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BERKELEY COUNTY, SC

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SC Court of Appeals

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF GENERAL SESSIONS FOR THE NINTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA, Plaintiff, v. DEVAR T. RAVENELL, Defendant.	CASE NO: 4102P0416497 & 4102P0416498 And Probation Violation Hearing Case No. Heard on May 4, 2017 MOTION TO ALTER OR AMEND JUDGMENT (SENTENCING)

Comes now the Defendant, by and through his undersigned attorney, who moves this Court alter or amend its sentencing Order in the above captioned matter, which was heard on Thursday, May 4, 2017. This motion is pursuant to Rule 29 of the SC Rules of Criminal Procedure and other applicable law. Under Rule 29, the sentencing judge retains jurisdiction to hear post trial motions filed with 10 days of the sentencing. Rule 5 states that if the 10th day is on a weekend or holiday then the time period is extended until the next business day.

PROCEDURE

On March 18, 2016 the Defendant entered a plea before Judge Dennis and was sentenced to four years suspended upon service of three years of probation. On March 10, 2017, Defendant entered a plea of guilty before Judge Harrington to the offenses of habitual driving offender statute and hit and run. It being generally accepted by the State, the Defense, and the Court that this plea would invite a motion to revoke the existing probation; Judge Harrington granted Defendant's motion to defer sentencing until the hearing on the department of probation and parole's motion for revocation of probation, and to run sentencing concurrently. The Court convened on May 4, 2017 for the purpose of hearing the Department of Probation and Parole's Motion to Revoke Probation and for the purpose of sentencing the Defendant upon the plea

Exhibit A

entered on March 10, 2017. As a result of oversight, the Defendant had not been served with the Department of Probation and Parole's motion to revoke probation until the morning of the hearing. Counsel for the Defendant reviewed the notice, which identified the Defendant's arrest on the charges to which he plead guilty on March 10, 2017 as the basis for the Department's motion to revoke his probation. At the call of the case, Defendant's counsel stated on the record that the Defendant had only been served with the notice of probation violation that morning but because the Defense had previous notice of the basis for the Department's motion it waived the 10 day advance notice for the hearing; and was prepared to continue.

The solicitor stated that the State had no opinion on sentencing. The Department of Probation and Parole recommended that the Defendant be Ordered to serve 10 days active sentence, on five consecutive weekends, resume the existing probation, grant a concurrent probationary sentence on the new charges and that the existing bond remain active for the Defendant to self-surrender for service of the active sentence on weekends. The Defense asked the Court to follow the recommendation that it had negotiated with the Department of Probation and Parole.

Prior to hearing anything further from any Party, Judge Harrington asked when the last time the Defendant had been drug tested. Unsatisfied with the response from the Department of Probation, Judge Harrington placed the Defendant under oath and asked him whether or not he would pass a drug test if tested at that moment. Before Defendant's Counsel could object to this inappropriate line of questioning by the Court, Defendant said he would not pass a drug test because he had been around marijuana. Judge Harrington then Ordered the Defendant to be drug tested on the spot. Defendant's counsel was directed to wait in the court room while the

Defendant was escorted by the bailiff to be administered a drug test by unknown persons. A half hour later, the Defendant was brought back before the Court and a representative stated that the Defendant had tested positive for marijuana and cocaine. Judge Harrington directly questioned the Defendant for the next 10 to 20 minutes about his marijuana and cocaine use. The Judge then briefly asked the representative of the State, Department of Probation and Parole, and Defendant's Counsel if there was anything else to add; and then sentenced the Defendant to 3 years on the underlying charges of violation of the habitual offender statute and hit and run, and ordered the Defendant's probation revoked in full, the sentences to run concurrent, with credit for time served. Upon information and belief, this equates to a sentence of roughly 4 years, as a result of the full revocation of probation.

Errors of Law

The Court's sentencing in this matter is erroneous and in clear violation of law. The sentencing hearing and the Judge's decisions were wrongfully influenced by the Defendant's testimony regarding drug use as well as the spontaneous court ordered drug test which indicated that the Defendant tested positive for marijuana and cocaine.

Defendant's constitutional right to due process was violated in that the Department of Probation and Parole's notice and application for revocation of Defendant's Probation did not indicate drug use as a basis for violation of probation nor did any of the underlying charges relate to drug use.

Defendant's constitutional right against self-incrimination was violated by Judge Harrington's direct inquiry to the Defendant where she asked him if he would pass or fail a drug test and

subsequently questioned the Defendant about his drug use. The Defendant was not being sentenced for a drug related offense nor had he been noticed that drug use was a basis for revocation of probation.

The Defendant was not mirandized prior to being questioned about drug use, which constituted questioning about a new criminal offense, and was a violation of his constitutional rights against self-incrimination.

The Defendant's constitutional right to privacy and constitutional right against self-incrimination were violated by the judicially ordered drug test of the Defendant.

The Defense was not provided with evidence relating to the drug test or its results and was denied constitutional rights of confrontation relating to this evidence of a new criminal offense.

The sentencing Judge violated the separation of powers under the US Constitution when she acted as an investigatory agent of the executive branch of the State during a probation revocation hearing and during a sentencing hearing; in questioning the Defendant about criminal offenses not before the Court, and using the power of the bench to compel the Defendant to give evidence in the form of a drug test in violation of her jurisdiction and in violation of the Defendant's constitutional rights.

