

**STATE OF TENNESSEE**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
**SECOND FLOOR CORDELL HULL BUILDING**  
**425 FIFTH AVENUE NORTH**  
**NASHVILLE, TENNESSEE 37243-0488**

October 13, 2004

Opinion No. 04-155

Drug Testing as a Condition of Pre-trial Release on Bail

---

**QUESTIONS**

1. Does requiring criminal defendants who are released on bail to submit to drug screens as a condition of their release violate any federal or state constitutional prohibitions upon unreasonable searches?
2. May the trial court deny setting bail in the case of a criminal defendant who refuses to participate in a drug screen program as a condition of release?
3. In setting the amount of a criminal defendant's bail, may the trial court set a higher bail for a criminal defendant who refuses to submit to random drug screens?
4. In setting the amount of a criminal defendant's bail, may the trial court require a criminal defendant to answer questions under oath regarding illicit drug activities when the information will be used in determining whether the defendant is likely to use drugs while released on bail?
5. When submission to drug testing is required as a condition of release on bail, is consent to such testing, or the waiver of the Fourth Amendment's protection, voluntary?
6. Does a criminal defendant's failure to object to the condition of release at the time they are imposed by the trial court constitute consent to the conditions or a waiver of any objection to the conditions?
7. If the imposition of drug testing as a condition of release on bail violates a criminal defendant's constitutional rights, is the trial judge individually liable for any resulting damages?

**OPINIONS**

1. No. Requiring criminal defendants to submit to drug testing as a condition of release on bail does not constitute an unreasonable search in violation of the state and federal constitutions.

2. No. The trial court may not refuse to set bail for a criminal defendant who refuses to submit to drug testing as a condition of release. However, the trial court may refuse to release a criminal defendant on bail if the criminal defendant refuses to abide by the conditions of release.

3. Yes. The trial court may consider a criminal defendant's unwillingness to submit to drug screens as a condition of release in determining the appropriate amount of bail.

4. No. The trial court may not require a criminal defendant to answer questions under oath regarding illicit drug activity without violating the defendant's privilege against self-incrimination.

5. Criminal defendants seeking pretrial release on bail have reduced expectations of privacy such that the voluntariness of consent under the Fourth Amendment to the conditions of release is not implicated.

6. No. A criminal defendant's failure to object to the imposition of a particular condition of release does not constitute a waiver of the issue. However, Rule 8 of the Rules of Appellate Procedure requires a criminal defendant to file a written motion in the trial court before seeking appellate review of the conditions set by the trial court.

7. No. The trial judge is immune from civil liability for official acts done within the trial court's jurisdiction.

### ANALYSIS

**1. A trial court does not violate the state and federal constitutions' prohibitions of unreasonable searches in requiring a criminal defendant to submit to drug testing as a condition of pretrial release on bail.**

Generally, all criminal defendants charged with non-capital offenses have a constitutional and statutory right to bail by sufficient sureties before trial. Tenn. Const. art. I, § 15; Tenn. Code Ann. § 40-11-102. Admission to bail is governed by the Release from Custody and Bail Reform Act of 1978 ("Bail Reform Act"). See Tenn. Code Ann. § 40-11-101 et seq. The Bail Reform Act empowers trial courts to set conditions that a criminal defendant must follow upon release and to revoke bail when such conditions are not met. Tenn. Code Ann. § 40-11-112, -116, and -120. Section 116 establishes the parameters within which the conditions of release on bail may be set. That section states, in pertinent part: "If conditions on release are found necessary, the magistrate may . . . [i]mpose reasonable restrictions on the activities, movements, associations, and residences of the defendant." Tenn. Code Ann. § 40-11-116(b)(2). In accordance with this provision, a trial court is statutorily authorized to restrict a criminal defendant's illicit drug activities while released on bail.

