



Search Warrants

HB 361 and SB 247

October 3, 2016

Overview



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Study Authorization



- During the Regular Session of the 2016 General Assembly, House Bill 361 (HB 361) was introduced by Delegate G. Manoli Loupassi and Senate Bill 247 (SB 247) was introduced by Senators Richard Black and Jill Holtzman Vogel.
- Both bills were identical as introduced.

Study Authorization



- Senate Bill 247 was amended in the Senate Courts of Justice Committee and passed the Senate.
- Both HB 361 and SB 247 were left in the House Courts of Justice Committee.
- A letter was sent to the Crime Commission requesting a review of the subject matter of the two bills.

Background



- As introduced, both SB 247 and HB 361 sought to add the authority to obtain a search warrant for “*any person to be arrested or any person who is unlawfully restrained*” to the Virginia search warrant statutes (Va. Code § § 19.2-53, 19.2-54 and 19.2-56).
- The language of the bills was identical to the terminology used in Rule 41 of the Federal Rules of Criminal Procedure.

Background



- Senate Bill 247 was amended in the Senate Courts of Justice Committee; two of the primary amendments were the following:
 - The phrase “*any person to be arrested*” was amended to “*any person to be arrested for whom a warrant or process for arrest has been issued.*”
 - The phrase “*any person who is unlawfully restrained*” was deleted from the bill.

Background



- Both bills were intended to fix an issue that arises when a person who is on probation (or parole) violates the terms of his probation, but does not commit a new “crime.”
- If a probationer is believed to be in the residence of a third party, how can law enforcement gain access to a third party’s residence to arrest the probationer for a violation of the rules of probation?

Legal Analysis



- In the 1980 case of Payton v. New York, 445 U.S. 573, the U.S. Supreme Court held that in the absence of exigent circumstances, the Fourth Amendment prohibits law enforcement from making a warrantless entry into a person's home for the purpose of executing a routine felony arrest.
 - In order to enter a person's residence to execute a routine felony arrest, law enforcement must first obtain an arrest warrant for that person.
- Payton did not address entering the residence of a third party to execute an arrest of an individual.

Legal Analysis



- In the 1981 case of Steagald v. United States, 451 U.S. 204, the U.S. Supreme Court held that in the absence of exigent circumstances or consent, law enforcement may not enter the home of a third party to execute an arrest warrant, even if they believe the subject of the arrest warrant will be found there.
 - Warrantless entry into the residence is a violation of the homeowner's Fourth Amendment rights.
 - The proper course of conduct is to obtain a search warrant, allowing entry into the residence to search for the person who is the subject of the arrest warrant.

Legal Analysis



- There is a distinction between a warrantless arrest for a probation violation and a warrantless arrest for a criminal offense.
- If a probation officer desires to have a probationer arrested for violating the terms of their probation, the officer has two options:
 - Request that a judge issue a *capias* for violation of a court order; or,
 - Authorize a warrantless arrest of the probationer.

Legal Analysis



- In Virginia, probation officers have arrest authority but not arrest power—meaning that a probation officer can authorize a warrantless arrest for a probationer, but the probation officer cannot physically detain the subject.
- Probation officers in Virginia are granted the power to authorize warrantless arrests of probationers pursuant to Va. Code § 53.1-149 and 53.1-162.
 - These arrests are commonly referred to as a “PB 15.”
 - The probation officer issues the PB 15 and then provides the document to law enforcement to execute the arrest.

Legal Analysis



- A warrantless arrest on a PB 15 is for a violation of the rules of probation.
- These violations can be for status offenses—actions that are punishable only because the offender is on supervised probation, such as:
 - Failure to report an arrest; failure to maintain or report changes in employment; failure to report to probation as instructed; failure to allow probation to visit home or workplace; failure to follow instructions; use of alcohol; use of controlled substances; possession or transport of a firearm; change of residence or leaving the Commonwealth without permission; etc.

Legal Analysis



- The more commonly recognized statute regarding warrantless arrests is Va. Code § 19.2-81:
 - Law enforcement officers in Virginia may arrest without a warrant for any crime committed in their presence and for any felony not in their presence—must be based on probable cause.
 - Law enforcement may also arrest for certain misdemeanors not committed in their presence, such as driving under the influence, shoplifting, carrying a weapon on school property, assault and battery, brandishing a firearm, or destruction of property.
- Warrantless arrests under this Code section all involve activities which are clearly criminal violations under the Virginia Code.

Legal Analysis



- If probable cause exists, a criminal search warrant may be issued pursuant to Va. Code § 19.2-53 “...for the search of or for specified places, things or persons, and seizure therefrom of the following things as specified in the warrant”:
 - Weapons or other objects used in the commission of crime;
 - Articles or things the sale or possession of which is unlawful;
 - Stolen property or the fruits of any crime; and,
 - Any object, thing, or person, including without limitation, documents, books, papers, records or body fluids, constituting evidence of the commission of crime.

Legal Analysis



- When applying for a search warrant, Va. Code § 19.2-54 requires the filing of:
 - “...an *affidavit* of some person reasonably describing the place, thing, or person to be searched, the things or persons to be searched for thereunder, alleging briefly material facts, constituting the probable cause for the issuance of such warrant and alleging substantially the offense in relation to which such search is to be made and that the object, thing, or person searched for *constitutes evidence of the commission of such offense.*”

Legal Analysis



- A search warrant can be obtained for a person when there is probable cause that said person committed a crime—the person himself “*constituting evidence of the crime.*”
- In the case of a probation violation, though, no “crime” may have been committed.
 - The “crime” may be a status offense—a violation of a court order or rules of probation.

Legal Analysis



- These considerations create a lack of clarity within the search warrant statutes as to whether a search warrant may be issued for a person who is subject to arrest.
- While the original intent of the HB 361 and SB 247 centered around search warrants for arrests on probation violations, the proposed amendments would provide clarity within the search warrant statutes on whether a search warrant may be issued for any person who is subject to arrest.

Legal Analysis



- If Va. Code § § 19.2-53, 19.2-54, and 19.2-56 were amended as provided for in the original versions of HB 361 and SB 247, the issuance of a search warrant for all cases involving an arrest warrant would be clearly authorized.
 - The original language applied to “... *any person to be arrested...*”

Legal Analysis



- If Va. Code § § 19.2-53, 19.2-54, and 19.2-56 were amended as provided for in the substitute version of SB 247, the issuance of a search warrant would be clearly authorized for all cases involving an arrest warrant, capias or technical violation of probation.
 - The substitute language in SB 247 applied to “...*any person to be arrested for whom a warrant or process for arrest has been issued.*”
- This substitute version appears to provide more clarity as to when a search warrant can be authorized for a person subject to arrest.

Legal Analysis



- Both HB 361 and SB 247 originally included language relating to the issuance of a search warrant for “... *any person who is unlawfully restrained.*”
- Including this phrase in the search warrant statutes is probably not necessary.
 - If a person is unlawfully restrained, he is probably the victim of an abduction, and therefore a search warrant can already be issued to search for the person who is “evidence of the commission of [the] crime.”

Recommendation



Recommendation:

- The Crime Commission should endorse the substitute version of SB 247 that:
 - Adds the phrase “*any person to be arrested for whom a warrant or process for arrest has been issued*” to the search warrant statutes; and,
 - Deletes the phrase “... *any person who is unlawfully restrained*” from the original version of the bill.



Discussion
