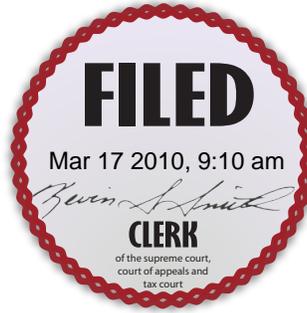


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CICERO OFFERLE,)
)
Appellant-Defendant,)
)
vs.) No. 02A03-0911-CR-517
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0612-FC-260

March 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Cicero Offerle appeals the revocation of his probation. Offerle raises one issue, which we revise and restate as whether the trial court committed fundamental error in revoking Offerle's probation. We affirm.

The relevant facts as stated in Offerle's direct appeal follow:

In October 2006, Angela Waldron and her children, including ten-year-old K.W., lived near the apartment of Offerle and his girlfriend. Waldron often left K.W. in Offerle's care because she had to make frequent trips to the hospital with her other child. One evening in October 2006, K.W. spent the night in Offerle's apartment. After Offerle's girlfriend went to bed, K.W. asked Offerle if she could also go upstairs to sleep. He said no. Later, while K.W. was laying on the couch watching TV, Offerle lay down "kind of like on top of" K.W. and began "cuddling" with her. K.W. could feel Offerle's "private part" on her leg and it "felt kind of hard." After about five to ten minutes, Offerle got up and warned K.W. that if she told anyone what had happened, they would both get into trouble.

Offerle v. State, No. 02A03-0801-CR-9, slip op. at 1 (Ind. Ct. App. June 27, 2008) (citations to record omitted).

In November 2007, a jury convicted Offerle of child molesting as a class C felony. In December 2007, the trial court sentenced Offerle to four years, with two years suspended to probation. This court affirmed Offerle's conviction and sentence on appeal. In its order of probation, the trial court required Offerle to obtain a psychological evaluation and successfully complete treatment pursuant to the evaluation. The court also issued special instructions by an Addendum Order of Probation. Paragraph 3 of the Addendum Order of Probation contained the following requirement:

You shall attend, actively participate in, and successfully complete a certified sexual perpetrator treatment program that utilizes polygraph testing in order to ensure compliance with the Addendum Order of

Probation. . . . Unsuccessful termination from treatment or noncompliance with treatment conditions will be considered a violation of your probation.

Appellant's Appendix at 88.

Offerle participated in the treatment program, but continued to assert his innocence. Offerle's counselors with the treatment program wanted to know if Offerle was being truthful to his therapist about the offense itself. In April 2009, Offerle was requested to submit to polygraph testing and met with a polygraph examiner. According to the polygraph examiner's report, the "purpose of the examination was to conduct a Disclosure over the Instant Offense as requested by [Offerle's] probation and therapy supervisors." Defendant's Exhibit A. The type of examination "basically addresses denial of the offense" and is "different from the maintenance type test that addresses their behavior since they've been on probation." June 9 Transcript at 16-17.

Prior to the testing, Offerle and the examiner discussed the questions that would be asked during the examination. Offerle originally agreed to be asked certain questions about his offense, but then decided that the questions were inappropriate. Offerle "continued to state he didn't like the questions addressing any intentional or deliberate touching or placing his penis against [K.W.]" Defendant's Exhibit A. Offerle and the examiner "[tried] to come to an agreement . . . about what questions are appropriate [and] how they should be worded" June 9 Transcript at 33. After conducting an initial acquaintance test to assist in establishing a baseline, Offerle "stated he didn't like the questions addressing his alleged behavior with [K.W.], believed it was 'entrapment' and refused to continue." Defendant's Exhibit A. Offerle completed a written statement,

which stated: “I don’t feel right about taking a polygraph because I feel I am being intraped [sic] into saying things that are not right about my case.”¹ Id.

On April 16, 2009, the State filed a verified petition for revocation of probation alleging that Offerle “refused to submit to polygraph testing, violating rule #3 of the Addendum Order of Probation.” Appellant’s Appendix at 133. On April 21, 2009, the State filed an amended petition for revocation also alleging that Offerle “[d]id not successfully complete sexual perpetrator counseling.” Id. at 136.

