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Opinion No. 13-06

Fees for Collection of Biological Specimens from Persons Convicted of Certain Offenses

QUESTION

As amended by 2012 Tenn. Pub. Acts, ch. 996 (Chapter 996), are Tenn. Code Ann. §§ 40-35-321(b) and (d)(1), requiring persons convicted of certain criminal offenses but who are not incarcerated at the time of sentencing to pay for the collection of DNA specimens, applicable to persons who were convicted before the effective date of the amendments?

OPINION

Yes. The plain language of Tenn. Code Ann. §§ 40-35-321(b) and (d)(1), as amended by Chapter 996, makes those provisions applicable to persons who are not incarcerated at the time of sentencing and who provide DNA specimens on or after May 10, 2012, the effective date of the amendments. The application of the statute as amended to such persons convicted before the effective date of the amendments is not prohibited by either the Tennessee or the United States Constitution.

ANALYSIS

Tennessee Code Ann. § 40-35-321 provides for the collection of biological specimens for DNA analysis from persons convicted of certain offenses. Under subsection (b), those who have been convicted of committing or attempting to commit aggravated rape, rape, aggravated sexual battery, sexual battery, rape of a child, aggravated rape of a child, or incest (or those juveniles adjudicated delinquent for violating or attempting to violate those offenses) shall be ordered by the court to provide biological specimens for the purpose of DNA analysis. Tenn. Code Ann. § 40-35-321(b). Furthermore, under subsection (d)(1), persons convicted of any felony committed after July 1, 1998, or any misdemeanor for which the person must register as a sexual offender on or after July 1, 2007, shall be ordered by the court to provide a biological specimen for DNA analysis. Tenn. Code Ann. § 40-35-321(d)(1). All specimens are then forwarded to the Tennessee Bureau of Identification (TBI), which analyzes, maintains, and preserves them. Tenn. Code Ann. §§ 38-6-113 & 40-35-321(b), (a)(1).

Under prior law, the convicting court was required to order those who were not incarcerated at the time of sentencing to report to the county or district health department to give a biological specimen for DNA testing. *See* Tenn. Code Ann. §§ 40-35-321(b), (d)(1) (2010). No fees were charged for the collection and analysis of the specimen, and thus those costs were borne by the TBI and the agencies that collected and analyzed the specimen. *Id.*

Effective May 10, 2012, Tenn. Code Ann. § 40-35-321, as amended by Chapter 996, now provides that

> [i]f the person is not incarcerated at the time of sentencing, the order shall require the person to report to the probation division of the department charged by law with the supervision of probationers, which shall gather the specimen. If a probation officer is not available to gather the specimen, the court may designate a person to do so. The cost of taking, processing and storing the specimen shall be paid by the defendant and shall be collected by the probation officer in the same manner as other fees.

Tenn. Code Ann. §§ 40-35-321(b), (d)(1).[1]

The question posed is whether the requirement of paying the cost of taking, processing, and storing the specimen applies to those persons convicted prior to May 10, 2012, the effective date of the 2012 amendments, when the actual collection occurs on or after May 10, 2012. The plain language of the provisions demonstrates that it does. The statute as amended states that the fee is to be collected at the time the specimen is taken, without regard to the date of the person's conviction. Thus, the statutory provisions apply to persons who are not incarcerated at the time of sentencing and who provide the specimen on or after May 10, 2012, regardless of whether their convictions occurred prior to that date. *See Garrison v. Brickford*, 377 S.W.3d 659, 663 (Tenn. 2012) (stating the general rule of statutory construction that a court's role is "to examine the text of the statute and, if the language used is unambiguous," the court will "simply apply the plain meaning of the words used in the statute").

The Tennessee Constitution, Article I, § 20, prohibits the General Assembly from enacting retrospective laws or laws that impair contractual obligations. The Tennessee Supreme Court has characterized a retrospective law as one that takes away or impairs vested rights under existing laws. *See Morris v. Gross*, 572 S.W.2d 902, 907 (Tenn. 1978). A statute does not operate retrospectively merely because it upsets expectations. *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994). Furthermore, a statute "is not made retroactive merely because it draws upon antecedent facts for its operation." *Id.* n.24 (quoting *Cox v. Hart*, 260 U.S. 427, 435 (1922)). By its amendment of Tenn. Code Ann. §§ 40-35-321(b) and (d)(1), the General Assembly merely required certain convicted criminals to pay a fee for DNA samples collected on or after the effective date of the act. This is not a retrospective law within the meaning of Article I, § 20, because it does not impair any contractual obligation or take away or impair any

[1] For those persons incarcerated at the time of sentencing, the statute remains unchanged: "If the person is incarcerated at the time of sentencing, the order shall require the chief administrative officer of the institution of incarceration to designate a qualified person to gather the specimen." Tenn. Code Ann. §§ 40-35-321(b), (d)(1). There is no requirement that incarcerated persons pay the costs of taking, processing, and storing the specimen. *Id.*

vested right belonging to a convicted person. *See* Op. Tenn. Att'y Gen. 04-069 (Apr. 21, 2004) (concluding that proposed act's application of registration and reporting requirements to sexual offenders convicted prior to effective date of act not violative of prohibition in Tenn. Const. art. I, § 20, against retrospective laws).

