

STATE OF TENNESSEE

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Opinion No. 10-117

Duty to Destroy DNA Samples and Records of Samples

QUESTION

1. Is the Tennessee Bureau of Investigation (TBI) required to destroy DNA samples taken pursuant to Tenn. Code Ann. § 40-35-321(e)(1) when the grand jury returns a no true bill or when the State enters a nolle prosequi?

2. Is the TBI required to destroy DNA samples taken pursuant to Tenn. Code Ann. § 40-35-321(e)(1) when the defendant is convicted of a lesser-included offense that would not require collection of a DNA sample?

3. Is the TBI required to destroy DNA samples if the defendant dies before his or her case is concluded?

OPINIONS

1. The TBI is required to destroy a defendant's DNA sample and all records of the sample when his or her case is dismissed. A nolle prosequi results in a dismissal and would require destruction of the DNA sample and its records. However, the grand jury's decision not to indict a defendant on the arresting charge does not necessarily result in a dismissal and would not require destruction of the DNA sample and its records.

2. The TBI is required to destroy a defendant's DNA sample and all records of the sample if the defendant is charged with a "violent felony" as defined in Tenn. Code Ann. § 40-35-321(e)(3) but is convicted of a lesser-included offense that does *not* require collection of a blood sample or there is no pending qualifying warrant or capias that would otherwise require that the sample remain in the data bank.

3. The TBI is not required to destroy a defendant's DNA sample and the records of the sample based solely on his or her death prior to the conclusion of the case.

ANALYSIS

The DNA analysis statute, Tenn. Code Ann. § 40-35-321, provides for the collection and analysis of DNA samples taken from criminal defendants. The statute initially applied to defendants

who had been convicted of certain enumerated offenses. Tenn. Code Ann. § 40-35-321(a)-(d). However, the legislature later amended the statute, as follows, to provide for the collection and analysis of DNA samples taken from individuals arrested for committing violent felonies:

When a person is arrested on or after January 1, 2008, for the commission of a violent felony as defined in subdivision (e)(3), the person shall have a biological specimen taken for the purpose of DNA analysis to determine identification characteristics specific to the person as defined in subsection (a). After a determination by a magistrate or a grand jury that probable cause exists for the arrest, but prior to the person's release from custody, the arresting authority shall take the sample using a buccal swab collection kit for DNA testing. The biological specimen shall be collected by the arresting authority in accordance with the uniform procedures established by the Tennessee bureau of investigation, pursuant to § 38-6-113, and shall be forwarded by the arresting authority to the Tennessee bureau of investigation, which shall maintain the sample as provided in § 38-6-113. The court or magistrate shall make the provision of a specimen a condition of the person's release on bond or recognizance if bond or recognizance is granted.

Tenn. Code Ann. § 40-35-321(e)(1) (2010). Under subsection (e)(3), a "violent felony" for purposes of this statute means:

- (A) First or second degree murder;
- (B) Aggravated kidnapping or especially aggravated kidnapping;
- (C) Aggravated assault;
- (D) Aggravated child abuse;
- (E) Robbery, aggravated robbery or especially aggravated robbery;
- (F) Aggravated burglary or especially aggravated burglary;
- (G) Carjacking;
- (H) Sexual battery, sexual battery by an authority figure or aggravated sexual battery;
- (I) Statutory rape by an authority figure or aggravated statutory rape;
- (J) Rape, aggravated rape, rape of a child or aggravated rape of a child;
- (K) Aggravated arson;

(L) Attempt, under § 39-12-101, to commit any of the offenses enumerated in this subdivision (e)(3);

(M) Solicitation, under § 39-12-102, to commit any of the offenses enumerated in this subdivision (e)(3);

(N) Conspiracy, under § 39-12-103, to commit any of the offenses enumerated in this subdivision (e)(3);

(O) Criminal responsibility, under § 39-11-402(2), for any of the offenses enumerated in this subdivision (e)(3);

(P) Facilitating the commission, under § 39-11-403, of any of the offenses enumerated in this subdivision (e)(3); or

(Q) Being an accessory after the fact, under § 39-11-411, to any of the offenses enumerated in this subdivision (e)(3).

The statute additionally provides for the destruction of DNA samples and all records of such samples taken from arrestees when a case is dismissed or the defendant is acquitted of the charges. That portion of the statute states:

The clerk of the court in which the charges against a person described in subdivision (e)(1) are disposed of shall notify the Tennessee bureau of investigation of final disposition of the criminal proceedings. *If the charge for which the sample was taken is dismissed or the defendant is acquitted at trial, then the bureau shall destroy the sample and all records of the sample;* provided, that there is no other pending qualifying warrant or capias for an arrest or felony conviction that would otherwise require that the sample remain in the data bank.

Tenn. Code Ann. § 40-35-321(e)(2) (emphasis added). All of the questions presented involve the TBI's duty to retain or destroy DNA samples taken from arrestees pursuant to Tenn. Code Ann. § 40-35-321(e)(1) and (2).

1. The first question is whether the TBI is required to destroy DNA samples collected pursuant to Tenn. Code Ann. § 40-35-321(e)(1) when the grand jury returns a no true bill on the charges or when the State enters a nolle prosequi on the charges. The answer turns on what is considered a "dismissal" under the statute. DNA samples and the records of the samples need only be destroyed "[i]f the charge for which the sample was taken is dismissed or the defendant is acquitted at trial." Tenn. Code Ann. § 40-35-321(e)(2).

