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OPINION COMMITTEE

KERR COUNTY ATTORNEY

REX EMERSON

COUNTY COURTHOUSE, SUITE BA-103 • 700 MAIN STREET • KERRVILLE, TEXAS 78028

FILE # ML 45967-08

February 6, 2009

I.D. # 45967

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED: 7005-1820-0001-1168-5384

The Honorable Gregg Abbott
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711-2548

RQ-0783-GA

Re: ID #45967 – Brief Regarding Question Presented

Dear General Abbott:

Thank you for agreeing to review and render an opinion on our request dated December 22, 2008, relating to the necessity for continuing to maintain dedicated videotaping rooms in Texas jails, pursuant to S.B. 1, Acts 1983, Ch. 303 §24, 68th Legislature, Regular Session. As requested, please find a brief regarding this issue.

If you have any additional questions, please do not hesitate to contact me.

Sincerely,

M. Rex Emerson
Kerr County Attorney

Enclosures

cc: Kerr County Sheriff

MAIN NUMBER (830) 792-2220 • HOT CHECKS (830) 792-2221 • FAX (830) 792-2228
Website: http://www.co.kerr.tx.us/attorney

REQUEST FOR OPINION #45967
OFFICE OF THE ATTORNEY GENERAL

BRIEF BY REQUESTOR

ISSUES PRESENTED:

Issue No. 1: Whether the Kerr County Jail must continue to maintain a dedicated room containing video recording equipment for the purpose of recording intoxicated drivers, as required by S.B. 1, Acts 1983, Ch. 303 §24, 68th Legislature, Regular Session?

Issue No. 2: If the Kerr County Jail is required to maintain a room for video recording, may the room also be utilized for other purposes?

DISCUSSION AND ANALYSIS:

The Kerr County Sheriff maintains a room with videotape equipment for recording arrested intoxicated drivers as required by S.B. 1, Acts 1983, Ch. 303 §24, 68th Legislature, Regular Session. This law provides as follows:

SECTION 24. (a) Each county with a population of 25,000 or more according to the most recent federal census shall purchase and maintain electronic devices capable of visually recording a person arrested within the county for an offense under Article 67011-1, Revised Statutes, or Subdivision (2), Subsection (a), Section 19.05, Penal Code.

(b) The sheriff of the county shall determine upon approval by the county commissioners court the number of devices necessary to ensure that a peace officer arresting a defendant for an offense listed in Subsection (a) of this section may visually record the defendant's appearance within a reasonable time after the arrest.

(c) The fact that an arresting officer or other person acting on behalf of the state failed to visually record a person arrested for an offense listed in Subsection (a) of this section is admissible at the trial of the offense if the offense occurred in a county required to purchase and maintain electronic devices under this section.

The Kerr County Sheriff has asked this office to seek an opinion as to whether this law is still effective to require him to maintain the room and the recording equipment, and if so, may he also utilize the room for other purposes when it is not being utilized for such recording. It is his belief that the law is no longer applicable to require him to maintain the dedicated room or equipment, and seeks authorization to dispose of the equipment and utilize the room for other law enforcement purposes.

The law in question was enacted in 1983 as part of a comprehensive bill that was intended as a legislative response to public demand for stronger laws related to drunk driving. In addition to the requirement that counties with a population of 25,000 or more purchase and maintain equipment to record intoxicated arrestees, the bill increased penalties for drunk driving, required mandatory jail time for all but first offenses, and made a tested blood-alcohol concentration of .10 or greater intoxication by definition. It provided that refusal to take a breath test would be admissible at trial, and allowed for suspension of the suspect's driver's license for a test showing over this limit. It provided for forfeiture of a defendant's vehicle for conviction of certain DWI offenses, and provided for an auto insurance surcharge to be imposed for a DWI conviction.

Some authorities[1] have opined that the law is no longer effective to require jails to have this recording equipment, as the law was never codified or made part of any specific statute, and related specifically and solely to recording persons arrested for "an offense under Art. 6701*l*-1," which law was subsequently repealed. Texas drunk driving law is now codified in TEX. PENAL CODE §49.04, which contains no reference to this recording requirement. Furthermore, a strong argument can be made that the reason for the law, which was to provide some visual evidence that could be presented to a jury in a DWI trial, has been superseded by the more modern technology of video recording equipment in peace officers' patrol cars, which provides more immediate and presumably more probative evidence of an arrestee's state of intoxication at the time of arrest than a jailhouse video, often taken hours after the actual arrest. All of Kerr County's patrol vehicles are equipped with these video recording devices.

There is a contrary argument that regardless of its lack of codification, since it has not been repealed, and was clearly intended to apply to DWI arrests, it should continue to be applicable to DWI arrests even under the current statute, despite the fact that TEX. PENAL CODE §49.04 does not specifically reference this requirement, nor was the bill otherwise explicitly incorporated into the new law; however, we contend that to view the statute in this light would contravene public policy, as it would require the sheriff to make useless expenditures and underutilize existing facilities in order to comply with a law whose purpose is being achieved better and more efficiently by in-car video recording at the scene of DWI arrests.

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[1] *See, e,g,* Texas District & County Attorney's Association publication, DWI Investigation and Prosecution, by Richard Alpert, 2007, p. 32

If Kerr County is still required to provide and maintain the required equipment as required by S.B. 1, the sheriff has asked if he could be permitted to utilize this space for other purposes when it is not being used for such recording. The answer to this question is particularly important to the Kerr County Sheriff, as the room which has been previously dedicated to video recording equipment for drunk drivers is a space that is needed for other law enforcement purposes, in a law enforcement center that is already overcrowded. If it is no longer mandatory for this room to be maintained solely for video recording, as it has been, the room can be put to better use immediately.

The attached copies of legislative history address the issues raised and provide some background that may assist you in making your determination. These documents are hereby incorporated herein by reference.

