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Opinion No. 02-090

Seizure and Disposition of Pawned Items

QUESTIONS

1. Under Tenn. Code Ann. § 45-6-213(b), anyone asserting ownership to property, which is alleged to be stolen and in the possession of a pawnbroker, may file a report with a law enforcement agency and provide proof of ownership. The person seeking to recover the property must have made a report of its theft within thirty days after obtaining knowledge of its theft or loss. On receipt of the proof of ownership, any law enforcement officer is authorized to recover the property from the pawnbroker, unless the pawnbroker presents evidence of having received proof of ownership of the property by the person who sold or pledged it to the pawnbroker. The statute does not otherwise require the law enforcement agency to provide a hearing for the pawnbroker before taking the property. Does the statute comply with due process requirements of the Tennessee and United States Constitutions?

2. What are the responsibilities of local law enforcement agencies with regard to this statute?

OPINIONS

1. In our opinion, a court would conclude that this statute violates the due process protections of the Tennessee and United States Constitutions because it does not provide for prior notice and a hearing to protect the property interests of the pawnbroker in the items.

2. This Office has found no direct authority regarding the responsibilities of law enforcement agencies under this statute. By its terms, the statute implies that the police have a duty to investigate a report filed by a claimant and ask the pawnbroker for evidence that the pawnbroker received proof of ownership of the property from the person who sold or pawned it. The statute then states that the police are "authorized" to seize the property and award it to the claimant. But the statute does not specify what constitutes "acceptable evidence" that the pawnbroker received proper proof of ownership from the person who sold or pledged it. Under the statute, if the police determine that they have received acceptable evidence from the pawnbroker, then the police must inform the party alleging ownership that that person must sue for recovery of the items in court.

This Office has concluded that, for public officials with discretionary duties under a statute that the Attorney General has opined to be unconstitutional, such officer may elect to conform his

conduct to comply with the particular constitutional mandate, particularly if the statute appears to be "palpably unconstitutional," or may initiate a judicial action for a declaratory judgment as to his legal responsibilities. In light of the opinions of the United States Court of Appeals for the Tenth Circuit, there is a risk that the defense of qualified immunity might not be available for an official sued in a federal civil rights action for violating a pawnbroker's due process rights by enforcing Tenn. Code Ann. § 45-6-213.

ANALYSIS

1. Constitutionality of Pawnbroker Laws on Seizure of Items Reported Stolen

The request seeks advice regarding application of the State's pawnbroker laws. The request indicates that a pawnshop frequently receives pawned items obtained through "rent-to-own" plans. Sometimes the rental company files a report that these items were stolen. Local law enforcement officials have been confiscating these items and returning them to the rental company. The pawnshop has asked the local governments to reconsider this practice. They note that, under Tennessee law, a pawnbroker might be able to assert good title against a rental company for an item that a customer rented and then pawned. This argument would be based on the Uniform Commercial Code protecting a party who gives value for an item to someone who was in lawful possession of the item. *See, e.g., Alsafi Oriental Rugs v. American Loan Co.*, 864 S.W.2d 41 (Tenn. Ct. App. 1993), *p.t.a. denied* (1993). As a result, the pawnshop argues, local law enforcers are depriving the pawnshop of a property interest without affording a prior hearing as required by the due process requirements of the Tennessee and United States Constitutions. The questions raised by the request appear to be, first, whether the statute authorizing confiscation is constitutional; and, second, whether local law enforcement officials must nevertheless enforce the statute, even if this Office considers it unconstitutional.

Under Tenn. Code Ann. § 45-6-213(a), a pawnbroker must obtain certain specified information from a person selling or pledging property to the pawnbroker. The pawnbroker must also obtain a statement from the pledgor that the pledgor is the lawful owner of the item. The person from whom the pawnbroker receives the property must sign the record. The record must be made available to any law enforcement agency or officer upon request.

