

OP. NO. 02-138

CRIMINAL PROCEDURE: SENTENCE; JUDGMENT; EXECUTION OF SENTENCE – DNA ANALYSIS AND DATA BANK.

Requirement that person lawfully arrested for violent felony provide saliva or tissue sample for DNA analysis; use of reasonable force to obtain DNA sample from arrestee who refuses to comply with applicable DNA statutes.

The Honorable William R. Janis
Member, House of Delegates
May 13, 2003

Issue Presented

You inquire regarding the taking of deoxyribonucleic acid ("DNA") samples from persons arrested for certain violent offenses. Specifically, you ask whether § 19.2-310.3:1 permits the use of force to obtain a DNA sample from an arrestee who refuses to cooperate.

Response

It is my opinion that § 19.2-310.2:1 requires a person lawfully arrested for a violent felony to provide a saliva or tissue sample for DNA analysis. Reasonable force may be used, if necessary, to obtain a DNA sample from such an arrestee who refuses to comply with the applicable DNA statutes.

Applicable Law and Discussion

Section 19.2-310.2:1 requires persons arrested for certain violent felonies¹ to provide a DNA saliva or tissue sample prior to their release from custody. Section 19.2-310.2:1 stipulates that a DNA sample shall be taken only after a magistrate has determined that probable cause existed for the arrest. The purpose of a DNA sample is "to determine identification characteristics specific to the individual whose sample is being analyzed."² The Division of Forensic Science, or its designated entity, analyzes the sample,³ which the Division maintains in a DNA data bank.⁴ Section 19.2-310.5 governs the availability of access to the results of a DNA analysis and comparison of identification characteristics from samples in the database.

Section 19.2-310.2:1 requires the clerk of court to notify the Division of Forensic Science of the final disposition of the criminal case. Section 19.2-310.2:1 further provides that, "[i]f the charge for which the sample was taken is dismissed or the defendant is acquitted at trial, the Division shall destroy the sample and all records thereof." Section 19.2-310.3:1 requires that the DNA sample be taken prior to the release from custody of the arrestee at a place designated by the magistrate.⁵ Samples are to be taken "in accordance with procedures adopted by the Division," in the manner prescribed by § 19.2-310.3:1(A).⁶

The taking of DNA samples does not violate an arrestee's federal or state constitutional rights.⁷ The Commonwealth has a legitimate interest in the identification of an individual arrested on probable cause.⁸

An arrestee typically is required to provide identifying information such as fingerprints and photographs during the "booking" process.⁹ Fingerprints have long been accepted as a legitimate means of obtaining identification from an arrestee.¹⁰ The stated objective of § 19.2-310.2:1 is "to determine identification characteristics specific to the person." The procedure for taking a DNA saliva or tissue sample is less intrusive than taking a blood sample from a convicted felon.¹¹ In fact, the procedure is more analogous to fingerprinting and photographing.

A threshold issue in "use of force" cases is whether the degree of force employed is necessary to protect a legitimate state interest and is "objectively reasonable" under the totality of the circumstances.¹² The taking of a DNA saliva or tissue sample satisfies a legitimate state interest in identifying arrestees. Thus, the use of force requiring a person who otherwise refuses to provide a DNA sample is permissible when it is reasonably based on a totality of the circumstances. Any determination as to what is "reasonable" in any given circumstance necessarily depends on the facts.¹³ The reasonableness of the force used, however, must be consistent with the objective of identifying an arrestee, as well as the safety and reliability of the "booking" process. Moreover, if a DNA sample is not obtained as required by § 19.2-310.3:1, the arrestee may be held in custody until he complies or the court otherwise directs.

Conclusion

Accordingly, it is my opinion that § 19.2-310.2:1 requires a person lawfully arrested for a violent felony to provide a saliva or tissue sample for DNA analysis. Reasonable force may be used, if necessary, to obtain a DNA sample from such an arrestee who refuses to comply with the applicable DNA statutes.

¹A violent felony is deemed an "act of violence," as that term is defined in § 19.2-297.1, or a felony committed in violation of §§ 18.2-89 through 18.2-92. Va. Code Ann. § 19.2-310.2:1 (LexisNexis Supp. 2002).

²Section 19.2-310.4 (LexisNexis Supp. 2002).

³Sections 19.2-310.2:1, 19.2-310.4.

⁴Section 19.2-310.3:1 (LexisNexis Supp. 2002).

⁵*The chief magistrate for each jurisdiction shall coordinate with the chief law enforcement officer(s) in the jurisdiction to designate the place(s) where saliva and tissue samples are to be taken when persons are arrested for qualifying offenses. The samples shall be collected during booking by the sheriff's office, police department or regional jail responsible for booking upon arrest.* 19:10 Va. Regs. Reg. 1511, 1512 (2003) (to be codified at 6 Va. Admin. Code 20-210-60).

⁶The 2002 Session of the General Assembly charged the Division of Forensic Science with the duty of adopting regulations pursuant to the Administrative Process Act to implement the Commonwealth's DNA statutes. 2002 Va. Acts ch. 753, cl. 2, at 1258, 1259; *id.* ch. 773, cl. 2, at 1286, 1287. See 19:10 Va.

Regs. Reg. *supra* note 5, at 1512 (to be codified at 6 Va. Admin. Code, pt. 4, 20-210-60 to 20-210-100 (procedures for taking saliva or tissue samples)).

⁷See *Johnson v. Commonwealth*, 259 Va. 654, 671-73, 529 S.E.2d 769, 779-80 (2000).

⁸See *id.* at 672, 529 S.E.2d at 779 (citing *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) (finding that minor intrusion of taking blood samples from inmates is outweighed by Commonwealth's interest in identification of felons)).

⁹See § 19.2-390(A.1) (LexisNexis Supp. 2002) (requiring that state officials or agencies and local officials, having power to arrest for felony, provide report to Central Criminal Records Exchange, which "shall be accompanied by fingerprints" of arrestee); § 19.2-392(A) (Michie Repl. Vol. 2000) (providing that police with arrest powers "may take" fingerprints and photographs of (1) arrestees charged with felonies or certain misdemeanors, or (2) persons pleading or found guilty of certain misdemeanors).

¹⁰See *Jones*, 962 F.2d at 306-07 (citing *Davis v. Mississippi*, 394 U.S. 721, 727 (1969)).

¹¹*Cf. Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 625 (1989); *United States v. Reid*, 929 F.2d 990, 994 (4th Cir. 1991) (noting that breath tests are less intrusive than blood tests and holding that blood tests are not violative of Fourth Amendment).

¹²See *generally* *Graham v. Conner*, 490 U.S. 386 (1989); *Scott v. United States*, 436 U.S. 128 (1978) (analyzing use of force by law enforcement within context of Fourth Amendment's "objective reasonableness" standard).

¹³This Office historically has declined to render opinions that involve determinations of fact rather than questions of law. See, e.g., 1991 Op. Va. Att'y Gen. 122, 124, and opinions cited therein.

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