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Opinion No. 04-069

Constitutionality of SB 3217 Amending Title 40, Chapter 39, Regarding Sex Offenders

QUESTIONS

1. Would the registration and reporting requirements of SB 3217, if enacted and applied to persons who were convicted of sex offenses prior to its effective date, violate the prohibition against double jeopardy set forth in the Fifth Amendment to the United States Constitution and Art. I, §10, of the Tennessee Constitution?

2. Would the registration and reporting requirements of SB 3217, if enacted and applied to persons who were convicted of sex crimes prior to its effective date, violate the prohibition against ex post facto laws set forth in Art. 1, § 9, of the United States Constitution and Art. I, §10, of the Tennessee Constitution?

3. Would application of the registration and reporting requirements of SB 3217 to persons who were convicted prior to its effective date violate the prohibition against retrospective laws set forth in Art. I, § 20, of the Tennessee Constitution?

4. SB 3217 would authorize the state to prove a violation of the registration, verification and tracking provisions of the statute through use of an affidavit from a TBI records custodian, rather than live testimony. Would this provision of SB 3217, if enacted, violate the confrontation clauses of the Sixth Amendment of the United States Constitution or Art. I, § 9, of the Tennessee Constitution?

OPINIONS

1. The registration and reporting requirements set forth in SB 3217 are not punishment and, therefore, application of those requirements to persons convicted before the effective date of the bill would not violate the prohibition against double jeopardy set forth in the Fifth Amendment to the United States Constitution and Art. I, §10, of the Tennessee Constitution.

2. The registration and reporting requirements of SB 3217 are not punishment and therefore application of those requirements to persons convicted before the effective date of the bill would not violate the prohibition against ex post facto laws set forth in Art. 1, § 9, of the United States Constitution and in Art. I, § 10, of the Tennessee Constitution.

3. The registration and reporting requirements of SB 3217 are remedial, and, therefore, application of those requirements to persons convicted under previous law would not violate the prohibition against retrospective laws set forth in Art. I, § 20, of the Tennessee Constitution.

4. The provisions of SB 3217 that authorize the state to use an affidavit from a TBI records custodian, in lieu of live testimony, to prove that, based on records maintained by TBI, a sexual offender or violent sexual offender is in violation of the registration, verification and tracking provisions of the statute, would violate the confrontation clauses of the Sixth Amendment of the United States Constitution or Art. I, § 9, of the Tennessee Constitution.

ANALYSIS

Registration and Reporting Provisions of SB 3217

SB 3217, if enacted into law, would amend the registration and reporting requirements¹ for sex offenders that are presently set forth in Tenn. Code Ann. §§ 40-39-101 through 111 by adding new provisions that would be set forth in new code sections 40-39-201 through 211.² The primary changes from present law are the addition of a classification for violent sexual offenders, shortening of the time in which sex offenders are required to register with the appropriate authorities and a change in the periodic reporting requirements.³

Under the current statute, “sexual offender” is the only classification. Tenn. Code Ann. § 40-39-102(4).⁴ SB 3217, if enacted, would modify the classification scheme to create two categories of persons who are subject to the statute: “sexual offenders” and “violent sexual offenders.” Sexual offenders would be defined as persons who have been convicted of sexual offenses. Proposed Tenn.

¹The constitutionality of residency and employment restrictions similar to the ones set forth in this bill was addressed in Op. Tenn. Att’y Gen. 04-53 (March 25, 2004).

²S.B. 3217, section 1 (hereinafter Proposed Tenn. Code Ann. § - -).

³Proposed Tenn. Code Ann. §§ 40-39-203(a) and 204(b) and(c).

⁴The statute defines a sexual offender as a person who has committed a sexual offense as defined in Tenn. Code Ann. § 40-39-102(5) and whose conviction, incarceration, or alternative to incarceration falls within the time period set forth in the statute. The offenses under that definition include rape, aggravated rape, sexual battery, aggravated sexual battery, incest, aggravated prostitution and a host of other sex crimes.

Code Ann. § 40-39-202(15).⁵ Violent sexual offenders would be defined as persons who have been convicted of violent sexual offenses. Proposed Tenn. Code Ann. § 40-39-202(23).⁶

SB 3217, if enacted, would also modify the registration requirements as they exist under current law. Offenders are presently required to register with the appropriate authorities within ten (10) days after release from incarceration, coming into the state, moving to a different county, changing residences or employment or becoming a student at an institution of higher learning. Tenn. Code Ann. § 40-39-103(a). If SB 3217 is enacted, the period for registration by offenders coming within its terms would be shortened to 48 hours after release, change of residence, entry into the state, change of employment or enrollment at an institution of higher learning. Proposed Tenn. Code Ann. § 40-39-203(a).

