STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

July 27, 2023

Opinion No. 23-09

Authority of Elected Municipal Court Clerk to Set Bail

Question 1

When an elected municipal court clerk serves a municipal court that exercises concurrent jurisdiction with a general sessions court, does Tenn. Code Ann. § 40-11-105(a) or any other law authorize that clerk to set bail for a defendant who has been arrested or held to answer for any bailable offense? Specifically, is such a municipal court clerk the equivalent of a "clerk of any circuit or criminal court" under Tenn. Code Ann. § 40-11-105(a)?

Opinion 1

No. Neither Tenn Code Ann. § 40-11-105(a) nor any other general law authorizes an elected municipal court clerk to set bail, regardless of any concurrent jurisdiction that the municipal court may exercise with a general sessions court.

Question 2

If the answer to question 1 is "yes," are there any statutory limitations on the elected municipal court clerk's authority to set bail for a defendant who has been arrested or held to answer for any bailable offense?

Opinion 2

In light of Opinion 1, this question is moot.

Question 3

If the answer to question 1 is "yes," does the municipal court judge have the authority under state law to limit or revoke the authority of the elected municipal court clerk to set bail? If the municipal court judge does not have such authority under state law, can a city charter give the municipal court judge such authority?

Opinion 3

In light of Opinion 1, this question is moot.

Question 4

If the answer to question 1 is "yes," is there an authoritative governing body that can take corrective action against an elected municipal court clerk when the clerk violates his or her authority relative to setting bail amounts, and if so, which authoritative governing body can take such action?

Opinion 4

In light of Opinion 1, this question is moot.

ANALYSIS

Under Tennessee law, criminal defendants have a right to bail before trial except in capital cases. *See Wallace v. State*, 193 Tenn. 182, 185-86, 245 S.W.2d 192, 193 (1952) (citing Tenn. Const., art. I, § 15); Tenn. Code Ann. § 40-11-102. The statutory framework governing pretrial release and bail is predominately found in the "Release from Custody and Bail Reform Act of 1978" ("Bail Reform Act"). *See* Tenn. Code Ann. §§ 40-11-101, *et seq*.

Tennessee Code Annotated § 40-11-105(a) of the Bail Reform Act provides that a defendant is entitled to be "admitted to bail" when the defendant has been arrested or held to answer for any bailable offense.[1] As currently codified, Tenn. Code Ann. § 40-11-105(a) authorizes only three categories of officials to admit defendants to bail—committing magistrates, judges of circuit and criminal courts, and clerks of circuit and criminal courts:

> (a)(1) When the defendant has been arrested or held to answer for any bailable offense, the defendant is entitled to be admitted to bail *by the committing magistrate, by any judge of the circuit or criminal court, or by the clerk of any circuit or criminal court*; provided, that if admitted to bail by the clerk of any circuit or criminal court, the defendant has a right to petition the judge of the circuit or criminal court if the defendant feels that the bail set is excessive, and shall be given notice of this fact by the clerk.
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> (2) The clerk of any circuit or criminal court may only admit a defendant to bail when the judge is not present in the court and the clerk reasonably believes that the judge will not be present within three (3) hours after the defendant has been committed to the county or city jail, following arrest.

Tenn. Code Ann. § 40-11-105(a) (emphasis added).

As explained below, an elected municipal court clerk is not a "committing magistrate," a "judge of the circuit or criminal court," or a "clerk of any circuit or criminal court." Accordingly, Tenn. Code Ann. § 40-11-105(a) does not authorize an elected municipal court clerk to set bail for a defendant who has been arrested or held to answer for any bailable offense.

[1] "Admitt[ing] to bail" is the judicial act of allowing bail, 8 C.J.S. *Bail* § 70 (2023), and includes setting the amount of bail, *id*., *see* Tenn. Code Ann. § 40-11-105(a)(1). Admitting to bail stands in contrast with the taking, accepting, or approving of bail after its allowance. 8 C.J.S. *Bail* § 70 (2023).

