

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Berkley County
W. Jeffrey Young, Circuit Court Judge

DEC 17 2010

S.C. SUPREME COURT

CHAVIS AIKMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA

RESPONDENT

APPELLATE CASE NO. 2017-002295

BRIEF OF RESPONDENT
PURSUANT TO WHITE V. STATE

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INDEX

INDEX.....	i
TABLE OF CASES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	4
1. WHETHER THE PROBATION COURT ABUSED ITS DISCRETION WHEN IT FOUND AIKMAN WAIVED HIS RIGHT TO COUNSEL WHEN AIKMAN HAD A MONTH'S NOTICE TO SECURE COUNSEL, BUT FAILED TO DO SO?.....	4
2. WHETHER THE PROBATION COURT'S DECISION TO REVOKE AIKMAN'S PROBATION IS SUPPORTED BY THE RECORD?.....	6
CONCLUSION.....	8

TABLE OF AUTHORITIES

<i>State v. Brown</i> , 424 S.C. 479, 818 S.E.2d 735 (2018).....	4, 7
<i>State v. Hamilton</i> , 333 S.C. 642, 511 S.E.2d 94 (Ct. Att. 1999).....	7
<i>North Carolina v. Alford</i> , 400 U.S. 25 (1970).....	2
<i>Salley v. State</i> , 306 S.C. 213, 410 S.E.2d 921 (1991).....	4, 5–6
<i>State v. Samuel</i> , 422 S.C. 596, 813 S.E.2d 487 (2018).....	4
<i>White v. State</i> , 263 S.C. 110, 108 S.E.2d 35 (1974).....	3

STATEMENT OF ISSUES

1. Whether the probation court abused its discretion when it found Aikman waived his right to counsel when Aikman had a month's notice to secure counsel, but failed to do so?
2. Whether the probation court's decision to revoke Aikman's probation is supported by the record?

STATEMENT OF THE CASE

Chavis Aikman pled guilty to first degree assault and battery pursuant to *Alford v. North Carolina*,¹ before Judge R. Markley Dennis Jr., on November 29, 2012. (App. 50). Judge Dennis sentenced him to serve ten years imprisonment, suspended on the service of five years' probation, and ordered that he be placed on the Central Registry of Child Abuse and Neglect. (App. 50). Aikman's probation was subject to the following special conditions: he was to pay the applicable fees (\$133.90); attend substance abuse counseling; submit to random drug/alcohol testing; have no contact with the victim; and fully comply with any Family Court Order affecting him. (App. 50). However, Aikman was not required to register as a sex offender. (App. 50). Aikman did not appeal his conviction and sentence.

The record reflects Aikman had three probation revocation hearings. (App. 45–47). This appeal follows Aikman's third probation revocation hearing; wherein, his probation was revoked in full. (App. 47). Aikman's first probation revocation hearing was held on April 18, 2013. (App. 45). The probation court found Aikman violated three conditions—seven, nine, and ten—of his probation. The probation court tolled Aikman's probation fees while he served a Family Court sentence. The probation court further ordered that Aikman be exempt from all future supervision fees and arrearage. (App. 45). Aikman did not appeal.

Aikman's second probation revocation hearing was held on April 25, 2014. (App. 46). The probation court found Aikman violated four conditions—one, seven, nine, and ten—of his probation. (App. 46). The probation court revoked Aikman's suspended sentence and required him to serve one year imprisonment of his original sentence; after the service of one year of the original sentence, Aikman's probationary sentence was to be reinstated. (App. 46). The probation court ordered additional conditions, "Revoke [one year]. Credit for time served since [November,

¹ 400 U.S. 25 (1970).

26, 2013]. Report intensive for four (4) months. Restructure [c]ourt fines.” (App. 46). Aikman did not appeal.

Finally, Aikman’s third probation revocation hearing was held on October 31, 2014. (App. 1, 47). Aikman appeared pro se. (App. 1). The probation court found Aikman violated condition ten and the special condition of his probation. (App. 47). The probation court revoked Aikman’s probation and ordered him to serve the remainder of the sentence. (App. 47). Aikman did not appeal.

