

BILL ANALYSIS

C.S.H.B. 2725
By: Hartnett
Criminal Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

With limited access to an intermediate level of care in the community, a person with severe mental illness who commits a minor offense often enters the criminal justice system. If the mentally ill defendant cannot understand the proceedings or cannot participate in the defense, the court may determine that the defendant is not competent to stand trial and may order competency restoration services by way of a forensic commitment to a state mental hospital. Over the years, interested parties contend, the forensic caseload has steadily increased at a faster rate than the non-forensic caseloads. It has been reported that a forensic patient's length of stay at a state hospital is much longer than that of a non-forensic patient. While nearly 75 percent of all non-forensic commitments in a recent year were for less than a month, almost all forensic commitments were for more than a month, and the majority of forensic commitments lasted more than three months.

Due to the high demand for forensic beds in excess of the state hospitals' capacity, hundreds of mentally ill defendants may wait for months in jails across Texas for an available forensic bed. Medicaid does not cover the cost of services for adults in the state hospitals, which receive almost half of all state mental health funding and use those funds primarily on forensic commitments. Despite the hundreds of millions of dollars spent on this expensive level of care, the outcomes are dismal, as many of these defendants have an average of more than one arrest per year and an average of almost one forensic commitment per year.

Access to an appropriate and significantly less expensive level of care for this population would improve outcomes, such as recidivism, and maximize federal funding. C.S.H.B. 2725 makes numerous changes to the forensic commitment process to implement efficiencies to achieve cost-savings and address the forensic bed shortage.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 2725 amends the Code of Criminal Procedure to require a court sentencing a person convicted of a criminal offense to credit to the person's sentence term the time spent confined in a mental health facility, residential care facility, or jail pending a determination as to the defendant's competency to stand trial, rather than pending a trial to determine whether the defendant is incompetent to stand trial. The bill requires the court, as an alternative to crediting that period to the sentence, to credit the time the person is confined in one of those facilities or jail between the date of any initial determination of the defendant's incompetency to stand trial and the date the person is transported to jail following a final judicial determination that the person has been restored to competency. The bill makes conforming changes to reflect the requirements in provisions of law relating to judgment and sentence generally.

C.S.H.B. 2725 specifies, for purposes of the maximum cumulative period allowed for a defendant's commitment to a mental hospital or other inpatient or residential facility or participation in outpatient treatment program for restoration to competency, that the period begins on the date the initial order of commitment or initial order for outpatient treatment program participation is entered. The bill specifies that the cumulative period includes any time that, following the entry of the initial order, the defendant is confined in a correctional facility or is otherwise in the custody of the sheriff during or while awaiting, as applicable, the defendant's transfer to a mental hospital or other inpatient or residential facility, the defendant's release on bail to participate in an outpatient treatment program, or a criminal trial following any temporary restoration of the defendant's competency to stand trial. The bill specifies that such time included in the maximum cumulative period is in addition to any inpatient or outpatient treatment period to which a defendant is committed or in which a defendant is required to participate. The bill requires the court to credit to the maximum cumulative period any time that a defendant, following the arrest for the offense for which the defendant was to be tried, is confined in a correctional facility before the initial order of commitment or initial order for outpatient treatment program participation is entered. The bill specifies that the proceedings required to be followed in confining a defendant in a mental hospital or other inpatient or residential facility or requiring the defendant to participate for an additional period in an outpatient treatment program for an additional amount of time on expiration of the maximum restoration period are the civil proceedings conducted under the Texas Mental Health Code and the Persons with Mental Retardation Act by a court with probate jurisdiction.

C.S.H.B. 2725 removes from the conditions qualifying a psychiatrist or psychologist for appointment as an expert for purposes of examining or testifying as to a defendant's competency or incompetency the requirement to have a certain number of years of experience in performing criminal forensic evaluations for courts, depending on the year of appointment. The bill removes the requirement, for purposes of qualifying for such appointment, that the psychiatrist's or psychologist's eight hours of continuing education relating to forensic evaluations completed in the 12 months preceding the appointment be documented with the court.