WHEREFORE, the Defendant requests this Honorable Court alter and amend the sentence imposed on May 4, 2017; re-sentence the Defendant without consideration of the improperly

obtained evidence; afford proper weight to the recommendation of the Department of Probation and Parole; and sentence the Defendant consistent with the laws of the State of South Carolina and the United States Constitution.

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May 12, 2017

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY STATE OF SOUTH CAROLINA, Plaintiff, v. DEVAR T. RAVENELL, Defendant.	)	IN THE COURT OF GENERAL SESSIONS FOR THE NINTH JUDICIAL CIRCUIT CASE NO: 4102P0416497 & 4102P0416498 And Probation Violation Hearing Case No. Heard on May 4, 2017 **LEGAL MEMO re:** **MOTION TO ALTER OR AMEND JUDGMENT (SENTENCING)**

Please take notice that the 5th Amendment of the US Constitution and Article 1 Section 12 of the SC Constitution are applicable at sentencing as well as at the guilt phase of a trial. "No person shall be subject for the same offense to be twice put in jeopardy of life or liberty, nor shall any person be compelled in any criminal case to be a witness against himself."

The Fifth Amendment privilege against compelled self-incrimination applies in both the guilt and penalty phase of a capital trial, and a defendant was unfairly prejudiced by the solicitor's comment in closing argument calling attention to defendant's failure to testify. State v. Arther (S.C. 1986) 290 S.C. 291, 350 S.E.2d 187.

This is discussed by the United States Supreme Court in Estelle v Smith 451 U.S. 454, 101 S.Ct. 1866 (1981).

> 1011 The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," *468 Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 1110 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence."11 Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493–1494, 12 L.Ed.2d 653 (1964). We agree with the Court of Appeals that respondent's **1876 Fifth Amendment rights were violated by the admission of Dr. Grigson's testimony at the penalty phase.
>
> 1213 A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness. If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated, *469 but the State must make its case on future dangerousness in some other way.
>
> "Volunteered statements ... are not barred by the Fifth Amendment," but under Miranda v. Arizona, supra, we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not "given freely and voluntarily without any

Exhibit B

compelling influences" and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. Id., at 478, 86 S.Ct., at 1630.

Similar to the case of Estelle v Smith, Devar Ravenell was compelled to testify against himself by direct order of Judge Harrington when she swore him in and demanded that he tell her whether or not he would pass a drug test, and then compelled him under contempt of court powers of the Court to provide a urine sample for a drug test during sentencing where he was not accused of, nor plead guilty to a drug related offense. Mr. Ravenell had plead guilty to the offense of violation of the habitual offender statute and had been ordered to remain out on bond pending the sentencing hearing he was attending, and was in custody of the state at the time of the judicially ordered compulsion that he testify against himself.

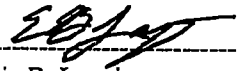
Similar to the case of Estell v Smith, Devar Ravenell did not knowingly waive his right to remain silent or refuse the drug test. He was not advised of his right to remain silent, nor was he advised that he could refuse the test. (5th Amendment Miranda Violation) To the contrary, the Judge ordered the bailiff to seize Mr. Ravenell and escort him to be tested on the spot. When Mr. Ravenell's counsel attempted to question the Judge on what was happening, Judge Harrington instructed him to take a seat and the hearing would continue after Mr. Ravenell had been tested and returned to the Courtroom. The Judge then moved onto the next case on the docket while awaiting test results.

The Fifth Amendment guarantee of due process was violated as well. "No person shall be * * * deprived of life, liberty, or property, without due process of law" *See US Constitutional Amendment V.* The application / motion to revoke probation filed and served by the Department of Probation and Parole the morning of the hearing did not identify use of illegal drugs, failure of a drug test, or any element of drug use as a basis of the revocation or as a consideration as to sentencing for any probation revocation. Neither was there an indictment, nor a plea against the Defendant providing notice that drug use was a basis for, or an element to be considered at the time of, or for the purpose of sentencing.

Finally, the sentencing Judge should not act in an investigatory capacity; ordering the collection of evidence against the Defendant, with or without his consent. A court's power is judicial only, not administrative or investigative. Webster Eisenlohr, Inc. v. Kalodner, C.C.A.3 (Pa.) 1944, 145 F.2d 316, certiorari denied 65 S.Ct. 1404, 325 U.S. 867, 89 L.Ed. 1986. Courts ⚭ 26(1) This section vesting the judicial power in the courts implies the limitation that courts may not exercise legislative or executive powers. U.S. v. Manning, W.D.La.1963, 215 F.Supp. 272. Constitutional Law ⚭ 2470; Constitutional Law ⚭ 2540

In doing so, the sentencing Judge has crossed the line envisioned by the separation of powers; and assumed the duties of the executive branch of government. The sentencing Judge cannot simultaneously serve in both an executive and judicial capacity, as it is overly prejudicial to the Defendant. Due Process requires the Defendant have a fair and impartial Judge. The Judge's actions indicate that the sentencing Judge was not fair and impartial.

Laquiere Law, Inc.



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