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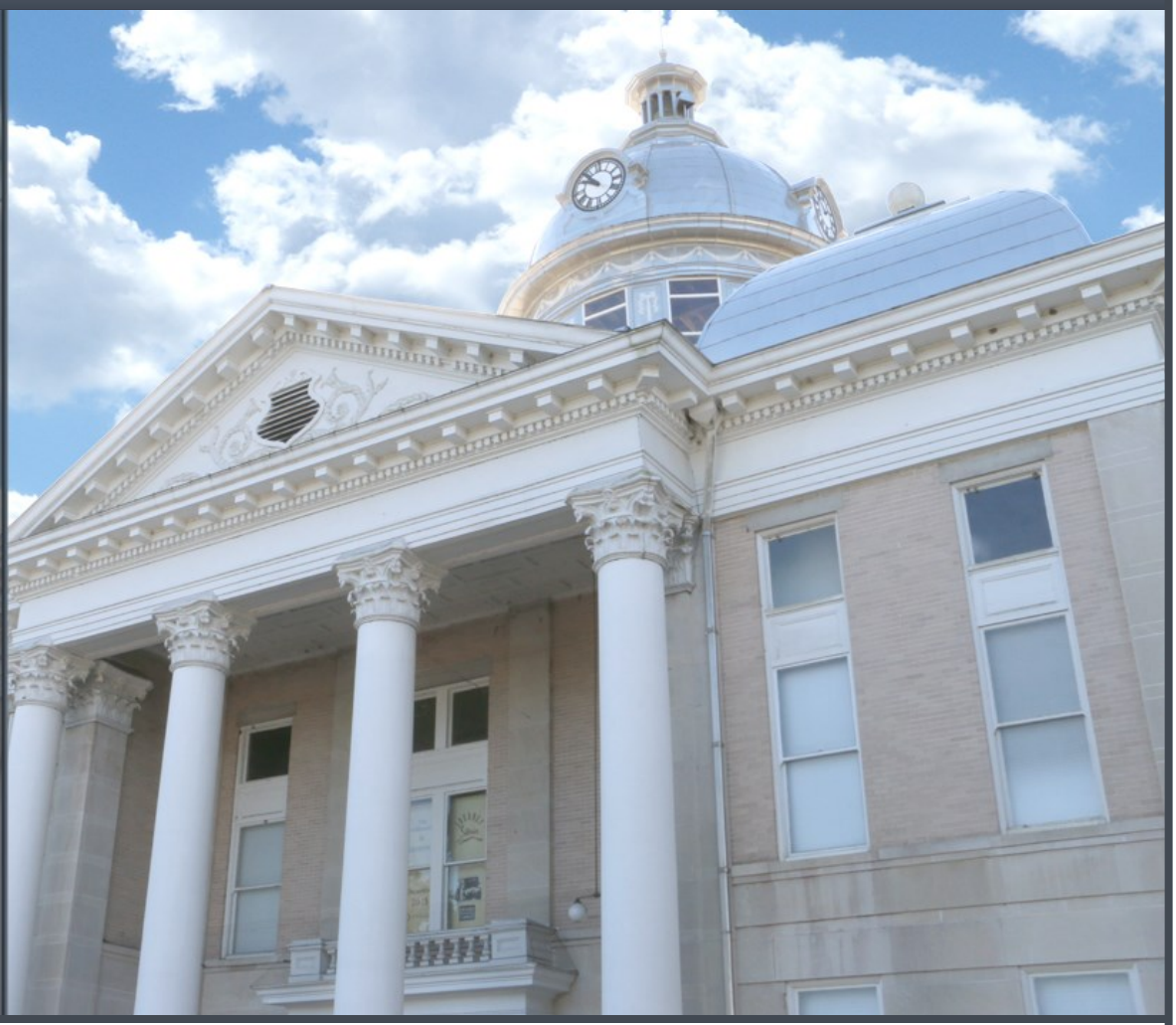

