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Opinion No. 10-68

Burden of proof related to sexual offenders residing with minors

QUESTION

Would Amendment No. 1 to Senate Bill 3697/House Bill 3370, if enacted, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by improperly relieving the State of its burden of proving every element of the crime charged under the statute?

OPINION

Amendment No. 1 to SB 3697/HB 3370 unconstitutionally relieves the State of its burden of proving every fact necessary for conviction beyond a reasonable doubt, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

ANALYSIS

As presently written, Tenn. Code Ann. § 40-39-211(c) prevents sexual offenders and violent sexual offenders from residing with minors.¹ Violations of the residency and other restrictions set forth in Tenn. Code Ann. § 40-39-211 are punishable as Class E felonies. Tenn. Code Ann. § 40-39-211(f).

Generally, the statute is not violated if the defendant is the “parent” of the minor with whom he or she resides with.² Tenn. Code Ann. § 40-39-211(c); *see also* T.P.I.-Crim. 10.17(a). Section 40-39-202(11) excludes from the definition of “parent” any step-parent if the offender’s victim was under the age of thirteen (13) at the time of the offense.³ Therefore, if the defendant

¹ As defined in Tenn. Code Ann. § 40-39-202(8), a minor is any person under the age of 18.

² In the event the offender is the parent of the minor, he or she can still be found to have violated Tenn. Code Ann. § 40-39-211(c). In that situation the State must prove one of the following in order to obtain a conviction: 1) the offender’s parental rights have been or are in the process of being terminated as provided by law; or 2) any minor or adult child of the offender was a victim of a sexual offense or violent sexual offense committed by the offender. Tenn. Code Ann. § 40-39-211(c)(1) and (2).

³ Tenn. Code Ann. § 40-39-202(11) defines “parent” as a “biological parent, adoptive parent, or step-parent, and includes any legal or court-appointed guardian or custodian; however, ‘parent’ shall not include step-parent if the offender’s victim was a minor less than thirteen (13) years of age.”

is a step-parent and, at the time the sexual offense or violent sexual offense was committed the victim was thirteen (13) years of age or older, § 40-39-211(c) has not been violated, unless the offender's parental rights have been or were in the process of being terminated by law, or any minor or adult child of the offender was a victim of a sexual offense or violent sexual offense committed by the offender. Tenn. Code Ann. § 40-39-211(c)(1) and (2).

Amendment No. 1 to SB 3697/HB 3370, if enacted, would amend Tenn. Code Ann. § 40-39-211(c) by adding the following language between the first and second sentences of Tenn. Code Ann. § 40-39-211(c):

If the age of the offender's victim cannot be ascertained because the victim's image appeared in child pornography accessed by the offender, it shall be presumed that, for purposes of this part, the victim was a minor less than thirteen (13) years of age.

There are three types of presumptions: (1) permissive presumptions or inferences, (2) mandatory rebuttable presumptions, and (3) conclusive or irrebuttable presumptions. Only the first category of presumption, the permissive presumption or inference⁴, is constitutional in the criminal setting. A mandatory rebuttable presumption "requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted."⁵ Such a presumption violates due process because it "relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding."⁶

An irrebuttable or conclusive presumption is one which "removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption."⁷

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."⁸ Stated another way, the burden of proving the essential

⁴ "A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw the conclusion. . . . A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved. . . . A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Francis v. Franklin*, 471 U.S. 307, 314-15, 105 S.Ct. 1965, 1971 (1985).

⁵ *Francis*, 471 U.S. at 314 (citing *Sandstrom v. Montana*, 442 U.S. 510, 517-18, 99 S.Ct. 2450, 2455-56, 61 L.Ed.2d 39 (1979)).

⁶ *Francis*, 471 U.S. at 317.

⁷ *Francis*, 471 U.S. at 314 (citing *Sandstrom v. Montana*, 442 U.S. 510, 517-18, 99 S.Ct. 2450, 2455-56, 61 L.Ed.2d 39 (1979)).

⁸ *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970).

elements of the crime cannot be shifted, nor can the State be relieved of the burden of proving every element of the crime beyond a reasonable doubt.

Amendment No. 1 creates a conclusive presumption. Specifically, according to Amendment No. 1, if the State proves the predicate fact (i.e., the victim's age is not ascertainable because the victim's image appeared in child pornography), the finder of fact would be required to find that the victim was under thirteen (13) years of age. In the case of a step-parent, the application of the amendment would result in an impermissible presumption, as the State would not be required to prove beyond a reasonable doubt that the step-parent's victim was less than thirteen (13) years of age.

Such a result does not comport with the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as it would relieve the State of its burden of proving all of the necessary elements of the offense beyond a reasonable doubt. Consequently, Amendment No. 1 to SB 3697/HB 3370 is unconstitutional.

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