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Opinion No. 08-33

Biological specimens for DNA analysis

QUESTIONS

1. What is the definition of "the arresting authority" as the phrase is used in the new subsection (e) of Tenn. Code Ann. § 40-35-321?

2. What liability, if any, does "an arresting authority" potentially have if it fails to carry out the mandate of subsection (e) to take the biological specimens?

OPINIONS

1. The definition of the phrase "arresting authority" as used in the new subsection (e) is the agency or official that makes the arrest, *i.e.*, the public officer who asserts his authority to restrain or arrest an individual.

2. The statute does not create a private right of action for damages, either expressly or by implication.

ANALYSIS

1. The General Assembly has enacted a new subsection (e) to Tenn. Code Ann. § 40-35-321 requiring that biological specimens be taken from individuals arrested for the commission of a violent felony after January 1, 2008, for the purpose of DNA testing. In relevant part, the amendment provides:

> When a person is arrested on or after January 1, 2008, for the commission of a violent felony, as defined in subdivision (3), such person shall have a biological specimen for the purposes of DNA analysis taken 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 such 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 bureau, which shall maintain the sample as provided in § 38-6-113. The court or magistrate shall make the providing of such a specimen a condition of the person's release on bond or

recognizance if bond or recognizance is granted.

Neither the amendment nor any other statutory provision defines the phrase "arresting authority." "Courts are restricted to the natural and ordinary meaning of the language used by the legislature in the statute, unless an ambiguity requires resort elsewhere to ascertain legislative intent." *Austin v. Memphis, Pub. Co.*, 655 S.W.2d 146, 148 (Tenn. 1983). The only reasonable definition of the phrase "arresting authority" as used in the new subsection (e) is the agency or official that makes the arrest, *i.e.*, the public officer who asserts his authority to restrain or arrest an individual. Black's Law Dictionary defines "arrest" as involving "the authority to arrest, the assertion of that authority with the intent to effect an arrest, and the restraint of the person to be arrested." Black's Law Dictionary 100 (5th ed. 1979). In relevant part, the dictionary defines the word "authority" as "legal power; a right to command or to act; the right and power of public officers to require obedience to their orders lawfully issued in the scope of their public duties." Black's Law Dictionary 122 (5th ed. 1979). In light of these definitions, the phrase "arresting authority" is free of any ambiguity.

2. The statute does not address the question of what liability, if any, "an arresting authority" can incur by failing to carry out the mandate of subsection (e) to take the biological specimen. The initial issue to be resolved is whether Tenn. Code Ann. §40-35-321(e) creates a private right of action, express or implied. We believe that it does not.

Our Supreme Court has outlined the appropriate analysis in *Premium Finance Corp. of America v. Crump Insurance Services of Memphis, Inc.*, 978 S.W.2d 91, 93 (Tenn. 1998):

> Where a right of action is dependent upon the provisions of a statute, our courts are not privileged to create such a right under the guise of liberal interpretation of the statute. [citation omitted]. Only the legislature has authority to create legal rights and interests. Thus, the burden of establishing the existence of a statutory right of action lies with the plaintiff. [citation omitted].
>
> In determining whether the legislature intended to grant a statutory right of action, we begin by examining the language of the statute. If no cause of action is expressly granted therein, then we must determine whether such action was intended by the legislature and thus is implied in the statute. To do this, we consider whether the person asserting the cause of action is within the protection of the statute and is an intended beneficiary. [citation omitted]. The statute's structure and legislative history are helpful in making this determination.

Id.

The language of Tenn. Code Ann. §40-35-321(e) does not expressly grant a cause of action to anyone against an arresting authority who fails to obtain a biological specimen. The tort liability of the State and its employees is governed by Tenn. Code Ann. §9-8-301 *et. seq.*, commonly referred to as the Claims Commission Act. In the absence of an express creation of a private right of action against the State, no tort claim can be maintained against the State or its employees. Tenn. Code

Ann. §9-8-307(a)(1)(N)&(h).

The tort liability of local governmental entities and employees is governed by the Governmental Tort Liability Act. Tenn. Code Ann. §29-20-101 *et. seq*. To determine their liability, it is necessary first to determine if Tenn. Code Ann. §40-35-321(e) creates a private right of action by implication.

Nothing in the language of the statute or the legislative history suggests that the General Assembly impliedly created a private right of action for damages against local law enforcement officials and their employing agencies. The courts will be reluctant to find an implied private right of action for damages in light of the deference traditionally accorded law enforcement officers in the enforcement of penal statutes. *See, e.g., Ezell v. Cockrell*, 902 S.W.2d 394 (Tenn. 1995)(discussion of public duty doctrine). Our Supreme Court has outlined the government's interest in collecting and analyzing DNA samples in *State v. Scarborough*, 201 S.W.3d 607, 621 (Tenn. 2006), citing with approval *United States v. Sczubelek*, 402 F.3d 175, 177 (3d Cir. 2005). The State's interest is "[to] promot[e] increased accuracy in the investigation and prosecution of criminal cases." *Scarborough*, 201 S.W.3d at 621. Collection of the samples aids in solving future crimes. *Id*. The samples assist in exculpating individuals who are serving sentences of imprisonment for crimes they did not commit and eliminating individuals from suspect lists when crimes occur. *Id.* As the discussion of the governmental interests promoted by Tenn. Code Ann. §40-35-321 reflects, the statutory duty imposed on law enforcement personnel by that statute is a duty owed to the public at large rather than to a protected class of individuals.

Determining issues of liability turns on the operative facts, the causes of action alleged, and what entity/individual is sued; definitive opinions in the abstract are difficult. However, inasmuch as the statute does not create a private right of action for damages, failure to carry out the statutory mandate to collect biological specimens should not result in liability.

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