STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 15-79

Extension of Probationary Periods by General Sessions Courts

Question

Does Tenn. Code Ann. § 40-35-308(c) apply to allow a general sessions court that revokes a defendant's probation to then extend the probationary period for up to two years?

Opinion

Yes. A general sessions court that revokes a defendant's probation has authority under Tenn. Code Ann. § 40-35-308(c) to extend the probationary period for up to two years.

ANALYSIS

Tennessee Code Annotated § 40-35-308(c) provides:

> Notwithstanding the actual sentence imposed, at the conclusion of a probation revocation hearing, the [sentencing] court shall have the authority to extend the defendant's period of probation supervision for any period not in excess of two (2) years.

Thus, by its plain terms § 40-35-308(c) allows a "sentencing" court that conducts a probation revocation hearing to extend the probationary period for up to two years.

The legislation that establishes general sessions courts, endows general sessions judges with "the same jurisdiction relative to the suspension and revocation of sentences imposed by them as that conferred upon all trial judges by title 40, chapter 29." Tenn. Code Ann. § 16-15-401(b). But the current title 40, chapter 29, confers no jurisdiction on judges relative to probation; it deals only with the restoration of citizenship rights. When Tenn. Code Ann. § 16-15-401(b) was enacted, chapter 29 did authorize judges to revoke probation for misdemeanor sentences within one year of granting probation, but the only option upon that revocation was to reinstate the original judgment, to be served in confinement. 1961 Tenn. Pub. Acts 326-27 (codified at Tenn. Code Ann. § 40-2906 (1961) (repealed 1989)).

These provisions raise two questions. The first is whether a general sessions court counts as a "court" for purposes of § 40-35-308(c). If yes, the second question becomes whether § 40-35-308(c) controls over the earlier requirement that the judgment be reinstated upon revocation of probation. We answer both questions in the affirmative.

I. Tennessee Code Annotated § 40-35-308(c)

Several statutory provisions lead to the conclusion that § 40-35-308(c) applies to general sessions courts. In general, the sessions courts have jurisdiction to try misdemeanor cases so long as the defendant waives an indictment, presentment, grand jury investigation, and jury trial. Tenn. Code Ann. § 40-1-109. The statute conferring that jurisdiction specifies that the general sessions court "may inflict punishment within the limits provided by law for the particular offense as the court may determine proper under the peculiar circumstances of the case." *Id.*

Probation is one such punishment. The misdemeanor sentencing statute, Tenn. Code Ann. § 40-35-302, provides that the "court has authority to place the defendant on probation . . . ." *Id.* § 40-35-302(e); *see also id.* § 40-35-303(b) ("A court shall have authority to impose probation as part of its sentencing determination at the conclusion of the sentencing hearing."). One subsection of this statute contains a specific reference to the general sessions courts. *Id.* § 40-35-302(f).

Whenever a defendant is arrested for violating the conditions of probation, "the trial judge granting the probation and suspension of sentence" must inquire into the charges to determine whether a violation has occurred. *Id.* § 40-35-311(b). Since general sessions judges can grant probation, they also conduct revocation proceedings. It follows that the authority granted by § 40-35-308(c) to extend the probationary period for up to two years "at the conclusion of a probation revocation hearing" applies to general sessions courts.

Misdemeanor sentences are limited to 11 months, 29 days of imprisonment. *Id.* § 40-35-111(e). At first blush, this limitation may seem inconsistent with two-year extensions of probation because probationary terms themselves are generally limited to "the statutory maximum time for the class of the conviction offense." *Id.* § 40-35-311(c)(1). Certain misdemeanors, however, carry potential probationary terms of up to two years. *See id.* § 40-35-303(c)(2)(B)-(C). From the perspective of a defendant who violates his or her probation near the end of the term, moreover, two additional years of supervision may be preferable to incarceration for a shorter time. *See id.* § 40-35-308 sentencing comm'n cmt. (stating that subsection (c) addresses this situation). And, at any rate, § 40-35-308(c) expressly authorizes two-year extensions of probation "[n]otwithstanding the actual sentence imposed." We therefore conclude that general sessions courts may extend a misdemeanant's period of probation for up to two years.

