SUBJECT: Burden of proof in probation revocation hearings concerning indigence

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 6 ayes — Peña, Vaught, Riddle, Escobar, Mallory Caraway, Pierson

0 nays

3 absent — Hodge, Moreno, Talton

WITNESSES: For — Will Harrell, ACLU of Texas, NAACP, LULAC; Celeste Villareal, Texas Criminal Defense Lawyers Association; Ana Yanez-Correa, Texas Criminal Justice Coalition; (*Registered, but did not testify:* Andrea Marsh, Texas Fair Defense Project)

Against — Terry Breen, 24th Judicial District Attorney's Office; Kari Price; (*Registered, but did not testify:* Richard Glaser, County and District Attorney of Fannin County)

BACKGROUND: Under Code of Criminal Procedure, art. 42.12, sec. 21(c) during a probation revocation hearing in which the only allegation is that the defendant violated a condition of probation by failing to pay for state-appointed counsel, community service fees, court costs, restitution, or reparations, the inability of the defendant to pay as ordered by the judge is an affirmative defense to revocation, which the defendant must prove by a preponderance of the evidence.

DIGEST: CSHB 312 would amend Code of Criminal Procedure, art. 42.12, sec. 21(c) by shifting the burden of proof from the defendant to the state during a probation revocation hearing for failing to pay for state-appointed counsel, community service fees, court costs. The bill would require the state to prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge. It also would remove inability to pay as a reason for non-payment of court-ordered restitution or reparations during probation revocation hearings.

The bill would take effect September 1, 2007, and apply only to probation hearings held on or after that date.

SUPPORTERS SAY:

CSHB 312 would address technical probation violations, which needlessly send poor people to prison, by shifting the burden of proof to the state to show that a defendant who did not pay probation fines should be deprived of liberty. Some 69 percent of probation revocations result from the failure to pay probation fines. Nearly half of revoked probationers return to state prison and serve an average of 51 months, which results in a cost of $68,255 to the state for each revoked probationer. In light of the fact that that the average amount owed by those probations is $3,700, revoking probation for non-payment of fines, fees, and court costs is a wasteful spending and policy decision. Texas' jails and prisons are full and any available space should be reserved for the most violent offenders, not for probationers who have committed technical violations.

The state should revoke probation for substantive violations of parole, not technical ones. Too often, the state uses a technical violation to justify revoking probation because revoking probation on other grounds would be more difficult to prove. If there is a compelling reason to remove the probationer from society, the state should seek revocation on that basis rather than continuing to use non-payment as a catch-all revocation method.

CSHB 312 appropriately would continue to allow the state to revoke probation for non-payment of reparations and restitution. Code of Criminal Procedure, art. 42.037 already requires the court to consider a defendant's finances in the decision to revoke probation based on non-payment of reparations and restitution. These are debts that defendants owe to victims, and their rights to receive these payments should not be impinged.

The state already is empowered through discovery and subpoena laws to gather any information it might need to prove a case against a defendant. While CSHB 312 might lead to increased costs to state and local governments as they investigate a defendant's finances, the state already is set up to do this and must go through many of the same investigations and determinations under current law when it is contesting a defendant's claims of indigence.

OPPONENTS SAY:

It should not be the state's burden to prove indigency by a probation violator. A person on probation is allowed to live in society only so long as that person complies with court-ordered conditions. As such, current law makes sense when it directs a probationer to show indigence as an

affirmative defense. The real issue is the non-payment of the defendant's debt to society.

It is harder for the state to disprove indigence than for the defendant to establish it. Because defendants have access to their own financial records, they are best able to prove that they do not have funds available to pay. Furthermore, current law allows people to testify and explain their finances, but the state cannot compel defendants to answer financial questions on the stand due to Fifth Amendment protections against self-incrimination.

A major reason for holding a probation revocation hearing is because the probationer is guilty of another violation that is more difficult for the state to prove. This is akin to a district attorney's prosecutorial discretion in deciding what crimes to charge a defendant with. Probation revocation for non-payment of fines, fees, and court costs gives the state a valuable tool in keeping the streets safe and ensuring compliance with all terms of probation.

OTHER OPPONENTS SAY:

CSHB 312 should apply the same protections it would grant probationers to parolees as well. Parolees often are unable to pay fines, fees, and court costs because of indigence. The state should face the same burden of proving a defendant's ability to pay before revoking parole on a technical violation.

While it is appropriate to shift the burden of proof, the bill also should guarantee the state access to the probationer's financial records. This could be accomplished by empowering probation departments to gather this information, either as an initial condition of probation or through a court order if indigence becomes an issue.