

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

December 3, 2014

Opinion No. 14-104

Registration Requirements and Sentencing for Methamphetamine Offenses

QUESTIONS

1. Does Tenn. Code Ann. § 39-17-436, as amended on July 1, 2014, require persons convicted of misdemeanor possession or casual exchange of methamphetamine pursuant to Tenn. Code Ann. § 39-17-455(b) to be placed on the drug offender registry?

2. Do the mandatory sentencing provisions for methamphetamine offenses set forth in Tenn. Code Ann. §§ 39-17-417(n) and 39-17-418(c)(2) apply to convictions under Tenn. Code Ann. § 39-17-455?

3. (a) Are the new offenses enumerated under Tenn. Code Ann. § 39-17-436, as amended on July 1, 2014, regarding the inclusion of offenders with qualifying convictions onto the Drug Offender Registry retroactively enforceable?

(b) Under Tenn. Code Ann. § 39-17-436, as amended on July 1, 2014, when can a person convicted of a qualifying offense be included on the Drug Offender Registry—is inclusion onto the Registry determined by the date of the qualifying *conviction* that occurs on or after July 1, 2014, or the date of the qualifying *offense* that occurs on or after July 1, 2014?

OPINIONS

1. Yes. The language of Tenn. Code Ann. §§ 39-17-436 and -455 indicates that the General Assembly intended to require persons convicted of misdemeanor possession or casual exchange of methamphetamine pursuant to section 39-17-455(b) to be placed on the drug offender registry.

2. Yes. The language of Tenn. Code Ann. § 39-17-455(d) indicates that the General Assembly intended the sentencing provisions for methamphetamine offenses enumerated in Tenn. Code Ann. § 39-17-417(n) and 39-17-418(c)(2) to apply to convictions under Tenn. Code Ann. § 39-17-455.

3. (a) No. The language of Tenn. Code Ann. § 39-17-436 does not indicate that the General Assembly intended for the persons convicted of the

offenses enumerated in subsection (a) before July 1, 2014, to be included onto the Drug Offender Registry retroactively.

(b) Pursuant to Tenn. Code Ann. § 39-17-436, the inclusion of a person onto the Drug Offender Registry is determined by the date of the qualifying conviction.

ANALYSIS

1. Tenn. Code Ann. § 39-17-417 criminalizes the manufacture, delivery, sale, or possession with the intent to manufacture, deliver, or sell, of a controlled substance. Section 417 is Tennessee’s general felony drug-offense statute and is applicable to felony offenses involving any scheduled controlled substance. Methamphetamine is a Schedule II controlled substance. *Id.* § 39-17-408(d)(2). Tenn. Code Ann. § 39-17-418 proscribes the knowing possession or casual exchange of a controlled substance. Generally, simple possession is a Class A misdemeanor. *See id.* § 39-17-418(c). Like its felony counterpart in Section 417, the provisions of Section 418 apply to all controlled substances.

Effective July 1, 2014, the General Assembly created a new Code section—Tenn. Code Ann. § 39-17-455—that specifically applies only to methamphetamine offenses. *See* Tenn. Pub. Act, ch. 904. Felony methamphetamine offenses formerly prohibited under Section 417 must now be prosecuted under subsection 455(a). Similarly, the knowing possession or casual exchange of methamphetamine must now be prosecuted under subsection 455(b), as opposed to the general simple possession statute of Section 418. While methamphetamine offenses are still proscribed under Sections 417 and 418, “[i]f the violation is for methamphetamine, the defendant shall be charged, indicted, prosecuted and convicted under this section [455] rather than §§ 39-17-417 or 39-17-418.” Tenn. Code Ann. § 39-17-455(c).

Prior to July 1, 2014, persons convicted of certain methamphetamine offenses were to be placed on a methamphetamine registry to be maintained by the Tennessee Bureau of Investigation. *See* Tenn. Code Ann. § 39-17-436 (Supp. 2013). Effective July 1, 2014, however, the General Assembly amended Section 436 and converted the methamphetamine registry into a drug offender registry. *See* Tenn. Pub. Act, ch. 732. Under the amended statute, the TBI is to maintain a drug offender registry of persons convicted of a violation of any of the following offenses:

- (1) Section 39-17-418 involving any substance listed in § 39-17-408(d)(2);
- (2) Section 39-17-431; or
- (3) Any felony offense prohibited by this part; or

(4) Conspiracy to commit, attempt to commit, or solicitation to commit any of the offenses listed in subdivisions (a)(1)-(3).

Tenn. Code Ann. § 39-17-436(a). The “[a]ny felony offense” provision of subsection 436(a)(3) clearly requires registration of persons convicted of a felony methamphetamine offense under the newly-created subsection 455(a).

