

SUBJECT: Establishing criminal asset forfeiture

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 6 ayes — Moody, Bhojani, Bowers, Harrison, C. Morales, Schatzline
3 nays — Cook, Darby, Leach

WITNESSES: For — Arif Panju, Institute for Justice; Derek Cohen, Texas Public Policy Foundation (*Registered, but did not testify*: Kevin Hale, Libertarian Party of Texas; Linda Guy; Thomas Parkinson; Maria Person)

Against — Angela Beavers, Harris County District Attorneys Office; James Smith, San Antonio Police Department (*Registered, but did not testify*: Philip Mack Furlow, 106th Judicial District Attorney; Shane Deel, Callahan County Attorney; Eric Carcerano, Chambers County District Attorney’s Office; Guadalupe Cuellar, City of El Paso; Chris Jones, Combined Law Enforcement Associations of Texas; M Paige Williams, Dallas County Criminal District Attorney John Creuzot; James Parnell, Dallas Police Association; David Batton, Harris County Deputies’ Organization FOP 39; Jessica Anderson, Houston Police Department; Ray Hunt, Houston Police Officers’ Union; Carlos Ortiz, San Antonio Police Officers’ Association; Ray Scifres, Sheriffs' Association of Texas; Thomas Wilson, Smith County Criminal District Attorney’s Office; Lindy Borchardt, Tarrant County Criminal District Attorney, Phil Sorrells; Leighton Guarnere, Texas Municipal Police Association; AJ Louderback, Texas Sheriffs’ Regional Alliance; Henry Bohnert; Richard Bohnert)

BACKGROUND: Concerns have been raised that the current civil asset forfeiture process may lead to unfair outcomes for some individuals, as individuals subject to asset seizure and forfeiture are not typically afforded protections such as representation or a right to a trial.

DIGEST: HB 3758 would repeal Code of Criminal Procedure Ch. 59 relating to forfeiture of contraband and create a new chapter for the establishment of criminal asset forfeiture in Texas. The purpose of the chapter would be to

deter criminal activity by reducing the economic incentives, increase the pecuniary loss that resulted from engaging in criminal activity, and protect against the wrongful forfeiture of property.

HB 3758 would establish an offense subject to forfeiture as:

- a first or second-degree felony under the Penal Code;
- a third-degree or state-jail felony intoxication and alcoholic beverage offense, if the defendant had been previously convicted three times of such an offense;
- health care fraud or perjury or falsification involving a health care program;
- a felony offense of trafficking, money laundering, insurance fraud, or public indecency; or
- other certain offenses, including any other offense that resulted in a personal injury to a victim and that was provided under the Penal Code or a federal criminal law.

The bill would authorize a convicting court to order a person convicted of such an offense to forfeit:

- any property derived from the commission of the offense;
- property directly traceable to property derived from the commission of the offense; or
- instrumentality, meaning property that was otherwise lawful to possess that was used in the commission of an offense.

Under the bill, a person would be considered convicted if a sentence was imposed or if the person received community supervision, including deferred adjudication community supervision.

Property could be forfeited only if a person was convicted of an offense subject to forfeiture and the state established by clear and convincing evidence that the bill's requirements for forfeiture were met. HB 3758 would exempt homestead property, a motor vehicle valued at less than \$10,000, and U.S. currency totaling \$200 or less from being eligible for

forfeiture. The bill would not prevent the forfeiture of property by plea agreement approved by the convicting court.

HB 3758 would authorize a court, on the state's motion, to order the forfeiture of substitute property owned by the defendant if the state proved by a preponderance of the evidence that the defendant intentionally transferred, sold, or deposited property with a third party to avoid the court's jurisdiction. The value of the substituted property could not exceed the value of the property transferred, sold, or deposited.

The bill would establish that a defendant convicted of an applicable offense would not be jointly and severally liable for a forfeiture award owed by another defendant. If ownership was unknown, the convicting court could order each defendant to forfeit property on a pro rata basis or by other equitable means.