Aikman commenced an action for post-conviction relief (PCR) on February 26, 2015. Aikman alleged he was being held in custody unlawfully pursuant to his probation revocation because he was denied counsel in violation of the sixth amendment, and his probation was revoked due to inability to pay a civil fine. (App. 14). An evidentiary hearing on the matter was held on July 31, 2017, before Judge Michael G. Nettles. Aikman was represented at the hearing by appointed counsel. (App. 24).

At the outset of the hearing, the State made a motion to dismiss all claims as being improper for PCR as they could have been raised on direct appeal. (App. 26). PCR counsel argued that Aikman was: denied the right to counsel at his probation revocation hearing;² effectively denied the right to an appeal; and entitled to a belated review pursuant to *White v. State*, 263 S.C. 110, 108 S.E.2d 35 (1974). (App. 27–29). The State subsequently consented to a direct appeal pursuant to *White*. (App. 40). Thereafter, the PCR court issued an order: (1) dismissing Aikman’s current PCR application with prejudice; (2) granting Aikman belated review of his direct appeals issues pursuant to *White*; and (3) that Aikman remain in custody. (App. 44).

² Whether or not Aikman’s claim of being denied the right to counsel is a cognizable PCR claim is not an issue on appeal.

ARGUMENT

The issue before the Court is whether the probation court committed reversible error in finding Aikman waived his right to counsel, and revoking his probation in full. Aikman's revocation should be affirmed.

1. **Whether the probation court abused its discretion when it found Aikman waived his right to counsel when Aikman had a month's notice to secure counsel, but failed to do so?**

Aikman asserts the probation court violated his rights under South Carolina law and the Due Process Clause when it revoked his probation after disregarding his requests for a lawyer. Specifically, Aikman claims he had a right to counsel, requested counsel, could not afford to retain counsel, and did not waive his right to counsel. The State does not dispute Aikman had a right to counsel, requested counsel at the hearing, and claimed he could not afford counsel. However, Aikman waived his right to counsel when he had a month's notice of his third revocation hearing, did not secure a public defender, and did not attempt to retain counsel.

"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*, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018). A trial court's ruling will not be disturbed without an abuse of discretion and probable prejudice. *State v. Brown*, 424 S.C. 479, 489, 818 S.E.2d 735, 739–40 (2018). An abuse of discretion occurs when the trial court's ruling either lacks evidentiary support or is controlled by an error of law. *Id.* at 489, 818 S.E.2d at 740.

"The right to counsel attaches in probation revocation hearings." *Salley v. State*, 306 S.C. 213, 215, 410 S.E.2d 921, 922 (1991). "The trial [court] has the duty to ensure that the defendant makes an intelligent and competent waiver of counsel." *Id.* "However, in the absence of a specific inquiry by the trial judge to determine whether the defendant has made his decision to proceed *pro se* . . . [appellate courts] will look to the record to discern whether there are facts to show the

defendant had sufficient background or was apprised of his rights by some other source so as to constitute a knowing and intelligent waiver of the right to counsel.” *Id.* (internal citations omitted).

The probation court recognized Aikman had a right to counsel at the revocation hearing. (App. 7–8). At the outset of the hearing, the probation court engaged in a colloquy with Aikman, and the prosecuting probation officer. The gist of the initial colloquy was that Aikman requested an attorney, the agent affirmed Aikman had previously been in court for a probation violation, and the agent affirmed that Aikman had been informed he needed to have an attorney present. (App. 2–3). After the initial colloquy, the probation court stated, “All right. You’ve had an opportunity to get an attorney and you didn’t get one. We’re going forward.” (App. 3–4). The probation agent then informed the probation court Aikman “had an administrative hearing . . . which [found] to have him revoked.” (App. 4). Aikman subsequently told the probation court he could not afford to retain an attorney. (App. 4). Aikman stated that he requested a public defender, but could not remember when he requested counsel. Further, Aikman did not have the requisite paperwork documenting his request for counsel. (App. 4). The victim’s mother, Lauren Cleary, was then allowed to address the court. (App. 5–6).

After Cleary addressed the court, Aikman again requested an attorney. (App. 6). The probation court was aware Aikman had not previously waived his right to an attorney. (App. 7). The probation asked Aikman if he was aware he needed to have an attorney present, and Aikman replied, “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). The probation court then ruled to revoke in full. (App. 10).

