STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

July 23, 2014

Opinion No. 14-72

Second-degree Murder by Unlawful Distribution of Illegal Drugs

QUESTIONS

1. In a prosecution for second-degree murder under Tenn. Code Ann. § 39-13-210(a)(2), is the State required to prove that the killing was knowing?

2. In a prosecution for second-degree murder under Tenn. Code Ann. § 39-13-210(a)(2), is the standard of "conscious indifference" announced in *State v. Randolph*, 676 S.W.2d 943 (Tenn. 1984), still applicable?

OPINIONS

1. No. Intentional, knowing, or reckless conduct will establish the culpable mental state for second-degree murder under Tenn. Code Ann. § 39-13-210(a)(2). As a practical matter, however, the mental-state element for subdivision (a)(2) is recklessness.

2. No.

ANALYSIS

1. The offense of second-degree murder is defined in Tenn. Code Ann. § 39-13-210 as follows:

> (a) Second degree murder is:
> (1) A knowing killing of another; or
> (2) A killing of another that results from the unlawful distribution of any Schedule I or Schedule II drug, when the drug is the proximate cause of the death of the user.

The definition of second-degree murder under subdivision (a)(2) does not specifically list a mental-state requirement, but Tenn. Code Ann. § 39-11-301(b) provides that a culpable mental state is required for every criminal offense in Title 39 unless the definition of the offense plainly dispenses with a mental element. The legislature has demonstrated, in dealing with other criminal offenses, what it means to "plainly dispense" with a mental-state requirement. For example, in defining two different

forms of first-degree murder—felony murder, Tenn. Code Ann. § 39-13-202(a)(2), and murder committed as a result of the unlawful throwing, placing, or discharging of a destructive device or bomb, Tenn. Code Ann. § 39-13-202(a)(3)—the legislature explicitly provided:

> No culpable mental state is required for conviction under subdivision (a)(2) or (a)(3), except the intent to commit the enumerated offenses or acts in those subdivisions.

Tenn. Code Ann. § 39-13-202(b).

In the absence of similar language defining the elements of second-degree murder under § 39-13-210(a)(2), the mere omission of a listed mental state for subdivision (a)(2) offenses does not signify an intention to dispense with a mental-state requirement. Instead, proper construction of the criminal code leads to applying the default mental-state provision, Tenn. Code Ann. § 39-11-301(c), which provides that intent, knowledge, or recklessness will suffice to establish the culpable mental state where none has been explicitly provided. These three statutory mental-state elements—intentional, knowing, and reckless—are arranged in descending degrees of culpability; proof of the greater element necessarily includes proof of the lesser elements. Tenn. Code Ann. § 39-11-301(a)(2). Therefore, intent, knowledge, or recklessness suffice to establish the culpable mental state for second-degree murder under § 39-13-210(a)(2).

As a practical matter, however, the mental-state element for second-degree murder under subdivision (a)(2) is recklessness. An intentional killing resulting from the unlawful distribution of a Schedule I or Schedule II drug would warrant prosecution for first-degree murder under Tenn. Code Ann. § 39-13-202(a)(1), and a knowing killing resulting from the unlawful distribution of a Schedule I or Schedule II drug would warrant prosecution for second-degree murder under § 39-13-210(a)(1). Indeed, as the Sentencing Commission observed in its comment on Tenn. Code Ann. § 39-13-210, the section "makes clear that the requisite mens rea for second degree murder is the 'knowing' killing of another or that the killing be done *recklessly* as a result of unlawful distribution of a Schedule I or Schedule II drug." *Id.* § 39-13-210, Sentencing Comm'n Cmts (emphasis added).

2. In *State v. Randolph,* 676 S.W.2d 943 (Tenn. 1984), the defendant and two codefendants conspired to sell heroin to the victim, knowing that a user of heroin was "subject to dying" whenever the drug was injected and that the particular heroin sold to the victim was especially dangerous because it had not been diluted. 676 S.W.2d at 944. The victim died of a self-injected overdose the next day. *Id.* at 943. The Supreme Court held that a trier of fact could conclude that the defendant and his codefendants, all charged with second-degree murder, had acted "with such conscious

indifference to the consequences of their highly unlawful activities as to evince malice," at that time an element of second-degree murder. *Id.* at 947.

Because the "conscious indifference" standard was relevant to evaluating the presence of malice, and malice is not a statutory requirement for prosecution of second-degree murder under Tenn. Code Ann. § 39-13-210(a)(2), the *Randolph* standard no longer has any application to such prosecutions.

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