

State of New York
Commission on Judicial Conduct

In the Matter of the Proceeding Pursuant to Section 44,
subdivision 4, of the Judiciary Law in Relation to

Determination

LESTER C. HAMEL,

a Justice of the Champlain Town Court,
Clinton County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Helaine M. Barnett, Esq.
E. Garrett Cleary, Esq.
Stephen R. Coffey, Esq.
Mary Ann Crotty
Lawrence S. Goldman, Esq.
Honorable Juanita Bing Newton
Honorable Eugene W. Salisbury
Barry C. Sample
Honorable William C. Thompson

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the
Commission

Niles & Cardany (By John F. Niles) for Respondent

The respondent, Lester C. Hamel, a justice of the Champlain Town Court, Clinton County, was served with a Formal Written Complaint dated September 8, 1994, alleging that he improperly jailed two defendants for failure to pay restitution and that he improperly sentenced to jail defendants charged with marijuana violations. Respondent filed an answer dated October 13, 1994.

By order dated October 24, 1994, the Commission designated the Honorable C. Benn Forsyth as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 28, 1994, and the referee filed his report with the Commission on February 8, 1995.

By motion dated March 31, 1995, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent had engaged in judicial misconduct. Respondent did not file any papers in response thereto.

By determination and order dated July 14, 1995, the Commission made the findings of fact enumerated below. The administrator and respondent then filed memoranda as to sanction. Oral argument was waived.

On August 31, 1995, the Commission considered the record of the proceeding and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Champlain Town Court for more than 30 years. He has also served in the past as a justice of the Champlain Village Court and as acting justice of the Rouses Point Village Court.

2. On September 11, 1989, Dale R. Ashline appeared before respondent on a charge of Unauthorized Use Of A Motor Vehicle. He pleaded guilty, and respondent fined him \$100 plus a \$67 surcharge. Respondent told Mr. Ashline that he would have to pay the complaining witness, Stephen Buskey, restitution for

damages to Mr. Buskey's vehicle. Respondent did not give Mr. Ashline any written record of the restitution obligation. Respondent made no court record of the restitution, contrary to UJCA 2019-a and the Recordkeeping Requirements for Town and Village Courts, 22 NYCRR 200.23.

3. Mr. Ashline's mother, Thelma Garber, paid the fine and surcharge in three installments in October 1989 and received court receipts from respondent.

4. After her son was arraigned, Ms. Garber received an estimate, indicating that Mr. Ashline's restitution was \$271.12.

5. Ms. Garber made four restitution payments to respondent in cash: two payments of \$50 each; a third of \$71.12, and a final payment of \$100 on March 14, 1990. Respondent gave Ms. Garber a handwritten receipt for each payment on a small piece of yellow paper. He made no court record of the receipt of the restitution, contrary to Town Law §31(1)(a) and the Recordkeeping Requirements for Town and Village Courts, 22 NYCRR 200.23(3). He did not deposit the money in his court account, as required by the Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.9(a); he turned the cash over to Mr. Buskey.

6. Subsequently, outside of court, Mr. Buskey told respondent that he had not received any restitution. Based on this claim, respondent issued, on August 30, 1993, a bench warrant for Mr. Ashline's arrest on the purported basis that Mr. Ashline had failed to appear in court on September 25, 1989,

even though respondent's court docket shows that no court appearance was ever scheduled for September 25.

7. Mr. Ashline was arrested on the bench warrant on September 12, 1993, and brought before respondent. Respondent told Mr. Ashline that he had failed to pay the fine and restitution four years earlier and that he was going to jail. Respondent did not advise Mr. Ashline of his right to be resentenced if he could not afford to pay the fine or the restitution, as required by CPL 420.10(3).

8. Mr. Ashline and his mother, who was also present, maintained that the money had been paid. Relying solely on Mr. Buskey's representations, respondent insisted that the money had not been paid and summarily sentenced Mr. Ashline to 15 days in jail for Contempt of Court.

9. Mr. Ashline indicated that he wanted to retain an attorney. Respondent did not offer him an opportunity to make a telephone call or grant an adjournment of the proceeding.

10. Respondent told Mr. Ashline that if he did not pay the restitution, he would face another jail term. Respondent acknowledges that he intended at the time to continue incarcerating Mr. Ashline until the restitution was paid.

11. Ms. Garber returned to her home and found respondent's handwritten receipt for her final restitution payment on March 14, 1990. She called respondent, but he refused to release Mr. Ashline because the receipt had not been marked "paid in full."