C.S.H.B. 2725, in the list of factors that an expert is required to consider during an examination of a defendant's competency or incompetency to stand trial and in any report based on that examination, requires the determination of whether the defendant has a mental illness or is a person with mental retardation to be supported by current indications and the defendant's personal history. The bill adds to that list of factors whether the identified condition has lasted or is expected to last continuously for at least one year. The bill includes in that list the degree of impairment resulting from the mental illness or mental retardation, if existent, and the specific impact on the defendant's capacity to engage with counsel in a reasonable and rational manner, rather than the impact of the mental illness or mental retardation on the defendant's capacity to so engage with counsel. The bill requires an expert's report to the court regarding a competency examination to describe in specific terms, rather than in general terms, procedures, techniques, and tests used in the examination; to describe conclusions reached; and to state the specific criteria supporting the expert's diagnosis. The bill revises the information that an expert who determines that a defendant is incompetent to proceed is required to state in the expert's report to include the symptoms, exact nature, severity, and expected duration of the deficits resulting from the defendant's mental illness or mental retardation, if any, and the impact of the identified condition on the factors considered in the examination. The bill adds to the information required to be reported an estimate of the period needed to restore the defendant's competency, including whether the defendant is likely to be restored to competency in the foreseeable future.

C.S.H.B. 2725 requires a court, on a determination that a defendant is incompetent to stand trial and is unlikely to be restored to competency in the foreseeable future, to proceed under provisions of law relating to civil commitments of defendants whose charges are pending or whose charges are dismissed or to release the defendant on bail and makes the specified provisions of law applicable to such a defendant.

C.S.H.B. 2725 clarifies the applicability of provisions of law relating to the release on bail of a defendant found to be incompetent to stand trial and not a danger to others and to the commitment of a defendant to a certain facility for restoration to competency. The bill reduces, for a defendant charged with an offense punishable as a misdemeanor, the maximum possible duration of commitment to a mental health facility or residential care facility for further examination and treatment for restoration to competency from 120 days to 60 days.

C.S.H.B. 2725 authorizes a court that receives credible evidence indicating that a defendant has been restored to competency at any time after the defendant's incompetency trial but before the defendant is transported to a mental health facility, residential care facility, or outpatient treatment program, as applicable, to appoint disinterested experts to reexamine the defendant's competency. The bill provides that the court is not required to appoint the same expert or experts who performed the initial examination of the defendant. The bill establishes that, if after a reexamination of the defendant the applicable expert's report states an opinion that the defendant remains incompetent, the court's order releasing the defendant on bail or committing the defendant for restoration to competency remains in effect and requires the transportation of the defendant to the facility or outpatient program, as applicable. The bill requires the court, if after a reexamination of the defendant the applicable expert's report states an opinion that the defendant has been restored to competency, to withdraw its order releasing the defendant on bail or committing the defendant for restoration to competency. The bill requires the court to find the defendant competent to stand trial and proceed in the same manner as if the defendant had been found restored to competency at a hearing if both parties agree that the defendant is competent to stand trial and the court concurs. The bill requires the court to hold a hearing to determine whether the defendant has been restored to competency if any party fails to agree or if the court fails to concur that the defendant is competent to stand trial. The bill requires, if a court holds such a hearing on the request of the counsel for either party or the motion of the court, that a jury make the competency determination. The bill establishes that, for purposes of the hearing, incompetency is presumed and requires the defendant's competency to be proved by a preponderance of the evidence. The bill requires the court, if after the hearing the defendant is again found to be incompetent to stand trial, to issue a new order releasing the defendant on bail or committing the defendant for restoration to competency, as appropriate based on the defendant's current condition.