On June 9, 2009, the trial court held a revocation hearing. The polygraph examiner’s report stated that the “examination is requested to help in determining [Offerle’s] truthfulness for therapeutic purposes, and to continue in his treatment program.” Defendant’s Exhibit A. The polygraph examiner testified that “[a]s part of [Offerle’s] treatment, it’s my understanding he has to be . . . compliant with his therapy and one of those is that he is truthful to his therapist and probation officer about the offense itself.” June 9 Transcript at 17. Offerle argued that he substantially complied with the condition that he submit to a polygraph examination. The State argued that

¹ The following are the “relevant questions [which] were to be asked of [Offerle], which he felt would be ‘entrapment’ and did not wish to be tested on:”

Regarding you placing your penis against [K.W.], Do you intend to answer truthfully each question about that?

Did you deliberately place your penis against any part of [K.W.’s] body?

Did you intentionally lay against [K.W.] so she could feel your penis?

Are you telling the entire truth about what happened on the couch with [K.W.]?

Defendant’s Exhibit A.

“[n]obody said that if [Offerle] fails the polygraph that he’s going to get revoked, but they do need to know whether or not he’s being honest in his therapy in order to determine whether he is suitable for counseling, and that’s part of his probation and that’s why he was sent there in the first place.” Id. at 60. Offerle also asked for another opportunity to take the polygraph test.

On June 16, 2009, the trial court found that Offerle “terminated the [polygraph examination] and wrote out a statement at the conclusion of the test and explaining his reasoning for the . . . termination.” June 16 Transcript at 5. The court then determined that “[Offerle’s] refusal to submit to a polygraph test is [a] violation of the Addendum Order of Probation, condition three.”² Id. The court ordered “the suspended portion of the sentence revoked and order[ed] [Offerle] committed to the Department of Correction for a period of two (2) years.” Id.

The sole issue is whether the trial court committed fundamental error in revoking Offerle’s probation. Offerle argues that his “Fifth Amendment right against self-incrimination was violated when his probation was revoked because he chose not to answer questions which may have incriminated him in a future criminal proceeding.” Appellant’s Brief at 8. Specifically, Offerle argues that he “did not want to answer questions that would reveal if he had been lying throughout his prosecution.” Id. at 11. Offerle further argues: “If [he] admitted that he had lied about his innocence it would incriminate him in a possible future charge of Perjury, a Class D Felony.” Id. at 12.

² It appears that the trial court did not make any specific findings regarding the State’s allegation in its amended petition for revocation that Offerle failed to complete his sexual perpetrator counseling.

Offerle argues that “[i]n this situation the only way in which the State could require Offerle to admit his guilt is if he was given immunity.” Id. at 13. Offerle also argues that “[t]he Fifth Amendment issue was not raised during the revocation hearing,” but that “the harm to Offerle, denying the right, is substantial and apparent.” Id. at 14-15. The State argues that “Offerle has waived his claim” and that “any responses given during the [polygraph] examination could not have been used against him in future perjury proceedings.” Appellee’s Brief at 6, 8. The State also argues that “Offerle was not required to admit his guilt at the polygraph examination or face revocation. The purpose of the examination was to further his therapy goals.” Id. at 9.

Initially, we note that Offerle did not object on Fifth Amendment grounds when his probation was revoked. Offerle’s failure to object at the revocation hearing results in waiver of the issue on appeal. See McQueen v. State, 862 N.E.2d 1237, 1241 (Ind. Ct. App. 2007). Seeking to avoid procedural default, Offerle claims that the trial court’s revocation of his probation constitutes fundamental error. The fundamental error exception is extremely narrow. Id. To qualify as fundamental error, the error must be “so prejudicial to the rights of the defendant as to make a fair trial impossible.” Carden v. State, 873 N.E.2d 160, 164 (Ind. Ct. App. 2007). The fundamental error exception “applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.” McQueen, 862 N.E.2d at 1241. See also Schmidt v. State, 816 N.E.2d 925, 945 (Ind. Ct. App. 2004) (“The mere fact that an alleged error implicates

constitutional issues does not establish fundamental error has occurred.”) (citing Wilson v. State, 514 N.E.2d 282, 284 (Ind. 1987)), reh’g denied, trans. denied; Brabandt v. State, 797 N.E.2d 855, 861 (Ind. Ct. App. 2003) (noting that the defendant failed to object at his probation revocation hearing on the grounds that his Fifth Amendment rights were violated and thus that the defendant was required to show that any constitutional error denied him fundamental due process).

