

STATE OF TENNESSEE

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May 6, 2004

Opinion No. 04-088

Fee for Service of Criminal Process

QUESTIONS

1. Under Tenn. Code Ann. § 8-21-901(a)(1)(D), a sheriff or constable is entitled to receive seven dollars for returning any service of process where the sheriff or constable attempts service but is unsuccessful. Under Tenn. Code Ann. § 40-25-109, a sheriff or other executive officer may not receive any fee for attempted service of criminal process unless he or she makes oath before the clerk as to certain matters. Is a clerk authorized to pay the seven-dollar fee in a criminal case if the serving officer has not provided the oath required by Tenn. Code Ann. § 40-25-109?

2. Would an affidavit attached to the unserved process be sufficient to satisfy Tenn. Code Ann. § 40-25-109?

OPINIONS

1. No, the statutes should be read together to provide that, in order to receive the seven-dollar fee for attempting to serve criminal process, the sheriff must satisfy the conditions in Tenn. Code Ann. § 40-25-109.

2. No, the statute expressly requires that the oath be made “before the clerk.” The oath could be made before a deputy of the clerk authorized to transact business on his or her behalf.

ANALYSIS

1. Attempt to Serve Criminal Process

This opinion concerns the fee a sheriff is entitled to receive for attempting to serve criminal process. It should be noted that Tenn. Code Ann. § 8-21-105 provides a mechanism for resolving fee questions in the context of the case in which the fees must be paid. The statute states: “It is the duty of the courts to decide, upon application by the officer entitled to compensation, any question arising under the law, and such decision will protect the officer acting under it.”

Tenn. Code Ann. § 8-21-901 provides in relevant part:

(a) *Notwithstanding any other provision of law to the contrary*, the sheriff or constable is entitled to demand and receive the respective fees for the following services where services are actually rendered:

(1) Service of Process.

(A) For serving any process *except as otherwise provided in this section or other applicable law*, whether issued by a clerk for a general sessions, criminal, circuit, chancery or any other court, the sheriff or constable shall be entitled to the following fees, based on the manner in which process is served, for each item of process that must be served separately per person served:

* * * *

(D) *For returning any service of process* where the sheriff or constable attempts service but is unsuccessful, the sheriff or constable shall only be entitled to:.....\$7.00.

(Emphasis added). The entire statutory section dates from 2002, when it was completely rewritten. 2002 Tenn. Pub. Acts ch. 794.

The question concerns the effect of Tenn. Code Ann. § 40-25-109 on a sheriff's right to receive service fees. This statute provides:

No fee is allowed the sheriff or other executive officer, upon the return of any kind of criminal process or subpoena "not found," unless the officer makes oath before the clerk that the officer has been to the residence of the person mentioned in the process, or at the place where the person last resided in that county, or that such person has not for twelve (12) months resided in the county.

This statute has not been changed since it was codified in 1858. Code 1858, § 5567 (deriv. Acts 1843-1844, ch. 215, §§ 10, 12).

It is not clear to what extent Tenn. Code Ann. § 40-25-109 remains in effect. It can be argued that, since Tenn. Code Ann. § 8-21-901(a)(1)(D) provides that "[n]otwithstanding any law to the contrary," a sheriff is entitled to receive seven dollars for any returned service of process, a sheriff need not satisfy the further conditions set forth in Tenn. Code Ann. § 40-25-109 to receive the fee. But this interpretation would impliedly repeal that act. A repeal by implication of an earlier act by a later act will be found only when a conflict between the acts is inescapable. *Knox County Association v. Knox County Board of Education*, 60 S.W.3d 65 (Tenn.Ct.App. 2001). Further, Tenn. Code Ann. § 40-25-109 specifically addresses service of criminal process, while Tenn. Code Ann. § 8-21-901(a)(1) covers fees for service of process in general. Provisions of a special or specific statute prevail and have controlling effect over the provisions of a general statute. *Arnwire v. Union County Board of Education*, 120 S.W.3d 804, 809 (Tenn. 2003). Applying these principles of

statutory construction, we think the statutes should be read together to provide that, in order to receive the seven-dollar fee for attempting to serve criminal process, the sheriff or constable must satisfy the conditions in Tenn. Code Ann. § 40-25-109.

2. Requirement of Oath under Tenn. Code Ann. § 40-25-109

The second question is whether an affidavit attached to the unserved process would satisfy the requirement of an oath in Tenn. Code Ann. § 40-25-109. Presumably, the affidavit would be witnessed by a notary. But the statute expressly requires the sheriff or other officer to make the oath “before the clerk” For this reason, an affidavit would not satisfy the requirement of an oath “before the clerk” in Tenn. Code Ann. § 40-25-109. *Campbell v. Brady*, 158 Tenn. 98, 11 S.W.2d 687 (1928) (where the statute authorizing the issuance of an original attachment required it to be made on affidavit before the officer issuing the attachment, an affidavit attested by a notary public was not sufficient). The oath could be made before a deputy of the clerk. Tenn. Code Ann. § 18-1-108(a)(4) (a court clerk may appoint deputies with full power to transact all the business of such clerk).

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