SB 3217 also changes the reporting requirements. Under current law, every 90 days, TBI is required to send a form to all registered sex offenders to verify that the information that was previously provided is still accurate. The registrants are required to return the form to TBI within ten days of receipt. Tenn. Code Ann. § 40-39-104(a). If SB 3217 is enacted, all violent sexual offenders will have to report in person to the designated law enforcement agency to verify the accuracy of previously provided information and provide an updated photograph, palm prints and fingerprints on a quarterly basis.⁷ Proposed Tenn. Code Ann. § 40-39-204(b). Sexual offenders will be required to report in person to designated law enforcement agencies and to provide the same items on an annual basis. Proposed Tenn. Code Ann. § 40-39-204(c).

By its terms, SB 3217, if enacted, will apply to some sex offenders who were convicted before its effective date.⁸ Those offenders who are presently registered under current law, but who

⁵Sexual offenses are defined in proposed Tenn. Code Ann. § 40-39-202(16) and include simple rape, simple sexual battery, incest and aggravated prostitution.

⁶Violent sexual offenses are defined in proposed Tenn. Code Ann. § 40-39-202(24) and include aggravated rape, aggravated sexual battery, rape of a child and especially aggravated prostitution.

⁷The designated law enforcement agency is the law enforcement agency that has primary jurisdiction over the place the offender resides, works or attends an institute of higher learning. Proposed Tenn. Code Ann. § 40-39-202(3).

⁸SB 3217 does not expressly repeal present registration and reporting requirements found in Tenn. Code Ann. § 40-39-103, but simply defines “sexual offender” in proposed section 40-39-202(15) in such a way as to require a number of persons who were previously convicted of sex offenses to comply with the new requirements. *See also* Proposed Tenn. Code Ann. §§ 40-39-202(24) and 40-39-203.

The definition revolves around the status of the offender on or after January 1, 1995. The specific definition is as follows:

a person who has been convicted in this state of committing a sexual offense as defined in §40-39-202(16), or has another qualifying conviction as defined in §40-39-202(2); provided that:

- (A) The conviction occurs on or after January 1, 1995; or
- (B) If the conviction occurred prior to January 1, 1995, the person:

meet the definitional requirements of the new law, will be required to comply with the provisions of the new law within 30 days of its effective date. Proposed Tenn. Code Ann. § 40-39-203(f). Offenders coming within the terms of the new law will also have to comply with the same physical restrictions on residency and employment as are imposed under current law.⁹ Violation of these restrictions, however, will be a Class E felony rather than an A misdemeanor as under current law.¹⁰

Double Jeopardy

There can be no violation of the prohibitions against double jeopardy under the Fifth Amendment to the United States Constitution and Art. I, § 10 of the Tennessee Constitution unless the statute under challenge imposes punishment. *Smith v. Doe*, 538 U.S. 84 (2003); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *State v. Davis*, 741 S.W.2d 120 (Tenn. Crim. App. 1987).¹¹ The constitutionality of Tennessee's current sex offender registration and reporting laws was upheld by the Sixth Circuit in *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999). In that case, the Court held that those provisions are not punishment and, therefore, do not violate the constitutional prohibition against double jeopardy.

Based on the reasoning in *Smith*, *Hendricks*, *Davis* and *Cutshall*, it is likely that, if challenged, SB 3217 would be upheld against double jeopardy challenges under both federal and state law. Its purpose, like the purpose of the current law, is to protect the public and not to impose punishment.¹²

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- (i) Remains under or is placed on probation, parole, or any other alternative to incarceration on or after January 1, 1995;
 - (ii) Is discharged from probation, parole, or any other alternative to incarceration on or after January 1, 1995; or
 - (iii) Is discharged from incarceration without supervision on or after January 1, 1995; . . .

Proposed Tenn. Code Ann. 40-39-202(15).

⁹Proposed Tenn. Code Ann. §40-39-211(a)-(d).

¹⁰Proposed Tenn. Code Ann. §40-39-211(e).

