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RECENT DEVELOPMENT

VARRIALE V. STATE: THE STATE MAY STORE AND USE A VOLUNTARILY PROVIDED DNA SAMPLE AND RESULTANT PROFILE FOR ANY FUTURE CRIMINAL INVESTIGATIONS, UNLESS THE SUSPECT PROVIDES AN EXPRESS LIMITATION.

By: C. Harris Schlecker

The Court of Appeals of Maryland held that when a suspect does not expressly limit consent to DNA testing, the Fourth Amendment does not prevent the State from storing and using his voluntarily provided DNA in later, unrelated criminal investigations. *Varriale v. State*, 444 Md. 400, 404, 119 A.3d 824, 826 (2015), cert. denied, 15-618, 2016 WL 207276 (U.S. Jan. 19, 2016).

On the morning of July 10, 2012, Anne Arundel County police interviewed George Varriale (“Varriale”) as a potential rape suspect and asked him to submit to a DNA test. Varriale agreed and signed a consent form, which included the statement, “I realize that if I do consent to a body search, that *any evidence found to be involved in this investigation ... can be used in any future criminal prosecution.*” Comparison of Varriale’s DNA to that collected from the victim excluded him as a suspect in that case. Following the rape investigation, police uploaded Varriale’s DNA profile into the County and State DNA databanks. Subsequently, an automatic search of the database resulted in a match between Varriale’s DNA profile and a DNA profile associated with an unsolved commercial burglary that occurred in 2008. Varriale was charged in connection with the burglary.

Varriale filed a motion to suppress the State’s DNA match evidence on grounds that use of his DNA beyond the rape investigation exceeded the scope of his consent. The Circuit Court for Anne Arundel County denied the motion. Varriale entered a conditional guilty plea, reserving his right to appeal the court’s ruling on his motion to suppress. Varriale appealed to the Court of Special Appeals of Maryland, which affirmed, reasoning that once the State has validly obtained a DNA sample, the Fourth Amendment is not implicated in its future use. The court of appeals granted Varriale’s petition, and the State’s cross-petition, for certiorari.

The Court of Appeals of Maryland confined its analysis to the scope of Varriale’s consent to be searched, and whether that consent allowed for use of Varriale’s DNA in unrelated cases. *Varriale*, 444 Md. at 413, 419, 119 A.3d at 832, 835. While Varriale admitted that he gave his DNA sample voluntarily, he asserted that his consent was limited to the purposes of the rape investigation. *Id.* at 410-11, 119 A.3d at 830. The court discussed whether, under the totality of the circumstances in this case, it was reasonable for

Varriale to expect that the use of his DNA would be limited to the rape investigation. *Id.* at 415, 119 A.3d at 833.

Consensual searches are limited by the Fourth Amendment, as made applicable to the states by the Fourteenth Amendment. *Varriale*, 444 Md. at 411, 119 A.3d at 831. Under *Florida v. Jimeno*, the standard for measuring the scope of a suspect's consent under the Fourth Amendment is objective reasonableness. *Id.* at 415, 119 A.3d at 833 (citing *Florida v. Jimeno*, 500 U.S. 248, 249 (1991)). Reasonableness is determined by the totality of the circumstances. *Id.* (citing *State v. Green*, 375 Md. 595, 621, 826 A.2d 486, 501 (2003)).

The court evaluated whether the language of the consent form could be reasonably construed by Varriale to limit use of his DNA to the investigation of the specific crime enumerated on the form. *Varriale*, 444 Md. at 414-15, 119 A.3d at 833. Varriale reasoned that the reference to “evidence found in *this* investigation” meant the investigation of the rape, and by implication, that “any future criminal prosecution” was for that same crime. *Id.* at 415, 119 A.3d at 833. Conversely, the State argued that the phrase “can be used for *any* future criminal prosecution” enabled the police to use the DNA to prosecute *any* other crime. *Id.* at 415, 119 A.3d at 833 (emphasis added).

While the court conceded that the consent form was unclear, it refused to construe that ambiguity against the State. *Varriale*, 444 Md. at 415, 119 A.3d at 833. Both the Court of Appeals of Maryland and the United States Supreme Court have held that “DNA profiles are like fingerprints, which police routinely catalog and compare in the course of criminal investigations.” *Id.* at 416, 119 A.3d at 833 (citing *Maryland v. King*, 133 S.Ct. 1958, 1972 (2013); *Raynor v. State*, 440 Md. 71, 87, 99 A.3d 753, 762 (2014), reconsideration denied (Oct. 21, 2014), cert. denied, 135 S.Ct. 1509, 191 L. Ed. 2d 433 (2015)).

The court, therefore, concluded that a reasonable person would understand that police retain DNA samples, once legally obtained, and use them in future investigations. *Varriale*, 444 Md. at 417-18, 119 A.3d at 834-35 (citing *People v. Collins*, 250 P.3d 668, 676 (Colo. App. 2010)). Since Varriale did not impose an express limitation on the use or storage of his DNA, and the State made no misrepresentation as to what would happen to his DNA following the analysis required for the rape investigation, it was reasonable for the State to store and use it for future unrelated investigations. *Id.* at 418-19, 119 A.3d at 835.

Furthermore, the court held that the Fourth Amendment was not triggered in subsequent uses of Varriale's DNA, once it was lawfully obtained. *Varriale*, 444 Md. at 422-23, 119 A.3d at 838. (citing *Wilson v. State*, 132 Md. App. 510, 549, 752 A.2d 1250, 1271-72 (2000)). The privacy interest protected by the Fourth Amendment concerns the manner in which the State comes into possession of evidence, not in its consequent use. *Id.* at 423, 119 A.3d at 838. Varriale waived any privacy interest he may have had in his DNA when he consented to its collection without limiting the scope of its storage or future use. *Id.* at 424, 119 A.3d at 838. Therefore, there was no warrant

requirement or need for Varriale's consent to conduct further testing of his DNA or to upload it to the County and State DNA databases for comparison with other DNA profiles. *Id.*

The dissent, however, disagreed with the majority's conclusion that Varriale failed to limit the scope of his consent. *Varriale*, 444 Md. at 432, 119 A.3d at 843 (Harrell, J., dissenting). The dissent felt that a reasonable person would not understand that use of his DNA would not be confined to the case under investigation, given the language in the consent form. *Id.* Similarly, a reasonable person would not seek to negotiate the terms of a consent form furnished by police. *Id.* at 432, 119 A.3d at 843-44. Accordingly, the dissent reasoned the Fourth Amendment should function to prevent the subsequent, non-consensual use of Varriale's DNA for purposes beyond the rape investigation. *Id.* at 433, 119 A.3d at 844.

In *Varriale*, the Court of Appeals of Maryland held that the Fourth Amendment does not operate to prevent storage and future use of DNA freely given by a suspect, if the suspect has not expressly limited its use. Such limitations must be explicit, and cannot stem from inferences a suspect may draw from the language of a consent form, regardless of the ambiguity of such forms. The social consequence of the majority's ruling is that suspects who cooperate with police are afforded fewer constitutional protections than those who require law enforcement to obtain a warrant. This operates as a disincentive to the public to assist in police investigations.

The State has a pronounced interest in expanding its suspect database to solve crimes; however, this ruling may have the unintended result of inhibiting witnesses from cooperating with investigations. It is unlikely that the average person will understand the extent to which he must articulate the limitations he places on consent to relinquish his DNA. Because of this, Maryland criminal defense attorneys no longer may be able to rely on the Fourth Amendment to exclude evidence obtained as a result of the State's unrestrained ability to collect, retain, and use voluntarily given DNA samples.