S T A T E O F T E N N E S S E E
OFFICE OF THE
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Opinion No. 00-042

Representation of the State in Criminal and Juvenile Proceedings in General Sessions Courts

QUESTIONS

1. Is the District Attorney General the only person who has the authority to represent the State at a detention hearing conducted in Juvenile Court pursuant to Tenn. Code Ann. § 37-1-114 pending a hearing on a petition pursuant to Tenn. Code Ann. §§ 37-1-108(4), 37-1-120 and 37-1-124?

2. Is the District Attorney General required to appear and prosecute all criminal cases in any state, county or municipal court in his or her district?

3. May a crime victim or arresting officer present the criminal case on behalf of the State in a Court of General Sessions?

4. Is a Court of General Sessions required to dismiss criminal charges if, on the date set by the court for trial, the District Attorney General or a duly appointed Assistant District Attorney General does not appear in court to try the case?

OPINIONS

1. No. There is nothing in Tenn. Code Ann. § 37-1-114 which requires an Assistant District Attorney General to appear and represent the State in detention proceedings thereunder. The statute on hearing petitions on the merits, Tenn. Code Ann. § 37-1-124(b), states that the district attorney general, city or county attorney, or any other attorney upon request of the court shall present evidence in support of a petition filed pursuant to Tenn. Code Ann. § 37-1-120.

2. No. Tenn. Code Ann. § 8-7-106(6) and authority inherent in the office gives the district attorney general complete discretion, subject to certain constitutional limits, both in deciding whether to appear or to prosecute any criminal case within his or her jurisdiction.

3. No. If the victim of a crime, the arresting officer or any other non attorneys were to question witnesses or make arguments on behalf of the State in a criminal action in a Court of General Sessions, this would constitute the unauthorized practice of law in violation of Tenn. Code Ann. § 23-3-103(a). However, the judge may question witnesses during the course of proceedings.

4. No. The absence of an authorized representative of the district attorney general to represent the State in a criminal case in a court of general sessions does not mandate dismissal of such case. While the court has the inherent authority to exercise its discretion and dismiss the case, doing so without regard for the circumstances could constitute an abuse of discretion.

ANALYSIS

1. Tenn. Code Ann. § 37-1-108 sets out the way to commence juvenile proceedings. Section 37-1-114 authorizes the detention of juveniles in certain circumstances and section 37-1-120 sets forth the required contents for petitions filed in juvenile court. None of these provisions requires the district attorney general or anyone else to represent the State at the detention hearing. Tenn. Code Ann. § 37-1-124(b) identifies the persons who may present evidence on the merits. It states:

> The district attorney general, or city or county attorney, or any attorney at the request of the court, shall present evidence in support of the petition and otherwise conduct proceedings on behalf of the state.

If the language of a statute is plain and unambiguous, it is to be interpreted according to the ordinary meaning of the language. Statutory language is considered to be plain and unambiguous if it lends itself to only one meaning. *Browder v. Morris*, 975 S.W.2d 308 (Tenn. 1998). The language of Tenn. Code Ann. § 37-1-124(b) is clear and unambiguous. According to its ordinary meaning, the district attorney general is not the only person who can represent the State in proceedings on the petition. City and county attorneys or any other attorney acting pursuant to a request from the court may represent the State in such proceedings. When that provision is construed in pari materia with Tenn. Code Ann. § 8-7-106(b), the district attorney general is not required to appear at the hearing on the merits, either.

2. Although Tenn Code Ann. § 8-7-103(1) states that district attorneys general have the duty to appear in every court having criminal jurisdiction in their district and to prosecute every case in which the state is a party, district attorneys general still have, within constitutional limits, almost complete discretion in deciding whether to prosecute persons for criminal offenses. *State v. Superior Oil, Inc.*, 875 S.W.2d 658 (Tenn. 1994); *State v. Head*, 971 S.W.2d 490 (Tenn. Crim. App. 1997); *Quillen v. Crockett*, 928 S.W.2d 47 (Tenn. Crim. App. 1995). Tenn. Code Ann. § 8-7-103(6) states that a district attorney general:

> Shall have discretion in the performance of duties and responsibilities in the allocation of resources available to such district attorney general, any other provision of law notwithstanding.

According to the ordinary meaning of the foregoing, district attorneys general have the authority to use the resources available to them as they see fit. Such authority necessarily would include the right to staff the various courts within their districts.

The legislature has recognized that district attorneys general might not always be able to attend all circuit or criminal court proceedings in their districts. Tenn. Code Ann. §8-7-106 provides for the appointment of district attorneys general pro tem in state court proceedings.

There is no statutory provision for such appointments in county, city and other municipal courts. However, in a previous formal opinion, this Office has opined that a general sessions court lacks the authority to require a district attorney general to have an attorney present in the courtroom during all criminal proceedings. Op. Tenn. Atty. Gen. 00-01 (Jan. 4, 2000) at 4. A copy of that opinion is enclosed. The basis for that opinion was that to allow general session courts to compel such action would constitute an unwarranted interference with the authority and discretion inherent in the office of the district attorney general. In addition, the Committee Comment to Tenn. R. Crim Proc. Rule 5 recognizes that criminal proceedings in general sessions courts are often conducted without having an assistant district attorney general present.

