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Opinion No. 00-092

Constitutionality of S.B. 2234, conversion of restitution orders to civil judgments

## QUESTIONS

1. Whether the procedure proposed by Senate Bill 2234, which would amend Tenn. Code Ann. § 40-35-304 to allow victims of crime, or their beneficiaries, to convert orders of restitution entered in criminal cases to civil judgments upon a hearing before a civil court judge sitting without a jury, would violate the defendants' right to jury trial in civil cases under Article I, § 6 of the Tennessee Constitution?

2. Whether the conversion procedure proposed by Senate Bill 2234 would violate the defendants' right to a jury trial under the Seventh Amendment to the United States Constitution?

3. Whether the conversion procedure proposed by Senate Bill 2234 would constitute double jeopardy in violation of the Fifth Amendment to the United States Constitution or Article I, § 10 of the Tennessee Constitution?

4. Whether the conversion procedure proposed by Senate Bill 2234 would violate the defendants' right to due process under Article I, §8 of the Tennessee Constitution?

5. Whether the conversion procedure proposed by Senate Bill 2234 would violate Article VI, § 14 of the Tennessee Constitution which requires a jury to impose any fine in excess of fifty dollars ($50)?

6. Whether the conversion procedure proposed by Senate Bill 2234 would violate any other provision of the Tennessee or United States constitutions?

## OPINIONS

1. No. The procedure proposed by Senate Bill 2234 would not violate a defendant's right to a jury trial of facts at issue in a civil action at law as provided by Article I, § 6 of the Tennessee Constitution.

2. No. The procedure proposed by Senate Bill 2234 would not violate a defendant's right to a jury trial of facts at issue in a civil action at law as provided by the Seventh Amendment to the United States Constitution.

3. No. The procedure proposed by Senate Bill 2234 does not constitute double jeopardy in violation of the Fifth Amendment to the United States Constitution or Article I, § 10 of the Tennessee Constitution.

4. No. The procedure proposed by Senate Bill 2234 would not violate a defendant's right to due process under Article I, § 8 of the Tennessee Constitution.

5. No. Restitution is not a fine. Therefore Article VI, § 14, which requires that fines in excess of fifty dollars ($50) be imposed by a jury, is not applicable.

6. Probably not. Although it is impossible to imagine every potential constitutional challenge, it does not appear that the procedure proposed by Senate Bill 2234 would violate any provisions of the constitutions of Tennessee or the United States.

## ANALYSIS

1. Right to jury trial under the Tennessee Constitution.

Senate Bill 2234, as amended, would amend Section 40-35-304, Tennessee Code Annotated, which provides for the payment of restitution as a condition of probation. Tenn. Code Ann. § 40-35-304(c) limits the period in which the trial court may enforce an order of restitution to the maximum term of probation which could be imposed for the offense from which the defendant was convicted. Senate Bill 2234 would extend the period within which restitution can be enforced by providing that the criminal court's restitution order can be converted into a civil judgment.

Specifically, Senate Bill 2234 would add a new subsection to Tenn. Code Ann. § 40-35-304 which would enable the victim, or his or her beneficiary, to convert the restitution order to a civil judgment for an amount equal to the balance of restitution remaining unpaid at the expiration of the criminal sentence. The conversion process would have to commence within twelve months of the expiration of the time of payment or payment schedule. The victim or beneficiary could initiate the process by filing a certified copy of the restitution order with a civil court having jurisdiction. S.B. 2234, § 1 ( )(2). Contemporaneous with such filing, the victim or beneficiary would have to personally serve the defendant with notice of intent to convert the restitution order to a civil judgment and a statement as to the amount of restitution allegedly unpaid. S.B. 2234, § 1 ( )(3). After personal service and allowance of time to file an answer, the court would conduct a hearing on the amount of restitution not paid. S.B. 2234, § 1 ( )(4), (5). The resulting judgment would be enforceable for ten years. S.B. 2234, § 1 ( )(7). The proposed procedure is somewhat similar to existing procedures for conversion of juvenile court restitution orders and of administrative orders assessing civil penalties and damages for violation of environmental statutes.[1] The proposed