In construing statutes, a court's role is "to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *State v. Strode*, 232 S.W.3d 1, 9 (Tenn. 2007) (internal quotation marks and citations omitted). Thus, the first step in construing a statute is to "look at the . . . plain language." *Spires v. Simpson*, 539 S.W.3d 134, 143 (Tenn. 2017). The initial focus must be on the words of the statute, giving them their natural and ordinary meaning in light of their statutory context. *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 526-27 (Tenn. 2010). If the language is clear and unambiguous, the task is at an end. *See Keen v. State*, 398 S.W.3d 594, 610 (Tenn. 2012). But if the language is ambiguous, the court may look to the broader statutory scheme, the legislative history, and other sources, including established canons of statutory construction. *Spires*, 539 S.W.3d at 144; *State v. Marshall*, 319 S.W.3d 558, 561 (Tenn. 2010); *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008).

Here, the plain language of the statute, read in the context of the Bail Reform Act, is clear: an elected municipal court clerk does not fall within any of the three categories of officials authorized to admit a defendant to bail under Tenn. Code Ann. § 40-11-105(a)—i.e., (1) judges of circuit and criminal courts, (2) clerks of circuit and criminal courts, and (3) magistrates.

First, an elected municipal court clerk is not a "*judge* of the circuit or criminal court." Judges are public officials who are authorized by law to hear and decide legal matters in court. 46 Am.Jur.2d *Judges* § 1 (2023); *see In re Lawyers' Tax Cases*, 55 Tenn. 565, 650 (1875). Clerks, on the other hand, are ministerial officers who serve as "arms" of the courts, subject to the direction, control, and supervision of the judge of the court. 15A Am.Jur.2d *Clerks of Court* § 1 (2023); *see Bailey v. Schubert*, 203 Tenn. 660, 666, 315 S.W.2d 249, 252 (1958).

Second, an elected municipal court clerk is not a "clerk of any circuit or criminal court," even when the clerk serves a municipal court that exercises concurrent jurisdiction with a general sessions court. An examination of the Bail Reform Act squarely substantiates that the phrase "clerk of any circuit or criminal court" is confined to those clerks who are elected pursuant to Tenn. Code Ann. § 18-4-101 to serve circuit and criminal courts, i.e., courts governed by Tenn. Code Ann. §§ 16-10-101, *et seq*. The phrase cannot be read to refer to *any* clerk that serves a court that has jurisdiction over criminal matters because the Bail Reform Act is replete with provisions that apply only to clerks of certain courts, while other provisions clearly encompass clerks of several courts. When "the legislature includes particular language in one section of a statute but omits it in another section of the same act, it is presumed that the legislature acted purposefully in including or excluding that particular subject." *State v. Casper*, 297 S.W.3d 676, 693 (Tenn. 2009); *see Crowe v. Ferguson*, 814 S.W.2d 721, 723 (Tenn. 1991) (courts should assume that the General Assembly used each word in the statute purposely and the use of these words conveyed some intent and had a meaning and purpose).

For instance, some provisions of the Bail Reform Act apply generally to the "clerk of the court having jurisdiction of the offense,"[2] "the clerk of the court before which the proceeding is

[2] *See* Tenn. Code Ann. § 40-11-106(a) (addressing duty of sheriff or peace officer to deposit bail with "the clerk of the court having jurisdiction of the offense").

pending,"[3] "the clerk of the court,"[4] or simply "the clerk."[5] In contrast, there are provisions like Tenn. Code Ann. § 40-11-105(a) that apply to specific clerks, such as Tenn. Code Ann. § 40-11-106(b)(1), which addresses the certification of surety by "the circuit court clerk." And particularly significant here, Tenn. Code Ann. § 40-11-107 and § 40-11-108 address the authority of "the city court clerk" to "take" bail.

These various provisions of the Bail Reform Act demonstrate that the phrase "clerk of any circuit or criminal court" in Tenn. Code Ann. § 40-11-105(a) does not include a municipal court clerk, especially in light of the Act's inclusion of "city court clerks" as officers authorized to "take" bail in § 40-11-107 and § 40-11-108 and the exclusion of those same clerks as officers authorized to admit a defendant to bail in § 40-11-105(a). Had the General Assembly intended Tenn. Code Ann. § 40-11-105(a) to include municipal court clerks, it would have specifically referred to these clerks in § 40-11-105(a) or it would have used language such as "the clerk of the court having jurisdiction of the offense" or "the clerk of the court before which the proceeding is pending," as it did in other sections of the Bail Reform Act. *See Casper*, 297 S.W.3d at 693; *Crowe*, 814 S.W.2d at 723. Accordingly, an elected municipal court clerk is not a "clerk of any circuit or criminal court." *See Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 895 (Tenn. 2011) (statutes are to be construed in a manner that does not broaden statute beyond its intended scope).

