Dennis M. Papp *Legislative Service Commission*

Am. H.B. 100

123rd General Assembly
(As Passed by the House)

Reps. **Young, Allen, Barrett, Brading, Britton, Buchy, Callender, Cates, Corbin, Core, Damschroder, DePiero, Evans, Flannery, Ford, Gardner, Grendell, Hartnett, Hoops, Householder, Jacobson, Jerse, Jolivette, Jones, Jordan, Krebs, R. Miller, Mottley, Myers, Netzley, O'Brien, Ogg, Olman, Padgett, Patton, Roman, Schuck, Sulzer, Taylor, Terwilleger, Thomas, Van Vyven, Vesper, Willamowski, Williams, Buehrer, Goodman, Tiberi, Carey, Peterson, Haines, Barnes, Sullivan, Verich, Maier, Calvert, Clancy, Hollister, Harris, Pringle, Austria, Schuring, Boyd, James**

BILL SUMMARY

- Expands the offense of felonious assault to also prohibit a person with knowledge that the person has tested HIV positive from knowingly doing any of the following: (1) engaging in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in sexual conduct, (2) engaging in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested HIV positive, or (3) engaging in sexual conduct with a person under 18 years of age who is not the spouse of the offender.

- Subjects a person accused of violating the new felonious assault prohibitions to mandatory HIV testing upon the request of certain persons.

- Specifies that prosecution under the bill's new felonious assault prohibitions of a person testing HIV positive is not prohibited by that person's compliance with existing law's requirement that a person testing HIV positive disclose that knowledge to another person with whom the offender intends to make common use of a hypodermic needle or engage in sexual conduct.

CONTENT AND OPERATION

Felonious assault--new prohibition

Existing law

Under existing law, the offense of "felonious assault" is committed if a person knowingly causes serious physical harm to another or to another's unborn, or causes or attempts to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance. The offense generally is a felony of the second degree, but, if the victim of the offense is a peace officer, it is a felony of the first degree. (Sec. 2903.11.)

Operation of the bill

New prohibition. The bill adds a third prohibition to the offense of felonious assault. The bill prohibits a person, with knowledge that the person has tested positive as a carrier of a virus (the HIV virus) that causes acquired immunodeficiency syndrome (AIDS), from knowingly doing any of the following (sec. 2903.11(B) (see **COMMENT**)):

(1) Engaging in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engaging in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of the HIV virus;

(3) Engaging in sexual conduct with a person under 18 years of age who is not the spouse of the offender.

A violation of the new prohibition is a felony of the second degree. The penalty for the new prohibition is not enhanced if the victim is a peace officer. The bill provides that the prosecution of a person for the offense of felonious assault does not preclude prosecution of that person for the offense of rape. (Sec. 2903.11(C) and (D).)

Definition. For purposes of the above-described new felonious assault prohibition, "sexual conduct" has the same meaning as in the existing Sex Offenses Law (sec. 2903.11(F)(3) by reference to sec. 2907.01): "sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and without privilege to do so,

the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

Mandatory HIV testing and notification of test results

Existing law

Existing law provides that, notwithstanding the requirements for informed consent to an HIV test, if a person is charged with specified sex offenses, the court, upon the request of the prosecutor in the case, upon the request of the victim, or upon the request of any other person whom the court reasonably believes had contact with the accused in circumstances related to the offense that could have resulted in the transmission to that person of a virus that causes AIDS, must cause the accused to submit to one or more tests designated by the Director of Health to determine if the accused is a carrier of the HIV virus (an HIV test).

If an accused who is free on bond refuses to submit to an HIV test ordered by the court, the court may order that the accused's bond be revoked and that the accused be incarcerated until the test is performed. If an accused who is incarcerated refuses to submit to the HIV test ordered by the court, the court must order the person in charge of the jail or prison in which the accused is incarcerated to take any action necessary to facilitate the performance of the test, including the forcible restraint of the accused for the purpose of drawing blood to be used in the test. A state agency, a political subdivision of the state, or an employee of a state agency or of a political subdivision of the state is immune from liability in a civil action to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with the performance of the duties regarding the HIV test described in this paragraph unless the acts or omissions are with malicious purpose, in bad faith, or in a wanton or reckless manner. (Sec. 2907.27(B)(1)(a), (2), and (3).)

