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SFA



BILL ANALYSIS

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House Bill 4444 (Substitute S-1 as reported)
House Bill 4445 (Substitute S-1 as reported)
House Bill 4446 (Substitute S-1 as reported)
Sponsor: Representative Candace Curtis (House Bill 4444)
Representative Mike Nye (House Bill 4445)
Representative Kirk Profit (House Bill 4446)
House Committee: Judiciary
Senate Committee: Judiciary

Date Completed: 5-21-98

RATIONALE

Michigan's statutes punishing various sorts of larceny generally distinguish between misdemeanor and felony offenses based on the value of the property stolen. Typically, this threshold is \$100, although it can be as low as \$5 (for larceny from a motor vehicle or trailer) or as high as \$500 (for use of a utility service without consent). For simple larceny, the \$100 threshold has remained unchanged since 1957, when Public Act 69 of that year doubled the \$50 threshold that had been in effect at least since the Michigan Penal Code was enacted in 1931. In the ensuing years, the effect of inflation alone has caused offenses that once would have been considered misdemeanors to become felonies. For some time, many have been urging that the misdemeanor/felony threshold be raised, and that the penalties applicable to various types of larceny be standardized.

Although some have advocated raising the felony threshold, merchants have been concerned that doing so could lessen the deterrent effect of penalties for larceny offenses, retail fraud, and bad check violations. Consequently, some people believe that any increase in the felony threshold should be accompanied by increased penalties for repeat offenders and larger value amounts, as well as tougher civil penalties for passing bad checks.

CONTENT

House Bills 4444 (S-1) and 4445 (S-1) would amend the Michigan Penal Code to revise the felony threshold level and increase the

penalties for various larceny and bad check offenses. House Bill 4444 (S-1) also would create the misdemeanor of third-degree retail fraud and increase the threshold and penalties for the felony of first-degree retail fraud and second-degree retail fraud.

House Bill 4446 (S-1) would amend the Revised Judicature Act (RJA) to require the payment of specific fees and charges for checks written on insufficient funds or no account. The bill also would revise a provision of the RJA concerning the recovery of damages and costs by a merchant who was a victim of retail fraud.

The bills are tie-barred and include an effective date of January 1, 1999.

House Bill 4444 (S-1)

Larceny Offenses

Under the bill, the various offenses would be punishable by graduated maximum penalties, depending on the value of the property involved in the offense and prior convictions. Values of property stolen in separate incidents pursuant to a scheme or course of conduct within any 12-month period could be aggregated to determine the total value of property stolen.

The offense would be a felony punishable by up to 10 years' imprisonment and/or a maximum fine of \$15,000 or three times the value, whichever was greater, if the value were \$20,000 or more or if the

value were \$1,000 or more, but less than \$20,000, and the person had two or more prior convictions. The offense would be a felony punishable by up to five years and/or \$10,000 or three times the value, whichever was greater, if the value were \$1,000 or more, but less than \$20,000 or if the value were \$200 or more, but less than \$1,000, and the person had one or more prior convictions. For purposes of the felony offenses, a "prior conviction" would not include a misdemeanor violation for which the maximum term of imprisonment was not more than 93 days or an offense for which the maximum term, after enhancement by prior convictions, was not more than one year.

The offense would be a misdemeanor punishable by up to one year and/or \$2,000 or three times the value, whichever was greater, if the value were \$200 or more, but less than \$1,000, or if the value were less than \$200 and the person had one or more prior convictions, including a violation of a local ordinance substantially corresponding to the offense. The offense would be a misdemeanor punishable by up to 93 days' imprisonment and/or a maximum fine of \$500 or three times the value, whichever was greater, if the value were less than \$200.

The offenses to which the bill would apply are: simple larceny; larceny from a vehicle; larceny of a rented vehicle; various malicious destruction of property offenses, including the destruction of personal property, a house, barn, or building, any tree, shrub, turf, plants, crops, or soil, and memorial markers; and dealing in stolen property. The bill would add theft of a stereo, telephone, computer, or other electronic device to the provision proscribing theft from a vehicle.

The current misdemeanor/felony threshold for simple larceny is \$100; the felony is punishable by up to five years' imprisonment and/or a maximum fine of \$2,500.

