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Opinion No. 02-055

Constitutionality of H.B. 2651 regarding forfeiture of motor vehicles used in promoting or patronizing prostitution

QUESTIONS

1. House Bill 2651, as amended, provides for forfeiture of motor vehicles used in the commission of a person's second or subsequent violation for promoting prostitution or patronizing prostitution. Would the bill, if enacted, violate the due process provisions of the United States or Tennessee Constitution?

2. Would House Bill 2651, if enacted, violate the takings provisions of the United States or Tennessee Constitution?

3. Would House Bill 2651, if enacted, violate the excessive fines provisions of the United States or Tennessee Constitutions?

4. Would House Bill 2651, if enacted, violate any other federal or state constitutional provision?

OPINIONS

1. No. H.B. 2651, if enacted, would not violate the due process provisions of either the United States or Tennessee constitutions.

2. No. H.B., 2651, if enacted, would not violate the takings provisions of the either the United States or Tennessee constitutions.

3. H.B. 2651, if enacted, would not be facially unconstitutional under the excessive fines clauses of the United States or Tennessee Constitutions. However, H.B. 2651 could be held unconstitutional as applied in certain circumstances.

4. This office is unaware of any other federal or state constitutional provision that would be violated by H.B. 2651, if enacted.

ANALYSIS

Introduction

Current law provides for forfeiture of motor vehicles used in maintaining or conducting prostitution. "All . . . equipment . . . used in or in connection with the maintaining or conducting of a nuisance . . . are subject to forfeiture." Tenn. Code Ann. §29-3-101(c). Nuisance is currently defined as "any place in or upon which lewdness, assignation, prostitution" or other specified illegal activities "are carried on or permitted." Tenn. Code Ann. §29-3-101(a)(2). House Bill 2651 would expand the definition of nuisance to include places in which prostitution is promoted or patronized, [1] clarify that items subject to forfeiture for use in maintaining or conducting a nuisance include "motor vehicles,"[2] and specifically provide for forfeiture of vehicles used in the commission of a person's second or subsequent violation for promoting or patronizing prostitution in violation of Tenn. Code Ann. §§39-13-514, 39-13-515, regardless of whether the violation happened at the location of a nuisance or elsewhere.[3] The request asks whether House Bill 2651, if enacted, would violate any provisions of the United States or Tennessee constitutions. This opinion addresses the three constitutional provisions under which a challenge would most likely be made.

1. Due process

In considering a challenge to a Michigan statute providing for forfeiture of vehicles used in the commission of prostitution, the United States Supreme Court held that such forfeiture, when it occurs with notice to interest holders and an opportunity to be heard, does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Bennis v. Michigan*, 516 U.S. 442, 443-44 and nn.2-3, 446, 116 S.Ct. 994, 996 and nn.2-3, 997-98, 134 L.Ed.2d 68 (1996). This was so even as

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[1]The bill inserts the words "promotion of prostitution, patronizing" after "assignation" and before "prostitution."

[2]Section two of the bill would amend subsection (c) of Tenn. Code Ann. §29-3-101 by adding "motor vehicles" to the list of items subject to forfeiture if used in maintaining or conducting a nuisance.

[3]Section three of the bill provides for adding a new subsection (e) to section 29-3-101 which provides that any vehicle used in the commission of a person's second or subsequent violation for promoting prostitution or patronizing prostitution is subject to forfeiture pursuant to procedures established in the Disposition of Forfeited Property Act of 1998, Tenn. Code Ann. §§39-11-701— 39-11-717 (Supp. 2001).

to allegedly innocent owners, such as the claimant in *Bennis.* The Supreme Court held that there was "a long and unbroken line of cases [which] hold[] that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." *Id.*, 516 U.S. at 446, 116 S.Ct. at 998. The court noted that the forfeiture was a consequence of legitimate exercise of government authority "to deter illegal activity that contributes to neighborhood deterioration and unsafe streets." 516 U.S. at 453, 116 S.Ct. at 1001.

H.B. 2651, like the Michigan statutes in *Bennis*, seeks to deter the same illegal activity. It also, like the Michigan statutes, provides for notice and an opportunity to be heard. The bill incorporates the procedural provisions of the Disposition of Forfeited Property Act, Tenn. Code Ann. §§39-11-701— 39-11-717. H.B. 2651, § 3. Thus the bill would withstand a constitutional challenge under the Fourteenth Amendment to the United States Constitution.

The "law of the land" provision found in Article I, Section 8 of the Tennessee Constitution provides for due process. *State v. Hale*, 840 S.W.2d 307, 312 (Tenn. 1992). The Tennessee Supreme Court has held that this provision is synonymous with the due process provisions of the Fourteenth Amendment to the United States Constitution. *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992). Thus the holding in *Bennis* under the Fourteenth Amendment to the United States Constitution would apply to Article I, Section 8 of the Tennessee Constitution.

