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Opinion no. 04-086

Constitutionality of SB 176/HB 591

QUESTION

Whether SB 176/HB 591, which would prohibit the showing within motor vehicles of obscene and patently offensive movies which are visible to other drivers, violates Article I, § 19 of the Tennessee Constitution or the First Amendment of the United States Constitution?

OPINION

No. Both the United States Supreme Court and the Tennessee Supreme Court have held that the state may regulate the display of obscene materials.

ANALYSIS

This question concerns the constitutionality of the following language from SB 176/HB 591, which would amend Tenn. Code Ann. § 55-8-187. Section 55-8-187 currently provides:

> To avoid distracting other drivers and thereby reduce the likelihood of accidents arising from lack of attention or concentration, the display of obscene *or patently offensive bumper stickers, window signs, or other markings on a motor vehicle* which are visible to other drivers is prohibited and display of such materials shall subject the owner of the vehicle on which they are displayed, upon conviction, to a fine of not less than two dollars ($2.00) nor more than fifty dollars ($50.00). "Obscene" or "patently offensive" has the meaning specified in §39-17-901.

The proposed amendment to §55-8-187 seeks to substitute "and patently offensive movies, bumper stickers, window signs or other markings on, or in, a motor vehicle," for the italicized language above.

This office has previously opined that the current version of Tenn. Code Ann. § 55-8-187 is constitutionally sound so long as the prohibited materials satisfy the test for obscenity established by the United States Supreme Court. *See* Op. Tenn. Att'y Gen. No. 88-44 (1988). The Supreme Court has held that the police powers of the state permit the regulation of the display of obscene

materials, including movies, and established the following test for judging whether material is obscene: (1) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The Supreme Court recently reaffirmed this test in *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 122 S.Ct. 1700, 1708, 152 L.Ed.2d 771 (2002). The Court also reiterated that the "patently offensive" prong of the test is a question of fact to be decided by a jury applying contemporary community standards. *Id.*, 535 U.S. at 576, n. 7; *see also* Tenn. Code Ann. § 39-17-901(11) ("patently offensive" is defined as "that which goes substantially beyond customary limits of candor in describing or representing such matters").

The Tennessee Supreme Court has held that the same test for obscenity set forth in *Miller* and *Ashcroft v. Am. Civil Liberties Union* is applicable under the Tennessee Constitution. *Davis-Kidd Booksellers, Inc v. McWherter,* 866 S.W.2d 520 (Tenn. 1993); *see also* Tenn. Code Ann. § 39-17-901(10) (applying same standard as definition for "obscene"). Accordingly, it is the opinion of this office that the proposed amendment to Tenn. Code Ann. § 55-8-187 is constitutionally sound if the movies in question satisfy the test established in *Miller* and are visible to other motorists.

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