Probation is an alternative to commitment in the Department of Correction, and it is at the sole discretion of the trial court. Lightcap v. State, 863 N.E.2d 907, 911 (Ind. Ct. App. 2007) (citing Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999), reh’g denied). A defendant is not entitled to serve a sentence in a probation program; rather, such placement is a “matter of grace” and a “conditional liberty that is a favor, not a right.” Brabandt, 797 N.E.2d at 860 (citing Cox, 706 N.E.2d at 549). The decision whether to revoke probation is a matter within the sound discretion of the trial court. Id. at 860 (citing Dawson v. State, 751 N.E.2d 812, 814 (Ind. Ct. App. 2001)). A probation revocation is in the nature of a civil action because there is no formal finding of guilt or innocence and the alleged violation need be proven only by a preponderance of the evidence. Bussberg v. State, 827 N.E.2d 37, 40 (Ind. Ct. App. 2005) (citing State v. Cass, 635 N.E.2d 225, 226 (Ind. Ct. App. 1994), trans. denied), reh’g denied, trans. denied; see also Cox, 706 N.E.2d at 551. Consequently, a probationer is not entitled to the full array of rights afforded at trial. Bussberg, 827 N.E.2d 37 at 40.

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that no person shall be compelled in any criminal case to be a witness against himself. Brabandt, 797 N.E.2d at 861 (Grubb v. State, 734 N.E.2d 589, 591 (Ind. Ct. App. 2000) (citing U.S. Const. amend. V), trans. denied). “[I]t has long been held that the privilege against self-incrimination not only applies to a defendant at a criminal trial but also to a person in any other proceedings, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” Bussberg, 827 N.E.2d 37 at 40. We have observed that “a probation revocation proceeding is not criminal in nature; thus, a probationer may not successfully assert his Fifth Amendment right against self-incrimination for the purpose of defending against an alleged probation violation.” Bussberg, 827 N.E.2d at 41.

In Patton v. State, 580 N.E.2d 693, 698 (Ind. Ct. App. 1991), trans. denied, this court considered whether a sentencing court may impose a condition of probation that required the probationer to submit to polygraph examinations and to stipulate to the admissibility of the results. We held that a probationer could not be forced to stipulate to the admissibility of such evidence, but that a sentencing court may require the probationer to submit to polygraph examinations upon request “when the condition bears a reasonable relationship to the rehabilitative aspects of probation.” 580 N.E.2d at 698-699. Such a condition is appropriate when imposed “as a deterrence from violating other terms of probation by instilling the fear of detection or where the examination provides probation officials with an indication of the probationer’s progress in rehabilitation.” Id.

at 698. The court stated: “We impose no impediment upon the use of polygraph examinations as a rehabilitative tool much like the probation condition that a probationer be truthful in responding to questions asked by his or her probation supervisor.” Id. at 699. The court in Patton also observed that “absent stipulation or waiver, the results of a polygraph examination are inadmissible in a criminal prosecution.” Id. at 698 (citing Tope v. State, 266 Ind. 239, 246, 362 N.E.2d 137, 142 (1977), cert. denied, 434 U.S. 869, 98 S. Ct. 209 (1977)). “The examination results are excluded because they have not been proven to be sufficiently accurate to provide a foundation for their admissibility into evidence” Id. at 698-699 (citing Vacendak v. State, 264 Ind. 101, 110, 340 N.E.2d 352, 357 (1976), cert. denied, 429 U.S. 851, 97 S. Ct. 141 (1976)).

Here, the record reveals that Paragraph 3 of the Addendum Order of Probation required Offerle to “attend, actively participate in, and successfully complete a certified sexual perpetrator treatment program” that “utilize[d] polygraph testing.” Appellant’s Appendix at 88. The condition in Paragraph 3 was appropriate because it “provide[d] probation officials with an indication of the probationer’s progress in rehabilitation.” See Patton, 580 N.E.2d at 698. The record also reveals that “[a]t [Offerle’s] request, the [polygraph] examination was terminated” Defendant’s Exhibit A. Thus, Offerle failed to satisfy the conditions of Paragraph 3 in the Addendum Order of Probation. Further, the results of the polygraph examination administered to Offerle—whether the results showed that Offerle had passed or failed the polygraph examination—would have been inadmissible in a criminal prosecution, including as evidence that Offerle had

