

STATE OF TENNESSEE
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Opinion No. 04-144

Tenn. Code Ann. §40-35-321(d)(1) - Applicability to Persons on Pretrial and Judicial Diversion

QUESTION

Whether Tenn. Code Ann. § 40-35-321(d)(1), which requires that all convicted felons provide a biological specimen for DNA analysis, applies to persons on pretrial and judicial diversion.

OPINION

No. Pursuant to Tenn. Code Ann. § 40-35-321(d)(1), a person is required to provide a biological specimen for DNA analysis only when that person has been convicted of a felony. Persons on pretrial and judicial diversion have not yet been convicted.

ANALYSIS

Tenn. Code Ann. § 40-35-321(d)(1) provides, in relevant part, as follows:

When a court sentences a person convicted of any felony offense committed on or after July 1, 1998, it shall order the person to provide a biological specimen for the purpose of DNA analysis as defined in subsection (a).

Based on the plain language of this statute, it is only after a person is convicted of a felony that the sentencing court is authorized to order such person to provide a biological specimen for DNA analysis.

One who has been granted pretrial diversion or judicial diversion for a charged offense has not yet been *convicted* of that offense. Tenn. Code Ann. §§ 40-15-105(e); 40-35-313(a)(1)(A). When a person is granted pretrial diversion, prosecution of the underlying charge is suspended pending the outcome of the diversion period. Tenn. Code Ann. §§ 40-15-105(a)(1); 40-15-105(b)(1); *See State v. Spears*, 780 S.W.2d 776, 777 (Tenn. Crim. App. 1989) (pretrial diversion statute authorizes suspension of the prosecution). In the case of judicial diversion, the court defers

entry of the judgment of conviction pending the outcome of the diversion probation period. Tenn. Code Ann. § 40-35-313(a)(1)(A); *State v. Johnson*, 15 S.W.3d 515, 517 (Tenn. Crim. App. 1999), *appeal denied* (Tenn. 2000) (proceedings are deferred without entry of conviction); *State v. Jesse Ross Tolbert*, No. E1999-02326-CCA-R3-CD, 2000 WL 1172344 (Tenn. Crim. App. Aug. 18, 2000) (when judicial diversion is granted, a judgment of conviction is not entered in the record and all proceedings against the defendant are stayed); *See Op. Tenn. Att’y Gen. 02-099* (Sept. 16, 2002).

If the person successfully completes the diversion probation, the underlying criminal charge is dismissed. Tenn. Code Ann. §§ 40-35-313(b); 40-15-105(e). Thus, a judgment of conviction is never entered. The effect is to restore the person to the status occupied before the offense upon successful completion of the diversion. Tenn. Code Ann. §§ 40-35-313(b); 40-15-105(e). If, on the other hand, the person fails to comply with the conditions imposed under judicial diversion, the judgment of conviction is entered. Tenn. Code Ann. § 40-35-313(a)(2); *State v. Doyle R. Stevens*, No. E1999-02097-CCA-R3-CD, 2000 WL 1661490, at *2 (Tenn. Crim. App. Nov. 6, 2000). If the person does not successfully complete pretrial diversion, the person must then be tried and found guilty before a judgment of conviction may be entered. Tenn. Code Ann. § 40-15-105(d); *Id.*

In either case, it is only after the judgement of conviction has been entered that the sentencing court may require that a biological specimen be provided for DNA analysis. Consequently, it is the opinion of this office that persons on pretrial diversion and judicial diversion are not subject to the requirements of Tenn. Code Ann. § 40-35-321(d).

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