



ALAN WILSON
ATTORNEY GENERAL

August 3, 2020

The Honorable Charles Wright, Sheriff
Spartanburg County
P.O. Box 771
Spartanburg, SC 29304

Dear Sheriff Wright:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter asks the following:

I am requesting an opinion from your office on the "DNA Preservation Act," S.C. Code Ann. § 17-28-300.

The specific questions has to do with vehicles that are impounded at the Sheriff's Office impound and a search warrant is executed on the car to process it for a crime to collect evidence. We understand that "The Act" requires items that we take into evidence for the twenty-four listed crimes that may yield biological evidence will be maintained for the specified period as defined in "The Act." In an example where a vehicle is towed, so that it can be processed with a search warrant, is the vehicle considered "evidence" as defined in "The Act?" It is our belief that a vehicle would fall under the same general category as a residence or other structure, where any evidence that is collected during the execution of the search warrant would be the evidence that is to be maintained.

We would like to be able to return vehicles that we impound to the owners, lien holders, or other interested parties once they have been processed completely. These parties normally have a financial stake in these vehicles, and some of them have that as their only mode of transportation.

Law/Analysis

If a vehicle is processed according to a search warrant for one of the twenty-four listed crimes in S.C. Code § 17-28-320(A), such a vehicle may well be considered "physical evidence."

S.C. Code § 17-28-310(9). This Office’s June 17, 2015 opinion explained the “Preservation of Evidence Act’s” (the “Act”) statutory scheme as follows:

Section 17-28-320(A) of the South Carolina Code specifies what evidence must be preserved and by whom. Specifically, it provides that “[a] custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for at least one of the following offenses ... [the designated twenty-four offenses follow].” S.C. Code Ann. § 17-28-320(A) (2014) (emphasis added). Subsection (B) of Section 17-28-320 provides the conditions for preservation, stating that:

[t]he physical evidence and biological material must be preserved:

- (1) subject to a chain of custody as required by South Carolina law;
- (2) with sufficient documentation to locate the physical evidence and biological material; and
- (3) under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material.

S.C. Code Ann. § 17-28-320(B) (2014). Subsection (C) of the same section relates to the length of time physical evidence and biological material must be preserved, providing that:

[t]he physical evidence and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A). However, if the person is convicted or adjudicated on a guilty or nolo contendere plea for the offense enumerated in subsection (A), the physical evidence and biological material must be preserved for seven years from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first.

S.C. Code Ann. § 17-28-320(C) (2014).

Being that the Act applies to “custodians of evidence” for the preservation of all “physical evidence” and “biological material,” the definitions provided for these terms in the Act follow. S.C. Code Ann. § 17-28-310(2) (2014) defines the term “custodian of evidence” as:

... an agency or political subdivision of the State including, but not limited to, a law enforcement agency, a solicitor's office, the

Attorney General's office, a county clerk of court, or a state grand jury that possesses and is responsible for the control of evidence during a criminal investigation or proceeding, or a person ordered by a court to take custody of evidence during a criminal investigation or proceeding.

“Biological material” is defined as “any blood, tissue, hair, saliva, bone, or semen from which DNA marker groupings may be obtained. This includes material catalogued separately on slides, swabs, or test tubes or present on other evidence including, but not limited to, clothing, ligatures, bedding, other household material, drinking cups, or cigarettes.” S.C. Code Ann. § 17-28-310(1) (2014).

And, the term “physical evidence” is defined as “an object, thing, or substance that is or is about to be produced or used or has been produced or used in a criminal proceeding related to an offense enumerated in 17-28-320, and that that is in the possession of a custodian of evidence. S.C. Code Ann. § 17-28-310(9) (2014).

In a July 15, 2011 opinion, we opined on the legislative intent in enactment of both the Post-Conviction DNA Testing Act and the Preservation of Evidence Act. See Op. S.C. Att'y Gen., 2011 WL 3346426 (July 15, 2011). After addressing the rule of construction that the legislative intent should be found in the plain language of the statute itself, we commented as follows:

[t]he Act is part of 2008 S.C. Acts 413, that included the “Access to Justice Post-Conviction DNA Testing Act” aimed at providing convicted defendants with the opportunity to have evidence, which was not previously subjected to DNA testing or not the same type of DNA testing, tested to determine whether it possesses any exculpatory value. In the opinion of this office, the Legislature's intent upon passing the Act was twofold. That intent was, first, to provide procedures for the preservation of evidence and to delineate the offenses for which physical evidence and biological material must be preserved; and secondly, to establish guidelines for the return of evidence prior to the period of time set forth therein, and to provide for penalties for destroying or tampering with evidence covered by the Act.