Currently, the theft or unlawful removal or taking of any wheel, tire, radio, heater, or clock in or on any motor vehicle, house trailer, trailer, or semi-trailer is a felony punishable by up to five years' imprisonment and/or a maximum fine of \$10,000. Entering or breaking into a motor vehicle, house trailer, trailer, or semi-trailer for the purpose of stealing or unlawfully removing any property valued at \$5 or more is a felony punishable by up to five years' imprisonment or a maximum fine of \$1,000. The current felony threshold for refusal or willful neglect to return a rented or leased motor vehicle, trailer, or other tangible property pursuant to a

written agreement providing for its return is \$100; the felony is punishable by up to two years' imprisonment and/or a maximum fine of \$1,000.

The current felony threshold for willful and malicious destruction of another's personal property, and for malicious destruction of a house, barn, or other building of another, is \$100. (The Code does not specify a penalty for either offense.) The current threshold for the willful destruction, mutilation, defacing, removal of, or injury to any tomb, monument, gravestone, or other structure or thing placed for a memorial is \$100; the felony offense is punishable by up to five years' imprisonment and/or a maximum fine of \$2,500.

The current penalty for malicious destruction of trees, shrubs, turf, plants, crops, or soil is up to 90 days' imprisonment and/or a maximum fine of \$100, regardless of the value of property destroyed. A violator also must make restitution and, if the violation was committed with a vehicle, may have his or her driver's license suspended for up to one year. The bill would delete the restitution requirement, but retain the possibility of license suspension.

The current felony threshold for buying, receiving, possessing, concealing, or aiding the concealment of stolen, embezzled, or converted money, goods, or property is \$100; the felony offense is punishable by up to five years' imprisonment and/or a maximum fine of \$2,500.

The bill also would revise the current graduated penalties for illegal use of telecommunications services to make those penalties consistent with the bill's proposed larceny penalties.

Retail Fraud

Under the Code, the felony of first-degree retail fraud involves property or money valued at over \$100 and the misdemeanor of second-degree retail fraud involves property or money valued at \$100 or less. Under the bill, the felony of first-degree retail fraud would involve property or money valued at \$1,000 or more; the misdemeanor of second-degree retail fraud would apply if the value were \$200 or more, but less than \$1,000; and the new misdemeanor of third-degree retail fraud would apply if the value were less than \$200.

First-degree retail fraud would be punishable by up to five years' imprisonment (rather than two years) and/or a maximum fine of \$10,000 or three times the value, whichever was greater (rather than a fine

of up to \$1,000). Second-degree retail fraud would be punishable by up to one year's imprisonment (rather than 93 days) and/or a maximum fine of \$2,000 or three times the value, whichever was greater (rather than a fine of up to \$100). Third-degree retail fraud would be punishable by up to 93 days' imprisonment and/or a maximum fine of \$500 or three times the value, whichever was greater.

Values of property stolen or unlawfully removed in separate incidents pursuant to a scheme or course of conduct within any 12-month period could be aggregated to determine the total value of property stolen or unlawfully removed.

In addition, under the Code, a person who commits second-degree retail fraud and who has one or more prior convictions for retail fraud, simple larceny, larceny from a building, or securing land, personal property, or any thing of value by false pretenses, with intent to defraud or cheat, is guilty of first-degree retail fraud. The bill would add an attempt to commit any of those offenses and specifies that, for purposes of the felony offense, a "prior conviction" would not include a misdemeanor violation in which the value of stolen property was less than \$200. Under the bill, a person who committed third-degree retail fraud and who had a prior conviction for any of those offenses would be guilty of second-degree retail fraud.

Enhanced Sentences

If a prosecuting attorney intended to seek an enhanced sentence under the bill based on the defendant's having one or more prior convictions, the prosecuting attorney would have to include on the complaint and information a statement listing the prior conviction or convictions. The existence of a prior conviction would have to be determined by the court, without a jury, at sentencing or at a separate hearing for that purpose before sentencing, and could be established by any evidence relevant for that purpose, including, but not limited to, one or more of the following:

- A copy of the judgment of conviction.
- A transcript of a prior trial, plea-taking, or sentencing.
- Information contained in a presentence report.
- The defendant's statement.

House Bill 4445 (S-1)

Under the bill, the various offenses would be punishable by graduated maximum penalties,

depending on the value of the property involved in the offense and the number of prior convictions. Values of property stolen in separate incidents pursuant to a scheme or course of conduct within any 12-month period could be aggregated to determine the total value of property stolen. The 12-month time limit for aggregation would not apply under some of the bill's offenses, however, if the scheme or course of conduct were directed against only one person or entity.

