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Opinion No. 08-42

On the constitutionality of confinement as a condition of pre-trial and judicial diversion

QUESTION

Senate Bill 2847 would amend the pre-trial diversion statute, Tenn. Code Ann. § 40-15-105(a)(2), and the judicial diversion statute, Tenn. Code Ann. § 40-35-313(a)(1)(A), to permit up to 30 days of confinement as a condition of diversion. Are these proposed amendments constitutional?

OPINION

It is the opinion of this office that such a requirement can be defended as serving a legitimate remedial governmental interest and having appropriate due process protections. There is no clearly established rule of either state or national constitutional law that would prohibit the requirement of confinement for up to 30 days as a condition of either pre-trial diversion or judicial diversion. However, as an issue of first impression, such provisions could be found to violate the courts' traditional constitutional authority with respect to ordering confinement. Also, as an issue of first impression, such provisions could be found to violate the Fifth Amendment's Due Process Clause in that the period of confinement is excessive when compared to the purpose of diversion.

ANALYSIS

The pre-trial diversion statute, Tenn. Code Ann. § 40-15-105, permits a qualified criminal defendant and the District Attorney General to suspend a prosecution for up to two years by entering into a memorandum of understanding that imposes behavioral and other conditions on the defendant with a view toward rehabilitation. Similarly, the judicial diversion statute, Tenn. Code Ann. § 40-35-313, allows the trial court to defer proceedings against a qualified defendant after conviction and place the defendant on probation upon such reasonable conditions as it may require without entering a judgment of guilty and with the consent of the defendant. Currently, neither statute authorizes a term of confinement as a condition of diversion. The pre-trial diversion statute has an exclusive list that does not include confinement. Tenn. Code Ann. § 40-15-105(a)(1)(2). The judicial diversion statute does not have a provision specifically addressing the issue of confinement, but it does require the defendant to be placed on probation. Tenn. Code Ann. § 40-35-313. The proposed statutory amendments in Senate Bill 2847 would provide statutory authority for the imposition of confinement as a condition of these diversionary programs.

Our state and national constitutions recognize two occasions on which a citizen may be seized and deprived of liberty. The first occurs when a citizen is initially arrested based upon probable cause that a crime had been committed. U.S. Const. amend. IV.; Tenn. Const. art. I, § 7; *Gerstein v. Pugh*, 420 U.S. 103, 111-112 (1975). The second occurs in accordance with the judgment of a trial court entered at the conclusion of a trial. U.S. Const. amends. V, VI, and VIII; Tenn. Const. art. I, §§ 8 and 9. Otherwise, except in capital cases, all prisoners are entitled to pre-trial release upon a reasonable bail by sufficient sureties. U.S. Const. amend. VIII; Tenn. Const. art. I, §§ 15 and 16; *Bell v. Wolfish*, 441 U.S. 520, 534 (1979). More importantly, although an alleged criminal may be detained before trial if bail is not posted, "under the [Fifth Amendment's] Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Wolfish, supra*, at 535.

In *Wolfish*, the United States Supreme Court summarized the constitutional principles governing pre-trial detention:

> A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a "judicial determination of probable cause as a prerequisite to the extended restraint of his liberty following arrest . . . . Under such circumstances, the Government concededly may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.

Id. at 536 (internal citations omitted). The test for drawing a distinction between "punitive measures" and pre-trial "regulatory restraints" was established by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963), and includes the following considerations:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are relevant to the inquiry . . . .

Id. at 168-169 (emphasis in original). In *Wolfish*, the Court applied the *Mendoza-Martinez* test and, in doing so, provided clarification concerning its application:

> A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish . . . that determination generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the

alternative purpose assigned to it.

441 U.S. at 538-539; *see Schall v. Martin*, 467 U.S. 253, 269 (1984) (applying *Wolfish* test to pre-trial detention of juveniles); *United States v. Salerno*, 481 U.S. 739, 746-751 (1987) (discussing whether pre-trial detention under the Bail Reform Act violates due process).

In accordance with these authorities, our state supreme court and court of criminal appeals have recognized that "to punish an individual without a prior adjudication of guilt is a violation of due process." *State v. Pennington*, 952 S.W.2d 420, 423 (Tenn. 1997) (citing *Mendoza-Martinez, supra*)); *State v. Johnson*, 980 S.W.2d 414, 421 (Tenn. Crim. App. 1998). The *Pennington* and *Johnson* courts held that "[p]re-trial detention that is remedial as distinguished from punitive is permissible provided that the individual is afforded sufficient procedural due process." 952 S.W.2d at 423; 980 S.W.2d at 421.

The issue of whether it is constitutional to impose confinement as a condition of pre-trial diversion has not been addressed in our state courts or the United States Supreme Court. However, with respect to judicial diversion, the issue has been addressed as a matter of statutory construction.[1] In 1992, this Office opined that imposing a period of confinement in a workhouse would be inconsistent with the sentencing act because "the language of the [judicial diversion] statute is not compatible with the concept of confinement in the workhouse for any period of time." Op. Tenn. Atty. Gen. No. 92-33 (Apr. 16, 1992). This Office reached that conclusion because, in accordance with the judicial diversion statute, "no judgment of guilt is to be entered [and] the court would not be authorized to sentence the defendant to a period of confinement." *Id.*[2] The reasoning of that opinion was soon adopted by the Court of Criminal Appeals. As a result, when trial courts have imposed confinement as a condition of probation pursuant to a judicial diversion order, the Court of Criminal Appeals has invalidated those conditions as inconsistent with the Sentencing Reform Act, in general, and the judicial diversion statute, in particular. *See, e.g., State v. Johnson*, 15 S.W.3d 515 (Tenn. Crim. App. 1999) (Rule 11 app. denied Mar. 13, 2000)*; State v. Vasser*, 870 S.W.2d 543 (Tenn. Crim. App. 1993) (No Rule 11 app. filed)*; State v. Porter*, 885 S.W.2d 93, 94 (Tenn. Crim. App. 1994) (No Rule 11 app. filed); *State v. Paul David Cable*, No. 03C01-9409-CR-00349, 1995 WL 328796 (Tenn. Crim. App. June 1, 1995) (No Rule 11 app. filed).

