived their rights to their property in exchange for release and no criminal charges. In some situations, peace officers have claimed they were not violating current law, which prohibits waivers at the time of a seizure, because they obtained waivers a few hours after seizing the property. CSSB 1579 would address these abuses by prohibiting peace officers from using asset waivers. To ensure that persons were given due process before any assets were forfeited, prosecutors would be restricted from using waivers until after they had begun forfeiture court proceedings.

CSSB 1529 would put teeth into these new requirements by authorizing the state auditor to audit and investigate the use of asset forfeiture funds. The attorney general could bring court proceedings against violators, including injunctions to stop abuses of the fund and penalties for past violations.

While most prosecutors and peace officers are honest and obtain and use seized assets according to the law, there have been enough abuses by enough jurisdictions to warrant the changes in CSSB 1529. While the bill

could make more cumbersome the seizure of assets in some cases in which no one claimed the profits of a crime, these cases would not be unduly difficult. Jurisdictions that are following current law honestly and using good law enforcement practices would not be adversely affected by the bill.

**OPPONENTS
SAY:**

If specific agencies are abusing the asset forfeiture law, those abuses should be addressed without making changes in the law that could make asset seizures and forfeitures more difficult for those who are abiding by the law. For example, restricting the use of waivers could impose unnecessary hurdles for law enforcement agencies in some cases. The practices of some law enforcement agencies described in media accounts could violate not just the seizure and forfeiture statutes but perhaps other existing laws or the standards of the State Bar or a law enforcement oversight entity. The forfeiture of assets is an essential law enforcement tool that takes some of the profit out of crime, and it should not be made more difficult to use.

Some provisions of CSSB 1529, such as statutory restrictions on the use of the asset proceeds, could remove local control over the funds from counties and cities where it should remain.

**OTHER
OPPONENTS
SAY:**

CSSB 1529 would not go far enough. Allowing peace officers to see a direct financial benefit from their work distorts criminal justice. The Legislature should eliminate any direct financial incentive in asset forfeitures to ensure that law enforcement agencies focused on crimes, not assets. One way to do this would be to have all forfeited assets deposited in a state account. Another reasonable restriction would be to require a criminal conviction before assets were forfeited.

NOTES:

The committee substitute made several changes to the Senate version of the bill, including adding the provisions giving prosecutors and law enforcement agencies immunity from liability under certain circumstances.