STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

May 6, 2016

Opinion No. 16-17

Effects of Judicial Diversion on Licensed Armed or Unarmed Security Guards

Question 1

Do the requirements for notification and potential disciplinary action apply to a person licensed pursuant to the Private Protective Services Licensing and Regulatory Act, Tenn. Code Ann. §§ 62-35-101 et seq., (the "Act") who has entered a guilty plea as part of a judicial diversion under Tenn. Code Ann. § 40-35-313?

Opinion 1

No. Under Tenn. Code Ann. § 62-35-130(e) licensed armed and unarmed security guards/officers are required to notify the Commissioner only of "conviction[s]," and a guilty plea entered as a condition of judicial diversion is not a "conviction" under Tenn. Code Ann. § 40-35-313.

Question 2

Would any discipline imposed as a result of a guilty plea entered as part of an agreement for judicial diversion be affected if, after successful completion of the diversion requirement(s), the underlying charges are dismissed and expunged?

Opinion 2

Although a licensee's guilty plea as part of an agreement for judicial diversion will not trigger notification requirements under Tenn. Code Ann. § 62-35-130(e) and will not, therefore, result in disciplinary action pursuant to that subsection, the guilty plea may trigger notification requirements pursuant to other sections of the Act, which may then lead to disciplinary action by the Commissioner against the licensee as otherwise authorized by the Act. The effect of later dismissal or expungement of the underlying charges on any such disciplinary action would depend on the particular circumstances involved in any given case.

ANALYSIS

The Private Protective Services Licensing and Regulatory Act makes it generally unlawful for any person to provide security guard services to another person on a contractual basis without being licensed. Tenn. Code Ann. § 62-35-104, § 62-35-102(6). The Act is administered by the Commissioner of Commerce and Insurance. Tenn. Code Ann. § 62-35-102(5).

Tennessee Code Ann. § 62-35-130(e) provides:

> Whenever an armed or unarmed security guard/officer *pleads guilty or is convicted* of any offense enumerated in this chapter, the licensee must within thirty (30) days notify the commissioner of that *conviction* and provide the commissioner with certified copies of the *conviction*. The licensee's license shall automatically be revoked thirty (30) days after the licensee's *conviction* unless the licensee makes a written request to the commissioner for a hearing during the thirty-day period. Following any such hearing held pursuant to this section, the commissioner may impose upon that licensee any sanction or discipline permitted by this chapter.

(emphasis added).

The first clause of the first sentence of section 62-35-130(e) mentions both guilty pleas and convictions, but the remainder of the subsection refers only to convictions, requiring security guards or officers to "notify the commissioner of that conviction and provide the commissioner with certified copies of the conviction." The second sentence of section 62-35-130(e) then provides for the automatic revocation of the security guard's or officer's license 30 days "after the licensee's conviction." Thus, the guard/officer need notify the Commissioner of only a "conviction" and provide the Commissioner with certified copies of only a "conviction," and the guard/officer's license is automatically revoked only "after the licensee's conviction."

Commonly referred to as "judicial diversion," Tenn. Code Ann. § 40-35-313 permits a trial court to "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." Tenn. Code Ann. § 40-35-313(a)(1)(A); *State v. King*, 432 S.W.3d 316, 323 (Tenn. 2014) ("If the trial court chooses to grant judicial diversion, the judgment of guilt is deferred and the defendant is placed on conditional probation.") (citing Tenn. Code Ann. § 40-35-313(a)(1)(A)). The judicial diversion statute further provides:

> Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. If, during the period of probation, the person does not violate any of the conditions of the probation, then upon expiration of the period, the court shall discharge the person and dismiss the proceedings against the person. Discharge and dismissal under [Tenn. Code Ann. § 40-35-313(a)(1)(A)] is without court adjudication of guilt . . . . The discharge and dismissal *shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or for any other purpose*, [except for limited enumerated purposes not at issue here.]

Tenn. Code Ann. § 40-35-313(a)(2) (emphasis added).

Judicial diversion therefore avoids an adjudication of guilt, and so long as the person does not violate the terms of probation, the charges will be dropped and proceedings dismissed, never resulting in a "conviction." *Rodriguez v. State*, 437 S.W.3d 450, 455 (Tenn. 2014) ("[Judicial diversion] is 'legislative largess' whereby a 'qualified defendant' enters a guilty or nolo contendere plea or is found guilty of an offense without the entry of a judgment of guilty.") (quoting *State v.*

Schindler, 986 S.W.2d 209, 211 (Tenn. 1999)); *State v. Kyte*, 874 S.W.2d 631, 633 (Tenn. Ct. Crim. App. 1993) ("Upon a finding of guilt by plea or trial, the trial judge has the authority to place a defendant on probation without the imposition of a conviction.").

