State of Tennessee v. Rosemary L. Decosimo

No. E2017-00696-SC-R11-CD

Attorney Contributor: Mark Fulks

Criminal Law Journal Member: Chase Misenheimer

This case began on August 18, 2012, when the defendant, Rosemary L. Decosimo, was arrested for driving under the influence ("DUI") with a blood alcohol content above 0.08% which constitutes DUI per se.[1] The defendant consensually provided a blood sample upon her arrest, and the sample was submitted for analysis to the Forensic Services Division of the Tennessee Bureau of Investigation, (the "TBI").[2] The defendant challenged the constitutionality of the $250[3] "blood alcohol or drug concentration test ("BADT") fee" on every person convicted of statutorily specified offenses, including DUI, if the offender "has taken a breath alcohol test on an evidential breath testing unit provided, maintained, and administered by a law enforcement agency for the purpose of determining the breath alcohol content" or the offender "has submitted to a chemical test to determine the alcohol or drug content of the blood or urine."[4]

The BADT fees are collected by clerks and forwarded to the state treasurer for deposit into the TBI's toxicology unit's Intoxicant Testing Fund, (the "ITF").[5] The monies deposited into the ITF do not revert to the State's general fund, but instead remain available for appropriation to the TBI, as determined by the General Assembly.[6] The money is used "to fund a forensic scientist position in each of the three (3) [TBI] crime laboratories, to employ forensic scientists to fill these positions, and to purchase equipment and supplies, pay for the education, training and scientific development of employees, or for any other purpose so as to allow the

[1] *See State v. Decosimo*, 555 S.W.3d 494 (Tenn. 2018)
[2] *Id.*
[3] In 2008, the TBI requested the General Assembly to raise the BADT fee from $100 to $250 to mitigate budget cuts that could have resulted in terminating special agent and forensic scientist positions. *Id.*
[4] Tenn. Code Ann. § 55-10-413(f) (2018).
[5] *Id*. § 55-10-413(f)(2), (f)(3)(A).
[6] *Id*. § 55-10-413(f)(3)(B).

[TBI] to operate in a more efficient and expeditious manner."[7] Any additional available funds "shall be used to employ personnel, purchase equipment and supplies, pay for the education, training and scientific development of employees, or for any other purpose so as to allow the bureau to operate in a more efficient and expeditious manner."[8]

On January 31, 2014, the defendant filed a motion to dismiss, or in the alternative, to suppress the TBI's blood alcohol test results.[9] The defendant contended the constitutionality of the BADT fee by arguing that conditioning the BADT fee upon conviction and allocating the monies collected to the ITF instead of to the State's general fund incentivizes the TBI's forensic scientists to develop test results that produce convictions.[10] The defendant argued that this system invokes an appearance of impropriety and potential for abuse that violated her fundamental right to a fair trial as guaranteed by both the Due Process Clause of the Fourteenth Amendment to the United States Constitution and article I, section 8 of the Tennessee Constitution.[11]

At trial, the defendant's defense motions for suppression and dismissal were denied.[12] The defendant entered a nolo contendere plea to DUI per se and reserved the following certified question of law for appeal:

> Whether the trial court erred in not dismissing this case, or alternatively, suppressing the blood alcohol evidence without which the State could not proceed against the defendant on this DUI per se conviction, where T.C.A. § 55-10-413(f) is unconstitutional in violation of due process and rights to a fair trial under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and under article I, sections 8 and 9 of the Tennessee Constitution based on the fact that the [TBI] receives a $250 BADT/BAT fee in every case in which a conviction is obtained for driving under the influence or other listed offense, wherein a TBI blood test or TBI-calibrated breath test result is used, thereby creating a "contingent-fee-dependent system" susceptible to bias because the TBI's testing and interpretation of these tests play the determinative role in the

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[7] *Id.* § 55-10- 413(f)(3)(C)
[8] *Id*.
[9] *See State v. Decosimo*, 555 S.W.3d 494.
[10] *Id.*
[11] *Id.*
[12] *Id.*

> prosecution of the charge, and a jury instruction regarding this statutory incentive in favor of conviction is insufficient to cure the magnitude of the constitutional violation.[13]

The Court of Criminal Appeals resolved the question and held that the BADT fee violates "due process principles" by creating in the TBI a "direct pecuniary interest in securing convictions."[14] The Appeals Court reversed the trial court, granted the motion to suppress the results of the TBI blood alcohol testing, and dismissed the DUI per se charge.[15]

