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Opinion No. 09-114

Constitutionality of Legislation Defining Certain Gang Activity as a Public Nuisance

QUESTIONS

1. Would section 2(2)(B)(vii) of HB 1432, which defines gang activity as the displaying of gang signs or symbols or the wearing of gang affiliated clothing, if enacted, violate due process rights under the United States and Tennessee Constitutions?

2. Could section 2(2)(B)(viii) of HB 1432, which defines gang activity as sitting, walking, driving or appearing in public with other gang members, except in certain specified situations, violate due process rights under the United States and Tennessee Constitutions?

OPINIONS

1. Yes. If enacted, section 2(2)(B)(vii) of HB 1432, which defines gang activity as the displaying of gang signs or symbols or the wearing of gang affiliated clothing, would likely be found to violate due process rights under the United States and Tennessee Constitutions, because it is not sufficiently specific to put reasonable people on notice concerning what conduct is prohibited.

2. Yes. If enacted, section 2(2)(B)(viii) of HB 1432, which defines gang activity as sitting, walking, driving or appearing in public with other gang members, except in certain specified situations, would likely be found to be unconstitutionally overbroad because it would prohibit a substantial amount of entirely innocent behavior that is protected by the guarantees of associative freedom under the United States Constitution.

ANALYSIS

You have asked whether two sections of HB 1432, sections 2(2)(B)(vii) and (viii), could withstand constitutional challenge. Both subparts are part of a section which, if enacted, would bring a criminal gang that regularly engages in "gang related conduct" within the definition of a public nuisance under Tenn. Code Ann. §29-3-101. Any activity adjudged to be a nuisance under that statute is subject to abatement, and all motor vehicles, furnishings, fixtures, equipment, moneys and stock used in connection with conducting the nuisance are subject to seizure and forfeiture. *Id.*

To come within the definition of public nuisance under HB 1432, the state would be required to prove by a preponderance of the evidence that the defendants are members of a criminal gang as that term is defined in Tenn. Code Ann. § 40-35-121(a)(1). Doing so requires proof that the defendant or defendants are members of an organization or group of three or more members that has as its activities the perpetration of one or more crimes and that has two or more members who have engaged in a pattern of criminal gang activity.[1]

In addition to showing that the defendants are members of a criminal gang, section 2(2)(B) of HB 1432 requires proof that the criminal gang has regularly engaged in "gang related conduct" as defined in the subparts of that subsection.[2] Under subpart (vii), the displaying of

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[1] Tenn. Code Ann. § 40-35-121(a)(1) states:

> As used in this section, unless the context otherwise requires:
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> (1) "Criminal gang" means a formal or informal ongoing organization, association or group consisting of three (3) or more persons that has :
>
> (A) As one (1) of its activities the commission of criminal acts; and
>
> (B) Two (2) or more members who, individually or collectively, engage in or who have engaged in a pattern of criminal activity.

Tenn. Code Ann. § 40-35-121(4)(A) defines the term "pattern of criminal activity" as:

"Pattern of criminal activity" means prior convictions for the commission or attempted commission of, or solicitation, or conspiracy to commit:

> (i) Two (2) or more criminal gang offenses that are classified as felonies; or
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> (ii) Three (3) or more criminal gang offenses that are classified as misdemeanors; or
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> (iii) One (1) or more criminal gang offenses . . . classified as a felony and two (2) or more criminal gang offenses that are classified as misdemeanors ; and
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> (iv) The criminal gang offenses are committed on separate occasions; and
>
> (v) The criminal gang offenses are committed within a five-year period.

"Criminal gang offense" is defined in Tenn. Code Ann. § 40-35-121(a)(3) to include any violent crime or any other offense that is committed with the intent of obtaining a financial monetary or other form of economic gain.

[2] In addition to the activities defined in subparts (vii) and (viii) other types of gang related activity as defined in the subparts include: intimidation, harassment and assaulting people; possessing weapons; damaging or defacing property; dealing drugs; recruiting new gang members; or committing other gang offenses. The constitutionality of these provisions is beyond the scope of this opinion. Therefore, we are not commenting on the constitutionality of such provisions.

gang signs is a gang related activity. Under subpart (viii), standing, sitting, walking, driving or appearing with other gang members, except in certain situations, is a gang related activity.[3]

1. Subpart (vii) would include within the definition of gang related activity the "displaying of gang signs or symbols or wearing gang affiliated clothing." Under both the Fourteenth Amendment to the United States Constitution and Art. I, § 8 of the Tennessee Constitution, a statute that is vague would violate a person's due process rights. A statute is vague if it does not identify the conduct with sufficient definiteness to put a reasonable person on notice about what is forbidden. *Kolender v. Lawson,* 461 U.S. 352 (1983); *Leech v. American Booksellers Assn.,* 582 S.W.2d 738 (Tenn. 1979). A non penal statute will be upheld if a person of ordinary understanding would understand it and be able to comply with it. *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Big Fork Mining Co. v. Tenn. Water Quality Control Bd.,* 620 S.W.2d 515 (Tenn. App. 1981).