While the General Assembly expressly required registration for those persons convicted of methamphetamine possession or casual exchange under the general simple possession statute of Section 418, *see id.* § 39-17-436(a)(1), no express mention of Section 455 was included in Section 436. Nevertheless, persons convicted under the methamphetamine simple possession provision of subsection 455(b) are still subject to registration on the drug offender registry pursuant to Section 436. New Code Section 455(d) provides:

Any reference in Tennessee Code Annotated that provides a penalty, forfeiture, punishment, fine, disability or *other adverse effect* for a violation of §§ 39-17-417 or 39-17-418, shall be considered to apply to a conviction under this section if the violation involves methamphetamine.

Tenn. Code Ann. § 39-17-455(d) (emphasis supplied). As stated, Section 436(a)(1) plainly requires registration for those convicted of simple possession or casual exchange of methamphetamine under Section 418. The question then becomes whether that registration requirement is a “penalty, forfeiture, punishment, fine, disability or other adverse effect for a violation of [§ 418].” If so, then persons convicted for methamphetamine-related simple possession under subsection 455(b) must be included on the drug offender registry pursuant to subsection 455(d).

As it relates to subsection 455(d), the registration requirement of Section 436 is clearly not a “forfeiture” or a “fine.” And it is established that an offender-registry such as this does not qualify as a “penalty,” a “punishment,” or a “disability.” *See Smith v. Doe*, 538 U.S. 84, 99-101 (2003) (holding that placement upon Alaska’s sex offender registry was neither a punishment nor a disability); *Cutshall v. Sundquist*, 193 F.3d 466, 474-75 (6th Cir. 1999) (same conclusion regarding Tennessee’s sex offender registry); *Ward v. State*, 315 S.W.3d 461, 472 (Tenn. 2010) (the registration requirements of the sex offender registration act are nonpunitive and are therefore merely a collateral consequence of a defendant’s guilty plea).

Registration on the drug offender registry would, however, constitute an “adverse effect” of a person’s methamphetamine-related violation of Section 418. Courts have recognized that, while not rising to the level of a punishment or a disability, placement on a criminal registry could be “inconvenient.” *See Ward*, 315 S.W.3d at 469. Indeed, the publicity created by such registration “may cause

adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism.” *Smith*, 538 U.S. at 99. Nevertheless, such “attendant humiliation is but a collateral consequence of a valid regulation.” *Id.* Because placement on the drug offender registry is an adverse effect of a methamphetamine-related violation of Section 418, subsection 455(d) compels the registration requirement to apply to misdemeanor violations under subsection 455(b). This conclusion is strengthened by subsection 436(a)(1), which evinces a clear legislative intent to require registration for misdemeanor methamphetamine offenses.

2. Tenn. Code Ann. § 39-17-455(d) provides that “a penalty [or] punishment . . . for a violation of §§ 39-17-417 or 39-17-418, shall be considered to apply to a conviction under this section if the violation involves methamphetamine.” Thus, the General Assembly effectively incorporated the sentencing provisions in Sections 417 and 418 relative to methamphetamine into the newly-enacted Section 455. For this reason, the mandatory sentencing provisions in subsections 417(n) and 418(c)(2) apply to convictions under Section 455.

3. (a) In Tennessee, “a statute is generally presumed to operate only prospectively, unless the legislature indicates a specific intention otherwise.” *State v. Cauthern*, 967 S.W.2d 726, 735 (Tenn. 1998). Because the General Assembly specifically called for Tenn. Code Ann. § 39-17-436 to “take effect July 1, 2014, the public welfare requiring it,” and there are no other indications that it intended for this section to be applied retroactively, Tenn. Code Ann. § 39-17-436 operates prospectively, beginning on July 1, 2014. *See* Tenn. Pub. Act, ch. 732.

(b) Pursuant to Tenn. Code Ann. § 39-11-112, a person who committed an offense subject to a *penal* statute or legislative act that is amended or repealed by a subsequent legislative act “shall be prosecuted under the act or statute in effect at the time of the commission of the offense.” But, as discussed previously, Tenn. Code Ann. §39-17-436 is not a penal statute and, in fact, denotes the conviction as the qualifying event for both placing a person on and removing him from the Registry. *See* Tenn. Code Ann. §39-17-436(a), (e), (f). Because inclusion on the Drug Offender Registry constitutes an “adverse effect” or “collateral consequence” of a guilty plea and not a punishment or penalty, a person convicted of a qualifying offense under Section 436 should be included on the Registry if he was convicted on or after the law’s effective date of July 1, 2014. *See supra Smith*, 538 U.S. at 99; *Ward*, 315 S.W.3d at 469.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

SARA BETH MYERS
Assistant Attorney General

Requested by:

Mark Gwyn
Director, Tennessee Bureau of Investigation
901 R.S. Gass Boulevard
Nashville, TN 37216