Opinion No. 84-01

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OPINION OF: Paul Bardacke, Attorney General

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FACTS

Juvenile probation officers in the First Judicial District are currently issuing "pick up" orders for delinquent children reasonably believed to have violated the conditions of their probation or who may leave the jurisdiction of the court. City of Santa Fe Police officers are, within Santa Fe, picking up such suspected juvenile probation violators outside the presence of the juvenile probation officers.

QUESTIONS

May municipal police pick up delinquent children for suspected probation violations pursuant to "pick up" orders issued by juvenile probation officers?

CONCLUSIONS

No.

ANALYSIS

The authority of juvenile probation officers to pick up delinquent children under their charge for suspected probation violations is found in Section 32-1-8B NMSA 1978:

A probation officer does not have the powers of a law enforcement officer. A probation officer may take into custody and place in detention a child who is under his supervision as a delinquent child when the probation officer has reasonable cause to believe that the child has violated the conditions of his probation or that the child may leave the jurisdiction of the court. A probation officer taking a child into custody under this subsection is subject to and shall proceed in accordance with the provisions of the Children's Code relating to custody and detention procedures and criteria.

From the foregoing, it is clear that juvenile probation officers themselves possess authority to pick up delinquent children under their charge under the stated circumstances and conditions.

The question, then, is whether such authority extends to municipal police.

Section 32-1-22A NMSA 1978 sets forth the persons who are authorized to take a delinquent child into custody under the Children's Code, and the reasons they may do so:

A child may be taken into custody:

(1) pursuant to the order of the court endorsed on the summons because the child needs to be detained or taken into custody;

(2) pursuant to the order of the court issued because a parent, guardian or custodian fails when requested to bring the child before the court after having promised to do so when the child was delivered upon release from custody;

(3) pursuant to the laws of arrest for commission of a delinquent act;

(4) by a law enforcement officer when the officer has reasonable grounds to believe that the child is suffering from illness or injury or has been abandoned or is in danger from the child's surroundings and removal from those surroundings is necessary;

(5) by a law enforcement officer when he has reasonable grounds to believe that the child has run away from his parent, guardian or custodian; and

(6) by a probation officer proceeding under Section 32-1-8 NMSA 1978.

Law enforcement officers, such as municipal police, are specifically authorized to take a child into custody for the reasons set forth in paragraph (4) and (5) above. Furthermore, municipal police have a duty to execute valid process issuing from a court, such as is authorized under Paragraphs (1) and (2), and to make arrests, such as is required under paragraph (3) above. Section 3-13-2 NMSA 1978. However, no New Mexico statute or court decision authorizes municipal police to execute juvenile probation officers' pick up orders. Such orders, without more, are neither warrants nor other valid process of the court; nor are they directives of a law enforcement official or agency, since Section 32-1-8B NMSA 1978 specifically provides that juvenile probation officers are **not** law enforcement officers.

At least one case has held that, absent statutory authority, law enforcement officers do not possess the powers of parole officers to arrest parolees for violations of parole. **Commonwealth v. Pincavitch,** 206 Pa. Super. 539, 214 A.2d, 280 (Super. Ct. 1965). We think that the same reasoning applies equally to probation. **See, Gagnon v. Scarpelli,** 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

In Attorney General Opinion 62-32 this Office addressed a virtually identical question of whether, under former law, police could pick up juvenile probation violators on a probation officer's verbal request. The opinion concluded that in the absence of specific authority to do so, police officers could not. However, it appears from the text of the opinion that under former law neither the law enforcement officers nor the juvenile

probation officer was authorized to pick up the juvenile without some type of process issuing from the court. Under current law, such authority is specifically granted to juvenile probation officers, but to no one else.

An interesting approach to the problem of authority to arrest probation violators is found in the case of **State v. Deener,** 64 Ohio St.2d 335, 414 N.E.2d 1055 (1980); **cert. denied** 450 U.S. 1044 101 S. Ct. 1766, 68 L. Ed. 2d 243. In **Deener** the Ohio Supreme Court addressed the problem of whether a police officer could arrest an adult probation violator upon a probation officer's oral request. An Ohio statute specifically authorized the probation officer to arrest a probationer. Furthermore, the statute authorized a police officer to do so upon the written order of the chief probation officer. The Ohio court, while acknowledging that the arrest did not comport with the statutory requirement of a written order, held that the arrest was valid. The court reasoned that the arrest procedure outlined in the statute for suspected probation violators was not an exclusive method, and that other arrest procedures could be used as long as they were in accordance with minimum constitutional standards. The court discussed the extent of the constitutional standards applicable to arrest of probationers:

In **Reeves v. Turner** (1972), 28 Utah 2d 310, 501 P.2d 1212, the Supreme Court of Utah addressed an issue very similar to the one presented in the instant cause. The Utah statute involved provided that a parolee could be arrested on the written certified order of the secretary of the Board of Pardons. The court held that the statute did not provide the exclusive method for arrest of parolees, and upheld an arrest made by police after they had received a telephonic communication from the Adult Parole and Probation office to pick up the parolee. The court reasoned in part that:

"A parole officer's physical apprehension of his prisoner for suspected violation of parole is not an 'arrest' in the sense that a peace officer arrests a private individual who is suspected of a crime, but is merely a transfer of the subject from constructive custody into actual or physical custody. Furthermore, a parole officer may properly request police assistance in the apprehension and investigation of a parole violator. The standards governing the arrest and search of citizens possessed of full civil rights, are not applicable to the act of taking physical custody of a parolee."

414 N.E.2d at 1057.

The **Deener** court held on the basis of **Gagnon v. Scarpelli, supra,** that the Utah court's reasoning in connection with parolees could be applied with equal force to probationers. The court concluded that the arrest without a written order of the chief probation officer was both constitutional and proper.

OPINION

We have discussed **Deener** because of its potential application to your question; however, we think that there are countervailing considerations that outweigh the **Deener** rationale and make it inapplicable in the situation presented here.

First, both **Deener** and **Reeves** are distinguishable from the present situation. In both those cases there was clear authority for the probation or parole authorities to direct law enforcement personnel to carry out arrests of suspected probation or parole violators. The only problem in both cases was that the order directing the law enforcement officers to make the arrest was oral rather then written. That situation is considerably different from the one presented here. Under New Mexico statutes, there is no authority whatsoever for juvenile probation officers to delegate their power to pick up juvenile probation offenders.

Second, where the New Mexico legislature has intended to authorize probation the parole officers to delegate their authority to other law enforcement officers, it has specifically said so. For example, in the adult parole and probation context, the Director of the New Mexico Corrections Department Field Services Division is specifically authorized to arrest without warrant or "deputize any officer with power of arrest without warrant or "deputize any officer with power of arrest to do so by giving him a written statement setting forth that the (prisoner) (probationer) has, in the judgment of the director, violated the conditions of his release." Sections 31-21-14B and 31-21-15A(3) NMSA 1978. Such authority extends to both parole and probation violators, but is limited to adults. No equivalent authority, either to arrest or to deputize others to do so, exists in the juvenile probation context. A juvenile probation officer is authorized only to "take into custody" delinquent children under his supervision, not to arrest them. Unlike the Director of Field Services, a juvenile probation officer has no specific statutory authority to deputize law enforcement officers to carry out his limited powers.

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