

LEGISLATURE OF NEBRASKA
ONE HUNDRED SIXTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 352

Introduced by Morfeld, 46.

Read first time January 16, 2019

Committee: Judiciary

1 A BILL FOR AN ACT relating to criminal procedure; to amend section
2 29-1912, Reissue Revised Statutes of Nebraska; to adopt requirements
3 relating to testimony by jailhouse informants; to state intent; to
4 define terms; to create duties for prosecutors and provide for court
5 orders for failure to comply with such duties; to provide for a
6 hearing to determine reliability; to provide for a jury instruction;
7 to change provisions relating to requests for discovery by criminal
8 defendants; to harmonize provisions; and to repeal the original
9 section.
10 Be it enacted by the people of the State of Nebraska,

1 Section 1. (1) The Legislature finds and declares that the
2 interests of justice may be thwarted by unreliable testimony at trial.
3 There is a compelling state interest in providing safeguards against the
4 admission of testimony when the reliability of such testimony may be or
5 has been compromised through inducements.

6 (2) The Legislature further finds and declares that the testimony of
7 a jailhouse informant is sometimes unreliable. A jailhouse informant, due
8 to the receipt or promise of a benefit, is presumed to provide testimony
9 that may be unreliable.

10 Sec. 2. For purposes of sections 1 to 8 of this act:

11 (1) Benefit means any plea bargain, bail consideration, reduction or
12 modification of sentence, or any other leniency, immunity, financial
13 payment, reward, or amelioration of current or future conditions of
14 incarceration that has been requested by the jailhouse informant or that
15 has been offered or may be offered in the future to the jailhouse
16 informant in connection with his or her testimony in the criminal
17 proceeding in which the prosecutor intends to call him or her as a
18 witness; and

19 (2) Jailhouse informant means a person who offers testimony about
20 statements made by a suspect or defendant while the suspect or defendant
21 and jailhouse informant were in the custody of any jail or correctional
22 institution and who has requested or received or may in the future
23 receive a benefit in connection with such testimony.

24 Sec. 3. Sections 1 to 8 of this act apply to any case in which a
25 suspect or defendant is charged with a felony.

26 Sec. 4. Each county attorney's office shall maintain a central
27 record of:

28 (1) Each case in which testimony is offered or provided by a
29 jailhouse informant against a suspect's or defendant's interest; and

30 (2) Any benefit requested, offered, or provided to a jailhouse
31 informant in connection with such testimony.

1 Sec. 5. (1) Except as provided in subsection (3) of this section,
2 if a prosecutor intends to use the testimony or statement of a jailhouse
3 informant at a defendant's trial, the prosecutor shall disclose to the
4 defense any information in the possession, custody, or control of the
5 prosecutor or the state or political subdivision that is relevant to the
6 credibility of the jailhouse informant, including:

7 (a) The known criminal history of the jailhouse informant;

8 (b) Any benefit requested, offered, or provided to a jailhouse
9 informant or that may be offered or provided to the jailhouse informant
10 in the future in connection with such testimony;

11 (c) The specific statements allegedly made by the defendant against
12 whom the jailhouse informant will testify or provide a statement and the
13 time, place, and manner of the defendant's disclosures;

14 (d) The case name and jurisdiction of any criminal case known to the
15 prosecutor in which the jailhouse informant testified or a prosecutor
16 intended to have the jailhouse informant testify about statements made by
17 another suspect or criminal defendant that were disclosed to the
18 jailhouse informant and whether the jailhouse informant was offered or
19 received any benefit in exchange for or subsequent to such testimony; and

20 (e) Any occasion known to the prosecutor in which the jailhouse
21 informant recanted testimony about statements made by another suspect or
22 defendant that were disclosed to the jailhouse informant and any
23 transcript or copy of such recantation.

24 (2) The prosecutor shall disclose the information described in
25 subsection (1) of this section to the defense as soon as practicable
26 after discovery, but no later than thirty days before trial. If the
27 prosecutor seeks to introduce the testimony of a jailhouse informant that
28 was not known until after such deadline or if the information described
29 in subsection (1) of this section could not have been discovered or
30 obtained by the prosecutor with the exercise of due diligence at least
31 thirty days before the trial or other criminal proceeding, the court may

1 permit the prosecutor to disclose the information as soon as is
2 practicable after the thirty-day period.

3 (3) If the court finds by clear and convincing evidence that
4 disclosing information listed in subsection (1) of this section will
5 result in the possibility of bodily harm to a jailhouse informant or that
6 a jailhouse informant will be coerced, the court may permit the
7 prosecutor to redact some or all of such information.

8 (4) If, at any time subsequent to the deadline in subsection (2) of
9 this section, the prosecutor discovers additional material required to be
10 disclosed under subsection (1) of this section, the prosecutor shall
11 promptly:

12 (a) Notify the court of the existence of the additional material;
13 and

14 (b) Disclose such material to the defense, except as provided in
15 subsection (3) of this section.

16 Sec. 6. If the prosecutor intends to use the testimony or statement
17 of a jailhouse informant, the court shall conduct a hearing to determine
18 whether such testimony or statement is reliable, unless the defendant
19 waives such hearing. If the prosecutor fails to show by a preponderance
20 of the evidence that the jailhouse informant's testimony or statement is
21 reliable, the court shall not allow the testimony or statement to be
22 presented at trial. The court shall consider the factors enumerated in
23 subsection (1) of section 5 of this act and any other factors related to
24 reliability.