CONCLUSION:

We conclude that S.B.1, from the 68th legislature (1983) should be considered as no longer in force or effect. The law explicitly related to Tex. Rev. Civ. Stat. Ann. art. 6701*l*-1, which was repealed, and codified as current DWI law in the Texas Penal Code in 1993. S.B. 1 was never codified in art. *6701l*-1, nor was it brought forward into Tex. Penal Code §49.04. Clearly, the legislature did not intend this law to carry the video recording requirement forward into the Penal Code provisions, and is therefore no longer in effect.

In the alternative, we urge that if S.B. 1 still imposes the requirement that a sheriff must maintain a room and recording equipment that would allow him to record intoxicated drivers, the language of the bill is not exclusive, and therefore the sheriff may utilize the room for other purposes.

Respectfully Submitted,

Ilse D. Bailey
Assistant County Attorney
Kerr County, Texas
Kerr County Courthouse
700 Main Street, Suite BA-103
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PUBLIC INFORMATION &
ASSISTANCE DIVISION

KERR COUNTY ATTORNEY

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CRIME VICTIMS' COMPENSATION

REX EMERSON

COUNTY COURTHOUSE, SUITE BA-103 • 700 MAIN STREET • KERRVILLE, TEXAS 78028

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OPINION COMMITTEE

December 22, 2008

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CRIME VICTIMS' COMPENSATION

The Honorable Gregg Abbott
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711-2548

Re: Request for Opinion

FILE # ML-45967-08
I.D. # 45967

Dear General Abbott:

Pursuant to Section 402.043 of the TEXAS GOVERNMENT CODE, I am requesting an opinion from your office regarding the following:

The Kerr County Sheriff maintains a room with videotape equipment for recording arrested intoxicated drivers as required by S.B. 1, Acts 1983, Ch. 303 §24, 68th Legislature, Regular Session. This law provides as follows:

SECTION 24. (a) Each county with a population of 25,000 or more according to the most recent federal census shall purchase and maintain electronic devices capable of visually recording a person arrested within the county for an offense under Article 67011-1, Revised Statutes, or Subdivision (2), Subsection (a), Section 19.05, Penal Code.

(b) The sheriff of the county shall determine upon approval by the county commissioners court the number of devices necessary to ensure that a peace officer arresting a defendant for an offense listed in Subsection (a) of this section may visually record the defendant's appearance within a reasonable time after the arrest.

(c) The fact that an arresting officer or other person acting on behalf of the state failed to visually record a person arrested for an offense listed in Subsection (a) of this section is admissible at the trial of the offense if the offense occurred in a county required to purchase and maintain electronic devices under this section.

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CRIME VICTIMS' COMPENSATION

The Kerr County Sheriff has asked this office to seek an opinion as to whether this law is still effective to require him to maintain the room and the recording equipment, and if so, may he also utilize the room for other purposes when it is not being utilized for such recording.

The law in question was enacted as part of a comprehensive bill that was intended as a legislative response to public demand for stronger laws related to drunk driving. In addition to the requirement that counties with a population of 25,000 or more purchase and maintain equipment to record intoxicated arrestees, the bill increased penalties for drunk driving, required mandatory jail time for all but first offenses, and made a tested blood-alcohol concentration of .10 or greater intoxication by definition. It provided that refusal to take a breath test would be admissible at trial, and allowed for suspension of the suspect's driver's license for a test showing over this limit. It provided for forfeiture of a defendant's vehicle for conviction of certain DWI offenses, and provided for an auto insurance surcharge to be imposed for a DWI conviction.

Some authorities[1] have opined that the law is no longer effective to require jails to have this recording equipment, as the law was never codified or made part of any specific statute, and related specifically and solely to recording persons arrested for "an offense under Art. 6701*l*-1," which law was subsequently repealed. Texas drunk driving law is now codified in TEX. PENAL CODE §49.04, which contains no reference to this recording requirement. Furthermore, a strong argument can be made that the reason for the law, which was to provide some visual evidence that could be presented to a jury in a DWI trial, has been superseded by the more modern technology of video recording equipment in peace officers' patrol cars, which provides more immediate and presumably more probative evidence of an arrestee's state of intoxication at the time of arrest than a jailhouse video, often taken hours after the actual arrest. All of Kerr County's patrol vehicles are equipped with these video recording devices.

The contrary position is that regardless of its lack of codification, it has not been repealed, and was clearly intended to apply to DWI arrests. Despite the fact that TEX. PENAL CODE §49.04 does not specifically reference this requirement, it should be interpreted to apply to drunk driving arrestees under the newer DWI law.

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[1] *See, e.g.* Texas District & County Attorney's Association publication, DWI Investigation and Prosecution, by Richard Alpert, 2007, p. 32

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CRIME VICTIMS' COMPENSATION

If it is still required that we provide and maintain this equipment in a place designed for recording drunk driving arrestees, the sheriff has asked if he could utilize this space for other purposes when it is not being used for such recording. The answer to this question is particularly important to the Kerr County Sheriff, as the room which has been dedicated to video recording equipment for drunk drivers is a space that is needed for other law enforcement purposes, in a law enforcement center that is already overcrowded. If it is no longer mandatory for this equipment to be maintained solely for video recording, as it has been, the room can be put to better use immediately.

The attached copies of legislative history address the issues raised and provide some background that may assist you in making your determination. If you have any additional questions, please do not hesitate to contact me.

Sincerely,

M. Rex Emerson
Kerr County Attorney

Enclosures

cc: Kerr County Sheriff

Acts 1983, 68th Leg., Regular Session, Ch. 303 §24:

SECTION 24. (a) Each county with a population of 25,000 or more according to the most recent federal census shall purchase and maintain electronic devices capable of visually recording a person arrested within the county for an offense under Article 67011-1, Revised Statutes, or Subdivision (2), Subsection (a), Section 19.05, Penal Code.

