STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

EDWARD MAURICE DUNN, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001994

REPLY BRIEF OF PETITIONER

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ARGUMENTS IN REPLY

I. The South Carolina DNA Database Act's prohibition on the operation of DNA databases outside of SLED's authority is not limited to DNA databases that collect DNA "under compulsion of law enforcement incident to arrest."

In its Brief of Respondent, the state incorrectly interpreted the scope of the DNA Database Act ("the Act"). The state claimed that the wrongful retention of Petitioner's DNA in this case did not violate the Act because the DNA Database Act's prohibition on operating a DNA database without South Carolina Law Enforcement Division's ("SLED") approval only applied to DNA "taken under compulsion of law enforcement incident to arrest." Brief of Respondent, p. 7 – 8.

The import of the Act is clear. See Hodges v. Rainey, 341 S.C. 79, 85 – 86, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.") (citing In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998)). The creation and maintenance of DNA databases in South Carolina must be regulated under the purview of SLED. Any database operating outside of SLED's authority is *per se* illegal, regardless of how the DNA was procured. S.C. Code Ann. §§ 23-3-600 – 670.

The state's claim that the Act only applies to compelled[1] DNA collection pursuant to an arrest was contradicted by the provision of the Act where the Act's purpose is defined. The pertinent statute titled "State DNA Database established; purpose" provides that the DNA

[1] It is important to note that in the years since Petitioner's case, as far as undersigned counsel is aware, there are no sheriff's office DNA databases in South Carolina still operating outside of SLED's authority, regardless of how the DNA evidence was procured. Accordingly, the actions of the sheriff's offices across the state seem to indicate that they believe they are not allowed to run their own DNA databases at all. Moreover, the Attorney General in its opinion regarding the legality of the Orangeburg County Database did not state that the Act only applied to compelled procurement of DNA. See Attorney General Op. dated April 7, 2011, 2011 WL 1740752.

Database act applies to DNA evidence collected by the state "for law enforcement purposes *and for humanitarian and nonlaw enforcement purposes*, as provided for in Section 23-3-640(B)." S.C. Code Ann. § 23-3-610 (emphasis added). Certainly, collection of DNA for "humanitarian and nonlaw enforcement purposes" would include collection that was *not* incident to arrest. Furthermore, the Act specifically states that the disposition of *all* DNA samples taken pursuant the Act is at the discretion of SLED. See S.C. Code Ann. § 23-3-640(C).

However, if this Court agrees with the state's argument, that the Act only applies to DNA procured via compulsion incident to arrest, absurd outcomes would result such that the legislature could not have intended for that interpretation. See Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.") (citing Stackhouse v. Rowland, 86 S.C. 419, 68 S.E. 561 (1910)). For example, if the "Expungement of DNA record" provision of the Act was interpreted as the state requests, suspects who forced law enforcement to compel them to give their DNA would be afforded more protections than suspects who cooperated with law enforcement and consented to give their DNA. See S.C. Code Ann. § 23-3-660(A). Surely, the legislature would not intend to dissuade suspects from cooperating with law enforcement.

Furthermore, and even more absurd, would be that that interpretation would leave victims of crimes with less protections than criminal suspects. For example, when a family's house gets burglarized and the family consents to give their DNA to police to rule them out as suspects. The true suspect would have his DNA mandatorily expunged if he was found not guilty, the case was

dismissed, or the charge was *nolle prossed.* See S.C. Code Ann. § 23-3-660(A). However, the family's DNA could be retained by the state in perpetuity. South Carolinians would certainly be shocked to know that they have less privacy protections in the DNA that they consensually provide law enforcement than a suspect who was compelled to provide his DNA. Accordingly, the legislature cannot have meant to restrict the application of the Act to only DNA procured by compulsion incident to arrest such that the Act applied to the DNA evidence collected by the Richland County Sheriff's Office in this case and its retention in the unregulated, clandestine DNA database was illegal.

II. Trial counsel failed to show that Petitioner's consent was void because Petitioner could not consent to an illegal contract and trial counsel did not argue that the illegal nature of the DNA database was what allowed Petitioner's DNA to be retained beyond the scope of the limited, illegal, consent given.

