

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED

JUN 27 2016

S.C. SUPREME COURT

CHAVIS AIKMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002295

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974), where no notice of appeal was filed because Petitioner was denied counsel, and where the state consented to a belated appeal?

STATEMENT

Petitioner's probation was revoked in full after he requested counsel at a revocation hearing, and was denied counsel.

Petitioner appeared before the Honorable W. Jeffrey Young on October 31, 2014, for a hearing at which Agent Boyd¹ of the South Carolina Department of Probation, Parole, and Pardon Services alleged Petitioner violated the conditions of his probation. App. 1; App. 2, ll. 16-21.

At the start of the hearing, Petitioner asked the court: "Your Honor, may I request an attorney?" App. 3, ll. 5-6. Petitioner said: "I haven't had an opportunity to be able to get one." App. 3, ll. 9-10. "Your Honor, I haven't had the funds for an attorney." App. 4, ll. 10-11.

Petitioner originally received a sentence of ten years' incarceration suspended to five years of probation on November 29, 2011, from the Honorable R. Markley Dennis, for assault and battery in the first degree. App. 52. The victim in the case was the daughter of Petitioner and Lauren Cleary. App. 4, l. 25 – 5, l. 3. Cleary appeared at the probation revocation hearing, and she claimed: "I don't think [Petitioner's] taken [probation] seriously one bit." App. 5, ll. 8-9. Cleary said: "I'm asking for a full revocation." App. 5, l. 23.

The court asked Petitioner: "what would you like to tell me?" App. 6, ll. 8-9. Petitioner again asked for counsel: "Sir, I would ask for some legal representation, Your Honor." App. 6, ll. 10-11. "[Agent] Boyd told me about two weeks ago that I needed to get an attorney and that I could request an attorney at this hearing, Your Honor." App. 6, ll. 15-18.

The court asked the probation agent: "Did [Petitioner] specifically waive legal representation?" App. 7, ll. 7-8. Agent Boyd responded: "No, he hasn't waived it." App. 7, l. 9.

¹ Agent Boyd's first name is unknown. App. 1.

Cleary interjected that Petitioner was represented by the public defender, then private counsel, when his probation was previously revoked on April 25, 2014.² App. 9, ll. 11-15.

The court said: “So you are fully aware that you could have had an attorney.” App. 9, ll. 1-17. “I’m going to move forward with—yes, sir?” Petitioner explained: “Sir, I just haven’t had the money. I’ve just been out of jail a little over a month. I haven’t—” App. 9, ll. 19-23.

Cleary interrupted: “It’s not fair, Your Honor,” and the court said: “I am going to revoke him in full. Thank you. You can get an attorney and appeal within ten days. Have a good day.”³ App. 9, l. 24 – App. 10, l. 5. The court did not announce any legal or factual findings.

Petitioner filed an application for post-conviction relief (PCR) on February 26, 2015, alleging that he requested counsel but his request was denied by the court, and that he was unaware of his right to appeal. App. 12-18. On July 31, 2017, a hearing was held on the matter before the Honorable Michael G. Nettles. App. 24. Rodney Davis represented Petitioner and Judah VanSyckel represented the state.

PCR counsel argued Petitioner was deprived of his due process right to assistance of counsel at the revocation hearing. App. 31, ll. 5-12. PCR counsel pointed out that the denial of counsel denied Petitioner the right to appeal. App. 31, ll. 13-22. “He went from the courtroom to the jail and from the jail to prison, so it’s not as though he was here in the community for the next ten days and had time to go to—” App. 31, ll. 19-22.

The PCR court said: “He wasn’t afforded—really, he had no ability to file an appeal.” App. 37, ll. 9-11. The state consented to Petitioner receiving a belated appeal. App. 39, ll. 19-23.

² Petitioner’s probation was revoked by Judge Dennis on April 25, 2014, for one year with credit for time served. App. 46.

³ Judge Young revoked Petitioner’s suspended sentence and ordered him to serve ten years. App. 47.

