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Criminal Law—Jurisdiction to Revoke Parole

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expenses, and that such determination was not subject to review or approval by any other officer or governmental department. Bache and Co., v. Gainer 177 S.E.2d 10 (W. Va. 1970).

In the past the Court has been somewhat reluctant to use mandamus to coerce state officials to act because of the wide range of discretion available to executive officials in discharging their duties. But in recent years the Court has relaxed its views, and today mandamus has become a popular judicial device to secure individual rights vis-a-vis the state. See Davis, Mandamus to Review Administrative Action in W. Va. 60 W. VA. L. Rev. 1, (1957). See also, Annot., 91 A.L.R. 1497 (1934).

Criminal Law—Jurisdiction To Revoke Probation

In February, 1965, defendant represented by counsel pleaded guilty to a charge of forgery and in March was sentenced to a term of one to ten years in the state penitentiary. However, the sentence was suspended and the defendant was placed on probation for three years. Then in February, 1967, defendant pleaded guilty to a misdemeanor and was sentenced to the county jail for six months. The circuit court, vested with supervisory authority over the defendant, revoked the defendant's probation and ordered him to serve the suspended sentence in the state penitentiary. The defendant was without counsel at the revocation of probation hearing.

In April, 1968, after the probationary period had expired, the defendant instituted a habeas corpus proceeding in the circuit court alleging that the revocation of his probation was unlawful and void because he had been without counsel at the revocation of probation hearing. The circuit court agreed, and he was released. However, the same circuit court ordered a second revocation of probation hearing to be conducted and at that hearing ruled that the defendant had violated the terms of the probation. While incarcerated in the state penitentiary, the defendant appealed this second revocation of probation. Held, circuit court's ruling reversed. The circuit court did not have jurisdiction to revoke defendant's probation after the period of probation had expired. State v. Shawyer, 177 S.E.2d 25 (W. Va. 1970).

In West Virginia once the probationary period has expired, a court cannot revoke the defendant's probation. State v. Reel, 152 W.Va. 646, 165 S.E.2d 813 (1969). Generally a revocation of pro-
bation is void if the defendant was not represented by counsel and did not waive that right. *State ex rel. Render v. Wood*, 152 W.Va. 484, 165 S.E.2d 102 (1968). However, in West Virginia the court has held in applying *Mempha v. Rhay*, 389 U.S. 128 (1967), that revocation of probation of a defendant who was not represented by counsel is valid if he was previously sentenced with counsel present. *State ex rel. Riffle v. Thorn*, 168 S.E.2d 810 (W.Va. 1969). The court in *Shawyer* did not make a determination as to whether the circuit court had mistakenly voided the initial revocation of probation; it ruled that the decision to free the defendant was final and irreversible by application of the principles of res judicata. The court in *Shawyer* also rejected the state's contention that the second revocation of probation was actually a continuation (seventeen months later) of the first hearing which was held within the probationary period.

**Mandamus—State Agency Reimbursement**

The Attorney General, under authority of W. Va. Code ch. 11, art. 1, § 1 (Michie Supp. 1970), appointed assistant attorneys general to aid the State Tax Commissioner. W. Va. Code ch. 11, art. 1, § 1 (Michie Supp. 1970), and Budget Bill for 1969-70, item 17, account no. 240, require that the Attorney General be reimbursed for the use of legal counsel and secretarial help. Therefore, from its appropriations the Tax Department remunerated the Attorney General to the sum of $117,666.65 for those personnel appointed from July, 1969, through February, 1970. However, the Attorney General requested compensation of $131,538.15 and filed a writ of mandamus to compel the Tax Commissioner to issue a requisition upon the State Auditor for the $13,871.50 deficiency. *Held*, writ denied. The Tax Commissioner is required only to reimburse the Attorney General for those services “in an amount agreed upon by the Attorney General and the proper authority of said spending unit.” *Budget Bill for 1969-70, item 17, account no. 240*. The Tax Department's expenditure schedule for its appropriations earmarked sufficient funds to compensate the Attorney General, but that did not mean the Tax Commissioner had agreed upon an amount of reimbursement. To hold so would deny him the discretionary power of determining the personnel needs and appropriation expenditures for his department. Further, the petition for the writ did not allege any agreement on the amount of remuneration to be made; thus the Attorney General failed to show a clear legal right to the relief