Respondent also argued that even if Petitioner had a privacy right in the DNA he provided to law enforcement, his privacy rights were not violated by its illegal retention in the Richland County Sheriff's Office DNA database because Petitioner "consented" to give his DNA to police. Brief of Respondent, p. 9 – 11. That argument also misses the point. Petitioner's position was that trial counsel's motion to suppress the DNA evidence would have been successful had trial counsel argued the illegality of the DNA database voided Petitioner's "consent." The failure of trial counsel to make that argument constituted ineffective assistance of counsel.

Petitioner's argument relied on the limitations for using consent as the justification for the admissibility of DNA evidence. The collecting of Petitioner's DNA in this case was done solely by purported consent, so it needs to be analyzed under contract principles and a person cannot consent to an illegal contract. See Oscanyan v. Arms Co., 103 U.S. 261, 268 – 69 (1880) ("Whenever illegality in a contract sought to be enforced appears whether the evidence comes from one side or the other, the disclosure is fatal to the cause of action, and *no consent of the defendant can neutralize its effect.*") (emphasis added); see also Armstrong v. Collins, 366 S.C. 204, 224, 621 S.E.2d 368, 378 (2005) (holding that the general rule in South Carolina is that courts will not enforce contracts that are illegal or violate public policy) (citing White v. J.M. Brown Amusement Co., Inc., 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004)). Since the Richland County Sheriff's Office DNA database was illegal, Petitioner could not consent to have his DNA held

there. Even if Petitioner *expressly* gave his consent for his DNA to be held in their illegal database that consent would still be invalid.

It is with that in mind that Petitioner's argument for ineffective assistance of trial counsel becomes clear. Trial counsel provided ineffective assistance of counsel when he failed to argue that Petitioner's DNA being held in the illegal database violated his right to privacy in that DNA. App. 605 – 618. Had trial counsel made that argument, the DNA evidence would have been suppressed.

Secondly, trial counsel could have buttressed the suppression argument he made, that Petitioner's DNA was used outside of the scope of the consent given, such that the DNA evidence, and all the evidence that flowed from it, could not have been admitted. App. 101, l. 10 – 102, l. 24; App. 105, ll. 12 – 18; App. 101, l. 17 – 102, l. 23. Had trial counsel argued that the illegal nature of the Richland County Sheriff's Office DNA database was what allowed the Sheriff's Office to retain Petitioner's DNA beyond the scope of his consent there was a reasonable likelihood he would have successfully suppressed the DNA evidence.

The Act states that an individual's DNA must be destroyed after he is exonerated of the crime for which the DNA was collected and tested. See S.C. Code Ann. § 23-3-660(A). Since the Richland County Sheriff's Office was operating their DNA database outside of the SLED regulations, it was able to keep Petitioner's DNA after he was exonerated from the 2010 burglary investigation. App. 91, ll. 22 – 25; App. 92, ll. 15 – 25. Had the Richland County Sheriff's Office DNA database been a legal database required to follow the procedures under SLED's authority, the destruction of Petitioner's DNA would have been *mandatory* once he was exonerated him from the 2010 burglary investigation.

Accordingly, had trial counsel argued that the illegal nature of the database was what allowed the Richland County Sheriff's Office to clandestinely retain Petitioner's DNA out of SLED's regulatory view, he would have been able to show that but for the database's illegality the police would not have been able to match Petitioner's DNA to the DNA on the washrag. Thus, trial counsel's failure to make that argument in the suppression motion was ineffective assistance of counsel and, since all the evidence against Petitioner flowed from the DNA match, that ineffective assistance prejudiced Petitioner.

CONCLUSION

For these additional foregoing reasons, Petitioner respectfully requests that this Court vacate his conviction and remand his case for a new trial.

Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of March, 2022.

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Appeal from Richland County

Honorable D. Craig Brown, Circuit Court Judge

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Reply Brief of Appellant in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Edward Maurice Dunn, Jr., #351031, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 31st day of March, 2022.

Victor R. Seeger

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