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Opinion No. 12-76

Exclusion of Public Officials from Pretrial or Judicial Diversion

QUESTIONS

1. Does the United States or the Tennessee Constitution recognize a fundamental right to pretrial or judicial diversion?

2. Does the United States or the Tennessee Constitution recognize elected or appointed officials in the judicial, executive, or legislative branches of government as a "suspect class" for the purposes of an equal protection challenge?

3. Does the United States or Tennessee Constitution prevent a state from excluding elected or appointed officials who commit a crime from eligibility for pretrial or judicial diversion?

OPINIONS

1. No. Pretrial and judicial diversion are treated as "truly extraordinary relief" and are not fundamental rights.

2. No. Tennessee and federal courts have not recognized public officials as a suspect class for equal protection purposes.

3. No. A state may treat elected or appointed public officials differently from the general public by making them ineligible for pretrial or judicial diversion, without running afoul of federal or Tennessee constitutional protections.

ANALYSIS

The questions posed concern the constitutionality of Chapter 766 of the 2012 Tennessee Public Acts. Chapter 766 became effective July 1, 2012. 2012 Tenn. Pub. Acts, ch. 766, § 3. Chapter 766 amended the criminal statutes of the Tennessee Code to exclude, under certain circumstances, elected and appointed Tennessee public officials from eligibility for pretrial or judicial diversion for criminal acts committed in their official capacities.

Specifically, Tenn. Code Ann. § 40-15-105(a)(1) now provides:

> (a)(1)(A) A qualified defendant may, by a memorandum of understanding with the prosecution, agree that the prosecution will be suspended for a specified period, not to exceed two (2) years from the filing of the memorandum of understanding. As a condition of this suspension, the qualified defendant shall agree to pay ten dollars ($10.00) per month as part payment of expenses incurred by the agency, department, program, group or association in supervising the defendant. The payments shall be made to the agency, department, program, group or association responsible for the supervision of defendant.
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> (A) For purposes of this section, "qualified defendant" means a defendant who meets each of the following requirements:
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> . . . .
>
> (iii) The charged offense for which the prosecution is being suspended is not a felony or any of the following offenses:
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> . . . .
>
> *(f) Any misdemeanor offense committed by any elected or appointed person in the executive, legislative or judicial branch of the state or any political subdivision of the state, which offense was committed in the person's official capacity or involved the duties of the person's office.*

(Emphasis added to the language included by Chapter 766). Tenn. Code Ann. § 40-35-313(a) was also amended and now states in relevant part:

> (a)(1)(A) The court may defer further proceedings against a qualified defendant and place the defendant on probation upon such reasonable conditions as it may require without entering a judgment of guilty and with the consent of the qualified defendant. . . .
>
> (B)(i) As used in this subsection (a), "qualified defendant" means a defendant who:
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> . . . .
>
> (d) *Is not seeking deferral of further proceedings for any offense committed by any elected or appointed person in the executive, legislative or judicial branch of the state or any political subdivision of the state, which offense was committed in the person's official capacity or involved the duties of the person's office.*

(Emphasis added to the language included by Chapter 766).

The statutory changes made by Chapter 766 do not offend the United States or Tennessee Constitutions. Initially, acts of the General Assembly are presumed to be constitutional. *See, e.g., State v. White*, 362 S.W.3d 559, 566 (Tenn. 2012); *Petition of Burson*, 909 S.W.2d 768, 775 (Tenn. 1995); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529-30 (Tenn. 1993). In evaluating the constitutionality of a statute, a court must indulge every presumption and resolve every doubt in favor of constitutionality. *White*, 362 S.W.3d at 566; *Burson*, 909 S.W.2d at 775; *Davis-Kidd Booksellers*, 866 S.W.2d at 529-30.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that all persons be treated the same under like circumstances and conditions. *Mascari v. Int'l Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America (AFL) Local Union No. 667*, 187 Tenn. 345, 350, 215 S.W.2d 779, 781 (1948). Article 11, Section 8 of the Tennessee Constitution imposes equal protection requirements identical to those in the federal constitution, and the same rules are applied in determining the validity of legislative classifications under the equal protection provisions of the Tennessee and federal constitutions. *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003); *Nicholas v. Tullahoma Open Door, Inc.*, 640 S.W.2d 13, 18 (Tenn. Ct. App. 1982). When a classification does not involve the exercise of a fundamental right nor operate to the disadvantage of a suspect class, the normal standard of review under the Equal Protection Clause is the rational basis test. *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). Under this test, a classification is only required to bear a rational relationship to a legitimate state purpose. *Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). Accordingly, "if some reasonable basis can be found for the classification, or if any state of facts may reasonably be conceived to justify it, the classification will be upheld." *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993). This analysis applies to criminal statutes creating disparate classifications. *Tester*, 879 S.W.2d at 828-29; *State v. Price* 124 S.W.3d 135, 137 (Tenn. Crim. App. 2003).

1. Pretrial and judicial diversion do not qualify as fundamental rights. Tenn. Code Ann. § 40-15-105 provides for pretrial diversion, in the discretion of the district attorney general, for defendants who meet a number of eligibility requirements. Tenn. Code Ann. § 40-35-313 provides for judicial diversion, in the discretion of the trial court, for defendants who meet a number of eligibility requirements.

Tennessee courts have made clear that pretrial diversion, far from being a fundamental right, is a "truly extraordinary relief for a defendant." *State v. Baxter*, 868 S.W.2d 679, 681 (Tenn. Crim. App. 1993). One who is statutorily eligible is not presumptively entitled to diversion. *State v. Curry*, 988 S.W.2d 153, 157 (Tenn. 1999). This Office has previously opined that pretrial diversion is not a fundamental right. Op. Tenn. Att'y Gen. 81-469, at 2-3 (Aug. 21, 1981).

