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Criminal Law--Right to Counsel at Revocation of Probation

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CASE COMMENTS

Criminal Law — Right to Counsel at Revocation of Probation

In 1963 Hoyt Riffle pleaded guilty to a charge of breaking and entering and was sentenced to a term of one to ten years in the state penitentiary. His sentence was immediately suspended and he was plyaced on probation for five years. In 1965 Riffle's probation was revoked at a hearing at which he was not represented by counsel. Riffle applied to the West Virginia Supreme Court of Appeals in 1969 for a writ of habeas corpus alleging that he was deprived of substantial constitutional rights because he was not afforded the assistance of counsel at his probation revocation hearing. *Held,* prisoner remanded. Revocation of probation, where sentencing of the prisoner is not involved, is not a stage of criminal proceedings that entitles the prisoner to the assistance of counsel. *State ex rel. Riffle v. Thorn,* 168 S.E.2d 810 (W.Va. 1969).

In *Mempa v. Rhay,*[1] which originated in the state of Washington, the defendant entered a plea of guilty to a felony. The trial judge withheld sentencing of the defendant and placed him on probation. Thereafter, the defendant's probation was revoked at a hearing at which he was not represented by counsel, and he was *then sentenced* to the maximum term provided by law for that offense.[2] The Washington court denied the petitioner's prayer to be released from prison in a habeas corpus proceeding, but the Supreme Court of the United States reversed the judgment. In reversing the Washington decision, the Supreme Court was concerned with the application of the rule requiring counsel to be provided for an indigent at every stage of a criminal proceeding where substantial rights of an accused may be affected.[3]

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[1] 389 U.S. 128 (1967).

[2] Although the trial judge was required to impose the maximum sentence provided by law, the statute further provided that the judge should recommend the length of time he believed the prisoner should serve before being paroled. Mempa v. Rhay, 389 U.S. 128 (1967).

[3] In Townsend v. Burke, 334 U.S. 736 (1948), the defendant pleaded guilty to burglary and robbery in Pennsylvania and was not represented by counsel. While the judge was considering the sentence, the defendant was prejudiced by submission of misinformation regarding his prior criminal record. The Supreme Court held that the defendant was denied due process of law. Counsel might not have changed the sentence but would have taken steps to see that the conviction and sentence was not predicated on misinformation or misreading of the court records.

The decision in *Mempa* can be interpreted in two different ways. The first interpretation views *Mempa* in its narrow concern that substantial rights of the defendant were affected because a sentencing process was involved at the hearing. This view is technically correct because it limits the decision of *Mempa* to cases with similar facts. The proponents of this view argue that counsel should be provided an indigent defendant in a probation revocation hearing only if sentencing is involved.[4]

The second interpretation tries to derive from *Mempa* the broadest meaning and significance of the statements concerning the substantial rights of a criminal accused. This view looks not only to the particular facts in *Mempa* but also tries to encompass the perceived significance of the fourteenth amendment as construed by the United States Supreme Court in previous decisions.[5] This broader interpretation views the "substantial rights" rule used in *Mempa* as being applicable in any proceeding where a defendant's liberty may be at stake, and does not limit the applicability of the rule to only those critical stages already identified by the decisions of the United States Supreme Court. The proponents of this interpretation contend that probation revocation is such a critical stage

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The defendant in Moore v. Michigan, 355 U.S. 155 (1957), pleaded guility to murder without the assistance of counsel. The Supreme Court held that the defendant did not intelligently waive his right to counsel because there were certain technical defenses of which he was unaware.

In Hamilton v. Alabama, 368 U.S. 52 (1961), the Alabama law required the assistance of counsel at arraignments because only then could a defendant raise the defense of insanity. The defendant was arraigned in the absence of counsel and later convicted of a capital offense. The Court decided that the absence of counsel violated the defendant's rights under the due process clause of the fourteenth amendment.