Op. S.C. Att'y Gen., 2015 WL 4042029, at 3-4 (June 17, 2015). This Office has also concluded that once evidence for one of the crimes listed in section 17-28-320(A) is “collected” by law enforcement, i.e., gathered and retained for processing, it becomes either physical evidence or

biological material for purposes of the Act. Op. S.C. Att'y Gen., 2011 WL 3346426 (July 15, 2011).

The question raised in the request letter specifically concerns how vehicles that are impounded and processed for evidence during an investigation of one of the crimes listed in section 17-28-320(A) are treated under the Act. This Office has explained that the Act's evidence preservation requirements can apply to vehicles and even prevail over the claims of a lienholder.

Despite our conclusion that a law enforcement agency may generally release a vehicle confiscated pursuant to Section 56-5-6420, "upon the service of 'claim and delivery' or other repossession orders from the lienholder prior to the adjudication of criminal charges" we note that this conclusion is not absolute. For instance, if a confiscated vehicle that is otherwise subject to forfeiture under Section 56-5-6420 is also involved in any of the 24 offenses where preservation of "physical evidence" is mandated pursuant to Section 17-28-320(A), part of the Preservation of Evidence Act, the vehicle, assuming it amounts to physical evidence, could not be released until the earliest of the circumstances outlined in Section 17-28-320(C) has occurred.

Op. S.C. Att'y Gen., 2015 WL 5737884, at 2 n.1 (September 15, 2015). Whether a vehicle would be considered "physical evidence" in a given case is, of course, a matter for review by local authorities, including the local solicitor or prosecutor.

If the local solicitor determines that a vehicle should be considered physical evidence, we have consistently advised that evidence must be preserved by the custodian of evidence utilizing normal, customary, and contemporary forensic science techniques in the investigation and retention of evidence gathered and/or used in a criminal prosecution in order to comply with the Act. See Op. S.C. Att'y Gen., 2011 WL 2214060, 10 (May 12, 2011). Moreover, in the opinion of this office, it would be permissible and consistent with the intent of the Act that the gathering and retention of such evidence allows for the substitution and/or conversion of such original evidence later used as admissible evidence through the techniques of sampling, swabbing, photographing or the use of other forensic science techniques so long as care is taken to preserve the evidence in compliance with the rules of evidence and chain of custody. See id.

Finally, the Act permits the custodian of evidence to seek a court order allowing for the disposition of physical evidence or biological material before the expiration of the time periods established in section 17-28-320. Section 17-28-340(A)(1) lists grounds to request such an order which are consistent with reasons expressed in the request letter where "the physical evidence or biological material must be returned to its rightful owner, is of such size, bulk, or physical character as to make retention impracticable, or is otherwise required to be disposed of by law." S.C. Code Ann. § 17-28-340(A)(1).

Conclusion

If a vehicle is processed according to a search warrant for one of the twenty-four listed crimes in the Preservation of Evidence Act (the "Act"), S.C. Code § 17-28-320(A), such a vehicle may well be considered "physical evidence." S.C. Code § 17-28-310(9). Whether a vehicle would be considered physical evidence in a given case is, of course, a matter for review by local authorities, including the local solicitor or prosecutor. If the local solicitor determines that a vehicle should be considered physical evidence, we have consistently advised that evidence must be preserved by the custodian of evidence utilizing normal, customary, and contemporary forensic science techniques in the investigation and retention of evidence gathered and/or used in a criminal prosecution in order to comply with the Act. See S.C. Code Ann. § 17-28-320(B). The Act permits a custodian of evidence to seek a court order allowing for the disposition of physical evidence or biological material before the expiration of the time periods established in section 17-28-320(C). Section 17-28-340(A)(1) lists grounds to request such an order which are consistent with reasons expressed in the request letter for returning a vehicle where "the physical evidence or biological material must be returned to its rightful owner, is of such size, bulk, or physical character as to make retention impracticable, or is otherwise required to be disposed of by law." S.C. Code Ann. § 17-28-340(A)(1).

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General