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Under the authority of several statutes, many municipal courts have been imposing "civil penalties" in excess of $50. Municipal civil penalties in excess of $50 violate Article VI, Section 14 of the Tennessee Constitution if their purpose is punitive rather than remedial, the Tennessee Supreme Court held on Sept. 4 in *City of Chattanooga v. Davis* and *Barrett v. Metropolitan Government of Nashville and Davidson County*, ____ S.W.3d _____ (Tenn. 2001) [2001 WL 1005941]. The difficulty of showing that a municipality's civil penalty is remedial rather than punitive means that most municipalities will find it in their interest not to levy civil penalties more than $50.

Twenty-six municipal courts in Tennessee exercise jurisdiction concurrent with courts of general sessions. In that capacity, those municipal courts hear cases in which the offender is charged with violating the state law rather than a municipal ordinance. *Davis* and *Barrett* do not appear to have affected the penalties capable of being imposed by municipal courts exercising that jurisdiction.
Davis is also important for the question it put off until another day: Is *Tennessee Code Annotated* (*T.C.A.*) § 55-10-307, under which municipalities are authorized to adopt the rules of the road in *T.C.A.* Title 55, Chapter 8 and other traffic offenses in *T.C.A.* Title 55, Chapters 10 and 50, constitutional?

Other constitutional issues regarding municipal ordinance violation penalties and practices were also considered in *Davis*, but they were resolved in favor of municipalities and will not be considered here.

The $50 Civil Penalty

Article VI, § 14 of the Tennessee Constitution says: "No fine shall be laid on any citizen of this State that shall exceed Fifty Dollars, unless it shall be assessed by a jury of his peers ..." There is no statutory authorization for jury trials in municipal courts in Tennessee. Some Tennessee Supreme Court cases, especially *O'Dell v. City of Knoxville*, 338 S.W.2d 150 (1964), suggested that penalties for municipal ordinance violations were civil penalties to which the $50 fine limitation in Article VI, § 14 did not apply. *Davis* and *Barrett* specifically overturned *O'Dell* on that point. Because municipal courts were probably justified to rely on *O'Dell*, it is not likely that *Davis* and *Barrett* are retroactive.

City of Chattanooga v. Davis

The city of Chattanooga is a home-rule city.[1] The city court fined Davis $300 for reckless driving. Among his challenges to the fine was that *T.C.A.* § 6-54-306 violated Article VI, § 14. That statute says:

> All home rule municipalities are empowered to set maximum penalties of thirty (30) days imprisonment and/or monetary penalties and forfeitures up to five hundred dollars ($500), or both, to cover administrative expenses incident to correction of municipal ordinance violations.

In overturning Davis' $300 fine, the court said two important things:

- *T.C.A.* § 6-54-306 was not facially unconstitutional.

- The $50 fine limitation in Article VI, § 14 of the Tennessee Constitution *does* apply to the violation of municipal ordinances when: (1) the legislative body creating the sanction primarily intended that the sanction punish the offender for a violation of the ordinance; or (2) "despite evidence of remedial intent, the monetary sanction is shown by the 'clearest proof' to be so punitive in its actual purpose or effect that it cannot legitimately be viewed as remedial in nature."

The purpose of *T.C.A.* § 6-54-306 is contained in the statute itself, declared the court: "... to cover administrative expenses." But the language of both the city's ordinance governing reckless driving and the general penalty provision of its code of ordinances was punitive: "Every person *convicted* of reckless driving shall be *punished* ..." and "... the violation of any such provision of this code or any such ordinance, rule, or regulation shall be *punished* ..." The ordinances contained no remedial purposes.

Barrett v. Metropolitan Government of Nashville and Davidson County

Title 16 of the Nashville/Davidson County metropolitan code regulated buildings and construction. The Nashville/Davidson County Metropolitan Court levied on *Barrett* a civil penalty of $500 for each of five civil warrants issued over a period of months for various building code violations, including the failure to install proper roof underlayment, failure to obtain a building permit, and violating a stop-work order.

It is worthwhile to note that *T.C.A.* § 7-3-507 provides that:

> All metropolitan governments are empowered to set a penalty of up to five hundred dollars ($500) per day for each day during which the violation of ordinances, laws, or regulation of such metropolitan government continues or occurs. [The statute prescribes lesser penalties for certain housing and zoning violations.]

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[1] There are 13 home-rule cities in Tennessee: Chattanooga, Clinton, East Ridge, Etowah, Johnson City, Lenoir City, Memphis, Oak Ridge, Red Bank, Sevierville, Sweetwater, Whitwell, and Knoxville.