In *Wallace v. State*, the Tennessee Supreme Court recognized the authority of a trial court

to supervise criminal defendants released on bail pending trial. 193 Tenn. 182, 245 S.W.2d 192 (1952); *see* Op. Tenn. Att’y Gen. 95-057. In *Wallace*, the Court stated:

The primary purpose of bail in a criminal case is . . . to combine the administration of criminal justice with the convenience of a person accused but not proved to be guilty. Its object is to relieve the accused of imprisonment, and the state of the burden of keeping him, pending the trial, and at the same time, to put the accused as much under the power of the court as if he were in custody of the proper officer, and to secure the appearance of the accused so as to answer the call of the court and do what the law may require of him.

*Id.* at 187; 245 S.W.2d at 194. Relying on *Wallace*, this Office previously opined that, although the right to bail in non-capital cases is mandatory and without exception, the right is violated only if a criminal defendant is denied the opportunity to make bail. Op. Tenn. Att’y Gen. 95-057. Further, this Office opined that the constitutional right to bail “does not preclude a trial court from placing reasonable restrictions on what an individual released out on bail may or may not do while in the community.” *Id.*

Regarding search and seizure issues, the Fourth Amendment to the United States Constitution and Article I, Section 7, of the Tennessee Constitution do not provide a general constitutional right to privacy. *Katz v. United States*, 389 U.S. 347, 350, 88 S.Ct. 511, 19 L.Ed.2d 576 (1967). Rather, the purpose and intent of those constitutional provisions is to “safeguard the privacy and security of individuals against the arbitrary invasions of government officials.” *State v. Simpson*, 968 S.W.2d 776, 779 (Tenn. 1998) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967)). An inquiry into the reasonableness of a search pursuant to those provisions involves two separate components. First, it must be determined whether the individual had an actual, or subjective, expectation of privacy. Then, it must be determined whether society is willing to view the individual’s subjective expectation of privacy as reasonable and justifiable under the circumstances. *State v. Munn*, 56 S.W.3d 486 (Tenn. 2001) (citing *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)).

Applying this test, courts have determined that an incarcerated individual—an individual “in custody of the proper officer”—does not have a reasonable expectation of privacy. *See Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (inmate had no reasonable expectation of privacy in his prison cell entitling him to protection of Fourth Amendment); *Lanza v. New York*, 370 U.S. 139, 143, 82 S.Ct. 1218, 1221-22, 8 L.Ed.2d 384 (1962) (a public jail cell is not the equivalent of one’s home wherein one may find constitutional protection, nor does a jail cell share any of “the attributes of privacy of . . . an automobile, an office, or a hotel room”); *State v. Williams*, 690 S.W.2d 517, 524 (Tenn. 1985) (an expectation of privacy in a jail cell is not reasonably justified); *see also State v. Dulsworth*, 781 S.W.2d 277, 284 (Tenn. Crim. App. 1989) (“[t]he Fourth Amendment proscription against unreasonable searches and seizures does not apply within the confines of a prison cell”).

Although this issue has not been addressed by any court in Tennessee, because a criminal defendant released on bail is subject to the supervision of the trial court to the same extent as an incarcerated prisoner, it is the opinion of this Office that a criminal defendant released on bail does not have a reasonable expectation of privacy that would prevent the trial court from imposing reasonable regulations—such as a prohibition of illicit drug activity enforced through mandatory drug testing—as conditions of release. It is the opinion of this Office that such conditions on release are not unreasonable.

Other jurisdictions have reached similar conclusions. In *State v. Ullring*, 741 A.2d 1065 (Me. 1999), the Supreme Judicial Court of Maine concluded that a bail condition authorizing random searches of the home of a defendant charged with a drug offense was authorized by the state bail statute’s catch-all provision and was not unconstitutional as applied to the defendant. In *In re York*, 9 Cal. 4th 1133, 40 Cal. Rptr. 2d 308, 892 P.2d 804 (1995), the California Supreme Court concluded that the imposition of warrantless drug testing and warrantless searches as conditions of release does not violate the Fourth Amendment. Notably, the court in *York* equated the rights of a defendant released on recognizance with the rights of a defendant unable to make bail:

Because an incarcerated individual generally is subject to random drug testing and warrantless search and seizure in the interest of prison security, the conditions challenged do not place greater restrictions upon an OR releasee’s privacy rights than the releasee would have experienced had he or she not secured OR release.