C.S.H.B. 2725 requires the facility or treatment program to which a defendant is committed or released to assess and evaluate whether the defendant is likely to be restored to competency, rather than whether the defendant will obtain competency, in the foreseeable future. The bill specifies that the notification required to be given to the court by the head of the facility or the outpatient treatment program regarding the expiration of a restoration period is notice that the initial restoration period is to expire according to the terms of the court order or applicable provisions of law relating to incompetency to stand trial. The bill requires the head of the facility or the outpatient treatment program provider to promptly notify the court when the head of the facility or the program provider believes that the defendant is not likely to attain competency, rather than will not attain competency, in the foreseeable future and to file a report when providing the notices regarding expiration of the initial period of restoration and the defendant's competency. The bill requires the report to include a list of the types and dosages of medications prescribed for the defendant, rather than the types and dosages of medications with which the defendant was treated for mental illness, while the defendant was in the facility or program. The bill requires the explanation for the basis of a request by the head of the facility or treatment provider for an extension of the initial restoration period to include a description of any evidence indicating a reduction in the severity of the defendant's symptoms or impairment. The bill removes the requirement that a court's determination that the defendant has not attained competency and that an extension of the initial restoration period will likely enable the facility or program to restore the defendant to competency within the period of the extension be based on information provided by the head of the facility or the program provider. The bill establishes that the extension of the initial restoration period that the court is authorized to grant is for 60 days and in connection with the specific offense with which the defendant is charged.

C.S.H.B. 2725 authorizes the court, on the return of a defendant to the court, to make a determination with regard to the defendant's competency to stand trial based on medical information or personal history information relating to the defendant, in addition to the final report filed with the court by the head of the facility or outpatient treatment provider discharging the defendant. The bill clarifies that a party is authorized to object to the findings of the final report by a specified date.

C.S.H.B. 2725 requires the Department of State Health Services, in coordination with the Health and Human Services Commission, to study the feasibility of providing home and community-based services, instead of institutional care, to persons with severe and persistent mental illness who have a history of more than one inpatient forensic commitment. The bill requires DSHS, not later than December 1, 2012, to issue a report to the legislature regarding the results of the feasibility study.

C.S.H.B. 2725 makes conforming and nonsubstantive changes.

EFFECTIVE DATE

September 1, 2011.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 2725 omits a definition for "developmental disability" included in the original.

C.S.H.B. 2725 contains provisions not included in the original relating to the requirements for a court sentencing a person convicted of a criminal offense to credit to the person's sentence term the time served in a mental health facility, residential care facility, or jail pending an initial or final judicial determination as to the defendant's competency to stand trial.

C.S.H.B. 2725 contains a provision not included in the original specifying that the civil proceedings conducted under the Texas Mental Health Code and the Persons with Mental Retardation Act that are required by the bill to be followed in confining a defendant for an additional amount of time on expiration of the maximum restoration period are proceedings by a court with probate jurisdiction. The substitute contains a specification not included in the original that the period of time a defendant is confined in a correctional facility while awaiting the specified transfer, release on bail, or criminal trial that is included in the maximum cumulative period is in addition to any inpatient or outpatient treatment period to which a defendant is committed or in which a defendant is required to participate. The substitute contains a provision not included in the original including in the cumulative period of time, following an initial order of commitment or treatment participation, any time that the defendant is otherwise in the custody of the sheriff during or while awaiting the specified transfer, release, or criminal trial. The substitute contains a provision not included in the original requiring the court to credit to the maximum cumulative period any time that a defendant, following the arrest for the offense for which the defendant was to be tried, is confined in a correctional facility before the initial order of commitment or initial order for outpatient treatment program participation is entered.

C.S.H.B. 2725 differs from the original by retaining statutory language removed in the original conditioning the qualification of a psychiatrist or psychologist for appointment as an expert for purposes of examining or testifying as to a defendant's competency or incompetency on the psychiatrist or psychologist having at least eight hours of continuing education relating to forensic evaluations, completed in the 12 months preceding the appointment.

C.S.H.B. 2725 differs from the original by specifying, for purposes of the list of factors required to be considered during an examination of a defendant's competency and in any report based on that examination, that the determination of whether the defendant has a mental illness or is a

person with mental retardation is to be supported by both current indications and the defendant's personal history, whereas the original requires that determination to be supported by either current indications or the defendant's personal history. The substitute omits provisions included in the original requiring that determination to include whether the defendant is a person with a developmental disability or has any other medical condition that significantly limits the defendant's cognitive functioning. The substitute omits a requirement included in the original that the list of required factors include the degree of impairment resulting from the defendant's developmental disability or other cognitive impairment.

