

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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NASHVILLE, TENNESSEE 37202

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Opinion No. 04-013

DUI as a lesser-included offense of child endangerment and consecutive sentencing for DUI and child endangerment.

QUESTIONS

1. Is DUI a lesser-included offense of child endangerment?
2. Must a trial court impose consecutive sentences for dual convictions of DUI and child endangerment?
3. Would consecutive sentences for DUI and child endangerment violate the double jeopardy guarantees of the state and federal constitution?

OPINIONS

1. No. Even though the elements of DUI are subsumed within the offense of child endangerment, the General Assembly has expressly designated DUI and child endangerment as separate, distinct offenses, and dual convictions for both offenses does not violate double jeopardy.
2. No. As previously stated in Attorney General Opinion No. 99-165, the mandate of Tenn. Code Ann. § 55-10-414 that a child endangerment sentence be “in addition to” another sentence required by law does not necessarily mandate consecutive sentencing for dual DUI and child endangerment convictions.
3. No. Since dual convictions for DUI and child endangerment do not offend double jeopardy and since they do not necessarily require consecutive sentencing, service of the two sentences consecutively, when authorized by law, does not implicate or offend double jeopardy.

ANALYSIS

1. Under Tenn. Code Ann. § 55-10-401, Tennessee’s DUI statute, it is unlawful for any person to drive or be in physical control of a motor vehicle while under the influence of an intoxicant. The Class A misdemeanor offense of child endangerment occurs under Tenn. Code Ann. § 55-10-414(1) if a person violates Tenn. Code Ann. § 55-10-401 while accompanied by a child

under 13 years of age. If the child consequently suffers seriously bodily injury as a result of the child endangerment, then the offense is aggravated child endangerment, a Class D felony. Tenn. Code Ann. § 55-10-414(2). If the child suffers death, then the offense is especially aggravated child endangerment, a Class C felony. Tenn. Code Ann. § 55-10-414(3). The elements of DUI under Tenn. Code Ann. § 55-10-401 are subsumed within the elements for child endangerment under Tenn. Code Ann. § 55-10-414(1). While this generally would satisfy the strict elements test under part (a) of the *Burns* analysis, as a lesser-included offense of child endangerment, the General Assembly has clearly intended dual convictions for these two offenses. *See State v. Burns*, 6 S.W.3d 453 (Tenn. 1999). As such, both are separately punishable, and one is not a lesser-included offense of the other.

The more telling and dispositive question here is whether a trial court may constitutionally impose dual convictions under separate indictments for DUI and child endangerment. In fact, the Court of Criminal Appeals has affirmed dual convictions for DUI and child endangerment multiple times on appeal, although the legality of the dual convictions was not then challenged. *See State v. Grooms*, No. E2002-02013-CCA-R3-CD (Tenn. Crim. App. Aug. 1, 2003); *State v. Partin*, No. E2002-00094-CCA-R3-CD (Tenn. Crim. App. Nov. 15, 2002); *State v. Fitzgerald*, No. 03C01-9809-CR-00339 (Tenn. Crim. App. Sept. 20, 1999); *State v. Fithiam*, No. 03C01-9610-CC-00381 (Tenn. Crim. App. Oct. 28, 1997); *State v. Morrell*, No. 03C01-9409-CR-00355 (Tenn. Crim. App. Jan. 31, 1996); *State v. Fiorito*, No. 03C01-9401-CR-00032 (Tenn. Crim. App. Nov. 27, 1995); *State v. Reagan*, No. 03C01-9410-CR-00359, (Tenn. Crim. App. June 23, 1995); *State v. Reagan*, 03C01-9407-CR-00258 (Tenn. Crim. App. March 14, 1995).

It is the opinion of this Office that dual convictions for DUI under Tenn. Code Ann. § 55-10-401 and for child endangerment under Tenn. Code Ann. § 55-10-414 are constitutionally permissible, and this situation is most analogous to felony murder. Dual convictions for felony murder and for the underlying enumerated felony do not offend double jeopardy because “the two statutes are directed at separate evils.” *State v. Blackburn*, 694 S.W.2d 934, 936 (Tenn. 1985). The key factor in determining this issue is “whether the legislature intended cumulative punishment.”

