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Opinion No. 08-77

Constitutionality of HB 3137 Relating to Confidentiality of Handgun Permit Records

QUESTION

If enacted, would HB 3137, which makes records related to the issuance of handgun carry permits confidential and not subject to public inspection, be vulnerable to constitutional challenge?

OPINION

If enacted, HB 3137 likely would survive a facial challenge to its constitutionality. However, it might be vulnerable to an as-applied challenge under the First Amendment, depending on the facts and circumstances of the particular case.

ANALYSIS

Under current law, records related to the issuance of handgun carry permits are public records. Section 10-7-503(a), Tennessee Code Annotated, states that all state, county and municipal records are open to public inspection unless state law provides otherwise.[1] As shown by *Schneider v. City of Jackson*, 226 S.W.3d 332 (Tenn. 2007), such records are presumed to be available to the public unless a specific exemption protects the records from disclosure. At present, there is nothing under Tenn. Code Ann. § 39-17-1351, the statute governing the issuance of handgun carry permits, or any other statute that would prevent public access to records related to the issuance of handgun carry permits.

HB 3137, if enacted, would shield records related to handgun carry permits from public view. Section 1 states that all information contained in the application for a handgun carry permit, all information provided to any federal, state, county or municipal agency or employee of those agencies in connection with the investigation of the applicant, and any information related to the renewal of any such permit are confidential and not subject to public inspection. Section 1 further provides that such information may not be published in any manner. Under that same section, any

[1] Exceptions to the general rule can be found in various statutes. For example, Tenn. Code Ann § 10-7-504 provides that TBI investigative records, medical records of patients in public hospitals, and other specific types of state, municipal and county records are confidential and not open to public inspections. Also, as shown by *Waller v. Bryan*, 16 S.W.3d 770 (Tenn. Ct. App. 1999) and *Arnold v. City of Chattanooga*, 19 S.W.3d 779 (Tenn. Ct. App. 1999), additional exceptions can be found in the Tennessee Rules of Civil Procedure and the Tennessee Rules of Criminal Procedure.

violation is made a criminal act punishable as a Class E felony.

A statute that is challenged on constitutional grounds is presumed to be valid, and the courts will make every reasonable attempt to uphold it. *Muller Optical Co. v. EEOC*, 743 F.2d 380 (6th Cir. 1984); *Brown v. Bd of Commissioners of City of Chattanooga*, 722 F. Supp. 380 (E.D. Tenn. 1989). The burden of demonstrating unconstitutionality rests with the party making such a claim. *In re Frosty Morn Meats, Inc.*, 7 B.R. 988 (M.D. Tenn. 1980).[2]

A challenger may argue that the statute is either facially invalid or that it is unconstitutional as applied in a particular case. *United States v. Salerno*, 481 U.S. 739 (1987). In that case, the Court noted that facial challenges are the most difficult to sustain because a party must show that no circumstances exist under which the statute would be valid. *Id.* at 745.

It is unlikely that a person could mount a successful facial challenge against HB 3137. It is unlikely that a challenger could meet the burden of showing that it is unconstitutional under any circumstances to make permit files confidential. Deciding which records are exempt from public disclosure is a matter of legislative prerogative.[3] The General Assembly has exercised that prerogative on prior occasions when it created exemptions for other types of records. For example, Tenn. Code Ann. § 10-7-504 exempts investigative records of the TBI, as well as other types of records. Likewise, under Tenn. Code Ann. § 40-32-101, expunged criminal records are not available for public inspection. No cases have been found in which successful facial challenges were raised against either of those provisions.

The inclusion of a criminal penalty for the disclosure of handgun carry permit information should also withstand a facial attack. Determining what conduct is criminal and how it should be punished are matters of legislative prerogative. *See State v. Farner*, 66 S.W.3d 188, 200 (Tenn. 2001). That prerogative includes the authority to determine whether disclosure of certain types of information is a crime and how it should be punished. The legislature has enacted other statutes that impose criminal penalties for the disclosure of confidential information. For example, Tenn. Code Ann § 36-1-125 states that unauthorized disclosure of adoption records is a Class A misdemeanor. Section 40-32-104 states that public disclosure of expunged criminal records is a Class A misdemeanor, and § 37-1-154 states that unauthorized disclosure of law enforcement records of investigations of juveniles is punishable as criminal contempt. No cases showing any successful facial challenges of these statutes have been found.

The statute might be subject to an as-applied challenge in a particular case. Because such

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[2]*See also In re Lees*, 252 B.R. 441 (Bankr. W.D. Tenn. 2000). In that case, the court noted that the lack of certainty about the constitutionality of a statute is not sufficient to rebut the presumption of validity.

[3]In *Thompson v. Reynolds*, 858 S.W.2d 328 (Tenn. Ct. App. 1993) the court recognized the legislature's authority to create such exemptions. In that case, the court stated, "[i]t was the legislature that opened the door making the records public in the first place. Certainly, in light of subsequent events, the legislature could decide that its policy was too broad and close the door on certain records." *Id*. at 329.

a challenge could be raised in a wide variety of settings, it is not possible to cover all of the potential cases in which such a challenge might arise. The most likely source of such a challenge, however, would be in a criminal prosecution of a media defendant for the publishing, broadcasting, or internet posting of handgun carry permit information. As *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam), and *Landmark Comm., Inc. v. Virginia*, 435 U.S. 829 (1978) illustrate, a media defendant might be able to raise a First Amendment defense to such a prosecution. As both cases also show, whether any such defense would be successful would depend on the facts and circumstances of the particular case.

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