

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
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Opinion No. 12-33

Imposition of Penalties for Simple Possession or Casual Exchange of a Controlled Substance

**QUESTION**

1. What does the term “casual exchange” mean as used in Tenn. Code Ann. § 39-17-418(a)?
2. May House Bill 2285 of the 107<sup>th</sup> General Assembly (HB2285) impose an additional penalty for a violation of Tenn. Code Ann. § 39-17-418(a), which prohibits the simple possession or casual exchange of a controlled substance?

**OPINION**

1. The term “casual exchange” means the spontaneous passing of a small amount of an illegal drug, regardless whether money is received for the exchange of the illegal drug.
2. Yes. If adopted by the Legislature, HB2285 would give a judge the discretion to impose the penalties listed therein in addition to, but not in lieu of, any other penalties that might be imposed by a court as provided in the statute.

**ANALYSIS**

Under Tennessee Code Annotated § 39-17-418(a), “it is an offense for a person to knowingly possess or casually exchange a controlled substance,” unless the substance was obtained pursuant to a valid prescription or order of a practitioner. This criminal statute currently provides as follows:

- (a) It is an offense for a person to knowingly possess or casually exchange a controlled substance, unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of a professional practice.
- (b) It is an offense for a person to distribute a small amount of marijuana not in excess of one-half (1/2) ounce (14.175 grams).
- (c) Except as provided in subsections (d) and (e), a violation of this section is a Class A misdemeanor.

- (d) A violation of subsections (a) or (b), where there is casual exchange to a minor from an adult who is at least two (2) years the minor's senior, and who knows that the person is a minor, is punished as a felony as provided in § 39-17-417.
- (e) A violation under this section is a Class E felony where the person has two (2) or more prior convictions under this section.
- (f)(1) In addition to the other penalties provided in this section, any person convicted of violating this section for possession of a controlled substance may be required to attend a drug offender school, if available, or may be required to perform community service work at a drug or alcohol rehabilitation treatment center.
- (2) Any person required to attend a drug offender school pursuant to this subsection (f) shall also be required to pay a fee for attending the school. If the court determines that the person, by reason of indigency, cannot afford to pay a fee to attend the school, the court shall waive the fee and the person shall attend the school without charge. The amount of fee shall not exceed the fee charged for attending an alcohol safety DUI school program if such a program is available in the jurisdiction. All fees collected pursuant to this subsection (f) shall be used by the governmental authority responsible for administering the school for operation of the school.

Although not defined by statute, the term "casual exchange" has been interpreted by the Tennessee Court of Criminal Appeals to mean a spontaneous passing of a small amount of illegal drugs, for instance, at a party, where money may or may not have been exchanged for the drugs. *State v. Copeland*, 983 S.W.2d 703, 708 (Tenn. Crim. App. 1998).<sup>1</sup>

2. Currently the statute, with the exceptions set forth at Tenn. Code Ann. § 39-17-418(d) & (e), proscribes punishment for the offense of knowingly possessing or casually exchanging a controlled substance as a Class A misdemeanor. A person found guilty of a Class A misdemeanor under this statute may be sentenced to imprisonment for not more than eleven months, twenty-nine days, or be ordered to pay a fine not to exceed \$2,500.00 or both. Tenn. Code Ann. § 40-35-111(e)(1). In misdemeanor cases, unless otherwise provided by a specific statute, the court has complete discretion to levy the appropriate punishment within the statutory ranges. Tenn. Code Ann. § 40-20-102. Furthermore, as previously noted, under Tenn. Code Ann. § 39-17-418(t) the court may require the person convicted to attend drug offender school "in addition to the other penalties" that may be imposed under Tenn. Code Ann. § 39-17-418. HB2285 would add community service as punishment for simple possession or casual exchange of a controlled substance. HB2285 would amend Tenn. Code Ann. § 39-17-418 by adding the following subsection:

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<sup>1</sup> On November 1, 1989, the Tennessee Drug Control Act of 1989 took effect, repealing Tenn. Code Ann. § 39-6-417(b) and replacing it with § 39-17-418(a). Before the statute was amended, the Tennessee Supreme Court determined that a "casual exchange" occurred when the transfer of the controlled substance is made without the exchange of money. *State v. Helton*, 507 S.W.2d 117, 120-21 (Tenn. 1974).

(g) In addition to the other penalties provided in this section, any person convicted of violating subsection (a) where there is a casual exchange to an adult from an adult, may be required to remove litter from the state highway system, public playgrounds, public parks, or other appropriate locations or to work in a recycling center or other appropriate location for a prescribed period of time.

In construing the language of this proposed bill, the most basic rule is to ascertain and effectuate the Legislature's intent. *State v. Sliger*, 846 S.W.2d 262, 263 (Tenn. 1993). Generally, legislative intent shall be derived from the plain and ordinary meaning of the statutory language when a statute's language is unambiguous. *Carson Creek Vacation Resorts, Inc. v. Dep't of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993).

Here, the language of HB2285 is reasonably amenable to but one interpretation and is therefore unambiguous. The plain and clear language of subsection (g), as proposed, states that a person who violates subsection (a) *may* be required to perform community service "*in addition to other penalties provided in this section.*" This language clearly and unambiguously states that the penalty under subsection (g) is meant to be imposed *in addition to*, not in lieu of, any other penalties provided in the statute that might be imposed by the court, such as the penalties associated with being found guilty of a Class A misdemeanor. Moreover, the use of the permissive "may," as opposed to the mandatory "shall," indicates that the proposed amendment intends to give a judge the discretion on whether to impose the penalty under this subsection. *Steppach v. Thomas*, 346 S.W.3d 488, 505-06 (Tenn. Ct. App. 2011). Reading subsection (g) *in pari materia* with the entire statute, as is required by the basic tenets of statutory construction, further supports this interpretation.<sup>2</sup> See *Graham v. Caples*, 325 S.W. 3d 578, 582 (Tenn. 2010). Thus, in operation under the proposed bill, a court finding a person guilty of a Class A misdemeanor could impose as the punishment imprisonment or a fine within the statutory ranges, or both, and in addition could require the guilty party to attend drug offender school or perform the community services outlined in the bill, or both.

It is therefore the opinion of this Office that HB2285 would give a judge the discretion to impose the penalties listed therein in addition to, but not in lieu of, other penalties provided in the statute.

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<sup>2</sup> The language contained in the proposed subsection (g) is similar to the language currently in subsection (f)(1) of the statute.

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