II. Tennessee Code Annotated § 16-15-401(b)

Section 16-15-401(b)'s incorporation by reference of title 40, chapter 29, does not alter this conclusion, even though the current version of title 40, chapter 29, is no longer relevant to the purpose of the reference. Incorporations by reference come in two varieties, specific and general, and they differ in effect according to their type. *See* 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 51.07 (6th ed. 2000). A specific incorporation adopts only limited and particularized provisions of the incorporated legislation as it existed at the time of adoption; it does not include subsequent additions or modifications to the incorporated legislation unless the legislature expressly signifies that intent. *Roddy Mfg. Co. v. Olsen*, 661 S.W.2d 868, 871 (Tenn. 1983). Incorporation by general reference, by contrast, occurs when the legislature incorporates the general law on a particular subject into the incorporating legislation. *Union Cemetery v. City of Milwaukee*, 108 N.W.2d 180, 182 (Wis. 1961). Incorporation by general reference adopts not

only the provisions of the incorporated legislation as it existed at the time the incorporating legislation was passed, but it also carries with the incorporating statute any future alterations to the incorporated statute, up to and including repeal of the incorporated statute. *Id.*

Section 16-15-401(b) took effect on February 27, 1961. 1961 Tenn. Pub. Acts 455. Nine days earlier, the Governor had signed amendments to title 40, chapter 29, which, as relevant here, authorized trial judges in probation violation cases to "revoke and annul such suspension, and in such cases the original judgment so rendered by such Trial Judge shall be in full force and effect from the date of the revocation of such suspension, and shall be executed accordingly." *Id.* at 326-27; *see id.* at 328 (authorizing trial judge "to revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered"). In 1982, this provision was renumbered—with the approval of the Code Commission—as Tenn. Code Ann. § 40-21-106. Parallel Reference Table, Tenn. Code Ann., Vol. 7A (1982). Then, in 1989, all of former title 40, chapter 29, was repealed as a part of the Criminal Sentencing Reform Act of 1989. *See* Compiler's Notes, Tenn. Code Ann., Vol. 7A, §§ 40-21-101 to -110 (1997).

The 1961 version of title 40, chapter 29, contained substantially all of the law governing the suspension of sentences at the time. Its incorporation in § 16-15-401(b) immediately follows a grant of authority to general sessions courts parallel with that of other trial courts to issue "fiats for writs of injunction, attachments and other extraordinary process"—clearly a general reference. These features suggest that the General Assembly intended the reference to title 40, chapter 29, to be a general one. *See, e.g., Dir., Office of Workers' Comp. Programs v. Peabody Coal Co.*, 554 F.2d 310, 329 (7th Cir. 1977) (calling the Federal Coal Mine Health and Safety Act "a general reference [statute] masquerading as a specific and descriptive reference"); *Hawaii Providers Network, Inc. v. AIG Hawaii Ins. Co.*, 98 P.3d 233, 243 (Haw. 2004) (collecting cases). Because the Sentencing Reform Act of 1989 repealed and replaced title 40, chapter 29, the modern provisions governing revocation of probation would control on this construction. *See, e.g., Dane County Hosp. v. Labor & Indus. Rev. Comm'n*, 371 N.W.2d 815, 824 (Wis. Ct. App. 1985) (holding that general reference statute incorporated the Rehabilitation Act of 1973, which had repealed and rewritten the referred statute, the Vocational Rehabilitation Act).

Even if § 16-15-401(b) were viewed as a specific incorporation, the result would be the same. Section 16-15-401(b) is relatively specific, referring to a particular chapter (though not a section number). *See id.* (characterizing a specific incorporation as "a specific and descriptive reference to the statute or provisions adopted"); *cf. Union Cemetery*, 108 N.W.2d at 182 ("A specific reference refers specifically to a particular statute by its title or section number and incorporates only a part of the law on a subject."). Further, the adopted chapter consisted of only eight sections, making the point at least debatable. *See* Tenn. Code Ann. §§ 40-2901 to -2908 (1961 Supp.). Taking the reference as specific, one might argue that the 1961 provisions of title 40, chapter 29, would control, since they would be deemed "incorporated bodily into the adopting statute," and the subsequent changes to the chapter would be of no effect. *Roddy*, 661 S.W.2d at 871 (internal quotation marks omitted).

