STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

May 27, 2015

Opinion No. 15-46

Crime of Obstructing a Highway or Other Passageway: H.B. 1286, 109th Gen. Assem. (Tenn. 2015)

Question

If the amendments to Tenn. Code Ann. § 39-17-307 proposed in H.B. 1286, 109th Gen. Assem. (Tenn. 2015), are enacted, would Tenn. Code Ann. § 39-17-307 be unconstitutionally vague in violation of article I, section 8 of the Tennessee Constitution and/or the Due Process Clause of the United States Constitution?

Opinion

No.

ANALYSIS

In its current form, Tenn. Code Ann. § 39-17-307 makes it a criminal offense to obstruct "a highway, street, sidewalk, railway, waterway, elevator, aisle, or hallway" to which the public has access. The same statute also makes it a criminal offense to disobey a reasonable request or order to move to prevent the "obstruction of a highway or passageway" or to "maintain public safety by dispersing [people] gathered in dangerous proximity to a fire, riot, or other hazard."

House Bill 1286 proposes several amendments to Tenn. Code Ann. § 39-17-307. The proposed amendments would:

(1) add "driveway" to the list in § 39-17-307(a)(1) of passageways and spaces that people are prohibited from obstructing;

(2) delete § 39-17-307(a)(2) and replace it with the following, which makes it an offense if a person:

> (2) Disobeys a reasonable request or order to move issued by a person known to be a law enforcement officer, a firefighter, an owner, or a person with authority to control the use of the premises to:
>
> (A) Prevent obstruction;
>
> (B) Maintain public safety; or
>
> (C) Protect the rights of private property.

(3) broaden the definition of "obstruct" in § 39-17-307(b) to include "restrict[ing] passage with the intent to harass";

(4) add the word "public" to modify "highway or street intersection" in § 39-17-307(d)(1)(A);

(5) delete § 39-17-307(d)(2), a subsection that limits the availability of the affirmative defense of solicitation by permit in certain counties so that the affirmative defense would be universally available; and

(6) add a clarifying cross-reference in § 39-17-307(d)(3).

The Fourteenth Amendment to the United States Constitution prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." Article I, § 8, of the Tennessee Constitution similarly provides that no one shall be "deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." The "law of the land" proviso of the Tennessee Constitution is "synonymous with the 'due process of law' provisions of the federal constitution." *City of Knoxville v. Entertainment Resources, LLC*, 166 S.W.3d 650, 655 (Tenn. 2005) (citing *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 786 (Tenn. 1980)). Thus, the due process analysis is the same under both the Tennessee and the U.S. Constitutions.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 531-32 (Tenn. 1993) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). This "void-for-vagueness" doctrine ensures fair notice as to what acts are criminal and provides standards for uniform and fair enforcement by officials and by the judicial system. *Vandergriff v. City of Chattanooga*, 44 F. Supp. 2d 927 (E.D. Tenn. 1998), *aff'd*, 182 F. 3d 918 (6th Cir. 1998).

A criminal statute that forbids the doing of an act in terms that are so vague that persons of ordinary intelligence have to guess at its meaning and persons charged with enforcing the statute might be encouraged to enforce it arbitrarily or discriminatorily violates the right to due process guaranteed under both the Tennessee and the U.S. Constitutions. *Leech v. American Booksellers Assoc.*, 582 S.W.2d 738 (Tenn. 1979). A statute is unconstitutionally vague if "men of common intelligence must necessarily guess at its meaning." *See, e.g., Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 531-32; *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973). To pass due process muster, 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, 358 (1983) (citations omitted); *Leech, supra*, 582 S.W.2d at 746. If a criminal statute permits "'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections'" it will be deemed void for vagueness. *Kolender, supra*, 461 U.S. at 358 (citation omitted). On the other hand, a statute should not be invalidated for vagueness if the intention of the legislature can be intelligently gathered from the statute as a whole, however awkwardly that intention may be expressed. *County of Shelby v. McWherter*, 936 S.W.2d 923, 929 (Tenn. Ct. App. 1996).