[2] It is observed in Footnote 4 that in the trial court, Davis "argued that Tennessee Code Annotated, § 6-54-308, which permits non-home-rule municipalities to establish monetary penalties not exceeding $500, also violated Article XI, Section 8 [of the Tennessee Constitution]. The constitutionality of section 6-54-308 has not been raised in this appeal, and it appears to have no direct application to the issues presented before this court. Therefore, we do not refer to this provision in the procedural history of this case."

The constitutionality of that statute under Article VI, § 14 of the Tennessee Constitution was not an issue in *Barrett*; indeed, it was not even mentioned except in a footnote in connection with *Davis*![2]

The court launched a two-step inquiry into the question of whether the fines were punitive or remedial:

- Was the language of the pertinent ordinances punitive or remedial?

The penalty provision of Title 16 at the time of the violations in question contained punitive language. The city later "clarified" the penalty provision, changing the words "misdemeanor," "offense," "fine," and similar terms to "it shall be a civil offense" and "civil penalty." That clarification made it a close question whether the penalty provision was remedial or punitive, but "for the purposes of this case only" the court resolved the question in favor of the remedial nature of the provision.

- Were the "actual purpose and effect" of the ordinances punitive or remedial?

The introductory provision of Title 16 declared that the purpose of the title is "to secure ... public safety, health, and general welfare, tough structural strength, stability, sanitation, adequate light and ventilation, and safety to life and property from fire and other hazards incident to the construction, alteration, repair, removal, demolition, [and the] use and occupancy of buildings, structures, or premises." But labeling the sanctions remedial did not necessarily make them so. "Therefore," said the court, "we must first examine how monetary penalties can serve remedial goals in general and then determine whether the penalties imposed here truly served a remedial role within the context of their statutory scheme." Civil remedial measures have certain attributes that are basically preventative, corrective, and compensatory, continued the court.

Instances of remedial sanctions in Title 16 were a stop-work order, revocation or approval of permits, and the ability of the director of the codes administrator to require proof of compliance at the expense of the owner or agent. Each of those sanctions sought to correct or to halt violations of the code.

But a "monetary penalty" can serve but a few truly remedial purposes: (1) compensation for loss, (2) reimbursement for expenses, (3) disgorge "ill-gotten gains," (4) restitution for harm, and (5) ensure compliance with an order or directive through the execution of a bond or through a *prospectively* coercive fine.

The fines imposed upon Barrett for failing to secure a building permit and for improper installation of roof underlayment served none of those purposes. Title 16 itself imposed monetary penalties for past violations without regard to correcting or rectifying any harm. For those reasons, those fines fell under the $50 limitation under Article VI, § 14.

The civil penalty for the violation of the stop-work order was different. It was remedial if it met one of the following two conditions:

(1) It was *prospectively* coercive. It could meet this condition only if it could be purged in one of two ways:

(a) It was imposed and suspended pending future compliance.

(b) It was imposed per diem, or for each day of noncompliance with an order or directive.

(2) It served to compensate the party injured by the violation of the order.

But the fine for the stop-work order did not compensate the city for the harm it did the city; indeed, there was no proof to "calibrate" the damage suffered by the city, and the fine was fixed and determinate. For those reasons, it too fell under the $50 fine limitation in Article VI, § 14.

Application of the $50 Fine Limitation to all Municipalities

Davis involved a home-rule municipality, and *Barrett* involved a metropolitan government. The statutory authority of home-rule municipalities and metropolitan governments to levy civil penalties of up to $500 derives, respectively, from *T.C.A.* § 6-54-306 and § 7-3-507. The remaining Tennessee municipalities are chartered under private acts and several general laws and derive their statutory authority to levy fines of up to $500 (except in moving traffic cases) from *T.C.A.* § 6-54-308, which provides that:

> (a) Except as provided in § 6-54-306 for home-rule municipalities, the legislative body of any other municipality may establish a monetary penalty not to exceed $500 for each violation of an ordinance of such municipality.
> (b) The authority for increased monetary penalties for ordinance violations provided by this section does not apply to ordinances regulating all moving traffic violations.

While neither *T.C.A.* § 7-3-507 nor § 6-54-308 were an issue in *Davis* or *Barrett*, the sweep of those cases was broad enough to include penalties for municipal ordinance violations under whichever statute they are levied.