Under Tenn. Code Ann. § 45-6-213(b)(1), a party asserting ownership of property, which the party claims is stolen and in the possession of a pawnbroker, may recover the property by making a report to a law enforcement agency. The party must provide the agency with proof of ownership of the property and must have reported the theft of the property within thirty days after obtaining knowledge of its theft or loss. The statute provides:

> Upon the receipt of such proof of ownership, any law enforcement officer is authorized to recover the property from the pawnbroker, without expense to the rightful owner thereof, unless the pawnbroker presents evidence of having received proof of ownership of such

> property by the person who sold same to pawnbroker or pledged the property as security for a loan. Any property recovered from a pawnbroker, pursuant to this section, shall be returned to the rightful owner thereof, subject to evidence in any criminal proceeding.

Tenn. Code Ann. § 45-6-213(b)(1). If the pawnbroker presents "acceptable" evidence to the law enforcement agency of having received proper proof of ownership from the person who sold or pledged the property, "then and only then shall it be understood the law enforcement agency has satisfied its processes, duties and responsibilities." Tenn. Code Ann. § 45-6-213(b)(2). The statute provides no further guidance regarding what evidence a pawnbroker must submit to show it received proper proof of ownership from the person who sold or pledged the property, nor does it provide for a hearing before or after the seizure or the award of the property to the person who filed the report.

If the pawnbroker has presented "acceptable" evidence to the law enforcement agency of having received proper proof of ownership from the person who sold or pledged the property, the agency must then inform the party claiming ownership that it must sue for recovery of the property within thirty days of receiving the notice. The pawnbroker may not be required to surrender the property to the agency or any other person absent an appropriate warrant. *Id.*

Under subdivision (b)(3), if the local authorities have seized property and cannot locate the rightful owner, they may return it to the pawnbroker. The pawnbroker must execute a hold harmless agreement in accordance with Tenn. Code Ann. §§ 40-33-101, *et seq.*, concerning forfeitures.

The Constitution of the United States prevents any state from depriving "any person of life, liberty, or property, without due process of law . . .." U.S. Const. Amend. 14, § 1. Likewise, Article I, Section 8 of the Tennessee Constitution states "[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." The "law of the land" provision of Article I, Section 8 has been construed as synonymous with the "due process of law" provisions of the Fifth and Fourteenth Amendments to the United States Constitution. *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992). Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. *Little v. Streater*, 452 U.S. 1, 5, 101 S.Ct. 2202, 2205, 68 L.Ed.2d 627 (1981) (citing *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780 (1971)). The four elements that a plaintiff must establish to state a claim for a violation of its due process rights are (1) state action which (2) deprives the claimant of (3) a constitutionally protected interest in liberty or property (4) by procedural means which do not meet Fourteenth Amendment standards. *Parratt v. Taylor*, 451 U.S. 527, 536, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

A number of federal courts have found that a pawnbroker has an interest in property pawned or sold to it that is protected under the Fourteenth Amendment. The United States District Court for

the Southern District of Florida concluded that a statute similar to § 45-6-213 violated the due process rights of pawnbrokers. *Florida Pawnbrokers and Secondhand Dealers Association, Inc. v. City of Fort Lauderdale*, 699 F.Supp. 888 (S.D. Fla. 1988). The statute challenged in that case authorized local police to recover stolen property from a pawnbroker where the lawful owner of property filed a timely report of its theft and its location along with proof of ownership. The statute authorized the police to recover the property from the pawnbroker unless the pawnbroker presented evidence of having received proof of ownership of such property by the person who sold it to the pawnbroker or pledged the property as security for a loan. The statute did not require the person filing the report to post a bond or reimburse the pawnbroker. The statute provided that "[a]ny property recovered from a pawnbroker pursuant to this section shall be returned to the lawful owner subject to its use as evidence in any criminal proceeding." Fla. Stat. Ann. § 715.041(2), *quoted at* 699 F.Supp. at 889.

