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OFFICE OF THE
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Opinion No. 09-29

Economic Crime Fees and Judicial Forfeiture Proceeds

QUESTIONS

1. Can proceeds from judicial forfeitures under Tenn. Code Ann. §§ 39-11-701 to 39-11-717 (2008 Supp.) be used to fund an economic crime fund established under Tenn. Code Ann. §§ 40-3-201 to 40-3-210 (2008 Supp.)?
2. Can a District Attorney and a criminal defendant enter into a valid plea agreement where the Defendant agrees to pay an economic crime fee greater than the statutorily authorized maximum established under Tenn. Code Ann. § 40-3-204 (2008 Supp.)?
3. May a valid plea agreement include a requirement that a defendant pay an economic crime fee pursuant to Tenn. Code Ann. §§ 40-3-201 to 40-3-210 (2008 Supp.) when the Defendant is not charged with one of the specified crimes listed in Tenn. Code Ann. § 40-3-204 (2008 Supp.)?
4. May a valid plea agreement include a requirement that a Defendant agree to forfeit a sum of money under Tenn. Code Ann. §§ 39-11-701 to 39-11-717 (2008 Supp.) to an economic crime fund established under Tenn. Code Ann. §§ 40-3-201 to 40-3-210 (2008 Supp.) or to another source outside the operation of Tenn. Code Ann. § 39-11-713 (2008 Supp.)?
5. May a valid plea agreement include a provision where a Defendant agrees to forfeit a sum of money under Tenn. Code Ann. §§ 39-11-701 to 39-11-717 (2008 Supp.) when the Defendant has no forfeitable assets?
6. Under what circumstances may proceeds from judicial forfeitures arising out of Tenn. Code Ann. §§ 39-11-701 to 39-11-717 (2008 Supp.) or economic crime fee funds arising out of Tenn. Code Ann. §§ 40-3-201 to 40-3-210 (2008 Supp.) be used to pay salaries?
7. If a plea agreement includes a provision that provides for a forfeiture of some of the Defendant's assets, are there any criteria that prosecutors and defendants should follow to determine the amount of forfeiture, if any?
8. Can a court, pursuant to a plea agreement, waive the mandatory minimum drug fines provided for in Tenn. Code Ann. § 39-17-428 (2008 Supp.) due to the indigence of a

defendant, but then require, as part of a plea agreement, that a defendant forfeit a similar amount of money to specified law enforcement agencies?

OPINIONS

1. No. Proceeds from judicial forfeitures may be allocated only in accordance with Tenn. Code Ann. §§ 39-11-713 and 39-17-420 (2008 Supp.)

2. No. Courts must assess a fee for economic crimes prosecutions in accordance with the fee schedule in Tenn. Code Ann. § 40-3-204 (2008 Supp.). This fee schedule is only applicable to economic crimes, and the maximum possible fee that can be assessed for any one charge is \$75. A plea agreement term that provides for a larger payment would be void as against public policy and in violation of the economic crime fee statute. Tenn. Code Ann. §§ 40-3-201 to 40-3-210 (2008 Supp.).

3. No. A defendant who is not charged with an economic crime as specified in Tenn. Code Ann. §§ 40-3-201 to 40-3-210 (2008 Supp.) cannot, pursuant to a plea agreement, agree to pay an economic crime fee. A plea agreement term that provides for such a fee payment would be void as against public policy and in violation of the economic crime fee statute. Tenn. Code Ann. §§ 40-3-201 to 40-3-210 (2008 Supp.).

4. No. Proceeds from judicial forfeitures may be allocated only in accordance with Tenn. Code Ann. §§ 39-11-713 and 39-17-420 (2008 Supp.). The terms of a plea agreement cannot alter this statutory requirement.

5. Whether a forfeiture action is appropriate is dependent on the facts and circumstances in a given case. However, forfeiture actions typically target specified property that is subject to forfeiture because of the property owner's illegal act. A plea agreement that includes a forfeiture not predicated on the seizure of specific property that is tied to an illegal act may be voided as against public policy and beyond the express intent of the General Assembly.

6. Under no circumstances may proceeds from judicial forfeitures be used to pay salaries. Money from economic crime fees may be used to pay salary supplements through the Tennessee District Attorneys General Conference.

7. There are no specific criteria to determine the nature or scope of a plea agreement other than the general rule that the terms of a plea agreement cannot circumvent or violate any statute. However, attorneys are always bound by the Rules of Professional Conduct. This office does not, as a matter of policy, issue opinions on or interpretations of the Rules of Professional Conduct, a subject which is in the purview of the Tennessee Board of Professional Responsibility.