C.S.H.B. 2725 omits a requirement included in the original that the report of the expert who determines that a defendant is incompetent to proceed state the symptoms, exact nature, severity, and expected duration of the deficits resulting from the defendant's developmental disability or other cognitive impairment and the least restrictive setting in which treatment may be delivered to the defendant.

C.S.H.B. 2725 differs from the original by requiring a court, on a determination that a defendant is incompetent to stand trial and is unlikely to be restored to competency in the foreseeable future, to release the defendant on bail as an alternative to proceeding under provisions of law relating to civil commitments of defendants whose charges are pending or whose charges are dismissed, whereas the original requires the court, as such an alternative, to take other action authorized by law.

C.S.H.B. 2725 omits a provision included in the original reducing from 120 days to 60 days the maximum possible duration of participation in an outpatient treatment program for applicable defendants released on bail. The substitute differs from the original by reducing, for a defendant charged with an offense punishable as a misdemeanor, the maximum possible duration of commitment to a mental health facility or residential care facility for further examination and treatment for restoration to competency from 120 days to 60 days, whereas the original makes such a reduction for all defendants.

C.S.H.B. 2725 omits a provision included in the original requiring copies of certain reports and documents relating to the medical condition of the defendant to be provided by a court to a facility to which a defendant is committed or an outpatient treatment program to which a defendant is released.

C.S.H.B. 2725 contains provisions not included in the original setting out court procedures when a court receives credible evidence of a defendant's restoration to competency at any time after the defendant's incompetency trial but before the defendant is transported to a mental health facility, residential care facility, or outpatient treatment, as applicable.

C.S.H.B. 2725 omits a provision included in the original changing the interval at which a treatment program to which a defendant is released, other than a treatment program provided by an inpatient mental facility or a residential care facility, is required to make its report to the court.

C.S.H.B. 2725 contains a specification not included in the original that the notification required to be given to the court by the head of the facility or the outpatient treatment program regarding the expiration of a restoration period is notice that the initial restoration period is to expire according to the terms of the court order or applicable provisions of law relating to competency to stand trial. The substitute differs from the original by requiring the head of the facility or program provider to include with the required notices regarding the expiration of the initial restoration period and the defendant's competency a list of the types and dosages of medications prescribed for the defendant while the defendant was in the facility or program, whereas the original requires inclusion of a list of the types and dosages of medications with which the defendant was treated during that time. The substitute omits a provision included in the original reducing from 60 days to 30 days the additional amount of time that the head of the facility or

program provider is authorized to request from the court as an extension of the defendant's initial restoration period. The substitute contains a provision not included in the original requiring the facility head's or treatment provider's explanation for the basis of the request for an extension of the initial restoration period to include a description of any evidence indicating a reduction in the severity of the defendant's symptoms or impairment.

C.S.H.B. 2725 omits a provision included in the original authorizing the court to enter an order extending the initial restoration period on its own motion or the motion of any party and reducing the authorized additional period from 60 to 30 days. The substitute contains a provision not included in the original establishing that the extension that the court is authorized to grant is for 60 days and in connection with the specific offense with which the defendant is charged.

C.S.H.B. 2725 omits a provision included in the original redesignating Article 46B.080(c), Code of Criminal Procedure, as Article 46B.0805, Code of Criminal Procedure, and amending that provision of law to authorize a court to grant a second extension with respect to a period of restoration, and making that authorization conditional on medical evidence showing a reduction in the severity of the defendant's symptoms or functional impairment. The substitute omits a provision included in the original making a conforming change to reflect the authorization for a court to grant a second extension of a restoration period.

C.S.H.B. 2725 contains a clarification not included in the original that any party is authorized to object to the findings of the final report filed with the court by the head of the facility or outpatient treatment provider discharging a defendant.

C.S.H.B. 2725 differs from the original by requiring the Department of State Health Services to study the feasibility of providing home and community-based services, instead of institutional care, to persons with severe and persistent mental illness who have a history of more than one inpatient forensic commitment and to issue a report to the legislature regarding the study's results, whereas the original requires DSHS to apply for and actively pursue a federal waiver or other authorization to provide Medicaid home and community-based services to those persons.

C.S.H.B. 2725 differs from the original in nonsubstantive ways.