The Tennessee Supreme Court granted the State's application for permission to appeal.[16] Upon de novo review, the Court held that under both the federal and state constitutions, the standards of neutrality[17] apply only to persons exercising either judicial or quasi-judicial authority and do not apply to TBI forensic scientists which lack such authority.[18] Additionally, even if the standards applied to TBI forensic scientists, the constitutional claim fails because the scientists have "no direct, personal, substantial pecuniary interests in fees imposed pursuant to the [BADT] statute, and any institutional financial interest the scientists may have . . . is too remote to give rise to an appearance of impropriety."[19] Furthermore, the Court also disagreed with the Court of Criminal Appeals that the statute violates substantive due process, and thus, the Court of Criminal Appeals was reversed, and the trial court's judgment was reinstated.[20]

The most striking thing about the Supreme Court's opinion—and the Court of Criminal Appeals' opinion that preceded it[21]—is that the appellate courts did not have jurisdiction to hear

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[13] *Id*.
[14] *State v. Decosimo*, No. E201700696CCAR3CD, 2018 WL 733218, at *16 (Tenn. Crim. App. Feb. 6, 2018).
[15] *Id.* at *17-18.
[16] Prior to hearing, the Court directed the parties to file supplemental briefs addressing whether the constitutional challenge was moot because in 2018 the BADT fee statute was amended to abolish the ITF. The fees now go directly to the State's general fund. Both parties argued in the negative and the case proceeded. *See State v. Decosimo*, 555 S.W.3d 494.
[17] *See Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972); and *Connally v. Georgia*, 429 U.S. 245 (1977).
[18] *See State v. Decosimo*, 555 S.W.3d 494.
[19] *Id.*
[20] *Id.*
[21] *State v. Decosimo*, No. E2017-00696-CCA-R3-CD, 2018 WL 733218 (Tenn. Crim. App. Feb. 6, 2018).

the certified question because it is not dispositive of the case. Neither appellate court addressed the jurisdictional prerequisites.[22,23] The rules of criminal procedure permit a criminal defendant to appeal a certified question of law following plea of guilty or nolo contendere only if:

> (A) the defendant entered into a plea agreement under Rule 11(c) but explicitly reserved–with the consent of the state and of the court–the right to appeal a certified question of law that is dispositive of the case, and the following requirements are met:
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> > (i) the judgment of conviction or order reserving the certified question that is filed before the notice of appeal is filed contains a statement of the certified question of law that the defendant reserved for appellate review;
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> > (ii) the question of law as stated in the judgment or order reserving the certified question identifies clearly the scope and limits of the legal issue reserved;
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> > (iii) the judgment or order reserving the certified question reflects that the certified question was expressly reserved with the consent of the state and the trial court; and
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> > (iv) the judgment or order reserving the certified question reflects that the defendant, the state, and the trial court are of the opinion that the certified question is dispositive of the case.[24]

The Tennessee Supreme Court has held that a certified question "is dispositive when the appellate court must either affirm the judgment of conviction or reverse and dismiss the charges."[25] Moreover, the appellate courts are "not bound by the determination and agreement of the trial court, a defendant, and the State that a certified question of law is dispositive of the case."[26] Instead, the appellate courts are required to "make an independent determination that the certified question is dispositive."[27] Furthermore, and most importantly, the appellate courts

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[22] See *State v. Springer*, 406 S.W.3d 526, 531 (Tenn. 2013) (addressing the jurisdictional prerequisites for certified questions and concluding that the question satisfies jurisdictional requirements and that the issue is properly before the Court).
[23] The State of Tennessee did not address the question of jurisdiction in its application for permission to appeal, a significant error of its part.
[24] Tenn. R. Crim. P. 37(b).
[25] *State v. Dailey*, 235 S.W.3d 131, 134 (Tenn. 2007) (quoting State v. Walton, 41 S.W.3d 75, 96 (Tenn. 2001)).
[26] *State v. Thompson*, 131 S.W.3d 923, 925 (Tenn.Crim.App. 2003).
[27] *Dailey*, 235 S.W.3d at 135 (citing *State v. Preston*, 759 S.W.2d 647, 651 (Tenn. 1988)).

do not have jurisdiction to decide certified questions that are not dispositive.[28] Thus, when a defendant reserves a certified question challenging some but not all of the state's evidence, the question is not dispositive because the State has other evidence to sustain the defendant's prosecution.[29] "When the record contains incriminating evidence apart from that challenged through the certified question, the appellate court must dismiss the appeal because the certified question is not dispositive."[30]

