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TENTH JUDICIAL CIRCUIT

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INSIDE

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WARRANTLESS SEARCHES OF PROBATIONERS
By: Gary Allen, Director of V.O.P.

It has been several years since the Legal Advisor has taken a look at the guidelines for warrantless searches of probationers by law enforcement officers. Since that time, there have been some big-time changes that affect how you should deal with these situations.

Last time we looked, searches of probationers (this includes persons on community control, a/k/a house arrest) were strictly limited. Only probation officers could do a probationary, warrantless search of a probationer. Also, any evidence seized by the probation officer could be used only to violate the probation. The police officer's role was just to provide security for probation officers.

Back then, there was only one way to turn a probationary search into a new charge and here's how it went---the probation officer did a probationary search. If evidence of a new crime was found, e.g. something that looks like cocaine on the kitchen table, the probation officer would call the police (they might already be there providing security). Then, the police could use the observations of the probation officer to show probable cause for a search warrant. In the meantime, the police could secure the premises (without searching) until the search warrant got there. Finally, once the warrant got there, the police could do the search like any other search warrant execution, and any evidence seized could be used for both the violation of probation and any appropriate new charges. These search warrant procedures are still valid today.

But then, along came U.S. v. Knights. In that case, the United States Supreme Court held that if a warrantless search of a probationer is supported by reasonable suspicion, evidence of a new crime seized by probation officers or police officers can be used as the basis of a new criminal prosecution. Over the past few years, we've seen more and more new cases based on these searches, so let's take a look at some of the different ways these rules can be applied.

First off, recall that 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.

Here's an example from a case in the panhandle. In 2009, probation officers had received a phone call with an unverified, anonymous tip that the probationer had drugs at his house. Probation officers went to the house along with deputies who were to provide security and drug identification expertise. The house was searched without a search warrant and a trafficking amount of drugs was found. The probationer was convicted of the new charge. On appeal, the DCA reversed. Even though the state

WARRANTLESS SEARCHES OF PROBATIONERS

argued that Knights doesn't actually require reasonable suspicion for the warrantless search, the DCA held that contraband discovered during a search supported by reasonable suspicion may be used for a new law violation, but contraband discovered during a search not supported by reasonable suspicion may not. The anonymous tip was not reasonable suspicion and the new charge was thrown out. (As a note, since officers did not have reasonable suspicion in this case, the only way to have saved it would have been by getting a search warrant based on the information provided by the probation officer.)

Assistant State Attorney Gary Allen is the director of Violation of Probation division. He has been with the State Attorney's Office for 24 years.

The lesson here is that 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. For example, I recently saw a new charge where the police officer made a traffic stop and found out the defendant was on probation but didn't state that he observed anything that could be construed as reasonable suspicion. The officer's report stated that he then "proceeded to make a probationary search of the vehicle." The officer found drugs and a new felony charge followed. This case will almost certainly have difficulty if a motion to suppress is filed since there is nothing to indicate reasonable suspicion for the search. You must include the observation that caused you to believe the search was necessary if you want any new charges to hold up. Otherwise, you'll only be able to use the evidence for a violation of probation.

If, in fact, the officer in this case didn't have reasonable suspicion to make the search, the only way to have saved the case would have been to follow traditional procedures and ask for consent to search.

Finally, here is an example of a Polk County case that had a happy ending. In 2005, detectives received a tip from a previously reliable, confidential informant that the probationer was selling drugs. (It's important here to note that a CI's tip is considered reasonable suspicion while the unverified, anonymous tip in the panhandle case above was not.) The detective didn't get a warrant and didn't bring the probation officer along, either. The drugs were found and the defendant was charged with the new drug charge. Because the warrantless search was supported by reasonable suspicion, this conviction held up.

Of course, this brief analysis can't cover every situation. As always, feel free to contact our office if you have any questions in how to apply these guidelines

http://www.sao10.com

Bartow Phone Numbers:

Switchboard	534-4800
Misdemeanor Intake	534-4927
Misdemeanor	534-4926
Domestic Violence	534-4882
Victim Assistance	534-4987
Felony Intake	534-4987
Felony	534-4964
Investigations	534-4804
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Homicide Division	534-4959
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Worthless Checks	534-4874
Juvenile Division	534-4905
Fax-Malroom	534-4945
Witness Management	534-4021
Misdemeanor/Traffic Witness management	534-4020
Felony	534-4020

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FROM THE COURTS...

UNLESS LEGALLY DETAINED PERSON NEED NOT GIVE CORRECT IDENTITY.

In this Polk County case, the defendant was charged with lewd battery and resisting an officer without violence. At trial the evidence established that when a detective went to the defendant's home to talk to the defendant about the lewd battery, the defendant gave the detective a false name and date of birth He also told her that the person she was looking for was in Texas. The officer left and only later managed to get the defendant on his cell phone and arrange a meeting which then led to his arrest. The defendant was convicted as charged, but on appeal the Second District reversed his conviction for resisting without violence, holding that the defendant was not obligated to give his correct identity because he was not legally detained at the time. Sauz v. State, 35 FLW D368 (Fla. 2d DCA Feb. 12, 2010).

BAD AIM DID NOT JUSTIFY FELONY BATTERY.

The defendant, a juvenile, was charged with battery on a school employee, a third degree felony. At his trial the evidence established that he threw a stapler at another student. However, his aim was poor, and the stapler hit a school employee. Using the transferred intent doctrine, the court found the defendant guilty as charged. On appeal, the Fifth District reversed and reduced the conviction to simple battery, holding that the transferred intent doctrine is inapplicable to enhance the severity of a crime against an unintended victim. S.G. v. State, 35 FLW D483 (Fla. 5th DCA Feb. 26, 2010).

OFFICER NEED NOT PARTICIPATE IN OBTAINING TAPED CONVERSATION.

The defendant was charged with burglary and arson. At his trial the state attempted to introduce a recording made by the victim of a telephone conversation between the victim and defendant in which the defendant made admissions. The victim testified that an officer investigating the crime had given her a verbal direction to record conversations with the defendant and that the officer was not present when she made the recording. The defense objected to the introduction of the recording, but the court overruled the objection. The defendant was convicted as charged. On appeal, the Fourth District affirmed, holding that chapter 934, Florida Statutes, does not require an officer's presence or participation in a recording that he or she has directed a person to make. Mead v. State, 35 FLW D617 (Fla. 4th DCA Mar. 17, 2010).