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Mandamus--State Agency Reimbursement

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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

requested. A writ of mandamus cannot be granted unless the party seeking it shows a clear legal right to the remedy. *State ex rel. Brown- ing v. Haden*, 175 S.E.2d 197 (W. Va. 1970).

No cases were found discussing a state official's duty to spend his entire allocations, but the decision appears to be in accord with the restrictions upon a writ of mandamus. Such a writ will lie to compel one to exercise any discretion he is permitted, but not to control the result of that exercise. *Miller v. County Court of Tucker County*, 34 W. Va. 285, 12 S.E. 702 (1890). Furthermore, mandamus is the correct procedure to require payment of an order approved by a public body; but it cannot be used to demand remuneration of the original obligation. *Town of Elizabeth v. County Court of Wirt County*, 128 W. Va. 34, 35 S.E.2d 601 (1945).

Mandamus—Eminent Domain

Pursuant to a highway improvement contract with the State Road Commission, a construction company was engaged in excavating portions of a hillside for improvement to a state highway. During the work, an abandoned mine tunnel was opened. Several hours later, large volumes of water gushed from the tunnel, flooded a nearby town, and damaged realty belonging to petitioners. Petitioners brought a mandamus suit to compel the State Road Commissioner to institute an eminent domain proceeding to ascertain the damage. *Held*; Writs awarded. When highway construction or improvement results in property damage to non-residual, private property in the absence of an actual taking, the State Road Commissioner has a duty to institute eminent domain proceedings within a reasonable time to ascertain damages. Moreover, mandamus will lie to compel the observance of this duty. *State ex rel. Phoenix Insurance Co. v. Ritchie*, 175 S.E.2d 428 (W. Va. 1970). The court stated that W. VA. CONST. art. III, § 9, which provides that property shall not be taken or damaged for public use without just compensation, is not limited to residual property. The clear legal right which a petitioner must show is not that he had been damaged, but that there is reasonable cause to believe that the issue of damages should be resolved by a judge and jury. Possible negligence of the State in causing the damage is not a bar to recovery in eminent domain proceedings.

Judge Berry's dissent urged that the eminent domain proceeding applied only to residual property and did not extend to negligent