3. Victims of crime and arresting officers may not represent the State in criminal proceedings in courts of general sessions. Tenn. Code Ann. § 23-3-103 prohibits the unauthorized practice of law. It states, in part:

> No person shall engage in the "practice of law" or do "law business" or both, as defined in § 23-3-101, unless such person has been duly licensed therefor, and while such person's license is in full force and effect . . .

The term "law business" and "practice of law" are defined in Tenn. Code Ann. § 23-3-101. Subsection (1) defines the former. Among the elements set forth therein is receipt of valuable consideration in exchange for performing the acts described therein. By contrast, the definition of the term "practice of law" contains no such element. It states:

> "Practice of law" means the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies or the soliciting of clients directly or indirectly to provide such service.

The plain meaning of the text indicates that the relevant elements are: acting as an advocate; in a representative capacity; and before a court or other specified tribunal. All three elements would be met if a victim or arresting officer asked questions of witnesses or made arguments on behalf of the State. First, courts of general sessions are courts. Second, such a person would be acting as a representative if he or she thus presented the case. Finally, such a person would also be acting in a representative capacity. Criminal actions are not brought in the name of the victim or any other natural person. They are brought on behalf of the State. As a result, any person acting on its behalf

would have to do so in a representative capacity if that person examined witnesses, made arguments or did anything in court other than to offer testimony as a witness.

The prohibitions against the unauthorized practice of law by victims and police officers would not prohibit general sessions judges from asking questions of witnesses in a case. It is common knowledge that general sessions judges and judges in other courts often ask witnesses questions during the course of trials. This practice is recognized and specifically authorized under the Tennessee Rules of Evidence. *See* Tenn. R. Ev. Rule 614(b). Those Rules apply in all trial courts of Tennessee unless otherwise provided by statute or other rule. Tenn. R. Ev. Rule 101.

The practice of general sessions judges asking witnesses questions in criminal cases is consistent with the comments to Tenn R. Crim. Proc. Rule 5. In those comments, the drafters of the rules recognized that in criminal proceedings, general sessions courts often operate without the presence or participation of an assistant district attorney general. In such situations, judges often ask questions to clarify matters and to assist witnesses in providing relevant testimony.

It is also common knowledge that the district attorneys general do not appear and participate in traffic cases in general sessions cases. In Tennessee, traffic violations are criminal offenses. In such cases, the normal practice is for the court to receive the testimony of the arresting officer and other witnesses. General sessions judges often ask questions of witnesses in those cases. No statutory or other legal authority has been found which permits the practice in proceedings on traffic offenses but prohibits it during other criminal proceedings in general sessions courts.

Of course, there are limits on a judge's authority to question witnesses during a trial. Canon 3 of the Code of Judicial Conduct requires a judge to conduct a trial in a fair and impartial manner. By its terms, questions indicating a particular bias or favoritism would be prohibited. Likewise, judges may not use their judicial powers to invade the sphere of authority of a district attorney general or to appoint masters and other personnel to uncover evidence or perform the functions normally carried out by police and prosecuting attorneys. *State v. Ray*, 973 S.W.2d 246 (Tenn. Crim. App. 1997). In that case, the Court held that the trial court had exceeded its authority by engaging in conduct which far exceeded the normal uses of judicial power. Among the acts engaged in were the ordering of the district attorney general to obtain certain evidence from outside sources and the making of threats to appoint an independent prosecutor if the district attorney general did not pursue the case as vigorously as the court wanted. There is nothing in *State v. Ray* which would prohibit general sessions judges from questioning witnesses during a trial. The acts condemned by the Court of Criminal Appeals in *Ray* are well beyond the scope of that well known and acccepted practice.

4. There is no authority which requires a court of general sessions to dismiss a criminal case if the district attorney general fails to appear or send a representative to prosecute the action. However, the court has the authority to take such action if it chooses to do so. Such action would be within the scope of the court's discretion. Tenn. Code Ann. § 40-1-109 confers upon courts of general sessions the jurisdiction to try and dispose of misdemeanor cases properly brought before them. In situations where courts of general sessions have jurisdiction to try cases, they have the

same authority to regulate and manage the practice before them as any other trial court. *See, e.g., Taylor v. Waddey,* 206 Tenn. 497, 334 S.W.2d 733 (1960). As long as their actions do not conflict with statutes or rules of procedure, trial courts have the inherent power to control their own proceedings and to make rules governing the conduct of trials before them. *State v. Reid,* 981 S.W.2d 166 (Tenn. 1998). In the absence of a statute or applicable rule to the contrary, dismissal of cases based on the failure of the district attorney general to appear and prosecute would come within the authority of the court to control the trial of cases coming before it.

As pointed out in Op. Tenn. Atty. Gen. No. 00-01(Jan. 4, 2000), however, blanket dismissals without regard to the reasons for the State's failure to provide a prosecuting attorney might constitute an abuse of discretion. The opinion suggests that in order to properly exercise their discretion, general sessions courts should consider the reasons behind the inability of the district attorney general to furnish an attorney on a given date. The opinion also suggests that general sessions courts should give due regard to the nature and scope of a prosecutor's discretion before dismissing a case. Op. Tenn. Atty. Gen. No. 00-01(Jan. 4, 2000) at 2-3.

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