Third, an elected municipal court clerk is not a committing "magistrate," a term which includes the following three groups of officials for the purposes of title 40: (a) "judges of the supreme, appellate, chancery, circuit, general sessions and juvenile courts throughout the state," (b) "judicial commissioners and county mayors in those officers' respective counties," and (c) "the presiding officer of any municipal or city court within the limit of their respective corporations." Tenn. Code Ann. § 40-1-106.

As explained earlier, clerks are not judges; thus, a municipal court clerk cannot be a "*judge*" of any of the courts permitted to admit a defendant to bail as a "magistrate."

An elected *municipal* court clerk is also obviously not a "*county* mayor" or a "judicial commissioner"—another *county* official.[6] *See* Tenn. Code Ann. §§ 40-1-111; 40-5-201 to -204; Tenn. Att'y Gen. Op. 03-110 (Sept. 8, 2003).

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[3] *Id*. § 40-11-118(a)(1) (addressing deposit of bail bond with "the clerk of the court before which the proceeding is pending").

[4] *Id*. § 40-11-119 (addressing return of the deposit by "the clerk of the court").

[5] *Id*. § 40-11-120 (addressing duty of "the clerk" to mail notices regarding forfeiture of bail); *id*. § 40-11-122 (addressing conveyance of deeds of trust to "the clerk").

[6] While this Office has concluded that a judicial commissioner appointed under Tenn. Code Ann. § 40-1-111 may perform his or her official duties on behalf of a municipal court with concurrent general sessions jurisdiction, Tenn. Att'y Gen. Op. 03-110 (Sept. 8, 2003) (citing Tenn. Att'y Gen. Op. 00-126 (Aug. 7, 2000)), the judicial commissioner remains a county official, *id.* In any case, such a judicial commissioner is not within the scope of this Opinion because the question at hand is limited to *elected municipal* court clerks, which would not include clerks who have been *appointed* as judicial commissioners by chief legislative bodies of counties or by general sessions judges. *See* Tenn. Code Ann. §§ 40-1-111; 40-5-204.

Finally, an elected municipal court clerk is not "the presiding officer of any municipal or city court." Case law has only declared that "city court *judges*" are presiding officers of city courts and, therefore, "magistrates" under Tenn. Code Ann. § 40-1-106. *State v. Ford*, M2007-00431-CCA-R3-CD, 2008 WL 1968824, at *4-5 (Tenn. Ct. App. May 7, 2008); *see* Tenn. Att'y Gen. Op. 84-228 (July 24, 1984) (same); Tenn. Att'y Gen. Op. 78-365 (Oct. 6, 1978) (same). And while no court has considered whether any other official can be a presiding officer of a municipal court, legislative history for Tenn. Code Ann. § 40-1-106 appears to foreclose any assertion that a municipal court clerk could be a presiding officer of a municipal court. The caption of the 1973 Act that added the phrase "the presiding officer of any municipal or city court" to Tenn. Code Ann. § 40-1-106 states that it is "AN ACT to amend Section 40-114, Tennessee Code Annotated,[7] to include *judges* of municipal courts within the definition of magistrates." 1973 Tenn. Pub. Acts, ch. 48 (emphasis added). And consistent with the caption of the Act, the bill was referred to as "the municipal city *judge* bill" during the House debates;[8] no one suggested or otherwise indicated that municipal court clerks were also intended to become "magistrates" under the bill.[9] *See Womack v. Corrections Corp. of Am.*, 448 S.W.3d 362, 366 (Tenn. 2014) (it is appropriate to discern legislative intent from "the history and purpose of the legislation . . . the caption of the act, and the legislative history of the statute").

In short, municipal court judges, not municipal court clerks, are "magistrates" authorized to admit defendants to bail under Tenn. Code Ann. § 40-11-105(a). And because admitting a defendant to bail is a discretionary task,[10] it is a judicial function as opposed to a ministerial act. *See State ex rel. Millers Nat'l Ins. Co. v. Fumbanks*, 177 Tenn. 455, 462, 151 S.W.2d 148, 150-51 (1941) (judicial function is distinguished from ministerial function on the basis of the exercise of judgment and discretion; a duty requiring no discretion or exercise of judgment is ministerial). Thus, municipal court judges may not delegate the task of setting bail to municipal court clerks, i.e., ministerial officers. *See* 46 Am.Jur.2d *Judges* § 22 (2023) ("A judge generally may not delegate judicial authority or the performance of judicial acts."); Tenn. Att'y Gen. Op. 99-008 (Jan. 25, 1999) (general rule against clerks performing judicial acts yields only when legislature specifically authorizes the clerk to perform the act).