(b) The sheriff of the county shall determine upon approval by the county commissioners court the number of devices necessary to ensure that a peace officer arresting a defendant for an offense listed in Subsection (a) of this section may visually record the defendant's appearance within a reasonable time after the arrest.

(c) The fact that an arresting officer or other person acting on behalf of the state failed to visually record a person arrested for an offense listed in Subsection (a) of this section is admissible at the trial of the offense if the offense occurred in a county required to purchase and maintain electronic devices under this section.

C.S.S.B. 1 BY: SARPALIUS

HOUSE COMMITTEE ON
CRIMINAL JURISPURDENCE

BACKGROUND INFORMATION:

The problem of DWI in Texas has reached alarming proportions. Particularly troublesome is the repeat offender who, because of the current scheme of probation and deferred adjudication, is able to elude a felony DWI conviction while posing a grave danger to Texas motorists.

PURPOSE OF THIS BILL:

To save lives and decrease the number of casualties caused by drunken drivers. This bill requires mandatory jail time for 2nd and subsequent DWI offenders. Regardless of the number of DWI convictions a person has, if such person gets a DWI and a person is seriously injured as a result of such DWI, then the offender will be required to do a mandatory 30 days in jail as a condition of probation. Fourth DWI offenders, and persons who get a DWI while on probation for DWI will be subject to having their vehicle forfeited. Counties with a population of 25,000 or more are required to purchase video recording equipment to record DWI arrests.

SECTION BY SECTION ANALYSIS:

SECTION 1: Amends Article 6687b to forbid D.P.S. from issuing a license to a person convicted of D.W.I. or involuntary manslaughter until the period of suspension would have expired had the person had a license at the time of conviction.

SECTION 2: Amends Article 6687b providing the following scheme of license suspension:

1st DWI: 90-365 days.
2nd DWI: 180-365 days. 2nd DWI (juveniles) for 1 year or drinking age.
3rd DWI: 180-365 days.
Involuntary Manslaughter: 180 days to 2 years.

Suspension for refusal to take a test shall be credited towards license suspension. Provides for method of reporting completion of DWI course and manner of hearing on suspension where DWI course is not successfully completed.

SECTION 3: Amends Art. 67011-1, by changing the definition of alcohol concentration; amending the definition of intoxicated, and providing the following new schedule of punishments:

1st DWI: $100-$2000 fine; 3 days to 2 years jail.
2nd DWI: $300-$2000 fine; 15 days to 2 years jail.
3rd and Subsequent DWI: $500 to $2000 fine; 30 days to 2 years in the county jail, or, 60 days to 5 years in the penitentiary.

This section further provides that probation is to be considered a final conviction, but that if a person goes for 10 years or more without a DWI related conviction then any offense 10 years or older cannot be used for enhancement purposes.

SECTION 4: Amends Article 67011-5 to authorize the taking of certain tests to determine alcohol concentration, providing for oral and written warnings for refusal to submit to a test including a warning that such refusal can be used a trial, providing for a 90 day suspension for failure to submit to a test and allowing for a hearing on such issue; allowing for non-consensual alcohol testing of persons who are incapable of refusal, or who have been in a vehicle accident believed to have caused death and such persons refuse to submit to testing.

SECTION 5: Amends Art. 4.05, Code of Criminal Procedure, to confer district court jurisdiction on certain DWI cases.

SECTION 6; Amends Art. 4.17, Code of Criminal Procedure, to allow certain county courts to transfer misdemeanor DWI cases to district court.

SECTION 7: Amends Art. 38.33, Code of Criminal Procedure, to require on conviction of a DWI related offense a compilation of the defendant's fingerprint, driver's license number, and signature to be forwarded to the DPS.

SECTION 8: Amends Art. 42.12, sec. 3d, Code of Criminal Procedure to exclude DWI and DWI Involuntrary Manslaughter from deferred adjudication eligibility.

SECTION 9: Amends Art. 42.12, sec 4, Code of Criminal Procedure, to require an evaluation for alcohol or drug dependency to be conducted on DWI 1st offenders who take probation.

SECTION 10: Amends Section 6, Article 42.12, Code of Criminal Procedure, to allow community service probation for DWI and DWI Involuntary Manslaughter offenses.

SECTION 11: Amends Section 6b, Art. 42.12, Code of Criminal Procedure, providing for a scheme of rehabilitation and mandatory jail time to go as follows:

2nd Offense: 72 hours jail
3rd Offense: 10 days jail detention
Aggravated DWI (DWI causing serious bodily injury): 30 days jail

Rehabilitation to be provided according to the services available in the county, and the defendant's ability to pay. Payment for treatment and rehabilitation may be credited against the fine assessed.

SECTION 12: Amends Sec. 7, Art. 42.12, Code of Criminal Procedure, to disallow early probation release for defendants convicted of DWI and DWI Involuntary Manslaughter.

SECTION 13: Amends Subsection (a), Sec. 10A, Art. 42.12, Code of Criminal Procedure, to disallow deferred adjudication type community service restitution for DWI defendants.

SECTION 14: Amends Section 3a, Art. 42.13, Code of Criminal Procedure allowing for jury-assessed probation of a 1st offense DWI, and requiring that where the jury assessed punishment and the defendant's license is not suspended, the defendant shall be required to successfully complete the DWI educational course.

SECTION 15: Amends Subsection (a), Section 3B, Article 42.13, Code of Criminal Procedure to disallow defferred adjudication type community service probation for DWI defendants.

SECTION 16: Section 3d, Article 42.13, Code of Criminal Procedure, to disallow deferred adjudication for DWI Involuntary Manslaughter and DWI.

SECTION 17: Amends Section 4, Art. 42.13, Code of Criminal Procedure to require a 1st offense DWI defendant to submit to screening for alcohol or drug dependency as a term of probation.

SECTION 18: Amends Section 6, Article 42.13, Code of Criminal Procedure to allow community service probation for DWI and DWI Involuntary Manslaughter.

