Mississippi College Law Review

Volume 3 | Issue 2 Article 5

6-1-1983

Criminal Procedure - A Probationary Revocation Hearing is Not a Criminal Proseuction - Williams v. State

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CRIMINAL PROCEDURE—A Probationary Revocation Hearing is not a Criminal Prosecution—*Williams v. State*, 409 So. 2d 1331 (Miss. 1982).

James Allen Williams, a probationer, filed a petition for a writ of habeas corpus on December 4, 1980, alleging that his constitutional right to a public trial had been denied him when the judge presiding over his probationary revocation hearing had barred the public from the courtroom.[1]

Williams, who had been placed on probation for three years after pleading guilty in March, 1980, to a charge of selling marijuana, was once again arrested on the same charge on July 22, 1980.[2] During the probationary revocation hearing the circuit judge of Yazoo County barred the public, including Williams' relatives, from the courtroom in order to protect the identity of the principal witness, an undercover policeman. Thereafter, on December 4, 1980, Williams filed a writ of habeas corpus in which he charged a violation of his rights under the sixth amendment of the United States Constitution and under article III, section 26 of the Mississippi Constitution.[3]

The Mississippi Supreme Court affirmed the circuit court's opinion, stating that Williams' constitutional rights had not been violated because a probationary revocation hearing[4] is not a criminal prosecution, and the same rights afforded a criminal under either the Mississippi or the United States Constitutions were not due him.[5]

DISCUSSION

At the outset of its opinion the court refused to categorize a probationary revocation hearing as a criminal prosecution; therefore, a probationer was viewed as a person who had been vested with a privilege by the court, and thereby the full range of rights under the Constitution did not extend to him. The court drew a distinction between a criminal proceeding and a probationary revocation hearing, the hearing being described as "an ad-

1. Williams v. State, 409 So. 2d 1331 (Miss. 1982).
2. *Id.* at 1331.
3. *Id.*
4. *See* Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963). When comparing parole and probation, Judge Burger stated: "While there are distinguishing factors between probation and parole, the underlying purposes are closely allied.... Congress, which is the source of both of these penological devices, had given no indication that the revocation of parole should be more difficult or procedurally different [from] revocation of probation." *Id.* at 236. Therefore, within case authority parole revocation hearings have been applied to probationary revocation hearings and vice versa.
5. 409 So. 2d at 1333 (Miss. 1982).

ministrative summary proceeding growing out of a privilege that was granted appellant by the lower court when the suspended sentence and probation were granted."[6]

The court decided that minimum due process requirements had been afforded Williams during his hearing and refused to go outside the scope of these rules. The court avoided any discussion on the importance of a public hearing in regard to a probationer's basic individual rights as several courts had done in regard to addressing the importance of having counsel present at a probationary revocation hearing.[7] The court strongly relied on the proposition that a probationer does not receive the "full panoply" of rights which are due a defendant in a criminal prosecution under the requirements of the Constitution.[8]

LAW

The theory that a parole or probation revocation hearing is not a criminal proceeding is a majority view,[9] and therefore, most courts have held that probationers should not be afforded the same constitutional safeguards as those guaranteed by the United States Constitution to defendants in criminal cases. In probationary revocation hearing cases the courts have held that the sixth amendment of the U.S. Constitution governs *only* "criminal prosecutions."[10] The basic distinction between the constitutional rights of a free person and those of a probationer have been explained by describing the probationer's freedom as conditional, or by stating it another way: "A person is provisionally free who would otherwise be in jail."[11] The different judicial treatment of a "conditional-

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6. *Id.*

7. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778 (1973) (provided counsel to probationers on a case by case basis); Mempa v. Rhay, 389 U.S. 128 (1967) (when sentencing is imposed during a probationary revocation hearing, counsel should be provided since personal liberties are at stake); Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969) (counsel should be provided in probationary revocation hearings because personal rights are threatened).

8. 409 So. 2d at 1332 (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

9. *See, e.g.*,Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); In re Whitney, 421 F.2d 337 (1st Cir. 1970); United States v. Hollien, 105 F. Supp. 987 (W.D. Mich. 1952); Rasmussen v. State, 18 Md. 443, 306 A.2d 577 (1973); Gardner v. Collier, 274 So. 2d 662 (Miss. 1973).

10. 318 F.2d at 237. In the *Hollien* case probationer sought a "speedy trial." The court had refused to serve notice on the probationer for a violation of probation involving a suspended sentence. While serving a prison term for a second conviction, the probationer, upon learning of the probation violation warrant, requested that the court go ahead and serve it on him so that he might serve two concurrent prison terms. The court refused to grant him a speedy hearing on the probationary revocation warrant, stating that his rights had not been violated because a probationary revocation hearing was not a criminal proceeding; therefore, the rights due a criminal, one of which is a speedy trial, were not due a probationer. *See also* Riggins v. Rhay, 75 Wash. 2d 271, 450 P.2d 806 (1969).