committed perjury at his trial for the child molestation offense. See Lambert v. State, 448 N.E.2d 288, 292 (Ind. 1983) (noting that the defendant and the State had not stipulated that the results of a polygraph test would be admissible and thus any reference to the administration or results of the test were inadmissible); Tope, 266 Ind. at 246, 362 N.E.2d at 142 (“This Court has consistently held that, absent some sort of waiver or stipulation by the parties, the results of polygraph examinations of witnesses or parties are not admissible in criminal prosecutions.”) (citing Vacendak, 264 Ind. at 110, 340 N.E.2d at 357, and cases cited therein). We cannot say that the trial court committed fundamental error in revoking Offerle’s probation based upon his failure to participate in and complete the polygraph examination as required by Paragraph 3 of the Addendum Order of Probation.³ See Patton, 580 N.E.2d at 698-699 (holding that the probationer’s Fifth Amendment claim was without merit and that it was not improper to require the

³ Offerle also argues that the case of Gilfillen v. State, 582 N.E.2d 821 (Ind. 1991), “is similar to this case in that it involves the State revoking probation based upon an impermissible requirement that a probationer admit guilt.” Appellant’s Brief at 14. We find Gilfillen distinguishable. In that case, the appellant “denied that he had any sexual abuse problem and spent his time with counselors protesting his innocence,” and the appellant’s probation had been revoked because “he had not made a good faith effort to work on his sexual abuse problem.” 582 N.E.2d at 823. The Indiana Supreme Court noted that “requiring [the appellant] to admit that he has a problem with child molesting or face revocation of probation is tantamount to requiring that he admit that he is guilty of the crimes charged. Clearly, this is unacceptable.” Id. at 824. The Court held that “in a circumstance such as this, where the defendant has not pled guilty but was instead convicted while denying guilt, [the] trial court may not insist on an admission of guilt as a condition of probation or use a continued denial of guilt as the basis for revocation.” Id. Here, Offerle’s probation was not revoked because he was required to admit his guilt at the polygraph examination in order to satisfy the conditions of his probation; he only needed to participate in and complete the polygraph testing.

However, consistent with Gilfillen, we caution probation revocation courts that a probationer’s suspended sentence and probationary status may not be revoked based upon the probationer’s continued denial of guilt or refusal to admit his or her guilt as a condition of probation where the probationer was convicted while denying guilt. See Gilfillen, 582 N.E.2d at 824.

probationer to submit to polygraph examinations upon request when the condition bears a reasonable relationship to the rehabilitative aspect of probation, e.g., where the examination provides probation officials with an indication of the probationer's progress in rehabilitation); see also Johnson v. State, 716 N.E.2d 983, 985 (Ind. Ct. App. 1999) (holding that the trial court did not abuse its discretion by ordering as a term of the defendant's probation that he submit to polygraph examinations, and noting that "requiring [the defendant] to submit to a polygraph is intended to serve a rehabilitative, not a punitive function" and that "the results of the polygraph examination are inadmissible and cannot be used against [the defendant] in court without his explicit agreement"); Brabandt, 797 N.E.2d at 864 (finding no fundamental error where the probationer argued his Fifth Amendment rights were violated and affirming the revocation of the probationer's probation).

For the foregoing reasons, we affirm the trial court's revocation of Offerle's probation.

Affirmed.

BARNES, J., concurs.

MATHIAS, J., dissents with separate opinion.

**IN THE
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CICERO OFFERLE,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 02A03-0911-CR-517
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

MATHIAS, Judge, dissenting

I respectfully dissent.

The majority acknowledges that, pursuant to Gilfillen v. State, 582 N.E.2d 821, 823-24 (Ind. 1991), a probationer who did not plead guilty may not be required to admit guilt or face revocation of probation. See slip op. at 10 n.3. However, the majority contends that Offerle was not really required to admit his guilt to satisfy a condition of probation, but was instead required only to participate in and complete the polygraph testing that was an integral part of probation. Under the facts before us, I believe that this is a distinction without a difference, both factually and constitutionally.

The condition of probation upon which the court based revocation provided:

You shall attend, actively participate in, and *successfully complete a certified sexual perpetrator treatment program that utilizes polygraph testing in order to ensure compliance with the Addendum Order of Probation.* . . . Unsuccessful termination from treatment or noncompliance with treatment conditions will be considered a violation of your probation.

