

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 03-133

Forfeiture of Vehicles for Misdemeanor Possession of Narcotics

QUESTIONS

1. Does the forfeiture provision of the Tennessee Drug Control Act of 1989, Tenn. Code Ann. §53-11-451(a), authorize the seizure or forfeiture of conveyances used to facilitate the simple possession or casual exchange of a controlled substance, the distribution of one-half (1/2) ounce or less of marijuana, or the possession or delivery of drug paraphernalia?

2. Does Tenn. Code Ann. § 53-11-451 authorize seizure or forfeiture of conveyances used in violation of Tenn Code Ann. § 39-17-418(a) or (b) or Tenn. Code Ann. § 39-17-425 when only a passenger has committed the violation, and did so without the owner's knowledge or consent?

3. Does Tenn. Code Ann. § 53-11-451 authorize the seizure or forfeiture of conveyances used to facilitate the simple possession or casual exchange of a controlled substance other than marijuana, such as cocaine or methamphetamines?

OPINIONS

1. No. Tenn. Code Ann. § 53-11-451(a)(4)(C) excludes such conveyances from forfeiture. A conveyance is not subject to seizure or forfeiture under the Tennessee Drug Control Act of 1989 if its only provable connection to the controlled substance is as a means of facilitating simple possession or casual exchange of a controlled substance, delivery of one half ounce or less of marijuana, or possession, manufacture, or delivery of drug paraphernalia.

2. Yes, if the owner has not established the act or omission was committed or omitted without the owner's knowledge or consent, and the conveyance was not used to merely transport the controlled substance.

3. Yes. Tenn. Code Ann. § 39-17-418(a) includes all controlled substances as defined under Tenn. Code Ann. § 39-17-402(4), including cocaine and methamphetamines. Therefore, simple possession or casual exchange of such a substance would subject a conveyance to forfeiture unless the conveyance was only used as a means of transportation.

ANALYSIS

1. The Tennessee Drug Control Act of 1989¹ provides for criminal penalties for unauthorized possession, manufacture, distribution, and sale of controlled substances. It also provides for forfeiture of conveyances used to facilitate transportation, sale, or receipt of such controlled substances. Tenn. Code Ann. § 53-11-451(a) provides:

The following are subject to forfeiture

(1) All controlled substances which have been manufactured, distributed, dispensed or acquired in violation of parts 3 and 4 of this chapter or title 39, chapter 17, part 4;

...

(4) All conveyances, including aircraft, vehicles or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale or receipt of property described in subdivision (a)(1) or (2), but:

...

(C) A conveyance is not subject to forfeiture for a violation of § 39-17-418(a) or (b) or § 39-17-425.

Subsection (a) of section 39-17-418 makes it an offense to knowingly possess or casually exchange a controlled substance.² Subsection (b) makes it an offense to distribute up to one-half ounce of marijuana.³ Section 39-17-425 in general terms makes it a misdemeanor offense to use, or possess with intent to use, drug paraphernalia, and makes it a felony to deliver, possess with intent to deliver, manufacture with intent to deliver, or advertise drug paraphernalia. Thus the plain language of Tenn. Code Ann. § 53-11-451(a)(4) exempts vehicles from forfeiture in cases where the basis for forfeiture is casual exchange of a controlled substance, distribution of one half ounce or less of marijuana, or a paraphernalia offense.⁴

¹Tenn. Code Ann. §39-17-401 so designates part 4 of chapter 17 of title 39, and parts 3 and 4 of chapter 11, title 53.

² Subsections (c) through (e) further provide that the first two offenses under subsection (a), provided they do not involve distribution to a minor two or more years younger than the adult, will be punished as misdemeanors rather than felonies.

³As with simple possession, the first two such offenses, provided there is no distribution to a minor, are to be punished as misdemeanors rather than as felonies.

⁴ Simple possession is not a ground for forfeiture to begin with, so the exemption does not apply.

Tennessee courts have promulgated two cardinal rules of statutory construction. "The cardinal rule of statutory construction is to follow the plain meaning of the statute where the language is clear and unambiguous on its face." *Jackson v. General Motors Corp.*, 60 S.W.3d 800, 804 (Tenn. 2001). "The cardinal rule of statutory construction is to effectuate legislative intent, with all rules of construction being aids to that end." *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998).

Courts ascertain legislative intent "primarily from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language." *Hamblen County Educ. Ass'n v. Hamblen County Bd. of Educ.*, 892 S.W.2d 428, 431 (Tenn. Ct. App. 1994) (citing *National Gas Distributors, Inc. v. State*, 804 S.W.2d 66 (Tenn. 1991)). Thus, "If a statute is unambiguous, legislative intent is to be determined from the face of the statute . . . It is not for the courts to question the wisdom of legislative enactment." *Id.* at 432. As noted above, the statute is not ambiguous.