Recommended Action by Cities

Most cities will find it extremely difficult, if not impossible, to impose civil penalties exceeding $50 without violating Article VI, § 14. Even the court pointed to the difficulty in administering remedial civil penalties:

> From the onset, we acknowledge that only the rare case will admit of simple resolution, and these two cases [*Barrett* and *Davis*] in particular illustrate well the candid observation proffered by one scholar that '[a] criminal fine and a civil fine, do not by the very fact of their imposition, distinguish themselves.' Indeed, although distinguishing between punitive and non-punitive measures may have been a comparatively simple test in 1796, it has since become an increasingly complex undertaking.

Because the question of whether a fine is punitive or remedial is based on a "totality of circumstances" in individual cases, there is a good prospect the city will be wrong a high percentage of the time. After *Davis* and *Barrett*, cities should need no instruction on the cost of being wrong in such cases.

In addition, the administrative overhead involved in operating a so-called remedial, rather than a punitive, ordinance enforcement system will be high. It is also said in *Davis* that if the city of Chattanooga wished to recover the administrative expenses to which *T.C.A.* § 5-54-306 ties the civil penalty, "it will be required to provide a detailed statement of these expenses to the defendants as they were incurred in the *individual* case." [The court's emphasis.] Presumably, a city would face similar requirements under *T.C.A.* § 5-54-308, even though the civil penalty under that statute is not expressly tied to administrative expenses.

The Constitutional Question Left for Another Day in *Davis*

T.C.A. § 55-10-307 permits municipalities to adopt certain state offenses — generally, the rules of the road contained in *T.C.A.* Title 55, Chapter 8 and driver's license and other offenses contained in *T.C.A.* Title 55,

chapters 10 and 50. *Davis* also argued that statute was unconstitutional under Article VI, § 5 of the Tennessee Constitution because it usurped the authority of the district attorney general. Article VI, § 5 provides for the election of an attorney general and says of his powers that, "In all cases where the Attorney for any district fails or refuses to attend and prosecute according to law, the Court shall have the power to appoint an Attorney pro tempore." The attorney general's power is supplemented by *T.C.A.* 8-7-103(1), which provides that the district attorney "[s]hall prosecute in the courts of the district all violations of the state criminal statutes and perform all prosecutorial functions attendant thereto, including prosecuting cases in a municipal court where the municipality provides sufficient personnel to the district attorney general for that purpose."

The court agreed with *Davis*' argument, reasoning that it had said in *Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207 (Tenn. 1999), that "[a]lthough the General Assembly may enact laws prescribing or affecting the '*procedures for the preparation of indictments or presentments,' it cannot enact laws which impede the inherent discretion and responsibilities of the office of district attorney general without violating Article VI, section 5*." [Emphasis is the court's.] It pointed to "more than ninety city ordinances ... that are identical or substantially identical to state offenses dealing with motor vehicles and traffic offenses," to the discretion of police officers with respect to issuing either state or municipal ordinance violations for such offenses, and to the fact that there was no consultation with the district attorney general's office before any decision to the proper charge had been made. Much of the court's attention was focused on a letter issued by the Chattanooga chief of police requiring police officers to issue city ordinance violations where the offense in question was both a violation of the state law and of a city ordinance. "[W]e conclude that *Davis* has established a compelling case demonstrating that some policies and practices of the City of Chattanooga infringe upon the District Attorney General's constitutional and statutory authority, in direct violation of our decision in *Ramsey v. Town of Oliver Springs*." [Citation omitted.]

But "Despite the probable unconstitutionality of the policies and practices of the City of Chattanooga," the court "decline[d] to take corrective action at this time," because *Davis* lacked legal standing to make that challenge. The reasons he lacked standing are not important here. The party with standing, said the court, was the district attorney himself.

Recommended Action by Cities

It is almost impossible to determine what changes in municipal practices should be made with respect to traffic violations that are both state law violations and ordinance violations under *T.C.A.* § 55-10-307. In *Davis*, the court appears to have had trouble with the number of state traffic violations the city had adopted by ordinance. The court also had problems with: (1) the discretion on the part of police officers to determine whether to cite violators under state law or city ordinances and (2) the lack of discretion on the part of police officers who were required by the chief of police to cite offenders for city ordinance violations when the offense in question was both a state law and city ordinance violation. How a city would resolve similar problems to the court's satisfaction is not clear.

In theory, until the court holds unconstitutional all or parts of *T.C.A.* § 55-10-307 or the practices of municipalities under that statute, municipalities need do nothing. But in the face of the court's clear pronouncement that *T.C.A.* § 55-10-307 itself or municipalities' practices under it are unconstitutional and that it awaits only a suit brought by a district attorney general to officially confirm it points to another alternative: Municipalities wishing to continue trying those traffic offenses that they are authorized to adopt under *T.C.A.* § 55-10-307 should consider obtaining the district attorney general's written approval.

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