The Court found that the plaintiff had established all four elements of its procedural due process claim. The Court found that the city's enforcement of the state law constituted the requisite state action. The Court analyzed Florida law regulating pawnbrokers and concluded that a pawnbroker had at least two property interests in goods sold or pledged for a loan: a possessory interest, and a lien interest in the pawned property. *Id. at* 890. The Court found that both these rights were property rights entitled to due process protection. The Court found that the statute did not provide minimum procedural due process to protect these rights. The Court noted that the statute required no notice to the pawnbroker or the pawnee; did not require the alleged lawful owner to post a bond to protect the pawnbroker from meritless claims; and, most importantly, provided for no hearing before an impartial decisionmaker. The Court noted:

> While the defendant may contend that the pawnbroker's opportunity of a "hearing" before the police officer satisfies due process, few would hold that a police official seizing pawned property is an impartial decisionmaker possessed of the legal training sufficient to resolve conflicting claims to property.

699 F.Supp. at 893. The Court therefore declared the statute to be unconstitutional and enjoined the defendant city from enforcing it.

Other federal courts have concluded that pawnshops have a constitutionally protected property interest in pawned property of which they cannot be deprived without due process. *See, e.g., Wolfenbarger v. Williams,* 774 F.2d 358 (10th Cir. 1985), *cert. denied,* 475 U.S. 1065, 106 S.Ct. 1376, 89 L.Ed.2d 602 (1986). In that case, a police department seized property in a pawnshop and then released it to an individual claiming to be the rightful owner, all without a judicial hearing. The Court examined Oklahoma law and concluded that a pawnbroker has a protected interest in property in its possession. The Court rejected the argument that the officer's actions did not violate due process because state law provided adequate post deprivation remedies.

The Court affirmed this position in *Winters v. Board of County Commissioners,* 4 F.3d 848

(10th Cir. 1993), *cert. denied*, 511 U.S. 1031, 114 S.Ct. 1539, 128 L.Ed.2d 192 (1994). In that case, a deputy sheriff seized a pawned ring as part of a stolen property investigation. The officer did not obtain a warrant for the seizure. The ring was used as evidence in criminal proceedings. After the criminal proceedings were resolved, the sheriff's department returned the ring to the person claiming to be the rightful owner without conducting a hearing. The pawnbroker claimed that the seizure violated her due process rights as well as her right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution. The Court found that the warrantless seizure violated the pawnbroker's Fourth Amendment rights. The Court found, further, that the sheriff's department, by disposing of the ring without a hearing to identify its proper owner, had deprived the pawnbroker of her due process rights under the Fourteenth Amendment. The Court noted that the pawnbroker had a right to present her case for ownership regardless of the likelihood of its success. 4 F.3d at 856.

Similarly, under Tennessee law, a pawnbroker's interest in property pawned or sold to it is a property interest entitled to due process protection. A pawnbroker must retain possession of pledged goods until thirty days after the maturity date of the pawn transaction. Tenn. Code Ann. § 45-6-211. After that time, the pawnbroker acquires absolute title to the goods and may sell or dispose of them. *Id.* A pawnbroker therefore has both the right to possess the property and a security interest in the property. Further, as noted above, in some circumstances a pawnbroker may even acquire title to consigned property that has been pledged to it. We think a court would conclude that Tenn. Code Ann. § 45-6-213(b), by authorizing a law enforcement officer to seize and dispose of property in a pawnbroker's possession without any prior notice and opportunity for the pawnbroker to defend its ownership of the property, violates the due process requirements of the Tennessee and United States Constitutions.

It should be noted that courts have found that law enforcement officials, in some circumstances, may constitutionally seize pawned property even without a warrant, and certainly without providing prior notice and opportunity for a hearing, to obtain evidence in a criminal investigation. *See, e.g., Sanders v. City of San Diego*, 93 F.3d 1423 (9th Cir. 1996); *G & G Jewelry, Inc. v. Oakland*, 989 F.2d 1093 (9th Cir. 1993); *J.S. Pawn, Inc. v. Nye*, 2001 WL 238145 (D.Kan. Feb. 7, 2001) (procedural due process affords the plaintiff no more protection than his right to be free from unreasonable seizure under the Fourth Amendment). Tennessee law expressly provides that a pawnbroker is not required to turn property over to an officer without a warrant. Tenn. Code Ann. § 45-6-213(b)(2). In some instances, therefore, to the extent that the statute authorizes pawned property to be seized without affording the pawnbroker a prior hearing in connection with a criminal investigation, it is arguably defensible. But the statute also authorizes law enforcement officers to turn the property over to a person claiming to be the owner without affording the pawnbroker any notice or right to be heard before an impartial decisionmaker. No case has found that such a process complies with the pawnbroker's due process rights. Further, a separate statutory scheme governs the issuance of search warrants and seizure of property in connection with a criminal investigation. Tenn. Code Ann. §§ 40-6-101, *et seq.* Tenn. Code Ann. § 45-6-213, by contrast, appears to focus on seizure of property to return it to a person claiming to be the rightful owner.

