

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1999

FILED

November 18, 1999

Cecil CROWS ON, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

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No. 03C01-9904-

CC-00146

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Appellant,

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COCKE COUNTY

vs.

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Hon. Rex Henry Ogle, Judge

CANDRA ANN FRAZIER,

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(State Appeal)

Appellee.

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For the Appellee:

For the Appellant:

Thomas V. Testerman

301 East Broadway
Newport, TN 37821

Paul G. Summers

Attorney General and Reporter

and

R. Stephen Jobe

Assistant Attorney General
Criminal Justice Division
425 Fifth Avenue North
2d Floor, Cordell Hull Building
Nashville, TN 37243-0493

Amber Haas

Asst. Public Defender
102 Mims Avenue
Newport, TN 37821

Al Schmutzer, Jr.

District Attorney General
Sevier County Courthouse
125 Court Avenue, Suite 301-E
Sevierville, TN 37862

OPINION FILED: _____

APPEAL DISMISSED

David G. Hayes, Judge

OPINION

The State appeals the ruling of the Cocke County Circuit Court finding subsection (n) of the DUI statute, Tenn. Code Ann. § 55-10-403(n) (1998), unconstitutional. After review, we conclude that no case or controversy exists empowering this court to render a decision on the merits. Accordingly, the appeal is dismissed.

The appellee, Candra Ann Frazier, entered a guilty plea in the Cocke County General Sessions Court to the offense of driving under the influence. Before imposing sentence, the general sessions court found that Tenn. Code Ann. §55-10-403(n) was unconstitutional as violating the equal protection clause. Tenn. Code Ann. § 55-10-403(n) provides:

Notwithstanding the provisions of this section to the contrary, in counties with metropolitan form of government and population in excess of 100,000 . . . the judge exercising criminal jurisdiction may sentence a person convicted of violating the provisions of § 55-10-501, for the first time to perform two hundred hours of public service work in a supervised public service program in lieu of the minimum period of confinement required by the provisions of subsection (a).

It is conceded that the limiting language of subsection (n) applies only to Davidson County. The effect, therefore, permits those convicted in Davidson County to perform public service in lieu of the mandatory forty-eight hours confinement in jail. See Tenn. Code Ann. § 55-10-401(a). The general sessions court, invoking the doctrine of elision,¹ struck only the language of section 55-10-403(n) that limited the provision's application to Davidson County. The appellee was sentenced to perform two hundred hours of community service work in Cocke County. The State appealed this decision to the Circuit Court of Cocke County.

On March 1, 1999, the Cocke County Circuit Court, after hearing the

¹The doctrine of elision provides:

if it is made to appear from the face of the statute that the legislature would have enacted [the provision] with the objectionable features omitted, and those portions of the statute which are not objectionable will be held valid and enforceable, . . . provided, of course, there is left enough of the act for a complete law capable of enforcement and fairly answering the object of its passage.

Franks v. State, 772 S.W .2d 428, 430 (Tenn.1989) (citations omitted).

argument of counsel, the testimony of witnesses, and considering the evidence in the record, concluded that

there is no rational basis for the special exception for Davidson County to the general DUI statute and that Sub-Section (n) of Tenn. Code Ann. Section 55-10-403 violates equal protection in light of State v. Tester, 879 S.W.2d 823 (Tenn. 1994), and it further appearing to the Court that elision is not possible nor permissible . . . and therefore this Court declares subsection n of Tenn. Code Ann. § 55-10-403 to be unconstitutional. . . .^[2]

After striking subsection (n) from the statute, the trial court vacated the appellee Frazier's sentence to public service work and imposed a sentence of forty-eight hours jail confinement. The Attorney General of the State of Tennessee now appeals this decision.³

In order to litigate a constitutional issue, there must first be a genuine "case" or "controversy" present. Our supreme court has stated that a court should not "pass on the constitutionality of a statute, or any part of one, unless absolutely necessary for the determination of the case and of the present rights of the parties to the litigation." County of Shelby v. McWherter, 936 S.W.2d 923, 931 (Tenn. App. 1996) (citing Estrin v. Moss, 430 S.W.2d 345, 352 (Tenn. 1968)). The right of the court to declare a legislative action unconstitutional can only be exercised when there is a proper case between opposing parties. The decision that a case is non-justiciable bars consideration of the merits, regardless of other equities which may be at issue. There will be no "case or controversy" or "justiciable controversy" sufficient to allow the court to adjudicate constitutional issues where: the parties are seeking only an advisory or abstract hypothetical opinion; the litigation is premature or the controversy unripe; the litigation has become moot; there is an absence of adverse parties; or the judicial act could not give finality to the controversy. See 3

²The record reflects that, at the hearing before the Circuit Court, the State, represented by the District Attorney General for the Fourth Judicial District agreed with the General Sessions Court that, "the statute is in fact unconstitutional; that there is no rational basis for it." Notwithstanding, the District Attorney General argued that the General Sessions Court erred by applying the doctrine of elision and that the entire provision needed to be struck as being unconstitutional.