The Tennessee Supreme Court does not appear to have been squarely presented with a case like *Bennis*, where a forfeiture statute makes provision for forfeiture of the interest of innocent owners. Even if the Tennessee Supreme Court were inclined to hold that such a statute would violate state constitutional due process provisions, this issue would not arise under H.B. 2651 as amended. In contrast to the Michigan statute at issue in *Bennis*, H.B. 2651 in section 3 provides for an innocent owner defense. Tenn. Code Ann. §39-11-704(a)(Supp. 2001).

2. Takings

In *Bennis*, the court also dealt with a challenge to forfeiture under the Takings Clause of the Fifth Amendment to the Constitution of the United States. The petitioner, who claimed she had no knowledge that the vehicle would be used in an unlawful manner, asserted that the forfeiture was a taking of private property for public use in violation of the Takings Clause. The Supreme Court held that there was no violation because "the property in the automobile was transferred by virtue of that proceeding [the forfeiture] from petitioner to the State." 516 U.S. 442, 452, 116 S.Ct. 994, 1001. "The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Id.* (citations omitted). Accordingly the government was not required to compensate the owner. *Id.*[4]

[4]The court recognized that there was "considerable appeal" in the further argument that it is unfair to relieve prosecutors "from the burden of separating co-owners who are complicit in the wrongful use of the property from

Under H.B. 2651, the vehicle used in a person's second violation of laws against promoting or patronizing prostitution would be transferred to the state by virtue of the forfeiture proceeding. Since the government may legitimately acquire control of such property through the exercise of governmental power other than that of eminent domain, there is no need to compensate the owner under the Fifth Amendment Takings Clause.

Courts construing the Tennessee nuisance abatement statute which H.B. 2651 would amend have found no infirmity under the takings provision of Article 1, §21, of the Constitution of Tennessee. It has long been held in Tennessee that the takings provision cannot be applied to impose a limit on government police powers necessary for public safety and tranquility and that this principle applies to the abatement of nuisances. *Theilan v. Porter*, 82 Tenn. 622, 626, 14 Lea 622, 1885 WL 2853 (Tenn. 1885). Thus abatement of nuisances such as unhealthy dwelling houses[5] and property used in the unlawful selling of intoxicating liquors[6] has been upheld under predecessor nuisance statutes against constitutional challenge under Article I, section 21. Accordingly, a reviewing court would uphold forfeiture under H.B. 2651 against challenge under either federal or state constitutional provisions on takings.

3. Excessive fines

Regardless whether H.B. 2651 is construed as criminal or civil, constitutional provisions against excessive fines will apply because even civil forfeiture "is, at least in part, a punitive measure." *Stuart v. State*, 963 S.W.2d 28, 34 (Tenn. 1998).

U.S. Const. amend. VIII prohibits the imposition of excessive fines, stating: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Tenn. Const., art. I, § 16 imposes a substantially similar prohibition, stating: "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *Stuart*, the Court found that the provisions of the federal and state excessive fines clauses are coextensive. *Id.*, at 34.

Under these clauses, the Tennessee Supreme Court has emphasized that while the legislature must have broad discretion in defining criminal conduct and setting punishment, including forfeiture, courts must review forfeitures to ensure proportionality:

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innocent co-owners." 516 U.S. at 453, 116 S.Ct. at 1001. The force of the argument was reduced in light of the trial court's remedial discretion and "petitioner's recognition that Michigan may forfeit her and her husband's car whether or not she is entitled to an offset for her interest in it . . . ." *Id.* As noted above, the innocent owner issue would not even arise under H.B. 2651, because it incorporates an existing innocent owner provision.

[5]*Theilan v. Porter*, 82 Tenn. 622, 14 Lea 622, 1885 WL 2853 (Tenn. 1885).

[6]*State Ex Rel. Estes v. Persica*, 130 Tenn. 48, 168 S.W. 1056 (Tenn. 1914); *State Ex Rel. Evans*, 53 Tenn. App. 195, 381 S.W. 2d 553 (Tenn. App. 1964).

> Legislatures have extremely broad discretion in defining criminal offenses and in setting the permissible range of punishments for each offense. *Schall v. Martin*, 467 U.S. 253, 268-69 n.18, 104 S.Ct. 2403 (1984); *Solem v. Helm*, 463 U.S. 277, 290, 103 S.Ct. 3001, 3009 (1983). However, as the United States Supreme Court noted in *Bajakajian*, an authorization of forfeiture "cannot override the constitutional requirement of proportionality review." *Bajakajian*, 524 U.S. 339 n. 14, 118 S.Ct. 2038 n. 14. Thus it is left to courts to determine whether a particular forfeiture violates the constitution under the individual facts of that case, even where the legislature has granted general authority for such forfeitures

Hawks v. Greene, 2001 W.L. 1613889 (Tenn. App. 12/18/01) *no p.t.a.applied for*, at 14. (copy attached). See also, Austin v. United States, 509 U.S. 602, 604, 113 S.Ct. 2801, 2807, 125 L.Ed.2d 488 (1993)(prohibitions against excessive fines applies to civil in rem forfeiture proceedings).

