

**STATE OF TENNESSEE
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Opinion No. 04-054

Issuance of arrest warrants for probation violations

QUESTION

Do the newly enacted changes to Tenn. Code Ann. § 40-6-215(a) allow a clerk or magistrate to issue an arrest warrant for one who has violated his/her probation when the affiant to the warrant is a probation officer supervising probation for the General Sessions Court?

OPINION

No. Tenn. Code Ann. § 40-6-215 (a) does not apply to the issuance of probation violation warrants. The issuance of probation violation warrants is governed by Tenn. Code Ann. § 40-35-311(a).

ANALYSIS

Tenn. Code Ann. § 40-6-215(a) provides as follows:

As an alternative to a warrant of arrest as provided in §§ 40-6-201— 40-6-214, the magistrate, judge or clerk may issue a criminal summons instead of a warrant of arrest except when an affiant is not a law enforcement officer as defined by § 39-11-106(21),¹ or none of the affiants in the case of multiple-affiants is a law enforcement officer as defined by § 39-11-106(21), in which instance the magistrate, judge or clerk shall issue a summons; provided, however, that if, after examination of the affiant and the affidavit of complaint, the magistrate or judge has probable cause to believe that the issuance of a warrant of arrest rather than a criminal summons is

¹Tenn. Code Ann. § 39-11-106(21) defines a “Law Enforcement Officer” as “an officer, employee or agent of the government who has the duty imposed by law to: (A) Maintain public order; or (B) Make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses; and (C) Investigate the commission or suspected commission of offenses.”

necessary to prevent an immediate threat of imminent harm to a victim as defined in § 36-3-601(8), and makes a written finding of fact that an arrest warrant rather than a criminal summons is necessary, the magistrate or judge may issue a warrant of arrest notwithstanding the fact that the affiant is not a law enforcement officer, or, in the case of multiple-affiants, that none of the affiants is a law enforcement officer.

Tenn. Code Ann. § 40-6-215(a) (2003 Supp.) This statute applies to “warrant[s] of arrest as provided in §§ 40-6-201— 40-6-214.” The issuance of a warrant for a probation violation is provided for in Tenn. Code Ann. § 40-35-311(a) and probation violation warrants have been viewed as distinct from other warrants. *See, e.g., State v. Roger Dale Chisam*, No. 85-194-III, 1985 WL 4424 (Tenn. Crim. App. Dec. 13, 1985) (perm. app. denied Mar. 3, 1986) (The authority of a trial judge to issue probation revocation warrants is governed by the probation revocation statute and not by Rules 3 and 4 of the Rules of Criminal Procedure); *see also* Op. Tenn. Att’y Gen. 02-126 (Nov. 25, 2002) (Tenn. Code Ann. § 40-6-206 has no application to probation violation warrants); *State v. Janie Cousett*, No. W1999 -01256-CCA-R3-CD, 2000 WL 205055 (Tenn. Crim. App. Feb. 10, 2000) (“unlike arrest warrants pursuant to Tennessee Rules of Criminal Procedure, issuance of a probation revocation warrant is governed by the probation revocation statute). It is equally clear that the legislature intended to require a warrant for the violator’s arrest, as opposed to a criminal summons. *State v. Kenneth Michael Byrd*, No. E2002-01589-CCA-R3-CD, 2003 WL 21047130, *1 (Tenn. Crim. App. May 9, 2003). Consequently, Tenn. Code Ann. § 40-6-215(a) does not apply to warrants issued for probation violations pursuant to Tenn. Code Ann. § 40-35-311(a).

To the extent the question concerns whether a magistrate or clerk may issue a probation violation warrant, the probation revocation statute is clear on this point. Tenn. Code Ann. § 40-35-311(a) provides:

Whenever it comes to the attention of the trial judge that any defendant who has been released upon suspension of sentence, has been guilty of any breach of the laws of this state or has violated the conditions of probation, *the trial judge shall have the power to cause to be issued under such trial judge’s hand a warrant for the arrest of such defendant* as in any other criminal case. Regardless of whether the defendant is on probation for a misdemeanor or felony, or whether the warrant is issued by a general sessions court judge or the judge of a court of record, such warrant may be executed by a probation officer or any peace officer of the county in which the probationer is found.

Tenn. Code Ann. § 40-35-311(a) (2003 Supp.) (emphasis added). It is clear from the plain language of Tenn. Code Ann. § 40-35-311(a) that only the trial judge has the power to cause to be issued under his own hand the arrest warrant for a probation violation. *See State v. Lyons*, 29 S.W.3d 48, 51 (Tenn. Crim. App. 1999), *appeal denied* (Tenn. 2000) (“it is within a trial court's authority to cause a probation revocation warrant to be issued”).

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