Circuit Court for Dorchester County
Case No. C-09-CR-18-000266

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 102

September Term, 2021

ANTHONY D. HARRIS, JR.

v.

STATE OF MARYLAND

Kehoe,
Ripken,
Alpert, Paul E.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, Paul E., J.

Filed: December 22, 2021

* This is an unreported opinion, and it may not be cited in any paper, brief, motion or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On March 18, 2019, the appellant, Anthony D. Harris, Jr., pled guilty in the Circuit Court for Dorchester County to possession of at least ten grams of marijuana and possession of a firearm by a minor.[1] The court sentenced him to five years' incarceration, with all but one year suspended (less 156 days for time served), to be followed by three years' supervised probation.

After his release, and while on probation, Harris was again arrested and charged in the District Court for Dorchester County with possession of marijuana and possession of a controlled dangerous substance ("CDS") other than marijuana. Although he was ultimately acquitted of those charges, the State petitioned to revoke Harris's probation. At a probation violation hearing held on September 11, 2020, the court found that Harris had violated Rule 4 of his probation (which required him to obey all laws), revoked his probation, and ordered him to serve four years' incarceration, with all but 30 days suspended (to be served on weekends), and three years' post-release probation.[2]

Harris filed an application for leave to appeal, which we granted on March 29, 2021. He presents two questions for our review, which we quote:

1. Did the court err in finding that Mr. Harris waived his right to counsel?
2. Did the court err in finding that Mr. Harris violated probation?

[1] We take judicial notice of the docket entries in the underlying criminal cases pursuant to Maryland Rule 5-201, as they are available on the Maryland Judiciary website. *See Lewis v. State*, 229 Md. App. 86, 90 n.1 (2016), *aff'd*, 452 Md. 663 (2017) ("We take judicial notice of the docket entries … found on the Maryland Judiciary CaseSearch website, pursuant to Maryland Rule 5–201." (citation omitted)).

[2] The court also ordered Harris to write both an "apology letter" to his arresting officer, Corporal Garvey and "an essay on how traffic stops save lives."

We answer these questions in the negative and shall therefore affirm the judgment of the circuit court.

BACKGROUND

On December 4, 2019, Corporal Garvey, a nine-year veteran of the Hurlock Police Department, was on routine patrol in the area of Route 392 and Minor Road. As he turned onto Minor Road, Corporal Garvey observed a silver automobile approach a stop sign. Corporal Garvey made eye contact with the driver and sole occupant of that vehicle, whom he recognized as Harris. Upon running a driver's license and warrant check, he learned that Harris's driving privileges were suspended.

Corporal Garvey conducted a traffic stop of Harris, whereupon he smelled the strong scent of marijuana emanating from inside his vehicle. He advised Harris that his driver's license had been suspended, requested his license and registration, and called dispatch, requesting that additional units respond to the scene. When backup had arrived, Harris was asked to exit the vehicle. Aware that he usually carried a weapon, Corporal Garvey conducted a pat-down of Harris's person. During that search, Corporal Garvey detected a large bulge in Harris's left jacket pocket, which, based on his training, knowledge, and experience as a police officer, he believed to be marijuana. Harris admitted as much, identifying the bulge as a "smoke bag" and confessing that he smoked marijuana. After that admission, Corporal Garvey removed the bulge from Harris's jacket pocket. At the ensuing probation revocation hearing, Corporal Garvey testified that, based on his training,

knowledge, and experience, he believed that the bag that he had removed from Harris's jacket pocket contained marijuana.

During the searches of Harris's person and vehicle, the police discovered another bag containing fewer than ten grams of suspected marijuana, as well as a scale and a glassine bag containing suspected cocaine residue. In accordance with the Hurlock Police Department's policy to refrain from sending small amounts of suspected marijuana to the Maryland State Police Crime Lab, Corporal Garvey averred that as far as he knew the suspected marijuana had not been submitted for chemical analysis. The white powdery residue contained in the glassine bag, however, was chemically analyzed and confirmed to contain trace amounts of cocaine.

We will include additional facts as necessary to our resolution of the issues.

DISCUSSION

I.

Harris contends that the circuit court failed to strictly comply with Maryland Rule 4-215(a)'s requirement that it "[a]dvise [him] of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any." Md. Rule 4-215(a)(3). Alternatively, Harris challenges the court's finding that he waived the right to counsel by inaction, claiming that the record does not reflect its having considered his facially meritorious reasons for appearing without counsel.

As to Harris's first contention, the State counters that Rule 4-215(a)(3) is inapplicable because a petition for revocation of probation does not constitute a "charging

document." Accordingly, the State argues that the Rule did not require that the court advise Harris of the nature of the charges and the possible penalties corresponding thereto. Even if Rule 4-215(a)(3) were applicable to probation revocation proceedings, the State maintains that the circuit court adequately advised Harris of the nature of the charges and the maximum permissible penalties at his initial appearance. Responding to Harris's alternative argument, the State asserts that the court properly exercised its discretion in finding that he had waived his right to counsel by inaction.

Pertinent Procedural History

The Initial Appearance

At his initial appearance on August 6, 2020, the circuit court advised Harris of the nature of his March 2019 convictions and the permissible penalties corresponding thereto, stating:

> [Y]ou were put on probation, it looks like on March 18, 2019. You were convicted of CDS possession of marijuana over ten grams, possession of firearm by a minor. So on the possession of marijuana you got a sentence of six months. And on the possession of firearm it looks like you got five years. They suspended all but one year, they made the marijuana concurrent.
>
> So it looks like four years hanging over your head in this case.

The court then turned to the conditions of Harris's probation and the maximum penalty that he faced should it find that he violated the conditions thereof.

> One of the standard conditions of probation requires that you obey all laws. And the allegation we have, we got a report on June 19th alleging a violation of probation, and it was rule four, which requires you to obey all laws. And it's alleged you were charged with CDS possession of marijuana over ten grams and possession of non-marijuana, which could be a narcotic

> or something. These are two simple possession charges, but they would trigger a violation of probation.
>
> If convicted on the new charges you could receive the balance of your sentence … of four years, and it could be in addition to any sentence you get in the other case, the new case.
>
> You are also alleged to have violated condition eight, which requires you to not illegally possess, use, or sell any narcotic drug, controlled substance, or counterfeit substance, or paraphernalia. Obviously, if you're convicted of possessing the drugs, that would also be a violation of condition eight.