Nor does the act constitute an ex post facto law, which is prohibited by both the Tennessee and United States Constitutions. *See* U.S. Const. art. I, § 9, cl. 3, and Tenn. Const. art. I, § 11. The United States Supreme Court and the Tennessee Supreme Court have adopted complementary constructions of these provisions. *Kaylor v. Bradley*, 912 S.W.2d 728, 731 (Tenn. Ct. App. 1995). In order for a law to violate the prohibition against ex post facto laws, the law must impose a punishment. *See Collins v. Youngblood*, 497 U.S. 37, 41 (1990) ("[I]t has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes. . . ."). Determining whether a law imposes punishment for ex post facto purposes involves a two-step analysis. A court first asks whether the legislature's intent, as discerned from the structure and design of the statute, along with any declared legislative intent, was to impose a punishment or merely to enact a civil or regulatory law. *United States v. Ursery*, 518 U.S. 267, 288 (1996). Second, even if the legislature did not intend to impose a punishment, a law still may be said to do so if the sanction or disability that it imposes is "so punitive in fact" that the law "may not legitimately be viewed as civil in nature." *Id*.

While Tenn. Code Ann. § 40-35-321 does not contain an explicit statement by the General Assembly declaring its intent in enacting the DNA-specimen requirement, the Tennessee Supreme Court has observed that the purpose of the statute is the promotion of increased accuracy in the investigation and prosecution of criminal cases, "enabling law enforcement personnel to more quickly exonerate the innocent and prosecute the perpetrators." *State v. Scarborough*, 201 S.W.3d 607, 621 (Tenn. 2006). This purpose is not punitive. *See Jones v. Murray*, 962 F.2d 302, 309 (4th Cir. 1992) (concluding that Virginia statute requiring that incarcerated felons provide blood samples was not punitive when its purpose was to establish data bank to aid future law enforcement).

Nor is the requirement that those providing the samples pay a fee for "[t]he cost of taking, processing and storing the specimen" punitive in nature. *See In re DNA Ex Post Facto Issues*, 561 F.3d 294, 299-300 (4th Cir. 2009) (processing fee for submission of DNA sample not punitive); *People v. Johnson*, 959 N.E.2d 1150, 1155 (Ill. 2011) ($200 DNA-analysis fee not punitive). Indeed, the statute requires that the fee "shall be collected by the probation officer in the same manner as other fees," Tenn. Code Ann. §§ 40-35-321(b), (d)(1), suggesting that the fee is intended to be only an additional administrative charge, not punishment. Moreover, the relatively small size of the fee[2] also indicates that it was not intended to have significant retributive or deterrent value. *See In re DNA Ex Post Facto Issues*, 561 F.3d at 300 (concluding that relatively small size of fee ($250) indicates that fee is not punitive). Thus, it is clear that the

[2] The fiscal note submitted in support of House Bill 2854/Senate Bill 2922, of the 107th Tennessee General Assembly, enacted as 2012 Tenn. Pub. Acts, ch. 996, and provided with the opinion request indicates that the total cost incurred in obtaining and submitting a DNA sample is approximately $37. That amount includes the $22 cost to the TBI for the buccal-swab DNA test kit and mailing costs and the $15 cost to the Board of Probation and Parole for administering the test.

General Assembly did not intend to impose a punishment by requiring payment of the fee, but instead intended only an administrative charge.

Furthermore, regardless of the legislative intent, the imposition of the fee is not "so punitive in fact" that it "may not legitimately be viewed as civil in nature." The expression of the Washington Court of Appeals on the nature of a similar DNA-collection fee is equally applicable to Tennessee's statutory provisions:

> The DNA fee is a legal financial obligation. Its purpose is monetary, rather than retributive or deterrent. Such obligations have historically not been regarded as punishment. The fee does not define or punish criminal behavior and does not require a finding of scienter. It does not involve a disability or restraint. The amount of the fee is fixed and does not depend on the gravity of the offense, and is not excessive in relation to its purpose. The DNA collection fee is not punitive.

State v. Brewster, 218 P.3d 249, 251 (Wash. Ct. App. 2009) (footnotes omitted).

This conclusion is also consistent with judicial decisions upholding the constitutionality of various administrative fees challenged on ex post facto grounds. *See, e.g.*, *Taylor v. Rhode Island*, 101 F.3d 780, 783-84 (1st Cir. 1996) ($15 monthly supervision fee was civil, not criminal, in nature); *Owens v. Sebelius*, 357 F. Supp. 2d 1281, 1286-87 (D. Kan. 2005) (deduction from inmate's prison trust account of fees incurred for parole supervision not punitive in violation of ex post facto clause); *Frazier v. Mont. State Dep't of Corrs.*, 920 P.2d 93, 95-96 (Mont. 1996) ($10 monthly supervision fee was "civil administrative fee," not punishment); *Glaspie v. Little*, 564 N.W.2d 651, 653-54 (N.D. 1997) ($30 monthly fee to defray cost of supervision is civil fee for services); *Commonwealth v. Nicely*, 638 A.2d 213, 216 (Pa. 1994) ($25 monthly supervisory fee administrative in nature and not intended to be punitive).

Therefore, the plain language of Tenn. Code Ann. §§ 40-35-321(b) and (d)(1), as amended by Chapter 996, makes those provisions applicable to those persons who are not incarcerated at the time of sentencing and who provide DNA specimens on or after May 10, 2012, regardless of whether their convictions occurred prior to that date. The application of the statute as amended to such persons convicted before May 10, 2012, is not prohibited by either the Tennessee or the United States Constitution.

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