SUBJECT: Prosecution for illegally carrying a weapon

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 9 ayes — Place, Talton, Dunnam, Farrar, Galloway, Hinojosa, Keel, Nixon, A. Reyna

0 nays

WITNESSES: For — James D. Nicholson, Texas State Rifle Association; Lenuel E. Ferguson

Against — None

BACKGROUND: Penal Code sec. 46.02 prohibits carrying a handgun, illegal knife or club on or about one's person. The law creates defenses to prosecution for persons who are:

- carrying a concealed handgun and a valid license to do so;
- at home or on other premises under their control;
- traveling;
- hunting, fishing or engaged in a sporting activity or directly en route between the activity and home;
- security officers performing their duties who meet other specified qualifications and security officers who are providing personal protection with a state authorization;
- prison guards, members of the armed forces and state military personnel; or
- holders of an alcoholic beverage permit or license, or an employee of a licensee or permit holder, who are supervising their premises

Other defenses to prosecution allow noncommissioned security guards to carry clubs at higher education institutions if they meet certain training requirements and security officers employed by the adjutant general to carry a club or firearm under specified circumstances.

Sec. 46.03 lists *places* where carrying firearms, illegal knifes, clubs or certain other weapons are prohibited. This section contains a defense to

prosecution for peace officers, prison guards or members of the armed forces or national guard performing official duties.

Under Penal Code sec. 46.15, the provisions that prohibit persons from carrying weapons and listing places where weapons are prohibited do not apply to peace officers, regardless of whether the officer is performing official duties.

DIGEST:

CSHB 311 would eliminate the statutory *defenses to prosecution* for certain persons carrying a handgun, illegal knife or club. The Penal Code instead would specify that the prohibitions on carrying these weapons *would not apply to* that same set of persons and situations.

CSHB 311 would make one change to the set involving persons who are hunting, fishing or doing other sporting activities or are "*directly* en route" between those activities and their home. The bill would remove the word "directly" from the description so that the prohibition against carrying an illegal weapon would not apply to persons "en route" to a sporting activity.

The bill also would delete peace officers from the list of persons with defenses to prosecution for carrying weapons at certain places.

CSHB 311 would take immediate effect if finally approved by a two-thirds record of the membership in each house.

SUPPORTERS SAY:

CSHB 311 would make no substantive change in the statute that prohibits the carrying of weapons. Instead, it would simply clarify that the prohibitions against carrying weapons would not apply to persons listed in Penal Code sec. 46.02. This is the language that was in the Penal Code before the 1993 revisions. In 1995 the 74th Legislature used this same terminology in sec. 46.15 to specify that the prohibitions against carrying weapons do not apply to peace officers. CSHB 311 would not alter the list of those who can legally carry weapons and would make no changes in the law governing the licensed carrying of concealed handguns.

CSHB 311 would standardize in plain English whom the law covers. Reorganizing the statute would be especially helpful to police officers, security guards, game wardens, the public and others who are used to the

term “does not apply” and understand its meaning. This could help prevent erroneous arrests of persons who are legally carrying a weapon and avoid making them prove that they were not breaking the law.

The bill would make no practical difference in the prosecution or defense of persons charged with illegally carrying a weapon. Under Penal Code sec. 2.03, a ground of defense that is not plainly labeled as such still has the procedural and evidentiary consequences of a defense to prosecution. Although the term “does not apply” is undefined in the code, its meaning is clear, and legally any of the listed exemptions would still be considered a defense, the same as current law. If a person being tried for the offense of illegally carrying a weapon was legally able to raise one of the defenses listed in the Penal Code, prosecutors would continue to have to prove beyond a reasonable doubt that the defense was incorrect.

The bill would not change the right of peace officers to carry weapons by removing them from the list of persons with a defense to prosecution for carrying weapons in certain *places.* Another section of the statute clearly specifies that the prohibitions against carrying weapons in certain places do not apply to peace officers.

Removing the word “directly” from the provision allowing persons to carry weapons “en route” between a sporting activity and their homes would allow people the flexibility to vary their routes for such purposes as stopping at a store on the way to a hunting range or taking a more scenic route that is technically not “direct.” CSHB 311 would not expand the general provision that the person be “en route” between home and the activity.

OPPONENTS SAY:

CSHB 311 would defeat its own purpose by making less clear the statutory exemptions from the prohibition against carrying weapons. When the Penal Code was revised in 1993 the defenses to prosecution for illegally carrying a weapon were purposefully labeled as *defenses*, a term defined in Penal Code sec. 2.03. The term “does not apply,” however, is not defined, so its meaning must be inferred. In law it is always better to use standard, clearly defined terms, such as “a defense to prosecution,” instead of one that is not clearly defined. Prosecutors, defense attorneys and the public all benefit when the same terms are used consistently throughout the Penal Code.

Removing the word “directly” from the provision that allows persons to carry weapons “en route” between a sporting activity and their homes is an unwise expansion of the places to which weapons can be carried. Persons caught carrying a weapon could claim almost any activity was “en route” to a sporting activity.

OTHER OPPONENTS SAY:

There is a question as to whether the term “does not apply” would be interpreted as a defense. Instead, a court could decide that by enacting CSHB 311 the Legislature intended to change the meaning of the statute that currently provides a defense. Instead of being interpreted as a defense, the phrase could be interpreted as an “exception” to prosecution. This carries slightly different ramifications, requiring prosecutors to specify in the formal charge that the person does not fall under the exceptions.

NOTES:

The committee substitute removed the word “directly” in the provision allowing persons to carry weapons if they are “en route” between their home and a sporting activity.