8. The defendant's ability to pay a fine and a court's decision on whether or not to waive any mandatory fines should have no bearing on a judicial forfeiture proceeding, where the purpose is to deprive a person of assets that were wrongfully acquired in violation of a criminal statute.

ANALYSIS

1. The General Assembly established an economic crime fee to aid district attorneys in the prosecution of bad check cases, fraud, and other economic crimes. Tenn. Code Ann. §§ 40-3-201 to 40-3-210 (2008 Supp.). Persons who are convicted of certain economic crimes are assessed a fee by the court for each bad check or forgery charge ranging from \$5 to no more than \$75. Tenn. Code Ann. § 40-3-204 (2008 Supp.). Proceeds from this fee are deposited into a fund controlled by the district attorney established to procure resources to prosecute economic crimes. Tenn. Code Ann. §§ 40-3-202 and 40-3-207 (2008 Supp.).

Proceeds from judicial forfeitures should however be disposed of as directed by Tenn. Code Ann. § 39-11-713 (2008 Supp.). This statute provides that after the return of any property taken from its lawful owner and reimbursement for any of the State's incidental or out-of-pocket expenses resulting from the prosecution, the proceeds of the forfeiture should then be awarded to the State, if a state agency investigated the case and seized the property, or to the local agency or task force if the task force investigated the case and seized the property.

The primary objective of statutory construction is to ascertain and give effect to the intention of the legislature as expressed in the text of the statute. *In Re Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. 2007). When the language of a statute is clear and unambiguous, courts will give effect to that intent as expressed in the plain meaning of the statutory language. *State v. Strode*, 232 S.W.3d 1 (Tenn. 2007). Under rules of statutory construction, the express mention of one thing implies the exclusion of things that are not expressly mentioned. *Wells v. Tenn. Bd. of Regents*, 231 S.W.3d 912 (Tenn. 2007).

The statutes governing economic crime fees and judicial forfeitures are plain and unambiguous. Economic crime fees may only be assessed by a court for specified offenses authorized by the statute, in the amounts set forth in the statute. Proceeds from these fees likewise may only be used for the purposes authorized in Tenn. Code Ann. § 40-3-202 (2008 Supp.). Likewise, proceeds from judicial forfeitures may only be distributed as specified in Tenn. Code Ann. § 39-11-713 (2008 Supp.).¹ Furthermore, proceeds from forfeitures stemming from illegal narcotic crimes are further restricted on how they may be spent. Tenn. Code Ann. § 39-17-420 (2008 Supp.).² There is no statutory authorization for a court to order judicial

¹ After the return of any property to its rightful innocent owner, judicial forfeiture proceeds are first used to pay the incidental and out-of-pocket expenses of the district attorney and any investigating agency in prosecuting the case. Tenn. Code Ann. § 39-11-713(a) (2008 Supp.). After these expenses are paid, if the investigating or seizing agency is a state agency, such as the Tennessee Bureau of Investigation, then the proceeds are paid to the state general fund. Tenn. Code Ann. § 39-11-713(b)(2) (2008 Supp.). If the investigating or seizing agency is a local public agency, then the funds are distributed to the agency's governing body and distributed as directed by that body. However, these funds must be designated for law enforcement. Tenn. Code Ann. § 39-11-713(b)(3) (2008 Supp.). When multiple agencies are involved, the court ordering the forfeiture then divides the proceeds according to each agency's participant. *Id.* None of these funds may be used to supplement salaries or supplant other local or state funds. Tenn. Code Ann. § 39-11-713(d) (2008 Supp.).

² Tenn. Code Ann. § 53-11-451 (2008 Supp.) provides for the forfeiture of all illegal controlled substances; equipment used to manufacture or transport controlled substances; vehicles, aircraft, or vessels used by the owner to knowingly transport controlled substances; books, records and other research products and storage devices used for

forfeiture proceeds to be treated as economic crime fees or to be comingled with such fees, since their use restrictions are different.