Although the decisions in *Townsend, Moore,* and *Hamilton* would seem to provide a defendant with adequate protection, the right to counsel was limited to special circumstances by the prior decision of Betts v. Brady, 316 U.S. 455 (1942), in which the Supreme Court held that providing counsel for an indigent defendant is not a fundamental right but a legislative policy. In 1963, the Supreme Court in Gideon v. Wainwright, 372 U.S. 335 (1963), overruled the *Betts* decision and stated that the right to counsel in a criminal trial is a fundamental right that is essential to a fair trial. *Gideon* did not enumerate the various stages in a criminal proceeding at which counsel is required. However, *Townsend, Moore* and *Hamilton,* with the *Betts* requirement of special circumstances stripped away by *Gideon,* clearly stand for the proposition that providing counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.

[4] *See, e.g.,* United States *ex rel.* Bishop v. Brierly, 288 F. Supp. 401 (E.D. Pa. 1968); State v. Hartsell, 277 F. Supp. 993 (E.D. Tenn. 1967).

[5] Gideon v. Wainwright, 372 U.S. 335 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Townsend v. Burke, 334 U.S. 736 (1948).

of criminal proceedings that substantial rights of the accused are affected whether or not sentencing is involved at the hearing.[6]

After the *Mempa* decision, the West Virginia Supreme Court granted habeas corpus relief in three cases where a prisoners' probation had been revoked and each had been sentenced at a hearing without the assistance of counsel. In one case our court said "[t]he reasoning of the court in the *Mempa* and *Walkling*[8] cases indicates clearly that the criminal defendant is entitled to the assissance of counsel at *any proceeding* at which his probation is revoked."[9] This statement was attacked by Judge Berry who felt that the decision in *Mempa* was not broad enough to include a situation where sentencing was not involved.[10]

In other decisions since *Mempa,* where sentencing was not involved in probation revocation hearings, the majority of the cases have distinguished the facts from those in *Mempa* and adopted the narrower view as expressed by Judge Berry.[11] Theses courts have argued that the constitutional right to assistance of counsel does not apply to a hearing on a motion to revoke probation except to extent the revocation involved the deferred sentencing procedure present in *Mempa.*[12] Where the prisoner was not sentenced at a probation revocation the right to counsel has been held inapplicable.[13] This view was developed by interpreting *Mempa* to apply only to cases involving sentencing and seems to disregard the "substantial rights" rule as reiterated in *Mempa.*

A few courts have taken a contrary view of the problem and adopted a broader policy concerning the right to counsel at a probation revocation hearing. These courts have not differentiated between a hearing where a prisoner was sentenced and one where he

[6] *See, e.g.,* Garigan v. State 217 So.2d 578 (Fla. 1967); Perry v. Williard, 247 Ore. 145, 427 P.2d 1020 (1967).

[7] State *ex rel.* Strickland v. Melton, 165 S.E.2d 90 (W. Va. 1968); State *ex rel.* Render v. Wood, 165 S.E.2d 102 (W. Va. 1968); State *ex rel.* Phillips v. Wood, 165 S.E.2d 105 (W Va. 1968).

[8] Walking was one of the parties in a case that was consolidated for argument in Mempa v. Rhay.

[9] State *ex rel.* Strickland v. Melton, 165 S.E.2d 90, 96 (W. Va. 1969) (emphasis added).

[10] State *ex rel.* Strickland v. Melton, 165 S.E.2d 90, 101 (W. Va. 1968) (dissenting opinion).

[11] *See, e.g.,* United States *ex rel.* Bishop v. Brierly, 288 F. Supp. 401 (E.D. Pa. 1968).

[12] *Id.*

was not sentenced. The Oregon Supreme Court held that an indigent defendant is entitled to counsel under the equal protection and due process clauses of the United States Constitution at any hearing where the defendant's probation is revoked.[14] The court felt that the decision to deprive a probationer of his freedom is as critical as the imposition of sentence and that no magical difference exists between sentencing and probation revocation.