Accordingly, no provision of Tenn. Code Ann. § 40-11-105(a) authorizes elected municipal court clerks to set bail because elected municipal court clerks are not judges of circuit and criminal courts, clerks of circuit and criminal courts, or committing magistrates.

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[7] "Section 40-114, Tennessee Code Annotated" is the statutory precursor to Tenn. Code Ann. § 40-1-106.

[8] *See* Hearing on H.B. 74, 88th Gen. Assem., 1st Sess. (Tenn. Apr. 4, 1973). There was no Senate discussion on the bill (Senate Bill 106) as it was passed on the consent calendar.

[9] *See id.*; Hearing on H.B. 74, 88th Gen. Assem., 1st Sess. (Tenn. Mar. 29, 1973). The only other officials discussed during the 1973 debates were those added by amendment to the bill: "the mayor or chief officer and the recorder of any incorporated city or town, within the limits of their respective corporations." At that time, these municipal officials served as judges of municipal courts in certain cities. *See* Frederic S. Le Clercq, *The Tennessee Court System*, 8 Mem. St. U. L. Rev. 185, 431-66 (1978). This particular provision was later repealed. 1993 Tenn. Pub. Acts, ch. 115, § 3.

[10] *See* Tenn. Code Ann. § 40-11-118(b) (setting forth a variety of factors that court is to consider when fixing the amount of bail); Tenn. Att'y Gen. Op. 05-018 (Feb. 4, 2005) (Tennessee law requires an individualized hearing to address the bail factors in Tenn. Code Ann. § 40-11-118(b)); *see also State v. Melson*, 638 S.W.2d 342, 358 (Tenn. 1982) (trial court has "very wide latitude in setting bail").

Furthermore, no other *general* law addressing the authority of municipal court clerks empowers such clerks to set bail.[11] While Tenn. Code Ann. § 18-4-203 does authorize "the clerk of a general sessions court . . . to set the amount of bond in the absence the judge," this statute has no application to municipal court clerks, even when the municipal court clerk serves a municipal court that exercises concurrent jurisdiction with a general sessions court. Municipal courts that exercise concurrent jurisdiction with a general sessions court do so through Tenn. Code Ann. § 40-1-107,[12] which provides: "Original jurisdiction of criminal actions is committed to . . . city *judges* of certain towns and cities . . . ." While this provision can allow a municipal judge, i.e., the municipal court, to exercise additional authority, *see* Tenn. Att'y Gen. Op. 08-136 (Aug. 15, 2008), this provision provides no additional authority to municipal court *clerks*.

When the General Assembly intends for a municipal court clerk to exercise the power of a general sessions court clerk, that intent is made clear. For instance, Tenn. Code Ann. § 6-54-303 describes how municipal court clerks are to issue execution on certain judgments and states that "the clerks shall assess the same fees and costs as allowable to clerks of general sessions court." Tennessee Code Annotated § 18-4-203, in contrast, does not contain this type of language.

In sum, neither Tenn Code Ann. § 40-11-105(a) nor any other general law authorizes an elected municipal court clerk to set bail, regardless of any concurrent jurisdiction that the municipal court may exercise with a general sessions court.

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[11] *See* Tenn. Code Ann. § 18-1-105 and § 18-1-108 (setting forth general duties and authority of clerks); § 16-18-310 (setting forth certain duties of clerks of municipal courts established under the Municipal Court Reform Act). Local law, e.g., Private Act, however, could authorize the municipal court clerk to set bail.

[12] *See City of McMinnville v. Hubbard*, M2018-00223-CCA-R3-CO, 2019 WL 719077, at *3 (Tenn. Crim. App. Feb. 20, 2019); *State v. Paster*, W2014-00606-CCA-R3-CD, 2015 WL 376450, at *2 (Tenn. Crim. App. Jan. 28, 2015).