Moreover, in *Wright v. Tenn. Peace Officer Standards & Training Comm'n*, 277 S.W.3d 1 (Tenn. Ct. App. 2008), the court reviewed whether the Peace Officer Standards and Training Commission could consider an expunged guilty plea, which had been subject to judicial diversion, in determining whether a person was qualified to be an officer. The statute at issue, Tenn. Code Ann. § 38-8-106(4), stated that a police officer may "not have been convicted of or pleaded guilty to or entered a plea of nolo contendere to any felony charge . . . ." The *Wright* court reasoned:

> The legislature's inclusion of the term "pleaded guilty" does not necessarily imply an intention to include *expunged* guilty pleas under the ambit of the statute, and the mere fact that guilty pleas are listed separately from convictions does not by itself establish this intention. We do not know what the legislature intended when it chose to separately delineate convictions, guilty pleas and pleas of nolo contendere under Tenn. Code Ann. § 38-8-106, but we do know precisely what it intended when it crafted Tenn. Code Ann. § 40-35-313, based on the clear language of the statute. It is a well-settled rule of statutory interpretation that the specific controls the general. We will not disregard the specific language of Tenn. Code Ann. § 40-35-313, which bars any reliance upon expunged offenses for all but a strictly limited list of purposes, on the basis of this exceedingly general language in Tenn. Code Ann. § 38-8-106, which does not even *mention* expungement.

Id. at 16-17 (citation omitted) (emphasis in original). Here, as in *Wright*, it is unclear what the legislature intended when it chose to include "pleads guilty" in the first clause of Tenn. Code Ann. § 62-35-130(e), but the plain language of Tenn. Code Ann. § 40-35-313 is clear in prohibiting the consideration of expunged offenses that were subject to judicial diversion. It is furthermore clear that a guilty plea under Tenn. Code Ann. § 40-35-313, even before eventual expungement, is not an adjudication of guilt and not a conviction. *See Kyte*, 874 S.W.2d at 633.

Because a guilty plea that is subject to judicial diversion is not a conviction, the notice, automatic license revocation, and disciplinary provisions that would apply to a "conviction" under Tenn. Code Ann. § 62-35-130(e) are not triggered when a licensee's criminal charges and proceedings are deferred through judicial diversion. This conclusion is consistent with the purpose of judicial diversion, which is "to avoid placing the stigma and collateral consequences of a criminal conviction on the defendant, in addition to providing the defendant a means to be restored fully and to useful and productive citizenship." *State v. Johnson*, 980 S.W.2d 410, 413 (Tenn. 1998); *see* Tenn. Code Ann. § 40-35-313(b) ("The effect of [a dismissal followed by an expungement order] is to restore the person, in the contemplation of the law, to the status the person occupied before the arrest or indictment or information.").

Although a guilty plea alone would not trigger the need to comply with the notice requirements of Tenn. Code Ann. § 62-35-130(e) or the automatic license revocation that must follow notification under that section, a licensee who pleads guilty to a crime must nevertheless comply with other notice requirements of the Act, as may be applicable in a given situation. For example, the applicant for a security guard license has to disclose to the Commissioner "all

convictions *and pending charges* of commission of a felony or misdemeanor in any jurisdiction." Tenn. Code Ann. § 62-35-105 (emphasis added). Once licensed, the licensee is under a continuing duty to "notify the commissioner in writing within thirty (30) days of . . . [a]ny material change in the information previously furnished or required to be furnished to the commissioner; or . . . [a]ny occurrence that could reasonably be expected to affect the licensee's right to a license" under the Act. Tenn. Code Ann. § 62-35-112. Thus, even though Tenn. Code Ann. § 62-35-130(e) may not require a licensee to report a "guilty plea" made in pre-trial diversion, the licensee would still have to notify the Commissioner of that guilty plea—or even just the underlying "pending charge"—to the extent that it is a "material change" in the information supplied on the license application or an "occurrence" that could reasonably be expected to affect the licensee's right to a license. That notification would not result in mandatory, automatic revocation of the license, but it may lead to disciplinary action by the Commissioner against the licensee as otherwise authorized by Tenn. Code Ann. § 62-35-130. This is consistent with the overall policy of the Act of ensuring that persons licensed and entrusted to provide security and guard services are and remain properly qualified.

In sum, even though a licensee's guilty plea as part of an agreement for judicial diversion will not trigger notification requirements under Tenn. Code Ann. § 62-35-130(e) and will not, therefore, result in disciplinary action *pursuant to that subsection*, the guilty plea may trigger notification requirements pursuant to other sections of the Act, which may then lead to disciplinary action by the Commissioner against the licensee as otherwise authorized by the Act. The effect of later dismissal or expungement of the underlying charges on any such disciplinary action would depend on the particular circumstances involved in any given case.

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