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Opinion No. 04-034

Amendment to Pawnbroker Statute

QUESTION

Senate Bill 2299 amends Tenn. Code Ann. § 45-6-213. As amended, the statute would authorize a law enforcement official to recover property from a pawnbroker upon receiving proof of ownership from a party seeking to recover allegedly stolen property in the pawnbroker's possession. The amendment provides for notice to the pawnbroker and an opportunity for the pawnbroker to file an action for determination of ownership rights to the property. The court would retain the property until the conclusion of any criminal proceeding if the property was used as evidence in the proceeding or for one year from the date of the hearing if no criminal proceedings involving the property have occurred. Would the statute, as amended, satisfy the due process requirements of the Tennessee and United States Constitutions?

OPINION

Provisions of the amendment authorizing warrantless seizure of the property without affording a hearing are constitutionally defensible. Provisions of the amendment affording a pawnbroker the right to notice and a hearing after seizure but before disposition of the property to another claimant are constitutionally defensible. But the proposed bill requires a court to hold property for a full year from the date of a hearing to determine ownership, and after it has determined the rightful owner, even where no criminal prosecution in which the property might be used as evidence is pending. Depending on the particular facts and circumstances, a flat one-year requirement to hold property without any determination of reasonableness may be unreasonable and, thus, violate due process of law. For this reason, the provision could be unconstitutional as applied.

ANALYSIS

This opinion concerns a proposed amendment to Tenn. Code Ann. § 45-6-213 regarding the recovery of stolen property from a pawnbroker. This Office has concluded that subdivision (b) of this statute, as currently written, violates the due process protections of the Tennessee and the United States Constitutions because it does not provide for prior notice and a hearing to protect the property interests of the pawnbroker in property alleged to be stolen. Op. Tenn. Att'y. Gen. 02-090 (August 27, 2002). Senate Bill 2299 deletes the current subdivision (b) and substitutes a new version. Under the bill, a party asserting ownership of property that the party claims is stolen and is in the possession of a pawnbroker may seek to recover the property by making a report to any law enforcement agency.

The report must include the location of the property and proof of ownership of the property. The property must have been reported stolen within thirty days after obtaining knowledge of the theft or loss, and the party asserting ownership must assist in the prosecution of the party pawning the item. Upon receipt of proof of ownership, a law enforcement officer is authorized to recover property from the pawnbroker without expense to the rightful owner. The amendment provides:

An officer recovering the property shall give the pawnbroker verbal notice followed by written notice within forty-eight (48) hours of recovering the property that describes with specificity the property and records the date and time the officer took possession of the property. The officer is authorized to take possession of the property subject to the following provisions:

(1) Within thirty (30) days of the written notice, the pawnbroker may file an action in the general sessions court for a determination of the ownership rights to the property. The court may require a bond to protect against meritless claims. The court shall hold a due process hearing within ten (10) days of service of process upon the party asserting ownership of the property and the officer retaining possession of the property to determine the owner of the property. At the hearing, the property shall be deposited with the court. The court shall issue a conditional judgment for the owner of the property and may tax costs as justice requires. However, the court shall retain possession of the property and shall release the property to the rightful owner:

(A) Following the conclusion of any criminal proceeding if the property was used as evidence in such proceeding; or

(B) No earlier than one (1) year from the date of the hearing if no criminal proceedings involving the property have occurred.

(2) If the pawnbroker does not file an action in the appropriate court within thirty (30) days of the written notice, the officer may return the property to the party asserting ownership, subject to the property's use in any criminal proceeding.

Senate Bill 2299, Section 1.

The question is whether the statute, as amended by this provision, would satisfy the due process requirements of the United States and Tennessee Constitutions. 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, although the Tennessee Supreme Court is free to expand the minimum level of protection mandated by the federal 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)).

As discussed in Op. Tenn. Att’y. Gen. 02-090, various state and federal courts have concluded that pawnshops have a constitutionally protected property interest in pawned property of which they cannot be deprived without due process. The proposed amendment permits police to seize property from a pawnshop without obtaining a warrant or affording the pawnbroker a hearing. Instead, the amendment requires law enforcement officials to provide written notice to the pawnbroker within forty-eight hours after the property has been seized. The pawnbroker then has thirty days to file an action in General Sessions Court for determination of ownership of the property. The court may require a bond for meritless claims. The court must hold a hearing within ten days of service of process upon the person claiming ownership and the law enforcement officer who seized the property. At the hearing, the property must be deposited with the court. The proposed amendment, therefore, gives the pawnbroker notice and a right to be heard regarding ownership of the property after it has been seized by the police but before it has been given to a third party. We think these procedures afford a pawnbroker adequate due process under the United States and Tennessee Constitutions. *See, e.g., Florida Pawnbrokers and Secondhand Dealers Association, Inc. v. City of Fort Lauderdale*, 699 F.Supp. 888 (S.D. Fla. 1988) (a statute authorizing police to dispose of property seized from a pawnbroker without giving the pawnbroker notice, requiring a bond to protect the pawnbroker from meritless claims, or affording a hearing before an impartial decisionmaker violates due process); *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) (Oklahoma statutes providing pawnbrokers notice and the opportunity to be heard on ownership of allegedly stolen property before it was released to the claimant are constitutional on their face).

