S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

January 13, 2006

Opinion No. 06-010

Penalties for Panhandling in Violation of City Ordinance

QUESTIONS

1. May the General Assembly, by statute, authorize cities to levy a fine for more than fifty dollars for second or subsequent violations of a city ordinance prohibiting panhandling?

2. May the General Assembly, by statute, authorize cities to enact a graduated scale of penalties for repeat violations, such as:

a. Citation for aggressiveness on the first offense;

b. Restriction from an area for a certain period time for the second offense;

c. Revocation of a soliciting license, presently issued monthly, for a certain period of time;

d. A fine of fifty to one hundred dollars for a fourth offense;

e. Incarceration for a fifth offense?

OPINIONS

1. Under Article VI, Section 14, of the Tennessee Constitution, a punitive fine of more than fifty dollars for the violation of a city ordinance must be imposed by a jury, unless the defendant waives the right to a jury trial. Municipal ordinances are ordinarily enforced by city courts, some of which have concurrent general sessions jurisdiction over offenses within city limits. Under current law, city courts are not authorized to empanel juries.

2. a. Provided that the statute or the ordinance clearly defines "aggressive panhandling" so that persons of ordinary intelligence are on notice of precisely what conduct is forbidden, the General Assembly may authorize a city to cite an individual for aggressive panhandling.

b. Banning an individual from access to an area would be subject to different standards of review, depending on whether the area involved is a public forum or a nonpublic forum. Temporarily banning an individual from a public forum could be found unconstitutional because it

interferes with the individual's right to free expression and is not narrowly tailored to further a compelling municipal interest. On the other hand, it could also be argued that this type of ban is a far less restrictive penalty than imprisonment and, therefore, constitutionally defensible. Temporarily banning an individual from access to a nonpublic forum, on the other hand, would be constitutional so long as it is reasonable.

c. Requiring a license is a prior restraint and, therefore, subject to stringent constitutional review. Further, the punishment may be subject to different standards of review depending on whether the license involves panhandling in a public forum or in a nonpublic forum. If the license pertains to a public forum, then revoking the permit for continued violations of the city ordinance would be constitutional only if it is narrowly tailored to further a substantial city interest. On the other hand, if the license involves panhandling in a nonpublic forum, then revoking it for continued violations of the ordinance would be constitutional so long as it is reasonable.

d. As discussed above in the answer to Question 1, a punitive fine of more than fifty dollars for violation of a city ordinance must be imposed by a jury, unless the defendant waives the right to a jury trial. Municipal ordinances are ordinarily enforced by city courts, some of which have concurrent general sessions jurisdiction over offenses within city limits. Under current law, city courts are not authorized to empanel juries.

e. A court authorized to impose this punishment must meet the requirements of an "inferior court" within the meaning of Article VI of the Tennessee Constitution. The judge of an inferior court must be popularly elected to an eight-year term. Further, in order to satisfy due process requirements, the judge authorized to imprison an individual for multiple violations of the panhandling ordinances must be an attorney. Not all city judges are currently required to be attorneys.

ANALYSIS

1. Authority to Impose a Fine of More than Fifty Dollars

This opinion addresses whether the General Assembly may, by statute, authorize municipalities to impose a range of penalties for violations of a city ordinance against panhandling. As an initial matter, we note that, while begging is speech entitled to First Amendment protections, courts have upheld city ordinances imposing time, place, and manner restrictions narrowly tailored to promote a substantial city interest. *Gresham v. Peterson,* 225 F.3d 899 (7th Cir. 2000). No definitive answer to these questions is possible without reviewing the proposed statute. Any discussion of the issues raised in this request, however, requires an outline of certain applicable constitutional standards.

First, the request does not specify the areas where panhandling would be regulated. As a general matter, regulation of expressive conduct protected by the First Amendment — including panhandling — on public property is subject to varying degrees of review, depending on whether the property in question is a public forum. As a proprietor, the government may regulate to preserve

the property for the use to which it is properly dedicated. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50-51, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The "existence of a [First Amendment] right of access to public property and the standard by which limitations upon such right must be evaluated differ depending on the character of the property at issue." 460 U.S. at 44. The *Perry* Court explained that three categories have been recognized into which all government property must fall: public fora, limited public fora, and non-public fora. Public fora are "places which by long tradition or by government fiat have been devoted to assembly and debate," and in such fora "the rights of the State to limit expressive activity are sharply circumscribed." *Id.* at 45. The prime example of public fora are streets and parks, which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939). In public fora, the State may enforce regulations as to time, place, and manner of expression. These regulations must be content-neutral and narrowly tailored to serve a significant government interest leaving open ample alternate channels of communication. *Perry, supra*, 460 U.S. at 45. *See* Op. Tenn. Att'y Gen. 02-131 (December 12, 2002); Op. Tenn. Att'y Gen. 90-105 (December 19, 1990).

