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Opinion No. 03-156

Scope of a court's discretion under Tenn. Code Ann. § 55-10-701(b) to withdraw an order revoking or denying driving privileges of a juvenile

QUESTION

Tenn. Code Ann. §55-10-701(b) provides that a court which has issued an order denying driving privileges to a juvenile as provided in that section may, upon motion of the offender, withdraw the order of denial, but "may not" withdraw the order under certain circumstances. Does the use of "may not" instead of "shall not" grant the court any discretion to withdraw the order when those circumstances apply?

OPINION

No. In this context, the use of "may not" is equivalent to the use of "shall not," and therefore Tenn. Code Ann. § 55-10-701(b) gives courts no discretion to withdraw orders denying driving privileges before expiration of the time limits imposed by subsections (1) and (2), or when the order arose from the circumstance identified in subsection (3), operation of a motor vehicle while intoxicated or impaired.

ANALYSIS

When juveniles are convicted of certain classes of offenses or adjudicated delinquent, unruly, or a status offender under certain circumstances, Tenn. Code Ann. § 55-10-701(a) directs courts to prepare and send to the Driver Control Division of the Department of Safety an order denying driving privileges to the offender.[1] It provides, in pertinent part, as follows:

> When a person, younger than eighteen (18) years of age, but thirteen (13) years of age or older, commits any offense or engages in any prohibited conduct described in this subsection, then at the time the person is convicted of the offense, or adjudicated a delinquent child, unruly child or status offender, the court in which the conviction or

[1]The offenses, violations, infractions, or other prohibited conduct that "shall" result in denial or revocation of driving privileges set forth in Tenn. Code Ann. § 55-10-701(a) include the underage possession, use, sale or consumption of alcohol or illegal drugs and carrying weapons on school property.

> adjudication occurs shall prepare and send to the department of safety, driver control division, within five (5) working days of the conviction or adjudication, an order of denial of driving privileges for the offender.

Tenn. Code Ann. § 55-10-701(b) provides that on motion of the offender, the court "may withdraw the order at any time the court deems appropriate, except as provided" in subsections (1), (2), and (3) of that section. Those subsections provide:

> (1) A court may not withdraw an order for a period of ninety (90) days after the issuance of the order if it is the first such order issued by any court with respect to the petitioning person;
>
> (2) A court may not withdraw an order for a period of one (1) year after the issuance of the order if it is the second or subsequent such order issued by any court with respect to the petitioning person; and
>
> (3) A court may not withdraw an order involving a violation of part 4 of this chapter, concerning the operation of a motor vehicle while intoxicated or impaired.

The question posed is whether the use of "may not" instead of "shall not" in each of the subsections quoted above grants the court any discretion to withdraw the denial order before the expiration of the times specified in subsections (1) and (2), or in the circumstances specified in subsection (3).

A basic principle of statutory construction is to ascertain and give effect to legislative intent without unduly restricting or expanding the intended scope of a statute. *State v. Garrison*, 40 S.W.3d 426, 433 (Tenn. 2000). *See also Washington v. Robertson County,* 29 S.W. 3d 466, 471 (Tenn. 2000). Such intent is to be found from a reading of the statute as a whole in light of legislative purpose. *Seiber v. Greenbrier*, 906 S.W.2d 444, 447 (Tenn. 1995). "In interpreting statutes, the Supreme Court is required to construe them as a whole, read them in conjunction with their surrounding parts, and view them consistently with the legislative purpose." *Scott v. Ashland Healthcare Center, Inc.*, 49 S.W. 3d 281, 286 (Tenn. 2001). The Court must examine the language of a statute and, if unambiguous, apply its ordinary and plain meaning." *Washington*, 29 S.W. 3d at 471.

The primary inquiry involves the analysis of the Legislature's use of "may" instead of "shall" within the subparts of the statute. At times, Tennessee courts have concluded that words of a

permissive nature, such as "may," are to be given a mandatory significance.[2] *Baker v. Seal*, 694 S.W.2d 948, 951 (1984), *citing Fiske v. Grider*, 171 Tenn. 565, 106 S.W.2d 553 (1937). *See also Burns v. Duncan*, 23 Tenn.App. 374, 133 S.W.2d 1000 (1940); *Fiske v. Grider*, 106 S.W.2d 553 (1937)(holding that in statutory construction, the word "may" is frequently construed to mean "shall"). In determining whether a provision is permissive or mandatory, "the prime object is to ascertain the legislative intent, from a consideration of the entire statute, its nature, its object, and the consequences that would result from construing it one way or the other. . . ." *Baker*, 694 S.W. 2d at 951; *Stiner v. Powells Hardware Co.*, 168 Tenn. 99, 75 S.W.2d 406 (1934). *See also Burns, supra*, 23 Tenn.App. at 386, 133 S.W.2d 1000.

When the restrictive "not" is added to either "may" or "shall," both terms take on a mandatory definition, not permissive. Because the statute uses the term "may not" in setting forth the restrictions on the court's discretion, the plain meaning results in the juvenile courts having no discretion to review or withdraw orders revoking driving privileges within the time limits imposed by subsections (1) and (2), or if the offense involved operating a motor vehicle while under the influence, as set forth in subsection (3).

Such a result is consistent with a reading of the statute as a whole, including all subparts. The Legislature clearly intended that specified juvenile offenders suffer a mandatory penalty for violation of certain laws. To construe this statute otherwise would permit a juvenile court judge to circumvent the plain meaning of the statute, which is to impose a mandatory punishment for certain juvenile offenders.

In view of its plain language, and when read as a whole, subsection (b) clearly and unambiguously affords courts with limited discretion to review and withdraw orders denying or revoking the driving privileges of juveniles. By the same token, the section unambiguously limits this discretion. A court may review and withdraw such orders at any time except as prohibited under the specific conditions that are set forth in (b)(1) through (b)(3).[3]

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[2]Black's Law Dictionary, 7th Ed. 1999, defines "may" as, "is permitted to — This is the primary legal sense — usually termed the 'permissive' or 'discretionary' sense." The definition goes on to state, "in dozens of cases, courts have held 'may' to be synonymous with 'shall' or 'must', usually in an effort to effectuate legislative intent." Black's defines "shall" as, "has a duty to; more broadly, is required to; should; *may*. . . ."(*emphasis added*).

[3]Withdrawal of a court order of denial of driving privileges does not in and of itself provide for reinstatement or issuance of a drivers license. The juvenile applicant must then pay a $20 application fee, any other licensing fees, and complete one of the following: a driver's safety course, early intervention program, youth alcohol safety education program, or weapons safety course. *See* Tenn. Code. Ann. § 55-10-703.

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