*Id.* at 1149, 40 Cal. Rptr. 2d at 317, 892 P.2d at 814. The *York* Court concluded that, rather than violating the releasee’s constitutional rights, “the conditions simply define the degree of liberty that the court or magistrate, in his or her discretion, has determined is appropriate . . .” *Id.* at 1149-50, 40 Cal. Rptr. 2d at 317, 892 P.2d at 814. Similarly, in *Oliver v. United States*, 682 A.2d 186 (1996), the District of Columbia Court of Appeals concluded that drug testing required as a condition of pretrial release was reasonable under the Fourth Amendment. The *Oliver* Court based its decision, in part, upon the correlation between the use of illicit drugs while on pretrial release and a releasee’s failure to appear. *Id.* at 191-92.

Accordingly, it is the opinion of this Office that requiring a criminal defendant who is released on bail to submit to drug testing as a condition of release does not violate the state and federal constitutions.

## **2. The trial court may not refuse to set bail for a criminal defendant who refuses to submit to drug testing as a condition of release.**

As previously discussed, in Tennessee, criminal defendants have a constitutional and statutory right to pretrial bail in non-capital cases. For this reason, the trial court may not refuse to set bail under any circumstances. However, criminal defendants only have a right to the opportunity to make bail. They do not have a right to release on bail. Accordingly, because the trial court may impose conditions of release, it is the opinion of this Office that the trial court may revoke a criminal defendant’s bail for failure to cooperate with any conditions legitimately imposed. Furthermore, it

is the opinion of this Office that the trial court may refuse to release a criminal defendant on bail if the criminal defendant refuses to abide by the conditions established by the trial court because a defendant's failure to agree to the conditions for release is tantamount to a failure to post bail.

**3. The trial court may not consider a criminal defendant's unwillingness to submit to random drug screens in determining the appropriate amount of bail.**

The Bail Reform Act establishes the considerations that may be taken into account by a trial court when determining the appropriate amount of bail. *See* Tenn. Code Ann. § 40-11-118(b). Section 118 requires the trial court to determine the amount of bail necessary to assure the defendant's appearance based upon the following factors:

- (1) The defendant's length of residence in the community;
- (2) The defendant's employment status and history and the defendant's financial condition;
- (3) The defendant's family ties and relationships;
- (4) The defendant's reputation, character, and mental condition;
- (5) The defendant's prior criminal record and record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings;
- (6) The nature of the offense and the apparent probability of conviction and the likely sentence;
- (7) The defendant's prior criminal record and the likelihood that because of such record the defendant will pose a risk of danger to the community;
- (8) The identity of responsible members of the community who will vouch for the defendant's reliability . . .
- (9) Any other factors indicating the defendant's ties to the community or bearing on the risk of the defendant's willful failure to appear.

Tenn. Code Ann. 40-11-118(b).

The final factor enumerated by the legislature permits the trial court's determination of the amount of bail to include factors concerning the likelihood that the defendant will purposefully abscond. A criminal defendant's refusal to participate in a drug testing program as a condition of his pre-trial release on bail is a factor that may have a correlation with the likelihood that the defendant will fail to appear. *See, e.g., Oliver v. United States*, 682 A.2d 186 (1996). Thus, it is the opinion of this Office that a trial court may impose a higher bail for criminal defendants who refuse to submit to drug testing as a condition of release.

**4. The trial court may not require a criminal defendant to answer questions under oath regarding drug use under any circumstances.**

The Self-Incrimination Clause of the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” See *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). The Tennessee Constitution contains a similar provision in Article I, Section 9, which guarantees that “in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself.” These constitutional protections prohibit “officially coerced self-accusation.” *United States v. Washington*, 431 U.S. 181, 187, 97 S.Ct. 1814, 1818 (1977).

