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Opinion No. 12-83

Standing of Bonding Company to Commence Failure to Appear Action

## QUESTION

Does a bonding company, or someone appearing on behalf of a bonding company, have standing to file an action against a defendant for failure to appear under Tenn. Code Ann. § 39-16-609?

## OPINION

No. A failure to appear under Tenn. Code Ann. § 39-16-609 is a criminal offense and may only be prosecuted in the name of the State of Tennessee by the district attorney general for the appropriate judicial district.

## ANALYSIS

Tenn. Code Ann. § 39-16-609 is part of Title 39 of the Tennessee Code, which defines various criminal offenses, and provides as follows:

> (a) It is unlawful for any person to knowingly fail to appear as directed by a lawful authority if the person:
>  (1) Has been lawfully issued a criminal summons pursuant to § 40-6-215;
>  (2) Has been lawfully commanded to appear for booking and processing pursuant to a criminal summons issued in accordance with § 40-6-215;
>  (3) Has been lawfully issued a citation in lieu of arrest under § 40-7-118;
>  (4) Has been lawfully released from custody, with or without bail, on condition of subsequent appearance at an official proceeding or penal institution at a specified time or place; or
>  (5) Knowingly goes into hiding to avoid prosecution or court appearance.
> (b) It is a defense to prosecution under this section that:

(1) The appearance is required by a probation and parole officer as an incident of probation or parole supervision; or
(2) The person had a reasonable excuse for failure to appear at the specified time and place.

(c) Nothing in this section shall apply to witnesses.
(d) If the occasion for which the defendant's appearance is required is a misdemeanor or is a violation of subdivision (a)(2), failure to appear is a Class A misdemeanor.
(e) If the occasion for which the defendant's appearance is required is a Class A misdemeanor or a felony, failure to appear is a Class E felony.
(f) Any sentence received for a violation of this section may be ordered to be served consecutively to any sentence received for the offense for which the defendant failed to appear.

Because failure to appear is a criminal offense, only the State of Tennessee may prosecute the party charged with the offense. *See* Tenn. Code Ann. § 40-3-104 (stating that "[a]ll criminal actions are prosecuted in the name of the State of Tennessee"). The sole authority to determine whether a criminal case should be initiated resides with the district attorney general for the appropriate judicial district. As the Tennessee Supreme Court has stated, "a district attorney general has the *sole* duty, authority, and discretion to prosecute criminal matters in the State of Tennessee." *State v. Spradlin*, 12 S.W.3d 432, 433-34 (Tenn. 2000) (emphasis added). *See also Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 209 (Tenn. 1999). Furthermore, a district attorney general in exercising this discretion to prosecute is charged with enforcing Tennessee's criminal laws and not inappropriately using these criminal laws to collect a civil debt. Indeed such an improper utilization of Tennessee's criminal laws might violate the Tennessee Constitution's prohibition against imprisonment for debt. *See* Tenn. Const. art. I, § 18. As the Alabama Supreme Court observed in reviewing the relationship between Alabama's worthless check criminal statute and the Alabama Constitution's prohibition against imprisonment for debt (Ala. Const. art. I, § 20 (1901)):

> "The criminal law was not designed to enforce the payment of a debt or to adjudicate civil disputes between parties. *Hurst v. State*, 21 Ala. App. 361, 108 So. 398 (1926). The mere failure to pay a debt, while furnishing a basis for a civil suit, is not sufficient to constitute a crime. *Hurst*, supra. The improper employment of a statute to enforce payment of a debt is an unconstitutional application of that statute. *Tolbert*, supra. [*Tolbert v. State*, 294 Ala. 738, 321 So.2d 227 (1975)].
>
> "The Alabama Supreme Court has condemned the use of threat of prosecution as a means of collecting a debt by '[those] who seek only payment of debts and have no interest in criminal prosecution other than as a means of collecting money allegedly due them.' *Tolbert*, supra, 321 So.2d at 232. Thus, if one is prosecuted under

> a statute, he must be prosecuted for the crime which he has committed, not for the debt that he owes or to make him pay it. *Cottonreeder v. State*, 389 So.2d 1169 (Ala. Crim. App. 1980).
>
> "The difference between the improper use of a statute as a means of punishment for debt and the proper use of a statute as a means of punishment for a criminal act is intent. *Harris v. State*, 378 So.2d 257 (Ala. Crim. App.), cert. denied, 378 So. 2d 263 (Ala. 1979)."

Piggly Wiggly No. 208, Inc. v. Dutton, 601 So.2d 907, 909 (Ala. 1992) (quoting Bullen v. State, 518 So.2d 227, 233 (Ala. Crim. App. 1987).

Accordingly, a bonding company or its representative may not file an action against a defendant for a failure to appear under Tenn. Code Ann. § 39-16-609. A bonding company or its representative, however, is permitted to swear out an arrest warrant by preparing an affidavit of complaint in conformance with Rule 3 of the Tennessee Rules of Criminal Procedure.[1] Tenn. Code Ann. § 40-6-203. If that affidavit sets forth sufficient facts to establish probable cause that the defendant has committed the crime of failure to appear in violation of Tenn. Code Ann. § 39-16-609, a magistrate could then issue a warrant for the defendant's arrest. Tenn. Code Ann. § 40-6-202. After the warrant has been served, the district attorney general for the appropriate judicial district has the discretion to determine whether the case will go forward to prosecute the criminal offense of failure to appear.

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[1] Rule 3 of the Tennessee Rules of Criminal Procedure outlines the necessary requirements for an affidavit of complaint as follows:

> The affidavit of complaint is a statement alleging that a person has committed an offense. It must:
> (a) be in writing;
> (b) be made on oath before a magistrate or a neutral and detached court clerk authorized by Rule 4 to make a probable cause determination; and
> (c) allege the essential facts constituting the offense charged.

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