A second category of property is called the limited, or designated, public forum. This is government property that the State has opened for use by the public as a place for expressive activity. The State may not be required to create the forum in the first place and is not required to keep the facility open indefinitely, but "as long as it does so it is bound by the same standards as apply in a traditional public forum." *Perry*, at 46. A limited public forum may be opened only to certain groups. Finally, for purposes of First Amendment analysis, a "nonpublic forum" is public property that is not by tradition or designation a forum for public communication; in addition to time, place, and manner regulations, a state may reserve a nonpublic forum for its intended purposes, communicative or otherwise, as long as regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose a speaker's view. *Id.* For example, the United States Supreme Court concluded that airport terminals, while publicly owned and operated, are not "public fora." *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992), *aff'd*, 505 U.S. 830, 112 S.Ct. 2709, 120 L.Ed.2d 669 (1992). Under these decisions, regulation of speech in a nonpublic forum must be reasonable and not be an effort to suppress expression merely because public officials oppose a speaker's view. Governmental control over access to a nonpublic forum may be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and they are viewpoint neutral. Further, the government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation. Review of any panhandling ordinance, therefore, must first focus on the nature of the property the ordinance regulates.

Second, the request refers to a requirement that an individual obtain a license before he or she may engage in panhandling. A licensing requirement is a prior restraint, and prior restraints face a "heavy presumption" of invalidity. *Forsyth City, Georgia v. Nationalist Movement*, 505 U.S. 123, 130, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Municipalities generally can regulate the use of public forums by a permit or licensing scheme where the scheme does not confer overly broad

discretion upon a public official, is content-neutral, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels for communication. *See, e.g.,* Op. Tenn. Att'y Gen. 98-080 (April 7, 1998) (parade ordinance). In order to survive constitutional scrutiny, a system imposing a prior restraint must also provide for procedural safeguards, including immediate judicial review. *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44, 97 S.Ct. 2205, 2206, 53 L.Ed.2d 96 (1977); *Freedman v. State of Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1964).

In an unreported opinion, the United States District Court for the Southern District of Ohio recently refused a city's motion to dismiss a constitutional challenge to its panhandling ordinance. *Henry v. City of Cincinnati*, 2005 WL 1198814 (S.D. Ohio, April 28, 2005). The ordinance included a requirement that panhandlers obtain a valid registration from the police department before they may engage in solicitation. The registration was issued free of charge to anyone who presented identification or swore that he or she had no identification, and permitted himself or herself to be photographed. The Court noted that this requirement was subject to review as a prior restraint. After a lengthy analysis discussing conflicting case authority, the Court concluded that the ordinance was content-neutral. The Court also noted that a state's ordinary judicial review procedures may be a sufficient procedural safeguard if the courts remain sensitive to the need to prevent First Amendment harms, and where the licensing scheme does not censor expression, but only applies reasonably objective, nondiscretionary criteria unrelated to the content of expression. *Id.* at 9, *citing City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 124 S.Ct. 2219, 2224, 159 L.Ed.2d 84 (2004). The Court refused to dismiss the challenge to the ordinance, however, because it concluded that the plaintiffs might be able to demonstrate that the requirement was not narrowly tailored to a significant government interest, or did not in practice provide for a prompt review of registration denials.

The first question is whether the General Assembly may, by statute, authorize municipalities to levy a fine of more than fifty dollars for multiple violations of a city ordinance prohibiting panhandling. The Tennessee Supreme Court has held that, under Article VI, Section 14, of the Tennessee Constitution, a court cannot impose a punitive fine of more than fifty dollars for violation of a city ordinance unless the defendant waives his or her right to a jury trial. *City of Chattanooga v. Davis*, 54 S.W.3d 248 (Tenn. 2001). This prohibition applies irrespective of any right afforded the defendant to obtain a jury trial upon appeal to a higher court. *Town of Nolensville v. King,* 151 S.W.3d 427 (Tenn. 2004). A punitive fine of more than fifty dollars for violation of a city ordinance, therefore, must be imposed by a jury. Municipal ordinances are ordinarily enforced by city courts, some of which have concurrent general sessions jurisdiction over offenses within city limits. Under current law, city courts are not authorized to empanel juries.