11. Comment, *Post-Conviction Criminal Rights: Parole and Probation Revocation and Bail*, 8 CREIGHTON L. REV. 682, 684 (1974-75).

ly" free person and an "unconditionally" free person, therefore, has been made manifest in the probationary revocation hearing process.

In an attempt to categorize the probationary revocation hearing as something other than a criminal proceeding, the hearing has been seen as more "in the nature of a summary prosecution proceeding" rather than "a 'criminal prosecution' entitling defendant to a 'speedy and public trial' under the sixth amendment of the Constitution."[12]

Even though the weight of authority favors the view that the rights afforded a probationer during a probationary revocation hearing do not rise to the level of rights afforded a defendant in a criminal prosecution, the courts have not ignored the rights of the probationer because "the right to be heard before being condemned to suffer grievous loss of any kind ... is a principle basic to our society."[13]

The courts' views have evolved and expanded over the years as such rights have been demanded by probationers and parolees. That development will be shown in the following paragraphs.

Justice Cardozo in *Escoe v. Zerbst*[14] ruled that by statute Congress had mandated that the probationer, upon violation of probation, should have a hearing in which he could answer charges against him. In *Escoe*, instead of being "forthwith... taken before the court which had imposed the sentence," the probationer was "taken to a prison beyond the territorial limits of that court and kept there in confinement without the opportunity for a hearing."[15] Cardozo further stated that when the court denied the probationer the right to answer charges it had failed in its duty to follow congressional mandate.[16]

In its *Mempa v. Rhay*[17] decision, the Supreme Court ruled that in particular probationary revocation hearings counsel is required. When sentencing is delayed, then imposed during a probationary revocation hearing, as was the case in *Mempa*, the probationer should have counsel present. In *Mempa* Justice Thurgood Marshall reviewed the rights provided criminals by the sixth, as applied through the fourteenth, amendment to the Constitution. Marshall then applied the same rights to the probationer in *Mem-*

12. United States v. Hollien, 105 F. Supp. at 988 (W.D. Mich. 1952).
13. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951).
14. 295 U.S. 490 (1935).
15. *Id.* at 492.
16. *Id.* at 493-94.
17. 389 U.S. 128 (1967).
18. *Id.* at 134.

pa.[18] Marshall based his decision on the fact that in particular situations where the probationer's delayed sentence is based on actions for which he will never be tried, i.e., acts committed while on probation, the probationer should be provided with counsel.[19] Marshall saw sentencing during this type of probationary revocation hearing as a continuation of the criminal trial process because substantial rights of a probationer would be affected.[20] Some officials have read *Mempa* narrowly and refused counsel unless *substantial* rights of the probationer or parolee have been affected.[21] When *Mempa* is read broadly, the courts have extended the criminal's rights to every stage of the criminal process, even to include probationary revocation hearings.[22]

When an Iowa parolee challenged revocation hearing procedures in *Morrissey v. Brewer,*[23] the Supreme Court interpreted the statutory procedures as mandating a preliminary and public hearing. Before this ruling, parolees were at the mercy of varying state laws which set forth their rights. To insure due process to the probationer, certain minimum due process requirements were set forth which have been widely adhered to since that time.[24] After setting forth those requirements the Court was quick to add:

> We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.[25]

The Court in *Morrissey* gave flexibility to a parolee's due process and called for "such procedural protections as the particular

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19. *Id.* at 135.

20. *Id.* at 134.

21. *See* Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968) (*Mempa* was seen as inapplicable to parole revocation proceedings); Holder v. United States, 285 F. Supp. 380 (E.D. Tex. 1968); Riggins v. Rhay, 75 Wash. 2d 271, 450 P.2d 806 (1969).

22. Ashworth v. United States, 391 F.2d 245 (6th Cir. 1968) (holding that *Mempa* established the right to counsel at federal probationary revocation hearings). *See also* State v. Seymour, 98 N.J. Super. 526, 237 A.2d 900 (N.J. Super. Ct. App. Div. 1968). *See generally* Note, *Constitutional Law—Right to Counsel—State Courts Split on Probationers' Right to Counsel at Revocation Hearing,* 42 N.Y.U. L. REV. 955 (1967).

23. 408 U.S. 471 (1972).

24. The minimum due process requirements set forth in *Morrissey* are:

(a) Written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489.

25. *Id.*

situation demands."[26] *Morrissey* further stated that a state agency, in considering what due process procedures are appropriate for a parolee, should look to the circumstances, the function of the agency, and the interests of the parolee that are at stake.[27]

While many courts have followed *Morrissey*'s standards, there are still rights which parolees and probationers demand which are out of the scope of these rules. Many courts have refused to hold that the sixth amendment guarantees counsel to all probationers during revocation hearings.[28] Constitutional guarantees have been withheld because in a probationary revocation hearing the criminal is at "an entirely different stage of the criminal-correctional process."[29] The courts have, however, viewed each situation and made decisions based on the particular circumstances.

