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Opinion No. 01-060

Requiring Thumbprint in Pawnshop Transactions

QUESTIONS

1. May the State of Tennessee pass a constitutional law that requires an individual pawning property to provide a thumbprint for identification?

2. Are banks authorized to require their customers to provide thumbprints?

3. What differences exist between banks and pawnshops as financial institutions?

OPINIONS

1. Yes.

2. Research has not revealed any Tennessee or United States constitutional provision or any Tennessee or federal law that would prohibit state-chartered banks, as private businesses, from asking customers to provide thumbprints for identification. We think the general power to conduct a banking business would include the power to require customers or other individuals who wish to do business with a bank to provide a fingerprint for identification purposes.

3. State banks are chartered and regulated under Tenn. Code Ann. §§ 45-1-101, *et seq.* State law provides that the right to receive money on deposit and the right to pay out money on checks are the exclusive privileges of the banking business. Banks also have general lending powers. Pawnbrokers are licensed and regulated under Tenn. Code Ann. §§ 45-6-201, *et seq.* Pawnbrokers are not accorded the power to receive money deposits. A licensed pawnbroker may engage in pawn transactions as defined in that statute, and in certain other types of lending and merchandise purchases and sales if the pawnbroker first complies with the law regulating those particular transactions.

ANALYSIS

1. Requiring Thumbprint in Pawnshop Transaction

The first question is whether the General Assembly could constitutionally pass a law requiring individuals pawning property to provide a thumbprint, among other documentation, for identification. Your request refers to HB 1802/SB 1216. That bill would amend the statutory scheme governing licensing and regulation of pawnbrokers at Tenn. Code Ann. §§ 45-6-101, *et seq.* Among other changes, the bill would delete Tenn. Code Ann. § 45-6-209, regarding records that pawnbrokers must maintain and provide to law enforcement officials, and substitute a new statute. HB 1802, § 7. Under the proposed statute, in addition to information required under the current statute, a pawnbroker would be required to keep a record of the pledgor's right thumbprint. A "pledgor" is the pawn loan customer of the pawnbroker, entering into a pawn transaction with the pawnbroker. Tenn. Code Ann. § 45-6-203(9). The new statute would require licensed pawnbrokers to submit required information to local law enforcement agencies, either by United States mail or, if required by the local law enforcement agency, by computer, within forty-eight hours of the transaction. Records submitted to the local law enforcement agency are not records subject to disclosure under the Public Records Act.

The request asks whether the requirement that pawnbrokers obtain a pledgor's thumbprint among other documentation is constitutional. Although no Tennessee case directly addresses this issue, we think the requirement would be upheld against constitutional challenge under both the Tennessee and the United States Constitution. Courts in other states have upheld similar regulations against arguments that they were an unconstitutional invasion of privacy rights. *Miller v. Murphy*, 143 Cal.App.3d 337, 191 Cal.Rptr. 740 (Cal. Ct. App. 1983), *hearing denied* (1983) (a city ordinance requiring pawnbrokers to take fingerprints of their customers did not violate a pawnbroker's right to contract or engage in the occupation or the customers' right to privacy); *City of Wichita v. Wolkow*, 110 Kan. 127, 202 P. 632 (1921), *rehearing denied* (1922); *Medias v. City of Indianapolis*, 216 Ind. 155, 23 N.E.2d 590 (Ind. 1939). In *Miller v. Murphy*, the California Court of Appeals also rejected an argument that such requirements violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by creating a classification based on wealth. 143 Cal.App.3d at 348-49.

A. Right to Privacy

Both the United States and Tennessee Constitutions protect an individual's right to privacy. *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000). Interference with matters that implicate a "fundamental right to privacy" are generally subject to a heightened level of scrutiny. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 682 (1978) (right to marriage); *Planned Parenthood*, 38 S.W.3d at 10 (fundamental privacy right may not be abridged absent a compelling state interest). As the Tennessee Supreme Court noted in *Planned Parenthood*, however, in order to be protected by the right to privacy, an activity must be of the "utmost personal and intimate concern." 38 S.W.3d at 10-11.

