

STATE OF TENNESSEE
OFFICE OF THE
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Opinion No. 06-173

Consideration of Attempted Felony Conviction for Purpose of Police Officer Certification by
Tennessee Peace Officer Standards and Training Commission.

QUESTION

Where a candidate for chief of police pled guilty in 1965 to “Attempt to Commit a Felony” as a lesser included offense of larceny of a vehicle of a value of five hundred dollars (\$500), does his plea prohibit the candidate from being employed as a police officer under Tenn. Code Ann. § 38-8-106(4), which prohibits such employment for a candidate who has been convicted or pleaded guilty to any felony charge?

OPINION

No. Under Tennessee law, as it was in effect in 1965, felonies were defined as “violations of law punished by imprisonment in the penitentiary or by the infliction of the death penalty[.]” Since the subject in this case was sentenced to eleven months and twenty-nine days, suspended for five years, the subject was not eligible for “imprisonment in the penitentiary,” which required a sentence of one year confinement or more. Therefore, having pled guilty to a misdemeanor offense, the Peace Officer Standards and Training Commission could properly grant a waiver of pre-employment requirements to allow the candidate to serve as a police officer, or more specifically, as a chief of police.

ANALYSIS

The Executive Secretary of the Tennessee Peace Officer Standards and Training Commission requests the opinion of the Attorney General regarding the qualification of a police chief to act as a Tennessee police officer where the classification of a past offense earlier deemed to be a misdemeanor appears on closer examination to be a felony. Due to the sensitive nature of this inquiry, the name of the police chief and the city where he has served will not be mentioned in this opinion. The subject police chief will be referred to hereafter simply as “the subject.”

In 1965, the subject was indicted for larceny of “one 1960 Chevrolet automobile . . . of the value of Five Hundred Dollars.” Subsequently, the subject entered a plea of guilty “to an attempt to commit a felony, the State waiving the graver charge.” The court accepted the plea, found the subject guilty and sentenced him to serve eleven months and twenty-nine days in the County Workhouse, such sentence suspended subject to a five-year term of probation.

In 1965, the law in Tennessee was codified under the 1955 version of Tennessee Code Annotated, as modified by amendments during the subsequent years. When the subject entered his plea to the charge of attempt to commit a felony in 1965, the following provisions of the Tennessee Code were in effect:

§ 39-103 — Felonies and misdemeanors distinguished. — All violations of law punished by imprisonment in the penitentiary or by the infliction of the death penalty, are, and shall be denominated, felonies, and all violations of law punished by fine or imprisonment in the county jail or workhouse, or both, shall be denominated misdemeanors.¹

§ 39-104 — Penalty for felony. — Whenever a person is convicted, either as principal or accessory, of a felony the punishment for which is not otherwise provided in this Code, he shall be sentenced to imprisonment in the penitentiary not less than one (1) nor more than ten (10) years.

§39-105 — Penalty for misdemeanor. — Every person who is convicted of a misdemeanor, the punishment for which is not otherwise prescribed by a statute of this state, shall be punished by imprisonment in the county jail or workhouse not more than one (1) year, or by fine not exceeding one thousand dollars (\$1,000), or by both, in the discretion of the court.

§39-603 — Assault with intent to commit felony — Attempt to commit felony — Penalty. — If any person assault another, with intent to commit, or otherwise attempt to commit, any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars (\$500).

§39-4203 — “Grand” and “petit larceny” defined. — Grand larceny is the felonious taking and carrying away personal goods over the value of one hundred dollars

¹The language of Tenn. Code Ann. § 39-103 survived subsequent modifications to the Code, codified in the 1986 version of the Code at Tenn. Code Ann. § 39-1-103. It was not until the 1989 revision of the Code that the language was changed under Tenn. Code Ann. § 39-11-110 to reflect the following:

All violations of law which may be punished by one (1) year or more of confinement or by the infliction of the death penalty are denominated felonies and all violations of law punishable by fine or confinement for less than one (1) year, or both, are denominated misdemeanors.

As stated above, Tenn. Code Ann. § 39-11-110 is the current state of the law in Tennessee.

(\$100.00), and petit larceny, of goods not exceeding in value one hundred dollars (\$100.00).²

§39-4204 — Punishment for grand and petit larceny. — The punishment for grand larceny is imprisonment in the penitentiary not less than three (3) years nor more than ten (10) years; and for petit larceny, not less than one (1) year nor more than five (5) years.

