STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

February 21, 2024

Opinion No. 24-004

Constitutionality of Tenn. Code Ann. § 40-11-118(d)(1)(B)

Question

Does Tenn. Code Ann. § 40-11-118(d)(1)(B), requiring a defendant to report compliance or non-compliance with a bond condition to the District Attorney General, violate article I, section 9 of the Tennessee Constitution, by having the defendant communicate to the District Attorney General evidence against him or herself?

Opinion

No. Tenn. Code Ann. § 40-11-118(d)(1)(B) does not implicate protections against self-incrimination provided under article I, section 9 of the Tennessee Constitution.

ANALYSIS

Tennessee Code Annotated § 40-11-118(d) governs a trial court's determination of "the amount and conditions of bail to be imposed upon a defendant who has been charged with driving under the influence of an intoxicant . . . vehicular assault . . . aggravated vehicular assault . . . vehicular homicide . . . or aggravated vehicular homicide." Subdivision (d)(1)(A) provides that, when a defendant has been charged with one of those enumerated offenses and another enumerated qualifying factor is met, "the court shall require the defendant to operate only a motor vehicle equipped with a functioning ignition interlock device."

Tennessee Code Annotated § 40-11-118(d)(1)(B) provides that "[i]f the court imposes a condition under subdivision (d)(1)(A), then the defendant must demonstrate compliance with the condition by submitting proof of ignition interlock installation to the district attorney general's office within ten (10) days of being released on bail."

For the reasons below, subdivision (d)(1)(B) does not violate constitutional protections against self-incrimination.

The Fifth Amendment to the United States Constitution, which applies to the States through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The corresponding provision of the Tennessee Constitution provides "[t]hat in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. Courts have "traditionally interpreted article I, [section] 9 to be no broader

than the Fifth Amendment." *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001) (quoting *State v. Martin*, 950 S.W.2d 20, 23 (Tenn. 1997)).[1]

The protection against self-incrimination can be invoked in, or arise during, "any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446 (Tenn. 1995) (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 94 (1964)). But it "does not protect witnesses in circumstances" which "may subject them only to civil liabilities." *Id.* Instead, it only protects disclosure which may reasonably be used in a "criminal prosecution." *Id.* This constitutional protection from self-incrimination is "a fundamental *trial* right." *United States v. Patane*, 542 U.S. 630, 641 (2004) (emphasis in original) (quoting *Withrow v. Williams*, 507 U.S. 680, 691 (1993)); *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) ("[A] *constitutional violation occurs only at trial*.") (emphasis in original) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)). In other words, article I, section 9 is only implicated where a disclosure can reasonably be used in a criminal trial.

Moreover, constitutional protections against self-incrimination only apply when the information is incriminating in nature. *Fisher v. United States*, 425 U.S. 391, 409 (1976) (ruling that the Fifth Amendment "protects a person only against being incriminated by his own compelled testimonial communications"); *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951); *see also United States v. Sweets*, 526 F.3d 122, 124 (4th Cir. 2007) (finding that a coerced disclosure did not violate the Fifth Amendment because it was not incriminating); *United States v. Ritchie*, 15 F.3d 592, 602 (6th Cir. 1994) (holding that "the information required must be incriminating . . . in order for the Fifth Amendment to be implicated"). "Incriminating" is defined as "[d]emonstrating or indicating involvement in criminal activity." Incriminating, *Black's Law Dictionary* (11th Ed. 2019).

Tennessee Code Annotated § 40-11-118(d)(1)(B) requires a defendant to "demonstrate compliance with the condition" of bond. Any compelled communications showing compliance can only be favorable toward a defendant and would not be incriminating. Subdivision (d)(1)(B) does not require a defendant to report noncompliance with a condition of bond. Even if it did, noncompliance alone is not *criminal* activity; instead, a violation of this bond condition could lead, at most, to bond revocation. Tenn. Code Ann. § 40-11-141(b) (only permitting a court to "revoke and terminate the defendant's bond" upon the violation of a condition of release). So, any compelled communication to a District Attorney General regarding compliance with a condition of bond pursuant to the statute would not be used "at trial" and therefore is not within the scope of the constitutional protection from self-incrimination.

[1] The Tennessee Supreme Court has identified one difference between the two constitutional provisions, which focuses on the voluntariness of a confession during a custodial interrogation and does not apply here. *State v. Smith*, 834 S.W.2d 915, 919 (Tenn. 1992).

Any communication compelled by Tenn. Code Ann. § 40-11-118(d)(1)(B) does not implicate protections against self-incrimination under Article I, Section 9 of the Tennessee Constitution.

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