12. On September 13, 1993, Ms. Garber and her daughter, Penny Ashline, met with respondent. Ms. Ashline asked whether her brother would be released if she paid his restitution. Respondent refused to do so.

13. After Mr. Ashline was released, he received a letter from respondent, dated September 30, 1993, indicating that he had until October 18, 1993, to pay \$171.12 to Mr. Buskey and that, if he failed to do so, he would again be charged with Contempt of Court.

14. Mr. Ashline retained a lawyer, Timothy J. Lawliss, who, by letter to respondent dated October 6, 1993, demanded an evidentiary hearing with regard to the issue of whether restitution had been paid. Respondent ignored the letter and did not schedule a hearing.

15. By decision dated May 3, 1994, Clinton County Court Judge Patrick R. McGill vacated Mr. Ashline's contempt conviction, finding that the bench warrant for his arrest had been improperly issued and that his commitment had been "entered without a hearing and without giving the defendant an opportunity to obtain counsel...."

As to Charge II of the Formal Written Complaint:

16. On July 30, 1990, Monica Gamache pleaded guilty before respondent to a charge of Speeding. Respondent imposed a \$100 fine and a \$25 surcharge. Ms. Gamache said that she did not have the money and asked whether she could perform community

service. Respondent insisted that she pay the fine. He did not advise Ms. Gamache that she could apply to be resentenced if she could not pay the fine and did not make a determination as to whether she could pay the fine, as required by CPL 420.10(3) and (5).

17. On August 27, 1990, Ms. Gamache appeared before respondent on a charge of Issuing A Bad Check. Respondent did not ask her to plead; he merely informed her that she had to pay restitution of \$52 for a \$40 check, including a bank charge and \$2 for a certified letter ordering her to appear in court.

18. Ms. Gamache again asked whether she could do community service instead; respondent refused. He did not advise her that she could apply to be resentenced if she could not afford to pay the restitution and did not determine whether she was able to pay, as required by CPL 420.10(3) and (5). Respondent permitted Ms. Gamache to make installment payments.

19. Respondent did not tell Ms. Gamache that she had to pay a fine. In his docket, he noted a fine of \$50.

20. Ms. Gamache went to court periodically and reported that she was looking for a job and intended to pay respondent. At one point, respondent became upset that she had not paid. Ms. Gamache then asked for a lawyer; respondent told her that she had already waived that right. He did not ask whether she could afford an attorney.

21. After he had spoken outside of court to Ms. Gamache's father and had been told that the defendant was drinking in bars "every night," respondent, on June 10, 1991, issued a bench warrant for her arrest on the alleged basis that she had failed to appear in court on May 27, 1991, even though his court docket shows no court appearance scheduled for that date.

22. Ms. Gamache was arrested on June 10, 1991, and was brought before respondent. She told respondent that she had just found a job and would be able to pay what she owed by the following Friday, but respondent said that she was going to jail. He summarily sentenced her to 22 days for Contempt Of Court, apparently for failure to pay the fine. He did not advise her that she could apply to be resentenced if she was unable to pay, as required by CPL 420.10(3).

23. Ms. Gamache contacted friends, who raised more than \$200 and took it to respondent. He said that it was "too late" and that Ms. Gamache had to remain in jail.

24. After she was released from jail, Ms. Gamache was notified to appear again before respondent. In court, respondent told her that she still had to pay the Speeding fine and restitution for the bad check. She again said that she did not have the money and asked whether she could perform community service or return to jail instead. Respondent said that he would keep putting her in jail until she paid.

25. Ms. Gamache then began making a series of small payments to respondent. She paid \$20 on July 22, 1991; \$5 on August 12, 1991; \$15 on September 9, 1991, and \$10 on October 7, 1991. Respondent issued receipts which do not indicate to which charge the payments were being applied.

26. Ms. Gamache borrowed money, collected bottles and "went without" in order to make the payments. She repeatedly told respondent that she did not have a job and was supporting children.

27. On February 3, 1992, after obtaining a job and an advance on her salary, Ms. Gamache paid respondent \$167.25, the amount which respondent told her constituted the balance of the money that she owed. Respondent issued a receipt which did not indicate to which charge the money was being applied.

28. On November 15, 1993, respondent advised Ms. Gamache by letter that he had not received the fine on the Speeding charge. She appeared in court on November 29, 1993. Respondent told her that the receipts that he had given her were not for the Speeding fine. She said that she did not have the money and asked for more time. Respondent told her that her driver's license was suspended.

