S T A T E O F T E N N E S S E E
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Opinion No. 00-001

General Sessions Judge's Legal Authority

QUESTIONS

1. Does the State have a right to continuances?

A) Is the State entitled to the same right as a private attorney for continuances in general sessions court where an emergency develops or a material witness or, a party cannot be in court? If not, would allowing one class of witnesses or attorneys to have the right of continuances and to deny continuances to another class of witnesses or attorneys violate the constitution?

B) Is the policy of allowing a defendant time to hire an attorney but requiring the State to go forward on the date set for trial an abuse of discretion and denial of the State's right to represent the people of the State properly and adequately in general sessions court?

2. Can a general sessions judge dismiss cases where the State has made a first-time request for a continuance and officers are unavailable because they are in training, attending to emergencies, or assigned to another duty by a supervisor?

3. Can a general sessions judge require an attorney from the district attorney's office to be present in the general sessions court room during all criminal proceedings?

4. Can a general sessions judge require the district attorney to send a child-support IV-D attorney to appear and handle criminal matters in the general sessions court when no other attorneys are available in the district attorney's office? If yes, are there guidelines prohibiting a child-support attorney from being used in matters other than child support?

5. Can a general sessions judge, after denying the State's first request for a continuance, require officers to pay court costs or other fees if they fail to appear to prosecute a case because they have been sent to in-service training or called to duty by their supervisor?

6. Can a general sessions judge refuse to allow the State to *nolle prosequi* a case where the parties are in agreement and can a general sessions judge refuse to allow the State to dismiss a case where the State reserves the right to take the case to the grand jury?

7. Can a general sessions judge tax anyone with costs where the State moves to dismiss a case and reserves the right to take the case to the grand jury?

OPINIONS

1. (A) and (B). The State does not have a right to continuances, and the legislative provision giving appointed defense attorneys and members of the general assembly "sufficient opportunity to prepare the case" does not violate the constitution. Although general sessions judges have discretion granting continuances, a judge's policy of denying the State's request when the request is based on good cause and when prejudice to the prosecution would result may constitute an abuse of the judge's discretion.

2. General sessions judges have authority to dismiss a case for failure to prosecute, but such a dismissal likely would constitute an abuse of discretion where the State has made a first-time request for a continuance and officers are unavailable because they are in training, attending to emergencies, or assigned to another duty by a supervisor.

3. A general sessions court cannot enforce a requirement that the district attorney have an attorney from his or her office in the courtroom during all criminal proceedings.

4. A general sessions court cannot require the district attorney to assign any particular attorney to appear in criminal matters.

5. A general sessions court's order requiring officers to pay court costs or other fees when they fail to appear to prosecute a case because they have been sent to in-service training or called to duty by their supervisor is not authorized.

6. A general sessions judge who unreasonably refuses to allow the State to *nolle prosequi* a case or dismiss a case would abuse his or her discretion.

7. A general sessions judge's order taxing anyone with costs where the State moved to dismiss a case and reserves the right to take the case to the grand jury would be unauthorized.

ANALYSIS

1. (A) and (B). The first question is controlled by Tenn. Code Ann. § 16-15-720 that gives general sessions judges discretion in granting continuances. This provision is consistent with the general rule relating to a judge's decision to grant or deny continuances. In *Moorehead v. State*, 219 Tenn. 271, 409 S.W.2d 357 (Tenn. 1966), the Court held that a trial judge's decision to grant or deny a continuance would not be disturbed on appeal absent a showing that the judge's action was an abuse of discretion that prejudiced the defendant. 219 Tenn. at 274, 409 S.W.2d at 358-59. More recently, in a civil case, the Court relied on *Moorehead* and *State v. Strouth*, 620 S.W.2d 467 (Tenn. 1981), to reiterate that allowing or denying a continuance is within the discretion of the court and that the ruling on such a motion will not be disturbed unless the record "clearly shows abuse of discretion and prejudice to the parties seeking a continuance." *Blake v. Plusmark, Inc.*, 952 S.W.2d

413, 415 (Tenn. 1997).

Even though Tenn. Code Ann. § 40-14-202(a)(1998) provides that an attorney appointed to represent an indigent defendant, including members of the general assembly pursuant to Tenn. Code Ann. § 40-14-202(h), be given "sufficient opportunity to prepare the case," no similar statutory provision applies to the State. Nevertheless, these statutory allowances to appointed counsel for defendants do not run afoul of constitutional principles because the State itself, through the legislature, has exempted the State from the legislative classification and because the federal and Tennessee Constitutions proscribe a State's denial of equal protection to "any person" or "individual." U.S. Const. amend. XIV, § 1; Tenn. Const. art. I, § 8, art. XI, § 8. Neither the Federal nor the Tennessee Constitution contemplates equal protection guarantees for the State.

