Trick to get suspect’s DNA raises concerns

PETER CALLAGHAN; THE NEWS TRIBUNE
Last updated: May 15th, 2007 01:20 AM (PDT)

It was portrayed by the cops and the news media as ingenious detective work, worthy of TV’s “Law and Order: Special Victims Unit.”

Seattle detectives working on cold cases took advantage of improved testing methods to get DNA evidence in a 1982 rape and murder of a 13-year-old girl.

But the sample didn’t match any in the state’s growing database of felons. So to see if the sample matched a possible suspect – a neighbor of the victim – they sent the man a letter from a phony law firm inviting him to join a class-action suit over parking tickets. When he replied, they took the envelope sealed with the man’s saliva and scored a match.

John Nicholas Athan was convicted of second-degree murder in the death of Kristen Sumstad. The DNA evidence was the key to the conviction, with the state arguing that Athan gave his saliva freely and did not have a privacy interest in it anyway. Breaking state law by posing as lawyers was a minor offense, justified by the success in bringing a killer to justice.

By a 6-3 vote, the state Supreme Court agreed.

“The facts of this situation are analogous to a person spitting on the sidewalk or leaving a cigarette butt in an ashtray,” wrote Justice Charles Johnson for the majority. And “although the ruse used by detectives in this case violated certain statutes, it was not so outrageous or shocking to warrant dismissing the case.”

But the dissenting opinions – and even one of the concurring opinions – pointed out some disturbing trends in the decision that threaten more than a single conviction in an admittedly ugly crime. Privacy rights that are more-strongly protected in our state Constitution than in the Fourth Amendment to the U.S. Constitution were battered by the court.

In her dissent, Justice Mary Fairhurst scolded the majority for focusing on saliva when the real issue was the DNA contained within.

“But the majority’s holding, the government could analyze the DNA in anyone’s saliva, however obtained, as long as it was not directly from the person’s mouth, and use the information to construct a DNA database that includes both felons and nonfelons,” she wrote.

The answer, as with any other request by government to search someone’s property, is a warrant from a judge. But the only rationale as to why the police didn’t take that path was a fleeting suggestion that because the suspect had relatives in Greece, he was a flight risk. But after his arrest, the police used a court order to obtain a second DNA sample that confirmed the results of the first.

As noted, the state Constitution provides Washingtonians with stronger privacy protections than do other states. Under those protections, the state Supreme Court has already ruled that cops can’t – without court approval – use a Global Positioning System to follow a suspect’s car, use infrared devices to view inside someone’s house, search the contents of garbage left on the curb or use a device that collects all phone numbers dialed.
Even while agreeing with the outcome of the case, Chief Justice Gerry Alexander was surprised at the majority’s dismissal of DNA privacy: “It is hard for me to imagine that a person has a reasonable expectation of privacy in his garbage, but he does not have the same reasonable expectation of privacy in his body makeup.”

A second dissent, written by Justice Tom Chambers and endorsed by Justice Richard Sanders, accepted Fairhurst’s analysis of the privacy issue. But Chambers also was disturbed by police posing as attorneys. That, he wrote, violates attorney-client privilege, a basic premise of American justice. It also says it’s OK to break the law to capture a lawbreaker.

Wrote Chambers: “As Justice (Louis) Brandeis warned us long ago, ‘crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.’”

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Originally published: May 15th, 2007 01:20 AM (PDT)