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Opinion No. 12-36

Class E Felony Punishable by Fine Only

QUESTION

May the Legislature denominate an offense as a Class E felony punishable by fine only?

OPINION

Yes. Although felonies punishable by fine only stand in some tension with the provisions of the Criminal Sentencing Reform Act of 1989, the Legislature has the constitutional power to create them.

ANALYSIS

House Bill 2226/Senate Bill 2194 proposes to create a new criminal offense for using devices that falsify the records of electronic cash registers and other point-of-sale systems. H.B.2226/S.B.2194, §1(a), 107th General Assembly, 2nd Sess. (Tenn. 2012) (hereinafter "HB2226"). A violation is denominated "a Class E felony punishable by a fine only up to one hundred thousand dollars ($100,000)." *Id.* § 1(c). Certain existing criminal statutes assess similar punishments. Failing to obtain photo identification as a registered sex offender, shipping wine without a direct shipper's license, and committing the first offense of communication theft in an amount more than five hundred dollars but less than one thousand dollars are all classified as Class E felonies punishable only by fines in various amounts. Tenn. Code Ann. §§ 39-14-149(d)(1)&(2), 40-39-213(b), 57-3-217(g)(2).

This practice is constitutional. As a general matter, felonies are construed to be violations of law that may be punished by one year or more of confinement. Tenn. Code Ann. § 39-11-110. The authorized terms of imprisonment and fines for Class E felonies, in particular, are not less than one year nor more than six years' confinement and fines not exceeding three thousand dollars for natural persons. Tenn. Code Ann. § 40-35-111(b)(5). The existing classification of offenses is thought to "assure fair and consistent treatment of all defendants by eliminating unjustified disparity in sentencing and providing a fair sense of predictability of the criminal law and its sanctions." Tenn. Code Ann. § 40-35-102(2). *See also* Tenn. Code Ann. § 40-35-111, Sentencing Comm'n Comments ("The commission believes that the classification and terms designated for each classification are an improvement over prior law which had dozens of penalty variations which were totally unrelated to one another. By adopting felony classification with specific punishments, similar conduct can be given similar punishments.").

Nevertheless, "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *United States v. Bajakajian*, 524 U.S. 321, 336 (1998). *See also State v. Farner*, 66 S.W.3d 188, 200 (Tenn. 2001) ("The power to define what shall constitute a criminal offense and to assess punishment for a particular crime is vested in the legislature.").

The primary constraints on legislative power in this regard are the Cruel and Unusual Punishments and Excessive Fines clauses of the United States and Tennessee constitutions. U.S. Const. amend. VIII; Tenn. Const. art. I, § 16. Those provisions generally forbid punishments that are grossly disproportional to the gravity of a defendant's offense. *See Bajakajian*, 524 U.S. at 334 (so stating with regard to punitive forfeitures); *State v. Taylor*, 70 S.W.3d 717, 723 (Tenn. 2002) (citing *Bajakajian*). Annexing a fine-only punishment to an offense grade that would normally carry a term of imprisonment will not, of course, typically run afoul of this proscription. Moreover, the Excessive Fines clauses do not categorically prohibit the sanction envisioned by HB2226. Because point-of-sale device fraud could occasion large losses in a particular case resulting in a proportional fine, the punishment imposed by HB2226 cannot be facially unconstitutional. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (stating that a facial challenge to legislation must establish that "no set of circumstances exists under which the Act would be valid"). *See also Taylor*, 70 S.W.3d at 722 (requiring appellate courts to evaluate the propriety of individual fines under the principles of the Criminal Sentencing Reform Act in order to avoid constitutional questions).

This Office notes that, since HB2226 denominates its newly-created offense a felony, convictions will carry certain civil disabilities—perhaps most notably, loss of the right to vote. *See* Tenn. Code Ann. § 40-20-112. *See generally Cole v. Campbell,* 968 S.W.2d 274, 276-77 (Tenn. 1998) (surveying civil disability statutes). Statutes authorizing such disabilities have generally been sustained as non-penal exercises of the states' regulatory power. *See, e.g., Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) ("exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment"); *Farrakhan v. Locke*, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997) (rejecting free speech, double jeopardy and cruel and unusual punishment challenges to felon disenfranchisement law, and noting "*Richardson* suggests that the facial validity of felon disenfranchisement may be absolute"); *Kronlund v. Honstein*, 327 F. Supp. 71, 74 (N.D. Ga. 1971) ("disenfranchisement is a non-penal exercise of a State's power to regulate the vote and is not cruel and unusual punishment").

Accordingly, we are of the opinion that, although defining some offenses as Class E felonies punishable only by fine might create some inconsistency against the backdrop of the existing statutory scheme, the Legislature has the power to so proceed.

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