

SUBJECT: Requiring corroboration of testimony of undercover peace officer

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 5 ayes — Keel, Ellis, Dunnam, Hodge, P. Moreno
2 nays — Riddle, Denny
2 absent — Pena, Talton

WITNESSES: For — Gary Bledsoe, Texas NAACP; Keith S. Hampton, Texas Criminal Defense Lawyers Association; Will Harrell, American Civil Liberties Union, League of United Latin American Citizens, and NAACP; Scott Henson, ACLU of Texas; Rev. Charles Kiker, Friends of Justice; Barbara Markham; Ana Yanez-Correa, Texas LULAC and CDI

Against — Donald L. DeBlanc and Walter Redman, Houston Police Department; Tom Gaylor, Texas Municipal Police Association; Jana McCown, Williamson County District Attorney’s Office; Sally Ring, Harris County District Attorney’s Office

On — Bethan S. Greene, Department of Public Safety

BACKGROUND: The 77th Legislature enacted HB 2351 by Hinojosa, codified in Code of Criminal Procedure, art. 38.141. It provides that a defendant may not be convicted under the Texas Controlled Substances Act on the testimony of a person who is not a licensed peace officer or a special investigator but who is acting covertly on behalf of a law enforcement agency or under the color of law enforcement, unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed. Corroboration is not sufficient if it shows only the commission of the offense.

Code of Criminal Procedure, art. 38.14 similarly provides that a person may not be convicted based solely on the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed.

The Texas Controlled Substances Act (Health and Safety Code, ch. 481) imposes penalties for the possession, delivery, and manufacture of controlled substances.

DIGEST:

CSHB 2625 would prohibit a defendant from being convicted of an offense under the Controlled Substances Act on the testimony of any person who is a party to a transaction and is acting covertly on behalf of a law enforcement agency or under the color of law enforcement, including a peace officer, unless the testimony was corroborated by other evidence tending to connect the defendant with the offense committed.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2003.

**SUPPORTERS
SAY:**

CSHB 2625 logically would extend current law to require corroboration of a peace officer's testimony in an undercover drug operation. Incidents throughout the state have cast a shadow of doubt over these proceedings, harming the integrity of the criminal justice system. The bill would protect the innocent and would prevent past injustices from repeating themselves.

Too many innocent people in Texas have been "set up" by corrupt law enforcement to deny that a problem exists. The uncorroborated testimony of one undercover law enforcement officer in the Panhandle town of Tulia led to the conviction of 38 defendants for drug trafficking, more than two dozen of whom went to prison for terms ranging from 20 to 90 years. Thirteen wrongly convicted Texans remain in prison, even though a district judge has recommended that their convictions be thrown out and the undercover officer in their cases has been discredited and indicted on felony perjury charges. In Dallas, what police thought were bricks of cocaine seized as evidence in drug cases turned out to be ground sheetrock. As a result, prosecutors dismissed 86 drug cases and released dozens of defendants. In the Denton County-Collin County Narcotics Task Force, six of 12 officers were indicted in fall 2001 for drug-running and document tampering. Charges against a dozen people later were dropped. Most of these victims of corrupt peace officers are minorities.

CSHB 2625 would not hinder law enforcement's ability to enforce drug laws. It would affect only a very small percentage of all drug cases, because usually

more evidence exists than the uncorroborated testimony of one peace officer. The threshold for corroboration would be low, and any evidence would suffice, such as an audio or visual recording, fingerprints, marked bills, or a backup officer's testimony. Peace officers usually have backup present for their own safety, and testimony of a backup officer who witnessed the transaction would be sufficient corroboration. Although the backup officer might be working in an undercover capacity, he or she would not be considered a party to the actual drug transaction and therefore could provide corroborating evidence of what he or she witnessed. An audio recording would not be required in all cases, and peace officers could continue to use their discretion about whether it was safe to wear a wire. For those concerned about drug dealers possessing detection devices, technology is available that cannot be detected.

HB 2351, enacted last session, has not cut down on the number of drug cases that are prosecuted, despite dire warnings at the time the bill was debated. In fact, the number of drug cases continues to increase. Even if the number of prosecutions did decline slightly under CSHB 2625, it would be worth it to prevent innocent people from being convicted.