The court proceeded to advise Harris of his right to counsel at the impending violation of probation hearing. While acknowledging that he had retained private counsel to defend against the recent charges which had triggered the probation violation proceeding, the court stressed that such representation did not extend to the probation proceeding itself, in which an attorney had not entered an appearance on Harris's behalf. It subsequently underscored the importance of Harris's timely securing of legal representation and the potential ramifications of his failure to do so.

> [THE COURT:] Now, you do have a right to be represented by an attorney in these proceedings. Just because you're represented in the new case, in the new charges, you still have to apply for the VOP case, if it's the Public Defender, or you would have to make sure your private attorney knows that there is something else down the pike, okay?
>
> So don't think, just because you're represented over in [d]istrict [court] you're represented here. You've got to make sure you're represented in both.
>
> So you have the right to have an attorney represent you. An attorney can advise you of any defenses you may have. The attorney would help prepare you for trial, represent you at trial. Even if you wanted to enter a plea, the attorney could assist you in negotiating [that] plea and bring[]

matters to the [c]ourt's attention that could affect your sentence or other disposition.

Now, if you want an attorney it's your obligation to hire an attorney. Do that as soon as possible, preferably within the next 15 days. If you're financially unable to hire a private attorney, you should apply to the Public Defender.

Because this is a violation of probation [proceeding], you can apply directly to the Public Defender[.] [Y]ou don't have to go through that court commissioner process. The Public Defender is located over in the [d]istrict [c]ourt building, okay?

THE DEFENDANT: Okay.

THE COURT: Now, they need at least ten business days advance notice before they can commit to appear with you in court. So make sure you don't wait, if that's what you're going to do, do it as soon as possible.

Now, if the Public Defender refuses to provide you with representation, what I need you to do is write a letter to the clerk of this court[.] . . . [S]he will then give the file to me and I'll look at other ways to obtain counsel for you.

If an attorney does not enter their appearance within the next 15 days, any time after that the [c]ourt could enter a plea of not guilty on your behalf, we could schedule the case for trial, and then if you appear for trial without an attorney we could find you waived your right to have an attorney by neglecting or refusing to hire a private attorney or by failing to timely apply to the Public Defender, and in such event most likely the case would proceed even though you didn't have an attorney.

Do you understand all that?

THE DEFENDANT: Yes, sir.

THE COURT: What do you think you're going to do about an attorney in the VOP?

THE DEFENDANT: I'm gonna look for an attorney --

THE COURT: Okay.

> THE DEFENDANT: -- and try to have them, yeah, to be present.
>
> THE COURT: Now, who do you have over there?
>
> THE DEFENDANT: Right now I have [defense counsel] as my attorney.[3]
>
> THE COURT: Okay, all right, so just make sure that you get yourself an attorney who signs up for this. The two things to some extent might work together, but you've got to, there is no attorney that has entered their appearance in this case, obviously. Okay?
>
> THE DEFENDANT: Okay.

Satisfied that Harris both sufficiently understood and adequately appreciated the critical importance of expeditiously retaining counsel for purposes of the probation revocation hearing, the court advised him of the date on which that hearing would be held.

> THE COURT: … So you were sentenced by Judge Maciarello. I'm going to schedule your VOP in front of him, because that's the way it typically works. It's going to be September 11th. It's not hard to remember 9/11. And we'll see where it goes from there.
>
> * * *
>
> THE COURT: Okay? I'm going to get you to sign some paperwork. Now, look, we're giving you an order to appear on September 11th, that's the only notice you're going to get about when to be back here. So make sure that you, you know, I tell people put the date in their phone, stick it on the refrigerator, mirror, something where you see it every day, okay?

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[3] Harris was here referring to the attorney that he had hired to defend him in the pending district court criminal case. As we shall discuss in greater detail *infra*, that attorney did not represent Harris in the probation revocation proceedings. Accordingly, our forthcoming references to "defense counsel" pertain exclusively to the attorney that Harris had hired to defend him against the criminal charges arising from his December 4th arrest—and not to an attorney whose services he retained for purposes of the probation violation proceeding.

> THE DEFENDANT: Yes, sir.
>
> THE COURT: I don't want you to not be here when you're supposed to.

Once the hearing had been scheduled, the State reemphasized the benefit of legal representation, the importance of which the court echoed and Harris acknowledged.

> [THE STATE]: And, Your Honor, I'm just going to state for Mr. Harris'[s] benefit, that regardless of the outcome of the [d]istrict [c]ourt case the State may be trying this as a rule four, so it would definitely benefit him to have an attorney.
>
> THE COURT: Yeah, so what the [Assistant] State's Attorney is saying to you is, the rule four requirement is to obey all laws, it doesn't say to not get any convictions. So, for instance, even if you were successful over there, they could have a, sort of mini trial on whether you possessed drugs or not over here in this case. And there is no right to a jury trial for VOP's, and the burden of proof is lower, preponderance of the evidence, which is just a little more than half, it's not beyond a reasonable doubt.
>
> So the case could come over here, you could have, you could be exposed even if your trial doesn't result in conviction, okay?
>
> THE DEFENDANT: Okay.
>
> THE COURT: So … she wants you to know to get an attorney because it's important.
>
> THE DEFENDANT: Okay, thank you.

The Probation Revocation Hearing

The September 11th probation revocation hearing commenced with the State expressing its strenuous opposition to a postponement of the proceedings:

> Your Honor, we are here for a violation of probation where … the two allegations against the [d]efendant are a rule 4 and a rule 8. I will indicate for the [c]ourt that when Mr. Harris was here on August 6, 2020, for his initial appearance, I stated on the record that day that, regardless of the outcome of

> the rule 4 matter in [d]istrict [c]ourt, the State was prepared to proceed as a rule 4 violation at the VOP hearing.
>
> I also let Mr. Harris and his counsel know when his rule 4 in [d]istrict [c]ourt was postponed on August 12th, that I still intended to proceed on today's date with the violation of probation as a rule 4 violation.
>
> So the State is prepared to proceed here today. I would object to any postponement request by [d]efendant for failure to obtain counsel at this time.

