

SUBJECT: Requiring corroboration of testimony of undercover peace officer

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 8 ayes — Hinojosa, Dunnam, Keel, Garcia, Green, Kitchen, Martinez  
Fischer, Shields

1 nay — Talton

0 absent

WITNESSES: For — Jeff Frazier, Scott Henson, Van Williamson, American Civil Liberties Union (ACLU) of Texas; Bill Glenn, National Association for the Advancement of Colored People (NAACP) of Texas; William Harrell, ACLU of Texas, NAACP of Texas, National Council of La Raza, League of United Latin American Citizens (LULAC); Helen Boone; Freddie W. Brookins, Sr.; Gary O. Gardner; Wanda J. Williams; Thomas Charles Workman; Bradley Wyatt, on behalf of six defendants in Hearne; *Registered but did not testify*: Keith S. Hampton, Texas Criminal Defense Lawyers Association; Eva Owens, Texas Criminal Justice Reform Coalition; Vincent Ramos, Texas LULAC; Laura McNeal; Michelle Brantley for Michael Wells

Against — Margo Frasier, Sheriffs' Association of Texas; Hans Marticheck, Houston Police Officers' Union; John Gottlob, Texas Municipal Police Association; Chuck Noll, Harris County District Attorney's Office; *Registered but did not testify*: Ron DeLord, Combined Law Enforcement Associations of Texas; Cris Andersen, San Antonio Police Officers' Association; Chris Kirk, Brazos County Sheriff, Sheriffs' Association of Texas; J. D. Granger, Tarrant County District Attorney's Office; Bill Elkin, Houston Police Retired Officers' Association; Livia Liu, Dallas County District Attorney's Office; Jeff Pynes

On — *Registered but did not testify*: Dennis Johnston, Texas Parks and Wildlife Department

BACKGROUND: In July of 1999, police arrested 43 people on drug charges in the Panhandle town of Tulia in Swisher County. Law enforcement ultimately obtained

indictments against 46 people, 39 of whom were African-American. Tulia is a town of 4,700 people, with an African-American population estimated between 250 and 350. Approximately 12 percent of the African-Americans in Tulia were arrested and indicted on drug charges during the summer of 1999. Eleven went to trial. Two had the charges against them dismissed, and the rest received sentences ranging from two years' probation to 90 years in prison. Twenty-six others pled guilty and received fines, probationary sentences, or jail sentences ranging from three days in county jail to 18 years in prison.

All of the Tulia indictments were based on the testimony of one undercover law enforcement officer who reportedly did not have evidence in most cases to corroborate his testimony. Recent newspaper reports have cast doubt on the undercover officer's credibility, citing claims that he was charged with class B misdemeanors for official misconduct and theft, and that a former law enforcement employer wrote a letter to the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) stating that he should not be in the law enforcement field.

The American Civil Liberties Union (ACLU) filed suit in September 2000 against the officer, the sheriff, the district attorney, and the county, alleging civil rights violations, conspiracy, and discrimination. The U.S. Department of Justice opened an investigation in October 2000 into whether civil rights were violated in the Tulia drug bust after the National Association for the Advancement of Colored People (NAACP) and the ACLU filed a complaint.

**DIGEST:**

CSHB 2351 would add art. 38.141 to the Code of Criminal Procedure to require corroborating evidence to support the testimony of undercover peace officers in drug cases. A defendant could not be convicted of an offense under the Texas Controlled Substances Act on the testimony of an undercover peace officer or a person working undercover on behalf of a law enforcement agency unless the testimony were corroborated by other evidence that tended to connect the defendant with the offense committed.

Corroboration could include the testimony of witnesses who were undercover peace officers or persons working undercover on behalf of law enforcement, or the production of evidence of paraphernalia, fingerprints, audio or video recordings, or an effort to evade arrest. Corroboration would

not be sufficient if it only showed that an offense had been committed.

The bill would not require corroboration of the testimony of an undercover peace officer who:

- ! had been employed as a full-time peace officer for at least two years before the operation leading to the arrest of the defendant;
- ! held a peace officer's license that had not been suspended or revoked at the time of the operation; and
- ! who, during the operation, complied with guidelines of the officer's agency or TCLEOSE that were designed to ensure the reliability of identifying the correct defendant.

The requirement that an undercover peace officer be employed as a full-time peace officer for at least two years would not apply to officers in undercover operations at a school or institution of higher learning or that primarily involved those students.

"School" would mean a public or private elementary or secondary school. "Institution of higher education" would mean any public or private technical institute, junior college, senior college or university, medical or dental unit, or other agency of higher education as defined by the Education Code.

CSHB 2351 would take effect on September 1, 2001.

**SUPPORTERS  
SAY:**

CSHB 2351 would ensure that rogue police officers never again could convict innocent people solely on the basis of their testimony. Most of the people involved in the Tulia drug bust were arrested and convicted without any evidence other than the testimony of an undercover officer who turned out to be someone with a shady past. As a result of his testimony, dozens of possibly innocent people are sitting in prison. Some were not even arrested until 18 months after the alleged drug buys. Most decided to take a plea bargain after seeing the outrageous sentences being handed down by all-white juries. Had this bill been in effect, these people could not have been convicted unless the officer could show evidence that they actually sold drugs.

