

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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May 9, 2006

Opinion No. 06-085

Dual Prosecutions for (1) Contempt for Violating an Order of Protection and (2) Violation of Tenn. Code Ann. § 36-3-612 for Knowingly Violating a Protective Order.

QUESTIONS

1. When a person under an order of protection violates that order in a manner sufficient to constitute a violation of Tenn. Code Ann. § 36-3-612, would it constitute double jeopardy in violation of the United States and Tennessee Constitutions if the defendant were convicted of the Class A misdemeanor offense of violating an order of protection and the judge held such defendant in contempt of court for violating such order and if the offense and the contempt were based upon the same conduct?

2. Would it violate the doctrine of separation of powers if the General Assembly enacted legislation to prohibit a judge from enforcing an order of such judge's court by use of the power of contempt if the conduct giving rise to the contempt also constituted the criminal offense of violation of a protective order?

OPINIONS

1. No. It is the opinion of this Office that dual convictions for (1) criminal contempt of court for violating an order of protection under Tenn. Code Ann. § 36-3-610 and (2) the Class A misdemeanor offense for knowingly violating a protective order under Tenn. Code Ann. § 36-3-612 could be constitutionally supported.

2. No. It would not violate separation of powers if the General Assembly elected to remove a court's statutory authority to punish, as contempt of court, conduct which would constitute a violation of Tenn. Code Ann. § 36-3-612

ANALYSIS

1. In Op. Tenn. Att'y Gen. 05-183, this Office opined that Public Chapter No. 394, Public Acts of 2005, which amended Tenn. Code Ann. § 36-3-612 by creating the Class A misdemeanor offense of knowingly violating an order of protection under certain circumstances, did not repeal by implication Tenn. Code Ann. § 36-3-610 or any other statutory authority allowing a court to punish a violation of an order of protection as contempt of court. This opinion request now

asks whether dual prosecutions for contempt of court and for the new criminal offense codified at Tenn. Code Ann. § 36-3-612 would offend constitutional double jeopardy protections.

It is the opinion of this Office that dual convictions could be constitutionally sustained. In *State v. Winningham*, 958 S.W.2d 740 (Tenn. 1997), the Supreme Court determined that the double jeopardy clauses of the United States Constitution and the Tennessee Constitution did not prohibit dual prosecutions for criminal contempt of court for violating an order of protection and for arson, after the defendant burned down his wife's house. In so doing, the court looked at the following four factors from *State v. Denton*, 938 S.W. 373 (Tenn. 1996):

- a. An analysis under *Blockburger v. United States*, 284 U.S. 299 (1932), of the statutory elements of each offense.
- b. An analysis of the evidence used to prove each offense.
- c. A consideration of whether there were multiple victims or discrete acts.
- d. A comparison of the purposes of the respective statutes.

No one factor is determinative, but the results of each is weighed and considered in relation to the each other to determine the double jeopardy issue.

As for the first factor, the court noted that the relevant inquiry is “whether each offense contains an element not contained in the other; if not, they are the ‘same offense’ and double jeopardy bars additional punishment and successive prosecution.” *Winningham*, 958 S.W.2d at 743 (quoting *United States v. Dixon*, 509 U.S. 688, 696 (1993)). The court concluded that criminal contempt and arson have markedly distinct statutory elements and in fact have no common elements. “Thus, application of the *Blockburger* test strongly suggests that the legislature intended to impose separate punishment for each of these offenses.” *Id.* at 746.

Regarding the second factor, “[i]f the same evidence is not required to prove each offense, ‘then the fact that both charges relate to, and grow out of, one transaction, does not make a single offense where two are defined by the statutes.’” *Id.* The court noted that the defendant's conduct underlying the contempt were threats on the victim's life, trespass onto her property, firing shots at her and setting her house on fire. While only the last of these facts was evidence necessary to establish arson, the court concluded that this factor weighed in favor of finding a double jeopardy violation because, “in order to prove arson, the State must rely on evidence which necessarily includes some of the same evidence used to establish the appellee's conduct as contemptuous.” *Id.*

