STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

February 8, 2019

Opinion No. 19-01

Sentence Enhancement for Hate Crimes Against Transgender Individuals

Question

Tennessee Code Annotated § 40-35-114(17) authorizes a court to enhance a defendant's sentence if the defendant, among other things, "intentionally selected the person against whom the crime was committed . . . , in whole or in part, because of the defendant's belief or perception regarding the . . . gender of that person." If a defendant selects the person against whom he commits a crime because the person is transgender, may a court enhance the defendant's sentence under § 40-35-114(17)?

Opinion

Yes.

ANALYSIS

Tennessee Code Annotated § 40-35-114 provides that, "in determining whether to enhance a defendant's sentence," a court "shall consider, but is not bound by" various specified "advisory factors," as long as the factors are "appropriate for the offense" and "not already an essential element of the offense." In 2000, the General Assembly added a hate-crime factor to § 40-35-114, which permits the court to enhance a defendant's sentence when

> [t]he defendant intentionally selected the person against whom the crime was committed or selected the property that was damaged or otherwise affected by the crime, in whole or in part, because of the defendant's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin, ancestry or gender of that person or the owner or occupant of that property; however, this subdivision (17) should not be construed to permit the enhancement of a sexual offense on the basis of gender selection alone.

Tenn. Code Ann. § 40-35-114(17); see 2000 Tenn. Pub. Acts, ch. 896, § 1; Tenn. Crim. Trial Prac. § 28:27 (2018-19 ed.).

A defendant who targets a person for a crime because that person is transgender has targeted the person because of his or her gender within the meaning of § 40-35-114(17). A transgender person is "one who identifies with a gender other than that person's biological gender," Tenn. Att'y Gen. Op. 16-15 (Apr. 11, 2016) (citing New Oxford Am. Dictionary (3d ed. 2010)), and "who 'fails to act and/or identify with his or her gender'—i.e., someone who is inherently 'gender non-conforming,'" EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,

884 F.3d 560, 576 (6th Cir. 2018) (quoting *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)), *cert. petition filed*, No. 18-107 (June 24, 2018).

For purposes of the hate-crime enhancement, a crime committed against a person because that person manifests a gender that is different than his or her biological gender at birth—i.e. a crime committed against a person because he or she is transgender—is thus necessarily committed because of, at least in part, the person's gender.

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