[1]The recipient of restitution under a juvenile court order of restitution for damages may convert the unpaid amount of the restitution into a civil judgment if the specified amount is not paid before the juvenile court loses jurisdiction. Tenn. Code Ann. § 37-1-131(b). In a related context, administrative orders for civil penalties and damages

procedure is also similar to a federal provision for the civil enforcement of restitution orders entered in federal criminal proceedings.[2]

The bill does not provide for a jury trial on the amount of the judgment. Article I, § 6 of the Tennessee Constitution provides as follows regarding the right to a jury trial:

> That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

This provision only protects the right to trial by jury as it existed under the common law of North Carolina in effect at the time Tennessee became a state in 1796. It does not require jury trials for actions or other remedial proceedings created by the legislature since that time. "For rights and remedies created after the formation of our Constitution, the legislature is free to enact procedures that do not include jury trials." *Helms v. Tennessee Dept. of Safety*, 987 S.W.2d 545, 547 (Tenn. 1999). In 1796, there was no action at common law for the conversion of an order of restitution entered in a criminal proceeding into a civil judgment. The conversion action, if enacted, will be a remedy created after the formation of Tennessee's constitution. Therefore, the procedure in proposed Senate Bill 2234 would not violate the right to a jury trial protected by Article I, § 6 of the Tennessee Constitution.[3]

2. Right to jury trial under the United States Constitution.

Amendment Seven to the United States Constitution states:

> In suits at common law, where the value in controversy shall exceed twenty dollars ($20.00), the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any

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for violation of environmental statutes can be converted into civil judgments after the administrative order has become final. Tenn. Code Ann. §§ 68-202-309 (Radiation Source Inspection), 68-202-415 (Restoration of Atomic Energy Facilities), 68-202-506 (Medical Radiation Inspection Safety), 68-202-707 (Southeast Interstate Low-Level Radioactive Waste Compact), 68-221-713 (Safe Drinking Water Act), 69-11-110 (Water Wells), 68-2201-116 (Air Quality Act), 68-212-114 (Hazardous Waste Management Act of 1977), 68-212-215 (Hazardous Waste Management Act of 1983), and 69-3-115 (Water Quality Control Act). Conversion of these administrative orders is accomplished through the procedures set forth in the Uniform Enforcement of Foreign Judgments Act, Tenn. Code Ann. §§ 26-6-101-107.

[2]18 U.S.C. § 3664(m)(1)(B)

[3]Even if the civil conversion action were viewed as a continuation of the criminal prosecution, which it is not, there would still be no constitutional violation. In *Woods v. State*, 130 Tenn. 100, 169 S.W. 558 (1914), the Court held that in criminal cases, Article I, §6 of the Tennessee Constitution only protects the right to a trial by jury on issues related to innocence or guilt. The constitution does not establish a right to a jury determination of sentencing issues. The Court said that the power over determining punishment rested solely with the legislature which could prescribe the type and duration and could determine who would make all decisions related to imposing punishment.

> court of the United States, than according to the rules of the common law.

The Seventh Amendment right to a jury trial in civil cases applies only to actions which are brought in federal courts. It does not apply to proceedings which are brought in state courts. *St. Louis & Kansas City Land Co. v. Kansas City*, 241 U.S. 419, 36 S.Ct. 647, 60 L.Ed. 1072 (1916). Since Senate Bill 2234 creates a cause of action in state court, not federal court, the procedure does not violate the Seventh Amendment.[4]

3. Double Jeopardy.

Three principles underlying federal and state protections against double jeopardy[5]: (1) protection against a second prosecution for the same offense following an acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. *Stuart v. State*, 963 S.W.2d 28 (Tenn. 1998).[6]

The protection against subsequent prosecutions for the same offense following a conviction does not bar the State or some other party from bringing a civil action against the defendant based on the same conduct which gave rise to the criminal charges. *Stuart v. State, supra*; *Coakley v. Daniels*, 840 S.W.2d 367 (Tenn. App. 1992).