Appellant's App. p. 88 (emphasis added).

To comply with this condition of probation, Offerle had to *successfully* complete a certified sexual offender treatment program. The polygraph test at issue was an integral part of the required treatment program. It is unlikely that any offender who maintained his innocence throughout trial would ever be able to *successfully* complete a sexual offender treatment program that included polygraph testing with the line of questioning challenged here. Indeed, the State argued at the revocation hearing that the polygraph test would be used to determine whether Offerle was suitable for counseling and stated that if Offerle *passed* the polygraph test while denying guilt, he would not be appropriate for counseling. June 9 Tr. p. 60.

Although the State acknowledges that it could not revoke Offerle's probation simply because he maintained his innocence, the State's own witness explained that Offerle's treatment required him to be "truthful to his therapist and probation officer." June 9 Tr. p. 17. And in order to "truthfully" answer the line of questioning during the polygraph test at issue, as far as the State is concerned, Offerle would have to admit guilt.⁴

⁴ Because Offerle was found guilty beyond a reasonable doubt, the State can reasonably assume that Offerle's claims of innocence are not truthful. Yet while we can rightfully assert that American courts provide an accused the best system of justice yet devised, we must humbly acknowledge that it is imperfect.

As a general rule, the State does have, and should have, the right to use a polygraph to ensure that a probationer has complied with the conditions of probation. See Patton v. State, 580 N.E.2d 693, 698 (Ind. Ct. App. 1991) (approving use of polygraph testing for use as a rehabilitative tool). Offerle agreed to polygraph testing “to ensure compliance” with the terms of his probation. But when a condition of probation effectively requires a probationer to admit guilt for the underlying crime of conviction, either directly as in Gilfillen, or indirectly as in the circumstances before us, the legitimate use of polygraph testing is stretched beyond its constitutional limits.

The majority acknowledges that probationers have a Fifth Amendment right against self-incrimination. See slip op. at 8 (citing Bussberg v. State, 827 N.E.2d 37, 40 (Ind. Ct. App. 2005). Although a probationer may not generally assert a Fifth Amendment right against self-incrimination for purposes of defeating against an alleged probation violation, a probationer *may* assert a Fifth-Amendment right against self-incrimination where his answers might incriminate him in future criminal proceedings. Bussberg, 827 N.E.2d at 40. “A probationer may be forced to provide incriminating information only if the State recognizes that it may not use the required answers in a later criminal proceeding.” Id.

But under the circumstances before us, Offerle was effectively required to incriminate himself. Offerle testified under oath at his trial and maintained his innocence. If he admitted guilt when faced with a polygraph test, he could be subject to perjury charges. See Ind. Code § 35-44-2-1(a)(1). The majority concludes that Offerle

could not be charged with perjury because, absent stipulation or waiver, the results of a polygraph examination are not admissible in a criminal prosecution. I have two concerns about this conclusion.

First, there is no indication that Offerle was advised of the inadmissibility of polygraph results at the time he refused the examination.⁵ Even if Offerle had received such an advisement, I believe we expect too much from a probationer when we require him or her to assess whether or not evidence will be admissible in court. Moreover, had Offerle acknowledged his guilt when faced with the polygraph examination (assuming *arguendo* that he was in fact guilty of the underlying crime despite his consistent claim of innocence through and after his trial), there would be no need to admit the results of the examination itself; Offerle's admission would be adequate proof that he had lied under oath when he denied guilt.

Second, this is unlike the situation in Bussberg, where the trial court granted the probationer use immunity and specifically explained to him that "he would not face additional charges" by answering a question regarding whether he used illicit drugs while on probation. Under those facts, the court could be quite comfortable in holding that there had been no Fifth Amendment violation because "the incriminating information was to be used solely for the purpose of probation revocation and not for any criminal proceeding." 827 N.E.2d at 40.

⁵ To the contrary, the polygraph consent form signed by Offerle stated that he authorized the polygraph examiner to disclose the results of the exam to his probation officers "for whatever purposes they may determine." Appellant's App. p. 181.

For all of these reasons, I believe that the State's requirement that a probationer like Offerle admit his guilt for the underlying offense as a precondition to successful completion of probation makes successful completion impossible for any probationer who is legitimately entitled to maintain his innocence despite conviction. Further, I believe that the required admission violates a probationer's Fifth Amendment right against self-incrimination.