# MEMORANDUM DECISION

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IN THE

# COURT OF APPEALS OF INDIANA

Suzett Moffitt,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

April 28, 2023

Court of Appeals Case No. 22A-CR-2950

Appeal from the Marion Superior Court

The Honorable Grant Hawkins, Judge

The Honorable Peggy Hart, Magistrate

Trial Court Cause No. 49D31-2006-F5-18211

**Memorandum Decision by Judge Bailey**
Judges Brown and Weissmann concur.

**Bailey, Judge.**

## Case Summary

[1] Suzett Moffitt appeals the revocation of her probation. She presents the sole issue of whether she was denied due process because the trial court accepted her admission to a probation violation absent an advisement to Moffitt of the rights she was forfeiting. We reverse and remand the matter for further proceedings.

## Facts and Procedural History

[2] On June 9, 2022, Moffitt pled guilty to Battery, as a Level 5 felony,[1] and was sentenced to 910 days to be served on home detention, with 180 days suspended to probation. On June 13, 2022, the State filed a notice of probation violation alleging that Moffitt had been in an unapproved location and had failed to maintain contact with her probation officer. The notice of probation violation was amended on June 15, 2022, to additionally allege that Moffitt had failed to comply with her home detention placement by allowing her monitoring device to lose charge and shut off. At a hearing conducted on July 13, 2022, Moffitt admitted that she had violated the terms of her community corrections placement and had failed to maintain contact with her probation officer. She was continued on probation, with strict reporting requirements.

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[1] Ind. Code § 35-42-2-1(c)(1).

[3] On July 18 and November 7, 2022, the State filed additional notices of probation violations. On November 15, 2022, Moffitt appeared at a probation revocation hearing, at which the trial court offered Moffitt two years in the Department of Correction ("DOC"), contingent upon her admission to violating the terms of her probation. After a brief consultation with her attorney, Moffitt admitted to the allegations that she had left her residence without permission on July 15, 2022, and had absconded without contacting her probation officer from July 18 to November 5, 2022. In accordance with the offer extended, the trial court revoked Moffitt's probation and ordered that she serve two years in the DOC. Moffitt now appeals.

## Discussion and Decision

[4] Moffitt contends that she was denied due process at the probation revocation hearing because she was not properly advised of her rights. Whether a party was denied due process is a question of law that we review de novo. *Hilligoss v. State*, 45 N.E.3d 1228, 1230 (Ind. Ct. App. 2015).

[5] "A probationer faced with a petition to revoke h[er] probation is not entitled to the full panoply of rights [s]he enjoyed prior to the conviction." *Cooper v. State*, 900 N.E.2d 64, 66 (Ind. Ct. App. 2009). However, a probationer facing revocation is entitled to certain due process protections during the proceedings. *Id*. Indiana has codified the due process requirements for probation revocations in Indiana Code § 35-38-2-3. When a petition to revoke probation is filed, "the court shall conduct a hearing concerning the alleged violation." I.C. § 35-38-2-

3(d). Such a hearing requires "evidence be presented in open court," and the probationer is "entitled to confrontation, cross-examination, and representation by counsel." I.C. § 35-38-2-3(f).

[6] When a probationer chooses to admit to a probation or community corrections violation, she must be advised that she is giving up those protections. I.C. § 35-38-2-3(e); *see also Hilligoss*, 45 N.E.3d at 1231-32 (finding that probationer "was not properly advised" where the court failed to inform him that, by admitting to violation, he would be giving up right to confront and cross-examine witnesses at a hearing where the State would have to prove the alleged violation by a preponderance of the evidence); *Saucerman v. State*, 193 N.E.3d 1028, 1031 (Ind. Ct. App. 2022) (recognizing that the trial court was required to advise a probationer, prior to accepting what the trial court considered an admission, that he was giving up his rights to have an evidentiary hearing where the State proves the allegations by a preponderance of the evidence and to confront and cross-examine the witnesses against him).

[7] At the outset of the hearing on November 15, the trial court asked Moffitt's probation officer for a "recommendation on Moffitt," and the probation officer responded: "Our offer is 516 days or 387 actual." (Tr. Vol. II, pg. 4.) The trial court stated: "I have to give at least two years," and clarified that two years with "credit for 161 plus 53" would result in "time left to do" of "516 days or 387 actual." (*Id.* at 5.) The trial court then addressed Moffitt, advising that she "owed 910 days" and continuing: "if you admit that you absconded for over four months, my offer is [to] just give you the two years, 730 days." (*Id.*) The

trial court inquired whether Moffitt wanted to "take that" or have the matter set for a "contested [hearing]" and Moffitt replied: "What's that mean?" (*Id.* at 5-6.) Defense counsel explained what "the Judge was offering" was "instead of 910 days is to make the sentence 730, to take your credit time out and then you'd be left with 387 actual days to do to resolve your violation." (*Id.*) Defense counsel explained that the "other option" was a "contested hearing" in which "we would come back to Court and the State would have to prove these violations." (*Id.*) After some discussion about the availability of mental health resources, Moffitt admitted to both allegations against her.

[8] As such, prior to her admission to violating the terms of her probation and community corrections placement, Moffitt was advised of her right to have the State prove its allegations (although the State's burden of proof was not articulated). But when defense counsel advised Moffitt in open court of her options – take the trial court's offer[2] or proceed to a contested hearing – counsel did not fully explain what a contested hearing would entail, such as rights of representation, and the confrontation and cross-examination of witnesses. The trial court did not make these advisements.

[9] The trial court's acceptance of Moffitt's admission where there was a failure to properly advise her constitutes fundamental error. *See Hilligoss*, 45 N.E.3d at 1232; *Saucerman*, 193 N.E.3d at 1031. In *Hilligoss*, we set forth the appropriate

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[2] Essentially, this was the offer of the probation department, and the trial court appeared to actively enter into negotiations with the probationer, as opposed to maintaining a position of neutrality.

remedy for such error, that is: "the trial court shall hold an evidentiary hearing on [the probationer's] alleged probation violation or, if [she] admits to the violation, the trial court shall make a record to reflect that [she] has been properly advised of [her] rights in accordance with Indiana Code Section 35–38–2–3(e)." 45 N.E.3d at 1232. Accordingly, we reverse and remand to the trial court to conduct an evidentiary hearing or provide a full advisement of rights prior to acceptance of an admission.

## Conclusion

[10] We reverse the probation revocation and remand for further proceedings consistent with this opinion.

[11] Reversed and remanded.

Brown, J., and Weissmann, J., concur.