Courts should interpret statutes by looking at the plain language and giving effect to the ordinary meaning of the words. *State v. Denton*, 149 S.W.3d 1, 17 (Tenn. 2004). "It is presumed

that the legislature purposefully chose each word used in a statute and that each word conveys a specific purpose and meaning.” *Id.* Courts “ascertain and give effect to the legislative intent without unduly restricting or expanding a statute’s coverage beyond its intended scope.” *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995); *see also State v. Jennings*, 130 S.W.3d 43, 46 (Tenn. 2004).

The plain language of the DNA collection statute does not provide for the destruction of DNA samples and records when the grand jury does not indict the defendant on the arresting charge. “It is a long-recognized rule of statutory construction that ‘the mention of one subject in a statute means the exclusion of other subjects that are not mentioned.’” *State v. Layman*, 214 S.W.3d 442, 453-54 (Tenn. 2007) (quoting *Carver v. Citizen Utils. Co.*, 954 S.W.2d 34, 35 (Tenn.1997)). Here, the statute explicitly provides for two circumstances in which the DNA samples and records are to be destroyed— when a case is dismissed or the defendant is acquitted. While the practical effect of a no true bill may be the conclusion of the criminal proceedings against the defendant, it does not equate to a dismissal under the statute. Had the legislature intended to provide that the DNA samples and records be destroyed when the grand jury does not return an indictment, it could have stated as much in the statute. By analogy, Tennessee’s statute for the destruction of public records provides that a defendant’s records are to be expunged when the charge is dismissed, when a no true bill is returned by the grand jury, or when the person was arrested and released without being charged. Tenn. Code Ann. § 40-32-101. No similar provision exists in the DNA analysis statute. Thus, it appears that, so long as the defendant was arrested for a violent felony and a magistrate determined that probable cause existed for the arrest, destruction of a defendant’s DNA sample and all records of the sample is not required when the grand jury enters a no true bill.

In contrast, because a nolle prosequi results in a dismissal of the charges, the TBI would be required to destroy the DNA samples and all records of the sample when one is entered. A nolle prosequi results in the dismissal of a criminal charge upon motion of the State. *See* Tenn. R. Crim. P. 48(a) (providing for the termination of prosecution by the State and with the permission of the court by filing a dismissal of the indictment, presentment, information, or complaint); *Layman*, 214 S.W.3d at 448 (stating that after an indictment is returned, Tenn. R. Crim. P. 48(a) governs the dismissal or nolle prosequi of a criminal charge upon motion of the State); *State ex rel. Hobbs v. Murrell*, 93 S.W.2d 628, 630 (Tenn. 1936) (providing that “[a] nolle prosequi, when unconditionally entered, is a dismissal of the indictment against the accused”); *State v. D’Anna*, 506 S.W.2d 200, 202 (Tenn. Crim. App. 1973) (stating that “[w]hen an unconditional order of nolle prosequi is entered after indictment, it is a dismissal of the indictment and no conviction can be had except by beginning a new case against the accused”). Although Tenn. R. Crim. P. 48(a) appears to have replaced the nolle prosequi with a “dismissal,” the older terminology continues to exist. *State v. Thomas Braden*, No. 01C01-9403-CC-00098, 1995 WL 740202, at *1, n.1 (Tenn. Crim. App. Dec. 15, 1995), *perm. app. denied*, (Tenn. Apr. 8, 1996). Therefore, when a nolle prosequi is entered, the case is dismissed, and the TBI is required to destroy the defendant’s blood sample and all records of the sample.

2. Destruction of a defendant’s DNA sample and the records of the sample is mandated when “the charge for which the sample was taken is dismissed or the defendant is acquitted at trial.”

Tenn. Cod Ann. § 40-35-321(d)(1). A conviction on a lesser-included offense constitutes an implied acquittal of the greater offense if the jury had an opportunity to consider the greater offense before considering the lesser.” *State v. Huskey*, 66 S.W.3d 905, 929 (Tenn. 2001); *see also Green v. United States*, 355 U.S. 184, 190-91 (1957); *Johnson v. State*, 397 S.W.2d 170, 174 (Tenn. 1965). Thus, under § 40-35-321(e)(2), if the defendant is acquitted of the offense for which he was arrested, the sample and its records must be destroyed unless there is (1) a “pending qualifying warrant or capias for an arrest . . . that would otherwise require that the sample remain in the data bank” or (2) a “felony conviction that would otherwise require that the sample remain in the data bank.”

Your question assumes that the defendant has been arrested for the commission of a “violent felony” as defined in subsection (e)(3), that a DNA sample is therefore taken under the authority of subsection (e)(1), and that the defendant is acquitted of the offense for which he was arrested, but is convicted of a lesser-included offense. If the lesser-included offense is a “felony conviction that would otherwise require that the sample remain in the data bank,” then the sample and its records are not required to be destroyed. Of course, even if the lesser-included offense for which the defendant is convicted does not constitute such a “felony conviction that would otherwise require that the sample remain in the data bank,” but there is a “pending qualifying warrant or capias for an arrest . . . that would otherwise require that the sample remain in the data bank,” then the sample and its records are not required to be destroyed.

3. Tenn. Code Ann. § 40-35-321(e)(1) provides for the collection of a DNA sample when a defendant is arrested for one of the enumerated “violent felony” offenses and either a magistrate or a grand jury finds that probable cause exists for the arrest. So long as the foregoing prerequisites are met, there is nothing in the DNA analysis statute that would require destruction of the defendant’s blood sample if he or she dies before the case is concluded. While the death of the defendant might serve as the basis for a dismissal of a criminal charge against a defendant, unless and until an order to that effect is entered by the court, the TBI would not be required to destroy the DNA sample and its records.

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