2. Other Penalties

a. Citation for Aggressiveness

The next question is whether the General Assembly may, by statute, authorize a city to cite an individual for aggressive panhandling on the first offense. Provided that the statute or the ordinance clearly defines "aggressive panhandling" so that persons of ordinary intelligence are on notice of precisely what conduct is forbidden, the General Assembly may authorize a city to cite an individual for aggressive panhandling. *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 530, 532 (Tenn. 1993), quoting *Kolender v. Lawso*n, 461 U. S. 352, 358, 103 S.Ct. 1855, 1858, 75 L.Ed.2d (1993) (due process requires that a statute "must 'define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'").

b. Banning from an Area on Second Offense

The next question is whether the General Assembly may, by statute, authorize a city to ban an individual from going into an area where he or she has obtained a permit to panhandle for a certain period of time. This punishment would be imposed for a second violation of a city panhandling ordinance. We have found no case that addresses the constitutionality of this kind of punishment. As discussed above, regulation of panhandling in a public forum must be narrowly tailored to further a compelling state interest. Banning an individual from a public forum could be found unconstitutional because it interferes with the individual's right to free expression and is not narrowly tailored to further a compelling municipal interest. On the other hand, it could also be argued that this type of ban is a far less restrictive penalty than imprisonment and, therefore, constitutionally defensible.

Where the regulation concerns panhandling in a nonpublic forum, the standard of review is lower. As noted above, governmental control over access to a nonpublic forum may be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and they are viewpoint neutral. Further, the government's decision to restrict access to a nonpublic forum need only be reasonable. Banning an individual from access to a nonpublic forum, therefore, would be constitutional so long as it is reasonable.

c. Suspending Permit

The next question is whether the General Assembly could authorize a city to revoke or suspend a panhandling permit issued to an individual upon the third violation of the city's panhandling ordinance. As discussed above, requiring a license is a prior restraint and, therefore, subject to stringent constitutional review. Further, the punishment may be subject to different standards of review depending on whether the license involves panhandling in a public forum or in a nonpublic forum. If the license pertains to a public forum, then revoking the permit for continued violations of the city ordinance would be constitutional only if it is narrowly tailored to further a substantial city interest.

d. Fine of Fifty to One Hundred Dollars

The next question is whether the General Assembly could authorize a city to impose a fine of fifty to one hundred dollars for a fourth offense. For the reasons discussed above in the answer to Question 1, a punitive fine of more than fifty dollars must be imposed by a jury, unless the defendant waives the right to a jury trial. Municipal ordinances are ordinarily enforced by city courts, some of which have concurrent general sessions jurisdiction over offenses within city limits. Under current law, city courts are not authorized to empanel juries.

e. Incarceration

The last question is whether the General Assembly could authorize a city to incarcerate an individual for a fifth violation of a city's panhandling ordinance. A court authorized to impose this punishment must meet the requirements of an "inferior court" within the meaning of Article VI of the Tennessee Constitution. Thus, the judge of the court must be elected for an eight-year term. We reach this conclusion because, at the time Article VI was adopted, justices of the peace — the forerunners of city courts — were only authorized to try "small" offenses. Op. Tenn. Att'y Gen. 05-061 (April 27, 2005). "Small" offenses are those that carry a maximum fine of fifty dollars and for which no imprisonment may be inflicted. We think a court would conclude that the power to try individuals for an offense punishable by imprisonment must be exercised by an inferior court that meets the requirements of Article VI of the Tennessee Constitution. Not all city courts are "inferior courts" subject to the requirements of Article VI.

Further, the Tennessee Supreme Court has found that the due process protections of Article I, Section 8, of the Tennessee Constitution guarantee to a criminal defendant on trial for an offense punishable by incarceration the right to be tried before an attorney judge. *City of White House v. Whitley*, 979 S.W.2d 262 (Tenn. 1998). The judge authorized to imprison an individual for multiple violations of the panhandling ordinances, therefore, must be an attorney. Not all city judges are currently required to be attorneys.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Barbara Cooper
State Representative
38 Legislative Plaza
Nashville, TN 37243-0186