Although the opinions of the intermediate appellate court do not address the constitutionality of confinement as a condition of diversion, the court's opinions provide some guidance on that issue. In particular, the opinion in *State v. Vasser*, 870 S.W.2d 543 (Tenn. Crim. App. 1993), comes closest to addressing the issue of the constitutionality of confinement as a condition of diversion. In *Vasser*, the defendant, who was convicted of DUI, appealed the denial of judicial diversion. *Id.* On appeal,

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[1] The issue has never been litigated in the context of pre-trial diversion. As previously noted, the pre-trial diversion statute contains an exclusive list of conditions that does not include confinement, except in a residential treatment facility.

[2] In that opinion, this office was not asked to consider the constitutionality of confinement as a condition of diversion. *Id.*

the question was whether a defendant convicted of DUI was eligible for judicial diversion. *Id.* To resolve that question, the court looked to the intrinsic nature of judgments, convictions, and sentences. *Id.* at 545-546. In doing so, the court noted that "the judgment provides the legal authority for the executive branch of government to incarcerate a person who is sentenced to confinement." *Id.* at 546. Ultimately, the court concluded that, because the judicial diversion statute prohibits entry of a judgment and requires a period of probation, the statute precluded the imposition of a sentence of confinement. *Id.* at 547.

Subsequently, *Vasser* has been cited for recognizing the proposition that "traditionally" it is the trial court's entry of a judgment imposing a sentence that authorizes confinement. *State v. Paul David Cable*, No. 03C01-9409-CR-00349, 1995 WL 328796 (Tenn. Crim. App. June 1, 1995). In another case, the court held, "Inasmuch as no judgment of guilt is to be entered when judicial diversion is granted, the trial court would not be authorized to sentence the defendant to a period of confinement." *State v. James C. Wolford*, No. 03C01-9708-CR-00319, 1999 WL 76447 (Tenn. Crim. App. Feb. 18, 1999) (Rule 11 app. denied Sept. 20, 1999).

Although not specifically stated in constitutional terms, the court's invocation of traditional judicial authority can be read as an oblique reference to the constitutional authority of courts to impose sentences of confinement and, in turn, the executive branch's authority to imprison defendants. More recently, one judge on the intermediate appellate court stated, in a dissenting opinion, that "a valid judgment is a necessary prerequisite to enforcement of any sentence, by operation of law or otherwise." *Thomas Braden v. Ricky Bell, Warden*, No. M2004-01381-CCA-R3-HC, 2005 WL 2008200 (Tenn. Crim. App. Aug. 19, 2005) (Tipton, J., dissenting). Nevertheless, the cases adjudicate the issue as one of statutory construction, rather than constitutional authority. And, in *Paul David Cable*, the court specifically noted "the absence of specific [statutory] language that [could] be construed as authorizing confinement" in finding that the term of confinement imposed as a condition of judicial diversion probation was illegal. 1995 WL 328796 at *5.

Ultimately, there appear to be two potential problems with the amendments proposed in Senate Bill 2847. The first is the "traditional authority" of courts to impose confinement under the state constitution. This office has found no authority that specifically authorizes trial courts to impose pre-trial confinement for remedial or punitive purposes, except the confinement attendant to the initial arrest and the failure to post bail. This question would likely arise as an issue of first impression if Senate Bill 2847 is enacted into law, and at least one judge would question the authority of the courts to impose confinement prior to entry of judgment. The second potential problem is the question of Due Process under the United States Constitution. As long as the amendments are not adopted for the express purpose of punishing a pre-trial detainee on diversion, the matter would turn on the questions identified in *Wolfish*: whether the confinement is designed to serve a legitimate diversionary purpose rather than a punitive purpose and whether the confinement is excessive in relation to the diversionary purpose. *See Wolfish*, 441 U.S. at 538-539.

It is the opinion of this office that, consistent with the constitutional principles previously discussed, the diversion statute serves a legitimate remedial governmental interest. Additionally, the procedure established by the diversion statutes provides criminal defendants sufficient

procedural due process protections to withstand constitutional scrutiny as a general matter. However, given the nature of diversionary programs, which are designed to permit qualified defendants to rehabilitate themselves while avoiding the usual consequences of a criminal conviction, statutory provisions providing for confinement as a condition of diversion could be challenged on the grounds that the period of confinement is excessive in violation of due process. *Id.* This, too, would be an issue of first impression. Although reasonable arguments may be advanced in support of the constitutionality of the proposed amendments, the outcome of litigation challenging the amendments on constitutional grounds is uncertain.

Therefore, this office has found no clearly established rule of state or national constitutional law that would prohibit the requirement of confinement for up to 30 days as a condition of either pre-trial diversion or judicial diversion. However, there is a possibility that a period of confinement imposed in the absence of a judgment of conviction could run afoul of the traditional constitutional authority of trial courts to impose sentences of confinement and could be found to violate the defendant's right to due process of law.

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