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Senate Bill 152 (as enacted)
Sponsor: Senator Tonya Schuitmaker
Senate Committee: Judiciary
House Committee: Judiciary

PUBLIC ACT 479 of 2012

Date Completed: 6-24-13

RATIONALE

Many police departments around the country, including some in Michigan, make electronic recordings of custodial interrogations. It is widely accepted that this practice can protect against false confessions, deter police misconduct, prevent false claims of abuse or coercion, and help law enforcement officers, judges, and juries assess the truthfulness of a confession. In 2005, the Representative Assembly of the State Bar of Michigan adopted a resolution stating its support in principle for the use of video and audio recording "as the best method of securing a precise and accurate record of custodial interrogations". The resolution also called for the appointment of a State Bar Custodial Interrogation Recording Task Force. In May 2006, the 16-member task force was appointed, with members representing the criminal defense, prosecution, judicial, and law enforcement communities. In order to examine the effects of recording interrogations, the task force began a pilot project in Eaton, Jackson, and Washtenaw Counties several years ago, and developed protocol for the audiovisual recording of custodial interrogations in those counties. The pilot project was a considered a success, according to a representative of the task force, and was well received by the police departments involved. In order to promote transparency in the criminal justice process, many people believe that Michigan law should mandate the recording of custodial interrogations for certain offenses.

CONTENT

The bill amended the Code of Criminal Procedure to do the following:

- **Require a law enforcement official to make an audiovisual recording of an entire interrogation of an individual in custodial detention for questioning of his or her involvement in a major felony.**
- **Require the recording to include the individual's notification of Miranda rights.**
- **Allow an individual to object to having his or her interrogation recorded, and require the objection to be documented.**
- **Allow a major felony recording to be made without the consent or knowledge, or despite the objection, of the person being interrogated.**
- **Require a copy of a recorded statement to be provided to the defense upon request.**
- **Exempt a recorded statement from public disclosure before conviction or acquittal.**
- **Specify that failure to record a statement will not prevent a law enforcement officer from testifying in court about the statement.**
- **Require a jury to be instructed about the recording requirement and allow a jury to consider the absence of a recording, unless the individual objected and the objection was recorded.**
- **Specify that failure to comply with the bill will not create a civil cause of action.**
- **Require the Michigan Commission on Law Enforcement Standards (MCOLES) to establish quality standards and conduct cost assessments.**

-- Require the Legislature to appropriate funds to MCOLES for distribution to law enforcement agencies for the purchase of audiovisual recording equipment.

The bill took effect on March 28, 2013.

Definitions

The bill defines "interrogation" as questioning in a criminal investigation that may elicit a self-incriminating response from an individual. The term includes a law enforcement official's words or actions that the official should know are reasonably likely to elicit a self-incriminating response.

"Custodial detention" means an individual's being in a place of detention because a law enforcement official has told the individual that he or she is under arrest or because the individual, under the totality of the circumstances, reasonably could believe that he or she is under a law enforcement official's control, and is not free to leave. "Place of detention" means a police station, correctional facility, or prisoner holding facility, or another governmental facility where an individual may be held in connection with a criminal charge that has been or may be filed against the individual.

"Major felony" means a felony punishable by imprisonment for life, for life or any term of years, or for a statutory maximum of 20 years or more, or third-degree criminal sexual conduct (which is punishable by up to 15 years' imprisonment).

"Law enforcement official" means any of the following:

- A police officer of this State or a political subdivision of the State as defined in the Commission on Law Enforcement Standards Act.
- A county sheriff or his or her deputy.
- A prosecuting attorney.
- A public safety officer of a college or university.
- A conservation officer of the Department of Natural Resources.
- An individual acting under the direction of one of those law enforcement officials.

Recording Requirement

Under the bill, a law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony must make a time-stamped, audiovisual recording of the entire interrogation. A major felony recording must include the law enforcement official's notification to the individual of his or her Miranda rights.

An individual who believes that his or her interrogation is being recorded may object to having it recorded. The objection must be documented either by the individual's objection stated on the recording or by his or her signature on a document stating the objection. If the individual refuses to document his or her objection by either recording or signature, a law enforcement official must document the objection by a recording or signed document. A major felony recording may be made without the consent or knowledge of, or despite the objection of, the individual being interrogated.

A major felony recording must be produced using equipment and procedures that are designed to prevent alteration of the recording's audio or visual record.

Availability of Recording

The bill requires the prosecutor, pursuant to any request of discovery, to provide a copy of a recorded statement to the defense counsel of record or to the defendant, if he or she is not represented by counsel. The court may not require the police or the prosecutor to prepare or pay for a transcript of a recorded statement. A court or the defense may have a transcript prepared at its own expense.

Before conviction or acquittal, a statement recorded under the bill will be exempt from disclosure under the Freedom of Information Act.

Failure to Record

Any failure to record a statement as required under the bill or to preserve a recorded statement will not prevent any law enforcement officer present when the statement was taken from testifying in court

as to the circumstances and content of the individual's statement if the court determines that the statement otherwise is admissible.