We do not think requiring pawnbrokers to obtain a thumbprint from pledgors implicates any fundamental right to privacy. The Tennessee Supreme Court has long recognized that regulation of the pawnbrokers' business is a valid exercise of the State's police power. *State v. Kirkland*, 655 S.W.2d

140 (Tenn. 1983). In that case, the Court upheld a statute requiring dealers in used jewelry and metals to keep a log open for inspection at all times by local law enforcement agencies. The Court cited the rationale advanced by the Louisiana Supreme Court in *State v. Barnett,* 389 So.2d 352 (1980) for authorizing warrantless inspection of dealers in second-hand goods.

> Close scrutiny of traffic in second-hand goods is undeniably of central importance to state efforts in discouraging burglaries, thefts, and robberies, serious crimes that can be violent. Large interests are at stake, and inspection directly furthers those interests since it tends to limit access to channels through which thieves may safely convert stolen property into cash.

State v. Kirkland, 655 S.W.2d at 142 (quoting from *State v. Barnett,* 389 So.2d at 356). The statutory scheme regulating pawnbrokers states that one of its purposes is to:

> Ensure a sound system of making loans and acquiring and disposing of tangible personal property by and through pawnshops and to prevent unlawful property transactions, particularly in stolen property, through licensing and regulating pawnbrokers and certain persons employed by or in pawnshops.

Tenn. Code Ann. § 45-6-202(1). It is unlikely, therefore, that a court would conclude that participating in the pawnbroker business or pawning property implicates a fundamental right to privacy protected under either the United States or the Tennessee Constitution.

Further, courts have concluded that the process of fingerprinting is only "minimally intrusive." *Iacobucci v. City of Newport,* 785 F.2d 1354, 1357 (6th Cir. 1986), *rehearing and rehearing en banc denied* (1986), *rev'd on other grounds,* 479 U.S. 1047, 107 S.Ct. 383 (1987), *rehearing denied,* 479 U.S. 1047, 107 S.Ct. 913 (1987), *on remand,* 812 F.2d 294 (6th Cir. 1987). In that case, the United States Court of Appeals for the Sixth Circuit upheld a city ordinance requiring certain employees of establishments serving liquor by the drink to register with the police department, be fingerprinted, photographed, and obtain identification cards. The Court upheld the requirement because it found it bore a rational relationship to the city's legitimate interest in promoting enforcement of the state's liquor laws. The California Court of Appeals reviewed a requirement that pawnbrokers obtain a customer's fingerprint under the same standard, and found that it bore a rational relationship to the state's interest in crime prevention. *Miller v. Murphy,* 143 Cal.App.3d 337, 191 Cal.Rptr. 740 (Cal. Ct. App. 1983), *hearing denied* (1983). Courts have also upheld regulatory statutes requiring fingerprinting for identification in other contexts. *Miller v. New York Stock Exchange,* 425 F.2d 1074 (2d Cir. 1970), *cert. denied,* 398 U.S. 905, 90 S.Ct. 1696 (1970) (federal statute requiring persons employed by members of the national securities exchange to be fingerprinted); *Perkey v. Department of Motor Vehicles,* 42 Cal.3d 185, 721

P.2d 40, 228 Cal.Rptr. 169 (1986) (statute requiring individual to submit fingerprint to renew driver's license).

B. Unreasonable Searches and Seizures

The Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." This protection applies to the states through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 684, 691 (1961), *rehearing denied*, 368 U.S. 871, 82 S.Ct. 23 (1961), and its overriding function and purpose "is to protect personal privacy against unwarranted intrusions by the State." *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 1834 (1966). Courts have generally concluded that making a record of a person's public, physical characteristics like a voice exemplar or a fingerprint is not a violation of privacy or a search and seizure within the contemplation of the Fourth Amendment. *U.S. v. Dionisio*, 410 U.S. 1, 15, 93 S.Ct. 764 (1973); *U.S. v. Sechrist*, 640 F.2d 81 (7th Cir. 1981). In this context, therefore, it is unlikely that a court would conclude that requiring an individual pawning property to provide a thumbprint is an unreasonable search and seizure in violation of the Fourth Amendment.