2. Duty of Law Enforcement Personnel to Enforce Tenn. Code Ann. § 45-6-213

The second question is what responsibilities local law enforcement personnel have under Tenn. Code Ann. § 45-6-213. By its terms, the statute appears to accord some discretion to law enforcement officials. The statute states that "[u]pon the receipt of such proof of ownership [from the party seeking to recover a pawned item], any law enforcement officer *is authorized* to recover the property from the pawnbroker, without expense to the rightful owner thereof, *unless the pawnbroker presents evidence of having received proof of ownership of such property by the person who sold same to pawnbroker or pledged the property as security for a loan.* Any property recovered from a pawnbroker, pursuant to this section, *shall* be returned to the rightful owner thereof, subject to evidence in any criminal proceeding." Tenn. Code Ann. § 45-6-213(b)(1) (emphasis added). It can be argued that the statute authorizes, but does not unconditionally require, law enforcement authorities to take pawned property from a pawnbroker when they receive a report from a party claiming to be the rightful owner. Subdivision (b)(2) of the statute provides that if a pawnbroker has presented "acceptable evidence . . . of having received proper proof of ownership from the person selling or pledging the property, then and only then shall it be understood the law enforcement agency has satisfied its processes, duties and responsibilities." The statute, therefore, implies that the police have a duty to investigate a report and ask the pawnbroker for evidence that the pawnbroker received proof of ownership of the property from the person who sold or pawned it. But the statute does not specify what constitutes "acceptable evidence" of that receipt. If the police determine that they have received acceptable evidence from the pawnbroker, then the police must inform the party alleging ownership that it will be necessary for that person to commence an appropriate civil action for the return of the items within thirty (30) days of receiving such notice. Tenn. Code Ann. § 45-2-613(b)(2).

As discussed above, this Office has concluded that the statute is unconstitutional. But a statute is presumed to be valid until it has been found unconstitutional by a court of competent jurisdiction. *Cumberland Capital Corp. v. Patty*, 556 S.W.2d 516 (Tenn. 1977)*;* Op. Tenn. Atty. Gen. 84-157 (May 8, 1984). In Opinion 84-157, this Office concluded that, for public officials with discretionary duties under a statute that the Attorney General has opined to be unconstitutional, such officer may elect to conform his conduct to the particular constitutional mandate, particularly if the statute appears to be "palpably unconstitutional," or may initiate a judicial action for a declaratory judgment as to his legal responsibilities. Our review of cases decided since that opinion was issued provides no basis to change this conclusion.

Qualified immunity protects public officials from federal civil rights actions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed.2d 396 (1982); *Anderson v. Crieghton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). In inquiring whether a constitutional right is clearly established, the United States Court of Appeals for the Sixth Circuit has stated that the court must "look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits." *Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir. 1991), *cert. denied*, 502 U.S. 1060,

112 S.Ct. 939, 117 L.Ed.2d 110 (1992). The same Court has stated:

> In the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals, or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such "clearly established law," these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.

Black v. Parke, 4 F.3d 442, 445 (6th Cir. 1993), *citing Ohio Civil Service Employees Association v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988). In light of the opinions of the United States Court of Appeals for the 10th Circuit, there is a risk that the defense of qualified immunity might not be available for a law enforcement official sued by a pawnbroker for violating its due process rights by enforcing Tenn. Code Ann. § 45-6-213.

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