Unless the individual objected to having the interrogation recorded and the objection was properly documented, however, the jury must be instructed that it is the law of this State to record statements of an individual in custodial detention who is under interrogation for a major felony and that the jury may consider the absence of a recording in evaluating the evidence relating to the individual's statement.

Failure to comply with the bill's recording requirements will not create a civil cause of action against a department or individual. The bill states that the requirement to produce a major felony recording is a directive to departments and law enforcement officials, and not a right conferred on an individual who is interrogated.

Standards; Funding; Implementation

The Commission on Law Enforcement Standards must set quality standards for the audiovisual recording of statements under the bill, as well as standards for geographic accessibility of equipment in the State. The Commission also must conduct an assessment of the initial cost necessary for law enforcement agencies to purchase audiovisual recording equipment. The first assessment must be conducted within 120 days after the bill's effective date. The Commission must conduct subsequent assessments regarding the necessary costs of purchasing, upgrading, or replacing the equipment every two years.

The Commission must recommend to the Legislature each year an annual appropriation amount to be determined by the Commission's assessment. Legislature annually must appropriate funds to MCOLES for distribution to law enforcement agencies throughout the State to allow them to purchase audiovisual recording equipment for the purposes of the bill. Any funds appropriated for this purpose must be in addition to the appropriation provided to MCOLES and the Department of State Police in the prior fiscal year, and may not be appropriated from the Michigan Justice

Training Fund or the Department of State Police budget.

Law enforcement agencies must implement the bill's requirements within 120 days after receiving these funds from MCOLES or acquiring access to audiovisual recording equipment as directed by the standards set forth by the Commission.

A law enforcement agency must comply with the bill within 60 days after the date MCOLES adopts the equipment standards, however, if the agency has audiovisual recording equipment that complies with the standards on that date, or within 60 days after the date the agency subsequently obtains the equipment.

The requirement to record custodial interrogations will apply if a law enforcement agency has audiovisual recording equipment that is operational or accessible as provided above, or upon the expiration of the relevant time periods, whichever occurs first.

MCL 763.7-763.11

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 practice of electronically recording custodial interrogations is a powerful fact-finding tool that helps the criminal justice system reach the truth and protects against wrongful convictions. There are a number of reasons that a custodial interrogation can produce a false confession and otherwise lead to a wrongful conviction. Custodial interrogations by nature take place in isolation, and contradictory accounts of what transpired can result. Participants' perceptions can differ, recollections can fade before trial, and statements can have uncertain meanings. If interrogators are taking notes, they are less able to engage in active listening or observe a suspect's demeanor. An audiovisual recording can eliminate or alleviate these factors, providing a reliable, impartial account of the session and facilitating more effective questioning.

Recording interrogations also can deter police misconduct, as well as reduce the

number and length of motions to suppress confessions. The reduced time spent on suppression proceedings allows law enforcement officers to focus on other activities and lessens overtime costs associated with hearings. Fewer claims of police misconduct also can avoid time-consuming investigations and litigation, saving resources of both law enforcement agencies and courts.

The recording of a custodial interrogation also can preserve strong evidence to convict the guilty, and help prosecutors assess a case, prepare for trial, or engage in plea bargaining.

In addition, recording interrogations helps ensure that suspects receive the benefit of their Miranda rights, and provides independent evidence if police conduct was coercive or a statement was not voluntary. A recording also can be used to develop a defense or establish support for a false confession claim.

In a number of other states, recording custodial interrogations is mandated by statute, rule, or court ruling. In Michigan, however, the Court of Appeals has held that recording custodial interrogations is not constitutionally required (*People v Fike*, 228 Mich App 178).

The three-county pilot project conducted by the State Bar task force demonstrated that recording custodial interrogations can provide transparency in the criminal justice system without interfering with the way cases are processed. Senate Bill 152 reflects the experience gathered from the pilot project, and represents the best efforts of judges, prosecutors, the defense bar, and law enforcement professionals to implement the recording of custodial interrogations.

Response: The cost of purchasing, installing, and maintaining the necessary audiovisual equipment is presently unknown. Although the bill requires MCOLES to recommend an appropriation amount, requires the Legislature to make annual appropriations to the Commission for distribution to law enforcement agencies, and prohibits the appropriation of money from the Justice Training Fund or the State Police budget, the bill does not actually make an appropriation and does not identify a funding source.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill will have an indeterminate, but potentially substantial, fiscal impact on the State. The Michigan Commission on Law Enforcement Standards will be required to establish standards for audiovisual recording and to do a cost assessment of implementing the bill's provisions. The bill also requires MCOLES to recommend to the Legislature an annual appropriation of necessary funds for distribution to agencies, to enable them to purchase recommended equipment. The bill requires the Legislature annually to appropriate these funds. To date, MCOLES has not offered an estimate of the costs. Among the major felonies that will require a recorded interrogation with an arrested individual, the Michigan uniform crime report reflects that in 2009 there were 223 arrests for homicide, 234 for rape, and 206 for kidnapping. Currently, several law enforcement agencies already possess the technical means to fulfill the requirements of the bill; many others do not.

Fiscal Analyst: Bruce Baker

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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.