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Opinion No. 02-120

The Offense of Aggravated Perjury and the Related Defense of Retraction

QUESTIONS

1. Does the defense of retraction set forth in Tenn. Code Ann. § 39-16-704 apply to the offense of perjury because perjury is a lesser included offense of aggravated perjury?

2. May the State proceed with a prosecution for perjury against a defendant who commits aggravated perjury but has retracted his perjured statement?

3. Would the defense of retraction preclude a jury from convicting of perjury when the defendant has retracted the aggravated perjury?

OPINIONS

1. No. Even though simple perjury is a lesser included offense of aggravated perjury, it is the opinion of this Office that the defense of retraction is not available in a prosecution for simple perjury.

2. Yes. Where a defendant has committed aggravated perjury but has effectively retracted his perjured statement, it is the opinion of this Office that the State may, nevertheless, prosecute the defendant for simple perjury.

3. No. So long as the elements of perjury are established, a jury may convict a defendant of simple perjury even though he has made an effective retraction that would have provided a defense to a charge of aggravated perjury.

ANALYSIS

1. While the offense of perjury, set forth in Tenn. Code Ann. § 39-16-702, prohibits a person from making a false statement under oath while acting with the intent to deceive, the offense of aggravated perjury, set forth in Tenn. Code Ann. § 39-16-703, prohibits a person from making the same false statement during or in connection with any official proceeding. In addition, for aggravated perjury, the false statement made must be material. Tenn. Code Ann. § 39-16-703(a)(3). Tenn. Code Ann. § 39-16-704 provides for a defense to prosecution for aggravated perjury where the person making the statement retracts the false statement before completion of the proceeding during which the aggravated perjury was committed:

> It is a defense to prosecution for aggravated perjury that the person retracted the false statement before completion of the testimony at the official proceeding during which the aggravated perjury was committed.

This statute does not mention, nor provide a defense to prosecution for, the offense of simple perjury. The Sentencing Commission Comments to the statute state that "[t]he retraction defense extends only to aggravated perjury." Thus, it is the opinion of this Office that Tenn. Code Ann. § 39-16-704 does not apply to perjury, even though simple perjury has been held to be a lesser included offense of aggravated perjury. *See State v. Cutshaw*, 967 S.W.2d 332, 342 (Tenn. Crim. App. 1997).

2-3. A retraction affords a defense to prosecution for aggravated perjury only if it occurs in the same official proceeding during which the false statement was made. *State v. Cutshaw*, 967 S.W.2d 332 (Tenn. Crim. App. 1997). However, this Office has found no statute or decision forbidding the State from prosecuting a defendant for simple perjury where he has effectively retracted a false statement made during the same official proceeding.

As previously stated, the statute creating the defense of retraction, by its express terms, is limited in its application to the enhanced offense of aggravated perjury. To the extent retraction might have provided a defense to simple perjury at common law, it has been abolished. Tenn. Code Ann. § 39-11-203(e)(2)("Defenses available under common law are hereby abolished"). Accordingly, a jury may still convict a defendant of simple perjury, even if it is persuaded that the defendant has made an effective retraction and, therefore, acquits the defendant of the enhanced offense.

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