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Opinion No. 07-164

Sexual Offender Registration Requirements Based on Multiple Convictions in a Single Trial

QUESTIONS

1. Is a person who is convicted in a single trial of three or more counts of indecent exposure, in violation of Tenn. Code Ann. § 39-13-511, a sexual offender as defined by Tenn. Code Ann. § 40-39-202(17)(A)(vii) and thus required to register pursuant to Tenn. Code Ann. § 40-39-203?

2. Is Tenn. Code Ann. § 40-39-202(17)(A)(vii) vague and therefore unconstitutional?

OPINIONS

1. Yes. A person who has been convicted of three or more counts of indecent exposure in violation of Tenn. Code Ann. § 39-13-511 is a sexual offender as defined in Tenn. Code Ann. § 40-39-202(17)(A)(vii) and is therefore required to register pursuant to Tenn. Code Ann. § 40-39-203.

2. No. Tenn. Code Ann. § 40-39-202(17)(A)(vii) is not unconstitutionally vague.

ANALYSIS

1. Under Tenn. Code Ann. § 40-39-203, persons who have been convicted of a sexual offense must register as required by the Sexual Offender and Monitoring Act, Tenn. Code Ann. §§ 40-39-201 through 40-39-211. Tenn. Code Ann. § 40-39-202(17)(A)(vii) defines a sexual offense to include three or more convictions for indecent exposure. It states:

> "Sexual offense" means:
>
> (A) The commission of any act that, on or after November 1, 1989, constitutes the offense of:

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(vii) Indecent exposure, under § 39-15-511, upon a third or subsequent conviction.

The primary objective of statutory construction is to ascertain and give effect to the intent of the legislature. *Freeman Industries, LLC v. Eastman Chemical Co.*, 172 S.W.3d 512 (Tenn. 2005). If the language is clear and unambiguous, legislative intent is to be ascertained from the plain meaning of the statutory text. *Bostic v. Dalton*, 158 S.W.3d 347 (Tenn. 2005).

In the legal sense, "conviction" means:

> In a general sense, the result of a criminal trial which ends in a judgment or sentence that the accused is guilty as charged.

Black's Law Dictionary 301 (5th ed. 1979).

A criminal defendant may be charged and tried for multiple offenses in a single trial. Under Tenn. R. Crim. P. 8(a) joinder of offenses is mandatory when the offenses are based on the same conduct or criminal episode, are within the jurisdiction of a single court and were known to the appropriate prosecuting officials at the time the indictment was returned. Under Rule 8(b), such joinder is permissible, but not required, in cases where the offenses are part of a common plan or scheme or are of the same or similar character.[1] In cases where two or more offenses have been joined for trial, the jury must consider each count separately and render separate verdicts, according to the evidence, on each count. *See, e.g., State v. Alverado*, 961 S.W.2d 136 (Tenn. Crim. App. 1996); *State v. Millbrooks*, 819 S.W.2d 441 (Tenn. Crim. App. 1991).[2]

Tenn. Code Ann. § 40-39-202(17)(A)(vii), read in light of Tenn. Crim. P. 8, is clear and unambiguous. By its terms, a person who has been found guilty of three or more violations of Tenn. Code Ann. § 39-13-511 is a sexual offender. Under the criminal law, multiple convictions can arise from a single trial. There is nothing in the plain language of Tenn. Code Ann. § 40-39-202(17(A)(vii) to suggest that the legislature intended to require that the convictions for violations of Tenn. Code Ann. § 39-13-511 arise from separate trials.

2. A criminal statute is unconstitutionally vague if it fails to define the offense with

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[1]The State may not, however, break a single offense into separate parts and charge each part separately. *State v. Phillips*, 924 S.W.2d 662 (Tenn. 1996). As the Court noted in that case, such a practice would violate the prohibition against double jeopardy.

[2]*Alverado* and *Millbrooks* show that, in cases involving multi-count indictments, each count represents a separate charge that must stand or fall on its own. Thus, for example, if a jury finds there is sufficient evidence to convict on some, but not all, of the counts, a jury may render guilty verdicts where there is sufficient evidence and must render not guilty verdicts on those counts where the state failed to carry its burden of proof.

sufficient clarity to enable people of ordinary intelligence to understand the nature of the conduct that is prohibited or if it is so broad that it is open to arbitrary enforcement. *Vandergriff v. City of Chattanooga*, 44 F. Supp.2d 927 (E.D. Tenn. 1998). Likewise, noncriminal statutes are unconstitutionally vague if they are not set out in terms that will enable people of ordinary intelligence to understand and comply with their requirements. *Big Fork Mining Co. v. Tenn. Water Quality Control Bd.*, 620 S.W.2d 515 (Tenn. App. 1981).

Tenn. Code Ann. § 39-13-511 meets the requirements for a criminal statute, in that it is sufficiently clear to apprise persons of ordinary intelligence about the nature of the conduct that it prohibits. It is therefore not void for vagueness.

Tenn. Code Ann. § 40-39-202(17)(A)(vii) is a noncriminal statute that has been set out in sufficiently clear terms to enable persons of ordinary intelligence to understand and comply with its requirements.[3] It clearly provides that a person becomes a sexual offender after three or more indecent exposure convictions.

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[3]Statutes governing the registration and tracking of sex offenders are noncriminal remedial measures. *See, e.g., Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999).