One of these much litigated rights is a probationer's right to counsel during a probationary revocation hearing. In *Gagnon v. Scarpelli*,[30] the Court reversed the court of appeals' acceptance of the probationer's contention that the "State is under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases."[31] In *Gagnon* the Court surmised that in most probationary revocation hearings the presence of counsel would be unnecessary, but it was cautious in considering that "there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees."[32]

ANALYSIS

The decision of the court in the instant case turned on its reading of the Mississippi and U.S. Constitutions in regard to their applicability to a probationary revocation hearing. The Mississippi Supreme Court relied on its previous decision in *Gardner v. Collier*.[33] *Gardner* had followed *Morrissey* and held that a revocation hearing was not a criminal prosecution.[34]

The Court in *Morrissey* had posed two questions which the court in the instant case considered: (a) Is a probationary revocation hearing a criminal prosecution? and (b) If a revocation hearing is not protected by the Constitution, what due process should be

26. *Id.* at 481.
27. *Id.*
28. Riggins v. Rhay, 75 Wash. 2d 271, 450 P.2d 806 (1969).
29. In re Whitney, 421 F.2d 337, 338 (1st Cir. 1970).
30. 411 U.S. 778 (1973).
31. *Id.* at 787.
32. *Id.* at 790.
33. 274 So. 2d 662 (1973).
34. *Id.*

afforded the probationer?[35] Seeking the answers the Mississippi Supreme Court looked to *Gagnon*[36] which had also relied on *Morrissey*.[37] The Court in *Gagnon* recognized that even though the withdrawal of personal liberty is involved in a probationary revocation hearing, such a hearing is not a criminal prosecution, and a probationer is entitled to a preliminary and final hearing.[38]

After analyzing Williams' revocation hearing the court found that the minimum requirements set out in *Morrissey*[39] had been adhered to. Williams had been afforded adequate counsel, and when an objection was properly made concerning the closed hearing, the court had overruled it.[40]

Upon a determination that Williams had been treated fairly in the hearing, the court addressed the issue of a probationer's standing in regard to his constitutional rights. The court indicated that because of the standing of a probationer under the Constitution he was not due a "speedy and public trial."[41] To substantiate its assertion that Williams was not due a public hearing, the court, by inference, relied on *United States v. Hollien*[42] in which the probationer claimed that he had been denied constitutional rights to a "speedy trial."[43] The court in *Hollien* ruled that the probationer was not due the same rights as a criminal defendant because a probationary revocation hearing is not a "criminal prosecution" but is more in the nature of a "summary proceeding."[44]

CONCLUSION

There were no cases directly on point: a probationer's rights to a "public hearing" during a probationary revocation hearing. Therefore, the court relied on cases which dealt with *Morrissey*'s minimum due process requirements, as well as those which dealt with rights which were out of the scope of *Morrissey*.

The court determined that Williams' probationary revocation hearing had been properly administered and that any due process rights due him arose out of his standing under the privilege granted him by the lower court in suspending his sentence. The source of his due process rights was not constitutional.

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35. Morrissey v. Brewer, 408 U.S. at 477, 484 (1972).
36. 409 So. 2d at 1332.
37. *Id.*
38. 411 U.S. at 781-82.
39. 408 U.S. 471 (1972).
40. 409 So. 2d at 1332.
41. *Id.* at 1333 (quoting United States v. Hollien, 105 F. Supp. 987, 988 (W.D. Mich. 1952)).
42. 105 F. Supp. 987 (W.D. Mich. 1952).
43. *Id.* at 988.
44. *Id.*

The court summed up its decision by looking to *Morrissey* once more. It stated, "[T]he full panoply of rights due a defendant in a criminal prosecution under the requirements of the Constitutions does not apply to suspension and parole revocations."[45]

In reaching its decision as to Williams' right to a public trial the court refused to categorize a probationary revocation hearing as a criminal prosecution. The court further refused to call a probationer's liberty a right, but rather called it a privilege which is conditional in scope.

In *United States v. Hollien*,[46] in which a probationer was denied a "speedy trial," the Mississippi court found its closest precedent in regard to the question of a "public trial." The court never discussed the implications of a closed hearing in a probationary revocation hearing; rather it assumed the circuit judge, who had ordered the closed hearing, had exercised discretion. The court denied Williams the writ of habeas corpus because it saw no basis for a constitutional right to a public revocation hearing.

The court addressed the general constitutional rights of a probationer during a probationary hearing, yet it was reluctant to analyze and discuss the specific constitutional right to a public hearing. Several courts mentioned herein[47] addressed the issue of providing counsel for probationers and parolees during revocation hearings. If the courts have found merit in discussing the probationer's right to counsel during a revocation hearing, future courts will similarly find themselves faced with discussing the merits of a probationer's constitutional right to a "speedy and public trial."

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45. 409 So. 2d at 1333.
46. 105 F. Supp. 987 (W.D. Mich. 1952).
47. *See supra* note 7.