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Opinion No. 09-69

Constitutionality of HB 1120

QUESTIONS

1. Has legislation similar to HB 1120, which would prohibit certain sex offenders from being on school grounds and other enumerated places where children congregate, along with prohibiting sex offenders from loitering within one thousand (1,000) feet of school grounds and other enumerated places where children might congregate, withstood any constitutional challenges in any other jurisdiction and is the 1,000 foot restriction defensible under the state and federal constitutions?

2. Is the definition of "loitering" in HB 1120 subject to a constitutional challenge for vagueness under the United States and Tennessee Constitutions?

OPINIONS

1. Although other states have enacted statutes that are similar to HB 1120, we have found no reported decisions involving court challenges to such statutes. Similarly, we have found no cases from other jurisdictions addressing specifically the constitutionality of a 1,000 foot restriction (as compared with some greater or lesser distance). Whether a 1,000 foot restriction such as that contained in HB 1120 would raise constitutional issues would necessarily turn on the particular facts and circumstances to which it is applied.

2. Yes. The legislature's use of the term "loiter" would effectively and necessarily entrust lawmaking authority to the day to day decisions of police officers and therefore would be subject to challenge on grounds of vagueness.

ANALYSIS

HB 1120, if enacted into law, would amend certain provisions of the residential and work restrictions for sex offenders that are presently set forth in Tenn. Code Ann. § 40-39-211. Currently, subsection (d) prohibits certain sex offenders from being upon school grounds when minors are present and from standing, sitting idly, or remaining within five hundred (500) feet of a school building, or on school grounds, when minors are present without a legitimate reason for

being there.[1] HB 1120 would amend the statute to also prohibit sex offenders from being upon the grounds of licensed day care centers, other child care facilities, public parks, playgrounds, recreation centers, and public athletic fields. In addition, HB 1120 would prohibit sex offenders from "loitering" within 1,000 feet of any of the areas heretofore listed. The term "loitering" does not appear in the current version of Tenn. Code Ann. § 40-39-211. HB 1120 defines the term to mean, "to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting a child under eighteen (18) years of age."

1. Other states have enacted statutes that impose similar restrictions. For example, South Dakota prohibits sex offenders from loitering within five hundred (500) feet of any school park, playground, or public pool.[2] S.D. Codified Laws §§ 22-24B-22 through 22-24B-24. Similarly, Michigan law prevents sex offenders from loitering in areas that lie one thousand (1,000) feet or less from school property, including, public, private, denominational, or parochial school facilities and recreational areas. Mich. Comp. Laws. Ann. § 28.734. Alabama prohibits an adult sex offender, whose victim was a minor, from loitering on or within five hundred (500) feet of any property on which there is a school, child care facility, playground, park, athletic field or facility, or any other business or facility having a principal purpose of caring for, educating, or entertaining minors. Ala. Code § 15-20-26.[3] Georgia currently prohibits sex offenders from loitering at any child care facility, school, or areas where minors congregate. Ga. Code Ann. § 42-1-15. A number of other states have also enacted similar statutory schemes.[4]

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[1] Tenn. Code Ann. § 40-39-211(d), in pertinent part, states:

> (d)(1) No sexual offender, as defined in § 40-39-202, or violent sexual offender, as defined in § 40-39-202, shall knowingly:
>
> (A) Be upon or remain on the premises of any school building or school grounds in this state when the person has reason to believe children under eighteen (18) years of age are present.
>
> (B) Stand, sit idly, whether or not the person is in a vehicle, or remain within five hundred (500) feet of a school building or on school grounds in this state when children under eighteen (18) years of age are present, while not having a reason or relationship involving custody of or responsibility for a student or any other specific or legitimate reason for being there. . ..

[2] The violation of this section is a felony. S.D. Codified Laws § 22-24B-24.

[3] Alabama SB 137, if enacted would extend the application of Ala. Code § 15-20-26(f) to colleges and universities, and also school bus stops.

[4] *See, e.g.*, Idaho Code § 18-8329 (prohibits loitering on a public way within five hundred (500) feet from school grounds); Ill. Comp. Stat. Ann. 5/11-9.4 (prohibits loitering on a public way within five hundred (500) feet of a public park in order to approach, contact, or communicate with a child under 18); Ill. Comp. Stat. Ann. 5/11-9.4 (prohibits loitering within five hundred (500) feet of a school building or on school property while minors are present); Del. Code Ann. tit. 11 § 1112 (prohibits sex offenders from loitering within five hundred (500) feet of school property); Cal. Penal Code § 653b (prohibits every person, including sex offenders, from loitering about any school or public place where children attend or normally congregate); and La. Rev. Stat. Ann. § 14:91.1 (prohibits sexually violent predators from being on school property).

This office has found no decision of any Tennessee or federal court dealing with the constitutionality of a statute similar to HB 1120 that prohibits a sex offender from loitering within one thousand (1,000) feet of certain areas where minors are present. Whether a 1,000 foot restriction (as compared with some greater or lesser distance) would raise constitutional issues would necessarily depend on the particular facts and circumstances to which it is applied. In the absence of a concrete factual context, it is difficult to predict how HB 1120, if enacted, might be challenged.

2. Your second question asks whether the term "loitering" as used and defined in HB 1120 is sufficiently specific to pass muster under both the Tennessee and the United States Constitutions. To avoid unconstitutional vagueness, a criminal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352 (1983). The standard normally used in determining if a statute is vague is whether men of common intelligence must necessarily guess at its meaning. *Davis-Kidd Booksellers, Inc., v. McWherter,* 866 S.W.2d 520 (Tenn. 1993). Another important aspect of the vagueness doctrine is a requirement that the legislature establish minimal guidelines to govern law enforcement.[5] *Id.*

Morales v. City of Chicago, 527 U.S. 41 (1999), is instructive. In that case, the Court struck down a city ordinance that prohibited street gang members from loitering in public places.[6] The Court found that the statute was vague because it failed to properly limit the discretion of police officers in the enforcement of the ordinance. It noted that the inquiry was whether the language of the statute effectively entrusts lawmaking decisions to the moment to moment judgment of the officer.[7] *Morales,* 527 U.S. at 61. As the Court's reasoning shows, a criminal statute may not be so broadly worded as to allow the officer to decide what conduct is prohibited.

Applying the Court's reasoning in *Morales,* HB 1120, if enacted, would be subject to challenge because it would leave the question of whether a violation has occurred to the subjective judgment of the officer on the scene and would thus allow or invite arbitrary conduct by police officers. For example, the bill defines "loiter" as remaining for a "period of time." What constitutes a period of time is not defined and it would thus be left to the judgment of an individual police officer to make that determination. Whether a person is in a location for the primary purpose of observing or contacting a child would likewise be left to the judgment of the

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[5] "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Davis-Kidd Booksellers,* 866 S.W. 2d at 532, citing *Kolender v. Lawson,* 461 U.S. 352 (1983).

[6] Under the ordinance, "loitering" was defined as remaining in a public place with no apparent purpose. *Morales,* 527 U.S. at 47.

[7] The Court also noted that a statute is unconstitutionally vague if the language is sufficiently broad to allow or encourage arbitrary or discriminatory behavior by police officers. *Morales,* 527 U.S. at 56.

officer on the scene. By leaving such discretion in the hands of police officers, HB 1120 would be subject to challenge based on the holding in *Morales*.

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