Bad Checks

The Code prohibits the making, drawing, uttering, or delivering of a check, draft, or order, with intent to defraud, without sufficient funds in or credit with the bank or other depository to cover the payment. If the amount payable is \$50 or less, a first offense is a misdemeanor punishable by up to 93 days' imprisonment and/or a maximum fine of \$100; a second offense, charged as a second offense, is a misdemeanor punishable by up to six months' imprisonment and/or a maximum fine of \$250; a third offense, charged as a third offense, is a misdemeanor punishable by up to one year's imprisonment and/or a maximum fine of \$500; and a fourth or subsequent offense, charged as a fourth or subsequent offense, is a felony punishable by up to 13 months' imprisonment and/or a maximum fine of \$500. If the amount payable is more than \$50, but less than \$200, a first or second offense is a misdemeanor punishable by up to one year's imprisonment and/or a maximum fine of \$500, and third or subsequent offense, charged as a third or subsequent offense, is a felony punishable by up to 13 months' imprisonment and/or a maximum fine of \$500. If the amount payable is \$200 or more, the offense is a felony punishable by up to 13 months' imprisonment and/or a maximum fine of \$500.

Under the bill, if the amount payable were less than \$100, a first offense would be a misdemeanor punishable by up to 93 days' imprisonment and/or a maximum fine of \$500; an offense following one or more prior convictions would be a misdemeanor punishable by up to one year's imprisonment and/or a maximum fine of \$1,000. If the amount payable were \$100 or more, but less than \$500, a first or second offense would be a misdemeanor punishable by up to one year's imprisonment, and/or a maximum fine of \$1,000 or three times the amount payable, whichever was greater. An offense following two or more prior convictions would be a felony punishable by up to two years' imprisonment and/or a maximum fine of \$2,000. For purposes of the felony offense, a "prior

conviction” would not include a misdemeanor in which the amount payable was less than \$100. If the amount payable were \$500 or more, the offense would be a felony punishable by up to two years’ imprisonment and/or a maximum fine of \$2,000 or three times the amount payable, whichever was greater.

Larceny Offenses

The offense would be a felony punishable by up to 10 years’ imprisonment and/or a maximum fine of \$15,00 or three times the value, whichever was greater, if the value were \$20,000 or more or if the value were \$1,000 or more, but less than \$20,000, and the person had two or more prior convictions. The offense would be a felony punishable by up to five years and/or \$10,000 or three times the value, whichever was greater, if the value were \$1,000 or more, but less than \$20,000 or if the value were \$200 or more, but less than \$1,000, and the person had one or more prior convictions. For purposes of the felony offenses, a “prior conviction” would not include a misdemeanor violation for which the maximum term of imprisonment was not more than 93 days or an offense for which the maximum term, after enhancement by prior convictions, was not more than one year.

The offense would be a misdemeanor punishable by up to one year and/or \$2,000 or three times the value, whichever was greater, if the value were \$200 or more, but less than \$1,000, or if the value were less than \$200 and the person had one or more prior convictions. The offense would be a misdemeanor punishable by up to 93 days’ imprisonment and/or a maximum fine of \$500 or three times the value, whichever was greater, if the value were less than \$200.

The offenses to which the bill would apply are: malicious burning of personal property; placing a combustible or explosive material or device near a building with intent to burn; fraudulent use of a financial transaction device; various embezzlement offenses; and securing land, personal property, or any thing of value by false pretenses, with intent to defraud or cheat.

The current felony threshold for the burning offenses is \$50. (The Code does not specify a penalty.)

Currently, the felony threshold for knowingly using a canceled or revoked financial transaction device to obtain goods, property, services, or anything of value, with intent to defraud, is \$100; the felony

offense is punishable by up to one year’s imprisonment and/or a maximum fine of \$1,000. The current threshold for knowingly using a financial transaction device, with intent to defraud, to withdraw or transfer funds from a deposit account in violation of contractual limitations imposed on the amount or frequency of withdrawals or transfers, or in excess of the funds on deposit in the account is \$500. (The Code does not specify a penalty.)