When asked whether he was prepared to proceed, Harris informed the court that the attorney whom he had hired to represent him before the district court was unavailable that day. The State, in turn, told the court that, during a conversation with that attorney, she indicated that Harris had neglected to tender payment for her representation in the probation violation case and had stated that if Harris did not retain her services in that case by September 1st, she would not enter her appearance therein. The State further averred that, according to defense counsel, she had attempted to contact Harris to address these issues but was unable to do so.

> [THE STATE]: Your Honor, I'll also indicate, I spoke with [defense counsel] as of last week --
>
> THE COURT: Okay.
>
> [THE STATE]: -- [Defense counsel and] I had spoken about this case, I had asked if she was going to enter her appearance on the violation of probation, because she is his counsel on the [d]istrict [c]ourt matter, she indicated to me she had not received payment for this case.
>
> She spoke with me, and told me that she was going to be placing a deadline for Mr. Harris to retain her by September 1st or else she would not be entering her appearance for the September 11th case.

> My last e-mail with [defense counsel] indicated that she had been trying to get in touch with Mr. Harris, was unable to do so, and that she had not entered her appearance.

Although Harris tacitly conceded that he had neither paid defense counsel to represent him in the instant matter nor had met the September 1st deadline for retaining her services, he denied that she had attempted to contact him, claiming: "she ha[s] not tried to get in touch with me."

According to Harris, defense counsel and he last spoke a couple of days after his August 12th appearance before the district court. At that time, Harris claimed, his attorney (in the district court case) indicated that she would be present at his probation revocation hearing but stated that she would be unable to attend the hearing scheduled for September 11th. According to Harris, this apparent inconsistency was resolved by assurances from both his attorney and his probation agent, according to which the hearing date would be postponed. On September 10th, however, Harris's probation agent advised him that the hearing would proceed as scheduled.

The State responded to Harris's claims by reading from an e-mail that it had received from defense counsel on September 1st—the date of the deadline for Harris's retaining her representation—in which she wrote: "I have been unable to reach Mr. Harris since we spoke last week. I have no update. I was also not able to advise him of the State's position regarding opposing a postponement of the VOP." Once again, Harris denied that defense counsel had attempted to contact him, saying: "She has my number and I haven't got a

missed call from her." Reminding Harris of the advisements he had received at his initial appearance, the court replied:

> Well, here's the thing, sir, you were advised on August the 6th, 2020, … to either hire a lawyer and have that lawyer enter an appearance within 15 days or make application to the Public Defender's Office. And if the Public Defender denied you … were advised to, in writing, let the [c]ourt know if the Public Defender denied you so that the [c]ourt could determine if it should appoint a lawyer pursuant to Maryland law.
>
> * * *
>
> [Y]ou were also advised that if you appeared for trial without a lawyer, the [c]ourt could determine that you had waived your right to have a lawyer by neglecting or refusing to retain a lawyer or to make timely application to the Public Defender's Office.

Prior to ruling on whether Harris had waived his right to counsel, the court asked if there was anything he wished to add. Harris answered, "I'm not really waiving because … I want [defense counsel] to be here to represent me." Notwithstanding Harris's repeated claims that his *pro se* appearance was the result of a "miscommunication" with defense counsel, the court found that he had waived his right to counsel through inaction, ruling:

> [W]hat I'm dealing with here is what the record shows. And the record shows that you were advised of your right to an attorney. You were explained, not only orally, but in writing on what to do. [Defense counsel] did not enter her appearance. She's not here today. The State is ready and prepared and has two witnesses here in the courtroom. So, any request to continue is denied.
>
> I find that the [d]efendant has waived his right to have a lawyer present with him by neglecting or refusing to hire a lawyer and neglecting and refusing to go to the Public Defender's Office and apply for a lawyer, so we need to proceed now.

During the hearing, Harris neither requested a continuance, nor otherwise indicated a desire for additional time during which either to secure funds with which to compensate defense counsel or to seek representation from the Office of the Public Defender ("OPD").

Maryland Rule 4-215(a)

"[A] defendant in a revocation of probation proceeding is not entitled to the full panoply of rights accorded a criminal defendant[.]" *Conner v. State*, 472 Md. 722, 737 (2021) (internal quotation marks and citations omitted). A probationer does, however, enjoy "the right to assistance of counsel at his [or her] revocation hearing, and the requirements as to waiver are the same as those of a criminal defendant." *State v. Dopkowski*, 325 Md. 671, 680 (1992). The Court of Appeals adopted Maryland Rule 4-215 as a prophylactic measure to safeguard that right and to ensure that the waiver thereof is made knowingly and voluntarily. *See Pinkney v. State*, 427 Md. 77, 92 (2012) ("Maryland Rule 4-215 was drafted and implemented to protect … the right to the assistance of counsel[.]").

Maryland Rule 4-215(a) governs the procedures that a court must observe prior to finding that a criminal defendant has waived his or her right to counsel and provides, in pertinent part:

> **(a) First Appearance in Court Without Counsel.** At the defendant's first appearance in court without counsel, or when the defendant appears in the District Court without counsel, demands a jury trial, and the record does not disclose prior compliance with this section by a judge, the court shall:

*   *   *

> (3) Advise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any.

