STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

April 11, 2011

Opinion No. 11-32

Constitutionality of "Exclusionary Rule Reform Act"

QUESTION

If enacted, the "Exclusionary Rule Reform Act" (HB401), as amended by the House Judiciary Committee, would guarantee that evidence seized after the execution of a search warrant issued pursuant to Tenn. Code Ann. §§ 40-6-101, et seq., or Tenn. R. Crim. P. 41 would not be subject to suppression on account of "a good faith mistake or technical violation made by a law enforcement officer, court official, or the issuing magistrate," provided that the evidence is otherwise admissible in a criminal proceeding and not obtained in violation of the federal and state constitutions. Is this bill constitutional?

OPINION

Yes. The bill, by its terms, does not purport to authorize the admission of evidence that is otherwise inadmissible because it was unreasonably seized in violation of the United States Constitution or the Tennessee Constitution. Furthermore, the bill does not violate constitutional separation-of-powers provisions.

ANALYSIS

Both Tenn. Code Ann. §§ 40-6-101, et seq., and Tenn. R. Crim. P. 41 delineate the requirements under state law governing the application for—and the issuance and execution of—a search warrant. This bill would allow the admission of evidence seized following execution of a search warrant if the application for, the issuance of, or the execution of the warrant does not comply with Tenn. Code Ann. §§ 40-6-101, et seq., or Tenn. R. Crim. P. 41, so long as (1) the evidence is otherwise admissible in a criminal proceeding, (2) there was no violation of the federal or state constitution, and (3) the error "was a result of a good faith mistake or technical violation made by a law enforcement officer, court official, or the issuing magistrate." The bill, as amended, would enact a new statutory provision, Tenn. Code Ann. § 40-6-108, as follows:

> (a) Notwithstanding any provision of law to the contrary, any evidence that is seized as a result of executing a search warrant issued pursuant to title 40, chapter 6, part 1 or pursuant to Tenn. R. Crim. Pro. Rule 41 that is otherwise admissible in a criminal proceeding and not in violation of the

constitutions of the United States or the State of Tennessee shall not be suppressed as a result of any violation of title 40, chapter 6, part 1 or any violation of Tenn. R. Crim. Pro. Rule 41 if the court determines that such violation was a result of a good faith mistake or technical violation made by a law enforcement officer, court official, or the issuing magistrate as defined in subsection (c).

(b) This section does not limit or prohibit the enforcement of any appropriate civil remedy in actions pursuant to other provisions of law against any individual or government entity found to have conducted an unreasonable search or seizure; provided, however, unless otherwise provided by federal law or the Tennessee Constitution, if any evidence is seized as a result of a good faith mistake or technical violation, as defined in subsection (c), the individual government entity shall not be civilly liable.

(c) As used in this section, unless the context otherwise requires, "good faith mistake or technical violation" means:

(1) An unintentional clerical error or omission made by a law enforcement officer, court official or issuing magistrate in the form, preparation, issuance, filing and handling of copies, or return and inventory of a search warrant;

(2) When the officer to whom the warrant is delivered for execution is not present during the execution but an officer with law enforcement authority over the premises does otherwise execute the search warrant;

(3) A reasonable reliance on a statute that is subsequently ruled unconstitutional; or controlling court precedent that is overruled after the issuance of a search warrant, unless the court overruling the precedent orders the new precedent to be applied retroactively.

By its very terms, the bill only authorizes the admission of seized evidence "that is otherwise admissible in a criminal proceeding and not in violation of the constitutions of the United States or the State of Tennessee." Consequently, the bill would not authorize the admission of evidence that is otherwise inadmissible because it was unreasonably seized in violation of the Fourth Amendment to the United States Constitution and/or Article I, § 7, of the Tennessee Constitution.

In Op. Tenn. Att'y Gen. 09-88 (May 18, 2009), this Office opined that a bill to create a statutory good-faith exception to the exclusionary rule that enforces the state and federal constitutions' prohibitions against unreasonable searches and seizures would not offend the Fourth Amendment but could be vulnerable to attack under Article I, § 7. *See also State v. Carter*, 16 S.W.3d 762, 768 n.8 (Tenn. 2000), and *State v. Huskey*, 177 S.W.3d 868, 890 (Tenn.

Crim. App. 2005). The present bill does not purport to create a statutory good-faith exception to the exclusionary rule that enforces the Fourth Amendment or Article I, § 7; rather, it would allow for the admission of evidence otherwise inadmissible on account of a violation of Tenn. Code Ann. §§ 40-6-101, *et seq.*, or Tenn. R. Crim. P. 41. In a given case, an error that would qualify as a "good faith mistake or technical violation" under this bill might nevertheless render the search unreasonable under the Fourth Amendment or Article I, § 7. In that event, the exclusionary rule that enforces these constitutional provisions would require the suppression of the evidence.

Finally, although this bill would supersede Tenn. R. Crim. P. 41(g)'s suppression-of-evidence requirement for any violation of Rule 41 "if the court determines that such violation was a result of a good faith mistake or technical violation made by a law enforcement officer, court official, or the issuing magistrate as defined in subsection (c)," the bill does not violate separation-of-powers principles. The General Assembly has "broad power . . . to establish rules of evidence in furtherance of its ability to enact substantive law." *State v. Mallard*, 40 S.W.3d 473, 481 (Tenn. 2001); *see also Rust v. Griggs*, 172 Tenn. 565, 113 S.W.2d 733, 736 (1938) (observing that "'the power of the Legislature to prescribe rules of evidence, and to declare what shall be evidence, is practically unrestrained, and legislation, to those ends, will be upheld so long as it is impartial and uniform, and does not preclude a party from exhibiting his rights.'" (quoting *State v. Yardley*, 95 Tenn. 546, 565, 32 S.W. 481 (1895) (internal quotation marks omitted)). Nevertheless, the General Assembly's power to enact rules is not unlimited; it "can have no constitutional authority to enact rules, either of evidence or otherwise, that strike at the very heart of the court's exercise of judicial power[.]" *Mallard*, 40 S.W.3d at 483 (citations omitted). "Among the inherent judicial powers are the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved." *Id.* This bill does not infringe upon these inherent judicial powers, but merely provides an impartial and uniform rule regulating the admissibility of evidence.

ROBERT E. COOPER, JR.
Attorney General and Reporter

GORDON W. SMITH
Associate Solicitor General

JOHN H. BLEDSOE
Senior Counsel

Requested by:

The Honorable Karen D. Camper
State Representative, 87th District
24 Legislative Plaza
Nashville, Tennessee 37243-0192