SECTION 19: Amends Sec. 6b, Art. 42.13, Code of Criminal Procedure providing for a scheme of mandatory rehabilitation and jail time according to the following schedule:

2nd Offense: 72 hours jail
3rd and Subsequent Offense: 10 days jail
Aggravated DWI: 30 days jail
DWI Involuntary Manslaughter: 60 days jail.

SECTION 20: Amends Sec. 6c, Article 42.13, Code of Criminal Procedure to require a 1st offense DWI defendant whose license supension is probated to complete the DWI educational course within 181 days from the date of probation except upon a showing of good cause.

SECTION 21: Amends Sec. 7, Art. 42.13, Code of Criminal Procedure, to disallow early probation release for DWI and DWI Involuntary Manslaughter defendants.

SECTION 22: Amends Art. 6701d by striking reference to Section 50 of Art. 6701d. Sec. 143A.

SECTION 23: Amends Chapter 1A, Title 116, by adding Articles 67011-6 and 67011-7 providing as follows:

Article 67011-6 creates a Class C Misdemeanor offense of loaning a vehicle to person whose license is suspended for a DWI related offense.

Article 67011-7 provides for discretionary forfeiture of a vehicle from a person who gets a DWI while on probation for DWI, or from a person who gets a 4th DWI-related offense. Further provides for procedures for a hearing on forfeiture as well as the manner of the forfeiture sale and distribution of funds.

SECTION 24: Requires counties with a population in excess of 25,000 to purchase video recording equipment to be used for recording DWI defendats at the time of arrest.

SECTION 25: Amends Chapter 54, Family Code, by adding section 54.042 which provides for license suspension of the repeat DWI juvenile offender for 1 year or until drinking age is attained, whichever is longer.

SECTION 26: Amends Chapter 5, Insurance Code, authorizing a 1 year premium surcharge to be assessed against 1st offense DWI offenders, and allowing for additional 2 year surcharge to be assessed against repeat offenders.

SECTION 27: Repeals Art. 67011-2, 67011-3, and Section 50 of the Uniform Act Regulating Traffic on Highways (6701d).

SECTION 28: Non-retroactive clauses.

SECTION 29: Effective date: January 1, 1984.

SECTION 30: Emergency clause

RULEMAKING AUTHORITY:

It is the opinion of the committee that this bill does not delegate any rulemaking authority to any state agency, office, or commission.

SUMMARY OF COMMITTEE ACTION:

Pursuant to public notice having been posted in accordance with the House Rules, the Committee on Criminal Jurisprudence held a publi,c hearing on April 19, 1983. At that time the following persons testified in behalf of DWI Legislation: Jim Mattox, Attorney General; John William Both, rep. Henry Wade, Dallas Co. D.A.; RUsty Hardin, Harris Co. D.A.; Col. Jim Adams, Director , D.P.S.; Phil Smith, self; Ross Newby, Tx. Commission on Alcoholism, Bill Helwig, Coke Co. Atty; Mary Ann Warzecha, self; Davie Williams, self; Clifford Brown, Tx. Criminal Defense Lawyers Assn.; Charles J. Maltese, self, Judge Dalby, Garza Co. Judge; Dr. Herbert Madalin, self; Adelaida Leal,R.I.D.; Goerge Gustafson, Tx. Safety Assn; Eileen Hensen, self; Sally Madalin, R.I.D.; Ann Werner, R.I.D.; Dave Coslett, GOvernors Task Force; Mike Westergren, Nueces Co. Atty.; Wanda Miller, self; Greg Hooser, Tx. Medical Assn.; Marinelle Timmons, M.A.D.D.; Patti Williams, D.E.T.E.R.; Gerald Carnes, Kings Kid; Irene Tello, D.E.T.E.R.; Testifying against the bill were: Danny McNair, self; Drew Durham, Sterling Co. Atty.
The bill was referred to a subcommittee of the whole with Rep. Wayne Peveto acting as Chairman. The subcommittee held several formal meetings and work sessions. On April 29, the committee held a formal meeting and adopted a substitute to the bill. The subcommittee voted to report the bill to the full committee with the recommendation that it do pass by a record vote reflecting 5 ayes, 0 nays. On May 9, the full committee held a formal meeting and adopted a substitute. The committee reported the bill to the House with the recommendation that it do pass by a record vote reflecting 5 ayes, 0 nays.

COMPARISON OF ORIGINAL BILL TO SUBSTITUTE:

Original bill required that first offenders of DWI would have their license automatically suspended without ability to take the DWI educational course in lieu of suspension. The substitute allows for 1st offenders only to take the DWI course as a condition of probation to keep their license from being suspended. Consequently, all reference to a hearing on failure to successfully complete the DWI course is added to C.S.S.B. 1.

The definition of "intoxicated" is enlarged in C.S.S.B. 1 to include a person who is under the influence of a combination of alcohol and drugs or controlled substances.

The minimum term of confinement for 2nd offense DWI is increased from 3 days to 15 days.

In the original bill there was no minimum term of confinement in the penitentiary for 3rd and subsequent offense DWI. The substitute bill changed this to amke the range of penitentiary confinement 60 days to 5 years.

The substitute bill added a 10 year no enhancement provision meant to encourage persons to keep a "clean" DWI record. This provision says that persons who have gone 10 years or more without a DWI-related conviction, and who subsequently get a DWI conviction will not have their prior DWI record used for enhancement purposes.

All reference to psychomotor testing which appeared in the original bill is deleted because no standard guidelines have been established for psychomotor testing, and the arresting officer can request the arrestee to go through a field sobriety test at present.

The original bill simply stated that a refusal to submit to testing is admissible at trial. The substitute states that a refusal "whether express or the result of an intentional failure to cooperate" is admissible. The substitute further provides that a form shall be provided for the defendant to sign stating that he was offered a test and refused. In addition, upon being asked to take a test a defendant shall be informed that his refusal to take a test shall be admissible at trial.