Here, the Supreme Court's opinion makes it clear that the certified question was not dispositive. Decosimo challenged to the constitutionality of the BADT statute on due process grounds and sought to exclude the testimony of the TBI's forensic scientist who tested her blood sample on the ground that both the scientist individually and the TBI as an institution had a financial incentive to generate test results that support convictions, which, in turn, lead to the imposition of the BADT fee. Yet Decosimo did not seek suppression of the blood sample itself, which she provided voluntarily, and which incriminated her in the crime of DUI per se independently of the TBI agent's testimony.

The remedy for a successful facial challenge to the constitutionality of a statute is invalidation of the statute.[31] The remedy for conflicts of interest is disqualification in the context

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[28] *State v. King*, 437 S.W.3d 856, 886 (Tenn. Crim. App. 2013); *Walton*, 41 S.W.3d at 96 (citing *Preston*, 759 S.W.2d at 651); *State v. Cathey*, No. M2011–00438–CCA–R3–CD, 2011 WL 6020553, at *2 (Tenn.Crim.App. Dec. 5, 2011), perm. app. denied (Tenn. Apr. 18, 2012).

[29] *State v. King*, 437 S.W.3d 856, 886–87 (Tenn. Crim. App. 2013); *Walton*, 41 S.W.3d at 96 (holding certified question regarding the admissibility of the defendant's incriminating statements non-dispositive because the record contained other incriminating evidence); *State v. Brown*, No. M2004–02101–CCA–R3–CD, 2005 WL 2139815, at *5 (Tenn.Crim.App. Aug. 30, 2005) (holding certified question regarding validity of search warrant non-dispositive because the State had incriminating evidence gathered from other sources), perm. app. denied (Tenn. Feb. 6, 2006); *State v. Kennedy*, No. W2001–03107–CCA–R3–CD, 2003 WL 402798, at *3–4 (Tenn.Crim.App. Feb. 21, 2003) (holding validity of consent search non-dispositive where victim could also testify to defendant's possession of victim's property), perm. app. denied (Tenn. May 27, 2003).

[30] *Carter v. State*, No. M2012–01843–CCA–R3–PC, 2013 WL 3023093, at *5 (Tenn.Crim.App. June 14, 2013) (citing Dailey, 235 S.W.3d at 135–36).

[31] "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby Cty*., 118 U.S. 425, 442 (1886).

of expert witnesses,[32] prosecuting attorneys, [33] and defense counsel.[34] Dismissal is only a remedy when the conflict disqualifies the prosecuting attorney and strikes at the heart of the prosecuting attorney's charging decision.[35] Thus, the courts could remedy the constitutional challenge to the BADT fee statute by invalidating the statute and precluding the State from collecting the fee upon the defendant's conviction. And, although no court has ever excluded the testimony of a law enforcement officer on the ground that a conflict of interest created an appearance of impropriety,[36] the courts could remedy the defendant's claim that the TBI forensic scientist, who may be viewed as an expert witness, by disqualifying the witness and precluding the witness from testifying. Under these circumstances, dismissal is not an option.

But that is not the only reason the certified question is not dispositive of the case. Even if the courts declared the statute void and disqualified the forensic scientist, individually, or the TBI, collectively, the prosecution would still be entitled to use the defendant's blood sample to prove her guilt. In the absence of the TBI forensic scientist, the prosecution would remain free to submit the blood sample for analysis by an independent laboratory. This point finds emphasis in the court's discussion of the discharged forensic scientist: "The TBI fired the forensic scientist and sent all samples he had tested to an outside laboratory for retesting." In that instance, the

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[32] *Secura Ins. Co. v. Wisconsin Pub. Serv. Corp*., 156 Wis. 2d 730, 732, 457 N.W.2d 549, 549 (Ct. App. 1990) ("the trial court may disqualify an expert witness if it is shown that retention of the witness creates a conflict of interest"); *Roundpoint v. V.N.A. Inc*., 207 A.D.2d 123, 125, 621 N.Y.S.2d 161, 162–63 (1995) ("Although, as a general proposition, a party has the right to present the testimony that best supports its position, it has been recognized that a court has inherent power to disqualify an expert witness to preserve the fairness and integrity of the judicial process").

