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Constitutional Law--No Right to Counsel at Probation Revocation Hearings

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NOTES

CONSTITUTIONAL LAW—NO RIGHT TO COUNSEL AT PROBATION REVOCATION HEARINGS

In *Mercer v. Hopper*,[1] the Georgia Supreme Court, in a four-sentence per curiam opinion, held that "[t]here is no right to counsel at a probation revocation hearing in Georgia."[2] Mercer pleaded guilty to, and was convicted of, three charges of driving under the influence of intoxicants and one charge of forgery. He received a five year sentence for forgery and three 12-month sentences for the DUI charges, the latter to run consecutively, but concurrently with the forgery sentence. All sentences were ordered to be served on probation.[3]

Less than a month after his conviction, Mercer was arrested for public drunkenness, and was again arrested one week later for the same offense.[4] He was never tried on these charges, but his probation was revoked at a subsequent probation revocation hearing and he was imprisoned to serve the remainder of the sentences originally imposed. Mercer was not afforded the assistance of counsel at the probation revocation hearing. Whether or not he requested the assistance of counsel is unclear.[5]

Mercer petitioned for habeas corpus, arguing that he should have been allowed the assistance of counsel at his probation revocation hearing.[6] Both the habeas corpus court and the Georgia Supreme Court disagreed.

Though jurisdictions have split as to whether there is a right to counsel at probation revocation hearings, most, including Georgia, have long followed the view that there is not.[7] The predominant rationale has been that the constitutional guarantee of the right to counsel should not extend to a probation revocation proceeding since that proceeding is substantially different in nature from a criminal prosecution.[8] Those jurisdictions that have recognized the right to counsel at the revocation hearing have generally

1. 233 Ga. 620, 212 S.E.2d 799 (1975).

2. *Id.* at 620, 212 S.E.2d at 800.

3. *Id.* at 622, 212 S.E.2d at 800-01 (Ingram, J., dissenting) (the facts in this case were reported only in the dissenting opinion).

4. Mercer's mother had telephoned the sheriff's office regarding her other son who was apparently riding on a tractor while drunk. The sheriff could not locate Mercer's brother but did find and arrest Mercer, who, according to his mother's testimony, had come home from work and was in bed when the sheriff arrived. *Id.* at 622, 212 S.E.2d at 801 (dissent).

5. Justice Hall, concurring, stated that while Mercer had testified at the evidentiary hearing on his habeas corpus petition, he stood mute before the judge and did not request counsel at his probation revocation hearing. *Id.* at 621, 212 S.E.2d at 800. But Justice Ingram, dissenting, referred specifically to "appellant's alleged request for counsel." *Id.* at 624, 212 S.E.2d at 802.

6. *Id.* at 622, 212 S.E.2d at 801 (dissent).

7. *See* Annot., *Probation—Revocation—Right to Counsel*, 44 A.L.R.3d 306, 311-14 (1972).

8. *See* Annot., *Parole or Probation Revocation*, 36 L.Ed.2d 1077 (1973).

relied on due process grounds, asserting that where liberty is concerned, even conditional liberty, justice and fairness require the right to counsel.[9]

Dutton v. Willis,[10] decided by the Georgia Supreme Court in 1967, dealt with the precise issue raised in *Mercer*. There the court adopted the "general and accepted rule in the state and federal courts" and held that the failure to provide counsel to a probationer at his probation revocation hearing "did not violate his right to counsel under either the federal or the state Constitution."[11] The court, after quoting from the Statewide Probation Act of 1956,[12] which at least arguably established the right to counsel at probation revocation hearings,[13] chose to ignore that statute. The court's reasoning was simply that the hearing is not a criminal prosecution, even if the alleged probation violation is criminal in nature.[14]

After the decision of the United States Supreme Court in *Mempa v. Rhay*,[15] several jurisdictions shifted their position on this critical issue and extended the right to counsel.[16] However, in *Reece v. Pettijohn*,[17] the Georgia Supreme Court rejected an opportunity to do so, choosing instead to follow its prior decision in *Dutton*.[18] The court, in a short opinion, distinguished *Mempa* on its facts[19] and reiterated its prior position. *Reece* may be most significant for its scathing dissent by Justice Gunter which capsulizes the viewpoint advocating the right to counsel in Georgia. The dissent labeled *Dutton* "patently erroneous" and outlined three distinct bases of support for the right to counsel at a probation revocation hearing in Georgia.[20]

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9. *See* Annot., *Probation—Revocation—Right to Counsel*, *supra* note 7 at 321-23.