2. You have asked whether the terms of a plea agreement could include a provision where a defendant agrees to pay an economic crime fee greater than the statutory maximum set out in Tenn. Code Ann. § 40-3-204 (2008 Supp.). Rule 11(e) of the Tennessee Rules of Criminal Procedure permits plea bargaining between the district attorney and the attorney for the defendant. “Plea agreements . . . have been treated as contracts and are enforceable once the condition precedent is met; that is, the trial judge accepts the agreement.” *State v. Howington*, 907 S.W.2d 403, 407 (Tenn. 1995). This office has previously opined that district attorneys and criminal defendants were free to include within plea agreements mandatory contributions to a county drug fund, Op. Tenn. Att’y Gen. 04-96 (May 19, 2004), or to a local charity, Op. Tenn. Att’y Gen. 06-90 (May 16, 2006). However, as the Tennessee Supreme Court has noted, the principle of a plea bargain as a contract cannot be used to expand the statutory jurisdiction of a court. *McConnell v. State*, 12 S.W.3d 795, 799 (Tenn. 2000).³ Much as a contract that violates a provision of a law is void as a matter of public policy, *see Alcazar v. Hayes*, 982 S.W.2d 845, 851 (Tenn. 1998), a plea bargain and resulting sentence imposed by a court “in direct contravention of express statutory provisions . . . is illegal and subject to being set aside at any time, even if it has become final.” *State v. Mahler*, 735 S.W.2d 226, 228 (Tenn. 1987).

As discussed above, the economic crime fee is a creature of a plain and unambiguous statute wherein the General Assembly clearly established a fee schedule to be assessed.⁴ The General Assembly set these fees at a relatively low rate⁵ and vested with the district attorney wide discretion on how these funds can be spent. Tenn. Code Ann. § 40-3-202 (2008 Supp.). It is the opinion of this office that such an agreement would violate an express statute and therefore it would be contrary to public policy. The defendant thus cannot waive, by plea agreement, the maximum fee as established by statute or consent to an expansion of the court’s jurisdiction. *McConnell*, 12 S.W.3d at 799.

illegal narcotic trafficking; anything of value exchanged or intended to be exchanged for illegal narcotics; and drug paraphernalia. Tenn. Code Ann. § 39-11-713 (2008 Supp.) provides that the proceeds from these narcotics-related forfeitures that are turned over to local law enforcement agencies can only be used for drug education, drug enforcement, drug treatment programs, and non-recurring law enforcement expenditures.

³ In *McConnell*, the Tennessee Supreme Court vacated a sentence where the trial court imposed a sentence pursuant to a plea agreement that exceeded the maximum sentence. *McConnell*, 12 S.W.3d at 800. The *McConnell* Court distinguished its opinion from *Mahler*, 735 S.W.2d 226, that upheld the validity of a defendant’s being sentenced, pursuant to a plea, as a Range II offender, when he was only eligible for Range I sentencing. In *Mahler* the court found that defendant was free to waive his right to be sentenced as a Range I offender, pursuant to a plea agreement, so long as the sentence fell within the range to which the defendant had pled. *Id.* at 228. The *McConnell* Court emphasized that even if there was a plea agreement for a total effective sentence length, the trial court could not sentence a person beyond the statutorily permissible range. *McConnell*, 12 S.W.3d at 799.

⁴ The fee schedule in Tenn. Code Ann. § 40-3-204 (2008 Supp.) assesses a fee for each bad check charged or forged document “payable by the person or corporations against whom the costs are taxed.” The State and any local government are exempt from these fees. This fee would be assessed against a defendant upon conviction, entry of pretrial or judicial diversion, or other agreement dismissing charges upon the defendant’s agreement to pay costs.

⁵ The smallest fee is \$5 and the maximum fee is \$75 per count. Tenn. Code Ann. § 40-3-204 (2008 Supp.).

3. For the reasons discussed above, economic crime fees under Tenn. Code Ann. §§ 40-3-201 to 40-3-210 (2008 Supp.) are only applicable to specific offenses as set out in Tenn. Code Ann. § 40-3-204 (2008 Supp.). Just as a plea agreement that required a defendant to pay a larger fee than the one set by statute would be invalid, so too would an agreement to pay an economic crime fee where a person was not charged with one of the specified economic crimes. The fee cannot be assessed when the defendant is not charged with one of the offenses that is covered under the fee.

4. You have asked whether proceeds from a judicial forfeiture, by plea agreement or other order from the court, can be forfeited to a fund that was established to receive economic crime fees under Tenn. Code Ann. §§ 40-3-201 to 40-3-210 (2008 Supp.). Judicial forfeitures are governed under Tenn. Code Ann. § 39-11-701 to 39-11-717 (2008 Supp.).⁶

In construing statutes, we must "ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Wilson v. Johnson County*, 879 S.W.2d 807, 809 (Tenn. 1994). When the statute is unambiguous, legislative intent is determined from the plain and ordinary meaning of the language used. *Freeman v. Marco Transp. Co.*, 27 S.W.3d 909, 911 (Tenn. 2000). The statutory language must be "read in the context of the entire statute, without any forced or subtle construction which would extend or limit its meaning." *National Gas Distribs. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991).