Several technical "cleanup" changes were made on the original. Such changes include the following:

1. Instead of stating that persons shall be asked to "take a test" regarding the intoxilyzer and blood test, this language was changed to reflect that a person shall be asked to "give a specimen," because the "test" is the analysis of the specimen.

2. Definitions of "Public Beach" and "Public Highway" are added to the substitute.

3. Reference to Art. 44.13, Code of Criminal Procedure, in the caption is struck as it appears nowhere in the body of the bill.

4. Section 6 of the original bill placed the alcohol evaluation procedure under Art. 42.01, Code of Criminal Procedure, (the section on judgments). This evaluation procedure was moved into articles 42.13 and 42.12, Code of Criminal Procedure (the sections dealing with probation and presentence evaluations.)

5. In the original bill reference to alcohol treatment left out mention of treatment for drug dependence. This was added to the substitute.

The original bill forbid waiver of the DWI educational requirement. The substitute allows for waiver upon a showing of good cause, but only so that the time period to take the DWI course can be extended.

The original bill provided the following scheme of probation including mandatory jail time:

2nd offense: 72 hours
3rd and Subsequent Offense: 30 days
Any offense for Aggravated DWI: 180 days

The substitute has the following scheme of jail time as a condition of probation:

2nd Offense: 72 hours
3rd Offense: 10 days
Aggravated DWI 60 days

The original bill required the defendant to submit to treatment and rehabilitation as prescribed based upon the defendant's ability to pay. The substitute provides that the defendant shall submit to treatment if the facilities are available. The defendant if able shall pay all or part of the cost of treatment but the court has discretion to credit such costs against the fine assessed.

The substitute bill provides for transfer jurisdiction of DWI cases from the county court where the judge is not an attorney, to the district court, and invests the district court with jurisdiction to accept such cases.

The original bill prohibited admitting into evidence the county's refusal to videotape a defendant. The substitute makes such fact admissible where a county is required to have a video recorder.

The original bill had and effective date of September 1, 1983. The substitute has an effective date of January 1, 1984.

The substitute bill provides for a new Class C misdemeanor offense of "Allowing a Dangerous Driver to Borrow Vehicle."

The substitute bill has a vheicle forfeiture provision for 4th offense DWI and persons who get a DWI while on probation for DWI.

The original bill allowed for license suspension of up to 1 year for failure to take the intoxilyzer or give a specimen. In the substitute this period of suspension is limited to 90 days.

The original bill provided for an insurance surcharge of 3 policy years for a person convicted of DWI with an additional 3 year increase for a subsequent DWI. The substitute bill provides for a 1 year surcharge for DWI to be increased 2 additional years for a subsequent DWI offense.

The original bill disallowed any form of community service probation. The substitute bill provides for a limited type of community service restitution probation in which the defendant's record is not allowed to be dismissed.

The substitue bill excluded application of Sec. 7 of Articles 42.13 and 42.12, Code of Criminal Procedure, to DWI and DWI Involuntary Manslaughter. Under this section if the defendant satisfactorily completed the terms of his probation his record would be dismissed and could not be used for enhancement purposes.

The fine range for juveniles set up in the original bill is deleted from the substitute bill.

The two separate schemes for suspending a person's license for failure to successfully complete the DWI educational course and for failure to submit to a test are unified so that they involve the same procedure.

LEGISLATIVE BUDGET BOARD

Austin, Texas

FISCAL NOTE

May 13, 1983

Honorable Wayne Peveto, Chair
Committee on Criminal Jurisprudence
House of Representatives
Austin, Texas

In Re: Senate Bill No. 1,
as engrossed
By: Sarpalius

Sir:

In response to your request for a Fiscal Note on Senate Bill No. 1, as engrossed (relating to the offenses of driving while intoxicated, driving under the influence of a controlled substance or drug, and involuntary manslaughter involving the use of a motor vehicel; providing for visual recording of a person arrested, for tests and trial procedures for dealing with an offender, and for the criminal and civil consequences of a conviction of those offenses; changing penalties) this office has determined the following:

The bill would make no appropriation but could provide the legal basis for an appropriation of funds to implement the provisions of the bill.

The bill would change the procedure, sentencing structure and punishment alternatives applicable to the criminal offenses of driving while intoxicated (DWI), driving under the influence of drugs (DUID), and involuntary manslaughter involving the use of a motor vehicle. The bill would require automatic license suspension for failure to submit to tests for blood alcohol content, creates an offense per se for driving while having a blood alcohol concentration of .10 percent or more, increases the fines and minimum sentences, prohibits a court from setting aside a verdict after successful completion of a term of probation and prevents a court from granting deferred adjudication to an offender. The bill provides additional penalties if the offense results in serious bodily injury, and requires a mandatory jail term and evaluation and prescription by a rehabilitation facility as a condition of probation for subsequent offenses.

The provisions of the bill might reasonably be expected to: (1) increase the number of defendants who would choose a jury trial and the consequences thereof, rather than plead guilty and accept a deferred adjudication or probation as provided under current law; (2) result in more persons being prosecuted for subsequent offense DWI or DUID;(3) result in an increase in the number of court proceedings; (4) increase the actual time a defendant spends in jail; (5) result in an increase in the daily population of local jails; and (6) increase the number of cases in which a full trial is requested on the issues.

The bill provides that each county with a population of 25,000 or more shall buy and use electronic visual recording devices to record persons who have been arrested for DWI or DUID. The sheriff of the county determines the number of devices that would be needed. There are approximately 80 counties in Texas with a population of 25,000 or more, and it is estimated that 150 sets of equipment would be purchased, taking into consideration the fact that some entities currently have this equipment. The average cost per set is $3,500, for a total estimated cost of $525,000.