For embezzlement by an agent, servant or employee, or trustee, bailee, or custodian of another or of any partnership, voluntary association, public or private corporation, the State, or any political subdivision of the State, the current felony threshold is \$100; the felony offense is punishable by up to 10 years’ imprisonment and/or a maximum fine of \$5,000. For embezzlement, fraudulent removal, concealment or disposal of any personal property held subject to any chattel mortgage, lease, or unfulfilled contract to purchase, with intent to injure or defraud, the current felony threshold is \$100; the felony is punishable by up to two years’ imprisonment or a maximum fine of \$1,000. For embezzling or fraudulently disposing of or converting jointly owned property for one party’s use without the consent of the other part owner, the current felony threshold is \$100; the felony offense is punishable by up to 10 years’ imprisonment and/or a maximum fine of \$5,000.

For securing land, personal property, or use of any valuable thing, with intent to defraud or cheat, by color of any false token or writing, bogus check, printed or engraved instrument, spurious coin, or any other false pretense, the current felony threshold is \$100; the felony offense is punishable by up to 10 years’ imprisonment and/or a maximum fine of \$5,000.

The bill also would revise the current graduated penalties for theft of telecommunications services to make those penalties consistent with the bill’s proposed larceny penalties.

Enhanced Sentences

If a prosecuting attorney intended to seek an enhanced sentence under the bill based on the defendant’s having one or more prior convictions, the prosecuting attorney would have to include on the complaint and information a statement listing the prior conviction or convictions. The existence of a prior conviction would have to be determined by the court, without a jury, at sentencing or at a

separate hearing for that purpose before sentencing, and could be established by any evidence relevant for that purpose, including, but not limited to, one or more of the following:

- A copy of the judgment of conviction.
- A transcript of a prior trial, plea-taking, or sentencing.
- Information contained in a presentence report.
- The defendant's statement.

House Bill 4446 (S-1)

Bad Checks

Under the RJA, if the maker of a bad check fails to make payment within 30 days after receiving a written demand for payment, he or she is liable for damages of double the amount owed. Damages cannot be less than \$50 or more than \$500, but if the amount of the check is over \$500, the maker is liable for the amount of the check.

Under the bill, the maker of a bad check would have to pay either of the following, in cash, to the payee or a designated agent of the payee, after the mailing of a written demand for payment:

- The full amount of the dishonored check, draft, or order, plus a processing fee of \$25, paid within four days after the date of the mailing of the written demand.
- The full amount of the dishonored check, draft, or order, plus a processing fee of \$35, paid within 30 days after the date of the mailing of the written demand.

A maker of a bad check who failed to make either of those payments and who was found responsible for payment in a civil action would be liable to the payee for all of the following:

- The full amount of the check, draft, or order.
- Civil damages of two times the amount of the dishonored check, draft, or order or \$100, whichever was greater.
- Costs of \$250.

Those additional damages would not apply, however, if, before the trial of an action, the maker paid to the payee or a designated agent, in cash, the total of the bad check, a \$35 processing fee, and reasonable costs, not exceeding \$250, as agreed to by the parties.

Retail Fraud

Currently, a person who commits retail fraud is liable to the victim merchant for the full retail price of unrecovered property or recovered property not in salable condition, and a civil penalty of 10 times the retail price of the property, but not less than \$40 or more than \$100. The bill would change those limits to not less than \$75 or more than \$200. In addition, a person who commits retail fraud and fails to comply with a written demand for payment of the full retail price plus the penalty is liable for the full retail price, unless the property is recovered in salable condition, plus a civil penalty of \$200 and reasonable costs up to \$50. Under the bill, the offender would be liable for 10 times the retail price, but not less than \$75 or more than \$200, and costs, including reasonable attorney fees.

MCL 750.356 et al. (H.B. 4444)
750.74 et al. (H.B. 4445)
600.2952 & 600.2953 (H.B. 4446)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bills would update and standardize criminal sanctions for theft and improve civil remedies for victims of retail fraud and bad checks. By increasing the dollar amount of the misdemeanor/felony threshold for various larceny offenses, the bills would address the changes that have occurred in the prosecution of those offenses due to normal inflationary increases over the last 39 years. If this measure were to be taken, however, then merchants, who are victimized by shoplifters and bad check passers, would need improvements in civil remedy procedures. The bills would accomplish these dual goals.

With regard to criminal prosecutions, the bills would raise the felony threshold and institute a four-tier penalty structure that would offer stiffer penalties for the most egregious offenses, and allow strong misdemeanor penalties for some offenses that currently may be prosecuted as felonies. Also, by making even the lesser misdemeanor offenses 93-day misdemeanors, the bills would ensure that those offenders were fingerprinted and their criminal records maintained. The bills thus would enable repeat violators to be more easily identified. In addition, House Bill 4446 (S-1) would allow victims of bad check and retail fraud offenses to collect additional amounts when they pursued civil remedies, thereby discouraging potential offenders.

