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Opinion No. 01-127

Constitutionality of a proposal to publish names and photographs of those convicted of prostitution-related offenses.

QUESTION

Would a television news program's communication of the names and display of the photographs of those convicted of prostitution or patronizing prostitution violate any state or federal law?

OPINION

It is the opinion of this office that the publication of names and photographs of those convicted of prostitution-related offenses would not violate the provisions of either the Constitution of the United States or the Constitution of the State of Tennessee; nor is this office aware of any state or federal law which might be violated by this proposal.

ANALYSIS

Several cities across the country, including La Mesa, California; Miami, Florida; and St. Petersburg, Florida, have launched anti-prostitution campaigns incorporating publication of the names and photographs of those convicted of soliciting prostitution. Art Hubacher, Comment, Every Picture Tells A Story: Is Kansas City's "John TV" Constitutional?, 46 U. Kan. L. Rev. 551, 558 (1998). Several other cities, including Kansas City, Missouri; Aurora, Colorado; West Palm Beach, Florida; and Boston, Massachusetts, have publicized the names of those arrested for, or even suspected of, soliciting prostitution. *Id.* While these campaigns have created substantial local controversy, neither the United States Supreme Court, nor the high court of any of these states, has ever examined the constitutionality of the cities' actions. Therefore, the legality of such a campaign has never been either expressly condoned or rejected on appeal.

An assessment of the legality of publishing names and photographs of those convicted of

prostitution-related offenses begs an analysis of several constitutional rights.[1] The first of these is the right to privacy granted under both the federal and state constitutions. An invasion of the right to privacy may give rise to a right of action under 42 U.S.C. § 1983. The second right implicated is the right to life, liberty, and property guaranteed under the Due Process Clause of the 14th Amendment. A violation of this right may also give rise to a right of action under 42 U.S.C. § 1983.

I. Right to Privacy

Neither the Constitution of the United States, nor the Constitution of the State of Tennessee, specifically defines the right to privacy enjoyed by its citizens. However, both documents have been held to create such a right. *See Kewanee Oil Co. v. Bicron Corp*., 416 U.S. 470, 94 S.Ct. 1879, 40 L.Ed.2d 315 (1974); *Davis v. Davis*, 842 S.W.2d 588, 598-603 (Tenn. 1992). The Tennessee Constitution, however, affords an even greater right to privacy than that provided by the U.S. Constitution. *Campbell v. Sundquist*, 926 S.W.2d (Tenn. App. 1996).

The right to privacy creates a "realm of personal liberty, except in very limited circumstances, which the government may not enter, and the result is a right of personal privacy, or a guarantee of certain areas or zones of privacy." *Smith v. State*, 6 S.W.3d 512 (Tenn. Crim. App. 1999). These "zones of privacy" necessarily impose limits on the government's power to intrude into one's home; intervene in one's matters relating to marriage, procreation, contraception, family relationships, child rearing, or education; compel divulgence of one's personal views and beliefs; or publicize one's purely personal affairs. *See Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Smith v. State*, 6 S.W.3d 512 (Tenn. Crim. App. 1999). It is this last "zone of privacy" that merits further consideration in a discussion of the subject proposal.

While the Tennessee Supreme Court has recognized that Article I § 8 of the Tennessee Constitution guarantees a right to privacy, that right to privacy has not been extended to protect matters of public record. *See Langford v. Vanderbilt Univ.*, 199 Tenn. 389, 287 S.W.2d 32, 39 (Tenn. 1956)("There can be no invasion of a common law right of privacy by publishing information which is already a matter of public record"). Nor is there a federal constitutional privacy interest in matters of public record. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 493-496, 95 S.Ct. 1029, 1045-47, 43 L.Ed.2d 328 (1975). A defendant's name and offense, as well as his trial and conviction information, have been deemed matters of public record. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). In *Fann v. Fairview*, 905 S.W.2d 167 (Tenn. App. 1994), the Tennessee Court of Appeals held that a newspaper which printed an article regarding a candidate's criminal history was not liable for invasion of the candidate's right of privacy where the events surrounding the candidate's arrest, conviction, and subsequent reversal of the conviction were reported in a Tennessee Supreme Court decision and were already a matter of public record.

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[1] Attorney General Opinion Letter 97-075 (1997), analyzing the constitutionality of the Tennessee Sexual Offender Registration and Monitoring Act, addresses many of the same issues contained in this opinion.

The United States Supreme Court has rejected the idea that a state may not publicize the record of an arrest. *Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). In *Davis*, the Court noted its unwillingness to extend the right to privacy to an official act such as an arrest. *Id.* However, *Davis* notwithstanding, the government can violate one's right to privacy by disseminating personal information. The United States Supreme Court has prohibited the release of law enforcement records that could "reasonably be expected to constitute an unwarranted invasion of personal privacy." In *United States Department of Justice v. Reporters Committee*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1988), the Supreme Court recognized a significant privacy interest in FBI rap sheets and prohibited their disclosure to third parties under the Freedom of Information Act. The Court, however, did not assert that dissemination of one's arrest record by government officials necessarily constitutes an invasion of privacy but held that FBI rap sheets are information of a type contemplated by the "personal privacy" exception to the Freedom of Information Act.

The following seems to reconcile these holdings:

> There is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the date of his birth . . . On the other hand, if the record is one not open to public inspection, as in the case of income tax returns, it is not public and there is an invasion of privacy when it is made so.

United States Department of Justice v. Reporters Committee, 489 U.S. 749, 763 n.15, 109 S.Ct. 1468, 1476, 103 L.Ed.2d 774 (1989)(quoting Restatement (Second) of Torts § 652D, pp. 385-386 (1977)). Presumably, FBI rap sheets are generally not open to public inspection while arrest records are.

Because a person does not have a significant privacy interest in matters of public record and because conviction records will be matters of public record, it does not appear that dissemination of information regarding one's conviction for prostitution or patronizing prostitution implicates any federal or state right to privacy interest.

II. Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state shall deprive any person of life, liberty or property without due process of law. U.S. Const., Amend. XIV, Section 1; *See also* Tenn. Const., Article I, Section 8 ("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.").

In *Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the plaintiff asserted that the inclusion of his name and photograph on a flyer depicting accused shoplifters and

distributed by the chief of police resulted in damage to his reputation, thereby depriving him of a liberty interest protected by the Fourteenth Amendment. The United States Supreme Court rejected the plaintiff's claim, holding that reputation alone, apart from more tangible interests such as employment, is not sufficient to invoke the procedural protection of the Due Process Clause. The Court concluded that the police chief's action in distributing the flyer, while constituting state action, did not deprive the plaintiff of any "liberty" or "property" rights guaranteed against state deprivation by the Due Process Clause.

Considering the holding in *Davis*, the proposal to televise names and photographs of those convicted of prostitution-related offenses does not appear to endanger any "liberty" or "property" right protected under the Due Process Clause. Key to this opinion, however, is the assumption that the names and photographs are those of only *convicted* offenders, rather than those merely arrested. Publication of names and photographs of those arrested, but not convicted, would require further analysis of the accused's pre-trial due process rights.

The subject proposal does not appear to violate the provisions of either the state or federal constitution. Additionally, this office could find no state or federal laws which would be violated by this proposal.

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