The Court of Appeals construed the former forfeiture statute and exemption in *Hughes v. State*, 776 S.W.2d 111 (Tenn. Ct. App. 1989) *p.t.a. denied*. In *Hughes*, a vehicle used in a trip to purchase marijuana for the vehicle owner's personal use was confiscated. The Court of Appeals, *inter alia*, determined that when a vehicle's only connection to an illegal substance is simply as a mode of transportation⁵, it is not subject to forfeiture. A vehicle used to facilitate the sale of a controlled substance, by contrast, is subject to forfeiture.⁶

The authority to seize a vehicle is contained in Tenn. Code Ann. § 53-11-451(b), which provides that:

All property subject to forfeiture under parts 3 and 4 of this chapter or title 39, chapter 17, part 4, may be seized by the director of the Tennessee bureau of investigation or the director's authorized representative, agent or employee, the commissioner of safety or the commissioner's authorized representative, agent or employee. . .

⁵ For example, if a law enforcement officer stops a vehicle for speeding and discovers the driver is in possession of a small amount of marijuana, without any evidence to suggest that the vehicle had been used to facilitate a sale of the marijuana, then the vehicle is not subject to seizure by the officer's agency and forfeiture by the Department of Safety.

⁶ While the forfeiture statute has been amended since *Hughes* was decided, a comparison of the statute quoted in *Hughes* and the current statute shows they are substantially similar, and the holding in *Hughes* should be considered persuasive. After *Hughes* and before the statute was amended, this office opined that vehicles could be forfeited even when the amount of controlled substance found would only support a charge of simple possession or casual exchange. Op. Tenn. Atty. Gen. 93-46 (May 13, 1993). At that time, Tenn. Code Ann. § 39-6-417 had been repealed and the new exemption statute, § 39-17-418, was not referenced in § 53-11-451. The legislature has since amended the law to include the new location of the exception for simple possession or casual exchange. Thus, the previous opinion is no longer applicable to the situation.

The plain language of the statute only authorizes seizure of property which is subject to forfeiture under the Tennessee Drug Control Act of 1989. Therefore, if property is not subject to forfeiture, then there is no authority for anyone to seize the property. In this instance, an officer does not have the authority to seize a conveyance for violations of Tenn. Code Ann. §§ 39-17-418(a) or (b) or 39-17-425, as such conveyances are not subject to forfeiture.

Given the clear and unambiguous nature of the statute, along with the holding of the Court of Appeals in *Hughes*, it is the opinion of this office that a vehicle cannot be seized or forfeited under Tenn. Code Ann. § 53-11-451 for a violation of either Tenn. Code Ann. § 39-17-418(a) or (b), or Tenn. Code Ann. § 39-17-425, unless the vehicle can be proved by the department to have been used in something other than the mere transportation of a controlled substance.⁷ Therefore, until the Tennessee courts have ruled on the post-amendment language contained in Tenn. Code Ann. § 53-11-451, all law enforcement and judicial officers charged with enforcing the law should be aware of the lack of authority to seize and forfeit vehicles under Tenn. Code Ann. § 53-11-451 for a violation of either Tenn. Code Ann. § 39-17-418(a) or (b), or Tenn. Code Ann. § 39-17-425, if there is no proof that the vehicle was used for anything other than to merely transport a controlled substance.

2. The Tennessee Code does not differentiate between controlled substances which are in the possession of the driver of a vehicle and those which are in the possession of the passenger. A vehicle is subject to seizure and forfeiture when it is used, or is intended for use, to transport, or in any manner to facilitate the transportation, sale or receipt of controlled substances or the raw materials and equipment used or intended for use in manufacturing, compounding, processing, delivering, importing or exporting any controlled substance. Tenn. Code Ann. § 53-11-451(a)(4). Therefore a vehicle is subject to seizure or forfeiture even if the person with the controlled substance is the passenger in a vehicle.

Tenn. Code Ann. § 53-11-451(a)(4)(B) does provide that, “[n]o conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without such owner’s knowledge or consent.” Thus, if the driver/owner of the vehicle shows he did not know that the passenger was violating the Tennessee drug laws, then the vehicle is not subject to forfeiture.

The forfeiture of such a vehicle is still governed by our analysis under question one, and a vehicle that was merely used to transport a controlled substance is not subject to seizure or forfeiture.

3. Tenn. Code Ann. § 39-17-418(a) provides that “[i]t is an offense for a person to knowingly possess or casually exchange a controlled substance unless the substance was obtained

⁷ For example, if the officer had witnessed or participated in the sale of drugs in an undercover operation before the stop, then the vehicle would be subject to seizure by the officer’s agency and forfeiture by the Department of Safety.

directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice.”

Tenn. Code Ann. § 39-17-402(4) defines a controlled substance as a “drug, substance, or immediate precursor in Schedules I through VI of §§ 39-17-403 - 39-17-415 inclusive.” Read together *in pari materia*, any controlled substance listed in the enumerated statutes is included within the exception of Tenn. Code Ann. § 39-17-418(a). Thus, both cocaine and methamphetamine, Schedule II substances, Tenn. Code Ann. §§ 39-17-408(b)(4), 39-17-408(d)(2), are included in the exception provided by § 53-11-451(a)(4)(C).

The forfeiture of such a vehicle is still governed by our analysis under question one, and a vehicle that was merely used to transport such controlled substances is not subject to seizure or forfeiture.

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