

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 04-079

Constitutionality of certain proposed amendments to SB 3394/HB 3512 and SB 3392/HB 3513
relative to TennCare

QUESTIONS

1. Does the proposed amendment to SB 3392/HB 3513, establishing venue for “criminal actions involving fraud and abuse” in “the county where the offense was committed or in Davidson County,” violate Article I, § 9, of the Tennessee Constitution or the Sixth Amendment of the United States Constitution?

2. Does the proposed amendment to SB 3394/HB 3512, which would criminalize a willful failure to report a reasonable belief of TennCare fraud by another, violate state and federal constitutional due process protections as applied to a person who has received no pecuniary benefit from the fraud, has not participated in the fraud, but has merely kept silent concerning his knowledge of another’s misconduct?

OPINIONS

1. The proposed amendment violates Article I, § 9, of the Tennessee Constitution to the extent that it permits a defendant to be tried on a criminal charge in a county other than the county where the crime was committed.

2. The “failure to report” provisions of the legislation are constitutionally defensible and do not violate state and federal constitutional due process protections.

ANALYSIS

1. This question concerns the constitutionality of the following language from the proposed amendment to SB 3392/HB 3513 establishing the TennCare Fraud and Abuse Reform Act of 2004, within Section 20 of the proposed amendment:

Venue for civil and criminal actions involving fraud and abuse shall be in the county where the offense was committed or in Davidson County.

The question is whether establishing venue for a criminal offense in Davidson County, if the offense was not committed in Davidson County, would violate Article I, § 9, of the Tennessee Constitution.

Article I, § 9, of the Tennessee Constitution directs that, in all criminal prosecutions, the accused defendant has a right to “a speedy public trial, by an impartial jury of the County in which the crime shall have been committed.” As this Office previously stated:

Article I, Section 9, of the Constitution of Tennessee affords all criminal defendants the right to a trial in “the County in which the crime shall have been committed.” Thus, venue for the prosecution in question lies in the county of the situs of the crime. *Chadwick v. State*, 201 Tenn. 57, 296 S.W.2d 857 (1956); *Edge v. State*, 117 Tenn. 405, 95 S.W. 1098 (1907); *Riley v. State*, 28 Tenn. 646 (1849).

Tenn. Op. Att’y Gen. No. 81-444 (1981). In this regard, Article I, § 9, “has been interpreted to require that the accused be tried in the county in which the crime is alleged to have been committed.” *State v. Upchurch*, 620 S.W.2d 540, 542 (Tenn. Crim. App. 1980). “Hence, Tennessee case law has interpreted the local vicinage requirement in our state constitution to include a concomitant requirement of local venue that cannot be changed except on application of or with the consent of the defendant.” *State v. Nichols*, 877 S.W.2d 722, 728 (Tenn. 1994).

In light of these authorities, the proposed amendment would violate Article I, § 9, to the extent that it would authorize a defendant to be tried on a criminal charge in a county other than the county where the crime was committed.

2. This question concerns the constitutionality of the following language from the proposed amendment to SB 3394/HB 3512, relative to an obligation to report a reasonable belief of TennCare fraud by another:

(a) All Managed care organizations, contractors, subcontractors, providers ***or any other person or entity*** shall advise the Office of TennCare Inspector General immediately when there is a reasonable belief than an act of recipient, enrollee, or applicant fraud is being or has been committed. The Office of TennCare Inspector General shall review the information to determine if there is a sufficient basis to warrant a full investigation.

.....

(d) ***Willful failure to report such fraud shall be considered a class A misdemeanor***; however, if an entity, rather than an individual, fails to submit such a report, such entity shall be subject to a fine of not more than \$25,00 for each finding.

(emphasis added). The question posed by the request is whether state and federal due process guarantees would be violated by criminalizing the willful failure to report TennCare fraud when the person charged has received no pecuniary benefit from the fraud, has not participated in the fraud, but has merely kept silent concerning another's fraudulent misconduct.

For purposes of the due process guarantees under Article I, § 8, of the Tennessee Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, a statute may be subject to attack under two doctrines, vagueness and overbreadth, and this request seems to question whether the proposed amendment violates the overbreadth doctrine. The Tennessee Supreme Court has described the overbreadth doctrine as follows:

A statute may be challenged as overbroad when it reaches a substantial amount of constitutionally protected conduct. *Hoffman Estates, Inc.*, 455 U.S. at 494, 102 S.Ct. 1186. A statute may be invalid on its face if it inhibits the exercise of First Amendment rights and “if the impermissible applications of the law are substantial when ‘judged in relation to the statute's plainly legitimate sweep.’ ” *Morales*, 527 U.S. at 55, 119 S.Ct. 1849 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). To maintain an overbreadth challenge, Burkhardt must first show that the statute challenged involves constitutionally protected conduct. See *Hoffman Estates*, 455 U.S. at 494, 102 S.Ct. 1186. If the statute reaches a substantial amount of constitutionally protected conduct, a defendant must then “demonstrate from the text of the law and actual fact that there are a substantial number of instances where the law cannot be applied constitutionally.” *Lyons*, 802 S.W.2d at 593.

State v. Burkhardt, 58 S.W.3d 694, 700 (Tenn. 2001).

It is the opinion of this Office that the proposed amendment does not violate due process, since the statute does not implicate constitutionally protected conduct in criminalizing the failure to report a reasonable belief of TennCare fraud by another. This scenario is most analogous in present state law to Tenn. Code Ann. §§ 37-1-412 and 37-1-615, which establish a Class A misdemeanor criminal offense for “any person” knowingly to fail to report child abuse and child sexual abuse, respectively.¹ As for Tenn. Code Ann. § 37-1-615, this Office has previously opined that the criminal statute does not violate due process protections:

The legislature has unlimited power to define what acts shall constitute criminal offenses as long as such statutes do not violate the constitution. *Bostwick v. State*, 154 Tenn. 1, 285 S.W. 49 (1926). A statute should, however, have some relation to

¹For child sexual abuse under § 37-1-615, the failure to report must be both knowing and willful. While this statute applies by its terms to “any person required to report known or suspected child abuse,” Tenn. Code Ann. § 37-1-605 makes clear that the persons “required to report” include “any other person who knows or has reasonable cause to suspect that a child has been sexually abused.”

the comfort, welfare and safety of society. 22 C.J.S. Criminal Law, § 13. While most offenses require some affirmative conduct, criminal liability can also be imposed for an omission or failure to act where the law imposes a duty to act. *State v. Barnes*, 141 Tenn. 469, 212 S.W. 100 (1919). The duty to report known or suspected child sexual abuse is reasonably related to the welfare and safety of society. The legislature has recognized the effect which child sexual abuse has on the victimized child, his family and inevitably on all citizens of the state. T.C.A. § 37-1-601. Therefore, since imposing a duty to report child sexual abuse does not violate any constitutional provision and is reasonably related to protecting the general welfare of the citizens of this state, the legislature has the power to make the knowing and willful failure to perform this duty a misdemeanor.

Tenn. Op. Att’y Gen. No. 87-111 (1987). For the same reasons, the General Assembly has the authority to criminalize the knowing and willful failure to report a reasonable belief of TennCare fraud by another. Imposing a duty to report such misconduct would not violate any constitutional provision and is reasonably related to protecting the general welfare of the citizens of Tennessee.

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