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LOOKING AT THE LAW

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On July 6, 1976 the Supreme Court completed a very long term of court in which many major decisions were rendered. There were 138 signed opinions ranging from decisions upholding the constitutionality of the death penalty where properly administered (Gregg v. Georgia) to holdings that municipalities may control through licensing and zoning regulations the establishment of "skid rows." (Young v. American Mini Theaters, Inc.) In the area of criminal law there were several significant decisions on the power of arrest, the exclusionary rule, the Fifth Amendment's privilege against self-incrimination, and the availability of federal habeas corpus relief. In addition to the habeas corpus cases discussed in our last column the Court, on the last day of the term, delivered an opinion of significant importance.

Exclusionary Rule: Federal Habeas Corpus and State Prisoners

In Stone v. Powell, ___U.S.___ (July 6, 1976), the

Court held that where the state has provided a full and fair hearing on the merits of the petitioner's Fourth Amendment claim, the federal court may not grant habeas corpus relief to a state prisoner on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In weighing the utility of the exclusionary rule with the costs of extending it to collateral review of Fourth Amendment claims, the Court concluded that since the effectiveness of the rule in deterring improper police procedures at this stage of a criminal proceeding was minimal, the societal interests in the conviction and punishment of guilty offenders required that the rule should not be extended to federal habeas corpus petitions from state prisoners. Stone v. Powell has recently been applied retroactively. Frankboner v. Paderick, ___F.2d___ (4th Cir., Aug 4, 1976).

The reasoning of Stone v. Powell was utilized in another opinion delivered the same day. In United States v. Janis, ___U.S.___ (July 6, 1976), the court held that evidence seized by a state criminal law enforcement officer in good faith, but nevertheless unconstitutionally, is admissible in a civil proceeding by or against the federal government. As in Stone v. Powell the Court stated that it was not justified in extending the exclusionary rule to cover the situation because there had been no showing that there was a sufficient likelihood that the rule would deter improper conduct by

state police so as to outweigh the societal costs of the failure to prosecute civil offenders imposed by the exclusion.

Search and Seizure - Probation Officers

Inasmuch as the question of the authority for a probation officer to conduct on occasion a search and/or seizure of the person or property of a probationer has arisen repeatedly, the views of this office are offered on what we perceive is the current status of the relevant law.

Generally, a probation officer has the authority to conduct a "reasonable" search of the person, residence, and effects of probationers under his supervision. He does not need, in the opinion of our office, to obtain a warrant prior to his search nor does he need probable cause to conduct the search.1/

The rationale which supports this policy is based on the status of a probationer and the nature of the relationship between a probation officer and a person under his supervision. Clearly, Fourth Amendment rights are applicable to probationers. 2/ The extent to which these rights apply to a probationer, however, may differ from that of ordinary citizens. 3/ This is because a person serving a "sentence" of probation has been convicted of a crime and, in lieu of incarceration, has been placed under supervision of a probation officer. Similarly, a parolee, is

likewise a convict who is given early release from his prison term under the supervision of a parole officer. Moreover, this conditional liberty is subject to the supervisory control of, as I have said, probation or parole officers. The probation officer's duty is to assist in the rehabilitation of the probationer and, at the same time, to make all attempts to insure the safety of the public from criminal acts by the probationer. In order to carry out this dual responsibility courts have determined that there are situations in which a probation officer in his discretion may search a probationer's person or property when he has reason to do so. 4/

Courts thus generally allow the probation officer considerable leeway in exercising his discretionary power to determine whether he has sufficient reason to search.5/ The courts have reasoned that the probation officer's relationship with the probationer gives him a unique vantage point from which to determine when a search of a probationer under his supervision may be necessary. The probation officer is in the position to observe the probationer closely and to perceive occasions when he has committed, or is in the process of committing or preparing to commit another crime or otherwise to violate the conditions of his probation. 6/

In addition, the probation officer's relationship with a probationer requires the officer to be aware of the activities of the probationer throughout his term of probation, both for the protection of the public and in the interest of successfully rehabilitating the probationer. 7/ The officer, thus, has the duty to know if the probationer has returned to his former criminal behavior or unstable living situation, etc., and, therefore, has the right to search when he suspects that such is the case. 8/

