SUBJECT: Guaranteeing live witness testimony at pretrial suppression hearings

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 7 ayes — Keel, Riddle, Ellis, Denny, Hodge, Pena, Talton

0 nays

2 absent — Dunnam, P. Moreno

WITNESSES: For — Keith Hampton, Texas Criminal Defense Lawyers Association

Against — John Bradley

BACKGROUND: Under Code of Criminal Procedure, art. 28.01, at a pretrial hearing, a court does not have to hear oral testimony to rule on a motion to suppress evidence. At its discretion, the court may decide on the basis of the motions themselves, opposing affidavits, or oral testimony.

Rule 101(d), Texas Rules of Evidence, states that the rules of evidence do not apply in certain situations, including when the court is determining questions of fact preliminary to the admissibility of evidence under Rule 104. Rule 104 requires the court to determine preliminary questions such as the admissibility of evidence and specifies that the court is not bound by the rules of evidence, except those regarding privileges, in making those decisions.

The Court of Criminal Appeals, in *Granados v. State*, 85 S.W.3d 217 (2002), interpreted Rule of Evidence 101(d) and Rule of Evidence 104 to mean that the rules of evidence do not apply to suppression hearings, except with regard to privilege. Former Rule 1101(d)(4) of the Texas Rules of Criminal Evidence applied the rules of evidence to motions to suppress, but when the rules were promulgated jointly in 1997, Rule 1101(d)(4) was not incorporated.

Government Code, sec. 22.109 gives the Court of Criminal Appeals full rulemaking power with regard to rules of evidence in criminal cases. Rules promulgated by the court remain in effect unless the Legislature disapproves them.

DIGEST:

HB 618 would require a court to hear oral testimony on a motion to suppress evidence, unless the defendant and prosecutor agreed to allow the court to decide on the basis of the motions themselves or on opposing affidavits. The bill would specify that the Texas Rules of Evidence apply to a proceeding on a motion to suppress evidence, a confession, or a statement.

The bill would take effect September 1, 2003.

SUPPORTERS SAY:

Live witness testimony at suppression hearings. HB 618 would ensure fairness at hearings on motions to suppress evidence by guaranteeing live testimony at these hearings. A judge should assess the credibility of witnesses from their demeanor, rather than simply by reading an affidavit, before making a decision that could determine the outcome of a case. Live testimony is guaranteed at the trial stage and also should be guaranteed at suppression hearings, because the issues are distinct. A trial determines a party's guilt or innocence, while a suppression hearing determines the admissibility of evidence at trial. The credibility of police officers and other witnesses is crucial in determining whether evidence was obtained lawfully.

While trial judges should have discretion over most matters before them, preventing live witness testimony at this crucial stage of the process is an abuse of a judge's discretion. Judges still could exercise discretion and control their dockets by determining when hearings will be held and how long they will last.

Guaranteeing live witness testimony at suppression hearings would help courts dispose of more cases early in the process. A hearing on a motion to suppress often determines the outcome of the case. If a prosecution witness gives credible testimony, the defendant may accept a plea bargain rather than proceed to trial. Likewise, if a prosecution witness appears confused about the facts or not credible, the state may offer the defendant a more favorable plea agreement to resolve the case. If a court grants a motion to suppress, the prosecutor often is left with no admissible evidence and has no choice but to dismiss the case. Live witness testimony at suppression hearings would help to promote court efficiency by facilitating early resolution of cases.

HB 618 would ensure that the Legislature's intent is followed at suppression hearings. Code of Criminal Procedure, art. 28.01 was not intended to allow a

court to refuse to hear oral testimony in a case where either party wanted to call witnesses. Rather, it was intended to allow a judge to rule on the basis of affidavits if both parties agreed. However, some courts have interpreted the statute to allow them to ban live witness testimony at suppression hearings. HB 618 would reinforce legislative intent by guaranteeing that either party, if it chose, could call witnesses.

The bill also would facilitate effective appellate review of suppression orders. "Paper hearings" based only on affidavits are difficult for appellate courts to review because the record from the trial court is limited. Live witness testimony is recorded by a court reporter, and the transcript becomes part of the record, giving appellate courts more information about the facts of the case.

Rules of evidence. In the *Granados* case, the Court of Criminal Appeals held that the rules of evidence do not apply to motions to suppress. HB 618 would clarify that the rules of evidence do apply to these motions. Rule 1101(d)(4) was omitted from the Texas Rules of Evidence by mistake, as no one intended to exempt motions to suppress. The rules of evidence allow courts to limit cumulative and repetitive evidence and to exercise control over proceedings, among other things. Many lower courts have disregarded *Granados*, and the Legislature needs to clarify this issue.

In practice, courts would continue to hear all of the evidence they consider now, because it is admissible under the rules of evidence. Hearsay testimony by a police officer is admissible to establish probable cause under the Court of Criminal Appeals' decision in *McVickers v. State*, 874 S.W.2d 662 (1993). Therefore, officers still could offer hearsay testimony about what other people told them if those statements helped them determine that probable cause existed. Civilian witnesses who spoke to officers at the scene of a crime would not have to come to court to testify at a suppression hearing more often than they do already. Impeachment evidence about an officer or informant also is admissible under the rules of evidence and would continue to come in at suppression hearings.

Although the Legislature has given rulemaking authority to the Court of Criminal Appeals, it has not abdicated its authority. Both branches of government share responsibility for the rules of evidence, and the Legislature

can disapprove any rules promulgated by the court. The Legislature enacts rules of evidence in the Code of Criminal Procedure and decides where the rules of evidence will apply.

OPPONENTS SAY:

Live witness testimony at suppression hearings. Judges should have the discretion to decide the appropriate method of conducting hearings on motions to suppress. They have to control their dockets, and live testimony is more time-consuming than having the parties submit opposing affidavits or deciding on the basis of the motions themselves. Hearings with live witnesses often become minitrials that are repetitive and waste the court's time. Defendants can raise issues about the admissibility of evidence at the trial itself, where live witnesses must testify, so limiting their right to cross-examine at the suppression hearing is not unfair.

Live witness testimony at suppression hearings does not always promote the early disposition of cases. Often, defense lawyers use the hearings to prepare for trial. By questioning prosecution witnesses, they learn more about the case against their client and attempt to set up the witnesses for impeachment at trial by developing inconsistencies in their testimony. Live witness testimony, far from promoting efficiency, consumes court time without promoting justice.

Rules of evidence. A judge may find it helpful to consider evidence that is not admissible under the rules but is relevant to the reliability of the evidence, and judges should retain the discretion to consider all kinds of evidence. HB 618 would create uncertainty as to whether hearsay testimony by a police officer would be admissible in a suppression hearing, and that question likely would be litigated. Officer hearsay is important because victims and witnesses of crimes often are reluctant or unable to come to court, and requiring them to testify at a suppression hearing could be burdensome. Also, under HB 618, a defendant might not be able to raise questions about the history of the police officer or reputation of the informant because those issues would not be admissible under the rules of evidence.

The Legislature has delegated rulemaking authority to the Court of Criminal Appeals with regard to the rules of evidence. The proper forum to change these rules is through the court itself, not the legislative process.