29. On January 10, 1994, Ms. Gamache paid respondent \$125.

30. Respondent did not make any court record of the restitution in connection with the Bad Check charge, as required by UJCA 2019-a and the Recordkeeping Requirements for Town and Village Courts, 22 NYCRR 200.23.

As to Charge III of the Formal Written Complaint:

31. The charge is not sustained and is, therefore, dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a), 100.3(a)(1) and 100.3(a)(4), and Canons 1, 2A, 3A(1) and 3A(4) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Charge III is dismissed.

Because of respondent's inadequate recordkeeping and inattention to proper criminal procedure, two defendants were denied their liberty without due process of law. Respondent's mistakes in connection with these cases were so numerous and so serious as to demonstrate a lack of understanding of his obligations as a judge and to bring into question his fitness for judicial office.

When a judge imposes restitution in connection with a criminal case, he or she must order that it be paid to a designated "official or organization other than the district attorney." (CPL 420.10[1], [8]). A record of the disposition must be kept by the court. (Recordkeeping Requirements for Town and Village Courts, 22 NYCRR 200.23[13]).

If the judge imposes a condition of imprisonment in the event that a fine or restitution is not paid, it must be done in the presence of the defendant, and the judge must advise the defendant that he or she has the right to apply to be resentenced should the defendant be unable to pay. (CPL 420.10[3]).

If the designated collection agency subsequently reports that restitution has not been paid, a judge may order the arrest of a defendant. (CPL 420.10[3]). The defendant must be allowed to apply to be resentenced if unable to pay and, after notice to the collection agency and the victim, the judge must conduct a hearing. If the judge determines that the defendant is, in fact, unable to pay, the judge may adjust the terms of payment, lower the restitution or revoke it. (CPL 420.10[5]).

A judge may not summarily sentence to jail a defendant who does not pay a fine or restitution. "[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the [defendant] willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may...sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the [defendant] could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative methods of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the

court imprison a [defendant] who has made sufficient bona fide efforts to pay. To do otherwise would deprive the [defendant] of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." (Bearden v Georgia, 461 US 660, 672-73; see also, People v Montero, 124 Misc2d 1020 ([App Term, 2d Dept])).

The power of summary contempt for willful failure to pay is not available to the judge as a remedy since such a contempt must be "committed in the immediate view and presence of the court...." (Judiciary Law §751[1]).

A defendant is entitled to representation by counsel at each and every stage of a criminal proceeding (CPL 170.10[3], 180.10[3]; People v Ross, 67 NY2d 321), especially when incarceration is contemplated (see, Scott v Illinois, 440 US 367).

Respondent completely ignored these procedures in Ashline and Gamache in favor of his own summary method of presuming guilt and incarcerating the defendants until they paid amounts that they had had no opportunity to contest and that respondent had no proof was owed. In both cases, he acted on out-of-court, ex parte communications. As a result, Mr. Ashline was sentenced to 15 days in jail and Ms. Gamache to 22 days without hearings, even though Mr. Ashline had protested--correctly-- that he had paid and Ms. Gamache had pleaded that she was unable to pay.

After 30 years on the bench, respondent should have known that he cannot incarcerate defendants based on information that he hears on the street and without offering the defendants the opportunity to contest the accusations. (See, Matter of Earl, 1990 Ann Report of NY Commn on Jud Conduct, at 95, 98).

His conduct is particularly egregious since one of the defendants had actually paid the restitution, a fact which respondent would have known had he kept proper records. In the other case, the defendant had made out a prima facie case that she could not afford to pay but was denied the opportunity to prove it.

Respondent's conduct in this case and in those resulting in two prior censures (Matter of Hamel, 1991 Ann Report of NY Commn on Jud Conduct, at 61; Matter of Hamel, 1992 Ann Report of NY Commn on Jud Conduct, at 49) demonstrates a long pattern of failure to follow the law and further indicates that he is not fit to be a judge (see, Matter of Maney v State Commission on Judicial Conduct, 70 NY2d 27, 31; Matter of Rater v State Commission on Judicial Conduct, 69 NY2d 208, 209).

By reason of the foregoing, the Commission determines that the appropriate sanction is removal.

Mr. Berger, Mr. Cleary, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Newton, Judge Salisbury, Mr. Sample and Judge Thompson concur.

Ms. Barnett was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: November 3, 1995

Henry T. Berger
Henry T. Berger, Esq., Chair
New York State
Commission on Judicial Conduct