As an additional concern, the relationship between the probation officer and the one under his supervision occasionally places the probation officer in a vulnerable position from a physical standpoint. Thus, in order to protect himself, the officer may conduct a search of the probationer and his property to look for weapons. 9/

Since courts have held that a probationer does have some protection under the Fourth Amendment, there are limitations on the right of the probation officer to search without a warrant or without probable cause. Essentially, the search by the probation officer must be reasonable. 10/ He does not have to meet the same probable cause requirement necessary to obtain a search warrant for the property of an ordinary citizen. The probation officer, however, must have a reasonable basis for his search. In some cases, courts have found that the probation officer may search on the basis of a "hunch"

that the search is necessary; 11/ other courts, while not requiring the usual probable cause, demand something more than a mere hunch or suspicion unsupported by any evidence before the search is valid, that is, they desire presumably some articulable basis for the search or seizure. 12/

Additionally, the probation officer may not harass the probationer with repeated searches or with searches at odd hours without good reason for his action. 13/ Nor can the probation officer act as a stalking horse for local police who lack sufficient probable cause to obtain a search warrant. 14/ In this same vein, a condition of probation cannot require the probationer to submit at all times to searches by law enforcement personnel. 15/

In sum, while he does not need the usual probable cause before a search, the probation officer may conduct only a search that is reasonable in view of the existing circumstances. To be reasonable, the search must be related to the duty of the probation officer to protect the public, including himself, and to assist in the rehabilitation of the probationer.

After the search by the probation officer has uncovered contraband material, the question becomes when this evidence may be used in proceedings against the probationer.

One view, which was recently taken by the Supreme Court of Florida, 16/is that while probation status may be taken into account in determining whether a particular search was in fact reasonable (that is, applying a lesser Fourth Amendment test than that applicable to ordinary citizens), the procedural context in which the issue arises, namely whether in a suppression hearing incident to a criminal charge or in a probation revocation hearing, is a critical factor in determining the admissibility of the evidence. 17/ The Florida Supreme Court concluded that:

> "[A] probation officer has authority to enter upon the living quarters of his probationer to observe his life-style and any material evidence thereby discovered is admissible in proceedings for revocation of probation but this does not invalidate an otherwise unreasonable search for contraband resulting in prosecution for a separate criminal offense." 18/

In other words, the Florida Supreme Court is saying that we will bend the Fourth Amendment with respect to probationers only for the purposes of probation supervision and revocation.

The Ninth Circuit Court of Appeals, on the other hand, has taken a different approach to this issue. 19/ According to this court, if the search of the probationer is within the standard of reasonableness which is determined with respect to the status of the probationer in mind, the fruits

of the search may be used in both a probation revocation hearing and in a trial for a new offense based upon the seized contraband. That is, if the search was valid, its fruits are admissible for all purposes. 20/

It is our hope that the Supreme Court will make a determination on this question in the near future, so that the issue can be resolved in a uniform matter by the courts.

We would like to add the one caveat that, with respect to the United States Parole Commission, its view has always been that probation officers should not conduct searches or seizures in their supervision of parolees. Whether this view stems more from a policy standpoint than a legal one, it remains the view of the Parole Commission. With respect to searches of probationers, federal courts, in our view, would be well-advised through their probation offices to establish local guidelines with respect to the question of appropriate search and seizures by probation officers. In that way the authority of such officers would be clarified and there would be no question of their personal liability for conducting these searches.

A further question arises concerning the disposition of property seized by a probation officer in the course of supervising

a probationer. In our view, there are two separate situations. The first involves items or property taken from a probationer the possession of which, while not per se illegal or prohibited, constitutes a violation of the conditions of probation. An example of this situation might involve trapping equipment used in hunting where the offender was convicted of hunting wildlife on federal sanctuaries (18 U.S.C. §41) and, as a condition of his suspended sentence, was required to dispose of his trapping equipment while on probation. Such items should we believe be returned to the probationer when his case is terminated. If any such items are improperly seized, they should be returned forthwith.

In the second situation a probation officer may seize items which are in and of themselves illegal to possess. The probationer has no right to possess this contraband because its possession would be a continuing criminal offense. 21/ Therefore, when it is seized by a probation officer, it should not be returned to the probationer even after probation terminates.

