Opinion No. 2012-086

September 21, 2012

The Honorable S. Kyle Hunter
Prosecuting Attorney
Eleventh Judicial District West
101 West Barraque
Post Office Box 9090
Pine Bluff, Arkansas 71611-9090

Dear Mr. Hunter:

You have asked for my opinion about the interpretation of a statute that regulates "electioneering." This statute—A.C.A. § 7-1-103(9)—prohibits, among other things, "electioneering of any kind whatsoever within 100 feet of the primary exterior entrance used by voters to the building" in which they are voting. You indicate that "an issue" has arisen recently "involving the interpretation of the language" in this statute as it "relates to the use of a bull horn" or simply "yelling" to speak to voters who are themselves within 100 feet of the primary entrance to the building. You make it clear that, in your hypothetical, the "people yelling and using the bull horn are standing outside the 100 ft. limit, but are asking people within the 100 ft. limit to vote for their candidate." You ask whether subsection 7-1-103(9) prohibits this activity.

RESPONSE

In my opinion, the answer to your question is "no." As noted above, subsection 7-1-103(9) prohibits the conjunction of two things: (1) "electioneering of any kind whatsoever" (2) that is done within a certain distance from the primary exterior entrance used by voters at a polling place. The activity you describe clearly meets the first element but does not meet the second. Accordingly, in my opinion, this scenario does not violate the statute.

The activities you describe clearly qualify as "electioneering." While this term has not been defined by an Arkansas appellate court or by the statute itself, this office has often noted that the term is commonly defined as "tak[ing] an active part in an election; to work for the election of a candidate or a party."[1] In your question, the people doing the speaking "are asking people...to vote for their candidate." This clearly qualifies as "electioneering" within the meaning of the statute.

Yet the statute's prohibition on "electioneering of any kind whatsoever" is geographically limited. In your hypothetical, you make it clear that the speakers—regardless of whether they are yelling or using sound amplifiers—are not advocating for their candidates within the prohibited area. This statute simply does not prohibit electioneering—e.g. displaying campaign signs, shouting campaign slogans, etc.—that occur outside the 100-foot zone. Instead, the statute only speaks to activities that occur within the prohibited zone.

I understand that the speakers' voices are carrying over into the prohibited area. But if the statute prohibited "carry over," then people standing just outside the prohibited zone would have to be virtually silent, for a person's voice—whether amplified or not—is likely to carry at least a foot into the prohibited zone. The same analysis would have to apply to campaign signs persons displayed outside the prohibited area. Such signs would "carry over" into the prohibited area in the sense that the sign would probably be legible for some distance into the prohibited zone.

This "carry-over interpretation" of the statute is belied by the statute's plain language, which was discussed above, and by two additional arguments. First, statutes criminalizing certain behavior—as this statute does—must be construed strictly.[2] This canon of construction rules out the "carry-over interpretation." For,

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[1] *E.g.*, Op. Att'y Gen. Nos. 2010-028 (citing *Webster's Seventh New Collegiate Dictionary* 266 (7th ed. 1972); 2004-269, 93-306.

[2] *E.g.*, *Misenheimer v. State*, 100 Ark. App. 189, 191, 265 S.W.3d 764, 767 (2007). The basis for this rule of construction, which is called the "rule of lenity," was explained in 1820 by Chief Justice John Marshall: "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime...." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 296 (West 2012) (explaining that the "rule [of lenity] originally rested on the interpretive reality that a just legislature would not decree

even if we assume that the carry-over interpretation is reasonable, the converse of that interpretation is (at least) equally reasonable. In such a scenario, courts are required to adopt the interpretation that is favorable to the defendant. Second, if the legislature intended to prohibit certain activities *outside* the 100-foot zone, then, like some other states' legislatures,[3] it could have easily done so.

Therefore, it is my opinion that subsection 7-1-103(9) cannot be read to prohibit the activity you describe.

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

Dustin McDaniel
Attorney General

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punishment without making clear what conduct incurs the punishment and the extent of the punishment; or at least on the judge-made public policy that a legislature *ought* not to do so.").

[3] For example, while Texas prohibits "electioneering" within 100 feet of polling places, the state specifically prohibits electioneering by means of "a sound amplification device" within 1000 feet of a polling place. *See* V.T.C.A., Election Code §§ 61.004, 61.010. Rhode Island also has a larger prohibited zone for the use of sound amplification equipment. *Compare* R.I. Gen. Laws §§ 17-19-49, 17-23-13 (jointly establishing a 50-foot prohibited zone for electioneering) *with* § 17-23-15 (establishing a 500-foot prohibited zone for electioneering by means of sound amplifiers).