10. 223 Ga. 209, 154 S.E.2d 221 (1967).

11. *Id.* at 210-11, 154 S.E.2d at 223.

12. GA. CODE ANN. §27-2713 (Rev. 1972) in pertinent part provides that

> [t]he court, upon the probationer being brought before it, may commit him or release him with or without bail to await further hearing or it may dismiss the charge. If such charge is not dismissed at this time, the court shall give the probationer an opportunity to be fully heard at the earliest possible date on his own behalf, in person or by counsel. . . .

13. *See* the dissent by Justice Gunter in Reece v. Pettijohn, 229 Ga. 619, 620, 193 S.E.2d 841, 843 (1972).

14. 223 Ga. at 210, 154 S.E.2d at 223.

15. 389 U.S. 128 (1967). In *Mempa* the Supreme Court ruled that a probationer does have a right to counsel at a probation revocation hearing under a Washington statute which deferred sentencing in probation cases.

16. *See* Annot., *Probation—Revocation—Right to Counsel*, *supra* note 7 at 324.

17. 229 Ga. 619, 193 S.E.2d 841 (1972).

18. *Id.* at 619, 193 S.E.2d at 842. The court in *Reece* also relied upon Shaw v. Henderson, 430 F.2d 1116 (5th Cir. 1970) which provided the step-by-step analysis that *Reece* lacked. 229 Ga. at 619, 193 S.E.2d at 842.

19. The Georgia Supreme Court was not alone in its reasoning, as most jurisdictions which had previously not recognized the right to counsel in revocation hearings decided to construe *Mempa* to pertain only to deferred sentencing situations. *See* Annot., *Probation—Revocation—Right to Counsel*, *supra* note 7, at 314.

20. 229 Ga. at 621, 193 S.E.2d at 843. First, Justice Gunter, dissenting, interpreted *Mempa* to necessitate the right to counsel at revocation proceedings, construing the following

The United States Supreme Court, focusing in part on this issue in *Gagnon v. Scarpelli*,[21] seemed to reach a compromise between these antithetic viewpoints. The Court, reviving the rationale of *Betts v. Brady*,[22] held that the revocation authority should decide on a case by case basis whether due process requires that an indigent probationer be represented by counsel.[23] The Court declined to set strict guidelines but did state that

> [p]resumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.[24]

But in *Mercer* the Georgia Supreme Court, addressing this question for the first time since *Gagnon*, declined to follow that decision's rationale, guidelines, or requirements.[25] The court, in its terse opinion, pinpointed the issue and reaffirmed its position that "[t]here is no right to counsel at a probation revocation hearing in Georgia."[26] The decision was based wholly on *Reece*, without reference to *Gagnon* and without analysis, discussion or recitation of the facts.[27]

Both the dissenting and concurring opinions, recognizing that *Gagnon* rendered *Reece* invalid, applied the guidelines set forth in *Gagnon* to the facts of the case.[28] The dissent criticized the court's reliance on *Reece* and argued that the fundamental fairness rationale of *Gagnon* required the

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passage to so require: "[A] lawyer must be afforded at this proceeding whether it be labeled a revocation or probation or a deferred sentencing." *Id. quoting from* Mempa v. Rhay, 389 U.S. 128, 137 (1967). Secondly, since probation terms and conditions are equivalent to "rules or laws of the State," the alleged violation of the former, as well as the latter, should entitle the accused to the privileges and benefits of counsel under the Georgia Constitution as set forth in GA. CODE ANN. §2-105 (Rev. 1973). 229 Ga. at 621-22, 193 S.E.2d at 843. Finally, GA. CODE ANN. §27-2713 (Rev. 1972) specifically affords a probationer the right to counsel at his probation revocation hearing. 229 Ga. at 622, 193 S.E.2d at 843.

21. 411 U.S. 778 (1973).

22. 316 U.S. 455 (1942). In *Betts* the Court ruled that the due process clause of the fourteenth amendment was not governed by strict standards and did not require that the right to counsel be afforded defendents in all criminal cases. Rather, the Court adopted a flexible case by case approach "tested by an appraisal of the totality of facts in a given case." *Id.* at 462.

