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January 13, 2010

Opinion No. 10-01

Effect of 2009 Tenn. Pub. Acts, ch. 324, on blood tests for alcohol or drug content

QUESTION

Whether the enactment of 2009 Tenn. Pub. Acts, ch. 324 ("Public Chapter 324") allows law enforcement to use search warrants or other legal means to obtain a blood specimen over a suspect's express refusal of consent pursuant to Tenn. Code Ann. § 55-10-406?

OPINION

Public Chapter 324 requires a law enforcement officer having probable cause to believe that a motorist involved in an accident resulting in injury or death of another has committed a violation of Tenn. Code Ann. §§ 55-10-401 (driving under the influence), 39-13-213(a)(2) (vehicular homicide resulting from intoxication), or 39-13-218 (aggravated vehicular homicide) to cause the motorist's blood to be tested for alcohol or drug content. In all other cases, law enforcement officials must honor the refusal of the motorist to undergo testing.

ANALYSIS

Tennessee's Implied Consent Statute provides that, if the operator of a motor vehicle who has been placed under arrest for driving under the influence ("DUI") refuses to give consent to a test to determine the alcoholic or drug content of that person's blood, "the test or tests to which the person refused shall not be given . . . ." Tenn. Code Ann. § 55-10-406(a)(4)(A). The statute goes on to state, however, that "[n]othing in this section shall affect the admissibility in evidence, in criminal prosecutions for aggravated assault or homicide by the use of motor vehicle only, of any chemical analysis of the alcoholic or drug content of the defendant's blood that has been obtained by any means lawful without regard to the provisions of this section." Tenn. Code Ann. § 55-10-406(d).

In Op. Tenn. Att'y Gen. 98-154 (Aug. 17, 1998), this Office opined that, save for prosecutions for aggravated assault or homicide by the use of a motor vehicle, Tennessee Code Annotated section 55-10-406 prohibits an arresting officer from obtaining and then executing a search warrant to draw a sample of blood from a person arrested for DUI after the person arrested for DUI refuses to submit to a test to determine the alcohol or drug content of that person's blood. The following year, this Office reiterated that, notwithstanding the absence of an "exclusionary rule" barring admission of legally administered tests, "[t]he only circumstances under which law enforcement may use search warrants or other legal means to obtain a test from a nonconsenting driver are those where a driver may be charged with aggravated assault or homicide." Op. Tenn.

Att'y Gen. 99-179 (Sept. 17, 1999).

Cases decided after those opinions supported this interpretation. In *State v. Humphreys*, the Tennessee Court of Criminal Appeals explained that "the State of Tennessee, through its enactment of Tenn. Code Ann. § 55-10-406(a)(2) and (a)(3), has adopted a policy position prohibiting law enforcement officers from administering a breath or blood alcohol test against the motorist's will. Instead, in an effort to avoid potentially violent confrontations between private citizens and law enforcement officers, the state has elected to permit the motorist to refuse the test."[1] *Humphreys*, 70 S.W.3d 752, 761 (Tenn. Crim. App. 2001). Thus, in all cases other than prosecutions for aggravated assault or homicide by the use of a motor vehicle, "if consent is refused the test is inadmissible." *State v. Flittner*, No. M2000-02367-CCA-R3-CD, 2001 WL 1597739, at *3 (Tenn. Crim. App. Dec. 14, 2001).

Effective July 1, 2009, Public Chapter 324 amended Tenn. Code Ann. § 55-10-406 by adding the following new subsection:

> (f)
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> > (1) If a law enforcement officer has probable cause to believe that the driver of a motor vehicle involved in an accident resulting in the injury or death of another has committed a violation of §§ 55-10-401, 39-13-213(a)(2) or 39-13-218, the officer shall cause the driver to be tested for the purpose of determining the alcohol or drug content of such driver's blood. Such test shall be performed in accordance with the procedure set forth in this section and shall be performed regardless of whether the driver does or does not consent to such test.
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> > (2) The results of a test performed in accordance with this subsection may be offered as evidence by either the state or the driver of the vehicle in any court or administrative hearing relating to such accident or offense subject to the Tennessee rules of evidence.

2009 Tenn. Pub. Acts ch. 324. We have been asked to consider whether the enactment of this provision alters the conclusion that, when there will be no prosecution for aggravated assault or homicide, law enforcement must honor the refusal of a driver to undergo testing.