On the third factor, although both offenses involved the same conduct of burning the victim's house, the contempt proceeding also involved other violations of the order of protection. There were also different victims of the two offenses. For arson or any other criminal offense, the criminal conduct offends the State as the sovereign, but the victim of a contempt is the court itself, as an

organ of public justice. “The fact that different victims are involved suggests that separate prosecutions would not violate double jeopardy principles under the Tennessee Constitution.” *Id.*

Finally, as for the fourth factor, the contempt and arson statutes serve vastly different purposes, and this suggests that separate prosecutions would not violate double jeopardy principles under our state constitution. The court concluded, upon weighing the four factors, that dual prosecutions did not offend double jeopardy.

Applying these principles to the issue presented here, it is the opinion of this Office that dual convictions for contempt of court for violating an order of protection under Tenn. Code Ann. § 36-3-610 and for knowingly violating a protective order under Tenn. Code Ann. § 36-3-612 could be imposed. Applying the first *Denton* factor, the statutes contain different elements. Under Tenn. Code Ann. § 36-3-610(a), a court may punish any violation of an order of protection or a court-approved consent agreement as civil or criminal contempt. But under Tenn. Code Ann. § 36-3-612(a), it is only an offense if one violates an order of protection, or a restraining order issued to a “victim,” and if:

- a. The person received notice of the request for an order of protection or restraining order;
- b. The person had an opportunity to appear and be heard in connection with the order; and
- c. The issuing court made specific findings of fact in the order that the person previously committed domestic abuse.

This latter statute thus has several elements not encompassed in the offense of criminal contempt, and the latter only applies if each of these three circumstances are present.

As for the remaining *Denton* factors, the application of the second factor necessarily turns on the evidence presented in a particular prosecution. In any situation with dual prosecutions for these two offenses, there presumably would be proof that the defendant violated the order of protection; however, a prosecution under Tenn. Code Ann. § 36-3-612(a) would require further evidence to prove this offense. The third factor weighs in favor of allowing dual prosecutions because, just as in *Winningham*, each offense has different victims. Likewise, under the fourth factor, the statutes have different purposes, in that contempt seeks to maintain the integrity of the court and vindicate its authority, but the criminal statute seeks to deter and prohibit knowing violations of protective orders in certain specific situations. For example, the criminal statute only applies if the person subject to the protective order has previously been found to have committed domestic abuse. Weighing all of these factors together, dual prosecutions would not appear to offend double jeopardy. *See also State v. Wyche*, 914 S.W.2d 558 (Tenn. Crim. App. 1995) (dual prosecutions for contempt in failing to pay child support and for the misdemeanor offense of flagrant nonsupport did not offend constitutional double jeopardy protections).

2. “In Tennessee, the court’s authority to punish certain acts as contempt derives from statute,” and “any conduct punished as contempt in Tennessee must fall under these statutory provisions.” *State v. Turner*, 914 S.W.2d 951, 955 (Tenn. Crim. App. 1995). It is true that “[t]he inherent power of courts to punish contemptuous conduct has long been regarded as essential to the protection and existence of the courts.” *Black v. Blount*, 938 S.W.2d 394, 397 (Tenn. 1996). “Indeed, at common law, the power of courts to punish contempts was vast and undefined.” *Id.* However, “[b]ecause unlimited, undefined discretionary power carried with it the potential for abuse, specific statutory provisions were adopted to limit and define the conduct punishable by contempt.” *Id.* A court may now only punish someone for contempt of court for an act designated by statute as contemptuous. *See also Doe v. Bd. of Professional Responsibility*, 104 S.W.3d 465, 473 (Tenn. 2003).

As this Office noted in Op. Tenn. Att’y Gen. 05-183, a court presently may punish a violation of an order of protection as contempt under Tenn. Code Ann. § 36-3-610, as well as under Tenn. Code Ann. §§ 16-1-103 and 29-9-102. In light of the above, it would appear that the General Assembly has the authority to remove a court’s statutory authority to punish as contempt of court conduct which would constitute violation of a protective order under Tenn. Code Ann. § 36-3-612.

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