Although probation revocation cases are civil proceedings, the provisions of Rule 4-215 are nevertheless generally applicable thereto. *See* Md. Rule 4-347(d) ("The provisions of Rule 4-215 apply to proceedings for revocation of probation."). In *Dopkowski v. State*, 87 Md. App. 466 (1991), *rev'd on other grounds*, 325 Md. 671 (1992), however, this Court recognized a caveat to that rule. Dopkowski appealed from the revocation of his probation, arguing, *inter alia*, that the court failed to comply with Rule 4-215(a)(3)'s requirement that it "[a]dvise the defendant of the nature of the charges *in the charging document*, and the allowable penalties[.]"[4] *Id.* at 470 (emphasis added; quotation marks omitted). We determined that the validity of Dopkowski's waiver turned on "whether a petition for revocation, court order and violation warrant under Rule 4-347 constitute charging documents."[5] *Id.* If so, the court was required to comply with Rule 4-215(a)(3), and its

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[4] Dopkowski also contended that the court violated Rule 4-215(a)(1)'s requirement that it "[m]ake certain that the defendant [had] received a copy of the *charging document* containing notice as to the right to counsel." *Id.* at 470 (quotation marks omitted; emphasis added).

[5] Maryland Rule 4-347 governs probation revocation proceedings, and provides, in part:

> **(a) How Initiated.** Proceedings for revocation of probation shall be initiated by an order directing the issuance of a summons or warrant. The order may be issued by the court on its own initiative or on a verified petition of the State's Attorney or the Division of Parole and Probation. The petition, or order if issued on the court's initiative, shall state each condition of probation that the defendant is charged with having violated and the nature of the violation.

failure to do so would have invalidated Dopkowski's waiver. Distinguishing between probation revocation petitions and "charging documents," we explained that because the former "do not necessarily allege an offense[,]" and instead "merely state the reason the revocation is sought[,] . . . they are not charging documents as defined in the Rules." *Id.* at 471. We further reasoned that "probation revocation is not a 'new criminal prosecution; the commission of a crime is not charged and the alleged violation of probation, if established, is not punishable beyond the reimposition of the original sentence imposed.'" *Id.* (quoting *Howlett v. State*, 295 Md. 419, 424 (1983)). Finally, we explained that charging documents are "squarely within" criminal cases, while probation revocation hearings are civil proceedings. *Id.* at 472. Accordingly, we held that "th[ose] portion[s] of Rule 4-215 which appl[y] to charging documents simply do[] not apply to probation revocation proceedings." *Id.* at 471. Given that the requirements of Rule 4-215(a)(3) pertain exclusively to proceedings initiated by "charging documents," we concluded that they are inapplicable to probation violation proceedings, and that Dopkowski's waiver of counsel was therefore valid.

The State sought review of our decision on different grounds by writ of *certiorari*. Dopkowski, in turn, requested by way of cross-petition that the Court of Appeals examine the effectiveness of his waiver of the right to counsel. Although the Court granted the State *certiorari*, it denied Dopkowski's cross-petition, thereby declining to review the holding at issue.

Our holding in *Dopkowski* is on "all fours" with the instant appeal and is therefore dispositive of our resolution of this issue. Consistent with our holding in *Dopkowski* and in accordance with the doctrine of *stare decisis*, we hold that the circuit court in this case was not obligated to comply with the requirements of Rule 4-215(a)(3). *See Sabisch v. Moyer*, 466 Md. 327, 372 n.11 (2019) ("[A] court must follow earlier judicial decisions when the same points arise again in litigation." (quotation marks and citation omitted)); *DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 69 (2010) ("Merely arguing that the majority was wrong ... is not sufficient grounds to abrogate the principles of *stare decisis*.").

An *Arguendo* Alternative

Even if, *arguendo*, Rule 4-215(a)(3) applies to probation revocation proceedings, we would hold that the court strictly complied with the requirements thereof. *See Pinkney*, 427 Md. at 87 ("[T]he mandates of Rule 4-215 require strict compliance.").

Harris concedes that the court properly advised him of both the nature of his alleged probation violations and the permissible penalties for violating Rule 4, the condition of his probation requiring that he obey all laws. He complains, however, that "the court failed to advise [him] of the possible penalties for the Rule 8 violation," the condition prohibiting him from illegally possessing, using, or selling "any narcotic drug, controlled substance, counterfeit substance, or related paraphernalia." The failure to abstain from illegal CDS, Harris claims, is a technical violation, and, as such, is subject to a presumptive 15-day limit

on the duration of incarceration for the first offense. *See* Md. Code (2001, 2018 Repl. Vol.), § 6-223(d) of the Criminal Procedure Article ("CP").[6]

Assuming, without deciding, that Harris's alleged Rule 8 violation was "technical" in nature, we would nevertheless hold that the court's advisements satisfied Rule 4-215's mandate that it "[a]dvise the defendant of the … allowable penalties" with which he was faced. Md. Rule 4-215(a)(3). The presumption established by CP § 6-223(d) may be rebutted if, upon considering the following factors, the court finds and states on the record "that adhering to the limits on the period of incarceration" under CP § 6-223(d)(2) "would create a risk to public safety, a victim, or a witness:"

(i) the nature of the probation violation;

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[6] Md. Code (1999, 2017 Repl. Vol.), § 6-101(q) of the Correctional Services Article defines a "technical violation" as follows:

> a violation of a condition of probation ... that does not involve: (1) an arrest or a summons issued by a commissioner on a statement of charges filed by a law enforcement officer; (2) a violation of a criminal prohibition other than a minor traffic offense; (3) a violation of a no-contact or stay-away order; or (4) absconding.

CP § 6-223(d), in turn, prescribes the following presumptive limits of incarceration for technical probation violations:

> 1. not more than 15 days for a first technical violation;
>
> 2. not more than 30 days for a second technical violation; and
>
> 3. not more than 45 days for a third technical violation[.]

Upon finding that a probationer has committed "a fourth or subsequent technical violation or a violation that is not a technical violation," CP § 6-223(d)(2)(ii) authorizes the court to "impose any sentence that might have originally been imposed for the crime of which the probationer or defendant was convicted or pleaded *nolo contendere*."

(ii) the facts and circumstances of the crime for which the probationer or defendant was convicted; and

(iii) the probationer's or defendant's history.

CP § 6-223(e)(2). *See also Johnson v. State*, 247 Md. App. 170, 184-85 (2020). Should it make such an on-the-record finding, the court "'may impose a period of incarceration that exceeds those contained in the presumptive limits[.]'" *Id.* at 185 (quoting *Conaway v. State*, 464 Md. 505, 521 (2019)).