Tenn. Code Ann. § 39-11-713 (2008 Supp.) unambiguously delineates how judicially forfeited property is to be disposed of. After the return of any property wrongfully taken from an innocent owner and payment of the district attorney's out-of-pocket litigation expenses and the incidental expenses of any investigating agency, the remaining proceeds are either distributed to the state treasury or as directed by the local body that supervises the local public agency that investigated the crime or seized the property. Tenn. Code Ann. § 39-11-713(b) (2008 Supp.). If the funds are turned over to a local body,⁷ the funds can only be used for law enforcement purposes. Tenn. Code Ann. § 39-11-713(b)(3) (2008 Supp.). Proceeds from drug-related forfeitures are further restricted. Tenn. Code Ann. § 39-17-420 (2008 Supp.).

By the plain and unambiguous terms of Tenn. Code Ann. § 39-11-713 (2008 Supp.), it is clear that the General Assembly enacted a set of rules governing how judicial forfeiture proceeds are to be apportioned and spent separate and distinct from how economic crime fee proceeds

⁶ The term "judicial forfeiture" is used here to distinguish it from an "administrative forfeiture," an asset forfeiture procedure adjudicated civilly under the Uniform Administrative Procedures Act within the Tennessee Department of Safety or another state agency. Tenn. Code Ann. §§ 40-33-101 to 40-33-215 (2008 Supp.).

⁷ A "local public agency" is:

[A]ny county or municipal law enforcement agency or commission, any judicial district drug task force established under state law, the district attorney general, or any local department or agency of local government authorized by the attorney general to participate in the investigation.

Tenn. Code Ann. § 39-11-713(c) (2008 Supp.). The term "attorney general" above means the local district attorney general. Tenn. Code Ann. § 39-11-702(1) (2008 Supp.).

may be spent. Judicial forfeiture proceeds are allocated among the investigating and seizing agencies by the court, Tenn. Code Ann. § 39-11-713(b)(3) (2008 Supp.), and cannot, under any circumstances, be used to pay salaries. Tenn. Code Ann. § 39-11-713(d). Economic crime fees under Tenn. Code Ann. §§ 40-3-201 to 40-3-210 (2008 Supp.) are set aside solely to the district attorney's office that prosecuted the case. While a district attorney's office may receive part of the proceeds from a judicial forfeiture, Tenn. Code Ann. § 39-11-713(c) (2008 Supp.), these proceeds are still governed by the spending restrictions set forth in Tenn. Code Ann. § 39-11-713 (2008 Supp.), which are different from the spending restrictions for economic crime fees. Tenn. Code Ann. § 40-3-202 (2008 Supp.). It is therefore the opinion of this office that a plea agreement or court order that effectively treats proceeds from judicial forfeitures as economic crime fees would be in violation of the applicable statutes.

5. You also asked if a valid plea agreement could include an asset forfeiture provision when there are no forfeitable assets, or more specifically when the plea agreement merely states that the defendant agrees to judicially forfeit a certain amount of money not tied to any criminal proceeds.

A district attorney is an elected constitutional officer whose function is to prosecute state criminal offenses in his or her circuit or district. *Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 209 (Tenn. 1999); Tenn. Const. Art. VI, § 5; Tenn. Code Ann. § 8-7-103(1). The prosecutor's discretion to seek a warrant, presentment, information, or indictment is extremely broad and subject only to certain constitutional restraints. *City of Chattanooga v Davis*, 54 S.W.3d 248, 278-279 (Tenn. 2001); *Ramsey*, 998 S.W.2d at 209. The prosecutor's discretion with regard to prosecution extends to the plea-bargaining process. *See Ramsey*, 998 S.W.2d at 209; *State v. Superior Oil, Inc.*, 875 S.W.2d 658, 660 (Tenn. 1994); *Young v. United States*, 481 U.S. 787, 807 (1987). Plea-bargaining is "entirely within the district attorney general's discretion," *State v. Head*, 971 S.W.2d 49, 51 (Tenn. Crim. App. 1998), though the trial court is not obligated to accept any plea agreement. *State v. Layman*, 214 S.W.3d 442, 452 (Tenn. 2007). However, plea bargains that violate the express terms of statutes may be voided at any time. *Mahler*, 735 S.W.2d at 228.