The question then arises as to what can be done with this contraband. The probation officer should apprise the court of the evidence of the criminal offense so that

revocation, if warranted, may result. Secondly, the officer may, in discharging his duty to the public, desire to turn over such illegal items to the United States Attorney or FBI for investigatory purposes. If these authorities do not want the contraband, the probation officer should deposit the items with local police authorities who either independently or in a consortium with other law enforcement agencies should maintain a warehouse - destruction facility for disposing of like items. When a probation officer turns in any items to such a facility, he should obtain a receipt for them to keep with the probation case files.

Incriminating Statements Made to Probation Officers - Admissibility in Subsequent Criminal Trial

Three state courts have now decided that any statements about a later crime that a person under supervision makes while in custody to his probation officer without being given Miranda warnings (Miranda v. Arizona, 385 U.S. 436) may not be used as evidence in a prosecution for the crime to which those statements relate. Recently, the Arizona Supreme Court in State v. Magby, 19 Cr.L.Rptr. 243 (July 20, 1976), joined the holdings of the Supreme Courts of Kansas,

State v. Lekas, 442 P.2d 11, and Ohio, State v. Gallagher, 313 N.E.2d 396, in obligating probation or parole officers, when inquiring about a new crime for which the probationer or parolee is in custody, to advise that individual of his Miranda rights if any statements made are to be admissible in a forthcoming criminal trial.

The Arizona court quoted the United States Court of Appeals for the Fifth Circuit which had written in United States v. Deaton, 468 F.2d 541, 544 (5th Cir. 1972) that:

> "We have considerable doubt as to the propriety of even calling the parole officer as a witness for such a purpose. But, pretermitting that, we have no doubt that the testimony was inadmissible unless the officer gave prior Miranda warnings. A parolee is under heavey psychological pressure to answer inquiries made by his parole officer, perhaps even greater than when the interrogation is by an enforcement officer."

The decision in Deaton and the agreement of the three state Supreme Courts are a strong indication that the Miranda mandate will obtain in interviews by probation officers of probationers or parolees arrested on new charges if evidentiary use of any resulting statements is to be made. It would continue to be our hope, however, that in the

federal system probation officers preferably not be called as witnesses to testify to statements made in confidence to them by probationers or parolees. If Miranda warnings are not given, no evidentiary use could be made of such statements.

Miscellaneous Sentencing Cases - Federal Courts

In the last few months several appellate decisions have confronted questions of correctional law which are worth noting in brief:

United States v. Silverman, 19 Cr.L.Rptr. 2386 (3rd Cir., July 15, 1976)

A motion pursuant to 28 U.S.C. §§2255 is a proper way to correct a sentence where the sentencing judge's intentions have been frustrated by subsequently adopted parole criteria which add new considerations to the parole release eligibility of the defendant.

Napoles v. United States (No. 75-1937) (7th Cir., May 21, 1976)

Where jurisdiction over a probationer is transferred to another district court pursuant to the provisions of 18 U.S.C. §3653, an attack on the original sentence placing the defendant on probation should be filed pursuant to 28 U.S.C. §2255 with the original sentencing court. For this purpose probation constitutes a sentence.

United States v. Cavazos (No. 75-4066) (5th Cir. April 15, 1976)

A federal criminal defendant is entitled to be resentenced where it is apparent from the record that the sentencing judge relied on an inapposite analogy to another type of offender and irrelevant, hearsay computer statistics, both of which impute a past criminal record history to the offender who had never before been arrested or convicted of any criminal activity. The appellate court refused to review the severity of the offense inasmuch as it was within statutory limits but chose to focus on the judicial process by which the particular punishment was determined. In so doing, the Fifth Circuit cast doubt on the use of statistics as a valid basis for imposing sentence because of its derogation of individualized sentencing goals, and further the court refused to condone a uniform policy of denying probation as an option in certain drug distribution cases.

United States v. Crusco (No. 75-2325) (3rd Cir., Mar. 26, 1976)

Where a federal defendant at the time he tenders a guilty plea does not understand that, under the criminal statute applicable to his offense, a special parole term in excess of a period of confinement must be imposed, he is entitled to withdraw his plea. Advice that he is subject to both a prison term and a special parole term for a sentence "not to exceed seven years" will not suffice

where he is not specifically advised that the confinement is limited to seven years but that the special parole term may make the total sentence longer than seven years in duration.