³"[T]he Tennessee attorney general . . . has the statutory duty: [t]o defend the constitutionality and validity of *all* legislation of statewide applicability . . . enacted by the general assembly, *except in those instances where he is of the opinion that such legislation is not constitutional, in which event the attorney general and reporter shall so certify to the speaker of each house of the general assembly.*

State v. Chastain, 871 S.W.2d 661, 664 (Tenn. 1994) (quoting Tenn. Code Ann. § 8-6-109(b)(9) (1993) (emphasis added)).

CHESTER JAMES ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 48.27 (2d ed. 1997). In this case, we are precluded from ruling on the question presented on appeal because (1) the issue raised by the State is moot and (2) the case is absent “adverse” parties.

A case becomes moot when the issues initially presented in litigation ceases to exist or when the court’s ruling would have no practical effect on the parties. See County of Shelby v. McWherter, 936 S.W.2d at 931; McIntyre v. Traughber, 884 S.W.2d 134, 147 (Tenn. App. 1994). A court is not empowered “to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.” See United States v. Alaska Steamship Company, 253 U.S. 113, 116, 40 S.Ct. 448, 449 (1920). Indeed, “the power of the courts . . . to pass upon the constitutionality of [legislation] arises only when *the interests of litigants require the use of this judicial authority for their protection against actual interference.*” See United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 89, 67 S.Ct. 556, 564 (1947) (emphasis added).

In the case before this court, the trial court’s pronouncement finding subsection (n) unconstitutional had no effect on the State or the appellee. Accordingly, the court’s ruling was adverse to neither. The appellee was sentenced under the same DUI sentencing provisions as would have applied to any first time offender in a county other than Davidson.⁴ The State cannot complain because the appellee was sentenced as provided by law. While a decision regarding the statute’s constitutionality could be given, this would merely be a hypothetical ruling as between these parties. The only effect of the trial court’s finding that subsection (n) is unconstitutional is to deny first time DUI offenders in Davidson County the benefit of the public service exception. However, the impact of this decision is of no legal consequence as the circuit court’s opinion merely constitutes persuasive authority and is not binding, under the theory of *stare decisis*, upon other judicial

⁴The appellee does not assert that the general sessions court’s reliance upon the doctrine of elision is correct thereby entitling her to a sentence of community service. Rather, she relies upon the findings of the circuit court regarding the unconstitutionality of the statutory provision.

circuits, including the Twentieth Judicial District (Davidson County).⁵

An appellate court will not pass on lawsuits when there is no justiciable controversy presented, or render advisory opinions on questions which are premature. See State v. Rogers, 703 S.W.2d 166, 169 (Tenn. Crim. App. 1985) (citations omitted). The doctrine of justiciability prompts courts to stay their hand in cases that do not involve a genuine and existing controversy requiring the present adjudication of present rights. See McIntyre v. Traughber, 884 S.W.2d at 137 (citing State ex. rel Lewis v. State, 208 Tenn. 534, 537, 347 S.W.2d 47, 48 (1961); Dockery v. Dockery, 559 S.W.2d 952, 954 (Tenn. App. 1977)). Thus, this court declines the opportunity to render a mere advisory opinion in this matter, Super Flea Mkt. v. Olsen, 677 S.W.2d 449, 451 (Tenn. 1984); Parks v. Alexander, 608 S.W.2d 881, 892 (Tenn. App. 1980), or decide an abstract legal question. State ex. rel Lewis v. State, 208 Tenn. at 538, 347 S.W.2d at 49.

For the reasons aforementioned, the appeal is dismissed. The costs of this appeal will be paid by the State of Tennessee.

DAVID G. HAYES, Judge

CONCUR:

GARY R. WADE, Presiding Judge

DAVID H. WELLES, Judge

⁵We note that had the trial court upheld the General Sessions Court's imposition of two hundred hours community service, the issue would have been justiciable. Similarly, had this action arose in the courts of Davidson County, the issue would have been justiciable.