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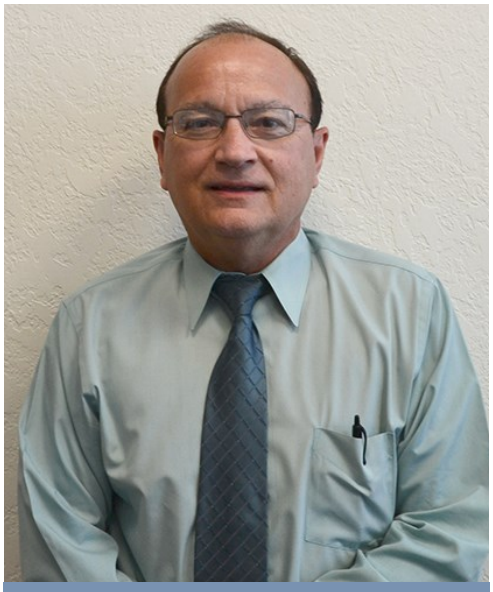
Probation Searches Revisited

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

Just four years ago the Legal Advisor took a look at searches of probationers. Since then, the number of cases we've seen involving this type of search has ballooned and they have certainly become an important tool for law enforcement. But the increased number of these cases has also given us a chance to see the many ways these searches can become the object of a motion to suppress. This article will discuss specific issues that you need to be aware of along with a short review of the basics.

The Old Days---Everybody who's on supervision has an order setting out the conditions of supervision. The earliest versions of these orders simply stated what the Florida Supreme Court had already stated-- that the probation officer has the right to search the probationer wherever he can be found. This provision was <u>not</u> considered to extend to police and anything the probation officer seized in the search could only be used in a VOP and could <u>never</u> be used to make a new charge.



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

"Officer, have ya got a search warrant?"---Florida courts came out with cases toward the end of the 90's which opened the door to use probation searches as a way to make new charges. Here's how it works—the probation officer goes to conduct the probation search. Law enforcement officers do not participate in the search. However, they can be present in the limited capacity of providing security for the probation officer(s). The LEO still had no authority to conduct a search of the probationer. The PO finds incriminating evidence. At that point, law enforcement officers are notified and the LEO uses the PO's observations and statements as the probable cause to get a search warrant. The search warrant is executed by law enforcement as usual and evidence seized can be used <u>both</u> in a VOP <u>and a new charge</u>. IF YOU WANT YOUR NEW CHARGE TO HAVE THE BEST CHANCE OF SURVIVING A MOTION TO SUPPRESS, THIS IS STILL THE BEST WAY TO DEAL WITH PROBATION SEARCHES.

"But I don't need a search warrant if he's got a search clause!"---Well, maybe. This is where the problems are coming up. As Florida courts have interpreted <u>U.S. v. Knights</u>, 1) if a probationer has a specific clause granting law enforcement the power to search the probationer and 2) there is reasonable suspicion to search, then any evidence seized in the search can be used for both a VOP <u>and</u> a new charge. This sounds easy but there has been such a wide range of interpretations that using this approach has become very risky. This was discussed in detail in the last Legal Advisor article and look there if you want to push this strategy--more on this later.

IMPORTANT POINT ABOUT THE SEARCH CLAUSE-- Lately, the Department of Corrections has made the issue of the search clause into a bigger problem than it needs to be. In the statewide probation order, they have specifically omitted the language from <u>Knights</u> that would grant law enforcement officers the power to search the probationer. Most probations from Polk County have added the appropriate language but many other counties don't. <u>You'll need to confirm that the language exists—otherwise, you don't have the authority to conduct ANY probation search.</u>

"I see you are on probation and have a 'consent to search' clause. So do I have your consent to search?"---- Consent to search cures lots of problems and probation searches are no exception. If the probationer gives his voluntary consent to the search you'll head off many problems. BUT –it's got to be clear that the consent was voluntary. We see lots of variations of the above conversation and every one has a motion to suppress waiting down the road. First of all, the search clause is NOT a "consent to search" but rather should be considered as a "submit to search" provision. In other words, since the defendant is on probation, he has

forfeited most of his rights involving warrantless search and seizure subject to the limitations stated in this article. He must submit to your request to search (if he has the appropriate search clause) or face a VOP for failure to submit to search. This means it's far better to think of consent as totally unrelated to the probation search. They're two different things.