Opposing Argument

Previous proposals in earlier legislative sessions included a section of the Penal Code that prohibits the theft of utility service. The felony threshold for this offense should be increased along with the other larceny offenses, and the bills' four-tiered penalty structure should be implemented for the utility service violation. One of the main aims of the legislation is to provide a consistent and reasonable penalty structure for larceny offenses. To the extent that the utility service offense is excluded from the bills, this aim is thwarted.

Response: The utility offense already carries a threshold of \$500, which is more reasonable than the felony thresholds for the offenses included in the bills. Utility companies reportedly have expressed a concern that raising the threshold to \$1,000 actually could encourage the theft of service up to that amount.

Legislative Analyst: P. Affholter

FISCAL IMPACT

House Bill 4444 (S-1)

The bill would have an indeterminate fiscal impact on the State and local government for the costs of incarceration of offenders and receipt of fine revenue.

The bill would create threshold tests including dollar value of property and the prior record of the offender to determine the maximum prison term and fine level for crimes such as larceny, malicious destruction, retail fraud, and receiving stolen property. Under current law, most of these crimes carry a four- or five-year maximum sentence and minimal fine levels.

In 1996, the Department of Corrections (DOC) had 1,819 offenders in custody for violations of the sections of law being amended by the bill. No aggregate data are available, however, on the dollar value of the property that led to each commitment. In general, half of the offenders have minimum sentences of one- to two-years, and half have three- to four-year minimum sentences. Under current practice (the Tanner Rule), 3.5 years would be the longest minimum sentence a judge could prescribe. If one assumed that the offenders with shorter minimum sentences represent convictions for small dollar value crimes, about half of the offenders currently incarcerated could have qualified for shorter prisoner terms or community placement under the proposed bill. To the extent that the offenders with longer minimum

sentences have convictions for larger dollar value crimes, maximum sentencing for these offenders would remain constant or increase.

For example, in 1996, there were 512 prisoners incarcerated for receiving stolen property, of whom 51% were serving one- or two-year minimum sentences, and 13% were serving four-year minimum sentences. Assuming that pursuant to the bill, the one- or two-year minimum sentence offenders would not be sentenced to prison at all and that they otherwise would serve the full minimum term (under current law), the State would realize cost savings, given an average cost of incarceration of \$18,000 annually, of \$8.2 million. Assuming that the offenders with four-year minimum sentences instead received a minimum sentence of 7.5 years (because of the proposed increased maximum for high dollar value crimes in the bill), the State would incur additional costs of \$4.3 million. The net cost savings to the State under these assumptions, would be \$3.9 million. Local government, however, would assume responsibility for costs for offenders who were sentenced locally.

The increase in fines proposed in the bill also would provide judges with other nonprison sentencing options that could reduce prison commitments or increase fine revenues.

House Bill 4445 (S-1)

The bill would create threshold tests including the dollar value of the transaction and the prior record of the offender to determine the maximum prison term and fine level for crimes such as writing checks with insufficient funds and embezzlement. Under current law, these crimes carry 10-year, four-year, or two-year maximum sentences and minimal fine levels.

In 1996, the DOC had 13 offenders in custody for writing checks without sufficient funds, which has a two-year maximum sentence, or for a financial transaction with intent to defraud or theft of communication services, both of which have a four-year maximum sentence. The DOC had 118 offenders serving for embezzlement by an agent, servant, employee, trustee, bailee, or custodian and 159 offenders serving for false pretense with intent to defraud, both of which have a 10-year maximum. Apparently no offenders were serving during 1996 for the crimes in other sections amended by this bill. No aggregate data are available on the dollar value of the transaction that led to each commitment.

Looking at the two crimes for which the majority of offenders are serving, over half are serving minimum sentences of four years or less. Under current practice (Tanner Rule), 7.5 years would be the longest minimum sentence a judge could prescribe. Assuming that prisoners with shorter minimum sentences have convictions for small dollar value crimes, over half the offenders may have qualified for shorter prison terms or community placement under the proposed bill, which would provide cost savings for the State. To that extent that this assumption is unsubstantiated, the fiscal impact of the bill on State and local government is indeterminate.

The increase in fines proposed in the bill also would provide judges with other nonprison sentencing options that could reduce prison commitments or increase fine revenues.

House Bill 4446 (S-1)

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: K. Firestone

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.