1980 S.C. Op. Atty. Gen. 67 (S.C.A.G.), 1980 S.C. Op. Atty. Gen. No. 80-34, 1980 WL 81918

Office of the Attorney General

State of South Carolina
Opinion No. 80-34
March 21, 1980

***1 SUBJECT: Arrest, Probation and Parole, Warrants**

(1) The statutory provisions with regard to probation agents provide the authority for a probation officer to issue an arrest warrant in writing charging a probationer with a violation of the terms and conditions of his probationary sentence.

(2) There is no constitutional violation in a probation officer being given the authority to issue a probation violation warrant without obtaining prior approval of a neutral judicial officer.

TO: J. P. Pratt, II
Associate Director of Operations
South Carolina Probation, Parole and Pardon Board

QUESTIONS:

1. Does Section 24–21–450 of the 1976 Code give probation agents the authority to issue probation violation warrants?

2. If there is statutory authorization, do the statutes present any constitutional problem by authorizing a probation officer to act in a judicial capacity?

STATUTES AND CASES:

Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); South Carolina Code of Laws (1976), §§ 17–13–10, et seq., 21–1–10, et seq., 24–21–280, 24–21–450.

DISCUSSION:

You have requested the Opinion of this Office with respect to the authority of probation agents to issue warrants charging individuals on probation with violating the terms of their probationary sentences. The Board has for over twenty years looked upon Section 24–21–450 as the basis for their position that probation agents have the authority to issue such warrants. Your question contains two parts: Does this statute give probation agents the authority to issue probation violation warrants and if so, does that statute present any constitutional problem by authorizing a probation officer to act in a judicial capacity?

The second part of your request presents the easier question to answer. Any objections to a probation officer issuing a warrant authorizing the arrest of an individual for violation of the terms of his probation would have to be based on the warrant requirement of the Fourth Amendment to the United States Constitution and the comparable provision of our State Constitution. The protection of that Amendment which is guaranteed to all citizens is to require that the inferences which may be drawn from evidence must be made by a neutral and detached magistrate rather than being judged by the officer engaged in the enterprise. Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971).

The simple answer to the question and the problem posed is to say that the individual whose arrest is sought is not being charged with a violation of the State's criminal laws. He is being charged with having violated the terms and conditions of his conditional release. It is to be assumed that he has previously been properly convicted. There is nothing in the statutes dealing with arrest which would authorize an officer or a citizen to arrest another citizen for violating the terms or conditions of his probationary sentence. See Section 17–13–10, et seq., Code of Laws of South Carolina, 1976. There is no statutory authority in those portions of the Code dealing with magistrates which would authorize them to issue an arrest warrant charging a probationer with the violation of the terms of his probation. See Section 21–1–10, et seq. Such an omission is logical in view of the fact that the violation is not necessarily and, frequently is not, a crime.

***2** The United States Supreme Court has in recent years had a number of occasions to consider the constitutional rights of those persons on probation and parole. The Supreme Court's decision in Gagnon v. Scarpelli, 411 U.S. 778 (1973), dealing with the due process rights of probationers and parolees stated that they were relying heavily in that case on their prior opinion in Morrissey v. Brewer, 408 U.S. 471 (1972), which dealt with the due process rights of parolees.

In Morrissey the Court dealt specifically with the due process rights of a parolee who is charged by his parole supervisor with a violation of the terms or conditions of his parole. The Court specifically stated that the initial stage of the proceedings occurs when the parolee is arrested and detained 'usually at the direction of his parole officer.' 408 U.S. at 485. The Court was concerned with the necessity of a preliminary inquiry into whether or not there was probable cause or reasonable grounds to believe that the arrested parolee had committed acts constituting a violation of parole conditions. The Court held that due process required that some independent officer must make a preliminary evaluation of the basis for believing the conditions of parole had been violated and specifically stated that this uninvolved person need not be a judicial officer because the granting and revocation of parole were traditionally administrative matters. The Gagnon Court stated that in this respect no distinction could be made between probation and parole. 411 U.S. at 782. The Morrissey Court went on to state that:
Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions . . . 408 U.S. at 483.

The Court placed great emphasis on the fact that there had presumably already occurred a constitutional proceeding in which the individual had been found guilty of a crime against the people and had been lawfully sentenced therefore. At the time of the subsequent violation he was still serving the sentence imposed by the court. Implicit in the Gagnon and Morrissey decisions is the recognition, that, there is no constitutional infringement in permitting a probation or parole officer to issue a warrant or charging document setting forth his judgment that the individual has violated the conditions or terms of his release.

The more difficult question is posed by your first inquiry. Pursuant to Section 24–21–280 of the 1976 Code, a probation officer has the powers of arrest and to the extent necessary for the performance of his duties the same rights to execute process as given to sheriffs. The statute further states that in the performance of those duties the officer is to be regarded as an official representative of the court and the Board. The critical provision is Section 24–21–450 of the Code. The first sentence of that Section states as follows:
***3** At any time during the period of probation or suspension of sentence the court, or the court within the venue of which the violation occurs, may issue or cause the issuing of a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence.

The statute, however, then goes on to state:
Any police officer or other officer with power of arrest, upon the request of the probation officer, may arrest a probationer. In case of an arrest the arresting officer shall have a written warrant from the probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation and such statement shall be warrant for the detention of such probationer in the county jail or other appropriate place of detention, until such probationer can be brought before the judge of the court, or of the court within the venue of which the violation occurs. Such probation officer shall forthwith report such arrest and

detention to the judge of the court, or of the court within the venue of which the violation occurs, and submit in writing a report showing in what manner the probationer has violated his probation.

It is possible to read that Section in such a manner as would indicate that the judge may issue or cause the issuing of a warrant for the probationer to be arrested and detained and that such is required. There is no doubt that the judge of the court may issue such a warrant. A careful reading of the statute, however, indicates that it is not intended to preclude the probation agent from issuing such a warrant. The subsequent portions of the statute state clearly that any police officer may effect such an arrest 'upon the request of the probation officer,' and in carrying out that arrest the officer 'shall have a written warrant from the probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation and such statement shall be warrant' for the detention of the probationer.

To read the first sentence of the statute as requiring that the warrant be issued by the judge of the court or at his instigation would render meaningless the subsequent portions of the statute stating that it is the judgment of the probation officer which suffices to authorize the arrest of the probationer. The further requirement of the statute stating that the probation officer must thereafter forthwith report the arrest and detention to the 'judge of the court' makes even clearer the intent of the statute to confer such authority on the probation officer.

CONCLUSION:

It is therefore the opinion of this Office that: (1) There is no constitutional provision which would preclude a probation officer from issuing a warrant or charging document setting forth his judgment that the probationer has violated the terms and conditions of his release without obtaining prior approval of a neutral judicial officer. (2) A probation officer in this respect is to be considered an officer of the court and the language of Section 24–21–450 of the Code referring to 'The Court' includes a probation officer. The further language of the statute then gives the probation officer the authority to issue a probation violation warrant.

***4** Emmet H. Clair
Deputy Attorney General

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