SUBJECT: Requiring probation for possession of certain controlled substances

COMMITTEE: Corrections — committee substitute recommended

VOTE: 4 ayes — Allen, Stick, Alonzo, Farrar

0 nays

3 absent — Hopson, Haggerty, Mabry

WITNESSES: *(On original version:)*
For — Ann del Llano, ACLU of Texas; Stuart M. DeLuca, Texas Inmaet Families Association; Bradley Smith; Emmitt Solomon, Restorative Justice Ministries Network; David Valentine, First Baptist Church of Huntsville; *(Registered, but did not testify:)* Michele Deitch; Dee Simpson, American Federation of State, County, and Municipal Employees

Against — Margo Frasier, Sheriffs' Association of Texas and Travis County Sheriff's Office; Chuck Noll, Harris County District Attorney's Office; Boyd L. Richie

On — Judge John Creuzot; Shannon Edmonds, Texas District and County Attorneys Association; Donald Lee, Texas Conference of Urban Counties; *(Registered, but did not testify:)* Jon Weizenbaum, Texas Commission on Alcohol and Drug Abuse

BACKGROUND: Under Penal Code, sec. 12.35, a person found guilty of a state jail felony must be confined in a state jail for 180 days to two years and may be fined as much as $10,000. However, a person found guilty of a state jail felony must be punished for a third-degree felony (two to 10 years in prison and an optional fine of up to $10,000) if it is shown at trial that the defendant used a deadly weapon while committing the offense or previously was convicted of an offense under Code of Criminal Procedure, art. 42.12, sec. 3(g), including murder, indecency with a child, aggravated kidnaping, aggravated sexual assault, or aggravated robbery; of any felony during the commission of which the offender used a deadly weapon; or of certain aggravated drug offenses committed within a drug-free zone or with the use of a child.

The Texas Controlled Substances Act (Health and Safety Code, ch. 481) contains criminal enforcement provisions and penalty groups relating to the possession, manufacture, and delivery of controlled substances. It is a state jail felony to knowingly or intentionally possess:

- less than one gram of a controlled substance in Penalty Group 1, which includes cocaine, heroin, and methamphetamine;
- fewer than 20 abuse units of a controlled substance in Penalty Group 1-A, which includes LSD;
- less than one gram of a controlled substance in Penalty Group 2, which includes mushrooms, amphetamines, ecstasy, hallucinogens, and hashish;
- a fraudulent prescription form or fraudulent prescription for a controlled substance in Schedule II or III, including controlled substances that have potential for abuse and may lead to psychological or physical dependence but that also have a currently accepted medical use in the United States; or
- between four ounces and five pounds of marihuana.

Code of Criminal Procedure, art. 42.12 governs community supervision. Upon conviction of a state jail felony that is not enhanced, the judge may place the defendant on community supervision and may suspend, in whole or in part, the imposition of any fine imposed on conviction. The minimum period of community supervision for a state jail felony is two years, and the maximum is five years, except that the judge may extend the maximum period of community supervision to not more than 10 years.

A judge only may impose a condition of community supervision on a defendant convicted of a state jail felony that the judge could impose for any other offense, except that a period of confinement in county jail as a condition of community supervision may not exceed 90 days.

Health and Safety Code, ch. 461 establishes a Drug Demand Reduction Advisory Committee to develop a statewide strategy to reduce drug demand.

DIGEST:

The author intends to offer a complete floor substitute in lieu of CSHB 2668. The floor substitute is summarized in the Digest below.

The floor substitute would require a judge to place a defendant on community supervision upon conviction of the following state jail felonies:

- possession of less than one gram of a controlled substance in Penalty Group 1;
- possession of fewer than 20 abuse units of a controlled substance listed in Penalty Group 1-A;
- possession of less than one gram of a controlled substance in Penalty Group 2;
- possession of a fraudulent prescription form or fraudulent prescription for a controlled substance in Schedule II or III; or
- possession of four ounces to five pounds of marihuana.

The judge would retain the discretion to place on community supervision a defendant convicted of any other state jail felony that was not enhanced.

Unless the judge made an affirmative finding that the defendant did not require treatment to complete the period of community supervision successfully, the judge would have to require the defendant to comply with substance-abuse treatment conditions consistent with standards adopted by the Texas Board of Criminal Justice under Government Code, sec. 509.015. The board would have to adopt best practices for substance-abuse treatment conditions imposed by the bill.

By October 1, 2003, the Drug Demand Reduction Advisory Committee would have to inform in writing each court with jurisdiction over the drug offenses listed above and each prosecutor charged with prosecuting those offenses of the bill's statutory changes and of the availability of grants and other sources of revenue to assist in providing the treatment required for probationers.

The bill would take effect September 1, 2003.

SUPPORTERS SAY:

The floor substitute for HB 2668 would require a judge to place a defendant on community supervision for an offense involving small amounts of controlled substances and would require substance-abuse treatment for those

probationers. Also, it would require the Drug Demand Reduction Advisory Committee to inform courts and prosecutors about grants and other sources of revenue to assist in providing substance-abuse treatment.

The bill would save money for the state. According to the Criminal Justice Policy Council (CJPC), in fiscal 2002, there were 9,130 state jail admissions for possession of a controlled substance of less than one gram. Slightly more than 4,000 of those inmates had no other charges against them or sentences pending and no prior sentences to a Texas Department of Criminal Justice (TDCJ) facility. The state would save, on average, $40 per inmate per day for each inmate that the bill would divert from state jail. According to the Legislative Budget Board, CSHB 2668 would save the state about $30 million during fiscal 2004-05 and about $117 million through fiscal 2008. The floor substitute should save the state even more money by expanding the list of those eligible for mandatory community supervision.