So you encounter our subject and figure out he's on probation and has a search clause granting law enforcement the power to search. You decide you'd like to search him. Here are the steps to consider.

1) First of all understand that all of this is trumped by any Terry concerns you have. If you have a reasonable suspicion to believe that a subject is armed and you must conduct a pat down to dispel your reasonable concerns then do it. This article involves situations where Terry concerns either don't exist or have been dealt with.

2) Ok, having said that, your suspect is on probation and you've determined he has a "submit to search" provision. Ask for consent to search without mentioning his obligation to allow the search because of his probation status. You're better off to ask for consent in the exact same way you'd ask if the subject were not on probation. Put it in your report, too. We see dozens of reports that say this, "I went to subject's residence to conduct a probation check. When subject answered the door I explained the reason for my visit and that he had a 'consent to search' clause. I obtained his consent and conducted the search." Defense attorneys are starting to figure out that this is most likely NOT a valid consent. Assuming the same scenario, I'll write the kind of report that will be more likely survive a suppression motion and it would go like this---"I went to subject's residence to conduct a probation check. When subject answered the door, I asked for consent to search which he granted. I did not discuss his probationary status at that time." So, do it this way and write it this way to avoid problems.

3) If the subject doesn't grant consent----You can proceed to search anyway and the evidence can still be used in a VOP. But if you're looking for a new charge you'll be stepping into wet concrete. Here are the problems---

First, if you don't have the PO with you to do the search, you won't be able to use the PO to give you the PC needed for a search warrant as set out above. Therefore, if you didn't have reasonable suspicion when you arrived, anything you come up with on your own will only result in a VOP. If you make a new charge, it will probably be no-billed as a VOP only.

Second, if you want to try to make a new charge without consent, without the PO and without a search warrant, you'll have to meet all the requirements of the Knight's case as well as the various interpretations by the Florida courts. Feel free to check my last article on probation searches in the Legal Advisor if you want to give it a go. At the suppression hearing, we'll have to show the subject had a valid search clause as stated above. You'll also be questioned as to how you developed your reasonable suspicion plus we'll be fighting the fact that the courts don't seem to like these types of cases anyway. We're up for the fight but beware that the ice gets thin in this part of the puddle. Regardless, the VOP will still stand and that may be acceptable to you.

Finally, almost all of you have written affidavits charging VOP's. When you do, be sure to state what condition the defendant has violated. In the "you can't make this stuff up" department, one of our DCA's recently held something like this---"Defendant was charged to be in violation of his probation by possessing marijuana and the officer wrote that in his affidavit. However, even though we all know that this is a violation of law, since the officer didn't specifically state that the defendant had a condition of probation prohibiting him from violating the law, the violation cannot stand."

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FROM THE COURTS...

BURGLARY OF A DWELLING – HOME UNDERGOING RENOVATIONS.

The Florida Supreme Court resolved a conflict between the First and Second DCA's as to whether a structure undergoing substantial renovations constitutes a "dwelling" under section 810.011(2), Fla. Stat. The court held that when determining if a structure is a dwelling, the purpose of the structure, rather than the current condition of the structure, should be considered. Therefore, the purpose of a dwelling does not change due to the owner's choice to update or remodel the structure. The fact that a house is undergoing renovations does not change its status as a dwelling, so long as its purpose is a house for lodging by people at night. *Young v. State,* 38 FLW S657a (Fla. September 19, 2013).

Destruction of Evidence in Incompetency Cases

Evidence should not be destroyed when a defendant has been found to be incompetent to proceed. Often, after court ordered training, defendants become competent and the litigation of their case resumes; however, if the evidence has been destroyed, the case will likely be dismissed. As a rule of thumb, please check with the State Attorney's Office prior to the destruction of any evidence regardless of the status of the case.