

BILL ANALYSIS

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C.S.H.B. 3228
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Criminal Justice
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Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The 78th Legislature, Regular Session, 2003, enacted legislation relating to prohibited substances and items in correctional facilities or on property of the Texas Department of Criminal Justice (TDCJ). The intent of the legislation was to make it a third-degree felony offense for an inmate of a correctional facility operated by or under contract with TDCJ to possess a cellular telephone. The law has been amended by subsequent legislatures, but the offense of possessing a cellular telephone remains applicable only to a narrow definition of a TDCJ correctional facility that does not include certain local facilities such as a county jail.

C.S.H.B. 3228 amends current law relating to the offense of prohibited substances and items in correctional facilities.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Reenacts and amends Section 38.11, Penal Code, as amended by Chapters 949 (H.B. 1575) and 1092 (H.B. 2077), Acts of the 79th Legislature, Regular Session, 2005, as follows:

Sec. 38.11. New heading: PROHIBITED SUBSTANCES AND ITEMS IN CORRECTIONAL FACILITY. (a) Provides that a person commits an offense if the person provides, or possesses with the intent to provide:

- (1) an alcoholic beverage, controlled substance, or dangerous drug to a person in the custody of a correctional facility, except on the prescription of a practitioner, rather than an alcoholic beverage, controlled substance, or dangerous drug to an inmate of a correctional facility or to a person in the custody of a secure correctional facility or secure detention facility for juveniles, except on the prescription of a physician or practitioner, as defined in Section 551.003 (Definitions), Occupations Code;
- (2) a deadly weapon to a person in the custody of a correctional facility, rather than a deadly weapon to an inmate of a correctional facility or to a person in the custody of a secure correctional facility or secure detention facility for juveniles;
- (3) a cellular telephone or other wireless communications device or a component of one of those devices to a person in the custody of a correctional facility, rather than a cellular telephone or other wireless communications device or a component of one of those devices, cigarette, tobacco product, or money to an inmate of a correctional facility operated by or under contract with the Texas Department of Criminal Justice (TDCJ) or to a person in the custody of a secure correctional facility or secure detention facility for juveniles, except for money that is provided for the benefit of the juvenile in accordance with facility rules;

(4) money to a person confined in a correctional facility, rather than a cellular telephone or money to a person confined in a local jail regulated by the Commission on Jail Standards; or

(5) a cigarette or tobacco product to a person confined in a correctional facility, except that if the facility is a local jail regulated by the Commission on Jail Standards, the person commits an offense only if providing the cigarette or tobacco product, violates certain rules or regulations adopted by the sheriff or jail administrator. Makes nonsubstantive and conforming changes.

(b) Deletes existing text providing that a person commits an offense if the person takes an alcoholic beverage, controlled substance, or dangerous drug into a secure correctional facility or a secure detention facility for juveniles, except for delivery to a facility warehouse, pharmacy, or physician.

(c) Provides that a person commits an offense if the person takes a controlled substance or dangerous drug on property owned, used, or controlled by a correctional facility, rather than TDCJ, the Texas Youth Commission (TYC), or a secure correctional facility or secure detention facility for juveniles, except for delivery to a warehouse, pharmacy, or physician on property owned, used, or controlled by TDCJ, TYC, or the facility.

(d) Provides that a person commits an offense if the person possesses a controlled substance or dangerous drug while in a correctional facility or on property owned, used, or controlled by a correctional facility or possesses a deadly weapon while in a correctional facility. Deletes existing text providing that a person commits an offense if the person possesses a controlled substance or dangerous drug while on property owned, used, or controlled by TDCJ, TYC, or a secure correctional facility or secure detention facility for juveniles, or in a correctional facility or a secure correctional facility or secure detention facility for juveniles, or possesses a deadly weapon while in a correctional facility or in a secure correctional facility or secure detention facility for juveniles. Makes nonsubstantive changes.

(e) Provides that it is an affirmative defense to prosecution under Subsection (b), (c), or (d)(1) (relating to possessing a controlled substance or dangerous drug while in a correctional facility) that the person possessed the alcoholic beverage, controlled substance, or dangerous drug pursuant to a prescription issued by a practitioner or while delivering the beverage, substance, or drug to a warehouse, pharmacy, or practitioner, rather than physician, on property owned, used, or controlled by the correctional facility, rather than TDCJ or TYC, or by the operator of a secure correctional facility or secure detention facility for juveniles. Provides that it is an affirmative defense to prosecution under Subsection (d)(2) (relating to possessing a deadly weapon while in a correctional facility) that the person possessing the deadly weapon is a peace officer or is an officer or employee of the correctional facility who is authorized to possess the deadly weapon while on duty or traveling to or from the person's place of assignment. Makes nonsubstantive changes.