No data are available on which to base an estimate of the potential revenue gain to counties as a result of the provisions of the bill relating to the increases in the minimum fines. No data are available on which to base an estimate of the cost to units of local government related to the potential increases in jail population, number of court proceedings, and workload on law enforcement agencies and prosecutors.

The potential increase in the number of subsequent offense convictions could result in more persons sentenced to the state penitentiary, and an increase in related costs to the Texas Department of Corrections.

There would be an additional cost to the Texas Commission on Alcoholism related to the development and implementation of a program for the evaluation and treatment of subsequent offenders as provided in the bill.

There would be administrative costs to the Department of Public Safety related to the processing of drivers' license suspensions and other reporting requirements provided in the bill. There would be a revenue gain related to filing fees for reinstatement of licenses after periods of suspension. The probable costs and revenue gains during each of the first five years followign passage is estimated as follows:

Fiscal Year	Cost Out of the General Revenue Fund	Revenue Gain to the Operators and Chauffeurs License Fund No. 99	Net Cost	Change in Number of State Employees from FY 1983
1984	$2,044,044	$1,160,950	$883,094	+ 91
1985	2,046,492	1,160,950	885,542	+ 91
1986	2,046,492	1,160,950	885,542	+ 91
1987	2,046,492	1,160,950	885,542	+ 91
1988	2,046,492	1,160,950	885,542	+ 91

Similar annual costs would continue as long as the provisions of the bill are in effect.

Jim Oliver
Director

Source: Texas Department of Public Safety; Texas Department of Corrections; Office of Court Administration; State Board of Insurance; Texas Commission on Alcoholism; Adult Probation Commission; LBB Staff: JO, HS, LG, PA

TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION

DWI INVESTIGATION & PROSECUTION

RICHARD ALPERT

duction to be friendly and treat the officer with respect, yet the officer's demeanor makes clear that he's upset with defendant. Many officers have been hit, for instance, with a stream of racial slurs all the way driving to the stationhouse, only to have the defendant turn into a polite and professional Eddie Haskell once they reach the stationhouse. Officers need to document any past words or exchanges that explain this. If not documented, officer needs to tell you about this.

Other defendants will respond that they do not understand the warnings, or they will simply refuse to respond at all. Rather than allow the defendant to control the pace of the proceedings by stalling, officers should take control of the events by responding, "I'm going to ask you one more time to give a sample, and any response other than affirmative I'm going to take as a refusal."

The prosecutor must be in a position to explain this game to the jury. Every minute a defendant delays the decision whether to give the sample is another minute that he's sobering up with alcohol dissipating from his system. Prosecutors must help the jury see this tactic as a game, in which the defendant cloaks his delay tactics in faux reasonableness, claiming rights that he does not have.

Use a defendant's refusal to cooperate with tests on videotape to rebut the defense argument that the only evidence the state has of intoxication is the officer's subjective observation. Argue that the videotape was the defendant's single opportunity to be in front of an objective observer—the video camera—and the defendant refused to do it. The video tape is the law's way to give the defendant the chance to rebut the officer's impression that the defendant is intoxicated. Same with breath tests: The breath test is the defendant's chance to take an objective instrument and prove the officer wrong. The fact that the defendant refused to perform FSTs on video (or submit a breath sample) rebuts the idea that he was not intoxicated.

Some defendants feign ignorance as to why they've been arrested. If you take them at their word, you can't get much better evidence of intoxication than someone who doesn't understand what they've been arrested for after being told multiple times by the officer what's going on. Prosecutors should discuss this issue with officer pretrial. In this situation, while the officer is testifying about what is going on in the videotape, stop the tape, let officer explain how many times he told the defendant what he was being arrested for and what made him pull defendant over in the first place.

Time Delays

The most significant problem with stationhouse videos is any time delay between stop and taping, particularly in counties where officers have no in-car video. Besides having to explain the delay to the jury, officers and prosecutors also need to realize that the more time that passes between arrest and stationhouse taping, the more time the defendant's body has to process the alcohol. Count on the defense to attack your rendition of how impaired the defendant appears at the scene compared to his behavior on the stationhouse video.

If the defendant is stopped at midnight, arrested at 12:20 a.m., but doesn't make it to the stationhouse on video until 2:30 a.m., chances are your jury will want to know the reason for the delay. If the officer has in-car video, that might explain what happened between arrest and the stationhouse video. If not, look to the officer's log for an explanation for the delay. Was the officer waiting on the tow truck? Or was there a long line for the intoxilyzer machine? Discussing the long line at the machine is another subtle way of reminding the jury what a significant problem DWI is.

Reviewing Videos

If a prosecutor works in a county where officers routinely record stationhouse interviews, the prosecutor needs to visit the taping room to be able to keep the events on the videotapes in context. Reviewing will help put any defense attacks of the video in

context for the jury. Physically examine the room where the videotapes are made. Camera angles can affect the ability of officers to observe, for instance, the defendant weaving while standing. An overhead camera won't be able to catch this as well as one situated lower. Prosecutors need to be aware of this and must be able to explain this phenomenon and prepare the officer.

If more than one officer administered FSTs to the defendant the night of the stop (for instance, one on the roadside and another one at the stationhouse), prosecutors should ask whether the officers explained and administered the tests in the same way. Prepare your officers to explain any discrepancies in the administration of the test, because defense lawyers will surely question them.

Larger Counties

The statute dealing with videotaping DWI suspects by officers in larger counties is not found in Penal Code chapter 49 or anywhere in the Transportation Code. Two important features of this law are: (1) It doesn't require videotaping. It only requires larger counties to purchase and maintain video equipment; and (2) It was never codified as a statute, either as part of the former DWI laws in Article 6701*l* of the Texas Civil Statutes or the newer DWI provisions in Chapter 49 of the Penal Code.