Although no court has addressed the applicability of the prohibition against compulsory self-incrimination in the context of a pretrial bail proceeding, the United States Supreme Court has stated that the right can be asserted in any civil, criminal, administrative, or judicial proceeding, whether investigatory or adjudicatory, where the answers might incriminate the defendant in future criminal proceedings. *Kastigar v. United States*, 406 U.S. 441, 444-445, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed. 2d 274 (1973). In the scenario currently under consideration, the trial court purports to question a criminal defendant who is in custody under oath regarding the defendant’s illicit drug use for the purpose of determining the conditions governing that defendant’s release on bail. Under such circumstances, it is the opinion of this Office that such questioning implicates “the cruel trilemma of self-accusation, perjury or contempt.” *Michigan v. Tucker*, 417 U.S. 433, 445, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974) (quoting *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964)). Accordingly, it is the opinion of this Office that a trial court may not compel a criminal defendant to answer questions under oath regarding incriminating information during a bail proceeding.

**5. Under the Fourth Amendment, the voluntariness of consent to a search is a question of fact that can only be determined upon a consideration of all of the attendant circumstances.**

As previously discussed, this Office is of the opinion that the Fourth Amendment’s proscription of unreasonable searches is not implicated by the imposition of conditions of release on bail because of the diminished expectation of privacy. It is well-settled that an individual can assert a claim of Fourth Amendment protection only if the individual had a reasonable expectation of privacy in the objects of the search. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Because the Fourth Amendment is not implicated, the issue of consent is not implicated either. *State v. Bartram*, 925 S.W.2d 227, 230 (Tenn.1996) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)) (consent is an exception to the warrant requirement).

**6. Rule 8 of the Rules of Appellate Procedure requires a criminal defendant to file a written motion in the trial court before seeking appellate review.**

Rule 8 of the Rules of Appellate Procedure governs release in criminal cases. That rule provides for the appeal of release orders either before or after conviction. However, “as a prerequisite” to appellate review, a criminal defendant must challenge an “order entered by the trial court . . . granting, denying, setting, or altering conditions of defendant’s release” by filing a written motion in the trial court. Tenn. R. App. P 8(a). More particularly, the Tennessee Supreme Court has said that a defendant’s only effective remedy for challenging the conditions of release is to seek review pursuant to Rule 8 promptly rather than wait until after conviction. *State v. Melson*, 638 S.W.2d 342, 358 (Tenn. 1982). Accordingly, it is the opinion of this Office that a criminal defendant’s failure to challenge the conditions of release on bail in a written motion in the trial court constitute a waiver of the issue.

**7. The trial court is immune from civil liability for official acts done within the exercise of legitimate judicial authority.**

The doctrine of judicial immunity affords judges, acting within their judicial capacities, absolute immunity from civil liability. The United States Supreme Court has recognized that this doctrine extends to suits brought against judges for constitutional violations. *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967). Similarly, the Tennessee Supreme Court has stated: “It is generally recognized that a judge is immune from civil liability for bona fide acts done within the exercise of his judicial function while acting within the limits of his jurisdiction.” *Harris v. Witt*, 552 S.W.2d 85 (Tenn. 1977). If the trial court commits error in imposing conditions upon a criminal defendant who is released on bail, the defendant’s relief from such conditions is by way of an appeal from the ruling, not by an action for damages against the trial judge. *Id.*; Tenn. R. App. 8(a). Because the imposition of conditions of release is a discretionary judicial function within the trial court’s jurisdiction, it is the opinion of this Office that the trial judge is immune from liability for any constitutional violations that arise in that context.

---

PAUL G. SUMMERS  
Attorney General

---

MICHAEL E. MOORE  
Solicitor General

---

MARK A. FULKS  
Assistant Attorney General

Page 8

Requested by:

Hon. Edward L. Hardister  
Assistant District Attorney General  
P.O. Box 145  
Trenton, Tennessee 38382