(f) Defines "component" and "correctional facility."

(g) Provides that an offense under this section is a felony of the third degree.

(h) Provides that notwithstanding Section 15.01(d) (relating to the penalties for an offense under this section), if a person commits the offense of criminal attempt to commit an offense under Subsection (a), (b), or (c), the offense committed under Section 15.01 (Criminal Attempt) is a felony of the third degree. Makes nonsubstantive changes.

(i) Provides that it is an affirmative defense to prosecution under Subsection (b) that the actor takes four ounces or less of an alcoholic beverage into the

correctional facility, rather than the correctional facility or the secure correctional facility or secure detention facility for juveniles, and personally consumes all of the alcoholic beverage or departs from the facility with any portion of the beverage not consumed.

(j) Provides that a person commits an offense if the person, while confined in a correctional facility, possesses a cellular telephone or other wireless communications device or a component of one of those devices, rather than provides that a person commits an offense if the person while an inmate of a correctional facility operated by or under contract with TDCJ or while in the custody of a secure correctional facility or secure detention facility for juveniles possesses a cellular telephone or other wireless communications device or a component of one of those devices.

(k) Provides that a person commits an offense if, with intent to provide to or make a cellular telephone or other wireless communications device or a component of one of those devices available for use by a person in the custody of a correctional facility, the person acquires a cellular telephone or other wireless communications device or a component of one of those devices to be delivered to the person in custody, provides a cellular telephone or other wireless communications device or a component of one of those devices to another person for delivery to the person in custody, or makes a payment to a communication common carrier, as defined by Article 18.20, Code of Criminal Procedure, or to any communication service that provides to its users the ability to send or receive wire or electronic communications.

SECTION 2. Amends the heading to Article 18.20, Code of Criminal Procedure, to read as follows:

Sec. 18.20. DETECTION, INTERCEPTION, AND USE OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS.

SECTION 3. Amends Section 4, Article 18.20, Code of Criminal Procedure, to authorize a judge of competent jurisdiction to issue an order authorizing interception of wire, oral, or electronic communications only if the prosecutor applying for the order shows probable cause to believe that the interception will provide evidence of the commission of a felony under Section 485.032 (Delivery to a Minor), rather than Section 485.033 (Inhalant Paraphernalia), Health and Safety Code, and an offense under Section 38.11, (Penal Code). Makes nonsubstantive changes.

SECTION 4. Amends Section 5, Article 18.20, Code of Criminal Procedure, by amending Subsection (a) and adding Subsections (c) and (d), as follows:

(a) Provides that, except as otherwise provided by this section and Sections 8A (relating to a member of a law enforcement unit authorized to possess an electronic, mechanical, or other device) and 8B, rather than Section 8A, only the Department of Public Safety of the State of Texas is authorized by this article to own, possess, install, operate, or monitor an electronic, mechanical, or other device.

(c) Authorizes TDCJ to own electronic, mechanical, or other devices for a use or purpose authorized by Section 500.008, Government Code, and authorizes the inspector general of TDCJ, a commissioned officer of that office, or another person acting in the presence and under the direction of a commissioned officer of that office to possess, install, operate, or monitor those devices as provided by Section 500.008.

(d) Authorizes TYC to own electronic, mechanical, or other devices for a use or purpose authorized by Section 61.0455, Human Resource Code, and authorizes the inspector general of TYC, a commissioned officer of that office, or another person acting in the presence and under the direction of a commissioned officer of that office to possess, install, operate, or monitor those devices as provided by Section 61.0455.

SECTION 5. Amends Article 18.20, Code of Criminal Procedure, by adding Subsection 8B, as follows:

Sec. 8B. DETECTION OF CELLULAR TELEPHONE OR OTHER WIRELESS COMMUNICATIONS DEVICE IN CORRECTIONAL OR DETENTION FACILITY.

(a) Defines "correctional facility."