In 1983, the Legislature passed a bill that had the videotaping language in it, but the bill didn't tie the video provisions to any other law, such as Article 6701*l*. So the provision is effective, but it has only had a session law-type cite, and not a statutory cite. The videotape provision has never been codified or brought into the Penal Code. You can cite it as Acts 1983, ch. 303, §24. That section states:

> (a) Each county with a population of 25,000 or more according to the most recent federal census shall purchase and maintain electronic devices capable of visually recording a person arrested within the county for an offense under Article 6701*l*-1, Revised Statutes, or Subdivision (2), Subsection (a), Section 19.05, Penal Code.
>
> (b) The sheriff of the county shall determine upon approval by the county commissioners court the number of devices necessary to ensure that a peace officer arresting a defendant for an offense listed in Subsection (a) of this section may visually record the defendant's appearance within a reasonable time after the arrest.
>
> (c) The fact that an arresting officer or other person acting on behalf of the state failed to visually record a person arrested for an offense listed in Subsection (a) of this section is admissible at the trial of the offense if the offense occurred in a county required to purchase and maintain electronic devices under this section."

OPERATOR QUALIFICATIONS

No special training on the use of video equipment is necessary if the operator has basic knowledge of operating procedures or instructions.[49] Later in trial, the prosecutor will have to lay a predicate for admission of the video, and T.R.EVID. 901 addresses the proper predicate.[50] The fact that the machine was operating properly can be inferred from evidence and testimony by the operator or by someone else.[51]

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49 *Clark v. State*, 728 S.W.2d 484 (Tex. App. — Fort Worth), *vacated and remanded on other grounds*, 753 S.W.2d 371 (Tex. Crim. App. 1987), *on remand*, 781 S.W.2d 954 (Tex. App. — Fort Worth 1989, no pet.); *Holland v. State*, 622 S.W.2d 904 (Tex. App. — Fort Worth 1981, no pet.).

50 *Leos v. State*, 883 S.W.2d 209 (Tex. Crim. App. 1994).

51 *Roy v. State*, 608 S.W.2d 645 (Tex. Crim. App. [panel op.] 1980); *Sims v. State*, 735 S.W.2d 913 (Tex. App. — Dallas 1987, pet. ref'd).

HOUSE
STUDY
GROUP bill analysis 5/17/83

SB 1
Sarpalius et al.(T. Smith)
(CSSB 1 by T. Smith)

SUBJECT: Driving while intoxicated

COMMITTEE: Criminal Jurisprudence: committee substitute recommended

VOTE: 5 ayes--Peveto, T. Smith, Waldrop, Burnett, Granoff

0 nays

4 absent--Danburg, Hernandez, S. Hudson, Hury

SENATE VOTE: (On motion to suspend) 28 ayes, 1 nay (Washington)

WITNESSES: (on SB 1 and other DWI-related bills)

For--Speaker Gib Lewis; John William Booth, assistant district attorney, Dallas County; Rusty Hardin, assistant district attorney, Harris County; James B. Adams, director, Texas Department of Public Safety; Mike Westergren, Nueces County attorney; Dave Coslett, Governor's Task Force on Traffic Safety; Giles Darby, Garza County judge; Greg Hooser, Texas Medical Association; Marinelle Timmons, Charles Maltese, Mothers Against Drunk Driving; George Gustafson, Texas Safety Association; several representatives of Remove Intoxicated Drivers

Against--Drew Durham, Sterling County attorney; Danny McNair, Austin student

On--Attorney General Jim Mattox; Ross Newby, director, Texas Commission on Alcoholism; Bill Helwig, Coke County attorney; David Williams, Richardson attorney; Clifford Brown, Texas Criminal Defense Lawyers Association

DIGEST: CSSB 1 would change the penalties for driving while intoxicated and the evidence standards for chemical tests for intoxication. It would require that DWI convictions remain on the offender's record.

For first-offense DWI, the penalty would be a fine of $100 to $2,000 and 72 hours to two years in jail (the current fine is $50 to $500). The driver's-license suspension would last from 90 days to one year (currently 12 months for first offense, 18 months for subsequent suspensions). An evaluation for referral to an alcohol or drug rehabilitation program would be required. If the offender completed an alcohol-education program by the 181st day of first-offense probation, the license would not be suspended.

DIGEST: (continued)

For second-offense DWI, the fine would be $300 to $2,000, the jail term 15 days to two years (currently the fine is $100 to $5,000, the jail term ten days to two years--or prison for up to five years). The license suspension would last from 180 days to two years. If probation were granted, it would have to include minimum jail time of 72 hours.

For subsequent offenses, the fine would be $500 to $2,000, the jail term 30 days to two years (or prison for 60 days to five years). Probation would have to include minimum jail time of ten days. License suspension would be the same as for a second offense.

For serious bodily injury in connection with a DWI offense, the minimum and maximum fines would be increased by $500 and minimum confinement would be increased by 60 days. Probation would have to include minimum jail time of 30 days.

Involuntary manslaughter involving DWI would remain a third-degree felony (fine up to $5,000, prison for two to ten years), but if probation were granted, it would have to include at least 60 days in a penal institution. License suspension would last from 180 days to two years.

No deferred adjudication could be granted for a DWI offense.

Probation granted after Jan. 1, 1984, would be considered a final conviction and could not be removed from the record. If no DWI conviction had occurred in the ten years before the current offense, an older conviction could not be used to bring second-offense DWI charges.

A blood-alcohol concentration of 0.10 percent or greater would no longer establish a presumption of intoxication but would by definition constitute intoxication. Intoxication by drugs would also be covered. If a person arrested for DWI refused to provide a breath or blood specimen for alcohol testing, that refusal could be admitted as evidence. Refusal would result in a driver's-license suspension for 90 days, following a hearing, regardless of whether a DWI prosecution ever ensued. (Under current law, refusal cannot be admitted into evidence and no license suspension for refusal occurs if the DWI charge is dismissed or the defendant is acquitted.)

