

- SUBJECT:** Banning open containers and enhancing penalties for repeat DWI offenses
- COMMITTEE:** Criminal Jurisprudence — committee substitute recommended
- VOTE:** 7 ayes — Hinojosa, Dunnam, Keel, Green, Kitchen, Martinez Fischer, Shields
0 nays
2 absent — Talton, Garcia
- WITNESSES:** For — Laura Dean-Mooney and Bill Lewis, Mothers Against Drunk Driving; *Registered but did not testify:* Rick Donley, Beer Alliance of Texas; Alan Gray and Robert H. Sparks, Licensed Beverage Distributors; Lawrence Olsen, Texas Good Roads Association

Against — Keith S. Hampton and George Scharmen, Texas Criminal Defense Lawyers Association; H.W. “Sputnik” Strain, Texas Motorcycle Rights Association

On — Gary Taylor, National Highway Traffic Safety Administration; *Registered but did not testify:* Carlos Lopez, Texas Department of Transportation
- BACKGROUND:** Penal Code, sec. 49.03 makes it a Class C misdemeanor, punishable by a maximum fine of \$500, to consume an alcoholic beverage while operating a motor vehicle in a public place if observed by a law enforcement officer.

The federal Transportation Equity Act for the 21st Century, or TEA-21 (23 U.S.C., sec. 154), imposes funding sanctions on states that do not enact and enforce laws to prohibit possession of open containers and that do not enforce minimum penalties against repeat intoxicated drivers.
- DIGEST:** CSHB 5 would make it a Class C misdemeanor knowingly to possess an open container of alcohol in the passenger area of a motor vehicle on a public highway, regardless of whether the car was stopped, parked, or being operated. This prohibition would not apply to a passenger possessing an

open container in the living quarters of a house coach or motorized house trailer or in a motor vehicle used primarily to transport people for compensation.

The bill would define “open container” as a bottle, can, or other receptacle that contains any amount of an alcoholic beverage and that has been opened, has a broken seal, or the contents of which are partially removed. “Passenger area” would mean the seating area of the operator and passengers but would not include a locked glove compartment or similar storage container, the car’s trunk, or the area behind the last upright seat of a vehicle, if the vehicle did not have a trunk. “Public highway” would include the entire width and immediately adjacent to the boundaries of any public road, street, highway, interstate, or other publicly maintained way open to public motor vehicles, including public highway rights-of-way.

If 23 U.S.C, sec. 154, to the extent that it imposes sanctions involving the transfer of federal highway construction funds, ever is suspended or enjoined, the enforcement of CSHB 5’s open-container provision would be suspended on the 30th day after the attorney general filed a certificate with the secretary of state certifying that the federal law had been suspended. Enforcement of the open-container provision would be suspended until the 30th day after the date the attorney general filed a subsequent certification that the federal law no longer was suspended or enjoined. If that portion of the federal law ever expires or is repealed, found unconstitutional, or abrogated by a subsequent act of Congress, the enforcement of CSHB 5’s open container provision would expire on the 30th day after the attorney general filed a certificate with the secretary of state certifying the change in the federal law.

Penalties for repeat offenders. If a person were convicted of a second or subsequent offense for driving while intoxicated within five years of another offense, the court would have to order the installation of a deep-lung breath analyzer device on the defendant’s car that would prevent the defendant from operating the vehicle if the device detected alcohol in the operator’s breath. The court would have to prohibit the defendant from operating a vehicle that was not equipped with such a breath analyzer for one year after the end of the defendant’s license suspension.

Defendants would have to obtain and install such devices at their own cost and would have to provide evidence to the court of the installation of such a device. The Department of Public Safety (DPS) would be responsible for approving the deep-lung breath analysis device.

If the court found the defendant unable to pay for the device, the court could impose a payment schedule not to extend more than one year after the installation. Failure to comply with any of these court orders would be punishable by contempt of court. The court would retain jurisdiction over the defendant until the date on which the device no longer had to remain installed. In case of any conflict between this act and the section of the Code of Criminal Procedure dealing with community supervision of DWI offenders, the provisions of CSHB 5 would control.

Repeat DWI Offenses. If a person's driver's license had been suspended as the result of a second or subsequent conviction for driving, flying, or boating while intoxicated within five years of the most recent previous offense, that person could not get an occupational license until the first anniversary of the original license suspension.

