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OPINION COMMITTEE

PATRICIA R. LYKOS
District Attorney
Harris County, Texas

FILE # ML-47129-12
I.D. # 47129

September 5, 2012

Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-1082-GA

Dear Mr. Abbott:

Pursuant to Section 402.043 of the Government Code, I request your written opinion on the following questions:

Does the Harris County District Attorney's Office have the authority to petition a district or inferior court for the destruction of blood seized during the investigation of an intoxication-related offense?

Do district court judges and inferior court judges have the authority to order the destruction of blood seized during the investigation of an intoxication-related offense?

These questions have arisen in the course of litigation involving the State of Texas in which suspects have been arrested for intoxication-related offenses and blood samples have been obtained from them under various legal justifications.

Law enforcement authorities in Harris County currently have thousands of such vials of blood, many related to litigation that has concluded, and those authorities have sought this Office's assistance in the disposal of the blood vials. We have been unable to find clear legal authority addressing the power and procedure to destroy such blood vials.

Please find attached a brief on the merits of each question. I look forward to your opinion on these important issues of law.

Sincerely,

Brief in Support of Patricia R. Lykos's
August 28, 2012 Request for Attorney General Opinion

A. Questions Presented

The litigation of a request to destroy evidence in a closed case is a final step in the prosecution of a criminal case in which the State of Texas is interested. The proper timing and authority for such a step is important because premature or unauthorized destruction of evidence in bad faith may constitute a violation of a defendant's due process rights. *See generally Arizona v. Youngblood*, 488 U.S. 51 (1988); *Illinois v. Fisher*, 540 U.S. 544 (2004).

The disposition of blood seized in the course of intoxication-related criminal investigations is a particularly important question, given the exculpatory (and inculpatory) value of the blood, the privacy concerns associated with the blood, and the high costs of storage and maintenance of biological materials.

As such, the Harris County District Attorney respectfully submits the following questions that relate to the disposition of evidence in a criminal case:

1. Does the Harris County District Attorney's Office have the authority to petition a district or inferior court for the destruction of blood seized during the investigation of an intoxication-related offense?
2. Do district court judges and inferior court judges have the authority to order the destruction of blood seized during the investigation of an intoxication-related offense?

B. Relevant Facts

The Harris County District Attorney's Office prosecutes intoxication-related offenses in the district courts and inferior courts of Harris County. During the investigation of such cases, police officers often obtain blood samples from suspects through a variety of methods.

For example, the Transportation Code requires that a blood specimen be obtained in cases of felony driving while intoxicated (DWI), in cases of DWI with a child passenger, and in cases of DWI with a serious injury. TEX. TRANSP. CODE ANN. § 724.012 (West 2011). The Transportation Code also allows for the collection of a blood sample with either the implied consent or the actual consent of the suspect. TEX. TRANSP. CODE ANN. § 724.011 (West 2011). Furthermore, samples may be obtained by a search warrant if there is probable cause to believe that the suspect's blood contains evidence and the suspect refuses to consent. *See Beeman v. State*, 86 S.W.3d 613, 616 (Tex. Crim. App. 2002); *see also Schmerber v. California*, 384 U.S. 757, 769–70 (1966).

As a result of these practices, law enforcement agencies in Harris County have accumulated a substantial number of blood samples, most of which belong to suspects who have already resolved their cases. This office has estimated that there are approximately 13,000 vials of blood stored in Harris County, with the Houston Police Department alone in possession of over 4,700 such vials. Because secure refrigerated storage space with chain of custody protocols is expensive and limited, clear authority and procedures for destruction of blood vials in closed criminal cases is essential to ensure that blood evidence in open criminal cases is not stored in less secure refrigerated space or at room temperature.

C. Statutory Authority to Dispose of Blood Evidence in Intoxication-Related Cases

In Texas, at least two statutes arguably address the authority of a court to order the destruction of blood evidence in a criminal case.

Article 38.43, Code of Criminal Procedure. Article 38.43 of the Code of Criminal Procedure is entitled, “Evidence Containing Biological Material,” and provides that governmental and public entities must “ensure that biological evidence collected pursuant to an investigation or prosecution of a felony offense or conduct constituting a felony offense is retained and preserved.” TEX. CODE CRIM. PROC. ANN. art. 38.43(c) (West 2011). In this statute, the term “biological evidence” is defined quite broadly and includes:

any item that contains blood...collected as part of an investigation of an alleged felony offense or conduct constituting a felony offense that *might reasonably be used to*: (A) establish the identity of the person committing the offense or engaging in the conduct constituting the offense; or (B) exclude a person from the group of persons who could have committed the offense or engaged in the conduct constituting the offense.

TEX. CODE CRIM. PROC. ANN. art. 38.43(a) (West 2011) (emphasis added).

While the legislative history of Article 38.43 demonstrates that the Legislature was primarily concerned with DNA evidence used to identify or exclude a suspect in a criminal case,¹ the text of Article 38.43 – specifically, “any item that contains blood...that might reasonably be used to...exclude a person from the group of persons who could have committed the offense...” – is broad enough to encompass all of the blood collected as part of an investigation of an intoxication-related felony offense.

¹ See House Comm. on Criminal Jurisprudence, Bill Analysis, Tex. S.B. 3, 77th Leg., R.S. (2001) (“DNA advancements have made the use of DNA more precise for identification purposes, and therefore the use of postconviction DNA testing can increase the ability to prevent wrongful convictions.”)