The proposed amendment does not require law enforcement officers to obtain a warrant before seizing property that a third party has alleged to be stolen. Nor does it require a pawnbroker to be given a hearing before the property is seized. As we noted in the 2002 opinion, however, courts have found that law enforcement officials may seize pawned property without a warrant and without providing prior notice and opportunity for a hearing to obtain evidence in a criminal investigation. *Sanders v. City of San Diego*, 93 F.3d 1423 (9th Cir. 1996). Under the bill as drafted, seizure of property is conditioned on several requirements. The person claiming ownership must

submit evidence of ownership; the property must have been reported stolen within thirty days of the time the loss of the property was discovered; and the person claiming ownership must assist in the prosecution of the party pawning the property. We think the statute, therefore, is constitutionally defensible under the analysis of *Sanders* and general principles of due process analysis outlined in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) and later cases.

The proposed amendment requires the court to retain possession of the property even after it has determined ownership. The court must retain the property until the conclusion of any criminal proceeding in which the property is used as evidence and, even if no criminal prosecution is pending, for a full year from the date of the hearing, if no criminal proceedings regarding the property have occurred. We think retention of the property until the conclusion of criminal proceedings pending at the time ownership is determined is constitutionally defensible. *See, e.g., United States v. Francis*, 646 F.2d 251 (6th Cir. 1981), *cert. denied*, 454 U.S. 1082, 102 S.Ct. 637, 70 L.Ed.2d 616 (1981) (seized property, other than contraband, should be returned to its rightful owner after criminal proceedings).¹ But requiring the court to retain possession of the confiscated property for a year from the date of the hearing, even where no criminal prosecution is pending, is more problematic. Under the general statute governing personal property confiscated as stolen property by a law enforcement official, the property cannot be retained for more than thirty days without permission from a court. Tenn. Code Ann. § 40-17-118(b). Under that statute, the officer must show cause to the court, upon five days notice to the property owner, why the property should be further detained. The court may grant or refuse the requested impounding order upon such terms and conditions as are adjudged to be proper.

The proposed law provides for no such petition. Instead, the court is required to hold the property for a full year from the date of the hearing to determine ownership. By the time the hearing is held, the property may have already been in police possession for forty days.² The statute of limitations for a prosecution for a misdemeanor theft is one year from the time the offense was committed. Tenn. Code Ann. § 40-2-102; Tenn. Code Ann. § 39-14-105(1). The proposed law, therefore, would in effect require the court to hold the property until the statute of limitations for prosecuting an individual for the misdemeanor theft of the property had expired.

Federal courts have found that a United States district court may require the return of property held solely as evidence if the government has delayed in bringing a prosecution. *United States v. Premises Known as 608 Taylor Ave., Apartment 302, Pittsburgh, Pennsylvania*, 584 F.2d 1297 (3d Cir. 1978). In that case, an individual whose property was seized petitioned for a return

¹ Rule 41(g) of the Federal Rules of Criminal Procedure also authorizes a person aggrieved by the deprivation of seized property to move for its return. By contrast, Rule 41(f) of the Tennessee Rules of Criminal Procedure provides for such a motion only for unlawfully seized property.

² Under Rule 41(f) of the Tennessee Rules of Criminal Procedure, a person aggrieved by an unlawful or invalid search or seizure may move to suppress the evidence and for the return of the property unlawfully seized. This provision does not appear to provide relief, however, to an owner of lawfully seized property who wants it returned.

of property a few months after it was seized under a search warrant. The individual claimed that, by holding the property without beginning criminal proceedings, the government violated his right to due process. The district court found that the government could retain the seized property for a “reasonable time” before beginning criminal proceedings, found that retaining the property was reasonable under the circumstances, and refused to order its return.

On appeal, the United States Court of Appeals for the Third Circuit upheld the district court’s use of the reasonableness standard. The Court rejected the government’s argument that it had a right to hold property until the statute of limitations on the crime being investigated has lapsed. The Court noted that recognizing such a right “may in many cases impose an impermissible burden on a citizen whose property is potential evidence.” 584 F.2d at 1301. The Court found that, under its powers to supervise the law enforcement officials and the United States Attorney within its jurisdiction, the district court was authorized to require the return of property held solely as evidence if the government has unreasonably delayed in bringing a prosecution. *Id.* at 1302. The Court noted that, in making its determination, the district court “should carefully balance the citizen’s interest in use of his property against the wide-ranging governmental interests in law enforcement.” *Id.* The Court found, however, that the district court was also required to consider the purposes for which the property was being held in its determination of the reasonableness of the government’s retention of the property. *Id.* at 1304. For example, the Court noted that if the government’s interest in retaining the property was for its use as evidence, the district court should consider whether this purpose could be equally well served by alternatives other than retaining possession. The Court vacated the district court’s order denying the motion to return the property, therefore, and remanded the case for further proceedings.

As discussed above, the Court found the district court’s authority to order return of the property was based on its right to supervise law enforcement officials. In a concurring opinion, however, one of the judges pointed out the due process implications of continued retention of the property. The United States Court of Appeals for the Sixth Circuit has also found that the government must return seized evidence to its owner after the conclusion of criminal proceedings unless it can show cause for continuing to hold it — for example, that the property is necessary for a specific investigation. *Sovereign News Co. v. United States*, 690 F.2d 569 (6th Cir. 1982), *rehearing denied* (1982), *rehearing and rehearing en banc denied* (1983); *see also Lathon v. St. Louis*, 242 F.3d 841 (8th Cir. 2001) (police refusal to return seized property where no criminal charges were ever filed could be the subject for an action for violation of due process).

Thus, absent a pending criminal proceeding, continued holding of the property satisfies due process of law only if the holding is reasonable. Reasonableness depends upon the particular facts and circumstances involved, such as the time it ordinarily takes to investigate and begin a criminal prosecution and the value of the property in the investigation and as evidence. Depending on the particular facts and circumstances, a flat one-year requirement to hold property without any determination of reasonableness may be unreasonable and, thus, violate due process of law. For this

reason, the provision could be unconstitutional as applied.

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