Nevertheless, where a general sessions court forces the State to go forward on the date set for trial even though the State has requested a continuance for good cause and would be prejudiced by the denial of the request, the State could appeal on the grounds that the order is an abuse of discretion and that the substantive effect of the order is to preclude prosecution of the case, thereby interfering with prosecutorial discretion. *See Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207 (Tenn. 1999)(District Attorney General has great prosecutorial discretion).

2. The second question asks whether a general sessions judge can dismiss cases where the State has made a first-time request for a continuance and officers are unavailable because they are in training, attending to emergencies, or assigned to another duty by a supervisor.

Rule 48, Tenn. R. Crim. P.(b), provides: "If there is unnecessary delay in presenting the charge to a grand jury against a defendant who has been held to answer to the trial court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, presentment, information or complaint." Rule 1, Tenn. R. Crim. P., does not specifically make Rule 48 applicable to general sessions courts. However, Rule 1(i), Tenn. R. Crim. P., provides that the rules apply "in any other situation where the context clearly indicates applicability." Arguably, Rule 48 applies to general sessions court practice because the rule includes dismissal of a "complaint" that is defined in Rule 3, Tenn. R. Crim. P., which is specifically applicable to general sessions courts. Rule 1(a), Tenn. R. Crim. P.

A dismissal pursuant to Rule 48(b) "can be with or without prejudice but a dismissal on a non-constitutional ground is normally without prejudice to a subsequent reindictment and prosecution." *State v. Benn*, 713 S.W.2d 308, 310 (Tenn. 1986)(citations omitted). The Court in *Benn* explained that a dismissal with prejudice for lack of prosecution that does not implicate a constitutional violation "should be utilized with caution and only after a forewarning to prosecutors of the consequences." *Id.* (citations omitted). Thus, if Rule 48(b) provides authority for general sessions judges to dismiss criminal cases for want of prosecution, the Court in *Benn* set out general parameters for the exercise of a general session judge's discretion to dismiss.

In any event, *State v. Hazelwood*, Williamson County, No. 01C01-9705-CC-00175 (Tenn.

Crim. App., filed September 18, 1998, at Nashville), indicates by implication that a general sessions judge has the authority to dismiss charges against a defendant for failure to prosecute. After the State sought and was granted two continuances for the DUI defendant's preliminary hearings based on the unavailability of the blood-alcohol test, the general sessions judge dismissed the charges against Hazelwood for failure to prosecute when, at the third scheduled preliminary hearing, the State still was unable to produce the blood-alcohol test results or its primary prosecution witness. A reasonable inference from the case is that a general sessions judge has the authority to dismiss charges against a defendant for the State's failure to prosecute. Notwithstanding this authority, a general sessions judge would likely abuse his or her discretion by dismissing a case for want of prosecution when the State has made a first-time request for a continuance and when the prosecuting witnesses are unavailable for good cause.

3. The third question asks whether a general sessions court can require the district attorney to have an attorney in the general sessions courtroom during all criminal proceedings. No Tennessee statute or case appears to have addressed this issue directly, but such a requirement would interfere with a district attorney's exercise of "discretion in the performance of duties and responsibilities in the allocation of resources available" pursuant to Tenn. Code Ann. § 8-7-103(6)(1998). Moreover, Tenn. Code Ann. § 8-7-106(a), providing for a court-appointed district attorney general pro tem where a district attorney fails to attend the circuit or criminal court, is limited on its face to the circuit or criminal courts, thereby excluding a general sessions court from authority to usurp the discretionary performance of duties under Tenn. Code Ann. § 8-7-103(6).

Finally, the Advisory Commission Comments to Rule 5, Tenn. R. Crim. P., state that the district attorney must be given the right to object to a defendant's offer to waive a jury trial "because it is recognized that many General Sessions Courts must sometimes operate without the presence of the District Attorney General or his or her representatives." Rule 5 is specifically applicable to general sessions courts. Rule 1, Tenn. R. Crim. P. Absent a superseding statute or rule, the Advisory Commission Comments are instructive even if not authoritative. *See* Tenn. R. Crim. P., Rule 1, Advisory Commission Comments.

Based on these authorities and the principle that district attorneys have broad discretion in matters of prosecution, *see Ramsey v. Town of Oliver* Springs, 998 S.W.2d 207 (Tenn. 1999); *State v. Superior Oil, Inc.*, 875 S.W.2d 658 (Tenn. 1994); State *v. Gilliam*, 901 S.W.2d 385, 389 (Tenn. Crim. App. 1995), this office concludes that a general sessions court cannot enforce a requirement that the district attorney have an attorney from his or her office in the courtroom during all criminal proceedings.