C. Equal Protection

Finally, the provision would subject pawnbrokers and their customers to requirements not imposed on all loan businesses or loan transactions. The provision could, therefore, be challenged on the grounds that it violates the equal protection guarantees of the United States and Tennessee Constitution. U.S. Const. Amend. XIV; Tenn. Const. art. I, § 8, art. XI, § 8. As discussed above, the statutory scheme does not affect a fundamental right, nor does it affect a suspect class. The statute would, therefore, be subject to review under the rational basis test. Under the that test, "[i]f some reasonable basis can be found for the classification, or if any state of facts may reasonably be conceived to justify it, the classification will be upheld." *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) (citations omitted); *see also Estrin v. Moss*, 221 Tenn. 657, 667, 430 S.W.2d 345 (1968), *appeal dismissed*, 393 U.S. 318, 89 S.Ct. 554 (1969). For the reasons discussed above, including the nature of a pawn transaction, this requirement is clearly supported by the State's concern in crime prevention and, therefore, satisfies the rational basis test.

2. Authority of Banks to Request Thumbprint Identification

The second question is whether banks are authorized to require customers or other individuals to submit a thumbprint for identification purposes. Of course, while subject to regulation, banks are private actors. Constitutional requirements such as the Due Process Clause of the Fourteenth Amendment, for example, generally do not apply against private conduct. *See, e.g., Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 95 S.Ct. 449 (1974). We assume that your question refers to businesses chartered as banks under Tenn. Code Ann. §§ 45-1-101, *et seq.* This statutory scheme does not expressly authorize banks to require customers or other individuals to submit a thumbprint for identification or other purposes. But the banking laws are intended to provide a sound system of state-chartered banks by providing for and encouraging their development while restricting their activities "to the extent necessary

to safeguard the interests of depositors." Tenn. Code Ann. § 45-1-102(a). A bank chartered under Tennessee law may generally exercise all powers conferred upon banking corporations for profit under the Tennessee Business Corporation Act, Tenn. Code Ann.§§ 48-11-101, *et seq.*, through Tenn. Code Ann. §§ 48-27-101, *et seq.* Tenn. Code Ann. § 45-2-601. These statutes describe general corporate powers. We think the general power to conduct a banking business would include the power to prevent fraud by requiring customers or other individuals who wish to do business with a bank to provide a fingerprint for identification purposes. It should also be noted that banks are required to maintain the privacy of various consumer and customer-related records under both state and federal law. Tenn. Code Ann. §§ 45-10-101, *et seq.*; 12 U.S.C. §§ 3401, *et seq.*

3. Differences between a Bank and a Pawnshop as Financial Institutions

The third question concerns differences that exist between banks and pawnshops as financial institutions. As noted above, state-chartered banks are regulated under Tenn. Code Ann. §§ 45-1-101, *et seq.* Banks must satisfy the licensing requirements under those statutes and may exercise the powers conferred. Banks are expressly authorized to receive money on deposit. Tenn. Code Ann. § 45-2-701. A "deposit" means a "deposit of money, bonds or other things of value, creating a debtor-creditor relationship." Tenn. Code Ann. § 45-1-103(9). Under Tenn. Code Ann. § 45-2-1701, "[t]he right to receive money on deposit and the right to pay out money on checks are hereby declared to be the *exclusive* privileges of the banking business." (Emphasis added). A state bank may lend money and discount or purchase evidences of indebtedness and any agreement for the payment of money. Tenn. Code Ann. § 45-2-1101. This includes the power to make loans upon the same terms and at the maximum effective interest rates as loans are authorized and credit extended by national banks in Tennessee. Tenn. Code Ann. § 45-2-1108. State banks are subject to liquidation and dissolution under Tenn. Code Ann. §§ 45-2-1501, *et seq.*

Pawnshops are subject to regulation under Tenn. Code Ann. §§ 45-6-201, *et seq.* Pawnshops are not accorded the power to receive money deposits. A licensed pawnbroker has the powers outlined in Tenn. Code Ann. § 45-6-204. That statute includes a number of business transactions, including making loans on the security of pledged goods, a term defined in Tenn. Code Ann. § 45-6-203(8), and merchandise purchases and sales. The statute also provides:

> Notwithstanding the provisions of this section, except for a pawn or pawn transaction authorized by Acts 1995, ch. 186, no pawnbroker shall have the power as enumerated in this section without first complying with the law regulating the particular transactions involved.

Tenn. Code Ann. § 45-6-204(b). The definition of pawn transaction that appeared in the 1995 act is now codified at Tenn. Code Ann. § 45-6-203(4).

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