CSHB 5 would require a one-year license suspension period for repeat offenders of intoxication assault whose offenses occurred within five years of one another, instead of the current suspension range of 90 days to one year. The bill would add a specific license suspension period of one to two years for persons with repeat offenses of DWI occurring within five years of each other.

The license suspension period for a person convicted of a second or subsequent count of intoxicated manslaughter committed within five years of a previous such offense would be one to two years, instead of the current penalty of not less than 180 days or more than two years for all intoxication manslaughter offenses.

CSHB 5 would allow DPS to revoke the license of a person with a repeat offense of DWI within five years of a previous offense even if the person had to complete, during probation from license suspension, an educational program to rehabilitate persons who have operated motor vehicles while intoxicated.

In all cases involving second or subsequent DWI offenses and second or subsequent intoxication assault and intoxication manslaughter offenses that involved a motor vehicle and occurred within five years of a previous offense, the judge would have to order an evaluation to determine the appropriateness and proper course of conduct for alcohol and drug rehabilitation of the defendant.

CSHB 5 would set a minimum term of not less than five days of confinement in a county jail if a defendant was being punished by community supervision (probation) for a second DWI offense that occurred within five years of a previous offense. If the defendant was being punished for a second or subsequent offense that occurred within five years of the previous offense, a jury recommending probation for the defendant could not recommend that the defendant's license not be suspended.

CSHB 5 would set a license suspension period of one to two years for a second or subsequent offense occurring within five years of another offense if a defendant had been given probation and sent for a second time to an educational rehabilitation program. The suspension time for a repeat offense not occurring within five years of another offense would remain at between 180 days and two years.

CSHB 5 would take effect September 1, 2001, unless before that date the attorney general certified that 23 U.S.C. 154 had been suspended, enjoined, repealed, found unconstitutional, or abrogated by Congress. If any element of an offense occurred before the effective date, the previous law would apply.

SUPPORTERS
SAY:

CSHB 5 would help save lives on Texas roadways by getting tough with drunk drivers. These measures are necessary because in 1999, Texas led all other states in the number of alcohol-related traffic fatalities with 1,734. Alcohol-related fatalities account for nearly half of all fatalities in the state. In addition, CSHB 5 would prevent Texas from losing federal funds for highway construction.

Open containers. By enacting CSHB 5, Texas would join about 30 other states and the District of Columbia in banning open containers of alcohol in vehicles. Making it illegal to possess an open container of alcohol in the

passenger area of a vehicle on a public highway would help ensure that Texans do not drink and drive.

Current law recognizes an offense only if a law enforcement officer witnesses a driver in the act of drinking. This is difficult to enforce and leaves the false impression that alcohol and driving are acceptable if not observed.

CSHB 5 would reduce traffic accidents and save lives by raising public awareness of the problem of drunk driving. Texans soon would become accustomed to the open-container ban as they have become used to the law mandating the use of seat belts. A drinker who has to hide an open container is more aware of the consequences of being caught drunk behind the wheel. Open-container laws help focus continual attention on DWI laws.

CSHB 5 would not restrict people from taking open containers of alcohol to a party or anywhere else. They merely would have to place the alcohol in a locked glove compartment or similar storage device, in the trunk of the car, or behind the last seat of a car without a trunk.

The bill would not treat motorcycle enthusiasts differently from drivers of motor vehicles. It would provide an exception for a container in a locked storage device. A motorcyclist who could lock his or her saddlebags could carry an open container without breaking the law.

Repeat intoxication offenses. CSHB 5 would address the problem of repeat intoxicated drivers by providing tougher penalties for certain repeat offenses. About one-third of all drivers arrested or convicted of DWI or driving under the influence are repeat offenders, who are more likely to be involved in a fatal crash. The measures in this bill are warranted because prior offenders — who already have had a chance to change their actions — pose a greater risk to the public. Tougher penalties would ensure that these offenders were punished adequately or deterred from committing future offenses.

By stipulating that the repeated offenses occur within five years of each other for the purposes of enhancing penalties, CSHB 5 would meet the minimum federal requirements. Past proposals to crack down on repeat offenders have failed because many felt that the penalties were too harsh. A

five-year period, rather than the current 10-year period, is less objectionable and would make the enactment of CSHB 5 more likely, providing Texas with stronger drinking-and-driving laws.

Requiring the installation of a deep-breath analyzer on a defendant's car and increasing periods of license suspensions would help prevent DWI offenders from driving. A person who continues to drive without a license usually drives less often or more carefully. Deep-breath analyzers would prevent defendants with any trace of alcohol on their breath from operating their cars.