CSHB 2625 would enhance the reputation of peace officers and would send a message to the public that the Legislature is dedicated to justice and accountability. Peace officers should not take it as a personal affront that the Legislature imposes a system of checks and balances to protect the innocent. Current law already requires corroboration of accomplice and undercover informant testimony, as well as peace officer testimony about a defendant's confession, and peace officers must obtain authorization from a neutral and detached magistrate before they can make an arrest. Also, the Legislature has ethics rules to ensure that members do not take advantage of their positions of power. Law enforcement officers hold similar positions of power, and juries often attach more weight to their testimony for that reason. The bill would ensure that peace officers use their power fairly, and it would ensure peace officers that they would not send innocent people to prison.

The bill would preserve state and local resources. Money spent to investigate and prosecute uncorroborated cases is wasted if the officer is discredited. Furthermore, local governments could incur civil liability if, after being set up by a police officer, innocent victims successfully sued the police department.

The current system is not sufficient to address the wrongs committed in Tulia and elsewhere. Even if an individual officer is prosecuted for perjury, or if the convictions of the wrongfully accused are overturned, the damage already has been done. Innocent people spend months, if not years, of their lives behind bars, suffering psychological trauma, physical discomfort, and sometimes serious illness as a result. Many defendants from Tulia have not yet been released. It is much better to prevent these injustices from occurring in the first place than to punish corrupt peace officers after the fact. Minorities and low-income people are particularly vulnerable to this type of abuse, and the Legislature should protect them by enacting this bill.

**OPPONENTS
SAY:**

CSHB 2625 would impair the ability of law enforcement to enforce drug laws effectively. Peace officers aggressively pursue street-level drug deals in response to an outcry from communities who have had enough. The drug problem is out of control, and undercover operations are an effective means of combating it. While other forms of corroborating evidence readily would be available in large drug busts, those forms of evidence are not always available in smaller drug cases.

Corroboration of undercover buys is very difficult to obtain. Officers often strive to audiotape the transaction through use of a wire, but it is not always possible to get a clean recording. For example, offenders often check for the presence of wires, and equipment often malfunctions. Furthermore, many drug transactions take place at nightclubs or other locations where security guards always search patrons, which prohibits law enforcement from wearing a wire. Using a wire in every case might be prohibitively expensive for some police departments. Although backup officers usually are present when a transaction takes place, it would be unclear under this bill whether their testimony would be sufficient for corroboration, because they also would be acting covertly. Other forms of corroborating evidence, such as fingerprints, would be highly unlikely in a small drug case.

Requiring peace officers to wear recording devices in order to corroborate their testimony would endanger their safety. Offenders would increase their searches for wires if this bill were enacted, and officers likely would come to harm if discovered to be working undercover. Also, drug dealers can buy inexpensive devices that inform them when they detect a radio frequency being transmitted. While undercover officers are not searched often under

current law, that would change as drug dealers became aware of the need for corroborating evidence in these cases.

CSHB 2625 would send a message to law enforcement and to the public that peace officers are not trustworthy. This bill would suggest that an officer's testimony was no more reliable than that of an accomplice to a crime or of someone who acted as an undercover informant to reduce his or her sentence. No other groups require corroboration, including young children, the mentally ill, or a convicted felon who witnesses a crime. Also, the bill would send the confusing message to peace officers that they are credible when wearing their uniforms but that their testimony was no better than a criminal's when the uniform was off.

The bill would be inconsistent with federal law with and the laws of other states that do not impose a strict corroboration requirement on undercover narcotics officers.

The bill unreasonably would punish all peace officers because of the actions of a few rogue cops. The current system contains sufficient tools to punish such officers through perjury or aggravated perjury charges or by taking away their peace officer licenses. A better way to address the problem would be to examine the selection criteria, training, and review processes used for law enforcement and to strengthen them as needed.

NOTES:

As filed, HB 2625 would have prohibited a conviction under the Controlled Substance Act based solely on the uncorroborated testimony of a person acting covertly on behalf of law enforcement or under the color of law enforcement. It would not have limited the restriction to a person who was a party to a transaction.

The companion bill, SB 515 by Hinojosa, was considered in a public hearing by the Senate Criminal Justice Committee on March 18 and left pending.