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OFFICE OF THE
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Opinion No. 05-160

Waiver of Jury Setting Fines in a Criminal Trial

QUESTION

May a defendant, over the objection of the State, unilaterally waive the constitutional right to have a jury in a criminal trial set any fine over \$50.00 where there is a jury trial on the question of guilt or innocence?

OPINION

Yes, the defendant may unilaterally waive this right over the objection of the State.

ANALYSIS

A fine is a form of sentence that may be imposed alone or in addition to other authorized sentence alternatives. Tenn. Code Ann. § 40-35-104(c)(1) (2003). “Where the offense is punishable by a fine of fifty dollars (\$50.00) or less, the court shall fix the fine in accordance with § 40-35-111.”¹ Tenn. Code Ann. § 40-35-301(a) (2003). However, pursuant to Article VI, Section 14, of the Tennessee Constitution, a fine exceeding \$50.00 must be assessed by a jury.² That provision provides:

No fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than fifty dollars.

This is mirrored in Tenn. Code Ann. §40-35-301(b) (2003), which provides, in pertinent part,

¹Tennessee Code Annotated § 40-35-111 (2003) provides the “[a]uthorized terms of imprisonment and fines for felonies and misdemeanors.”

²“Article VI, Section 14, is unique in the whole of American constitutional law, and no other provision like it may be found either in the Federal Constitution or in any other modern state constitution.” *City of Chattanooga v. Davis*, 54 S.W.3d 248, 257 (Tenn. 2001).

In a case where the range of punishment includes a fine in excess of fifty dollars (\$50.00), the jury finding the defendant guilty shall also fix the fine, if any, in excess of fifty dollars (\$50.00). The jury shall report such fine with a verdict of guilty.

“Although the jury is to ‘fix’ the amount of the fine and report it with a guilty verdict, it is the trial court that is obligated to impose a fine, if any — not to exceed that fixed by the jury — as part of the sentence.” *State v. Blevins*, 968 S.W.2d 888, 895 (Tenn. Crim. App. 1997); *see also* Tenn. Code Ann. § 40-35-301(b).

A defendant may choose to waive his right to have the fine assessed by a jury pursuant to Tenn. Code Ann. §40-35-301(b), which provides:

The defendant may waive the right to have a jury fix the fine and agree that the court fix it, in which case the court may lawfully fix the fine at any amount which the jury could have. If a plea agreement imposing a fine in excess of fifty dollars (\$50.00) and the defendant's written waiver of the constitutional right to have a jury fix the fine are accepted by the court, the court may pronounce sentence, including the fine, without a jury. If the conviction is upon a guilty plea and there is no jury waiver as provided in this subsection (b), a jury shall be impaneled to fix the fine, if any, to be imposed by the court in an amount not to exceed the fine fixed by the jury.

Based on the foregoing, fines in excess of \$50.00 are generally assessed by a jury unless the defendant waives this constitutional protection. *See State v. Alvarado*, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996) (citing Tenn. Code Ann. § 40-35-301 and *State v. Mahoney*, 874 S.W.2d 627, 630 (Tenn. Crim. App. 1993)). A trial court may also assess a fine of more than \$50.00 when the fine is statutorily specified and allows no judicial discretion in its imposition. *France v. State*, 65 Tenn. 478, 486 (1873); *see also State v. Martin*, 940 S.W.2d 567, 570 (Tenn. 1997); *State v. Green*, 167 S.W. 867, 868 (Tenn. 1914). In cases where the defendant waives his or her constitutional right to have a jury impose a fine, the trial court may set the amount of the defendant's fine within statutory parameters. *See State v. Bryant*, 805 S.W.2d 762, 767 (Tenn. 1991). A fine is reviewable on appeal as it is part of the defendant's sentence. *Id.* Any challenge to the amount of the fine imposed by the trial court should be conducted in accordance with the principles of the 1989 Sentencing Act. *Id.*

The Tennessee Supreme Court has held that the Tennessee constitutional provision requiring that a jury set a fine in an amount over \$50.00 is “‘manifestly an amplification’ of the fundamental guarantee against the imposition of excessive fines. . . .” *State v. Durso*, 645 S.W.2d 753, 759 (Tenn. 1983) (quoting *France*, 65 Tenn. at 485). The Court stated further that the rights guaranteed

by that provision “are for his benefit and protection.” 645 S.W.2d at 759. As such, if the defendant “sees fit” to waive those rights, “such waiver is permissible, provided that it is done in accordance with safeguards provided by both the constitution and implementing statutes or rules of criminal procedure, and that such waivers should be given effect.” *Id.*

Although the waiver of a jury’s setting of fines is discussed in a number of Tennessee cases, the impact of the State’s objection to such a waiver has yet to be addressed. However, we can analogize the defendant’s right to have a fine imposed by a jury to the defendant’s right to a trial by jury. A defendant has a constitutional right to a jury trial “[f]or violation of general criminal statutes . . . where a fine of more than \$50.00 or any confinement of the accused may be imposed.” *State v. Dusina*, 764 S.W.2d 766, 768 (Tenn. 1989); *see also Willard v. State*, 130 S.W.2d 99, 100 (Tenn. 1939). This right is guaranteed by both the federal and Tennessee constitutions. U.S. Const. Amend VI.; Tenn. Const., Art. I., § 6; *see also* Tenn. R. Crim. P. 5(c) (2004).

The Tennessee Rules of Criminal Procedure provide that a defendant may waive his or her right to a jury trial “with the approval of the court and the consent of the district attorney general.” Tenn. R. Crim. P. 23 (2004). The corresponding rule for fines, Tenn. Code Ann. §40-35-301(b), simply provides that if a defendant waives the right to have a jury fix the fine, “the court may lawfully fix the fine at any amount which the jury could have.” Tenn. Code Ann. § 40-35-301(b). Further, in the case of a plea agreement, if the defendant waives the right to have the jury set the fine, and if that agreement and waiver are accepted by the court, “the court may pronounce sentence, including the fine, without a jury.” *Id.* The difference in the rules seems apparent. The rule providing for a waiver of a jury trial requires that the waiver be made with the consent of the district attorney general and the approval of the court; whereas, the statute providing for the waiver of a jury setting a fine merely requires that the waiver be accepted by the court.

Because the assessment of fines by a jury is for the benefit of the accused, *see Durso*, 645 S.W.2d at 759, and because there is no statutory provision requiring approval of the waiver by the district attorney general, it is the opinion of this office that a defendant can waive, over the objection of the State, his or her right to have fines set by a jury.

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