§40-2901 — Powers of trial judge - Costs.. — Whenever any person has been found guilty of a crime upon a verdict or a plea of guilty, all trial judges in the state having criminal jurisdiction are authorized and empowered to suspend the execution of sentence and place the defendant or defendants on probation, subject to such conditions as the trial judge may deem fit and proper. The trial judge shall possess the power to set the duration of such suspension at any period of time equal to the minimum sentence, but not more than the maximum sentence provided for the offense committed by the defendant or defendants, and to terminate the balance of such suspension at any time not less than the minimum provided for the offense committed by the defendant or defendants.³

Because the subject was sentenced to eleven months and twenty-nine days for his attempt to commit a felony, it would initially appear that he pled guilty to and was convicted of a misdemeanor. However, the analysis does not stop there.

The subject was originally indicted on a charge of larceny of a vehicle valued at five hundred dollars (\$500.00). In accordance with Tenn. Code Ann. §§ 39-4203 and 4204, the felonious taking of goods over the value of one hundred dollars (\$100) merits punishment in a range of “not less than three (3) years nor more than ten (10) years.” A careful examination of the language of the judgment reveals that the offense to which the subject pled guilty was “Attempt to Commit a Felony.” Tenn. Code Ann. § 39-603 states that “[i]f any person . . . attempt to commit, any felony or crime punishable by imprisonment in the penitentiary, . . . he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars (\$500).” Under Tennessee law as it existed in 1965, the court and/or jury had the authority to render a punishment for “Attempt to Commit a Felony” which could be either a misdemeanor or a felony, covering a range of confinement from imprisonment in the county workhouse or jail for less than a year to imprisonment in the penitentiary for up to five years.

²This is the language of Tenn. Code Ann. § 39-4203 (1955) as amended by Tenn. Pub. Acts 1957, ch. 301, § 2, March 23, 1957, which, as shown above, changed the threshold amount between grand larceny and petit larceny from sixty (\$60.00) to one hundred dollars (\$100.00).

³This is the language of Tenn. Code Ann. § 40-2901 (1955) as amended by Tenn. Pub. Acts 1963, ch. 192, § 1, which, as shown above, sets the limits of suspension in accordance with the minimum and maximum punishments for the offense of which a defendant was convicted.

Although the offense was *punishable* by imprisonment in the penitentiary, in the subject's case it was actually *punished* by imprisonment in the County Workhouse, suspended for five years. The language of Tenn. Code Ann. § 40-2901 empowers the trial judge to suspend a sentence as the judge did in the subject's case in 1965. The limits of the judge's power to suspend are for a term "equal to the minimum sentence, but not more than the maximum sentence provided for the offense committed by the defendant." Even though the period of suspension was consistent with the maximum term of imprisonment for the offense as a felony, the statutory distinction between a felony and a misdemeanor in effect in 1965 speaks only in terms of the subject's imprisonment and not in terms of the length of the term of probation. By the terms of the sentence, the subject was never eligible for imprisonment in the penitentiary and therefore did not plead guilty to a felony offense.

Based on careful consideration of the subject's sentence in the context of the statutes in effect at the time the subject was convicted and sentenced, it is the opinion of this office that the subject's 1965 conviction for "Attempt to Commit a Felony" was a misdemeanor conviction.

Tenn. Code Ann. § 38-8-106(a)(4) requires that a person employed as a police officer shall "[n]ot have been convicted of or pleaded guilty to or entered a plea of nolo contendere to any felony charge or to any violation of any federal or state laws or city ordinances relating to force, violence, theft, dishonesty, gambling, liquor or controlled substances[.]" Having determined that the subject did not plead guilty to a felony charge, it is clear that he nonetheless pleaded guilty to a state law relating to theft and dishonesty, which also disqualifies him from service as a police officer. However, the Peace Officer Standards and Training Commission is required under Tenn. Code Ann. § 38-8-104(e), to "establish criteria for determining whether to grant an exception to or to waive the qualifications of § 38-8-106." Accordingly, POST Rule 1110-9-.04(1)(b) establishes the following criteria for granting waivers from pre-employment requirements relating to criminal activity:

Criminal Activity - The Commission may consider a waiver from preemployment requirements relating to criminal activity on an individual basis and depending on the circumstances.

1. Waivers may be granted if the officer has been convicted of or pleaded guilty to or entered a plea of nolo contendere to any violation of any federal or state law or city ordinance (excluding felony charge and domestic violence) with the following charges:
 - (i) relating to force, violence, theft, dishonesty, gambling, liquor (including driving while intoxicated);
 - (ii) or controlled substances when the offense was classed as a misdemeanor.

Considering the criteria established by the POST Commission for granting waivers of the pre-employment requirements related to criminal activity, the Commission may not grant a waiver for a candidate's guilty plea to a felony charge, but may grant a waiver for a guilty plea to a misdemeanor charge relating to theft or dishonesty. A previous POST Commission having taken such action to grant the subject an appropriate waiver, no further action is now required or appropriate.

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