

**STATE OF TENNESSEE
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January 21, 2004

Opinion No. 04-008

Authority of a Trial Court to Set Bail Bond Requirements

QUESTIONS

1. When setting bail in a criminal case, is a court authorized to offer the defendant a choice of executing a bail bond secured by real estate or sureties or, in the alternative, paying into the court ten percent of the bail amount in cash, with the understanding that the cash deposit would be applied to any costs and fines before any balance would be returned to the defendant?

2. Does a court have the authority to require a cash bail bond, as opposed to a bail bond secured by real estate or sureties, and order that the cash deposit be applied to any costs and fines before any balance would be returned to the defendant?

OPINIONS

1. No, a trial court may not offer a defendant the choice between executing a bail bond secured by real estate or sureties, or paying into the court ten percent of the bail amount in cash because the cash deposit must be equal to the amount of the bond.

2. No, a trial court cannot require a defendant to secure a bail bond with a cash deposit rather than with real estate or sureties, but the court can apply the cash deposit to any fines or court costs rendered against the defendant.

ANALYSIS

1. A Court May Not Offer a Defendant the Option of Executing a Bail Bond Secured by Paying Ten Percent of the Bail Amount in Cash

No provision in the Tennessee Code authorizes a trial court to offer a defendant the choice of depositing ten percent of the bail amount in cash. Generally, all defendants are bailable by sufficient sureties before trial, except for those defendants who have been charged with a capital offense where the proof is evident or the presumption great. Tenn. Const. art. I, § 15; Tenn. Code

Ann. § 40-11-102. Once bail has been set for a defendant, the defendant may secure the bond in one of three ways. First, the defendant can secure the bail bond by executing a deed of trust conveying real estate to the clerk of the court. *See* Tenn. Code Ann. § 40-11-122(1). Second, the defendant can secure the bail bond by sureties. *See* Tenn. Code Ann. §§ 40-11-122(2)-(3). Third, the defendant can deposit with the clerk of the court a sum in cash “equal to the amount of bail.” Tenn. Code Ann. § 40-11-118(a). This section requires the deposit to be for the full amount of the bond and does not give the court the authority to accept a portion of the amount.

Though a trial court is not authorized to accept a portion of the bail amount as security for the bail bond, once the full amount of the bond has been deposited by the defendant, the trial court can apply the amount toward fines and court costs. Tenn. Code Ann. § 40-11-121 actually mandates that the deposit be applied to any judgment for a fine or court costs entered against a defendant who has made a deposit. Once the conditions of bail have been satisfied and the defendant has been discharged of any further obligations in the cause, the clerk must return the remainder of the sum deposited. *See* Tenn. Code Ann. § 40-11-119.

A court may not apply the cash deposited toward fines and court costs, as required under Tenn. Code Ann. § 40-11-121, when a third party deposits the cash on behalf of the defendant, unless the third party has either executed an agreement which specifically makes the third party liable or has consented to be liable. *See State v. Clements*, 925 S.W.2d 224 (Tenn. 1996); Tenn. Code Ann. § 40-11-118(c)(2).

2. A Court May Not Require a Cash Bond in Lieu of a Bond Secured by Real Estate or Sureties with the Understanding that the Deposit Will be Applied to Fines and Court Costs

As this office has previously opined, a court may not require the defendant to secure the bail bond with a cash deposit instead of with real estate or a surety. *See* Op. Tenn. Att’y Gen. 03-054 (April 30, 2003), 2003 WL 21155026, at *2 (copy attached). Once the amount of bail has been set by the trial court, the defendant has the “option as to how he will provide the security required.” *Lewis Bail Bond Co. v. Gen. Sessions Ct. of Madison County*, No. C-97-62, 1997 WL 711137, at *5 (Tenn. Ct. App. Nov. 12, 1997)(copy attached).

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