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Opinion No. 01-065

Constitutionality of Proposed Amendments to Pawn Shop Laws

QUESTIONS

HB 1802/SB 1216 would amend the statutory scheme governing licensing and regulation of pawnbrokers at Tenn. Code Ann. §§ 45-6-201, *et seq.* The request submits four amendments to the bill from the House Judiciary Criminal Practice and Procedure Subcommittee. Are the following amendments constitutional?

1. a. Amendment 1 would delete the entire current bill and amend the pawnbroker statutes to require a licensed pawnbroker to take a thumbprint from an individual pawning property and maintain it for five years. In order to obtain a thumbprint, a law enforcement official would be required to obtain a subpoena from a court by submitting an affidavit justifying its use in a criminal investigation. The amendment would allow a pawnbroker to invoke a right against self-incrimination, and receive immunity from prosecution after asserting the privilege.

b. Amendment 4 would contain all the provisions of Amendment 1 outlined above, except that the pawnbroker would only be required to obtain a thumbprint from a pledgor engaging in a pawn transaction that totals twenty-five dollars or more.

2. Amendment 2 would amend the pawnbroker statutes to authorize the city or county attorney to file an action to suspend the license of a pawnbroker who violates the requirements of the pawnbroker statutes.

3. Amendment 3 would require licensed pawnbrokers to deliver transaction-related records to the local law enforcement agency within forty-eight hours following the day of the transaction, and to make the records available for inspection to local law enforcement officials. Licensed pawnbrokers with more than fifty transactions a week could be required to transfer the records electronically to the local law enforcement agency.

OPINIONS

1. a. This provision is generally constitutional. A court could conclude that the provision

requiring a court to maintain an affidavit supporting a subpoena under seal is unconstitutional to the extent such secrecy is no longer necessary to preserve the confidentiality of an ongoing criminal investigation.

b. This provision is constitutional.

2. If Amendment 2 is added to the bill as initially filed, the bill would contain contradictory amendments to the same statute. Considered in isolation from the initial bill, however, we think the proposed amendment to the current statute is constitutional.

3. If Amendment 3 is added either to the initial bill or to the bill as amended by Amendment 1, the bill will contain contradictory or repetitive statutes. Considered in isolation from the initial bill and from the other submitted amendments, however, we think the proposed amendment to the current statutes is constitutional so long as the costs to pawnbrokers to comply with the new requirements is not so heavy that it is confiscatory, prohibitive, or constitutes the taking of property without due process of law. Based on the fact that the statute requires the local government to provide the required software, and on the wide use of computers for business purposes, we think the cost is unlikely to be unreasonable, particularly in light of the law enforcement purpose that such reporting would serve.

ANALYSIS

You have submitted four amendments to HB 1802/SB 1216, apparently proposed by the House Judiciary Criminal Practice and Procedure Subcommittee. HB 1802/SB 1216, as initially filed, would amend the statutory scheme governing licensing and regulation of pawnbrokers at Tenn. Code Ann. §§ 45-6-201, *et seq.* This Office addressed the constitutionality of requiring a pawnbroker to obtain a thumbprint in a pawn transaction in Op. Tenn. Atty. Gen. 01-060 (April 17, 2001). This opinion will focus on the constitutionality of the specific provisions that would be incorporated in the four proposed amendments.

1. Amendments 1 and 4: Subpoena Requirement

Proposed Amendment 1 would delete the entire bill initially filed. The proposed amendment would amend Tenn. Code Ann. § 45-6-209 to require a pawnbroker, in addition to other records, 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 amendment would then add a new section, Tenn. Code Ann. § 45-6-222, to the pawnbroker statute. Under this new section, a law enforcement officer would be required to obtain a subpoena for the production of a thumbprint taken and maintained by a licensed pawnbroker for the purpose of establishing, investigating or gathering evidence for the prosecution of a criminal offense. The new statute would require an officer to submit an affidavit supporting the need for the thumbprint to a judge of a court of record or a general sessions judge. The judge could grant the subpoena upon a series of four findings, but must deny it if he or she finds that all four criteria do not exist. If a subpoena is issued, the affidavit must be kept under seal by the judge as follows:

> (e) The affidavit filed in support of any request for the issuance of a subpoena pursuant to this section shall be filed with and maintained by the court. *If a subpoena is issued as the result of such an affidavit, such affidavit shall be kept under seal by the judge until a copy is requested by the district attorney general, criminal charges are filed in the case, or the affidavit is ordered released by a court of record for good cause.*

Amendment 1, Section 2(e) (emphasis added). We think the General Assembly may restrict the release of the affidavit in this manner without unconstitutionally encroaching upon the judicial function because this provision does not frustrate or interfere with the adjudicative function of the courts. *See Underwood v. State,* 529 S.W.2d 45 (Tenn. 1975) (statute permitting one who has successfully defended a criminal charge to have all public records of the case expunged upon filing a petition is not a violation of the separation of powers doctrine).

