

- SUBJECT:** Creating an exception for peace officers installing a tracking device
- COMMITTEE:** Public Safety — favorable, without amendment
- VOTE:** 9 ayes — Merritt, Frost, Burnam, Driver, P. King, Lewis, Mallory
Caraway, Rodriguez, Vo

0 nays
- WITNESSES:** For — Roger Dixon; (*Registered, but did not testify:* John Chancellor, Texas Police Chiefs Association; Tom Gaylor, Texas Municipal Police Association; Chris Jones, Combined Law Enforcement Associations of Texas; Steve Lyons, Houston Police Department; David Manning)

Against — Jonathan Wolfe, The American Civil Liberties Union of Texas

On — Shannon Edwards, Texas District and County Attorneys Association; (*Registered, but did not testify:* Douglas Kunkel, Texas Department of Public Safety – Criminal Law Enforcement Division)
- BACKGROUND:** Penal Code, sec. 16.06 establishes a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) for a person who knowingly installs a tracking device on a motor vehicle owned or leased by another person. The code establishes an affirmative defense to prosecution if the person installing the device was a peace officer who installed the device in the course of a criminal investigation or pursuant to court order to gather information for a law enforcement agency.
- DIGEST:** HB 1659 would provide an exception for installing a tracking device on a vehicle for a peace officer who installed the device in the course of a criminal investigation or pursuant to a court order to gather information for a law enforcement agency. The bill would strike provisions providing an affirmative defense to prosecution for a peace officer installing a tracking device.

The bill would take effect September 1, 2009, and would apply to an offense committed after the effective date of the bill.

SUPPORTERS
SAY:

HB 1659 would lessen the current burden of defense placed on peace officers who installed a tracking device on a vehicle as part of a criminal investigation or a court order. By creating an exception to the offense for peace officers acting on duty, the bill would place the burden on the prosecution to prove the defendant acted in violation of the law. The current affirmative defense to prosecution afforded a peace officer means that the officer could be required to prove in court the existence of the affirmative defense and that the officer acted under the auspices of the defense provided.

Current law leaves open the possibility of drawing into the prosecutorial net officers who committed no crime and could lead to some officers being charged, indicted, and brought to trial before being able to raise the affirmative defense. Although these cases may be rare, the criminal justice system should not be designed to needlessly subject the innocent to prosecution. Officers acting in good faith should not have to prove their actions were appropriate in court – rather, the prosecution should have to prove that the officer acted wrongfully with respect to the law.

OPPONENTS
SAY:

While technically the affirmative defense to prosecution could require that an officer stand trial and have to prove that he or she acted under the affirmative defense afforded, in practice this almost never happens. Prosecutors are aware of the affirmative defense created in statute and would proceed with a trial only if there were reason to believe an officer did not act in accord with current law. Creating an exception would do little in practice to enhance protection for officers acting in their official duties.

OTHER
OPPONENTS
SAY:

HB 1659 would grant a rare exception in law for peace officers and in so doing could create an inconvenience for prosecution of these cases. A better option would be to grant peace officers a defense to prosecution, which would require the officer to establish the applicability of the defense in light of the evidence presented by the prosecution. This is an intermediate protection that would strike a balance between protecting an officer acting in good faith and the state's interest in ensuring that the authority to install tracking devices was not abused.

The bill would retain language granting protection for a peace officer acting as part of an investigation *or* a court order. Legal protection should be granted only to peace officers installing a tracking device with an order from a court.

NOTES:

The author plans to offer an amendment striking a provision in the bill that would establish an exception for peace officers and substituting it with language that states the section *would not apply* to a peace officer who installed the device.