When advising Harris of the permissible penalties that he faced for having allegedly violated his probation, the court had not yet had occasion to consider the factors enumerated in CP § 6-223(e)(2), and was therefore unable to determine whether the presumptive 15 days' incarceration would give way to the then suspended "four years hanging over [Harris's] head[.]" Absent that finding, the court properly complied with Rule 4-215's mandate that it advise Harris of the *maximum* potential sentence he faced for that violation. *See Broadwater v. State*, 171 Md. App. 297, 310 (2006) ("Because the purpose of the advisement is to impress upon the defendant the importance of the assistance of counsel, we believe that advising the defendant of the maximum penalty she was facing satisfied requirement # 3."), *aff'd*, 401 Md. 175 (2007).

Waiver by Inaction

Harris also asserts that the court abused its discretion by finding that he had waived his right to counsel by inaction, arguing that "there is no basis, on this record, for a determination that [he] neglected or refused to obtain counsel." (Quotation marks and

citation omitted.) The State counters that the court could have reasonably rejected Harris's claim that his *pro se* appearance was the result of a miscommunication based on the State's "uncontradicted representation that defense counsel said that Harris had not paid her, and that she had given him a September 1st deadline to retain her for the September 11th hearing."

"We review a trial court's finding of waiver under Rule 4-215(d) only for an abuse of discretion." *Grant v. State*, 414 Md. 483, 491 (2010). A trial court abuses its discretion "where no reasonable person would take the view adopted by the [trial] court[.]" *Metheny v. State*, 359 Md. 576, 604 (2000) (quotation marks, citation, and emphasis omitted).

Maryland Rule 4-215(d) governs waiver of the right to counsel by inaction in the circuit court, and provides:

> **Waiver by Inaction—Circuit Court.** If a defendant appears in circuit court without counsel on the date set for hearing or trial, [and] indicates a desire to have counsel ... the court shall permit the defendant to explain the appearance without counsel. If the court finds that there is a meritorious reason for the defendant's appearance without counsel, the court shall continue the action to a later time and advise the defendant that if counsel does not enter an appearance by that time, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds that there is no meritorious reason for the defendant's appearance without counsel, the court may determine that the defendant has waived counsel by failing or refusing to obtain counsel and may proceed with the hearing or trial.

Although "there is no prescribed or set form of inquiry that must precede a trial judge's finding of waiver," *Grant*, 414 Md. at 490 (quotation marks omitted), when evaluating the merit of defendants' purported reasons for appearing without counsel, the court's inquiry:

> (1) must be sufficient to permit it to exercise its discretion ... (2) must not ignore information relevant to whether the defendant's inaction constitutes

> waiver ... and (3) must reflect that the court actually considered the defendant's reasons for appearing without counsel before making a decision.

Id. at 491 (citations omitted).

Analysis

Harris asserts that "[t]he record of the court's actions does not reflect that it actually considered [his] reasons for appearing without an attorney, but rather demonstrates that it totally ignore[d] information relevant to whether [he] waived his right to counsel by inaction." (Internal quotation marks and citation omitted.) We disagree.

This Court's opinion in *Webb v. State*, 144 Md. App. 729 (2002), is instructive to the resolution of this issue. During the waiver inquiry in that case, Webb volunteered that he was unrepresented at trial because he lacked sufficient funds to retain private counsel and had failed to timely contact the OPD. Without further inquiry, the court found that Webb had waived his right to counsel, ruling: "Well you had plenty of advanced notice from March 14th to either hire a lawyer or get to the Public Defender on time. So you know what happens now. You go to trial without a lawyer." *Id.* at 738. On appeal, Webb claimed, *inter alia*, that the court had abused its discretion by "fail[ing] to properly consider appellant's reason for appearing without counsel and failed to make findings as to whether his reason was meritorious." *Id.* at 740. Although we reversed the circuit court's judgment, holding that it had not strictly complied with the advisements mandated by Rule 4-215(a), we found that the waiver inquiry had been adequate, reasoning:

> He did not indicate that he was unaware of the time requirements to contact the Public Defender's office and that he did not contact the office because he thought he could obtain the money necessary to hire an attorney, as in *Gray*

> *v. State*, 338 Md. 106, 112-13, 656 A.2d 766 (1995), or that he had recently obtained employment, as in *Moore v. State*, 331 Md. 179, 186, 626 A.2d 968 (1993). In those cases, the Court of Appeals held the trial court should have further developed the reasons before deciding whether they were meritorious. In the case before us, appellant offered no information that required follow up, such as a change in his financial situation or lack of knowledge. The court, after listening to the explanation, implicitly found the reason was non-meritorious.

Id. at 747 (some citations omitted).

As in *Webb*, we are persuaded that further inquiry by the court was unnecessary in this case. During the waiver inquiry, neither party suggested that there had been a recent change to Harris's employment status or that he was unaware of the deadline by which he was required to retain counsel. Harris does not, moreover, proffer a single question that the court should have posed, much less what relevant information such a question might have elicited.

Relying on the Court of Appeals's opinion in *Gray*, *supra*, Harris also asserts that "the reasons [he] gave for not having counsel were meritorious." When Gray appeared at his arraignment *pro se*, the court advised him of his right to counsel and directed him to consult the OPD that same day. When he subsequently appeared at trial without an attorney, Gray explained that when he had gone to the OPD more than two months after his arraignment, he learned that he had missed the deadline, the existence of which he had previously been unaware. The court then inquired as to the reason for the delay. Gray answered that he had thought that he would be able to muster sufficient funds to afford private counsel and explained that he had been negotiating with such an attorney. Without

further inquiry, the court found that Gray's reasons for appearing without counsel were unmeritorious and required that he proceed *pro se*. *Gray*, 338 Md. at 108-10.