This bill would protect defendants from being convicted on the basis of uncorroborated testimony from police informants — people who have a motive to lie. In Hearne, a small town of 5,000 people just northwest of Bryan-College Station, law enforcement told a convicted car thief that if he bought a first-degree felony amount of cocaine from 20 people on a list he would receive probation for his latest crime. Those 20 people were indicted based on the informant's testimony, despite the fact that none of the pre-marked buy money was ever recovered from any of the defendants.

This bill would not impose an insurmountable standard, nor would it reduce enforcement of drug laws. In normal undercover situations, there is some corroboration of an officer's testimony, whether it be a recording of the transaction or another officer witnessing the buy. If no evidence were required to bring someone to trial, then every Texan would be in danger.

CSHB 2351 would not be an insult to peace officers. It would not affect experienced officers who had a good track record and who followed procedure. Instead, it would help deter rogue activity by requiring that inexperienced officers, who might be more prone to errors such as identifying the wrong defendant, be checked by the legal system.

OPPONENTS  
SAY:

CSHB 2351 would suggest that police officers are untrustworthy because of the actions of one rogue cop. This bill would say that an officer's testimony was no more reliable than that of an accomplice to a crime or someone who was acting as an undercover informant to reduce his sentence — persons who had a vested interest in skewing the facts of a case to their own advantage. This bill would not accomplish its objective, but rather would be a slap in the face to police across Texas. It would send a terrible message to peace officers by saying that they were trustworthy when wearing their uniform but that their testimony was no better than a criminal's when the uniform was off.

Not only would this bill be inconsistent with current Texas law regarding corroboration of testimony, it would make Texas the only state in the country in which corroboration would be required for a police officer's testimony. Corroboration currently is required only for accomplice testimony — because these are the kind of witnesses that have the greatest incentive to lie on the

stand. Even a prison snitch with a long criminal record can testify about crimes to which he is not a party without corroboration.

This bill would decrease enforcement of drug laws. Corroboration of undercover drug buys is very difficult to obtain. Drug dealers are smart enough not to sell drugs at a prearranged location where police could stake out officers and set up video and audio recording equipment. Typically, they will have the undercover officer follow them from place to place, and then they will execute the sale not in an open lot but inside of a darkened building. Any backup officers would not be able to observe the sale going on inside. This bill would not allow a backup officer to corroborate testimony unless he or she actually saw the sale taking place or had other proof that a specific defendant bought or sold the drug. In addition, undercover officers usually cannot wear a recording device because drug dealers purchase inexpensive, keychain-sized scanning devices from auto parts stores that light up when they detect a radio frequency being transmitted. If the dealer knew the officer were wired, he either would not make the sale or he would kill or harm the officer. The only evidence an officer usually has in a drug sale is the drug he purchased and his word.

CSHB 2351 would tell jurors that peace officers were not to be trusted. If this bill were enacted, judges would be required to charge, or tell, the jury that an officer's testimony would not be adequate on its own for a conviction. The jury would not receive this charge for ordinary eyewitnesses.

CSHB 2351 would prohibit juries from doing their job effectively. In our legal system, jurors judge the credibility of witnesses and decide whether to believe their testimony. Even if a jury determined that an undercover peace officer was a credible witness and believed his testimony beyond a reasonable doubt, this bill would prohibit the jury from finding a defendant guilty without additional evidence. The law already provides protection against an officer who lies by allowing the defense to bring up evidence to impeach the officer if any exists.

If one assumes that the officer in the Tulia cases lied, then the failure in those cases belongs not only to him, but to the grand jury that indicted the cases, the district attorney that tried them, and the judge and juries that found

the defendants guilty. This bill would do nothing to address those problems, but instead singles out peace officers.

OTHER  
OPPONENTS  
SAY:

CSHB 2351 would not address the problem it proposes to address. It is rare for a law enforcement agency to allow an officer with less than two years' experience to work on an undercover drug task force. In addition, most law enforcement agencies already require corroboration of informant testimony.

NOTES:

HB 2351 as filed would have barred a conviction upon the testimony of an undercover law enforcement officer unless it were corroborated by other evidence tending to connect the defendant with each element of the offense committed. The substitute added that no exceptions for officers with more than two years' experience.

CSHB 2351 is one of a package of "Tulia bills" Rep. Hinojosa has introduced this session. Another, HB 2350, would require disclosure of reports submitted to TCLEOSE regarding officers who were fired or resigned because of substantiated incidents of excessive force or violations of the law other than traffic violations. It is set on the Local and Consent Calendar for May 5. The third, HB 2350, which relates to the admissibility of evidence tending to prove the accused is innocent, is pending in the House Criminal Jurisprudence Committee.

The companion bill, SB 1585 by Van de Putte, was reported favorably, as substituted, by the Senate Jurisprudence Committee on May 1 and was recommended for the Local and Uncontested Calendar. The Senate bill differs from CSHB 2351 in that it would not require corroborating evidence for the testimony of undercover peace officers. Rather, the bill would affect persons who were not licensed peace officers or special investigators and who were undercover on behalf of law enforcement.