Any cost incurred by a hospital or other emergency medical facility in conducting a medical examination and test of the accused must be charged to and paid by the accused who undergoes the examination and test, unless the court determines that the accused is unable to pay. If the court determines that the accused is unable to pay, the cost must be charged to and paid by the municipal corporation in which the offense allegedly was committed, or charged to and paid by the county if the offense allegedly was committed within an unincorporated area. If a hospital or other emergency medical facility has submitted charges for the cost of a medical examination and test to an accused and has been unable to collect payment for the charges after making good faith attempts to collect for a

period of six months or more, the cost must be charged to and paid by the appropriate municipal corporation or county. (Sec. 2907.28(B).)

The results of the HIV test must be communicated in confidence to the court, and the court must inform the accused of the result. The court must inform the victim that the test was performed and that the victim has a right to receive the results on request. If the test was performed upon the request of a person other than the prosecutor in the case and other than the victim, the court must inform the person who made the request that the test was performed and that the person has a right to receive the results upon request. Additionally, regardless of who made the request that was the basis of the test being performed, if the court reasonably believes that, in circumstances related to the violation, a person other than the victim had contact with the accused that could have resulted in the transmission of the virus to that person, the court may inform that person that the test was performed and that the person has a right to receive the results of the test on request.

If the accused tests positive for HIV, the test results must be reported to the Department of Health and to the sheriff, head of the state correctional institution, or other person in charge of any jail or prison in which the accused is incarcerated. Subject to limited exceptions regarding prostitution, no other disclosure of the test results or the fact that a test was performed are permitted to be made, other than as evidence in a grand jury proceeding or as evidence in a judicial proceeding in accordance with the Rules of Evidence. If the test result is negative, and the charge has not been dismissed or if the accused has been convicted of the charge or a different offense arising out of the same circumstances as the offense charged, the court must order that the test be repeated not earlier than three months nor later than six months after the original test. (Sec. 2907.27(B)(1)(b).)

Operation of the bill

Under the bill, a person charged with the new prohibition the bill includes under the offense of felonious assault is subject to these mandatory HIV testing and notification provisions (secs. 2907.27(B)(1)(a) and 2907.28(B)).

Disclosure of AIDS test results or identity of any individual diagnosed with AIDS

Existing law

Under existing law, subject to specified exceptions, the results of an HIV test or the identity of an individual on whom an HIV test is performed or who is diagnosed as having AIDS or an AIDS-related condition may be disclosed only to

specified persons. Among those persons are law enforcement authorities pursuant to a search warrant or a subpoena issued by or at the request of a grand jury, a prosecuting attorney, city director of law or similar chief legal officer of a municipal corporation, or village solicitor, in connection with a criminal investigation or prosecution.

Existing law also requires an individual who knows that the individual has received a positive result on an HIV test or has been diagnosed as having AIDS or an AIDS-related condition to disclose this information to any other person with whom the individual intends to make common use of a hypodermic needle or engage in sexual conduct. No criminal penalty is prescribed for a person who violates the requirement.

Existing law specifies that nothing in the provisions regarding the disclosure of AIDS test results or identity of any individual diagnosed with AIDS prohibits the introduction of evidence concerning an HIV test of a specific individual in a criminal proceeding. (Sec. 3701.243(B)(1), (B)(1)(h), (F), and (G).)

Operation of the bill

Under the bill, the provisions listed above in "***Existing law***" under "***Disclosure of AIDS test results or identity of any individual diagnosed with AIDS***" remain unchanged. The bill specifies, however, that an individual's compliance with the requirement that a person testing positive for HIV or diagnosed with AIDS disclose that knowledge prior to the common use of a hypodermic needle or prior to engaging in sexual conduct does not prohibit a prosecution of the individual for a violation of the new prohibition created by the bill under felonious assault. (Sec. 3701.243(F).)

COMMENT

Three existing offenses, unchanged by the bill, pertain to sexual activity related conduct of a person who has knowledge that the person has tested positive for a virus that causes AIDS--"engaging in solicitation after a positive HIV test" (R.C. 2907.24), "loitering to engage in solicitation after a positive HIV test" (R.C. 2907.241), and "engaging in prostitution after a positive HIV test" (R.C. 2907.25).

HISTORY

ACTION	DATE	JOURNAL ENTRY

Introduced	01-28-99	p.	119
Reported, H. Criminal Justice	04-14-99	p.	414
Passed House (97-0)	04-28-99	pp.	482-483

H0100-PH.123/jc