25 Sec. 7. If, at any time during the course of the proceedings, it is
26 brought to the attention of the court that the prosecutor has failed to
27 comply with section 5 of this act, or an order issued pursuant to this
28 section, the court may:

29 (1) Order the prosecutor to disclose materials not previously
30 disclosed;

31 (2) Grant a continuance;

1 (3) Prohibit the prosecutor from calling a witness not disclosed or
2 introducing in evidence the material not disclosed; or

3 (4) Enter such other order as it deems just under the circumstances.

4 Sec. 8. If the testimony or statement of a jailhouse informant is
5 admitted into evidence, a cautionary instruction shall be provided to the
6 jury in substantially the following form:

7 That the testimony or statement of a jailhouse informant who
8 provides evidence against a defendant must be examined and weighed with
9 greater care than the testimony or statement of an ordinary witness; that
10 jailhouse informants may expect, and in practice often receive, benefits
11 that have not been formally promised to them prior to trial; and that the
12 reliability factors enumerated in subsection (1) of section 5 of this
13 act, to the extent they apply in such case, shall be considered when
14 determining whether the testimony or statement of the jailhouse informant
15 has been affected by interest or prejudice against the defendant.

16 Sec. 9. Section 29-1912, Reissue Revised Statutes of Nebraska, is
17 amended to read:

18 29-1912 (1) When a defendant is charged with a felony or when a
19 defendant is charged with a misdemeanor or a violation of a city or
20 village ordinance for which imprisonment is a possible penalty, he or she
21 may request the court where the case is to be tried, at any time after
22 the filing of the indictment, information, or complaint, to order the
23 prosecuting attorney to permit the defendant to inspect and copy or
24 photograph:

25 (a) The defendant's statement, if any. For purposes of this
26 subdivision, statement means a written statement made by the defendant
27 and signed or otherwise adopted or approved by him or her, or a
28 stenographic, mechanical, electrical, or other recording, or a
29 transcription thereof, which is a substantially verbatim recital of an
30 oral statement made by the defendant to an agent of the prosecution,
31 state, or political subdivision thereof, and recorded contemporaneously

1 with the making of such oral statement;

2 (b) The defendant's prior criminal record, if any;

3 (c) The defendant's recorded testimony before a grand jury;

4 (d) The names and addresses of witnesses on whose evidence the
5 charge is based;

6 (e) The results and reports of physical or mental examinations, and
7 of scientific tests, or experiments made in connection with the
8 particular case, or copies thereof; and

9 (f) Documents, papers, books, accounts, letters, photographs,
10 objects, or other tangible things of whatsoever kind or nature which
11 could be used as evidence by the prosecuting authority. ;

12 ~~(g) The known criminal history of a jailhouse witness;~~

13 ~~(h) Any deal, promise, inducement, or benefit that the prosecuting~~
14 ~~attorney or any person acting on behalf of the prosecuting attorney has~~
15 ~~knowingly made or may make in the future to the jailhouse witness;~~

16 ~~(i) The specific statements allegedly made by the defendant against~~
17 ~~whom the jailhouse witness will testify and the time, place, and manner~~
18 ~~of the defendant's disclosures;~~

19 ~~(j) The case name and jurisdiction of any criminal cases known to~~
20 ~~the prosecuting attorney in which a jailhouse witness testified about~~
21 ~~statements made by another criminal defendant that were disclosed to the~~
22 ~~jailhouse witness while he or she was a jailhouse witness and whether the~~
23 ~~jailhouse witness received any deal, promise, inducement, or benefit in~~
24 ~~exchange for or subsequent to such testimony; and~~

25 ~~(k) Any occasion known to the prosecuting attorney in which the~~
26 ~~jailhouse witness recanted testimony about statements made by another~~
27 ~~criminal defendant that were disclosed to the jailhouse witness while he~~
28 ~~or she was a jailhouse witness and, if any are known, a transcript or~~
29 ~~copy of such recantation.~~

30 (2) The court may issue such an order pursuant to the provisions of
31 this section. In the exercise of its judicial discretion, the court shall

1 consider among other things whether:

2 (a) The request is material to the preparation of the defense;

3 (b) The request is not made primarily for the purpose of harassing
4 the prosecution or its witnesses;

5 (c) The request, if granted, would not unreasonably delay the trial
6 of the offense and an earlier request by the defendant could not have
7 reasonably been made;

8 (d) There is no substantial likelihood that the request, if granted,
9 would preclude a just determination of the issues at the trial of the
10 offense; or

11 (e) The request, if granted, would not result in the possibility of
12 bodily harm to, or coercion of, witnesses.

13 (3) Whenever the court refuses to grant an order pursuant to the
14 provisions of this section, it shall render its findings in writing
15 together with the facts upon which the findings are based.

16 (4) Whenever the prosecuting attorney believes that the granting of
17 an order under the provisions of this section will result in the
18 possibility of bodily harm to witnesses or that witnesses will be
19 coerced, the court may permit him or her to make such a showing in the
20 form of a written statement to be inspected by the court alone. The
21 statement shall be sealed and preserved in the records of the court to be
22 made available to the appellate court in the event of an appeal by the
23 defendant.

24 (5) This section does not apply to jailhouse informants as defined
25 in section 2 of this act. Sections 1 to 8 of this act govern jailhouse
26 informants. For purposes of subdivisions (1)(g) through (k) of this
27 section, jailhouse witness means a person in the physical custody of any
28 jail or correctional institution as (a) an accused defendant, (b) a
29 convicted defendant awaiting sentencing, or (c) a convicted defendant
30 serving a sentence of incarceration, at the time the statements the
31 jailhouse witness will testify about were disclosed.

1 Sec. 10. Original section 29-1912, Reissue Revised Statutes of
2 Nebraska, is repealed.