Section 2(e) would limit access to an affidavit filed with a court to support a request for a subpoena in connection with a criminal investigation. The Tennessee Supreme Court has recognized a qualified right of the public, founded in common law and the First Amendment to the United States Constitution, to attend judicial proceedings and to examine the documents generated in those proceedings. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). However, this right of access is not absolute, and it must be balanced against other interests such as a criminal defendant's right to a fair trial. *Knoxville News-Sentinel v. Huskey,* 982 S.W.2d 359 (Tenn. Crim. App. 1998), *p.t.a. denied* (2000), *petition to rehear denied* (2000). This balance must be carefully struck, and any restriction on public access must be narrowly tailored to accommodate the competing interest without unduly impeding the flow of information. *Id, citing State v. Drake*, 701 S.W.2d 604, 607-08 (Tenn. 1985). Clearly, the provision requiring the documents to remain under seal promotes an important public interest in maintaining the confidentiality of matters in an ongoing criminal investigation. Potentially, however, under this provision the documents could remain closed indefinitely. A court could conclude that, to the extent continuing confidentiality is no longer necessary to preserve the secrecy of matters in an ongoing criminal investigation, this provision is unconstitutional because it is not sufficiently narrowly tailored.

The statute would also allow a pawnbroker to claim a privilege against self-incrimination before the time designated for complying with it. If the district attorney then certifies to the court that the interests of justice demand the production of the thumbprint for which the claim of privilege is asserted, then:

> . . . the court shall order the production of such thumbprint and no such pawnbroker shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning the requested thumbprint the pawnbroker was compelled to produce.

Proposed Amendment 1, Section 2(h). Subsection (i) provides:

> No subpoena for the production of a thumbprint as authorized by this section shall be directed to, or served upon, any defendant, or his counsel, in a criminal action in this state, any person who is suspected of committing a criminal offense or any person who is the subject to a criminal investigation.

This provision, in effect, prevents a law enforcement officer from obtaining thumbprint records under this statute from a pawnbroker who is the target of a criminal investigation. Because it treats a pawnbroker who is the target of an investigation differently from one who is not, the provision could be challenged on the grounds 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. 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 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). Clearly, the provision is intended to prevent thumbprint records maintained by a pawnbroker from being used to incriminate him or her. Thus, there is a rational basis for the different treatment.

Subsection (j) provides that a pawnbroker who fails to comply with the subpoena may be held in civil contempt and jailed until willing to comply with the subpoena. With the qualifications discussed above, we think all the provisions of Amendment 1 are constitutional.

b. Requirement of Thumbprint Only in Transactions of More than $25

Amendment 4 would amend this proposed scheme by requiring a pawnbroker to take a thumbprint from a customer only in a pawn transaction that totals twenty-five dollars or more. Thus, the print would not be required in transactions of less than twenty-five dollars. The only possible challenge to this provision would be 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. The statutory scheme does not affect a fundamental right, nor does it affect a suspect class. Therefore, as discussed above, the classification would therefore be upheld so long as there is a rational basis for it. We think this provision is constitutional because there is a rational basis for waiving the requirement for a thumbprint in transactions involving smaller amounts of money. This provision presents no other constitutional problems.

2. Amendment 2: Revocation of License

Amendment 2 would add a new section to the initial version of House Bill 1802/Senate Bill 1216. The new section would amend Tenn. Code Ann. § 45-6-218 by deleting the final sentence of subsection (a). Subsection (a) currently provides:

> Every person, firm or corporation, or agents or employees thereof, who knowingly violates any of the provisions of this part, on conviction thereof, commits a Class A misdemeanor. If such violation is by an owner or major stockholder and/or managing partner of the pawnshop, and such violation is knowingly committed by the owner, major stockholder or managing partner of the pawnshop, then the license of such pawnbroker or pawnbrokers may be suspended or revoked at the discretion of the city and/or county clerk.

The new second sentence would provide:

> If such violation is by an owner or major stockholder and/or managing partner of the pawnshop, and such violation is knowingly committed by the owner, major stockholder or managing partner of the pawnshop, then the city or county attorney may file an action in the appropriate chancery court to suspend or revoke the license of such pawnbroker or pawnbrokers.

In its current form, Amendment 2 appears to present technical problems. Section 12 of the initial version of House Bill 1802/Senate Bill 1216 currently would delete the current Tenn. Code Ann. § 45-6-218 in its entirety and substitute a new statute. Subsection (a) of the new statute would only have one sentence. If Amendment 2 is added to the bill as initially filed, the bill would contain contradictory amendments to the same statute. If Amendment 2 is enacted after Amendment 1, discussed above, this problem would not occur. This opinion will address the constitutionality of the proposed change to the current Tenn. Code Ann. § 45-6-218 contained in Amendment 2, in isolation from the initial bill.