The Court of Appeals reversed Gray's ensuing convictions, holding that, although his explanation for appearing without counsel was facially meritorious, "the record d[id] not reflect that the court 'actually considered' the reasons offered[.]" *Id.* at 114 (citation omitted). The Court reasoned, in pertinent part:

> A finding of waiver of counsel by inaction presupposes that the trial court has determined that the defendant has neglected or refused to obtain counsel. No basis for such determination appears in the record in this case. When asked if he had an attorney, the defendant answered no. He then explained that, unaware that he had a deadline, he went to the Public Defender's office, thirteen days before his trial date. He was refused representation because, under that office's policy, he was a day late getting there. When the court inquired as to why he waited over two months before contacting the public defender, the petitioner responded that he thought that he could get the money together for an attorney, but that he eventually realized that he couldn't. The petitioner's explanation is plausible and it is not, as a matter of law, non[-]meritorious.
>
> To be sure, the petitioner did not contact the Public Defender's office immediately after the arraignment as the arraignment judge suggested he might do. That fact alone, viewed in light of the petitioner's explanation, does not, as a matter of law, show that the petitioner neglected or refused to obtain counsel. We simply do not know from the record what attempts the petitioner made to obtain counsel before turning to the Public Defender's office for representation. Under the circumstances, we cannot say that contacting the public defender almost two weeks before the trial date dispositively demonstrates neglect or refusal to obtain counsel. This is especially the case when there is no advance notification that earlier contact is necessary in order for the defendant's request for representation to be processed. Moreover, we are not prepared to hold, as the arraignment judge seemed to indicate, that a defendant may not attempt to obtain counsel on his or her own prior to seeking the assistance of the public defender. If the State's position were adopted, a defendant who reasonably believes that he or she can acquire private counsel must nevertheless immediately contact the Public Defender's office for representation, as the failure to do so could result

> in a finding of waiver by inaction as a matter of law if it turns out that he or she is wrong.

Id. at 112-113 (internal citation and footnote omitted).

Gray is both readily and materially distinguishable from this case *sub judice*. When asked why he had delayed for more than two months before contacting the OPD, Gray answered that he was unaware of the OPD deadline and that he had been attempting, albeit unsuccessfully, to secure adequate funds with which to hire a private attorney. Harris, by contrast, neither claimed ignorance of the September 1st deadline to retain defense counsel nor attributed his failure to pay counsel (or, alternatively, to apply to the OPD for representation) to financial uncertainty or hardship. He was fully aware, moreover, that the attorney representing him before the district court was unavailable to appear at the September 11th probation revocation hearing. His only explanation for not having hired counsel to defend him at that hearing was that he was under the mistaken impression that the attorney defending him before the district court would file for a continuance—an act she could only perform once she had been retained and her appearance had been entered. At his initial appearance, the circuit court cautioned Harris against assuming that the attorney defending him in the criminal case would represent him at the probation violation hearing. The court further admonished Harris to either apply to the OPD or obtain counsel as soon as possible and preferably within the next fifteen days, noting that an attorney had not yet entered an appearance. Although aware of the critical importance of timely retaining counsel, Harris neglected to do so. For those reasons, Harris's proffered reasons for appearing without counsel were facially meritless, and we perceive no abuse of

discretion in the court's finding of a valid waiver of counsel through inaction pursuant to Rule 4-215(d).

II.

Harris also challenges the sufficiency of the evidence to support the court's finding at the probation revocation hearing that the substance discovered in his possession was, in fact, marijuana. In so doing, he relies on the Court of Appeals's opinions in *Robinson v. State*, 348 Md. 104 (1997), and *Ragland v. State*, 385 Md. 706 (2005), which, he claims, taken together "stand for the proposition that sight alone is insufficient to establish the chemical composition of the substance."

The State distinguishes *Robinson* from the instant case on the bases that, unlike in that case: (i) Harris admitted to possessing marijuana; (ii) the identification of marijuana does not require specialized knowledge; and (iii) the State bore the burden of proving that Harris had violated his probation merely by a preponderance of the evidence—and not beyond a reasonable doubt. Although the suspected marijuana in this case was not chemically tested, the State asserts that Harris's admissions, coupled with Corporal Garvey's identification of the substance, was "sufficient to establish that Harris possessed marijuana on the date of the charged offenses."

Standard of Review

In a probation revocation proceeding, the State bears the burden of proving the existence of a probation violation by a preponderance of the evidence.[7] *Dopkowski*, 325 Md. at 677. As in criminal cases, however, our review is limited to the burden of production. *See Sun Kin Chan v. State*, 78 Md. App. 287, 318 (1989) ("It is only the burden of production, of course, that we are dealing with when we assess the legal sufficiency of the evidence."). We will not disturb the revocation court's factual determination absent clear error. *See Brendoff v. State*, 242 Md. App. 90, 121 (2019). A court commits clear error when its decision was unquestionably erroneous. *See clear error,* Black's Law Dictionary (11th ed. 2019) (stating that "clear error" occurs where "[a] trial judge's decision or action … appears to a reviewing court to have been unquestionably erroneous").

Robinson and *Ragland*

In *Robinson* and *Ragland*, the Court of Appeals addressed the admissibility of lay opinion testimony to identify suspected CDS. In the former case, Robinson was arrested after having been found in possession of eight rocks of suspected crack cocaine. Upon arriving at the police station, however, he managed to ingest the substance, rendering it unavailable for chemical analysis. At trial, two officers testified as lay witnesses that,

[7] "'[P]reponderance of the evidence' means 'more likely than not[.]'" *State v. Sample*, 468 Md. 560, 598 (2020) (citation omitted).

based on their visual observations, the substance seized from Robinson was, in fact, crack cocaine. 348 Md. at 108-11.

