10-09: DNA Swab Voluntariness and Probable Cause

Case: Myles v. State, 35 FLW D2819a (Fla. 3d DCA)

Date: December 15, 2010

Subject: Roadside DNA swab taken from defendant was voluntarily obtained; DNA "cold hit" to an unsolved, unrelated crime provided probable cause for arrest. DNA evidence properly admitted**.**

FACTS: In January 2001, Miami-Dade police were called to scene of a sexual battery. The victim was unable to identify her attacker other than he was "a black man bigger than she was." DNA evidence was obtained from the victim, however, the crime was not solved, and the recovered evidence was entered into the Florida DNA database for future comparison. In October 2003, the defendant was stopped by police in his vehicle after an altercation with a female. After noting a resemblance to a sketch of a suspect known only as the "North Dade Rapist" the officers called to the scene two Miami-Dade detectives to seek voluntary DNA swabs. When the detectives arrived, Myles was sitting in the back of a police car, handcuffed. One of the detectives explained what they were investigating, and requested a voluntary swab from Myles. After Myles agreed, he was removed from the cruiser, the handcuffs were removed, the detective read a consent form aloud to Myles, and he signed it. Myles then conducted the swabbing himself, taking two swabs from each side of his mouth.

The swabs obtained from Myles eliminated him as a suspect in the "North Dade Rapist" case, but FDLE conducted a routine comparison with the DNA stored in the State Index Data Bank for unsolved crimes. This comparison resulted in two "cold hits" for unsolved rapes in Miami-Dade County, one of which is the subject of this case. Based upon this information, police arrested Myles and took him to the police station, where he signed a second consent for confirmatory DNA swabs. These swabs again matched the DNA recovered from the victim in this case. Prior to trial, Myles moved to suppress each of the DNA swabs obtained from him, claiming that the first was not voluntarily obtained, and thus any evidence obtained after that date would be "fruit of the poisonous tree." He challenged the second set of swabs by claiming that a "cold DNA hit" did not provide probable cause for arrest, "thus making the second DNA swabs inadmissible." The defendant's motions were denied by the trial court. The defendant was convicted of armed sexual battery, armed kidnapping, and other offenses. This appeal ensued.

RULING: The Third District Court of Appeal agreed with the trial court and rejected the defendant's arguments, finding that his DNA swabs were voluntarily obtained, and that a "hit" obtained when a DNA sample is compared to those contained in the DNA database did provide probable cause for arrest.

DISCUSSION: As to the roadside sample, Myles argued he had acquiesced to police authority and presence at the scene. However, the detective who obtained the sample testified that there were only 5 officers there, including the 2 detectives who were called to the scene for the purpose of requesting the swab. The detective further testified about reading the consent form and that Myles freely and voluntarily signed the form. The court therefore found the sample to be voluntary. As to the samples obtained after the arrest, the court held there was probable cause, stating that"(i)dentification by a DNA match is analogous to identification by a fingerprint match" (citing to *Anderson v. Commonwealth,* 650 S.E.2d 702, 705 (Va. 2007)). Accordingly, the comparison of the first "roadside" set of DNA swabs obtained from Myles, to the samples in the state database, equated to the comparison of "latent prints" to "known prints on file." As such, the "cold hit" did provide probable cause for arrest, and no "fruit of the poisonous tree" existed.

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Officers should consult with their agency legal advisors to confirm the interpretation provided in this Update and to determine to what extent the case discussed will affect their activities.