4. The fourth question asks whether a general sessions court can require a district attorney to send a child-support Title IV-D attorney to appear and handle criminal matters when no other attorneys in the district attorney's office are available. Again, no Tennessee statute or case directly answers this question, but the provision in Tenn. Code Ann. § 8-7-103(6) giving district attorneys discretion in performing their duties and responsibilities in the allocation of resources available to them establishes that a general sessions court cannot dictate to the district attorney

general which attorneys to assign to handle various matters.

Title IV-D, 42 U.S.C. § 651 *et. seq.*, imposes no requirement that child-support attorneys may not be used for matters other than child support. The guidelines for the use of child-support attorneys are set out in the contract between the State and the local district attorney's office. That contract typically requires the district attorney general to "maintain personnel activity reports for all multiple activity employees (employees working less than 100 percent of time on Title IV-D functions)." Interdepartmental Grant Agreement Between the State of Tennessee Department of Human Services and the District Attorney General Thirty-first Judicial District at 9, § A. 57. That contractual provision contemplates the use of employees for less than full-time child-support work.

Based on the foregoing, this office concludes that the authority of Tenn. Code Ann. § 8-7-103(6) precludes a general sessions court from requiring assignment of any particular attorney to appear in criminal matters, even though use of Title IV-D attorneys for matters other than child support is permissible.

5. The fifth question asks whether a general sessions judge, after denying the State's first request for a continuance, can require officers to pay court costs or other fees when they fail to appear to prosecute a case because they have been sent to in-service training or called to duty by their supervisor. Research has uncovered no authority for a general sessions judge to tax officers with costs and fees for failing to appear in a prosecution. Indeed, Tenn. Code Ann. § 40-25-126 limits the taxing of costs to a prosecutor for malicious or frivolous prosecutions that result in discharge of the defendant or acquittal. Tenn. Code Ann. § 40-25-127 provides that "if any person commences a criminal prosecution against any individual, either by warrant from the judge in the general sessions court, or otherwise, and shall afterwards willfully abandon the same, the court having jurisdiction of the cause shall have power to tax the prosecutor with the costs."

Thus, absent a finding that the prosecution is malicious or frivolous or has been willfully abandoned, a general sessions court lacks authority to tax court costs to officers, and a general sessions judge's order that officers pay court costs would not be authorized.

6. The sixth question asks whether a general sessions judge can refuse to allow the State to *nolle prosequi* a case where all of the parties are in agreement and whether a general sessions judge can refuse to allow the State to dismiss a case where the State reserves the right to take the case to the grand jury. Rule 48, Tenn. R. Crim. P., provides that the State "may by leave of court" file a dismissal of an indictment, presentment, information, or complaint, thereby terminating the prosecution. If Rule 48 applies to general sessions courts on the rationale contained in the analysis of question two above, then that rule requires leave of the court for dismissal.

Regardless of the applicability of Rule 48, leave of the court for the State to dismiss an indictment is required under *State v. D'Anna*, 506 S.W.2d 200 (Tenn. Crim. App. 1973). In that case, the State entered an order *nolle prosequi* in the general sessions court on the same date that the requested preliminary hearing was to occur. The court held that the determination of whether

pending criminal cases are to be discontinued or dismissed upon an order *nolle prosequi* "is a matter addressed to the judgment of the district attorney general *and the court* in which the case has been pending." *Id*. at 202 (emphasis added).

Although leave of the court to dismiss is required, a court's unreasonable refusal to grant the State's request to *nolle prosequi* would be an abuse of discretion. In *State v. Lusky*, 196 Tenn. 326, 267 S.W.2d 106 (Tenn. 1954), the Court held: "[t]he State has the legal right to have a *nolle prosequi* entered in the general sessions court before jeopardy attaches, and to have the defendant indicted or presented charging the same crime in the criminal court of Davidson County." 196 Tenn. at 333, 267 S.W.2d at 109. This principle was reinforced recently in *State v. Kenneth Bryan Harris*, Wilson County, No. 01C01-9807-CR-00305 (Tenn. Crim. App., filed June 4, 1999, at Nashville), *perm. to appeal granted*, December 6, 1999. In *Harris*, the court acknowledged the "leave of court" requirement in Rule 48(a), Tenn. Crim. P., but concluded that a trial court cannot "in essence compel the State to prosecute a case that the State does not desire or intend to prosecute." *Slip op.* at 7-8.

7. The seventh question asks whether a general sessions judge can tax anyone with costs where the State moves to dismiss a case and reserves the right to take the case to the grand jury. There is no statutory or other authority that would allow a general sessions judge to tax anyone with costs where the State moves to dismiss a case and reserves the right to take the case to the grand jury. Accordingly, any such taxation of costs would be unauthorized.

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