DIGEST: (continued)

The driver's license of a juvenile convicted of a DWI offense would be suspended for one year or until he or she reached the age for legal purchase of alcoholic beverages (currently 19), whichever period was longer.

To obtain probation for subsequent DWI offenses, defendants would have to submit to possible alcohol- or drug-dependence rehabilitation. The judge could require defendants to pay for all or part of the rehabilitation or could credit the cost against their fine. Community-service probation and restitution would be allowed for DWI probation.

A new class-C misdemeanor offense (maximum fine of $200) would be created for lending a motor vehicle to a person known to have a suspended license due to a DWI conviction or due to refusal to provide a specimen.

If a person were arrested for a DWI offense while on probation for a DWI-reltaed offense or had previously been convicted three or more times for such an offense, the offender's motor vehicle would be subject to forfeiture upon conviction. A restraining order could be granted to prevent a preemptive sale of the vehicle. The vehicle would be forfeited to the county and sold at auction, with lienholders and secured parties receiving the proceeds and the balance going to the county treasury.

Counties with a population of more than 25,000 would maintain devices to videotape persons arrested for DWI. In those counties, failure to videotape a person upon arrest would be admissible at trial.

A surcharge on private passenger-auto insurance premiums would be set by the State Board of Insurance and imposed for one year following a DWI conviction. If another conviction occurred within the year, the surcharge would continue for another two years.

The effective date of the act would be Jan. 1, 1984.

SUPPORTERS SAY:

SB 1 is a reasonable response to the growing public demand to halt the carnage on the highways caused by drunk driving. The national statistics are staggering--one-half of the 50,000 annual traffic deaths are alcohol-related, and every year 125,000 persons are permanently disabled. The economic loss from medical expenses, lost work hours, property damage and related factors is anywhere from $17 billion to $24 billion each year. While Texas penalties against drunk driving are superficially tough,

SUPPORTERS SAY: (continued)

they are riddled with loopholes; CSSB 1 would close some of the worst.

The biggest problem has been that there is little real deterrence. Repeat offenders often escape the tougher penalties for second offenses because their record is wiped clean after deferred adjudication or probation. CSSB 1 would require that each offense be counted, and penalties for repeat violations would be severe enough to force potential drunk drivers to think twice. Mandatory jail time for repeat offenses and forfeiture of the offender's automobile for the most extreme cases may not eliminate DWI, but it could save hundreds of lives. Similar measures in other states have had a sustained impact on reducing drunk-driving offenses.

Prosecutors should not have to fight DWI cases with their hands tied. Everyone who drives implicitly agrees that, if law-enforcement officers have legitimate reason to suspect that they are intoxicated, they must submit to alcohol testing or lose their driving privileges. The U.S. Supreme Court has wisely determined that refusal to take the test can be admitted as evidence in a DWI trial. Texas juries should be allowed to draw the clear inference from that refusal.

While we can recognize that many drunk drivers have a compulsion that explains their behavior, that is no reason to allow them to remain on the road as a mortal danger to the rest of us. CSSB 1 specifically provides for alcohol and drug rehabilitation as a probation condition, with evaluation and education on the first offense. But these programs would be at the offender's expense, to the extent possible.

CSSB 1 is only the start of a new public determination to deal with drunk driving. Certainly an extensive, sustained enforcement effort will be needed. Driver's license requirements must be tightened. And perhaps other measures, such as raising the drinking age or banning open containers in motor vehicles, should be considered as part of a comprehensive effort. CSSB 1 would be a big first step in redirecting state priorities and reinforcing the shift in public attitudes against drunk driving.

OPPONENTS SAY:

The effort to get tough on DWI offenders by drastically increasing penalties will quite likely be counterproductive. Eliminating deferred adjudication and turning probation into a final conviction that would remain on the record would leave few offenders with any incentive to plead guilty. And even if a small percentage of those charged insist on a trial, the county-court system would quickly bog down. With penalties so high for repeat offenses, police would be reluctant to arrest, prosecutors would be reluctant to file charges, and juries would be reluctant to convict because so little punishment discretion would be permitted. The mandatory jail and prison sentences could push already overcrowded facilities way beyond their limit.

While it is relatively easy for the Legislature to increase penalties as part of a well-publicized crackdown, in other jurisdictions any initial drop-off in DWI cases has been short-lived. Drunk driving increases to its former level as offenders realize that the chances of being caught and convicted, whatever the penalty, are no greater than before. The only way to make any real dent in the problem is a sustained enforcement effort. Such measures require not new laws but more money for law enforcement, as well as for alcohol-rehabilitation programs to get to the root of the problem.

The bill would send inconsistent signals to potential drunk drivers. It would actually decrease the license-suspension period and do nothing to eliminate the demonstrated abuses in granting exceptions for occupational licenses. Yet the bill also goes too far in the other direction, with a draconian car-forfeiture provision. A first offender on probation who slips just once would see his or her automobile sold by the county--a penalty potentially far greater than even the maximum $2,000 second-offense fine.

NOTES:

For an extensive discussion of current law and background on the DWI issue, see HSG Special Legislative Report No. 84, DWI and Texas Law, Sept. 22, 1982.

The House substitute made many changes in the Senate version of SB 1, all of which have been endorsed by Sen. Sarpalius. The substitute reduced some of the penalties and mandatory jail-time periods for repeat offenses and reduced the proposed

NOTES: (continued) license suspension for refusal to provide a specimen from the current maximum of one year to 90 days. The substitute added the provisions for forfeiture of the vehicle and the offense for lending a vehicle to a DWI offender.

Several House and Senate bills to ban open containers of alcoholic beverages in motor vehicles and raise the drinking age to 21 have been introduced. SB 2, by Sarpalius, to ban open containers, has emerged from committee. SB 24, by Sarpalius, which would restrict occupational licenses, has passed the Senate and is pending in the House Transportation Committee.