On appeal, Robinson claimed, *inter alia*, that the officers' lay opinion testimony "was inadmissible because a lay witness could not rationally identify a substance as crack cocaine based upon visual inspection alone." *Id.* at 115. The Court of Appeals agreed, reasoning that the officers' testimony did not satisfy the following then-recognized requirements for the admission of lay opinion testimony: "[I]t must be derived from first-hand knowledge, rationally connected to the underlying facts, and helpful to the trier of fact." *Id.* at 121. Although the Court acknowledged that, by virtue of their training and experience, the officers could properly testify that the substance bore "the *visual characteristics* of suspected crack cocaine," *id.* at 122, it reversed the judgment of the circuit court, reasoning, in pertinent part:

> [T]here has been no suggestion that crack cocaine is not subject to counterfeit imitation in the same manner as other illegal substances. To the contrary, the record reflects that any number of substances can adequately mimic crack cocaine. Although the circumstances of this case might support the inference that the substance visually identified by [the officers] was a controlled substance, the facts also fairly and substantially support the contradictory inference that the alleged contraband was a counterfeit noncontrolled substance. Hence, the proposition that crack cocaine can be identified by sight alone with reasonable certainty by a lay witness is logically unsound. Accordingly, the trial court should not have admitted the lay opinion testimony[.]

Id. at 126-127 (internal citation and footnotes omitted).

In *Ragland*, the Court revisited a premise from which it had proceeded in *Robinson*, to wit, "that lay opinion testimony could properly be based on the specialized knowledge

or experience of the witnesses." 385 Md. at 719. Ragland was arrested following an apparent hand-to-hand narcotics transaction in which he was an alleged participant. *Id.* at 709. At trial, a surveilling officer, testifying as a lay witness, described his observations of that transaction. The State then asked what he believed had occurred. Having received no notice that the officer would testify as an expert witness, defense counsel objected. *Id.* at 710. During an ensuing bench conference, the State proffered: "He brings special knowledge about drug deals and what these things bring. So I'm asking him what's his opinion of what occurred." *Id.* at 712. The court overruled defense counsel's objection, whereupon the officer testified that, based on his prior experience, he had observed a drug transaction. Another officer—also testifying as a lay witness—testified to the same effect. *Id.* at 714-15.

Before the Court of Appeals, Ragland argued that by opining that the events at issue constituted a narcotics transaction, the officers impermissibly expressed an expert opinion. *Id*. at 709. The Court agreed, holding that the officers' testimony constituted expert testimony because their opinions "were based on those witnesses' specialized knowledge, experience, and training." *Id.* at 725. Observing the "identity" between Federal Rule of Evidence 701 and Maryland Rule 5-701, the Court reasoned that "judicial decisions construing Fed. R. Evid. 701 often provide persuasive authority for the interpretation of Md. Rule 5-701."[8] *Id.* at 720. In accordance with the 2000 amendment to Federal Rule

[8] Federal Rule of Evidence 701 provides:

(continued…)

701, the Court held "that Md. Rules 5-701 and 5-702 prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education." *Id.* at 725. Given that the officers' trial testimony was based on such knowledge and experience—rather than having been rationally based on their perceptions—the Court concluded that the trial court had abused its discretion by admitting that testimony pursuant to Rule 5-701. *Id.* at 726.

Analysis

By claiming that *Robinson* and *Ragland*, taken together, "stand for the proposition that sight alone is insufficient to establish the chemical composition of the substance[,]" Harris is attempting to "back-door" an unpreserved issue pertaining to the admissibility of lay opinion testimony under the guise of a sufficiency challenge. Before the circuit court, Corporal Garvey testified: "There was two bags of marijuana found[.]" Harris neither objected to, nor moved to strike that testimony. Once admitted, the court could properly rely on Corporal Garvey's testimony (conclusory though it may have been) as evidence that Harris had violated the terms of his probation. *See In re Jones*, 420 S.W.3d 605, 612

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

(Mo. App. 2013) ("Once an expert opinion has been admitted, as any other evidence, it may be relied upon for purposes of determining the submissibility of the case. An appellant cannot 'back-door' an issue relating to the admissibility of expert testimony under the guise of a sufficiency of the evidence argument." (quotation marks, citation, and emphasis omitted)).

Harris's apparent assertion that evidence of expert chemical analysis was necessary to support a finding that he possessed marijuana is unavailing. As the Court of Appeals held in *Robinson*—one of the very cases on which Harris relies—"the nature of a suspected controlled, dangerous substance, like any other fact in a criminal case, may be proven by circumstantial evidence." 348 Md. at 113. In that case, the Court of Appeals adopted the following non-exhaustive list of factors set forth in *United States v. Dolan*, 544 F.2d 1219 (4th Cir. 1976), which are relevant to whether lay testimony may prove the identity of a suspected CDS in an alleged narcotics transaction beyond a reasonable doubt:

> (1) *the physical appearance of the substance* involved in the transaction;
>
> (2) evidence that the substance produced the expected effects when sampled by someone familiar with the illicit drug;
>
> (3) *evidence that the substance was used in the same manner as the illicit drug*;
>
> (4) testimony that a high price was paid in cash for the substance;
>
> (5) evidence that transactions involving the substance were carried on with secrecy or deviousness; and
>
> (6) *evidence that the substance was called by the name of the illegal narcotic by the defendant* or others in his presence.

Id. at 113 n.9 (citation omitted; emphasis added). The Court further explained that "'the State is not required to prove that all the circumstances were present in order to obtain a sustainable conviction.'" *Id.* (quoting *Urrutia v. State*, 924 P.2d 965, 968 (Wyo. 1996)). A further review of federal and state cases addressing the issue revealed the following additional factors, also held to be relevant to the identification of CDS by circumstantial evidence:

> whether the substance was packaged as a controlled substance; whether the substance was treated by another party in a transaction (buyer or seller) as a controlled substance; whether the substance was the subject of bargained-for exchange; whether the substance was responsible for a change in the defendant's behavior after ingestion; whether the identity of the substance was corroborated by testimony as to the expected effects of the narcotic; whether the identity of the substance was corroborated by the defendant's reference to the narcotic as "very good stuff"; and *whether the identity of the substance was corroborated by the known odor of the narcotic*.

Id. (citations omitted; emphasis added).