Contraband. HB 3758 would prohibit a person from having a property interest in contraband, which would be defined as tangible or intangible goods that were illegal to import, export, or possess, including a scheduled drug without a valid prescription. Contraband would be subject to seizure and would be required to be disposed of in accordance with state law, but contraband would not be subject to forfeiture under the provisions established by the bill.

Seizure of property. HB 3758 would authorize a court to issue, at the request of the state, an appropriate order to seize or secure personal property for which forfeiture was sought. The bill would establish that personal property subject to forfeiture could be seized at any time without a court order if:

- the seizure was incident to a lawful arrest or search;
- the personal property had been the subject of a previous judgment in favor of the state; or
- the law enforcement agency seizing the property had probable cause to believe that the seizure was immediately necessary to prevent the removal or destruction of the personal property; and

- the personal property would be forfeitable under the bill.

Real property could be seized only under a court order, which could be issued only after the property owners were provided notice and an opportunity for a contested hearing to determine the sufficiency of the probable cause for the seizure.

A law enforcement officer who seized property would be required to give an itemized receipt to the person possessing the property, or in the absence of any person, leave a receipt in the place where the property was found.

At the time of a seizure or the issuance of a notice or restraining order, the state would acquire provisional title to the seized property and could hold and protect the property under certain conditions.

Forfeiture proceedings. HB 3758 would establish provisions relating to hearings, forfeiture proceedings, and appeals.

Pretrial hearing regarding replevin. Following a seizure of property, a person claiming ownership or interest in the seized property would have the right to a pretrial hearing to determine the validity of the seizure. The claimant could, within a specified time before the start of the trial of the related criminal offense, claim the right to possession of property by a certain motion to the court. The bill would establish the procedures for filing and hearing the motion and the conditions under which the court would be required to grant the claimant's motion. Upon finding that the seized property was the only reasonable means for a defendant to pay for legal representation, the court could order the return of funds or property sufficient for the defendant to obtain legal counsel but less than the total amount seized, and could require an accounting for the use of the returned funds or property.

Forfeiture proceeding. HB 3758 would require a proceeding for the forfeiture of property to be held following the trial of the related alleged offense. If the value of the property was less than \$10,000, the proceeding would have to be held before a judge only.

Proportionality hearing. The bill would allow a defendant to petition the court to determine whether the forfeiture was unconstitutionally excessive under the U.S. or Texas Constitution. In such a hearing, the defendant would have the burden of establishing by a preponderance of the evidence that the forfeiture was grossly disproportional to the seriousness of the offense. The factors a court could consider in determining the value of the property and whether the forfeiture was excessive would be established by the bill.

Security interest. HB 3758 would exempt a bona fide security interest from forfeiture unless the person claiming the interest had actual knowledge that the property was subject to forfeiture at the time the security interest was created. A person claiming a security interest would have to establish the validity of the interest by a preponderance of the evidence.

Innocent owner. HB 3758 would prohibit the property of an innocent owner from being forfeited. A person who claimed to be an innocent owner and had ownership interest in the property at the time of the offense would be required to show their legal right, title, or interest in the property seized. If the owner showed such evidence, the state would be required to prove by a preponderance of the evidence that the person had actual or constructive knowledge of the underlying offense that gave rise to the forfeiture. A person would be presumed to have constructive knowledge of the offense if the person was a family or household member of the defendant and if the defendant, during the 10 years preceding the underlying offense, was convicted three or more times for the same or a similar offense.

The bill also would establish court procedures and evidentiary standards for proceedings involving a person who acquired ownership interest in property subject to forfeiture after the commission of an offense giving rise to forfeiture.

The court would be required to order the state to relinquish all claims of

title to the property if the court found that the person was an innocent owner.

Appeal. The bill would allow a party subject to forfeiture litigation to appeal the court's decision regarding the seizure, forfeiture, and distribution of property under the bill.