(b) Authorizes the office of the inspector general of TDCJ, notwithstanding any other provision of this article or Article 18.21 (Pen Registers and Trap and Trace Devices; Access to Stored Communications; Mobile Tracking Devices), to use electronic, mechanical, or other devices to detect the presence or use of a cellular telephone or other wireless communications device in a correctional facility without a warrant; intercept, monitor, detect, or, as authorized by applicable federal laws and regulations, prevent the transmission of any communication transmitted through the use of a cellular telephone or other wireless communications device in a correctional facility without warrant; and use, to the extent authorized by law, any information obtained under Subdivision (2), including the contents of an intercepted communication, in any criminal or civil proceeding before a court or other governmental agency or entity.

(c) Requires the inspector general, not later than the 30th day after the date on which the office of the inspector general uses an electronic, mechanical, or other device under Subsection (b), to report the use of the device to a prosecutor with jurisdiction in the county in which the device was used or the special prosecution unit established under Subchapter E (Special Prosecution Unit), Chapter 41 (General Provisions), Government Code, if that unit has jurisdiction in the county in which the device was used.

(d) Requires the office of the inspector general, when using an electronic, mechanical, or other device under Subsection (b), to minimize the impact of the device on any communications that is not reasonably related to the detection of the presence or use of a cellular telephone or other wireless communications device in a correctional facility.

(e) Provides that a person confined in a correctional facility does not have an expectation of privacy with respect to the possession or use of a cellular telephone or other wireless communications device located on the premises of the facility. Provides that the person who is confined, and any person with whom that person communicates through the use of a cellular telephone or other wireless communications device, does not have an expectation of privacy with respect to the contents of any communications transmitted by the cellular telephone or wireless communications device.

SECTION 6. Amends Section 17, Article 18.20, Code of Criminal Procedure, to provide that this article does not apply to conduct described as an affirmative defense under Section 16.02(c) (relating to an affirmative defense to prosecution for certain persons), Penal Code, except as otherwise specifically provided by that section.

SECTION 7. Amend Chapter 500, Government Code, by adding Section 500.008, as follows:

Sec. 500.008. DETECTION AND MONITORING OF CELLULAR TELEPHONES.

(a) Authorizes TDCJ to own and the office of the inspector general to possess, install, operate, or monitor an electronic, mechanical, or other device, as defined by Article 18.20, Code of Criminal Procedure.

(b) Requires the inspector general to designate in writing the commissioned officers of the office of inspector general who are authorized to possess, install, operate, or monitor electronic, mechanical, or other devices for TDCJ.

(c) Authorizes an investigative or law enforcement officer or other person, on request of the office of the inspector general, to assist the office in the operation

and monitoring of an interception of wire, oral, or electronic communications if the investigative or law enforcement officer or other person is designated by the executive director of TDCJ for that purpose and acts in the presence and under the direction of a commissioned officer of the inspector general.

SECTION 8. Amends Subchapter C, Chapter 61, Human Resources Code, by adding Section 61.0455, as follows:

Sec. 61.0455. DETECTION AND MONITORING OF CELLULAR TELEPHONES.

(a) Authorizes TYC to own and the office of the inspector general to possess, install, operate, or monitor an electronic, mechanical, or other device, as defined by Article 18.20, Code of Criminal Procedure.

(b) Requires the inspector general to designate in writing the commissioned officers of the office of inspector general who are authorized to possess, install, operate, or monitor electronic, mechanical, or other devices for TYC.

(c) Authorizes an investigative or law enforcement officer or other person, on request of the office of the inspector general, to assist the office in the operation and monitoring of an interception of wire, oral, or electronic communications if the investigative or law enforcement officer or other person is designated by the executive commissioner of TYC for that purpose and acts in the presence and under the direction of a commissioned officer of the inspector general.

SECTION 9. Amends Section 16.02, Penal Code, by adding Subsection (e-1), to provide that it is a defense to prosecution under Subsection (d)(1) (relating to manufacturing, assembling, possessing or selling an electronic, mechanical, other device or using the device primarily for nonconsensual interception of communications or unlawful purpose) that the electronic, mechanical, or other device is possessed by a person authorized to possess the device under Section 500.008, Government Code, or Section 61.0455, Human Resource Code.

SECTION 10. Makes application of the changes in law made by this Act to Sections 16.02 and 38.11, Penal Code, prospective.

SECTION 11. Effective date: September 1, 2009.