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Opinion No. 10-53

Ordinance Imposing Fine Greater Than \$50.00 on Large Motor Vehicles in Residential Areas

QUESTION

Whether a municipal court judge or general sessions court judge would violate Article VI, § 14 of the Tennessee Constitution if such a judge were to enforce an ordinance that imposes a fine greater than \$50.00 on those persons operating large motor vehicles in residential areas.

OPINION

Yes, absent a valid waiver of the defendant's Article VI, § 14 right to a jury.

ANALYSIS

Article VI, § 14 of the Tennessee Constitution provides: "No fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers[.]" In *City of Chattanooga v. Davis*, 54 S.W.3d 248 (Tenn. 2001), the Tennessee Supreme Court addressed the issue of whether Article VI, § 14 of the Tennessee Constitution applied to a proceeding for the violation of a municipal ordinance. The Court initially found that Article VI, § 14 applied to such proceedings even though they have been traditionally considered to be civil in nature. *Davis*, 54 S.W.3d at 261 (*overruling O'Dell v. City of Knoxville*, 388 S.W.2d 150 (Tenn. Ct. App. 1964)). The Court held that Article VI, § 14 applied to such proceedings when a monetary sanction imposed for an ordinance violation was punitive and therefore a "fine" for purposes of Article VI, § 14, rather than a remedial measure. *Id.* at 261-62, 281; *Town of Nolensville v. King*, 151 S.W.3d 427, 430 (Tenn. 2004) (discussing *Davis*). Specifically, the Court held that a monetary sanction falls within the scope of Article VI, § 14 when: (1) the legislative body creating the sanction primarily intended that the sanction punish the offender; or (2) despite evidence of remedial intent, the monetary sanction is shown by the "clearest proof" to be so punitive in its actual purpose or effect that it cannot be legitimately viewed as remedial in nature. *Davis*, 54 S.W.3d at 264, 281; *King*, 151 S.W.3d at 430 (discussing *Davis*). "The 'clearest proof' of punitive purpose or effect is more properly established by considering whether the totality of the circumstances demonstrates that the statutory scheme truly envisions the pecuniary sanction as serving to remedy or to correct a violation." *Davis*, 54 S.W.3d at 265.

The Court of Appeals has succinctly summarized the two-part test set forth in *Davis*.

[I]f the legislative body creating the sanction primarily intended that the sanction punish the offender the inquiry ends. The assessment is punitive. On the other hand, if the legislative body primarily intended the sanction to be remedial, the sanction may still be punitive if it serves no remedial purpose.

Dickson v. State, 116 S.W.3d 738, 743 (Tenn. Ct. App. 2003).

You have asked us whether the enforcement of an ordinance that imposes a fine greater than \$50.00 on those persons operating large motor vehicles in residential areas would violate Article VI, § 14 of the Tennessee Constitution. While the text of the ordinance is not included in your opinion request, you indicate that the purpose of the ordinance is to provide protection to children and older persons. Thus, for the purposes of applying the two-part test of *Davis*, we will assume that there is nothing in the text of the ordinance that indicates the legislative body creating the sanction primarily intends that the sanction punish the offender. By making this assumption, the first part of the *Davis* test would be satisfied. *See Davis*, 54 S.W.3d at 267-69; *Dickson*, 116 S.W.3d at 742-43. Nevertheless, even making this assumption, we do not believe that an ordinance imposing a fine greater than \$50.00 on those persons operating large motor vehicles in residential areas would satisfy the second part of the test set forth in *Davis*, for the reasons stated below.

In explaining the second part of the test set forth in *Davis*, the Tennessee Supreme Court initially stated: “[T]he mere fact that the intended purpose of the statute itself is remedial is not also determinative of whether the actual purpose and effect of the statute’s penalties are likewise remedial in nature.” *Davis*, 54 S.W.3d at 269. In giving guidance on determining whether a penalty is a remedial measure, the Court stated: “[R]emedial measures are any ‘means by which a right is enforced or the violation of a right is prevented, redressed or compensated.’” *Id.* Examples fitting the definition of a remedial measure are stop-work orders, the revocation of a permit, and an order to show proof of compliance at the owner’s expense. *Id.* at 269-70. The Court stressed that a monetary penalty often stands in sharp contrast to these types of remedial measures, because a monetary penalty can serve but a few remedial purposes.

Some examples of truly remedial purposes served by monetary penalties include those that (1) compensate for loss; (2) reimburse for expenses; (3) disgorge “ill-gotten” gains; (4) provide restitution for harm; and (5) ensure compliance with an order or directive, either through the execution of a bond, or as discussed below, through a prospectively coercive fine. Importantly, however, to the extent that a monetary penalty is not designed to serve these or similar goals, it will appear more likely to predominantly serve the purpose of general and specific deterrence. Although we agree that some level of deterrence is present in all remedial measures, when the *predominant* purposes served by the penalty are to provide general and specific deterrence and to ensure overall future compliance with the law, then the monetary penalty should be deemed as serving punitive purposes for analysis under Article VI, section 14.

Id. at 270 (emphasis original). In a footnote, the Court said: “[I]f the predominant ‘remedial’ purpose served by a monetary sanction is ensuring deterrence against future wrongdoing, then

the sanction more properly appears to be punitive in its actual purpose or effect.” *Id.* at 270 n. 22.

Accordingly, a fine that is fixed and determinant is predominantly punitive in nature. *Dickson*, 116 S.W.3d at 744 (citing *Davis*, 54 S.W.3d at 272). Under the *Davis* Court’s analysis, the only way a fixed, determinate fine can be considered remedial is when it bears some relationship to the harm caused by the violation, compensates for the costs of enforcement, or requires the wrongdoer to disgorge ill-gotten gains. *Dickson*, 116 S.W.3d at 744. An ordinance imposing a fine greater than \$50.00 on those persons operating large motor vehicles in residential areas does not seem to fall into any of these three categories. *See, e.g., Davis*, 54 S.W.3d at 270-71 (Court found fixed monetary penalty for failure to obtain building permit for past completed violations not to be remedial in nature because penalty was imposed without regard to correcting or rectifying any harm); *Dickson*, 116 S.W.3d at 744 (Court found fixed monetary fine for violation of Petroleum Underground Storage Tank Act to be punitive, rather than remedial, because it did not bear relationship to the harm caused by the violation, compensate the State for the costs of enforcement, or require the wrongdoer to disgorge ill-gotten gains). Thus, we think that a municipal court judge or general sessions court judge would violate Article VI, § 14 of the Tennessee Constitution if such a judge were to enforce an ordinance that imposes a fine greater than \$50.00 on those persons operating large motor vehicles in residential areas. The imposition of a fine greater than \$50.00 by such a judge would be constitutionally permissible only if the defendant knowingly waives his or her Article VI, § 14 right to a jury. *See King*, 151 S.W.3d at 433.

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