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Opinion No. 06-070

Constitutionality of Proposed Legislation Requiring a Person Arrested For a Violent Felony or Aggravated Burglary to Provide a Biological Specimen For DNA Analysis

QUESTION

Does House Bill 2649, requiring that certain categories of arrestees provide a biological sample for DNA testing for the purpose of entry into a national DNA database for criminal investigation, violate Article I, section 9, of the Tennessee Constitution?

OPINION

No. The privilege against self-incrimination guaranteed by Article I, section 9, applies only to compelled testimonial communications. Since DNA is not testimonial communication, the collection of a biological specimen for DNA analysis and entry into a national database for identification purposes does not violate the right against self-incrimination under Article I, section 9 of the Tennessee Constitution. However, the proposed legislation is constitutionally suspect under the Fourth Amendment and Article I, section 7 of the Tennessee Constitution.

ANALYSIS

Article I, section 9, of the Tennessee Constitution requires “[t]hat in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself.” In the analogous context of the 5th Amendment to the United States Constitution, the United States Supreme Court has held that the privilege against self-incrimination “applies only when the accused is compelled to make a *testimonial* communication that is incriminating.” *Fisher v. United States*, 425 U.S. 391, 408, 96 S.Ct. 1569, 1579, 48 L.Ed.2d 39 (1976) (emphasis in original). This privilege does not ordinarily apply to nontestimonial evidence. *See, e.g., Schmerber v. California*, 384 U.S. 757, 764, 86 S.Ct. 1826, 1832, 16 L.Ed.2d 908 (1966) (suspect may be compelled to supply incriminating blood samples). The Tennessee Supreme Court has applied Article I, section 9 similarly, declaring: “As is the case with the Fifth Amendment, Article I, section 9 is concerned only with a defendant’s coerced, self-incriminating *statements*, and this provision has never been interpreted to provide a *per se* exclusion of non-testimonial evidence.” *State v. Walton*, 41 S.W.3d 75, 91 (Tenn. 2001). Since House Bill 2649 would require no more than the collection of a biological sample, the bill would not violate the protections of the Fifth Amendment to the United States Constitution or of Article I, section 9 of the Tennessee Constitution.

Although House Bill 2649 does not violate Article I, section 9, the bill is constitutionally suspect under section 7 of Article I, which prohibits unreasonable searches and seizures. The courts have determined that the drawing of blood constitutes a search under the Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution. *See Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 616, 109 S.Ct. 1402, 1412-1413, 103 L.Ed.2d 639 (1989) (stating that the collection of a person's blood for alcohol content analysis "must be deemed a Fourth Amendment search"); *State v. Blackwood*, 713 S.W.2d 677, 679 (Tenn. Crim. App. 1986) (stating that "[i]ntrusions into the human body and the withdrawal of blood for the testing of its alcohol content has been held to be subject to the constraints of the Fourth Amendment"). Similarly, the United States Supreme Court has found that a search of a suspect's fingernails constitutes "the type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny." *Cupp v. Murphy*, 412 U.S. 291, 295, 93 S.Ct. 2000, 2003, 36 L.Ed.2d 900 (1973) (citing *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 1882, 20 L.Ed.2d 889 (1968)). Also, swabs or scrapings of cells from inside a person's mouth for DNA analysis have been deemed searches under the Fourth Amendment. *See, e.g., Banks v. Gonzales*, 415 F.Supp.2d 1248 (N.D. Okla. Feb. 14, 2006); *Nicholas v. Goord*, 430 F.3d 652, 656 n.5 (2d Cir. N.Y. Nov. 28, 2005).