23. 411 U.S. at 790.

24. *Id.* The Court also suggested that the responsible authority consider whether "the probationer appears to be capable of speaking effectively for himself." *Id.* at 791.

25. *Id.* at 790-91.

26. 233 Ga. at 620, 212 S.E.2d at 800.

27. *Id.* at 620, 212 S.E.2d at 799-800.

28. *Id.* at 621, 212 S.E.2d at 800 (Hall, J., concurring specially): "Under these facts I conclude that Mercer did not by his conduct bring himself within the rule of *Scarpelli*, and due process did not require that counsel be furnished him." (Emphasis added.)

appointment of counsel in this case.[29]

While the outcome of Mercer's habeas corpus petition was predictable,[30] the manner in which the decision was reached by the Supreme Court of Georgia was quite the opposite.[31] It was inconceivable. That the court blatantly ignored a United States Supreme Court decision, despite rational and analytical attempts at dissuasion by the concurring and dissenting justices, is inexplicable and unjustified. While *Dutton* and *Reece* were able to cite similar rulings in other jurisdictions for support,[32] such is not the case with *Mercer*.[33]

In *Mercer* the Georgia Supreme Court is plainly wrong. *Gagnon* does not suggest a case by case approach; it requires it.[34] The court simply disregarded this requirement without explanation, and, of course, without the prerogative to do so. The decision is irresponsible in that it so clearly contravenes the holding of the United States Supreme Court in *Gagnon*. This adamant position of the Georgia Supreme Court in denying counsel

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29. *Id.* at 624-25, 212 S.E.2d at 803 (Ingram, J., dissenting):

> I believe the rationale of *Gagnon* requires that counsel should have been appointed in this case. But the major fallacy I find with the majority opinion is in following the broad rule stated in *Reece v. Pettijohn* . . . which, in my opinion, clearly contravenes the holding of the U. S. Supreme Court in *Gagnon* . . . and is incorrect. (Emphasis added.)

30. *See* Cole, *Annual Survey of Georgia Law: Constitutional Law*, 25 MERCER L. REV. 73, 83 (1973):

> The dimensions of this problem have been changed by the United States Supreme Court's ruling in *Gagnon v. Scarpelli*. . . . However, the practical effect of denying counsel to indigents in probation revocation hearings in Georgia will probably remain substantially unchanged because the *Gagnon* opinion leaves the decision as to when an attorney is necessary (because of the complexity of the hearing) to the probation department.

See also Fisher, *Parole and Probation Revocation Procedures After Morissey and Gagnon*, 65 JOUR. CRIM. L. 46, 55 (1974):

> In probation revocation proceedings, the Parole Board wields broad discretion in revoking a conditional release. . . . Indeed, judicial decisions seem to indicate that the Parole Board's judgment is virtually unreviewable.

31. *Mercer* was based entirely on *Reece*. In this regard, see Annot., *Parole or Probation Revocation*, *supra* note 8 at 1118:

> A fairly significant number of cases [including *Reece*] decided just prior to the decision in *Gagnon v. Scarpelli* reached the conclusion that due process does not require the presence of counsel at revocation proceedings under any circumstances. *These cases obviously have no continuing validity*. . . . (Emphasis added.)

32. *See* Shaw v. Henderson, 430 F.2d 1116 (5th Cir. 1970); Welsh v. United States, 348 F.2d 885 (6th Cir. 1965); Jones v. Rivers, 338 F.2d 862 (4th Cir. 1964); Bennett v. United States, 158 F.2d 412 (8th Cir. 1946), *cert. denied*, 331 U.S. 822 (1947). *See also* Annot., *Probation—Revocation—Right to Counsel*, *supra* note 7 at 311-14.

33. *See* Shead v. Quatsoe, 486 F.2d 694 (7th Cir. 1973) (remanded for further consideration in light of *Gagnon*); M'Clary v. California Adult Authority, 481 F.2d 1281 (9th Cir. 1973) (remanded in light of *Gagnon*). *See also* Annot., *Parole or Probation Revocation*, *supra* note 8 at 1120-23.

34. 411 U.S. at 790.

in all probation revocation hearings is a blight upon the record of the court which should be rectified at the first opportunity.

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