

SUBJECT: Disposing of obscene devices and material in a criminal case

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 9 ayes — Keel, Riddle, Ellis, Denny, Dunnam, Hodge, P. Moreno, Pena, Talton
0 nays

WITNESSES: For — Chuck Noll, Harris County District Attorney’s Office
Against — None

BACKGROUND: Code of Criminal Procedure, art. 18.18 governs the disposition of contraband, including gambling paraphernalia, prohibited weapons, criminal instruments, and obscene devices and materials, that have been seized under a search warrant. Obscene device or material, for purposes of the disposition of contraband, means a device or material introduced into evidence and found obscene in a final judgment after all appellate remedies have been exhausted. Criminal instrument, gambling device, and prohibited weapon have the meanings given in the Penal Code.

Following final conviction for a crime involving the above contraband, the court entering the judgment must order that the contraband be destroyed or forfeited to the state. If no prosecution or conviction follows seizure of the contraband, the magistrate must order in writing the person found in possession of the alleged contraband to show cause why the property seized should not be destroyed. The magistrate must include in the notice a detailed description of the property seized, the address where the property was seized, and the date and time of the seizure, and must send it by registered or certified mail to the person found in possession at the address where the property was seized. If no one was found in possession or if the possessor’s address is unknown, the magistrate must post notice on the courthouse door.

Any person interested in the alleged contraband must appear before the magistrate on the 20th day following the date the notice was mailed or posted. Failure to appear timely forfeits any interest the person may have in the

property, and no person after failing to appear may contest the destruction of the contraband.

If a person timely appears to show cause why the property should not be destroyed, the magistrate must hold a hearing on the issue and determine the nature of the property and the person's interest in it. Unless the person proves by a preponderance of the evidence that the property is not gambling equipment, a prohibited weapon, a criminal instrument, or dog-fighting equipment, and that he or she is entitled to possession, the magistrate must dispose of the property. Obscene devices and materials are not included in this list of contraband that must be destroyed.

Penal Code, sec. 43.21 defines obscene device as a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs. It defines obscene as material or a performance that:

- the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;
- depicts or describes patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality, or patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, or lewd exhibition of the genitals in certain ways; and
- taken as a whole, lacks serious literary, artistic, political, and scientific value.

“Material” means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but excludes a three-dimensional obscene device.

DIGEST:

HB 559 would include obscene devices or material in the list of contraband of which a magistrate must dispose if a person timely appears to show cause why the property should not be destroyed but fails to prove by a preponderance of the evidence that the property is not contraband and that he or she is entitled to possession.

The bill would define obscene device and obscene as defined in Penal Code, sec. 43.21, but would not define obscene material.

The bill would take effect September 1, 2003.

**SUPPORTERS
SAY:**

HB 559 would bring uniformity to the law by including obscene devices or material in the list of items that a local magistrate must dispose of after notice to the owner and a hearing on the issue. Code of Criminal Procedure, art. 18 already requires the court that enters a judgment of conviction in a case involving obscene devices or materials to order this type of contraband to be destroyed. It was a legislative oversight to omit obscene devices or materials from the list of items that must be destroyed, in the absence of prosecution or conviction following seizure, when the alleged owner fails to prove by a preponderance of the evidence that the property is not contraband and that he or she is entitled to possession.

The bill would define obscene device and obscene to make the terms consistent with the Penal Code. The current definition limits obscene devices or material to items introduced into evidence and found obscene in a final judgment. Therefore, in a case where charges were not pursued, prosecutors and magistrates would have no means of disposing of alleged obscene devices and materials, which could take up a great deal of storage space. HB 559 would require the destruction of obscene devices and materials after due process, as with any other type of contraband. Other contraband within Code of Criminal Procedure, art. 18, such as criminal instruments, gambling devices, and prohibited weapons, are defined according to their meanings in the Penal Code. There is no reason to carve out obscene devices and materials for special treatment, and HB 559 would bring consistency to the law.

HB 559 would contain adequate safeguards to protect the due-process rights of alleged owners of obscene devices or materials. The magistrate would have to notify the owner and hold a hearing before destroying contraband in a case in which the seizure of evidence did not result in a final conviction.

**OPPONENTS
SAY:**

Obscene materials should not be disposed of unless a defendant actually is convicted of a crime involving possession of those materials. Prosecutors have a high burden of proof with regard to obscenity to protect the public's constitutional right to freedom of expression. Because a fine line may separate

art from obscenity, prosecutors must prove that taken as a whole, the material lacks serious literary, artistic, political, and scientific value. If charges were not pursued, there is a good chance that the materials were not obscene, and the owner should be entitled to have them returned. HB 559 unfairly would shift the burden to the owner to prove by a preponderance of the evidence that the property was not obscene before he or she could recover the property.

**OTHER
OPPONENTS
SAY:**

While the bill's intent is good, HB 559 would have the unintended consequence of omitting obscene materials from the list of contraband that must be destroyed following a hearing, which would mean that items such as obscene videotapes could not be destroyed, while obscene devices like dildos could be destroyed. "Material" also is defined in Penal Code, sec. 43.21, but HB 559 only would define obscene device and obscene and would exclude the definition of material.