The court issued a consent order of dismissal and grant of appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974). App. 42-44. In its order, the PCR court said it “affirmatively finds the Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Court concludes that the Applicant is entitled to a belated review of his convictions.” App. 44.

This petition for writ of certiorari follows.⁴

⁴ Contemporaneously, Petitioner is filing a brief of appellant pursuant to *White v. State*.

ARGUMENT

The PCR court correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974), where no notice of appeal was filed because Petitioner was denied counsel, and where the state consented to a belated appeal.

“The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR judge’s findings.” *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (quoting *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984)); *Rutland v. State*, 415 S.C. 570, 576, 785 S.E.2d 350, 353 (2016).

In South Carolina, “all persons charged with probation violations have a right to counsel and must be informed of this right pursuant to court rules and case law.” *Turner v. State*, 384 S.C. 451, 454, 682 S.E.2d 792, 793 (2009) (citing *Barlet v. State*, 288 S.C. 481, 343 S.E.2d 620 (1986); Rule 602(a), SCACR). A probationer has an “absolute right under state law to appointed counsel.”⁵ *Id.* at 455, 682 S.E.2d at 794. To proceed without counsel at a probation revocation hearing, the court must obtain a valid waiver of the right to counsel from the probationer. *State v. Bryant*, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009); *Salley v. State*, 306 S.C. 213, 216, 410 S.E.2d 921, 922 (1991).

When a client is convicted and sentenced, trial counsel has a duty to make certain the client is fully aware of the right to appeal. *White*, 263 S.C. at 118, 208 S.E.2d at 39. Probation counsel is required to inform a probationer of his right to appeal under the same circumstances that plea counsel is required to inform a client of his right to appeal, i.e., if there is reason to think that a rational defendant would want to appeal, the defendant demonstrated an interest in

⁵ A probationer may also have a federal constitutional right to counsel in a revocation hearing pursuant to the Due Process Clause of the Fifth and Fourteenth Amendments. *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973).

appealing, or other extraordinary circumstances exist. *Turner v. State*, 384 S.C. at 456, 682 S.E.2d at 795; *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000).

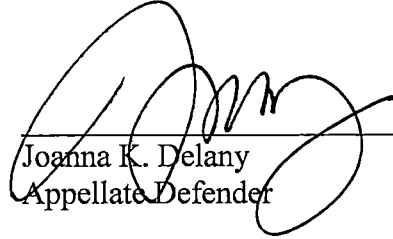
Here, Petitioner had a right to counsel and did not elect to waive his right to counsel. The record unambiguously shows Petitioner asked for a lawyer and did not wish to proceed without one. Petitioner's suspended sentence was imposed in full without an opportunity to respond to the allegations or present mitigation. If Petitioner had been represented by counsel, that counsel would have informed Petitioner of his right to appeal, because a rational defendant would want to appeal under the circumstances of this case where Petitioner was denied his right to counsel.

Because Petitioner was without counsel and immediately incarcerated following his revocation, the PCR court reasonably found that he had no ability to file an appeal. The state consented to Petitioner's receipt of a belated appeal.

This evidence supports the PCR judge's conclusion that Petitioner is entitled to a belated appeal pursuant to *White v. State*, 236 S.C. 110, 108 S.E.2d 35 (1974).

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari, permit full briefing on the issues presented, and consider Petitioner's belated direct appeal.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of June, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

CHAVIS AIKMAN,

PETITIONER

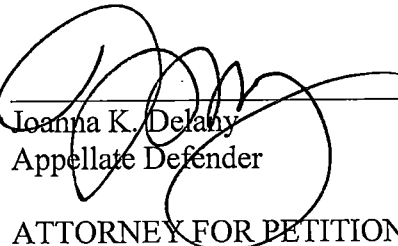
V.

STATE OF SOUTH CAROLINA,

RESPONDENT


CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan H. Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Chavis Aikman, #359767, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 27th day of June, 2018.



Joanna K. Delany
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 27th day of June, 2018. ATTORNEY FOR PETITIONER



(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023