¹¹In both *Hendrix* and *Smith*, the Court held that regulatory statutes aimed at protecting the public from harm by sexual offenders were constitutional. In *Smith*, the Court held that the imposition of registration and reporting requirements were not punishment and therefore did not violate the prohibition against ex post facto laws. In *Hendricks*, the Court held that the use of civil commitment statutes to confine sexual offenders to mental institutions at the conclusion of their prison sentences was not punishment and therefore did not violate prohibitions against double jeopardy or ex post facto laws.

¹²The legislative purpose behind the bill is set forth in Tenn. Code Ann § 40-39-201. The objectives listed therein are all related to protection of the public and not the imposition of additional punishment.

Ex post facto laws

There can be no violation of the prohibitions against ex post facto laws under Art. 1, § 9 of the United States Constitution and Art. I, § 11, of the Tennessee Constitution unless the statute under challenge imposes punishment. *Smith v. Doe, supra; Kansas v. Hendricks, supra; Kaylor v. Bradley*, 912 S.W.2d 728 (Tenn. App. 1995).¹³ As set forth above, the registration and reporting requirements of SB 3217 do not impose punishment. It is regulatory in nature and has no excessive punitive effect and, therefore, does not violate the prohibitions against ex post facto laws in both the United States and Tennessee Constitutions.¹⁴

Retrospective laws

Art. I, § 20, of the Tennessee Constitution prohibits retrospective laws. It does not, however, prohibit the enactment of remedial legislation that may be applied retroactively. *Caudill v. Foley*, 21 S.W.3d 203 (Tenn. App. 1999). Likewise, Art. I, § 20, does not prohibit the retroactive application of statutes that are procedural in nature and do not create or impair substantive rights.

The registration and reporting requirements of SB 3217 are remedial legislation that establish and/or modify procedures that are intended to protect the public. They do not impair any substantive rights or obligations and therefore do not violate Art. I, § 20, of the Tennessee Constitution.

Confrontation Clause

SB 3217 would make it a class E offense for an offender, among other things, to fail to register timely, falsify a registration form, or fail to sign a registration form. Proposed Tenn. Code Ann. § 40-39-208(a)(1), (2), (4). Proposed Tenn. Code Ann. § 40-39-208(d) provides:

In a prosecution for a violation of this section, in lieu of live testimony the TBI records custodian may, by sworn affidavit, verify that according to such records a sexual offender or violent sexual offender is in violation of the registration, verification and tracking requirements of this part.

¹³Courts have indicated that even if a statute or regulation is not expressly punitive, it can still violate the prohibitions against ex post facto laws if it has an excessive punitive effect. See Op Tenn. Att’y Gen. No. 04 -053, at 4-5, citing *Doe v. Miller*, 298 F. Supp. 2d, and *State v. Seering*, 2003 WL 21738894 (Iowa District Court, April 30, 2003), appeal pending, at 10-14 (both finding that residency and employment requirements have excessive punitive effects).

¹⁴Unlike certain restrictions on residence and employment, registration and reporting requirements do not restrict the registrant’s movements or activities in any meaningful way.

The Confrontation Clause under both the Sixth Amendment to the United States Constitution and Art. I, § 9, of the Tennessee Constitution affords defendants the rights to confront and cross-examine witnesses face to face. At its core, the Confrontation Clause prohibits the introduction of testimonial evidence against a criminal defendant unless the witness is unavailable and the defendant had a fair opportunity to cross-examine the witness at the time the testimony was taken. *Crawford v. Washington*, ___U.S. ___, 124 S.Ct. 1354 (2004). In that case, the Court noted that one of the primary evils that the Confrontation Clause was intended to prevent was the use of *ex parte* testimony against criminal defendants. While the Court declined to expressly define “testimony,” its reasoning indicates that the use of an affidavit in lieu of live testimony under Proposed Tenn. Code Ann. § 40-39-208(d) would violate the Confrontation Clause of the Sixth Amendment to the United States Constitution.¹⁵

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¹⁵The Court made particular reference to the use of affidavits and other *ex parte* statements obtained in anticipation of criminal proceedings as being among the types of testimonial evidence that are prohibited by the Confrontation Clause. *Crawford*, at 1360-1366. The Court also noted that business records and other express exceptions to the hearsay evidence rule are not testimonial and the use of such evidence in criminal trials would not violate the Confrontation Clause. *Crawford*, at 1367.