The new subsection (f) in large part makes explicit what was previously a matter of statutory construction. Subsection (a)(4)(A) provides—as a matter of legislative largesse—that a motorist may expressly refuse to submit to a blood test, notwithstanding the fact that the statutorily created implied consent of the motorist otherwise permits the warrantless search of his breath or blood. *Flittner*, 2001 WL 1597739, at *3; *Humphreys*, 70 S.W.3d at 761. The "net effect" of subsection (d) has been read to strip defendants in cases of aggravated assault and homicide by use of a motor

[1] The referenced subsections now occupy Tenn. Code Ann. § 55-10-406(a)(3) & (a)(4)(A).

vehicle of this protection, leaving them with only lesser constitutional protections. *State v. Huskins*, 989 S.W.2d 735, 739 n.4 (Tenn. Crim. App. 1998). Public Chapter 324 limits a suspect's statutory right to refuse in cases of a DUI injury accident and now makes clear that blood test evidence is indeed admissible in such circumstances. Additionally, the admissibility of blood test evidence no longer hinges on the motorist's status as a party defendant to a prosecution for aggravated assault or vehicular homicide; it turns, rather, on law enforcement's possessing probable cause to believe that the motorist has been driving under the influence and has injured or killed another. 2009 Tenn. Pub. Acts ch. 324, § 1. The evidence, moreover, may be offered not only in prosecutions for aggravated assault and vehicular homicide but in any hearing relating to the accident. *Id.* Finally, administration of a blood test is now mandatory rather than merely permissible under the enumerated circumstances.[2] *Id.*

While Public Chapter 324 somewhat broadens the admissibility of blood test evidence with respect to DUI incidents that involve injury or death of another, the key feature of the Implied Consent Statute that previously compelled the conclusion that law enforcement must otherwise honor the refusal of a motorist to undergo testing, however, remains intact. Subsection (a)(4)(A) retains the "policy position prohibiting law enforcement officers from administering a breath or blood alcohol test against the motorist's will." *Humphreys*, 70 S.W.3d at 761. Outside the context of accidents resulting in the injury or death of another, then, testing conducted over the motorist's express refusal of consent, even by warrant, is not legal for purposes of the statute.

We observe that Tenn. Code Ann. § 55-10-407 provides that the failure of a law enforcement officer to request the administering of a test is admissible in a criminal proceeding. Tenn. Code Ann. § 55-10-407(a). Because the new subsection (f) added to Tenn. Code Ann. § 55-10-406 mandates testing in DUI accidents resulting in injury or death of another, a law enforcement officer's failure to abide by that directive also would likely be admissible in evidence. *But cf. State v. Ferguson*, 2 S.W.3d 912, 917 n.11 (Tenn. 1999) (providing for missing evidence instruction where "the defendant would be unable to obtain comparable evidence through reasonably available means" and "the production of which would more probably than not be of benefit to the defendant"). In our view, that prospect does not detract from the conclusion that, in cases outside of those specified in Public Chapter 324, if consent is refused the test is inadmissible.

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[2] The new subsection (f) carves out no exceptions to the mandatory testing for law enforcement officers confronted with a belligerent suspect who physically refuses to allow blood to be withdrawn, or with medical personnel who refuse to withdraw the sample from the suspect. Tennessee Code Annotated §55-10-410 prescribes the method for the taking of blood samples for testing. The purpose of the statute is to "protect the donor [defendant] from being subjected to unhealthful conditions in the procurement of a blood sample and to prohibit the donor [defendant] from being subjected to unqualified people taking samples." *State v. Stowers*, 649 S.W.3d 607, 608 (Tenn. Crim. App. 1983). Our courts have held, however, that the State is not required to prove compliance with this statute as a prerequisite to admitting the results of the blood alcohol test. *See, e.g., State v. Gilbert*, 751 S.W.2d 454, 461 (Tenn. Crim. App. 1988). Additionally, the use of reasonable physical force by law enforcement officers to obtain a blood specimen has been upheld in a situation where a suspect was belligerent. *See State v. Cleo Mason*, No. 02-C-01-9310-CC-00233, 1996 WL 111200, at *7-8, 12 (Tenn. Crim. App. Mar. 13, 1996).

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