In 1992, the General Assembly enacted the Drunk Driving Child Protection Act and expressly adopted the offense of child endangerment. In so doing, the legislature left the offense of DUI intact and valid. Furthermore, the legislature expressly mandated, for child endangerment under Tenn. Code Ann. § 55-10-414(1), a mandatory minimum sentence of 30 days confinement and a mandatory minimum fine of \$1000 “in addition to any other incarceration and fine required by law.” As such, it is evident that the General Assembly, when it enacted the Drunk Driving Child Protection Act, clearly intended and precisely authorized cumulative punishment for the discrete act of committing DUI while simultaneously exposing a child under 13 years of age to the risks associated with DUI. “Where the Legislature has indicated that cumulative punishment is intended, the double jeopardy analysis need not proceed any further.” *State v. Goodsey*, 60 S.W.3d 759, 778 (Tenn. 2001). There is no double jeopardy violation under the state or federal constitutions for dual convictions of DUI and child endangerment. *But see State v. Neal*, No. M2001-00441-CCA-R3-CD (Tenn. Crim. App. Dec. 19, 2002) (app. denied May 5, 2003) (merging, on double jeopardy grounds,

two child endangerment convictions involving two victims present in the defendant's vehicle during one criminal event).

2. Both Tenn. Code Ann. §§ 55-10-401 and 55-10-414 individually require mandatory minimum sentences for DUI and child endangerment, respectively. This Office opined in Attorney General Opinion No. 99-165 that, although both offenses require mandatory minimum sentences of incarceration, consecutive sentencing is not necessarily required, and a trial court may impose concurrent sentencing. Tenn. Code Ann. § 55-10-414 designates child endangerment as an offense “punishable by a mandatory minimum incarceration of thirty (30) days and a mandatory minimum fine of one thousand dollars (\$1,000), *which incarceration and fine shall be in addition to any other incarceration and fine required by law.*” (emphasis added) As this Office stated in Attorney General Opinion No. 99-165:

By its plain meaning, the phrase “in addition to” encompasses both concurrent and consecutive sentencing. “Additional” means “the idea of joining or uniting one thing to another, so as thereby to form one aggregate.” Black’s Law Dictionary, 35 (5th Ed. 1979). In Tenn. Code Ann. § 55-10-414(1), the phrase “in addition to” merely shows the legislative intent to create two separate offenses of Child Endangerment and DUI. And, although the legislature has prevented the two offenses from being merged, the language of the statute does not mandate consecutive sentencing.

“When the language contained within the four corners of a statute is plain, clear and unambiguous, the duty of the courts is simple and obvious, to say six ex scripta, and obey it.” *Kradel v. Piper Industries Inc.*, 60 S.W.3d 744, 749 (Tenn. 2001). Furthermore, “[s]tatutes relating to the same subject matter are to be read together.” *State through Baugh v. Williamson County Hospital Trustees*, 679 S.W.2d 934, 936 (Tenn. 1984). These two statutes, read together, clarify that a conviction and mandatory minimum sentence for child endangerment shall be entered “in addition to” a conviction and mandatory minimum sentence for DUI. This does not mean that the statutes mandate consecutive sentencing for service of the two convictions and sentences. Whether or not a trial court may order consecutive sentencing for the two convictions is a separate issue under Tenn. Code Ann. § 40-35-115. “[T]he guidelines set forth in Tenn. Code Ann. § 40-35-115 must be satisfied before consecutive sentences may be imposed . . .” Attorney General Opinion No. 99-165.

3. As discussed above, dual convictions for DUI and for child endangerment do not offend double jeopardy, nor do they mandate consecutive sentencing. Therefore, service of the two sentences consecutively, when authorized under Tenn. Code Ann. § 40-35-115, does not implicate or violate constitutional guarantees against double jeopardy.

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