CSHB 2668 would make more prison beds available for violent offenders. Assuming that admission and release trends do not change significantly, CJPC projects that demand for prison space will exceed operational capacity by 2,131 beds at the end of fiscal 2003, by 4,755 beds at the end of fiscal 2004, and by 6,865 beds at the end of fiscal 2005, leading to backlogs in county jails as convicted felons await available beds in TDCJ facilities. According to the criminal justice impact statement, CSHB 2668 would decrease demand for state jail beds by 724 fiscal 2004 and by 1,596 in fiscal 2005, which would help alleviate prison overcrowding. The floor substitute should create even more space for violent offenders by diverting even higher numbers from state jail to probation.

The bill would help alleviate crowded court dockets. Offenders would have less need to take these cases to trial, because they would be ensured the fair option of probation. Many cases now go to trial because offenders face the threat of jail time.

As the CJPC statistics mentioned above show, many first-time offenders who possess small amounts of controlled substances are being sent to state jail under current law. Probation is a more appropriate and effective punishment for minor drug crimes than is jail time. The bill would preserve taxpayer dollars to incarcerate more violent offenders.

The bill would make substance-abuse treatment mandatory for offenders placed on community supervision for these offenses, unless the judge found that treatment was not necessary. As drug court programs have proven, treatment for offenders who commit drug-related crimes is effective. It reduces recidivism rates and helps offenders get their lives back on track. Offenders incarcerated in state jails now do not receive the treatment they need, meaning that when they are released, they are more likely to commit additional offenses. While concerns about the harmfulness of these controlled substances are valid, treatment, not incarceration, is the appropriate response.

The bill would contain sufficient safeguards to ensure public safety. A judge could use his or her discretion to revoke a term of community supervision and send the offender to state jail if necessary, or send the offender to state jail as a condition of a modified term of community supervision. Also, the bill would not apply to the manufacture or delivery of controlled substances, which are more aggravated crimes than mere possession.

The floor substitute would ensure that courts and prosecutors receive notice of the availability of grants and other sources of revenue to help provide substance-abuse treatment. Sufficient funding is available for treatment, but it is not being used because courts are unaware of it.

OPPONENTS SAY:

Mandating probation for drug offenders would be inappropriate. Judges should have the discretion to decide when to grant probation, based on the facts of the case and characteristics of the defendant. Also, making probation mandatory would remove prosecutors' bargaining power. A defendant would have nothing to lose by going to trial and, therefore, no incentive to reach a plea bargain. As a result, the bill would clog courts' trial dockets with minor drug possession cases, when the state's resources would be better directed toward prosecuting more serious crimes.

This bill is not necessary. Low-level drug offenders are not being sentenced to state jail for long periods of confinement. Almost any first-time offender can get probation already, and judges often continue them on probation even if they relapse and violate the terms of community supervision.

The bill inappropriately would reduce punishment for possession of serious drugs, including cocaine and heroine. It would send the message that personal

use is acceptable, whereas these drugs pose very dangerous health risks. Also, allowing a defendant with prior convictions to obtain mandatory probation for these offenses would remove a deterrent for would-be offenders.

The bill would not provide additional funding to pay for treatment programs for drug offenders on probation. The House and Senate engrossed versions of the general appropriations bill would reduce funding for probation by about 10 percent, making it difficult, if not impossible, for probation departments to find the resources to provide substance-abuse treatment programs.

Budget concerns should not be the driving force behind criminal justice policy. The Legislature should base sentencing decisions and priorities on the relative severity of the crime, rather than on fiscal concerns.

OTHER OPPONENTS SAY:

The floor substitute would not go far enough. It would not allow a defendant to clear his or her record after successfully completing a term of probation. Ex-felons face many handicaps, such as the loss of the right to vote and serve on juries, the inability to obtain many professional licenses, and limitations on where they can live and what jobs they can hold. That classification should be reserved for the most serious offenders. Also, many first-time drug offenders are young people who do not commit further crimes, and having a felony on their records penalizes them for life.

NOTES:

The floor substitute differs from the committee substitute in several ways. The committee substitute would not apply to possession of marihuana. It would limit the length of confinement in state jail for possession of small amounts of controlled substances; amend the habitual offender statute to establish that a previous conviction for these offenses could not be used for enhancement purposes; require a judge to set aside the verdict upon a first-time offender's successful completion of community supervision; and allow the judge to set aside the verdict upon a repeat offender's completion of community supervision.

As filed, HB 2668 included many provisions that differ from the committee substitute. Among other items, the original bill would have reduced the penalty for possession of one gram or less of a controlled substance in Penalty Groups 1 and 2 from a state jail felony to a Class A misdemeanor (punishable by up to one year in jail and/or a maximum fine of $4,000) with mandatory

intensive narcotics supervision or confinement. It did not include the provisions of the committee substitute establishing a model of progressive sanctions for drug offenses involving possession of small amounts of certain controlled substances.

A related bill, HB 715 by Dutton, was considered in public hearing on April 8 by the House Criminal Jurisprudence Committee and left pending. It would reduce the penalty for possession of marihuana from a Class B misdemeanor (punishable by up to 180 days in jail and/or a maximum fine of $2,000) to a Class C misdemeanor (maximum fine of $500) for less than one ounce. The committee considered another related bill, HB 2316 by Dutton, on the same day and left it pending. It would reduce the penalty for the manufacture, delivery, or possession of less than one gram of controlled substances from a state jail felony to a Class A misdemeanor and would reduce the penalties for possession of marihuana. It also would reduce sentences for other nonviolent offenses such as property crimes.