On a second issue the Third Circuit ruled that a Government agreement as part of a plea negotiation to take no position as to sentencing requires the Government not to comment on the defendant's character or respond to defense counsel's remarks at the time of sentencing.

United States v. Werker (No. 76-3024) (2d Cir. May 11, 1976)

On a writ of mandamus brought by the Government against a district court, the Second Circuit held that a judge may not promise a specific sentence to a defendant in return for a subsequent plea of guilty since such violates Fed.R. Crim.P. 11(e). The sentencing court is not to participate in any discussions leading to a plea agreement under Rule 11(e)(1) not only because of the potentially coercive nature of such involvement but also because of its effect on the neutral image of the court.

United States v. McMains, ___F.2d___ (8th Cir., July 30, 1976) (No. 76-1091).

A youth offender sentenced under the Youth Corrections Act was early terminated from probation granted him under 18 U.S.C. §5010(a). As a result, he was unconditionally

discharged from probation which operated to "set aside" his conviction pursuant to 18 U.S.C. §5021(b). Upon the request of the offender the district court in an ex parte order directed that the record of his conviction be expunged. On appeal by the Government the Eighth Circuit held that "the Act does not authorize expunction of the record of a conviction which has been set aside pursuant to section 5021." The court additionally held that in the absence of extraordinary circumstances, which were not shown here to the court's satisfaction, the trial court had no equitable power to expunge the criminal record. Although the United States Court of Appeals for the District of Columbia has suggested to the contrary, that section 5021 provides for expunction, see Tatum v. United States, 310 F.2d 854, 856 (D.C. Cir. 1962), McMains, supra, is a direct holding coming to the opposite conclusion. It upholds, moreover, the views of the Department of Justice.

FOOTNOTES

1/ United States v. Consuelo-Gonzalez, 521 F.2d 259, 265-66 (9th Cir. 1975) (dictum); Latta v. Fitzharris, 521 F.2d 246, 252 (9th Cir. 1975); United States ex rel Randazzo v. Follette, 282 F.Supp. 10 (S.D.N.Y. 1968), aff'd. on other grounds, 418 F.2d 1319 (2d Cir. 1969).

2/ Latta v. Fitzharris, 521 F.2d at 248.

3/ United States ex rel Sautos v. New York State Board of Parole, 441 F.2d 1216, 1218 (2d Cir. 1971); Martin v. United States, 183 F.2d 436, 439 (4th Cir. 1950).

4/ United States v. Consuelo-Gonzalez, 521 F.2d at 265-66; Latta v. Fitzharris, 521 F.2d at 249-250.

5/ United States v. Consuelo-Gonzalez, 521 F.2d at 265-66.

6/ United States v. Consuelo-Gonzalez, 521 F.2d at 266; Latta v. Fitzharris, 521 F.2d at 250.

7/ United States v. Consuelo-Gonzalez, 521 F.2d at 266.

8/ Id.

9/ Id.

10/ United States v. Consuelo-Gonzalez, 521 F.2d at 266; Latta v. Fitzharris, 521 F.2d at 252.

11/ Latta v. Fitzharris, 521 F.2d at 250.

12/ Compare Latta v. Fitzharris, 521 F.2d at 250 (majority opinion) with Latta v. Fitzharris, 521 F.2d at 253-4 (concurring opinion, Choy, J.).

13/ United States ex rel. Randazzo v. Follette, 282 F.Supp. at 13.

14/ United States v. Consuelo-Gonzalez, 521 F.2d at 267; United States v. Hallman, 365 F.2d 289, 292 (3d Cir. 1966).

15/ United States v. Consuelo-Gonzalez, supra.

16/ Croteau v. State, Circuit Court No. 73-7170 (Fla., June 16, 1976) (slip opinion).

17/ Id., at 3.

18/ Id., at 5.

19/ Latta v. Fitzharris, 521 F.2d 246 (9th Cir. 1975).

20/ Id., at 252-3; see United States ex rel. Sautos v. New York State Board of Parole, 441 F.2d at 1218-19.

21/ 68 Am.Jur. 2d, Searches and Seizures, §117 (1973). This rule of non-return applies even where the search and seizure were wrongful.

END

7 [illegible]