Likewise courts have recognized that a defendant eligible for judicial diversion is not entitled to judicial diversion as a matter of right. *See State v. Schlindler,* 986 S.W.2d. 209, 211 (Tenn. 1999) (describing judicial diversion as "legislative largess"). *See also State v. Bonestel,* 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper,* 29 S.W.3d 1, 9 (Tenn. 2000).

2. Nor do the United States or Tennessee constitutions recognize appointed or elected public officials as a "suspect class" for purposes of equal protection. A suspect class is one that "commands extraordinary protection from the majoritarian political process" because of a "history of purposeful unequal treatment" or "a position of political powerlessness." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973). *See also Gallaher*, 104 S.W.3d at 461. Tennessee and federal courts have included as suspect classifications for equal protection purposes race, alienage, national origin, and gender. *See, e.g., Rodriguez*, 411 U.S. at 61; *Gallaher*, 104 S.W.3d at 461; *State v. Whitehead*, 43 S.W.3d 921, 925 (Tenn. Crim. App. 2000). This Office has previously opined that public officials are not a suspect class for the purposes of equal protection. Op. Tenn. Att'y Gen. 94-145 (Dec. 29, 1994).

3. Given Chapter 766 does not impact a fundamental right nor involve a suspect class, Chapter 766 is subject to review under the rational basis test for equal protection purposes. The question thus is whether the separate classification of public officials by Chapter 766 has "a reasonable relationship to a legitimate state interest." *Gallaher*, 104 S.W.3d at 461. State legislatures have the initial discretion to determine what is "different" and what is "the same," and they are given considerable latitude in making those determinations. *Id.*

In this case, a number of reasons could rationally support the decision by the General Assembly, in enacting Chapter 766, to exclude, under certain circumstances, elected and appointed officials from eligibility for pretrial or judicial diversion for criminal acts committed in their official capacities. As pointed out by this opinion request, the State of Tennessee has a strong interest in not only deterring public officials from using their positions to effectuate criminal activity but also in holding public officials to a higher standard than the general public. These are legitimate state purposes, and the classification created by Chapter 766 arguably has a rational relationship to these purposes.

This Office in a previous opinion reached a similar conclusion regarding Tenn. Code Ann. § 57-3-210(b), which prohibits public officials from obtaining a liquor license or having an interest in an establishment that sells liquor. Op. Tenn. Att'y Gen. 94-145, at 2 (Dec. 29, 1994) (opining that a disparity in treatment between public officials and members of the general public did not raise equal protection problems, and that such a classification bore a rational relationship to the legitimate state interest in preventing corruption or the appearance of corruption by public officials).

Nor does Chapter 766 implicate federal or Tennessee procedural or substantive due process constitutional protections. The threshold consideration with regard to any procedural due process claim is whether the impacted individual has a liberty or property interest that is entitled to protection under the Fourteenth Amendment of the United States Constitution and Article 1, Section 8 of the Tennessee Constitution. *Martin v. Sizemore*, 78 S.W.3d 249, 262 (Tenn. Ct. App. 2001) (citing *Rowe v. Board of Educ.*, 938 S.W.2d 351, 354 (Tenn. 1996)). To qualify for constitutional protection, a property interest must be more than a "unilateral expectation" or an "abstract need or desire." *Id.* It must be a "legitimate claim of entitlement" created and defined by "existing rules or understandings that stem from an independent source such as state law." *Id.* (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Rowe v. Board of Educ.*, 938 S.W.2d at 354). The types of interests entitled to protection as property interests

share the common characteristic that they are an individual entitlement, grounded in state law, that cannot be removed except "for cause." *Id.* (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Armstrong v. Department of Veterans Affairs*, 959 S.W.2d 595, 598 (Tenn. Ct. App. 1997)).

There is no individual entitlement, grounded in state law, to pretrial or judicial diversion. Rather, as discussed above, diversion is a "truly extraordinary relief" and a privilege. Thus, Chapter 766 would not violate public officials' procedural due process rights.

Due process also has a substantive component that bars certain governmental actions regardless of the procedures used to implement them. *Parks Properties v. Maury County*, 70 S.W.3d 735, 743-44 (Tenn. Ct. App. 2001) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998)). Substantive due process is the second way that the Due Process Clause protects "life, liberty, or property." *Id.* Typically, a legislative act will withstand a substantive due process challenge if the government identifies a legitimate governmental interest that the legislative body could rationally conclude was served by the legislative act. *Id.* Legislative acts that burden certain fundamental rights may be subject to stricter scrutiny. *Id.* (citing *Sammon v. New Jersey Bd. of Med. Exam'rs*, 66 F.3d 639, 645 (3d Cir. 1995)).

As previously discussed, diversion is not a fundamental right and legitimate governmental interests exist that support the denial of diversion to public officials engaged in criminal activity in their official capacities. Chapter 766 therefore would not violate public officials' substantive due process rights by denying them eligibility for pretrial or judicial diversion for criminal acts committed in their official capacities.

Finally, Chapter 766 does not raise concerns under the Eighth Amendment to the United States Constitution or Article 1, Section 16 of the Tennessee Constitution, both which prohibit "cruel and unusual punishment." Denial of eligibility for diversion, a "truly extraordinary relief" and a legislative largess, does not constitute "cruel and unusual punishment." *See Lathem v. United States*, 259 F.2d 393, 397 (5th Cir. 1958) (stating that "[p]robation and parole are a matter of legislative grace . . . [t]here is also no merit to the contention that denial of probation for a first offense is cruel and unusual punishment").

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