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Opinion No. 08-114

Criminal liability of mother of child born with drug addiction

QUESTIONS

1. When a child is born addicted to an illegal drug as a result of the mother's ingestion of the drug, can the mother be criminally liable for assault, aggravated assault, or reckless endangerment?

2. If so, do the child's symptoms of withdrawal from addiction to the drug qualify alone as bodily injury or serious bodily injury?

3. In a criminal prosecution of the mother, what county has venue—the county of the child's birth or the county where the drug was ingested by the mother?

4. Is the date of the commission of the offense a date during pregnancy or the date of the child's birth?

OPINIONS

1. Yes. Assuming sufficient proof of causation, a mother who ingests an illegal drug, thereby injuring her viable fetus, can be criminally liable for assault if she intentionally, knowingly, or recklessly causes bodily injury; aggravated assault if she intentionally, knowingly, or recklessly causes serious bodily injury; or reckless endangerment if she places the fetus in imminent danger of death or serious bodily injury.

2. The question of whether the symptoms of withdrawal alone could constitute bodily injury or serious bodily injury is a question of fact that would most likely require expert medical evidence to resolve.

3. For purposes of a prosecution for assault or aggravated assault, venue lies either in the county where the ingestion of the drug occurred or the county where the ingestion of the drug actually caused either bodily injury or serious bodily injury. For purposes of a prosecution for reckless endangerment, venue lies either in the county where the ingestion of the drug occurred or the county where the ingestion of the drug placed the fetus in imminent danger of death or serious bodily injury.

4. For purposes of a prosecution for assault or aggravated assault, the offense date would be the date on which bodily injury or serious bodily injury occurred. For purposes of a prosecution for reckless endangerment, the offense date would be the date on which the fetus was placed in imminent danger of death or serious bodily injury.

ANALYSIS

1. According to our criminal code, "A person commits assault who [i]ntentionally, knowingly or recklessly causes bodily injury to another." Tenn. Code Ann. § 39-13-101(a)(1). "A person commits aggravated assault who [i]ntentionally or knowingly commits an assault . . . and [c]auses serious bodily injury to another." *Id.* § 39-13-102(a)(1)(A). "A person commits an offense who recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury." *Id.* § 39-13-103(a). Section 39-13-107(a) states, "For purposes of this part, 'another,' 'individual,' 'individuals,' and 'another person' include a viable fetus of a human being, when any such term refers to the victim of any act made criminal by the provisions of this part." The Tennessee Court of Criminal Appeals has drawn a distinction between assaultive and homicide offenses, for which the legislature has included a viable fetus as a victim, and the child abuse statutes, which the legislature has not yet amended to include a viable fetus. *See State v. Lisa Ann Hudson*, No. M2006-01051-CCA-R9-CO, 2007 WL 1836840, at *2 (Tenn. Crim. App. at Nashville, June 27, 2007), *no perm. app. filed*; *Jessica Renee Richards v. State*, Nos. E2004-02326-CCA-R3-PC, E2004-02327-CCA-R3-PC, 2005 WL 2138244, at *4 (Tenn. Code Ann. at Knoxville, Sept. 2, 2005), *no perm. app. filed*. *See also* Tenn. Op. Att'y. Gen. Nos. 95-023 (Mar. 27, 1995), 02-136 (Dec. 23, 2002). Therefore, assuming that the State can prove causation, a pregnant mother who ingests an illegal drug, thereby injuring her viable fetus, can be criminally liable for assault if she intentionally, knowingly, or recklessly causes bodily injury; aggravated assault if she intentionally, knowingly, or recklessly causes serious bodily injury; or reckless endangerment if she places the fetus in imminent danger of death or serious bodily injury.

2. "'Bodily injury' includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty[.]" Tenn. Code Ann. § 39-11-106(a)(2). "'Serious bodily injury' means bodily injury that involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty[.]" *Id.* § 39-11-106(a)(34).

Whether a condition constitutes "bodily injury" or "serious bodily injury" is a question of fact and not of law. *See State v. Barnes*, 954 S.W.2d 760, 765-66 (Tenn. Crim. App. 1997). Consequently, the question of whether the symptoms associated with withdrawal constitute an injury that would support the charges of assault, aggravated assault, or reckless endangerment must be determined by the trier of fact. However, a medical expert who is knowledgeable about the symptoms of withdrawal from a drug addiction could aid the trier of fact in making this determination.

3. The Tennessee Constitution provides criminal defendants with the right to a jury trial in the county where the offense was committed. *See* Tenn. Const. art. I, § 9; *State v. Young*, 196 S.W.3d 85, 101 (Tenn. 2006). *See also* Tenn. R. Crim. P. 18(a) ("Except as otherwise provided by statute or by these rules, offenses shall be prosecuted in the county where the offense was committed."). According to Tenn. Code Ann. § 39-11-103(d), "If one (1) or more elements of an offense are committed in one (1) county and one (1) or more elements in another, the offense may be prosecuted in either county."

Therefore, for purposes of a prosecution for assault or aggravated assault, venue lies either in the county where the ingestion of the drug occurred or the county where the ingestion of the drug actually caused either bodily injury or serious bodily injury. For purposes of a prosecution for reckless endangerment, venue lies either in the county where the ingestion of the drug occurred or the county where the ingestion of the drug placed the fetus in imminent danger of death or serious bodily injury.

4. In general, an offense is complete when all of the statutory elements are present or have occurred. *See, e.g. State v. Ralph*, 6 S.W.3d 251, 255 (Tenn. 1999) (holding that "the crime of burglary is complete when entry has been made into an automobile without the owner's consent and with an intent to commit a felony, theft, or assault"). Therefore, for purposes of a prosecution for assault or aggravated assault, the offense date would be the date on which bodily injury or serious bodily injury occurred. For purposes of a prosecution for reckless endangerment, the offense date would be the date on which the fetus was placed in imminent danger of death or serious bodily injury.

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