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CRIMINAL PROCEDURE

Sentence and Punishment: Regulation of HIV Testing in AIDS Transmitting Crimes

CODE SECTION: O.C.G.A. § 17-10-15 (amended)
BILL NUMBER: HB 554
ACT NUMBER: 411
SUMMARY: The Act provides that a victim, or legal guardian of a victim, of an AIDS transmitting crime or other crime involving "significant exposure" may request that the person arrested for the crime be tested for HIV. If the arrested person refuses to be tested, the superior court may order the test to be performed upon a showing that there is probable cause to believe that the person arrested for the offense committed the crime and that "significant exposure" occurred. Upon a verdict or plea of guilty or a plea of nolo contendere to any AIDS transmitting crime, an HIV test is mandatory. If the person refuses to submit to the mandatory HIV test, the court may require involuntary submission to the HIV test, and submission may be made a condition of suspending or probating any part of that person's sentence for the AIDS transmitting crime. If the person required by this Code section to submit to the HIV test is found to be infected with HIV, this result shall be reported to the Department of Human Resources; to the court which ordered the test, which shall make the sealed test results a part of the person's criminal record; and to the officer in charge of the penal facility where the person has been confined in order to keep the person separate from those not infected.

EFFECTIVE DATE: July 1, 1991

History

Recent national publicity has brought to the public eye the difficulties that victims of possible AIDS transmitting crimes have had in finding out whether the perpetrator of the crime is infected with the human immunodeficiency virus (HIV).¹ In Georgia, legislation already existed concerning the HIV testing of those convicted of an "AIDS transmitting crime,"² but the testing was discretionary, and the reporting of the results to the victim was also discretionary.³

The major goal in amending the existing Georgia law was to provide greater protection for victims by allowing earlier HIV testing of the suspect, making testing mandatory after conviction or a plea of *nolo contendere*, and removing the discretion in reporting the positive results of the HIV test to the victim.⁴

HB 554

The 1991 legislative session represented the first year that legislation aimed solely at assisting victims of AIDS transmitting crimes was introduced in the Georgia General Assembly.⁵ Approximately seven or eight states already have legislation similar to HB 554.⁶ The bill did not have any significant opposition and moved quickly through the House and Senate.⁷

1. Telephone Interview with Rep. Glynda B. King, House District No. 72 (Apr. 3, 1991) [hereinafter King Interview].

2. "AIDS transmitting crimes" have been defined in Georgia to include: rape, sodomy, aggravated sodomy, child molestation, aggravated child molestation, prostitution, solicitation of sodomy, incest, statutory rape, or "[a]ny offense involving a violation of Article 2 of Chapter 13 of Title 16, regarding controlled substances, if that offense involves heroin, cocaine, derivatives of either, or any other controlled substance in Schedule I, II, III, IV, or V and that other substance is commonly intravenously injected . . ." O.C.G.A. § 31-22-9.1 (1990).

3. 1988 Ga. Laws 1799 (formerly found at O.C.G.A. § 17-10-15 (1989)).

4. King Interview, *supra* note 1. See also Telephone Interview with Bob Keller, Clayton County District Attorney (Apr. 4, 1991) [hereinafter Keller Interview]. Mr. Keller worked with Rep. King and Clayton Superior Court Judge Steve Boswell, along with the Department of Human Resources (DHR), to help perfect changes in the original version of HB 554. *Id.*

5. King Interview, *supra* note 1. Another act related to HIV and notification, O.C.G.A. § 42-1-7, was passed in the 1991 session. That Act requires transporters of prisoners and inmates to be notified if the person being transported has been diagnosed with a communicable or infectious disease, including HIV; the specific disease is not revealed, only the route of possible transmission. O.C.G.A. § 42-1-7 (Supp. 1991).

6. King Interview, *supra* note 1.

7. *Id.* A similar bill, HB 527, was also introduced in the 1991 legislative session but was dropped when it was discovered that the two bills had the same intent. *Id.*

As introduced, HB 554 would have provided for mandatory HIV testing "upon indictment, or if there is no indictment, upon a verdict or plea of guilty or a plea of nolo contendere to any AIDS transmitting crime."⁸ The Senate Committee Substitute removed the mandatory testing "upon indictment," and added a new section that allows the victim, parent, or guardian of a victim of an AIDS transmitting crime or other crime that involves "significant exposure" as defined by the Act to request that the person who has been arrested for the crime be tested, and that the results of the test be released to the victim.⁹ This change allows the victim to seek testing at the earliest opportunity and to avoid delays caused by the sometimes slow workings of the legal system.¹⁰

Other changes in the bill reflected the goal of supporting victims' rights rather than serving as a punitive or prosecutorial measure.¹¹ The bill, as introduced, would have allowed the suspect's refusal to submit to HIV testing to be a condition for her release upon bail, and would also have allowed the report from the test to not only become part of the person's criminal record, but also to be a factor in considering bail.¹² The final version removed both of these provisions concerning bail and also removed a portion in the previous Code section allowing the HIV report to be considered in passing sentence after conviction.¹³ The Act also adds a section that keeps out evidence that the HIV test was performed or evidence of the test results in criminal proceedings related to the AIDS transmitting crime.¹⁴

The final change was the addition of the definition of "significant exposure."¹⁵ The purpose of adding this definition was to increase the potential crimes for which a victim may request testing.¹⁶

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8. HB 554, as introduced, 1991 Ga. Gen. Assem.

9. HB 554 (SCS), 1991 Ga. Gen. Assem.

10. Keller Interview, *supra* note 4.

11. *Id.*

12. HB 554, as introduced, 1991 Ga. Gen. Assem.

13. O.C.G.A. § 17-10-15 (Supp. 1991).

14. *Id.*

15. *Id.* "Significant exposure" was defined as:

[C]ontact of the victim's ruptured or broken skin or mucous membranes with the blood or body fluids of the person arrested for such offense, other than tears, saliva, or perspiration, of a magnitude that the Centers for Disease Control have epidemiologically demonstrated can result in transmission of the human immunodeficiency virus.

Id.

16. King Interview, *supra* note 1.