The judicial forfeiture of criminal proceeds would only be appropriate when the statutory grounds for forfeiture under Tenn. Code Ann. § 39-11-703 (2008 Supp.) have been met. A judicial forfeiture may only be initiated by the district attorney through a civil *in rem* action, by including the named property to be forfeited on an indictment or information, or by forfeiture order in general sessions court as provided in Tenn. Code Ann. § 39-11-708 (2008 Supp.). Tenn. Code Ann. § 39-11-703(a) states, "[a]ny property, real or personal, directly or indirectly acquired by or received in violation of any statute or as an inducement to violate any statute, or any property traceable to the proceeds from the violation, is subject to judicial forfeiture" Only property that meets this statutory requirement is subject to judicial forfeiture. Tenn. Code Ann. § 39-11-701(b) (2008 Supp.). The Tennessee Supreme Court has held that, since forfeitures are disfavored under the law, forfeiture statutes must be strictly construed against the state. *Garrett v. Tenn. Dep't of Safety*, 717 S.W.2d 290, 291 (Tenn. 1986). The plain language

of the statute cited above demonstrates that the General Assembly intended that only specific, identified assets that were proceeds of unlawful activity be subject to forfeiture.⁸

It is the opinion of this office that, unless there is some nexus between the property to be forfeited pursuant to a plea agreement, and the identified proceeds of criminal activity, the forfeiture would be in express violation of the forfeiture statutes and the term of the agreement could be therefore voided as against public policy.⁹

6. You also asked if local agencies could use proceeds from judicial forfeitures or economic crime fees to pay salaries. The General Assembly has enacted a comprehensive ban on the use of forfeiture proceeds to pay salaries. Tenn. Code Ann. § 39-11-713(d) states that “[f]unds awarded under this section may not be used to supplement salaries of any public employee or law enforcement officer. Funds awarded under this section may not supplant other local or state funds.” This statute plainly and unambiguously forbids local agencies from using judicial forfeiture proceeds to pay salaries.¹⁰

As discussed in the analysis of question 4 above, there are different restrictions on how economic crime fees are spent. Tenn. Code Ann. § 40-3-202 (2008 Supp.). The district attorney may use these fees to hire expert witnesses and obtain other resources to aid in the prosecution of economic crimes. *Id.* Proceeds from this fund may also be used to pay salary and salary supplements through the Tennessee District Attorneys General Conference for support staff and subject to other limitations. Tenn. Code Ann. § 40-3-202(5) (2008 Supp.).

7. As discussed earlier, a prosecutor has broad discretion in the discharge of his or her duties, which includes the plea-bargaining process. *See Ramsey*, 998 S.W.2d at 209; *Superior Oil*, 875 S.W.2d at 660; *Young*, 481 U.S. at 807. However, the terms of plea agreements cannot violate established law. *McConnell*, 12 S.W.3d at 799. Furthermore, district attorneys and counsel for defendants are bound by the Tennessee Rules of Professional Conduct, which govern the conduct of all lawyers. Tenn. Sup. Ct. R. 8. These rules also delineate the special responsibilities that prosecutors have in the administration of justice. Tenn. Sup. Ct. R. 8, RPC 3.8. This office does not, as a matter of policy, issue opinions interpreting the Rules of Professional Conduct. A request for such an opinion should be referred to the Board of Professional Responsibility.

8. Whether a court could, pursuant to a plea agreement, waive the imposition of a mandatory minimum fine but nevertheless collect a judicial forfeiture in a similar amount would

⁸ The only exception to this rule is found in Tenn. Code Ann. § 39-11-708(g) which stipulates that if the subject property cannot be located or is beyond the jurisdiction of the court, the court may enter a judgment against the property owner equal to the property’s value. In any case, the forfeiture action is still linked to a specific, identified piece of property.

⁹ This office is aware that it is common practice in many judicial districts for the district attorney and criminal defendant to reach a settlement on the disposition of seized property. These settlements often include agreements where the defendant agrees to forfeit a certain amount of money in exchange for the return of the seized property. This office is unaware of any legal impediment to such agreements, so long as they are made in good faith.

¹⁰ Proceeds from administrative forfeitures also may not be used to supplement salaries. Tenn. Code Ann. § 40-33-211(b) (2008 Supp.).

largely depend on the facts and circumstances of an individual case. However, the two issues should be considered entirely separate matters. A defendant's ability to pay a mandatory drug fine does not have any relevance to the authority to seize drug proceeds as defined in Tenn. Code Ann. § 39-11-703 (2008 Supp.). The purpose of a forfeiture under Tenn. Code Ann. § 39-11-703 is to deprive a criminal defendant of property acquired through unlawful activity, property the defendant never had the right to lawfully possess.

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