Nevertheless, a reviewing court would be unlikely to find the 1961 probation revocation provisions controlling for either of two reasons. First, there are situations in which a provision that reads as a specific incorporation may, in context, be construed instead as a general

incorporation. 2A Singer, *supra*, § 51.08. Thus, for example, in *George Williams College v. Village of Williams Bay*, the Wisconsin Supreme Court concluded that a statute synthesizing city and village sewer provisions was a general incorporation of all laws relating to city sewers into the village sewer provisions even though the legislation itself referred to specific sections of the city sewer provisions. 7 N.W.2d 891, 894 (Wis. 1943). As a result, subsequent amendments to the city sewer provisions were also applicable to village sewers. *Id.*

Second, a statute of specific reference can be repealed by implication with the repeal of the referenced statute. *See, e.g.*, *Curtis Ambulance of Fla., Inc. v. Bd. of County Comm'rs*, 811 F.2d 1371, 178 (10th Cir. 1987); *Hawaii Providers Network*, 98 P.3d at 242. Repeals by implication are disfavored in Tennessee, *Sharp v. Richardson*, 937 S.W.2d 846, 850 (Tenn. 1996), but the question is ultimately one of legislative intent, *Still v. First Tenn. Bank*, 900 S.W.2d 282, 284 (Tenn. 1995). To the extent that the second sentence of § 16-15-401(b) can be viewed as a specific incorporation, the Sentencing Reform Act of 1989 repealed it, just as it did the then-existing provisions of title 40, chapter 29.

As the Tennessee Supreme Court has put it, the Sentencing Reform Act "clearly establish[es] a legislative intent to subsume the entire field of criminal law and sentencing in Tennessee." *State v. Palmer*, 902 S.W.2d 391, 392 (Tenn. 1995). In *State v. Palmer*, the Court surveyed many of the terms of the Act—including that misdemeanants "shall be sentenced in accordance with *this* chapter" and that misdemeanor sentences "'*shall* be consistent with the purposes and principles' of the Act"—and concluded that it repealed by implication a sentencing provision in Tenn. Code Ann. § 40-21-236(f)(4). *Id.* at 392-93 (emphasis added) (citing Tenn. Code Ann. §§ 40-35-104(a), -302(b)). The Court of Criminal Appeals has likewise ruled that the Sentencing Reform Act repealed by implication the Motor Vehicle Habitual Offenders Act's general prohibition of probation. *State v. Martin*, 146 S.W.3d 64, 76 (Tenn. Crim. App. 2003).

These considerations hold good with respect to probation revocation proceedings conducted by general sessions courts. At the outset, a revocation ordered under the auspices of the former title 40, chapter 29, would result in the imposition, at least, of a sentence not under chapter 35 as contemplated by the Act, but one under § 16-15-401(b). Limiting sessions courts to reinstating the original judgment, moreover, would run counter to the purposes and principles of the Sentencing Reform Act. Significant among these is uniformity; the Act seeks to assure "consistent treatment of all defendants by eliminating unjustified disparity in sentencing" and to avoid "[i]nequalities in sentences that are unrelated to a purpose of this chapter." Tenn. Code Ann. §§ 40-35-102(2), -103(3). Too, the Act encourages "alternatives to incarceration" and calls for "the least severe measure necessary to achieve the purposes for which the sentence is imposed." *Id.* §§ 40-35-102(3)(C), -103(2), (4), (6). A regime under which a probation violator in a court of record could get an extension of the probationary term if circumstances warranted it, but one who consented to trial before a general sessions judge could not, would not further these ends, and is not what the General Assembly intended. Accordingly, we are of the opinion that a general sessions court that conducts a revocation hearing may extend a defendant's period of probation supervision for up to two years pursuant to Tenn. Code Ann. § 40-35-308(c).

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