

“Captain Savage” and 2009 Probation Reform

Legal Question of The Week

Vol. 2, Number 22

October 9, 2009

Brian Beasley
Former Probationary Employee and
Legal Adviser, HPPD

In 1841, a Boston boot maker born in Woburn,¹ Massachusetts persuaded a judge in the Boston police court to give him custody of a convicted drunkard² for a brief period prior to the man’s sentencing. The boot maker’s name was John Augustus³ and he was concerned about the practice of sentencing criminals without regard to their particular background. The judge released the man to Augustus’ custody on condition that the man pay a fine of \$3.76 and return to court in three weeks.

In those three weeks, Augustus found the man a job and made him sign a pledge to stop drinking. When Augustus and the offender returned to court, the man was completely sober and his appearance and demeanor had drastically changed. Proving the maxim that “no good deed goes unpunished,” the court allowed Augustus to take more and more offenders into his custody and “probation”⁴ was born.

Augustus would pick prospective probationers based on age, background and character. It was noted at his death that of the 2,000 people he ended up taking into his care in this manner, only four “proved unworthy” for which Augustus forfeited bail. In part because of Augustus’ successes, the mayor of Boston hired a former police officer in 1878, one “Captain Savage,”⁵ to become what many recognize as the first official probation officer. Two years later, every city in Massachusetts was using a probation officer and by 1890, every court in the state had one.

¹ With the opening of the Middlesex canal in 1803, Woburn had increased access to tanbark, and as a result the tanning, shoemaking, and (one could surmise) boot making businesses thrived. Pay attention – this is all going to be on the test later.

² We don’t convict people anymore of the status crime of being a “drunkard” and it’s rare to even hear the term “drunkard.” I think both of these changes are regrettable. In fact, the man in question was convicted not only of being a drunkard but of being a “common drunkard.” There wasn’t even anything special about him. So sad.

³ Augustus was a member of the Washington Total Abstinence Society which promoted total abstinence from alcohol (not sex – that would be too cruel). This society, while short-lived, laid the groundwork for later “Alcoholics Anonymous” programs.

⁴ Probation is from the Latin “probare” which means “to prove” or “to test.” This is going to be one heck of a test.

⁵ Talk about a cool name! I have been unable to determine whether this was the officer’s real name, a nickname, or the name he “rassled” under for the WWF, but regardless it’s a cool name.

Over the years, like everything in our criminal justice system, the probation system has undergone changes in addition to being understaffed, underpaid, and overwhelmed with the number of cases it has to deal with. In 2008, with the murders of Eve Carson, student body president at UNC, and Abhijit Mahato, a graduate student at Duke, both committed⁶ by defendants who were on probation, the Governor and the General Assembly thought it might be a good idea to re-examine some of our probation laws. This examination culminated in the passage of a probation reform law which does several things.

Here are some of the highlights of the new legislation, effective December 1, 2009:

1. Probation officers will have limited access to some probationers' juvenile records.
2. It will be a default regular condition of supervised probation that the person cannot use, possess, or control illegal drugs or controlled substances; associate with known or previously convicted users, possessors, or sellers; or be present at any place where drugs are sold, kept, or used. Currently, judges have to specifically impose these or similar conditions.⁷
3. There will be four new default probation conditions for those probationers subject to intermediate punishment (usually intensive probation): perform community service; not use, possess, or control alcohol; remain within the county of residence unless granted permission to leave; and participate in any evaluation, counseling, treatment, or educational program as directed by the probation officer.⁸
4. It will be a default regular condition of probation that the probationer must submit to warrantless searches by a probation officer of the probationer's person, vehicle, or premises.
5. Most important for law enforcement officers, it will be a default regular condition of probation that the probationer must submit to warrantless searches by a law enforcement officer of his or her person or vehicle if the officer has reasonable suspicion that the probationer is engaged in criminal activity or has a weapon or explosive without court permission.

Let's look at how these changes affect your ability to search probationers by comparing current law and practice to what we will be able to do after December 1, 2009.

⁶ Sorry, I should have said "allegedly committed." Actually, that's not right either, since it's clear that the crime wasn't allegedly committed, it was actually committed. But the people charged "allegedly" did it. You know what I mean.

⁷ Just so there is no confusion, a violation of any of these conditions, if not a crime by itself, is simply a probation violation which should be enforced by the probation officer. For example, if you see a person who you know to be on probation and he is hanging out with people you know to be drug users, you can't arrest for that, but should notify his probation officer. On the other hand, if you see a person who you know to be on probation smoking crack, arrest him for the cocaine charge and then notify the probation officer.

⁸ Footnote 7 applies here as well.

THE NOT-AS-GOOD OLD DAYS

Currently, the sentencing judge may require submission to warrantless searches by the probation officer in limited circumstances. G.S. 15A-1343(b1)(7) reads as follows:

(7) Submit at reasonable times to warrantless search by a probation officer of his or her person and of his or her vehicle and premises while the probationer is present, for purposes specified by the court and reasonably related to his or her probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

Under this condition, the search could only be done by a probation officer and not a law enforcement officer, even though later case law from the 4th Circuit made it clear that a police officer could help with the search and even direct the search, so long as the probation officer was present and the other requirements were met.⁹ (For instance, the probationer had to be present and the search had to be reasonably related to the probation supervision.)

STEP INTO THE FUTURE

On December 1, 2009, the above provision will cease to exist and G.S. 15A-1343(b)(14) will take effect, which makes the following requirement a regular condition of probation unless the judge specifically exempts the probationer:

(14) Submit to warrantless searches by a law enforcement officer of the probationer's person and of the probationer's vehicle, upon a reasonable suspicion that the probationer is engaged in criminal activity or is in possession of a firearm, explosive device, or other deadly weapon listed in G.S. 14-269¹⁰ without written permission of the court.

Now, before you go out and start searching people willy-nilly,¹¹ let's take a look at the requirements for a search under this section. First, you must have reasonable suspicion that the probationer is engaged in criminal activity or is in possession of an explosive or weapon. Second, you need to CONFIRM that the person is currently on probation. If you have detained the person on reasonable suspicion, you can keep him detained for a reasonable time while you phone the probation office to confirm his status.

⁹ U.S. v. Midgette, 478 F.3d 616 (2007).

¹⁰ This is the Carrying a Concealed Weapon statute. Therefore, if it's a weapon you can't carry concealed, it will qualify under this new law.

¹¹ This is a legal term meaning "haphazardly" or "every which way." Not to be confused with Milli Vanilli – that great lip-synching late 80's pop group. I'll admit it – I had their album on cassette. Everyone lip-synchs nowadays, but when Milli Vanilli did it, we had to destroy all their albums. Guess they were ahead of their time. But I digress.

Also note that this provision only allows you to search the probationer's person and the probationer's vehicle. You cannot search the probationer's house based on reasonable suspicion. In addition, the phrase "petitioner's vehicle" is a little unclear. My advice is that you only use this statute to search a vehicle the probationer owns or has rented in his or her name. I would not rely on this to search a vehicle that the probationer is driving that is registered to someone else and I certainly don't believe that this statute authorizes a search of a vehicle in which the probationer is merely a passenger based solely on reasonable suspicion.

The option of requesting the probation officer to search is still available as before. Under G.S. 15A-1343(b)(13), the probation officer may search the person, vehicle, or house of the probationer without a warrant while the probationer is present for purposes directly related to the probation supervision. Nothing in the new law would change prior court rulings that permit law enforcement officers from aiding in these searches.

So there you have it – a new tool available to you effective December 1, 2009. Now go out there and make Captain Savage proud!

Brian T. Beasley

Police Attorney

High Point Police Department