[33] *State v. Tate*, 925 S.W.2d 548 (Tenn. Crim. App. 1995) (holding that district attorney general who formerly presided over case as trial court judge was disqualified on basis of actual conflict of interest and appearance of impropriety, and that district attorney general's office was disqualified).

[34] *State v. White*, 114 S.W.3d 469, 476 (Tenn. 2003) ("[T]he United States Supreme Court and this Court have held that a trial court may disqualify or remove a defendant's counsel of choice where there exists an actual conflict of interest or a serious potential for conflict.")

[35] *State v. Culbreath*, 30 S.W.3d 309 (Tenn. 2000) (holding that private attorney's receiving $410,931.87 from special interest group created an actual conflict of interest, justifying disqualification of district attorney general's office and that dismissal of indictments was appropriate remedy). In *Culbreath*, the Supreme Court held that dismissal of an indictment may be appropriate under a court's general supervisory authority where prosecutorial misconduct, while short of constitutional error, has prejudiced a defendant or affected the charging decision by the grand jury and rendered the process fundamentally unfair. *Id.* at 317-318.

[36] *People v. Doyle*, 159 Mich. App. 632, 647, 406 N.W.2d 893, 900, on reh'g, 161 Mich. App. 743, 411 N.W.2d 730 (1987) ("there is no authority for the trial court's order recusing an investigating police officer").

TBI procured retesting of 2,827 blood samples. The TBI, or the District Attorney General, could more easily obtain retesting of the defendant's blood sample and those of the twenty-two other defendants who challenged the BADT fee statute. In the end, the results of the independent laboratory testing would be available to the prosecution for use at trial against Decosimo.

It is no answer to claim that the appellate courts obtained subject matter jurisdiction through the defendant's citation of *Tumey v. Ohio*, 273 U.S. 510 (1927), *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), and *Connally v. Georgia*, 429 U.S. 245 (1977), and her claim that dismissal is the appropriate remedy. For one thing, the claim falls hard upon the Supreme Court's conclusion that those cases apply only to judicial and quasi-judicial officers and not to TBI forensic scientists. For another, if Rule 37(b) is to retain any meaning, the appellate courts cannot leave the existence of subject matter jurisdiction to a defendant's outlandish claim to an unavailable remedy and citation to inapposite authority. To do so would reduce the jurisdictional analysis to the mere incantation of talismanic buzzwords devoid of substance.

Beyond the jurisdictional issue attendant to the lack of dispositivity, the Supreme Court's opinion is straightforward and flows directly from the factual distinctions between the defendant's case and the cases that she cites. The United States Supreme Court limited *Tumey* and its progeny to cases in which the neutrality of judicial or quasi-judicial actors was at issue. Moreover, the Supreme Court held in *Marshall* that *Tumey* strict neutrality did not apply to administrative prosecutors. The defendant attacked the conduct of law enforcement forensic scientists who the Tennessee Supreme Court rightly concluded resided one-step removed from the prosecutors. Simply stated, the TBI's forensic scientists are not deciders in the adjudicatory process; they do not decide to file charges, nor do they decide whether the defendant is guilty. Instead, the forensic scientists merely analyze the evidence submitted to the crime laboratory. Accordingly, the defendant's appeal was destined to fail under the cited authority.

Nevertheless, the Court held that forensic scientists' conduct may be subject to the constraints of due process.[37] And, after stating that it would not determine the boundaries imposed by due process, the court proceeded, by negative implication, to do precisely that. The Court appears to suggest that due process will be offended when a forensic scientist has "a direct, personal, substantial pecuniary interest in producing a particular test result."[38] Likewise, the Court appears to suggest that due process will be offended when the facts demonstrate "a realistic possibility" that a forensic scientists judgment will be distorted by the prospect of institutional gain.[39] These two points are analogous to the circumstances that have caused some courts concern over the governments outrageous and egregious conduct in criminal investigations.[40]

[37] Slip op. at 20.
[38] *Id.*
[39] *Id.* at 21.
[40] See *Commonwealth v. Benchion*, 582 A.2d 1067 (1990) (discussion cases on outrageous government conduct); *State v. Latham*, 1998 WL 191162 (Alaska 1998) (failure to preserve potentially exculpatory evidence); *Krause v. State*, 691 S.E.2d 211 (Ga. 2010) (failure to preserve evidence); *State v. Williams*, 403 N.J.Super 39 (2008) ("There can be no dispute that a criminal investigation infected by racial animus would violate a defendant's due process rights.")