The proposed conversion procedure does not constitute a second prosecution for the same offense on which a defendant has been prosecuted. In *Stuart v. State, supra*, the Court held that the institution of asset forfeiture proceedings in addition to criminal proceedings based on the same acts did not violate federal and state constitutional protections against double jeopardy. In that case, the Court applied the holding of *United States v. Usery*, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), that asset forfeiture proceedings were civil in nature for purposes of the federal double jeopardy clause. Therefore institution of such proceedings after criminal prosecution for the same facts did not violate the federal double jeopardy clause.

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[4]In *United States v. Rostoff*, 164 F.3d (5th Cir. 1998), the Court upheld 18 U.S.C. § 3664(m)(1)(B) against a challenge based on Seventh Amendment grounds. The defendant argued that the federal statute violated his Seventh Amendment right to a civil jury trial. The court rejected the argument and held that since restitution orders are penal and not compensatory, the Seventh Amendment did not apply. *See also, United States v. Palma*, 760 Fed. 2d 475 (3rd Cir. 1985) (Seventh Amendment does not apply to enforcement of restitution orders).

[5]The Fifth amendment to the United States Constitution provides federal protections against double jeopardy. State protections are provided by Article I, section 10 of the Tennessee Constitution.

[6]The proposed legislation only addresses situations where a person has been convicted of a criminal offense. Therefore, the protection against subsequent prosecutions for the same offense following an acquittal is not involved here. In addition, as set forth more fully below, the proposed conversion procedure is civil in nature and therefore does not involve multiple punishments for the same offense.

In addressing the state double jeopardy clause, the Court in *Stuart* applied a two pronged analysis. The first prong was to determine whether the legislature intended the action in question to be civil or criminal in nature. The second prong is to determine whether the substance, as opposed to the form, of the action is civil or criminal. If the legislatively created action is, in substance, clearly punitive in nature, the court will find that the action is criminal rather than civil. In the context of forfeiture proceedings, the Court said:

> The second prong of the *Usery* test requires us to determine whether Tennessee's forfeiture proceedings are so punitive in form and effect as to overcome the legislature's intent and render the proceedings criminal. The forfeiture proceedings must be shown by the "clearest proof" to be punitive in order to overcome legislative intent.

*Stuart v. State*, at 33. In applying the test, the Court recognized that the fact that the legislation might serve some punitive objectives will not render the statute unconstitutional. The relevant inquiry is whether the legislation serves sufficient remedial or other non punitive objectives.

Applying the first prong of the *Stuart* analysis to Senate Bill 2234, it is obvious that the text of the proposed legislation creates a new civil action. The action to convert a restitution order is to be instituted in a court having civil jurisdiction in accordance with the Tennessee Rules of Civil Procedure. Senate Bill 2234( )(3). Under the proposed statute, the action is to be brought by the victim or his or her beneficiary in his or her own name as opposed to being brought in the name of the State for the benefit of the State. In addition, the burden of proof is the preponderance of evidence, which is the customary evidentiary standard in most civil actions as opposed to proof beyond a reasonable doubt which is the standard of proof in criminal cases for issues of innocence or guilt.

The proposed conversion procedure effectively provides for the continued enforcement of a sanction which was imposed in a criminal proceeding, and as such, it serves a punitive objective. However, the proposed legislation serves non-punitive objectives as well. Among these objectives it that of providing compensation to the victim or victims of the criminal conduct which gave rise to the conviction. In addition, the act of restitution can serve a rehabilitative purpose for the offender. Since the text of the bill shows intent to create a civil remedy, and since in substance the bill would serve non-punitive as well as punitive purposes, imposition of the civil remedy after criminal conviction would not violate the double jeopardy clause of Article I, § 10 of the Tennessee Constitution.