Under Article 38.43, the attorney representing the state, the clerk, or another officer in possession of the biological evidence “may destroy the evidence” if that person notifies the defendant, notifies the last attorney of record for the defendant, and notifies the convicting court of the decision to destroy the evidence, and if no written objection is received within 90 days. TEX. CODE CRIM. PROC. ANN. art. 38.43(d) (West 2011). Therefore, Article 38.43 provides a viable method for disposing of some of the blood vials in the possession of law enforcement agencies in Harris County.

A major problem with this solution, however, is that the vast majority of intoxication-related offenses in Harris County are misdemeanors. Therefore, the vast majority of intoxication-related blood vials in the possession of the law enforcement agencies of Harris County would not fall under Article 38.43.

Article 18.17, Code of Criminal Procedure. The other statute that arguably addresses the disposal of such blood evidence is Article 18.17 of the Code of Criminal Procedure, which is entitled, “Disposition of abandoned or unclaimed property.” TEX. CODE CRIM. PROC. ANN. art. 18.17 (West 2011). It provides in part that:

All unclaimed or abandoned *personal property of every kind*, other than contraband subject to forfeiture under Chapter 59 of this code and whiskey, wine and beer, seized by any peace officer in the State of Texas which is not held as evidence to be used in any pending case and has not been ordered destroyed or returned to the person entitled to possession of the same by a magistrate, which shall remain unclaimed for a period of 30 days shall be delivered for disposition to a person designated by the municipality or the purchasing agent of the county in which the property was seized.

TEX. CODE CRIM. PROC. ANN. art. 18.17(a) (West 2011) (emphasis added).

The term “personal property” is not defined in the statute or the case law for the purposes of Article 18.17. In its common understanding, “personal property” has been defined to include “tangible movables.” *See* GARNER’S DICTIONARY OF LEGAL USAGE at 671 (3d ed., Oxford 2011) (quoting Ray Andrews Brown, *THE LAW OF PERSONAL PROPERTY* v (2d ed. 1955)). Under this definition, a vial of blood is a “tangible movable.”

The other Texas statutes that have defined “personal property” have similarly expansive definitions consistent with the common understanding of the phrase. *See, e.g.*, TEX. TAX CODE ANN. § 1.04(4)-(5) (West 2008) (“‘Personal property’ means property that is not real property...‘Tangible personal property’ means personal property that can be seen, weighed, measured, felt, or otherwise perceived by the senses...”); TEX. INS. CODE ANN. § 1.04(4)-(5) (West 2009) (“‘Personal property’ has

the meaning assigned by Section 1.04, Tax Code.”); TEX. PROBATE CODE ANN. § 3(z) (West 2003) (“‘Personal property’ includes interests in goods, money, choses in action, evidence of debts, and chattels real.”).

Under Article 18.17, the person having possession of the seized property must mail a notice to the last known address of the owner of the property by certified mail, and the notice must describe the property being held, give the name and address of the officer holding the property, and state that the property will be disposed of if the owner does not claim the property within 90 days. TEX. CODE CRIM. PROC. ANN. art. 18.17(b) (West 2011).

If such a procedure were the only means of disposing of all the blood vials for intoxication-related misdemeanor offenses, it would be cost-prohibitive for HPD as well as for the other large law enforcement agencies in Harris County.

D. Blood as a “Waste” Item Subject to Summary Destruction

One potential means of avoiding this predicament was suggested in a 1988 opinion letter of the Attorney General. Tex. Att’y Gen. Op. No. LO-88-134 (1988). The Harris County Attorney had inquired whether the Harris County purchasing agent was authorized to destroy confiscated and abandoned items that were worthless or otherwise unsalable. The Attorney General concluded:

While we can find no authority for a purchasing agent to destroy items (acquired under article 18.17) he believes to be waste, *we conclude that a magistrate may order items destroyed that are determined to be of such little value that they are “routinely discarded as waste.”*

Tex. Att’y Gen. Op. No. LO-88-134 at 2 (1988) (emphasis added). The Attorney General went on to state, however, that “if there be any doubt as to whether an item falls within this category, a safer practice would be to follow the provisions of article 18.17 relative to notice and sale of the property.” *Id.*

There can be little doubt that blood is routinely discarded as waste in certain contexts. *See* TEX. HEALTH & SAFETY CODE ANN. § 361.560(3) (West 2011) (“‘Medical waste’ includes animal waste, bulk blood and blood products, microbiological waste, pathological waste, sharps, and special waste from health care-related facilities...The term does not include artificial, nonhuman materials removed from a patient and requested by the patient, including but not limited to orthopedic devices and breast implants.”).

In other contexts, such as blood that falls within the definition of Article 38.43, blood is not routinely discarded as waste but must be kept for a period of time. *See* TEX. CODE CRIM. PROC. ANN. art. 38.43 (West 2011).

Nevertheless, blood that was not collected as part of the investigation of a felony offense and that relates only to a case that has been finally resolved is of such little value that it ought to be discarded as waste. The fact that the Legislature addressed the issue of blood destruction in Article 38.43 yet did not see fit to include misdemeanor cases in that statute supports this conclusion.

E. Conclusion

For these reasons, the Attorney General should find that the Harris County District Attorney's Office has the authority to petition a district or inferior court for the destruction of blood seized during the investigation of an intoxication-related misdemeanor offense and that the district court judges and inferior court judges have the authority to order the destruction of blood seized during the investigation of an intoxication-related misdemeanor offense if those judges determine that the blood is of such little value that it may be discarded as waste.