Disposition and return of property. The bill would repeal provisions related to the disposition of abandoned or unclaimed property and establish procedures and standards relating to the disposition, retention, and return of forfeited property.

HB 3758 would authorize a court to order forfeited property to the county treasurer in the county in which the seizure occurred within 30 days after the order. All abandoned property would be required to be delivered to the county in which the property was abandoned. If abandoned property held for evidentiary purposes was no longer needed for that purpose, the court could order that the property be delivered to the appropriate county treasurer no later than the 30th day following the order. The bill would require the county treasurer to dispose of the property, other than currency, at a public auction. Proceeds from the auction and forfeited currency would have to be used to pay first all outstanding liens on the forfeited property, and then would have to first be used to comply with any court order regarding payment of expenses. After making necessary payments, the county treasurer would be required to deposit any remaining money into the county's general fund.

If contraband was held for evidentiary purposes and was no longer needed, a court would be authorized to order the contraband to be destroyed within 30 days of the order.

Retaining property. The bill would prohibit a law enforcement agency from retaining forfeited or abandoned property for the agency's use or selling such property to an employee of the agency, an employee's relative, or another law enforcement agency.

The bill also would prohibit a law enforcement agency or attorney

representing the state from directly or indirectly transferring seized property to any federal law enforcement authority or federal agency unless:

- the value of the seized property exceeded \$50,000; and
- the state's attorney determined that the activity giving rise to the seizure was interstate in nature and sufficiently complex to justify the transfer or the seized property could only be forfeited under federal law.

Return of property. HB 3758 would require a law enforcement agency that held property to return the property to the owner no later than the fifth day after:

- the court found that the owner had a bona fide security interest;
- the court found that the owner was an innocent owner;
- the owner was acquitted of the offense that was the basis of the forfeiture proceeding; or
- the criminal charge against the owner that was the basis of the forfeiture was dismissed.

The law enforcement agency that held the property would be responsible for all damages, storage fees, and related costs applicable to the property returned.

Payment to defendant. The bill would entitle a defendant whose conviction was reversed, set aside, or vacated on appeal to recover any money deposited in the county's general fund as a result of the disposition of the defendant's forfeited property. HB 3758 would establish conditions related to such a payment.

Civil forfeiture. HB 3758 would establish that property would be subject to forfeiture, regardless of whether a person was convicted of an applicable offense in connection with the property, if:

- the property was seized with probable cause that it was involved in

- the commission of a felony or obtained through the commission of a felony; and
- the property owner had not claimed the property or asserted any interest in the property, or the property owner was unavailable.

The bill would authorize the state's attorney to bring a forfeiture proceeding by filing a complaint in a district court in the appropriate county. The complaint would be required to state facts showing that the property was subject to forfeiture under the bill. Such a proceeding would be required to proceed to trial in the same manner as in other civil cases, and the state would have the burden of proving by a preponderance of the evidence that property was subject to forfeiture.

Reporting. HB 3758 would require a law enforcement agency to report to the Department of Public Safety, no later than February 1 each year, certain information regarding seizures by the agency, including the total number of forfeitures according to specified categories and the total market value of each category of property forfeited, among other details.

Other provisions. The bill would repeal provisions relating to the authority of a game warden or other peace officer to seize property without a warrant, the authority of a court to order such property forfeited to the Parks and Wildlife Department, and the disposition of seized property.

On the effective date of the bill, any property in the possession of a law enforcement agency, game warden, or attorney representing the state that was seized under repealed provisions and had not been ordered forfeited to the state by a court would be required to be returned to the person from whom the property was seized. Property that was evidence in an investigation would not be required to be returned until the disposition of all charges relating to the offense.

The bill would make conforming changes to reflect these revisions. The bill would take effect September 1, 2023, and would not apply to abandoned or unclaimed property seized before that date.