This Office has concluded that the second sentence of Tenn. Code Ann. § 45-6-218(a) is an unconstitutional delegation of legislative authority to the city or county clerk. Op. Tenn. Atty. Gen. 89-53 (April 10, 1989). This conclusion was based on the fact that the statute grants sole discretion to the clerk to decide whether or not to revoke or suspend the license of a person who meets the criteria specified in the bill. As amended, the statute would authorize the city or county attorney to file an action to request a chancellor to suspend or revoke the license of a pawnbroker who knowingly violates a provision of the pawnbroker statutes. Presumably, the decision whether to file the lawsuit, and whether to seek to suspend a license temporarily or revoke it permanently would also rest in the sole discretion of the city or county attorney. We think that such discretion, however, concerns the administration of the law, and not the determination of legislative policy. The legislature cannot delegate the exercise of its discretion as to what the law shall be, but it may constitutionally delegate to officials or agencies powers of administration to be exercised upon discretion. *Lobelville v. McCanless,* 214 Tenn. 460, 31 S.W.2d 273 (Tenn. 1964). The test for determining whether a statute is an unlawful delegation of power to an administrative agency is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine if the agency is carrying out the legislature's intent. *Bean v. McWherter,* 953 S.W.2d 197

(Tenn. 1997), *rehearing denied* (1997). We think this provision, as amended, read in the context of the entire statutory scheme governing pawnbrokers, meets this standard. For this reason, we think this provision is constitutional.

3. Amendment 3: Delivery of Records

Amendment 3 would add a new section to the bill as initially filed. The new section would provide that Tenn. Code Ann. § 45-6-209 is amended by deleting subsection (d) in its entirety and substituting a new subsection (d) regarding delivery of pawn transaction information to law enforcement officials. Again, this amendment appears to present technical problems. Section 7 of House Bill 1802/Senate Bill 1216, as initially filed, amends Tenn. Code Ann. § 45-6-209 by deleting that statute in its entirety and substituting an entirely new statute. Subsections (d), (e), and (f) of the statute as amended by the initial bill all address delivery of information to law enforcement officials. If the new subsection (d) proposed by Amendment 3 is interpreted to amend that statute as already amended, then the resulting provision would contain contradictory or repetitive provisions. Similarly, Amendment 1, discussed above, substitutes an entire new bill for the initial bill, but also amends Tenn. Code Ann. § 45-6-209. In addition, Amendment 1 expressly requires a local law enforcement officer to obtain a subpoena to require a pawnbroker to produce specific thumbprints. The new subsection (d) of § 45-6-209 in Amendment 3, on the other hand, requires a pawnbroker to submit records to local law enforcement officials on an ongoing basis. Therefore if Amendment 3 is interpreted to amend Amendment 1, the bill will include contradictory provisions. This opinion will address the constitutionality of the proposed new subsection (d) of Tenn. Code Ann. § 45-6-209 in isolation from the initial bill and from the other proposed amendments.

Currently, Tenn. Code Ann. § 45-6-209(d) requires licensed pawnbrokers to deliver transaction-related records to the appropriate law enforcement agency by mail or in person within forty-eight hours following the day of such transactions. The pawnbroker must also make the records available for inspection each day, except Sunday, by the sheriff of the county and the chief of police of the municipality in which the pawnshop is located. As amended by Amendment 3, the statute would preserve these requirements, but would also authorize the governing body of the appropriate law enforcement agency to require that licensed pawnbrokers with more than fifty transactions per week electronically transfer these records within the same time period. The statute would require the law enforcement agency making the requirement to provide computer software at no cost to all pawnshops required to transfer such records electronically. The software must enable the pawnbroker's computer system to record and transfer pawn transaction information required under the statute. The pawnshops must either use this software to transfer the required information to the law enforcement agency, or they must use software that is able to communicate this information to the law enforcement agency in a computer format acceptable to that agency and compatible with such agency's software.

We think these requirements are constitutional so long as the cost to comply with them is reasonable. The Tennessee Supreme Court has 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. Conducting the business of pawnbrokering is a privilege and not a right, and those who avail themselves of it and derive its benefits must bear its burdens and conform to the law in force regulating the occupation, if it is not illegal. *Epstein v. State*, 211 Tenn. 633, 639, 366 S.W.2d 914 (Tenn. 1963), *reh'g denied* (1963), *citing* 40 *American Jurisprudence* 691, § 4. In that case, the Tennessee Supreme Court upheld the constitutionality of a statute prohibiting a pawnbroker from purchasing personal property in conducting a pawnbrokering business. The Court concluded that the regulation was well within the State's police powers because it discouraged the sale of stolen property.

The Supreme Court of Missouri upheld an ordinance requiring a licensed pawnbroker to install a camera and photograph customers and pawn tickets. *Liberman v. Cervantes*, 511 S.W.2d 835 (Mo. 1974). The Court rejected, among other arguments, the pawnbroker's contention that the cost to comply with these requirements placed an undue financial burden on him without any corresponding justification or need for identification. 511 S.W.2d at 839. The Court analyzed the cost of compliance and concluded that the pawnbroker failed to demonstrate that it was confiscatory, prohibitive, or that it constituted the taking of property without due process of law. *Id.* We think the requirement for electronic reporting by pawnbrokers with more than fifty transactions a week is constitutional, so long as the cost to comply is not confiscatory, prohibitive, or constitutes the taking of property without due process of law. Based on the fact that the statute requires the local government to provide the required software, and considering the wide use of computers for business purposes, we think the cost is unlikely to be unreasonable, particularly in light of the law enforcement purpose that such reporting would serve.

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