The court held that the following factors should be considered in determining whether a forfeiture violates constitutional prohibitions against excessive fines: the harshness of the penalty compared with the gravity of the underlying conduct; the harshness of the penalty compared with the culpability of the claimant; and the relationship between the seized asset and the offense. No single factor is regarded as dispositive. *Hawks*, at 7-8. One measure of the gravity of the underlying conduct is the range of punishment provided under criminal law. *Id.*, at 12 through 15. The court regarded the range of punishment as an important consideration because it shows the legislature's view of the severity of the offense. The Court observed that the state might have a more difficult time justifying the forfeiture of an asset for conduct punished only as a relatively minor offense, such as a lower grade misdemeanor, than for conduct which is punished more severely. The difficulty in justifying forfeiture for conduct punished as a minor offense is even greater when the asset subject to forfeiture has a value in excess of the fine that could be imposed in the criminal case. *Hawks*, at 12.

H.B. 2651 could potentially be challenged facially or as applied to particular facts. Facial challenges to statutes are rarely successful. When a facial challenge is mounted, courts initially presume that the statute is constitutional. In reviewing the statute, they will apply that presumption by resolving every doubt in favor of constitutionality. *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997). Such challenges will be rejected unless it is shown there are no circumstances in which the statute could be constitutionally applied. *Dean v. McWherter*, 70 F.3d 43 (6th Cir. 1995).

The first factor, severity of the underlying conduct, can be determined by an examination of the criminal penalties. The underlying conduct which may subject a person to forfeiture under H.B. 2651 is patronizing prostitution or promoting prostitution. Patronizing prostitution is punished criminally as a Class B misdemeanor, unless committed within one-half mile of a church or school, in which case it is punished as a Class A misdemeanor. Tenn. Code Ann. § 39-13-514. Class B misdemeanors are punishable by a jail term of not more than six months and/or a fine not to exceed $500. Tenn. Code Ann. § 40-35-111(e)(2). Class A misdemeanors are punishable by a jail term or not more than 11 months and 29 days

and/or a fine not to exceed $2,500. Tenn. Code Ann. § 40-35-111(e)(1). Promotion of prostitution is a Class E felony. Tenn. Code Ann. § 39-13-516. Class E felonies are punishable by imprisonment for a term of not less than one year nor more than six years and/or by a fine not to exceed $3,000. Tenn. Code Ann. § 40-35-111(b)(5).

It is obvious there are circumstances under which H.B. 2651 could constitutionally be applied. The easiest case would be where the vehicle is used to promote prostitution, the vehicle is worth close to or less than $3,000, which is the maximum criminal fine, the claimant is fully culpable for the conduct, loss of the vehicle would not cause an undue hardship on the claimant or the claimant's family, and the seized asset is used directly to accomplish the violation.[7] Vehicles used in patronizing prostitution could also be constitutionally forfeited where the vehicle is worth close to or less than $500, the maximum fine, and the other factors support forfeiture. Thus H.B. 2651 would not be unconstitutional on its face.

On the other hand, there may be circumstances under which H.B. 2651 would be unconstitutional as applied. As *Hawks* indicates, it would be impossible to develop a bright line test to determine whether a particular forfeiture would constitute an excessive fine under the U.S. or Tennessee constitutions. Courts will accord the *Hawks* factors different weight based on the facts and circumstances of each case.[8] As a result, it is likely that some forfeitures permitted under the terms of H.B. 2651 may not withstand scrutiny under an excessive fines analysis. The most difficult case would be where the vehicle was used in patronizing prostitution more than one-half mile from any church or school, the loss of the automobile would cause undue hardship on the claimant and the claimant's family, the owner was in a secondary role to another person in committing the violation, and the relationship between the vehicle and the offense was somewhat attenuated.[9] Thus while H.B. 2651 is not unconstitutional on its face, it is likely that it could be held unconstitutional as applied under some circumstances.

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[7]In Hawks, the Court suggested that financial hardship on the Claimant could be a relevant factor in some cases. It did not reach the issue because it was able to dispose of the case on other grounds. *Hawks*, at 17, n.22.

[8]In *Hawks*, for example, the Court of Appeals was particularly swayed by the fact that the offense of driving on a revoked license was a misdemeanor and therefore a relatively minor offense and that the criminal penalties for the offense were the same regardless of whether the revocation was for DUI or some other traffic violation. In some other case, a court applying the relevant factors might find that the forfeiture might constitute an excessive fine because the hardship it would impose on the claimant or his or her family would be unduly harsh in view of the severity of the offense.

[9]The connection between the vehicle and the violation would be attenuated, for example, if the owner walked a considerable distance from the car to the place where prostitution was patronized.

Even where the forfeiture would be excessive, however, the vehicle might nonetheless be subject to forfeiture is it was traceable to the proceeds of illegal activity. Under Tenn. Code Ann. § 39-11-703, any real or personal property that is traceable to the proceeds of criminal violations are subject to forfeiture. Forfeitures of property under that statute are not subject to challenge as an excessive fine. Since such proceeds represent ill gotten gains, the claimant never had any legal right to them. *Stuart v. State*, 963 S.W.2d 28, 34 (1998).

4. Other constitutional provisions

This office is unaware of any other federal or state constitutional provisions that would be violated by H.B. 2651, if enacted.

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