Of all the changes that H.B. 1286 would make to Tenn. Code Ann. § 39-17-307, only two could possibly be thought to introduce an element of vagueness. The first is the proposed change to Tenn. Code Ann. § 39-17-307(a)(2)(B) with regard to "public safety." That section currently makes it a misdemeanor to disobey "a reasonable request or order to move issued by a person known to be a law enforcement officer, a firefighter, or a person with authority to control the use of the premises to . . . [m]aintain public safety by dispersing those gathered in dangerous proximity to a fire, riot or other hazard." *Id.* (emphasis added). The proposed change would omit the underlined language that comes after "public safety." The clause that would be omitted does not define "public safety," but simply offers "fire" and "riot" as examples of the kinds of "hazards" that might jeopardize the public well-being. Deleting that clause does not affect the meaning of the term "public safety," which is clear and specific on its own.

The term "public safety" is not specially defined in § 39-17-307, but it is a commonly used and commonly understood term. Black's Law Dictionary defines "public safety" as "[t]he welfare and protection of the general public, usu. expressed as a governmental responsibility." (9th ed. 2009). In other words, "public safety" is a term that is commonly understood to mean the obligation of a governmental entity to protect citizens from danger and injury. Thus, "public safety" is not a vague term as used here, even if the words "fire, riot or other hazard" are omitted. Rather it is a term that is "'reasonably necessary to embrace all of its legitimately intended objectives without creating an encyclopedic and unwieldy [statute].'" *Donovan v. City of Haverhill*, 311 F.3d 74, 77 (1st Cir. 2002) (holding that the phrase "public safety" in a city permit ordinance is not unconstitutionally vague) (citation omitted).

Moreover, a "catch-all" phrase is not inherently vague and does not necessarily violate the right to due process. In *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Supreme Court upheld a statutory provision that authorized removal or suspension without pay of non-probationary federal employees "for such cause as will promote the efficiency of the service." In considering whether the phrase "efficiency of the service" was impermissibly vague, the Court stressed the need and, therefore, the propriety for using "catch-all" phrases when it is impracticable to formulate an exhaustive list of actionable conduct. *Id.* at 160-162. For that same reason, in *Wishart v. McDonald*, 500 F.2d 1110 (1st Cir. 1974), the catch-all clause "conduct unbecoming a teacher" invoked by a school board to discharge a teacher was upheld in the face of a constitutional challenge. *Id.* at 1116-17. Thus, even if the term "public safety" were to be deemed vague, it would likely be upheld nevertheless as the necessary and permissible use of a "catch-all" phrase since it would be impracticable to formulate an exhaustive list of every conceivable threat of damage or injury to the public.

The only other contemplated amendment that might conceivably be viewed as vague is the proposed addition of a new subsection (C) to Tenn. Code Ann. § 39-17-307(a)(2). That change would make it a misdemeanor to disobey a "reasonable request or order to move" issued by "a person known to be a law enforcement officer, a firefighter, an owner or a person with authority to control the use of the premises" to "[p]rotect the rights of private property." Although the term "rights of private property" is not specifically defined in the proposed amendments, it is not impermissibly vague as used here for the same reasons that "public safety" is not impermissibly vague. It is a term that is commonly used and commonly understood. "Private property" is defined in the Tennessee Code as "real property, or improvements to real property, not owned by the federal government or state agency." Tenn. Code Ann. § 12-1-202. "Right,"

used, as it is here, as a noun in the concrete sense means a power or privilege, and, in the specific context of property ownership, means an interest or title in an object of property, or a legal claim to hold, use, enjoy, or convey the property. Black's Law Dictionary (9th ed. 2009). The term "private property rights" is not a term at whose meaning a person of ordinary intelligence would have to guess.[1] Even if the term were deemed to be vague, it would be a permissible use of a catch-all phrase, since it is impracticable to formulate an exhaustive list of every right that is associated with private property ownership.

Accordingly, it is unlikely that the amendments to Tenn. Code Ann. § 39-17-307 proposed in H.B. 1286 would, in and of themselves, have the effect of rendering the statute void for vagueness.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

Requested by:

The Honorable Mike Stewart
State Representative
17 Legislative Plaza
Nashville, TN 37243

[1] The term "private property rights" is referenced in the Code in relation to eminent domain and criminal trespass. *See, e.g.* Tenn. Code Ann. § 29-17-103 and § 39-14-405.