Several courts have struck down, on vagueness grounds, laws aimed at curtailing or criminalizing the wearing of "gang" colors, emblems, or other insignia. In *Gatto v. County of Sonoma*, 98 Cal.App.4th 744 (Cal. Dist. Ct. App. 2002), the district court struck down a dress code as vague and facially overbroad because the dress code prohibited "apparel or accessories intended to provoke, offend or intimidate others including offensive slogans, insignia or 'gang colors.'" The court reasoned that the restrictions were vague due to the imprecision of the phrase "gang colors" and that the criteria were so subjective as to provide enforcement authorities with an almost "unfettered" license to decide what the dress code permitted and prohibited. *Gatto* at 774. *See also City of Harvard v. Gaut*, 660 N.E.2d 259 (Ill. App. Ct. 1996), in which the court struck down an ordinance which made it unlawful for any person to wear "known gang colors, emblems, or other insignia, or appear to be engaged in communicating gang-related messages through the use of hand signals. . ." reasoning that the ordinance prohibited a substantial amount of constitutionally protected speech and was facially overbroad.[4]

As demonstrated by the cases above, Subpart (vii) would be subject to challenge on grounds of vagueness. The statute provides no standards or other guidance about what

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[3] The activities that are specifically permitted under subpart (viii) are appearing together in school, church or other places of worship and when all of the gang members who are appearing in public have a parent/child relationship.

[4] However, some courts have upheld restrictions similar to those contained in HB 1432. In *Martinez v. State*, 2009 WL 383760 (TexApp.-FortWorth 2009), subsequent to finding a public nuisance, the court enjoined twenty-one members of the Varrios Carnales (VC) street gang from wearing specific clothing denoting gang membership and appearing in public with any other members of the VC gang. Appellant appealed five convictions for violations of the injunction alleging that the provisions of the injunction were unconstitutional. The court upheld the provisions because such provisions did not restrict a substantial amount of constitutionally protected conduct. Also, in *In re Roberto R.*, 2007 WL 4296607 (Cal.App. 1 Dist. 2007), the court upheld juvenile probation conditions that prohibited him from association with gang members and from wearing gang clothing. In upholding the probation conditions, the court required that the conditions be modified to include an element of knowledge that the juvenile was participating in prohibited conduct.

constitutes gang related signs, symbols or clothing. A reasonable person of ordinary intelligence could not determine, therefore, whether he is in compliance with the statute.[5]

2. Subpart (viii) defines nuisance as:

> Standing, sitting, walking, driving, gathering or appearing together with another gang member anywhere in public view, excluding:
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> (a) When all individuals are inside a school in class;
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> (b) When all individuals are inside a church or other place of worship; or
>
> (c) When all of the criminal gang members appearing in public have a parent/child relationship.

HB 1432, Section 2(2)(B (viii).

The subpart would be subject to challenge on grounds that it is unconstitutionally overbroad. A statute is overbroad and therefore violates due process rights if it reaches conduct that is protected under the First Amendment. *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993). In addition to protecting free speech and the free exercise of religion, the First Amendment also protects the right to associate for political or religious purposes or the choices to enter into or maintain certain types of intimate human relationships. *City of Dallas v. Stanglin*, 490 U.S. 19 (1989).

Morales is instructive. In that case, the city's "Gang Congregation Ordinance" prohibited persons believed to be members of a criminal street gang from loitering in public with one or more persons. The court struck down the ordinance because it violated due process, was impermissibly vague, and constituted an arbitrary restriction on personal liberty. *Morales* at 447.

Subpart (viii) has been drafted broadly enough to reach personal intimate human relationships. For example, the statute would prohibit siblings who happened to be gang members from gathering in public even if they were gathering for completely innocent purposes. Because subpart (viii) would reach a substantial amount of associative conduct between gang members that is entirely innocent and protected by the First Amendment, it is our opinion that a court would find the provision to be unconstitutionally overbroad.

[5] *See also* Op.Tenn. Att'y Gen. 09-73 (May 6, 2009) (addressing the constitutionality of the "saggy pants" bill).

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