The *Riffle* decision was based on the distinction between the right to counsel at a probation revocation hearing involving sentencing and a hearing where sentencing was not involved. However, Judge Haymond in a dissenting opinion in *Riffle,* felt that there was more to the case than a distinction of *Mempa.* He pointed out that the decision in *Strickland v. Melton*[15] created precedent in West Virginia to the effect that counsel must be provided at any proceeding at which a criminal defendant's probation is revoked. He dismissed as erroneous the majority decision that the opinion expressed in *Strickland* was clearly *obiter dictum.*[16]

Judge Caplan, also dissenting, pointed out that probation cannot be revoked without a hearing in West Virginia due to the statute which requires a hearing on the issue of probation revocation.[17] He inferred that the legislative purpose in affording the defendant a hearing would be meaningless if it were not contemplated that he would be given an opportunity to defend himself.

Since it has been held that denial of such a hearing would deprive the accused of the equal protection of state law[18] Judge

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[13] State v. Hartsell, 277 F. Supp. 993 (E. D. Tenn. 1967).

[14] Perry v. Williard, 247 Ore. 145, 427 P.2d 1020 (1967).

[15] 165 S.E. 2d 90 (W. Va. 1968).

[16] State *ex rel.* Riffle v. Thorn, 168 S.E.2d 810, 817 (W. Va. 1969) (dissenting opinion).

[17] State *ex rel.* Riffle v. Thorn, 168 S.E.2d 810, 815 (W. Va. 1969) (dissenting opinion). The statute Judge Caplan referred to provides:

> If at any time during the period of probation there shall be reasonable cause to believe that the probationer has violated any off the conditions of his probation, the probation officer may arrest him . . . whereupon he shall be brought before the court . . . for a prompt and summary hearing. . . . W. VA. CODE ch. 62, art. 12, § 10 (Michie 1966).

[18] Hamrick v. Boles, 231 F. Supp. 507 (N.D. W. Va. 1964). In this case the defendant's probation was revoked without a hearing. The court found that the defendant was deprived of important rights by discriminatory state action and could therefore claim protection under the equal protection clause. The court added that although the equal protection clause has its principal application in discrimination as to class or race, its reach is not limited and could therefore be applied in other kinds of cases. The court found prohibited discrimination in this case because the judge that revoked the probationknowingly and intentionally denied the defendant a hearing.

Caplan felt that such a hearing should be like any other criminal proceeding and the defendant should be entitled to the assistance of counsel.

Both dissenting opinions reached the conclusion that a defendant has substantial rights that would be affected in a probation revocation hearing. According to the *Mempa* decision where such substantial rights may be affected at a criminal proceeding, counsel must be afforded the indigent defendant. It seems that the majority decisions have drawn a fine distinction center around whether a prisoner was sentenced when his probation was revoked rather than granting a broad constitutional right to counsel in every situation where a defendant's liberty is in jeopardy.

The West Virginia Supreme Court may have made a proper technical distinction between *Riffle* and *Mempa*. In West Virginia, however, as well as in other jurisdictions, the option to revoke the probation remains with the hearing judge. Thus, although the judge may be more restricted in his power to impose a criminal penalty than in the sentencing procedure, he still controls the defendant's liberty. Because of this, at such a critical proceeding, there are strong considerations favoring the position that the defendant should be afforded counsel.

Steven C. Hanley

Deeds — Estoppel By Deed — Void Deeds Not Given Effect by Estoppel

On April 1, 1947, Gold conveyed real estate to Eveline Foulds Holwell by a deed which used only the grantee's maiden name. On the same day Eveline Foulds Holwell conveyed the same tract back to Gold, but in the deed immediately following Foulds' name were the words "a single woman." The next day Foulds recorded her deed from Gold, but the deed of reconveyance to Gold was left unrecorded until 1958. In 1956 Foulds executed a deed of conveyance of the same land to a Florida corporation which soon after recorded that deed. Again the marital status of Eveline Foulds was not stated. In 1959 Gold and the corporation conveyed the same tract of land by separate deeds to the defendant Zofnas. In 1969 plaintiff Eveline Fouls Holwell and her husband of fifty-six