Aikman’s reliance on *Salley v. State*, is misplaced because *Salley* is distinguishable from the instant case. 306 S.C. 213, 410 S.E.2d 921. In *Salley*, the defendant decided to proceed pro se because the probation officer represented to her that he would try and get her probation vacated.

Salley, 306 at 216, 410 S.E.2d at 922. However, the defendant's probation was revoked. *Id.* at 215, 410 S.E.2d at 922. The Court found the defendant waived her right to counsel not because she wished to proceed pro se, but based on the probation officer's representations. *Id.* at 216, 410 S.E.2d at 922. The Court concluded in *Salley* that the defendant did not knowingly and voluntarily waive her right to counsel; therefore, the Court reversed. *Id.*

Here, as mentioned above, the instant case was Aikman's third probation revocation hearing on the underlying charges. While the probation officer may have told Aikman he could request an attorney at the hearing, Aikman knew he needed an attorney present. Aikman did not rely on the probation officer's alleged representation, as he stated he applied for a public defender. However, Aikman did nothing to follow up on his request for counsel before the hearing. The record shows Aikman did not remember when he filed for a public defender, and did not have documentation evincing his request.

In requiring Aikman to proceed pro se, it can be inferred the probation court found Aikman knowingly and voluntarily waived his right to counsel. Aikman had at least a month's notice he needed an attorney present at the hearing, and provided no documentation showing he made any attempt to secure counsel. The aforementioned evidence supports the probation courts finding that Aikman waived his right to counsel. Aikman waived his right to counsel when he did nothing to find out whether he was appointed an attorney or not. He knew he needed an attorney, and did nothing to secure one. The Court should affirm Aikman's probation revocation.

2. **Whether the probation court's decision to revoke Aikman's probation is supported by the record?**

The second issue before the Court is whether there is any evidence in the record to support the probation court's decision.

Appellate court's review a decision to revoke probation under the abuse of discretion standard. *State v. Hamilton*, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct. Att. 1999). A trial court's ruling will not be disturbed without an abuse of discretion and probable prejudice. *State v. Brown*, 424 S.C. 479, 489, 818 S.E.2d 735, 739–40 (2018). An abuse of discretion occurs when the trial court's ruling either lacks evidentiary support or is controlled by an error of law. *Id.* at 489, 818 S.E.2d at 740.

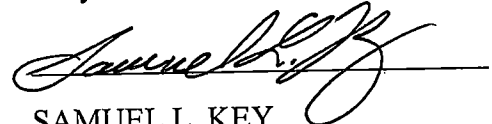
Aikman asserts there is no testimony, affidavit, or other documentary evidence introduced at his probation revocation hearing. While there was no sworn testimony at the revocation hearing, as mentioned above, Aikman, Cleary, and the probation officer engaged in a colloquy with the court. The colloquy established the instant case was Aikman's third probation revocation hearing on these charges, and he failed to follow the special condition of his probation—he violated a Family Court Order. The probation officer informed the probation court that Aikman violated a Family Court Order and was arrested on August 8, 2014. (App. 2). Aikman confirmed he violated the Family Court Order when he stated that he had only been out of jail for a month. (App. 9). Further, the probation officer gave the probation court a document stating Aikman previously had an administrative hearing on September 2, 2014, and the administrative panel's recommendation was to revoke probation. (App. 4). This evidence in the record supports the probation court's decision to revoke Aikman's probation; therefore, the probation court did not abuse its discretion.

The probation court's decision is supported by the record. Aikman's probation revocation should be affirmed.

CONCLUSION

The probation court did not abuse its discretion in finding Aikman waived his right to counsel when Aikman knew he need to secure counsel a month prior to the hearing, but failed to do so. The record supports the probation court's decision to revoke Aikman's probation; therefore, Aikman's revocation should be affirmed.

Respectfully submitted,



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CERTIORARI TO BERKELEY COUNTY
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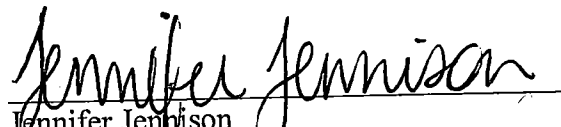
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent Pursuant to White v. State** has been served upon the applicant by sending two copies via interagency mail, addressed to:

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This 17th day of December, 2018.


Jennifer Jennison
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