STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

Honorable Michael G. Nettles, Circuit Court Judge

CHAVIS AIKMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002295

BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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2.

Whether the court erred when it revoked Appellant's suspended sentence and ordered him to serve ten years in prison where there was no evidence that he violated the conditions of his probation?

STATEMENT OF THE CASE

Appellant pleaded guilty to assault and battery in the first degree on November 29, 2011, and received a negotiated a sentence of ten years' incarceration suspended to five years of probation from the Honorable R. Markley Dennis. App. 50.

On October 31, 2014, Appellant appeared before the Honorable W. Jeffrey Young on for a hearing at which the South Carolina Department of Probation, Parole, and Pardon Services alleged Appellant violated the conditions of his probation. App. 1; App. 2, ll. 16-21. Appellant requested legal representation, but the judge denied Appellant counsel, revoked his suspended sentence in full, and ordered him to serve ten years in prison. App. 47; App. 3, ll. 5-6.

On February 26, 2015, Appellant filed an application for post-conviction relief (PCR), and on July 31, 2017, a hearing was held before the Honorable Michael G. Nettles. App. 12-18; App. 24. The PCR court found that Appellant did not knowingly and voluntarily waive his right to a direct appeal, and issued a consent order of dismissal and grant of appeal pursuant to *White v. State*.[1] App. 42 – 44.

This brief of Appellant follows.[2]

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1 *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974).

2 Contemporaneously, Appellant is filing a petition for writ of certiorari.

STATEMENT OF FACTS

Appellant appeared in court for a probation violation hearing before the Honorable W. Jeffrey Young on October 31, 2014. App. 1. Agent Boyd[3] of the South Carolina Department of Probation, Parole and Pardon Services alleged Appellant violated the conditions of his probation. App. 1; App. 2, ll. 16-21. Boyd said Appellant "is here for a violation in failing to follow the advice and instructions of the agent; failing to follow the special conditions ordered by the Family Court. [Appellant] was arrested on August 8th, 2014, for violating a Family Court order." App. 2, ll. 16-21.

There is no indication in the record that Boyd was sworn as a witness, and no documentation from the family court was presented to the judge.

At the commencement of the hearing, Appellant asked the court: "Your Honor, may I request an attorney?" App. 3, ll. 5-6. Appellant 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.

The victim in the underlying case was the daughter of Appellant and Lauren Cleary. App. 4, l. 25 – 5, l. 3. Cleary appeared at the probation violation hearing, and she claimed: "I don't think [Appellant's] taken [probation] seriously one bit." App. 5, ll. 8-9. Cleary said: "I'm asking for a full revocation." App. 5, l. 23. Cleary was not sworn as a witness. App. 8, ll. 19-23.

The court asked Appellant: "[W]hat would you like to tell me?" App. 6, ll. 8-9. Appellant said: "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.

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[3] Agent Boyd's first name is unknown. App. 1.

The court asked the probation agent: "Did [Appellant] specifically waive legal representation?" App. 7, ll. 7-8. Agent Boyd responded: "No, he hasn't waived it." App. 7, l. 9. The court said: "Okay. He's never come into court and asked for legal representation. Correct?" App. 7, ll. 10-12. "Ma'am I don't have any choice on that." App. 7, ll. 15-16. "Let's go ahead and—he's to go downstairs right now and apply for [an attorney]. I want you to bring me the receipt back up here. If you don't apply and leave out, then I'm going to have you arrested and revoke you in full. Do you understand that?" App. 7, ll. 20-25.

"I can't revoke him in full without being sure that he's been afforded the chance to—go down there, request it . . ." App. 8, ll. 11-13. Cleary interjected that when Appellant's probation was previously revoked on April 25, 2014, he was represented by the public defender, then private counsel.[4] App. 9, ll. 11-15. The court said: "So you are fully aware that you could have had an attorney." App. 9, ll. 16-17. "I'm going to move forward with—yes, sir?" App. 9, ll. 19-20. Appellant 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. 21-23.

After the court recognized that Appellant was entitled to counsel, Cleary remarked: "It's not fair, Your Honor." App. 9, ll. 24-25. The court then inexplicably declared: "I am going to revoke him in full. Thank you. You can get an attorney and appeal within ten days. Have a good day." App. 10, ll. 2-5. The court ordered Appellant to serve ten years in prison. App. 47. The court did not announce any factual or legal findings.