The statutorily mandated collection of biological samples for DNA analysis from persons convicted of sexual offenses has been found reasonable under the Fourth Amendment and under Article I, section 7, of the Tennessee Constitution. *See State v. Bruce Warren Scarborough*, No. E2004-01332-CCA-R9-CD, 2005 WL 1307792, *4 (Tenn. Crim. App. Nov. 16, 2004) (perm. app. granted Oct. 3, 2005). However, in *Scarborough*, the Court considered the searches of convicted prisoners, "who have a reduced expectation of privacy and do not enjoy the same panoply of rights as the general public." *Id.*¹ In House Bill 2649, persons merely arrested upon probable cause to believe they have committed a violent crime or aggravated burglary are to be subjected to a search for DNA.

When a person is arrested and detained upon probable cause to believe he has committed a crime, he loses the right of privacy from routine searches of the cavities of his body and his jail cell during his detention. *See Bell v. Wolfish*, 441 U.S. 520, 559-560, 99 S.Ct. 1861, 1884-1885, 60 L.Ed.2d 447 (1979) (balancing the interest in maintaining security in a detention facility against the privacy interests of the detained person). However, several courts have determined that a search warrant is required to draw blood from an arrestee. *See, e.g., Schmerber v. California*, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908 (1966) ("Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned"); *Graves v. Beto*, 301 F.Supp. 264 (E.D. Tex. 1969), *aff'd*, 424 F.2d 524 (5th Cir. 1970) (consent of an arrestee ineffective where police intimated that blood was taken to determine degree of drunkenness rather than for comparison to blood found at rape scene); *State v. Jones*, 49 P.3d 273, 281 (Ariz. 2002) (the drawing of blood is a bodily invasion and therefore a

¹In *Scarborough*, the State argued that the collection of a biological specimen from a convicted prisoner for DNA analysis does not constitute a search for purposes of the Fourth Amendment because a convicted prisoner has no reasonable expectation of privacy in blood drawn for both medical and identification purposes. That issue is currently under consideration by the Tennessee Supreme Court.

search under the Fourth Amendment requiring probable cause); *People v. Diaz*, 53 P.3d 1171, 1174 (Colo. 2002) (the Fourth Amendment forbids the unreasonable search and seizure of nontestimonial identification evidence taken from a defendant's body); *State v. Thomas*, 407 S.E.2d 141, 438 (N.C. 1991) (unless error was found to be harmless, arrestee defendant was entitled to relief where police took blood pursuant to a nontestimonial identification order when a search warrant was required); *State v. Carter*, 370 S.E.2d 553, 556 (N.C. 1988) (a search warrant must be issued before a blood sample can be obtained, unless probable cause and exigent circumstances exist that would justify a warrantless search); *Ferguson v. State*, 573 S.W.2d 516, 520 (Tex. Crim. App. 1978) ("if a defendant is in custody, either a warrant must be obtained or the defendant must consent to the taking of his blood"); *State v. Easthope*, 668 P.2d 528, 531-532 (Utah 1983) (taking of arrestee defendant's blood without a search warrant was justified where a magistrate conducted a hearing on a motion to compel discovery of body fluids, counsel were notified and defendant participated in the hearing, thus meeting the intent of the warrant requirement).

In *United States v. Purdy*, 2005 WL 3465721 (D. Neb. Dec. 19, 2005), a defendant challenged the constitutionality of a Nebraska law, known as the "Nebraska Identifying Physical Characteristics Act," which allowed law enforcement officers to obtain physical evidence to aid in the identification of criminal perpetrators. The statute specified such physical evidence as "fingerprints, palm prints, footprints, measurements, handwriting exemplars, lineups, hand printing, voice samples, blood samples, urine samples, saliva samples, hair samples, comparative personal appearance, and photographs of an individual." Neb. Rev. Stat. § 29-3301. Similarly to House Bill 2649, the Nebraska statute allowed the seizure of a biological specimen where a person had been lawfully arrested without any requirement for a legal proceeding to authorize the seizure. Neb. Rev. Stat. § 29-3304. The Nebraska legislature clearly intended to justify the taking of blood for DNA analysis in the same manner as other identification procedures, such as fingerprinting, visual identification, and other less intrusive manners of identification. However, the Court in *Purdy* distinguished the identifying characteristics of a person's DNA from other identifying characteristics which are readily ascertainable by the naked eye. The Court explained:

