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Probation Searches by Law Enforcement Officers

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Probation Searches by Law Enforcement Officers

Gary Allen, Early Case / V.O.P. Director

Once again, it's time to look in on probation searches. We were here last time with the August, 2014, issue of the ***Legal Advisor***. Back then, we worried that our DCA's might take a restrictive view of searches by law enforcement officers. Recent cases have confirmed that fear. In this article, I'll review the existing law of probation searches as well as cover what changes are necessary based on the latest rulings by the appellate courts.

Gary Allen,
Early Case / V.O.P. Director

Search Warrants Are Still Preferred

In previous articles, the recommendation was for law enforcement officers to work closely with the probation officers when searching probationers because the cases have clearly held that probation officers can search without cause and without any suspicion of wrongdoing by the probationer. Once the PO finds contraband, the statements and observations of the PO can be used as probable cause for the LEO to get a search warrant. At this point, the search is stopped and the premises can be secured and everybody waits until the search warrant is obtained. Once the search warrant is approved, the law enforcement officer then executes the search warrant, seizes any evidence and can use the evidence as proof of a new charge. (The PO can use the evidence in a VOP, too.) As we said then, this gives you the best chance to make sure that any evidence seized in the search can be used both for a VOP as well as any new charge.

No Reasonable Suspicion = No Search

The problem has come when law enforcement officers try to conduct the probation search on their own. It's pretty clear that law enforcement officers throughout Florida have run with the interpretation that LEO's could search probationers just like the PO can—that is without any suspicion at all. We are getting many cases in which LEO's are encountering probationers and conducting searches based on the fact that there was a LEO warrantless search provision in the probation order. In fact, I recently got a call where we had been offering prison on a pending new charge. The arresting officer was asking for probation so that the defendant would have the warrantless search provision. The officer went on to say that he had wanted to get into the defendant's house to see what he had and he'd have the best shot of getting in there if he could do a probation search. As we'll see, this is not going to work.

The problem is that older Florida cases hold that law enforcement officers can't conduct probation searches at all, even if there is a specific authorization in the probation order. Recent cases have held that this is still the basic law. This means that for now, officers need to erase suspicionless searches of probationers from their memory banks.

Most have heard of US v. Knights. In Knights, the US Supreme Court held that if a probationer had a warrantless search clause allowing search by law

enforcement officers or probation officers and the law enforcement officer had reasonable suspicion to justify the search, then the evidence seized could be used as the basis of a new charge. Because of the language of Knights, probation orders all over Florida started to include the condition that extended warrantless search authority to law enforcement officers. But what everyone thought might become the leading case on probation searches turned out to be construed in Florida as just an exception to the general rule that LEO's cannot lawfully conduct probation searches.

So, LEO's are back to where consent becomes as important for probationers as it is for suspects who are not on probation. But, when it comes to getting consent from probationers, there is an extra step in making sure you can show that the consent is voluntary. As we pointed out in our last article on probation searches, you're better off to ask for consent in the exact same way you'd ask if the subject were not on probation. Even then there could be problems.

So the rule is this: If a person is on supervision and has a clause allowing search by law enforcement officers, then LEO's can only conduct a probation search if the law enforcement officer has reasonable suspicion to justify a search. Without reasonable suspicion, the old law applies and any law enforcement search is invalid---in other words: Don't do it. Any evidence seized can't be used in either a new charge or in a VOP.

If you search a probationer without a warrant, you must be able to state in your report the facts and observations that caused you to reasonably suspect that a crime was being committed or would be committed. Remember--- reasonable suspicion is defined as circumstances that would reasonably cause an officer to suspect that a crime is or will be occurring. This means there must be more than just a police officer's "hunch" or "feeling" that the person is up to no good. An anonymous tip is not reasonable suspicion.

A recent case from our DCA highlights how tricky this is going to be. The defendant was stopped by an officer and the officer found out the defendant was on probation. He asked for consent to search the defendant. The defendant answered, "I have no choice since I'm on probation." The DCA found the consent was not voluntary for a number of reasons but the judge noted in regard to the defendant's statement, "The officer did not correct the defendant's misunderstanding…" (i.e., that he had to consent.) Make sure your report lays out how you gained the consent. If the consent appears to have been gained by pressuring the defendant with the fact that there's a search clause, you'll almost certainly have problems in a motion to suppress. We've all been warned---the courts are raising the bar for any type of probation search.

We'll continue to watch the cases for developments. If anything changes we'll do an update. As always please feel free to give us a call if you have any questions.

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