Appellant filed an application for post-conviction relief (PCR) on February 26, 2015, alleging that he requested counsel but the request was denied by the court, and that he was

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[4] Appellant's probation was revoked by the Honorable R. Markley Dennis on April 25, 2014, for one year with credit for time served. App. 46. The record does not disclose why his probation was revoked at that time.

unaware of his right to appeal. App. 12-18. On July 31, 2017, a hearing was held before the Honorable Michael G. Nettles. App. 24. Rodney Davis represented Appellant and Judah VanSyckel appeared on behalf of the state. App. 24.

PCR counsel argued Appellant was deprived of his due process right to assistance of counsel at the revocation hearing. App. 31, ll. 5-12. PCR counsel maintained that the denial of counsel denied Appellant 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.

Judge Nettles agreed: "He wasn't afforded—really, he had no ability to file an appeal." App. 37, ll. 9-11. The state consented to Appellant receiving a belated appeal. App. 39, ll. 19-23.

The court issued a consent order of dismissal and grant of appeal pursuant to *White v.* State, 263 S.C. 110, 208 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.

ARGUMENT

1.

The court erred when it denied Appellant counsel at a probation revocation hearing where Appellant requested counsel, did not agree to waive his right to counsel, said he had just been released from jail and could not afford counsel, and the court revoked Appellant's suspended sentence and ordered him to serve ten years in prison.

Standard of review

"Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo." *State v. Samuel*, Op. No. 27768 (S.C. Sup. Ct. filed Feb. 28, 2018) (Davis Adv. Sh. No. 9 at 47). "[A]ppellate courts review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 194, 810 S.E.2d 836, 847 (2018). *United States v. Legree*, 205 F.3d 724, 729 (4th Cir. 2000) (review of alleged denial of due process in failing to appoint counsel is de novo).

Discussion

The court violated Appellant's rights under state law and the Due Process Clause when it revoked his probation after disregarding his requests for a lawyer. Appellant had a right to counsel, and the record reflects that he requested counsel, explained he could not afford to retain counsel, and did not waive his right to counsel.

A probation revocation is a serious deprivation of liberty requiring the probationer be afforded due process. *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973). The United States Supreme Court has held that whether a probationer has a right to counsel in a revocation hearing pursuant to the Due Process Clause of the Fifth and Fourteenth Amendments is decided on a case-by-case basis. *Id.* at 790.

> **Presumptively, 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.

Id. at 790-91 (emphasis added). Analyzed under this framework, Appellant was entitled to counsel, as he requested counsel and did not admit guilt.

In additional to a federal constitutional right to counsel, 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.**" *Id.* at 455, 682 S.E.2d at 794 (emphasis added).

In *Turner*, this Court overruled *Huckaby v. State*, 305 S.C. 331, 408 S.E.2d 242 (1991), and held that "a probationer does not have a Sixth Amendment right to counsel. Rather, the right to counsel may arise pursuant to the Due Process Clause under the Fifth and Fourteenth Amendments." *Turner*, 384 S.C. at 454, 682 S.E.2d at 793. "A South Carolina probationer's right to counsel in a probation revocation hearing is grounded in our case law and court rules. A constitutional right to counsel *may* arise pursuant to the Due Process Clause, but cannot arise pursuant to the Sixth Amendment." *Id.* (emphasis in original).

Appellant did not waive his right to counsel. In *Salley v. State*, 306 S.C. 213, 215, 410 S.E.2d 921, 922 (1991), this Court found a probationer did not knowingly and intelligently waive her right to counsel where she "was neither informed of the dangers of self-representation nor desired to proceed without counsel." 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). *See Wroten v. State*, 301 S.C. 293, 294-95, 391 S.E.2d 575, 576-77 (1990) (record must demonstrate waiver of counsel at guilty plea was knowing and intelligent, that self-representation was choice made with eyes wide open).

Appellant asked for an attorney, and explained that he had only recently been released from jail and was unable to afford an attorney. This explanation is supported by the record, as Appellant had his probation revoked once already the same year and was sentenced to jail time by Judge Dennis. The court erred by depriving Appellant of his conditional freedom after denying him counsel and proceeding to revoke his probation.

The denial of counsel violated Appellant's due process rights under state and federal law, leaving him unable to respond to the allegations or hold the state to its burden of showing facts to support the allegation that he violated probation.

2.

The court erred when it revoked Appellant's suspended sentence and ordered him to serve ten years in prison where there was no evidence that he violated the conditions of his probation.

Standard of review

An appellate court's authority to review a decision to revoke probation is confined to correcting errors of law unless the lack of a legal or evidentiary basis indicates the circuit judge's decision was arbitrary and capricious. *State v. Hamilton*, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct. App. 1999).