Federal highway funds. Because Texas does not have an open-container law and because the state's penalties for repeat intoxication offenders do not meet federal standards, the federal government already has begun shifting funds from highway construction to traffic-safety programs. The amount of funds affected by these transfers will increase the longer Texas fails to act on these laws. In October 2000, \$43 million of highway construction funds were transferred to traffic safety. A similar transfer will occur in October 2001 if the state still does not comply with federal requirements, and the transfer could double to \$86 million beginning in October 2002. This would be the highest amount for any noncompliant state.

Transportation money is scarce, and Texas cannot afford to lose money that could be spent on needed road projects. Transferring these federal funds to highway safety programs would result in underfunding of construction programs that would relieve congestion and help traffic mobility.

OPPONENTS
SAY:

Texas already has strict laws to prohibit persons from driving while intoxicated and to punish severely those who do. Those who do not break these laws — especially passengers — should not have their freedom restricted. Restricting all open containers, as proposed by CSHB 5, would be an unwarranted intrusion of the government into individual behavior, allowing law enforcement officers to ticket or arrest a passenger in a vehicle merely for possessing an open beer can when the focus should be on whether the driver was impaired. The ban also could be used as a pretext to pull over drivers without reason, which might lead to racial profiling.

Texas will not lose federal funding if CSHB 5 is not enacted. The funds simply would be redirected to highway safety-related programs. These

programs are crucial because they help prevent alcohol-related accidents before they happen, rather than after the fact.

Enacting laws that create harsher penalties for alcohol-related accidents has not reduced deaths. Action needs to occur before someone gets in the car, not after. Most drunk drivers already are drunk by the time they get behind the wheel of a car.

CSHB 5 would create a new class of criminals: passengers and designated drivers. It could discourage the use of designated drivers, since a driver could be punished because a passenger has an open container. It also could be used to penalize people who collect empty beer bottles and cans from the side of the road if any alcohol residue remained.

Also, CSHB 5 could violate the equal-protection clause of the Fourteenth Amendment to the U.S. Constitution. Motorcycle enthusiasts could claim that the law treats them differently from people who drive motor vehicles. Under CSHB 5, it would be illegal for a motorcycle rider to carry an open container in, for example, the motorcycle's saddlebag. Thus, motorcycle riders could not carry open containers and would be denied the same privileges as motor vehicle drivers.

OTHER
OPPONENTS
SAY:

CSHB 5 would not go far enough in helping to prevent alcohol-related accidents. For example, the current period for which prior offenses can be considered in enhancing punishment is 10 years. However, CSHB 5 would apply harsher penalties only if the repeated offenses occurred within five years of each other. Also, the bill's harsher punishments for repeat offenders and its more restrictive open-container provision would be repealed if the federal mandate ever changes, sending the unfortunate signal that the Legislature is enacting effective measures aimed at punishing drunken driving only under duress in order to avoid losing federal highway construction funds.

Applying the offense only to persons who possessed an open container "knowingly" would weaken the bill's provisions. A driver could pass a container to a friend in the back seat or stash it under the seat and then claim ignorance of its presence. It would be difficult to prove that someone knew about an open container in the passenger area of a car. No other intoxication

or alcoholic-beverage offense requires a certain mental state, and neither should this offense.

NOTES:

The committee substitute changed the original bill by making knowledge of possession of an open container part of the definition of the offense, rather than an exception to the offense. The committee substitute also amended the filed version by applying the exception for buses and motor homes to passengers only. It also changed the time period for enhancing penalties for repeat intoxication offenses to offenses committed within five years of each other.

SB 89 by Nelson/Shapiro, which also concerns open containers and repeat offenders, passed the Senate on March 15. Differences between SB 89 and CSHB 5 include the sentencing requirements for repeat offenders, the time span that applies for enhanced punishment for repeat offenses, provisions for revoking and suspending an offender's license for repeat offenses, and the minimum term of confinement for intoxication offenses.

A related bill, HB 89 by Hill, addresses only the open-container issue. It would prohibit possession of an open container anywhere in the passenger area of a car and would not limit application to a person who knowingly possessed an open container. HB 89 is pending in the House Criminal Jurisprudence Committee.

SB 764 by Armbrister, the companion to HB 5, has been referred to the Senate Criminal Justice Committee. HB 91 by Hill, the companion to SB 89, is pending in the House Criminal Jurisprudence Committee.