

SUBJECT: Requiring probation for certain drug offenders with prior state jail felonies

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Peña, Escobar, Hodge, Mallory Caraway, Moreno

0 nays

3 present not voting — Vaught, Pierson, Talton

1 absent — Riddle

WITNESSES: For — Will Harrell, ACLU, NAACP, LULAC; Dennis P. McKnight, Bexar County Sheriff's Office; (*Registered, but did not testify*: Kristin Etter, Texas Criminal Defense Lawyers Association; Ana Yanez-Correa, Texas Criminal Justice Coalition; Ray Allen)

Against — Terry Breen

On — John Creuzot, Dana Hendrick

BACKGROUND: Code of Criminal Procedure art. 42.12, sec. 15(a)(1) requires judges convicting offenders of certain low-level drug offenses that are classified as state jail felonies (180 days to two years in a state jail and an optional fine of up to \$10,000) to suspend the sentence and place the defendant on community supervision (probation), unless the person has a previous conviction for a felony. Judges may place defendants who have previous felony convictions on probation or execute the sentence.

These requirements apply to low-level, non-dealing drug offenses that include:

- possession of less than one gram of cocaine, methamphetamine, certain hallucinogens, or certain opiates, including heroin;
- possession of up to five hits of LSD;
- possession of more than four ounces but not more than one pound of marijuana; and
- illegal possession of a prescription or a prescription form for certain controlled substances.

Penal Code, sec. 12. 44(a) allows courts to sentence defendants who have been convicted of state-jail felonies to the confinement allowed under a class A misdemeanor (up to one year in county jail) if the court finds that punishment would best serve the ends of justice.

DIGEST:

HB 1610 would apply the current requirement that people convicted of certain low-level drug offenses receive probation to a defendants who had previous state jail-felony convictions that were punished as class A misdemeanors.

The bill would take effect September 1, 2007, and would apply to only to people convicted of state-jail felonies on or after that date.

SUPPORTERS
SAY:

HB 1610 would help ensure that more low-level drug offenders receive the treatment resources available in local probation systems, a policy that the Legislature endorsed in 2003. That year, the 78th Legislature enacted HB 2668 by Allen, et al., requiring some low-level drug offenders to receive probation, which allows them to benefit from state-funded drug treatment programs that are not available in state jails. However, current law does not require that low-level drug offenders with prior felonies receive probation. These prior felonies can include state-jail felonies that under Penal Code sec. 12.44(a) have been punished as class A misdemeanors. This means that a class of drug offenders who committed prior state felonies deemed sufficiently minor to receive a lesser punishment are excluded from the mandatory probation initiative enacted in 2003 and might not get treatment that could benefit them and society.

HB 1610 would address this problem by including low-level drug offenders with prior state-jail felonies that were punished as class A misdemeanors in the group of offenders who must receive probation. While judges currently can grant probation to these offenders, it would be better to mandate probation so that more low-level drug offenders got treatment and so that everyone who falls in this special class of drug offenders was treated uniformly. Even if an offender's prior state-jail felony had nothing to do with drugs, the fact that the current offense is a low-level drug crime illustrates the need to get these offenders into treatment.

Probation supervision coupled with treatment is a better, cheaper option than state jail time for low-level drug offenders, especially those whose prior state-jail felonies were minor enough to have received a

misdeemeanor punishment or where mitigating circumstances made the lower punishment appropriate. Offenders sent to state jails do not receive any formal, state-funded drug treatment, which is an effective way to reduce recidivism. Keeping these offenders out of state jails also would ensure the availability of these beds for more serious offenders.

Concerns about the lack of available treatment resources in the probation system are unfounded. In 2005, the state increased probation resources, and the 80th Legislature is on track to increase these resources even more. By all measures, offenders are better off receiving treatment through the probation system than in state jails, where no state-funded treatment is available.

**OPPONENTS
SAY:**

HB 1610 would reduce the discretion of judges to decide punishment for low-level drug offenders who have previous convictions for state-jail felonies that were punished as misdemeanors. Currently, while these offenders are not required automatically to receive probation, judges are allowed to grant probation instead of imposing a jail sentence. By removing the discretion of the court, this bill would require all these offenders to receive probation, even when it would be inappropriate or unwanted by the judge, defendant, or prosecutor.

This bill would further the flawed idea that all low-level drug offenders should be routed into treatment. There are numerous circumstances in which probation could be inappropriate for low-level drug offenders with previous state-jail felony convictions. For example, an offender's previous state-jail felony could be a serious offense unrelated to the current drug offense, such as burglary, and a judge may decide that state jail time would be more appropriate than probation. In other cases, it may be important to a prosecutor to obtain a final felony conviction on an offender, which could be used to enhance punishments for future drug crimes but would not occur if an offender finished his or her probation term. Also, high-quality, appropriate drug treatment resources within the probation department might not be available, in which case an offender on probation would be released into society without receiving the proper treatment.

An unintended consequence of HB 1610 could be to provide an incentive to use Penal Code sec. 12.44(a) to punish low-level state-jail drug offenses as class A misdemeanors. If a prosecutor felt that a low-level drug offender with a prior state-jail felony punished as a misdemeanor

should be incarcerated but knew that the offender would receive probation under HB 1610, the prosecutor might opt to seek a class A misdemeanor for the drug offense to ensure that the offender received some jail time.