Discussion

There was no testimony, affidavit, or other documentary evidence introduced at Appellant's probation revocation hearing. The court erred in revoking Appellant's probation absent the receipt of any evidence he had violated the terms of probation.

The trial court must determine whether the state has presented sufficient evidence to establish that a probationer has violated the conditions of his probation. *State v. King*, 221 S.C. 68, 73, 69 S.E.2d 123, 125 (1952). "While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice." *State v. White*, 218 S.C. 130, 136, 61 S.E.2d 754, 756 (1950).

The "authority of the revoking court should always be predicated upon an evidentiary showing of fact tending to establish a violation of the conditions." *Hamilton*, at 648, 511 S.E.2d at 97 (citing *White*, 218 S.C. at 135, 61 S.E.2d at 756; *State v. Miller*, 122 S.C. 468, 475, 115 S.E. 742, 745 (1923)). "[B]efore revoking probation, the circuit judge must determine if there is sufficient evidence to establish that the probationer has violated his probation conditions." *Id.* at

648-49, 511 S.E.2d at 97. The judge must make a finding of "sufficient factual evidence of the violation" to support a probation revocation. *State v. Williamson*, 356 S.C. 507, 510, 589 S.E.2d 787, 788 (Ct. App. 2003).

The appellate courts of South Carolina have found a **sufficient** factual basis to uphold the trial court's revocation where evidence is introduced to support the state's claim in the form of testimony, affidavit, or other documentary evidence. *Williamson*, 356 S.C. at 510, 589 S.E.2d at 788 (sufficient factual basis where probationer arrested for CDVHAN: state introduced the victim's affidavit, her statement that probationer cut her with a knife, and photographs of her injuries); *White*, 218 S.C. at 138-40, 61 S.E.2d at 757-59 (sufficient factual basis where nine members of the constabulary and parole board testified before the court that probationer sold whiskey in gambling den, violating condition that he avoid persons or places of disreputable or harmful nature); *State v. Pauling*, 371 S.C. 435, 436, 639 S.E.2d 680, 681 (Ct. App. 2006) (sufficient evidence supported revocation where arrest warrants and affidavits of police officers and investigators were introduced to show probationer had firearm and committed ABIK).

The appellate courts of South Carolina have found **insufficient** evidence to uphold a probation revocation by the trial court where the court failed to make required factual findings. *State v. Spare*, 374 S.C. 264, 270, 647 S.E.2d 706, 709 (Ct. App. 2007) (revocation for violation based on failure to make payments requires finding probationer has failed to make bona fide effort to pay); *Barlet v. State*, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986) (revocation improper where court made no determination as to why probationer failed to make payments).

A probation revocation is a serious deprivation of liberty requiring the probationer be afforded due process. *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973). A probation revocation hearing may consist of live testimony, or "conventional substitutes for live testimony, including

affidavits, depositions, and documentary evidence." *Id.* at 789. The United States Supreme Court has held that a final revocation decision requires a hearing that "must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee[5] must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." *Morrissey v. Brewer*, 408 U.S. 471, 487-88 (1972). Revocation requires the judge "be reasonably satisfied that a probationer has violated the terms of his release." *United States v. Cates*, 402 F.2d 473, 474 (4th Cir. 1968).

A revocation hearing requires a showing of facts. Without a showing of facts, Appellant's probation revocation did not conform to the requirements of due process. No testimony, affidavit, or other documentary evidence was submitted to the court to support a finding Appellant violated probation. The unsworn remarks of Cleary and Agent Boyd were not testimony.[6]

Appellant submits the court's decision to revoke his probation was arbitrary and capricious, as the state made no evidentiary showing of fact that he violated the terms or conditions of his probation.

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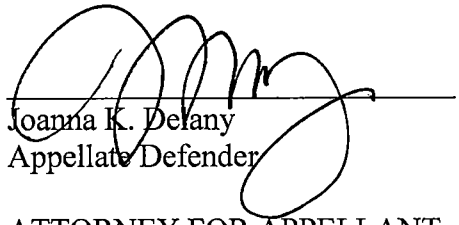
[5] The United States Supreme Court confirmed there is no difference between a parole revocation and a probation revocation relevant to due process analysis where the sentence has been previously imposed. *Gagnon*, at 782.

[6] Rule 603, SCRE provides: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests this Court reverse the decision of the trial court and remand for a new hearing.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of June, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellant pursuant to White v. State and 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 Brief of Appellant pursuant to White v. State and 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
ATTORNEY FOR APPELLANT

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

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