Although an uncorroborated extrajudicial confession is not, without more, sufficient evidence to satisfy the burden of proof *in criminal cases*, it *is* adequate to prove by a preponderance of the evidence that a defendant has violated the terms of his or her probation. *See United States v. Hilger*, 728 F.3d 947, 950 (9th Cir. 2013) (holding that the *corpus delicti* rule is inapplicable to probation revocation proceedings and does not, therefore, "bar revocation … as a matter of law")[9]; *People v. Woznick*, 663 N.E.2d 1037,

[9] The *corpus delicti* rule "prohibits the prosecution from proving the *corpus delicti* based solely on a defendant's extra-judicial statements." *Corpus delicti rule*, Black's Law Dictionary (11th ed. 2019). *See also Warszower v. United States*, 312 U.S. 342, 347 (1941) ("The rule requiring corroboration of confessions protects the administration of the

(continued…)

1039 (Ill. App. Ct. 1996) ("[A] trial court may revoke a defendant's probation based solely on defendant's voluntary confession or reliable extrajudicial admission that he violated the conditions of his probation."), *cert. denied*, 671 N.E.2d 742 (Ill. 1996); *People v. Monette*, 25 Cal. App. 4th 1572, 1575 (1994) ("The nature of a probation revocation hearing … does not require the application of the *corpus delicti* rule."); *McQueen v. State*, 740 P.2d 744, 745 (Okla. Crim. App. 1987) (holding that the defendant's admission to his case manager and probation agent that he had used marijuana was sufficient to show that he had violated his probation by a preponderance of the evidence); *Commonwealth v. Kavanaugh*, 482 A.2d 1128, 1133 (Pa. Super. Ct. 1984) ("The *corpus delicti* rule is not applicable outside of criminal prosecutions. As hereinbefore stated, revocation of probation is not a stage of criminal prosecution, but arises after the end of the criminal prosecution."); *State ex rel. Russell v. McGlothin*, 427 So.2d 280, 282 (Fla. App. 1983) ("A probationer's admissions against interest may, as a matter of law, be sufficient to revoke his probation.").

At Harris's probation revocation hearing, Corporal Garvey testified that on December 4, 2019, Harris had identified the bulge in his jacket as a "smoke bag" and admitted to smoking marijuana—thereby indicating that he had used the suspected CDS in a manner consistent with marijuana. When the State asked Corporal Garvey whether Harris had identified the substance as marijuana prior to his removing it from his jacket,

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criminal law against errors in convictions based upon untrue confessions alone."); *Bradbury v. State*, 233 Md. 421, 424 (1964) ("It is, of course, well settled that an extrajudicial confession of guilt by a person accused of crime, unsupported by other evidence, is not sufficient to warrant a conviction.").

he answered in the affirmative.[10] That uncoerced confession was, without more, sufficient to support the court's finding that Harris had violated the law and, therefore, its revocation of his probation.

Although it need not have been, Harris's confession was corroborated by Corporal Garvey's testimony regarding his visual, tactile, and olfactory observations on the date in question. We note that, in contrast to the suspected crack cocaine at issue in *Robinson*, the visual characteristics of which "are not unique to that substance alone[,]" *id.* at 125, "[m]arijuana has a distinctive appearance, taste, and odor, and perhaps even a feel[.]" *United States v. Thomas*, 211 F.3d 1186, 1191 (9th Cir. 2000).

As he approached the window of Harris's automobile, Corporal Garvey (who, through his training, knowledge, and experience had successfully identified marijuana previously) "detected a strong odor of marijuana coming from inside the vehicle." While it is unclear from the case law whether unsmoked crack cocaine, such as that at issue in *Robinson*, has a distinctive odor, it is abundantly clear that marijuana—whether raw or smoked—"has a readily identifiable, distinctive odor[.]" *Bailey v. State*, 412 Md. 349, 379 (2010). *See also Burns v. State*, 149 Md. App. 526, 541 (2003) ("Crack cocaine, unlike marijuana, leaves no odor after being smoked."). *Cf. Robinson v. State*, 451 Md. 94, 130

[10] During his closing argument, Harris also admitted that he had been in possession of marijuana on December 4, 2019, stating: "Like I said, I already stated to [Corporal] Garvey, that that day, like, I was in possession of the marijuana, okay, but that jacket wasn't mine." We need not determine whether the rules of evidence applicable to probation revocation proceedings are so relaxed as to permit the court's consideration of Harris's closing-argument admission. *See Bailey v. State*, 327 Md. 689, 698 (1992) ("[T]he rules of evidence … are relaxed at probation revocation hearings.").

(2017) ("[T]he odor of marijuana provides probable cause to search a vehicle."). *State v. Harding*, 166 Md. App. 230, 240 (2005) ("[T]he odor of marijuana alone can provide a police officer probable cause to search a vehicle[.]" (citing *United States v. Johns*, 469 U.S. 478, 482 (1985)), *cert. denied*, 393 Md. 161 (2006).

In addition to smell, Corporal Garvey testified that based on his experience, he knew from his pat-down of Harris that the large bulge in his left jacket pocket was marijuana. Once the bulging bag had been removed from Harris's jacket pocket, Corporal Garvey confirmed, presumably by visual inspection, that the substance contained therein was marijuana.

Corporal Garvey's visual, tactile, and olfactory perceptions, coupled with Harris's incriminating comments, furnished ample evidence from which the court could reasonably have found by a preponderance of the evidence that the substance in Harris's possession was, in fact, marijuana. Accordingly, we find no error—much less clear error.

Even if, *arguendo*, the court had clearly erred in finding by a preponderance of the evidence that the substance in Harris's possession was marijuana, any such error was harmless beyond a reasonable doubt. In addition to testifying that Harris was in possession of marijuana on December 4th, Corporal Garvey averred that he had recovered from Harris "a clear glassine baggy with a white powdery residue[,]" which he suspected was cocaine. That residue was sent to the Maryland State Police Crime Lab for chemical analysis. The court admitted the results of that analysis, which indicated that the residue tested positive for trace amounts of cocaine. That evidence unquestionably supported the court's finding

that Harris had, more likely than not, engaged in illegal activity, thereby violating the conditions of his probation and warranting the revocation thereof.

For the foregoing reasons, we affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR DORCHESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.