The Fourth Amendment . . . does not protect characteristics that a person knowingly exposes to the public. [*United States v. Dionisio*, 410 U.S. 1, 14, 93 S.Ct. 764, 771, 35 L.Ed.2d 67 (1973)] (involving the physical characteristic of a person's voice); *Hayes v. Florida*, 470 U.S. 811, 817, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985) (stating that "the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch."); *United States v. Mara*, 410 U.S. 19, 21 (1973) (involving handwriting exemplars, noting "there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice"); *but see Davis v. Mississippi*, 394 U.S. 721, 727, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969) (holding that warrantless fingerprinting in absence of either consent or probable cause to arrest violates the Fourth Amendment, despite the finding that "fingerprinting, because it involves neither repeated harassment nor any of the

probing into private life and thoughts that often marks interrogation and search, represents a much less serious intrusion upon personal security than other types of searches and detentions”).

However, DNA does not fit in the category of characteristics exposed to the public. The collection and chemical analysis of blood and body fluids “can reveal a host of medical facts” and “intrudes upon expectations of privacy that society has long recognized as reasonable.” *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (holding that breathalyzer exam for chemical analysis constitutes a search). . . . The court finds that compulsory extraction of cheek cells for DNA analysis, though marginally less intrusive than extraction of blood or collection of urine, constitutes a search for Fourth Amendment purposes.

Purdy at *3-4.

The Court in *Purdy* recognized that courts across the country have upheld laws requiring convicted prisoners to provide biological specimens for DNA analysis, but distinguished the status of convicted prisoners from that of mere arrestees:

Arrestees and persons in custody may not qualify as the “general public,” but neither do they have the same status as convicted felons. *See Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995) (noting that convicted felons “do not have the same expectation of privacy in their identifying genetic material that free persons and *mere arrestees* have: once a person is convicted of certain felonies “his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling”). There is an obvious and significant distinction between the DNA profiling of law-abiding citizens. . . .

Purdy at *6.

The Court in *Purdy* found the Nebraska statute to be unconstitutional and reasoned:

The statute, as written, would authorize wholesale warrantless DNA profiling of persons who have not been convicted of a crime without any narrowing limitations or safeguards whatsoever. It would authorize DNA searches of all those in custody, even for misdemeanor or traffic violations, and of all those arrested for any felony, without the showing of any nexus between the alleged crime and the information that a DNA test would reveal. A person arrested, but not convicted, for a certain crime cannot be forced to provide DNA “identification” evidence without a showing that such evidence would identify him as the perpetrator of the crime. The probable cause that supports an arrest is not necessarily probable cause for a DNA search. Further, there is no showing, in the case of DNA evidence, that exigent circumstances would justify a warrantless search at issue. . . . The information

revealed in a DNA analysis does not dissipate over time, thus, its acquisition is not time sensitive.

Id. at *7.

Although the Nebraska statute at issue in *Purdy* was broader than proposed House Bill 2649, many of the same concerns exist. The statute would authorize the search of an arrestee without a showing of any nexus between the crime alleged and the information the DNA test would reveal. For example, probable cause to believe a person has committed aggravated kidnapping would not necessarily constitute probable cause to believe evidence of the kidnapping would be found in the suspect's DNA. Of course, when there is such a nexus, probable cause justifying an arrest would ordinarily also supply probable cause to search the arrestee's DNA, and investigators would be entitled to seek a warrant authorizing such a search on the basis of that information. And once an arrestee is convicted, he would then be subject to the mandate of Tenn. Code Ann. § 40-35-321 requiring him to provide a biological specimen for DNA analysis and entry in a criminal investigation database.

It is the opinion of this office that House Bill 2649 does not violate Article I, section 9 of the Tennessee Constitution. However, the Bill is constitutionally suspect under Article I, section 7 of the Tennessee Constitution and the Fourth Amendment to the United States Constitution.

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