4. Due Process.

Article I, §8 of the Tennessee Constitution protects the right to due process of law. It states:

> That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

The procedural requirements imposed by the right to due process vary according to circumstance. Generally speaking, due process requires that before a protected liberty or property interest is taken away, the holder of that interest should be given notice and an opportunity to be heard.[7] However, in determining the type of process which is due in a particular circumstance, courts are guided by an overall objective of seeking a process which is likely to reach the right result in the case without disproportionate cost. In making such a determination, courts consider three factors: (1) the interest which is affected by the action; (2) the risk of an erroneous deprivation of the interest through the procedures used and any probable value of additional procedural safeguards; and (3) the government's interest involved in the proceedings, including the function involved, and the costs that additional procedures would entail. In applying these factors, it is appropriate to determine whether there were any proceedings before the proceedings at issue or whether other proceedings will follow. Less elaborate procedures at any given stage may be acceptable if more elaborate ones either preceded or will follow the proceedings at hand. *Phillips v. State Board of Regents*, 863 S.W.2d 45, 50 (Tenn. 1993).

The proposed conversion procedure in Senate Bill 2234 complies with the due process requirements of Article I, § 8 of the Tennessee Constitution. Section 1( )(3) requires that the defendant receive prior notice and subsections (4), (5) and (6) afford him or her with a prior opportunity to be heard before the entry of a civil judgment. In addition, the proposed conversion procedure is adequate to protect the defendant's interests in that such procedures are likely to produce a correct result. When a victim attempts to convert criminal restitution order into a civil judgment, the defendant's primary interest is to be protected from having imposed upon him or her a greater monetary liability than had been imposed in the criminal proceedings.[8] This interest is substantial, but not as great as the interest in avoiding wrongful conviction of crime, or improper imposition of restitution as part of the sentence. The interest in a correct determination of the amount owing can likely be resolved in a fairly straightforward way by examination of payment records and other documentary evidence, the value of additional safeguards and procedures imposed by a jury trial would be minimal. The state's interest in avoiding the considerable cost required to

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[7]Of course, there are situations where legal action may be taken without affording the affected party with prior notice and an opportunity to be heard, such as in the case of Restraining Orders entered pursuant to Tenn. R.C.P. Rule 65. However, the proposed legislation does not involve a prehearing deprivation of liberty or property and the due process requirements involved in such a situation will not be addressed.

[8]By the time a case reaches the point where it is ripe for conversion to a civil judgment, the defendant will have had the benefits of all the procedural protections available under the criminal process. The amount owed to the victim will have been set through that process. The only viable issue remaining at that stage will be the amount due and owing under the restitution order, a matter which can be resolved through an exercise in accounting.

provide a jury trial would be considerable. Thus under the factors identified in *Phillips*, due process would not require the provision of a jury to determine the amount of restitution remaining unpaid. The proposed conversion procedure adequately protects the interests of the defendant under the circumstances and therefore would not offend the due process clause of Article I, §8 of the Tennessee Constitution.

5. Fines in excess of fifty dollars.

Article VI, section 14 of the Tennessee Constitution states that any fine in excess of fifty dollars must be imposed by a jury. While restitution is one of the penalties which may be imposed in sentencing a criminal defendant, it is not a fine. Penalties are paid to the beneficiary who is designated by the statute. Fines, on the other hand, are always paid to the State. *O'Dell v. City of Knoxville*, 54 Tenn. App. 59, 388 S.W.2d 150 (1964). Restitution, whether paid in the criminal proceeding or in a resulting civil proceeding, is not a fine. Therefore the provision of Article VI, section 14 regarding fines does not apply.

6. Other constitutional provisions.

The procedure proposed by Senate Bill 2234 does not appear to run afoul of any other provisions of the Tennessee and United States constitutions.

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