

S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243-0488

September 7, 2000

Opinion No. 00-140

Felony evading arrest, Tenn. Code Ann. § 39-16-603

QUESTIONS

1. What is the definition of “innocent bystanders or other third parties” in Tenn. Code Ann. § 39-16-603(b)?
2. Does this phrase exclude persons who share criminal responsibility with the operator of the vehicle as defined by Tenn. Code Ann. § 39-11-401 *et seq.*, either for the evading offense or for the offense upon which the police were pursuing the driver?
3. Does this phrase exclude passengers in the fleeing vehicle?
4. Does this phrase exclude all law enforcement officers who were assisting in apprehending the person evading arrest?
5. Must the determination as to who is or is not an “innocent bystander” or “other third party” be made by the jury?

OPINIONS

1. “Innocent bystanders or other third parties” under Tenn. Code Ann. § 39-16-603(b)(3) refers to people present other than the driver evading arrest and the law enforcement officer(s) attempting to arrest the driver.
2. No. One who shares criminal responsibility with the driver either for the evading offense or the predicate offense can still be placed at risk for injury or death by the driver.
3. No. A driver evading arrest can create a risk of death or injury to his passenger.

4. Yes. An officer attempting to apprehend a person evading arrest is not an innocent bystander or a third party.

5. Yes.

ANALYSIS

1. Provisions of the criminal code should be “construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations, to promote justice, and effect the objectives of the criminal code.” Tenn. Code Ann. § 39-11-104 (1997). When a term is not defined in a statute, the term should be given its ordinary and commonly accepted meaning. *Beare Co. v. Tennessee Dep’t of Revenue*, 858 S.W.2d 906, 908 (Tenn. 1993).

A “bystander” is “a person who stands near but does not participate; [a] mere onlooker.” Webster’s New World Dictionary of the American Language, 2d College Edition 195 (1976). Black’s Law dictionary defines a “bystander” as “one who stands near; a chance looker-on; hence one who has no concern with the business being transacted. One present but not taking part, looker on, spectator, beholder, observer.” Black’s Law Dictionary 182 (5th ed. 1979). An “innocent” bystander is an onlooker who is “guiltless,” Webster’s New World Dictionary at 726, or “free from guilt,” Black’s Law Dictionary at 708.

A “third party,” on the other hand, is “a person in a case or matter other than the principals.” Webster’s New World Dictionary at 1479. Thus, a third party may be involved in the offense, either as an accomplice or a passenger, but would not be the driver or a law enforcement officer giving chase.

2. When it enacted Tenn. Code Ann. § 39-16-603(b), the legislature could have limited criminal liability for creating a risk of death or injury to the risk to innocent bystanders. The legislature did not impose this limitation, however, as reflected by the statute’s enhanced punishment for creating a risk of death or injury to “other third parties.” Because one should “assume that the legislature used each word in the statute purposely, and that the use of these words conveys some intent and has a meaning and purpose,” *Locust v. State*, 912 S.W.2d 716, 718 (Tenn. Ct. App. 1995), it is the opinion of this Office that the legislature intended the risk of death or injury to encompass anyone other than the driver or the officers chasing him, regardless of whether the person endangered has aided or abetted the driver.

3. For the same reasons, a driver is guilty of a Class D felony under Tenn. Code Ann. § 39-16-603(b) for creating a risk of death or injury to his passenger. In *State v. Leonard Ray Ferguson*, No. 02C01-9808-CC-00244 (Tenn. Crim. App., filed June 17, 1999, at Jackson) (copy attached), the Court of Criminal Appeals affirmed the defendant’s conviction for Class D felony evading arrest when the defendant’s passenger had “begged the defendant to stop” during the six to seven mile chase. *Id.*, slip op. at 2.

4. An officer assisting in apprehending the person evading arrest is a law enforcement officer “attempting to arrest the person.” Tenn. Code Ann. § 39-16-603(a)(1)(A). The officer is neither an innocent bystander (who has no involvement) or a third party (who is indirectly involved in the matter). Thus, creating a risk of death or injury to an officer attempting to arrest the person does not make evading arrest a Class D felony.

5. The elements of Class D felony evading arrest are as follows: (1) the defendant fled from or attempted to elude a law enforcement officer; (2) the defendant was operating a motor vehicle on a street/road/alley/highway in the state; (3) the defendant had received a signal from the law enforcement officer to bring the vehicle to a stop; (4) the defendant acted intentionally; and (5) the defendant’s flight created a risk of death or injury to innocent bystanders or other third parties. Tenn. Code Ann. § 39-16-603; Tennessee Pattern Jury Instructions 27.05(b) (Fourth Edition 1995). Each of these elements must be proved by the state beyond a reasonable doubt and determined by the jury. *See Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

PATRICIA C. KUSSMANN
Assistant Attorney General

Requested by:
James N. Ramsey, District Attorney General
Seventh Judicial District of Tennessee
100 Main Street
Room 126, Anderson County Courthouse
Clinton, Tennessee 37716