



Appellant-defendant Todd Whitmer appeals the revocation of his probation, arguing that he did not make a knowing, voluntary, and intelligent waiver of his right to counsel. Specifically, Whitmer contends that the trial court failed to advise him of the hazards and consequences of self-representation. Finding that Whitmer made a knowing, voluntary, and intelligent waiver of his right to counsel, we affirm the judgment of the trial court.

### FACTS

On August 2, 2007, Whitmer was charged with two counts of class D felony theft and one count of false informing, a class B misdemeanor. On February 5, 2008, Whitmer entered into a plea agreement in which Whitmer pleaded guilty to one count of class D felony theft in exchange for the dismissal of the remaining charges. On March 4, 2008, the court entered a judgment of conviction and sentenced Whitmer to thirty months imprisonment with six months executed and twenty-four months suspended to probation.

According to the terms of Whitmer's probation, he was required to report to the probation department as directed and to refrain from committing any criminal offenses. On July 15, 2009, the State filed a petition to revoke probation, alleging that Whitmer had been charged with criminal conversion, a class A misdemeanor, and had failed to report to the probation department as scheduled. A hearing was set for August 20, 2009, and a notice of the hearing was sent to Whitmer, who failed to appear. Consequently, the trial court issued a bench warrant.

On September 4, 2009, Whitmer appeared in custody before the trial court. At the beginning of the hearing, the following colloquy occurred:

COURT: . . . The state filed a petition to revoke your probation based on two grounds. One is an allegation that you committed a criminal offense back in April and the other is you failed to report to the probation department. Because the state is asking that your probation be revoked you have a right to have a lawyer represent you including the right if you are indigent to have a lawyer appointed at no cost to yourself. You also have a right to deny that you violated the terms of your probation and make the state prove what they said in this petition at a hearing where they would have to present evidence to support it and you could challenge their evidence, you could present your own. Do you understand your rights?

DEFENDANT: Yes.

COURT: Do you wish to have an attorney represent you on this?

DEFENDANT: No.

COURT: Pardon me?

DEFENDANT: No.

COURT: You wish to represent yourself?

DEFENDANT: I want to get it done today.

COURT: Do you wish to admit or deny you violated your terms of probation?

DEFENDANT: Admit.

Tr. p. 2-3. The trial court specifically asked Whitmer about each allegation and explained that being charged with a crime is not a probation violation but that committing a crime is a probation violation. Whitmer then provided explanations for the allegations, stating that someone else had stolen a pair of sunglasses and framed him for it. Additionally, Whitmer claimed that he did not report to the probation department because he lacked transportation. After giving these explanations, the following exchange occurred:

COURT: Here is my situation, are you admitting or denying? You can have a hearing on this. You can make explanations. I'm serious. You can make explanations. You can wait until the traffic and misdemeanor case is resolved or you can have the matter transferred here and I will hear the evidence. I'm trying to tell you what your rights are. How you handle them is entirely up to you. If you admit to the violation of probation you may well go to prison. If you are found to have violated probation you may well go to prison. How we do this is entirely up to you. You have a right to counsel. You can keep it – to tell you truthfully if you want this thing resolved today and you admit to the violation of probation without an attorney I will probably order a presentence supplement which means I will get some other information about what you may have done right since you were last in front of me. You still may go to prison or you may get on probation. I don't know. How would you like to handle this?

DEFENDANT: I just want to get back to my wife.

COURT: I'm not telling you you are going to get back to your wife. That's what I'm trying to tell you right now. When you get a felony probation and they say you screwed it up if it's true you may go to prison. Do you understand that?

DEFENDANT: Yes.

COURT: So do it today you may end up being locked up either way. You ought not make the decision on the hope that you would go home. You should make the decision based on what may ultimately happen in this case. Would you like to be represented by an attorney or would you like to represent yourself, would you like to admit or deny you violated the terms of your probation? You have an absolute right to have them prove what they said and you have a right to have a lawyer represent you in that instance.

DEFENDANT: I will do it today.

COURT: Pardon me?

DEFENDANT: I will do it today.

COURT: So you're telling me after all this you do wish to waive your right to counsel?

DEFENDANT: Yes.

Id. at 4-6. Whitmer then admitted that he violated the terms of his probation. At the September 25, 2009, sentencing hearing, Whitmer was sentenced to twenty-four months of executed imprisonment, which was the suspended portion of his sentence. Whitmer now appeals.

### DISCUSSION AND DECISION

Whitmer's sole argument on appeal is that the revocation of his probation should be set aside because he did not make a knowing, voluntary, and intelligent waiver of his right to counsel when he admitted to violating the terms of his probation. Specifically, Whitmer maintains that the trial court failed to advise him of the advantages of having an attorney and the disadvantages of self-representation.

Our Supreme Court has cautioned that “[p]robation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled.” Prewitt v. State, 878 N.E.2d 184, 188 (Ind. 2007). The trial court decides the conditions of probation and may revoke probation if the conditions are violated. Id. If the trial court finds that a defendant has violated a condition of probation, it may “[o]rder execution of all or part of the sentence that was suspended at the time of initial sentencing.” Ind. Code § 35-38-2-3(g). A probation revocation hearing is in the nature of a civil proceeding; therefore, the alleged violation need be proved only by a preponderance of the evidence. Isaac v. State, 605 N.E.2d 144, 147 (Ind. 1992).

Nevertheless, because probation revocation implicates the probationer's liberty interest, the probationer is entitled to some procedural due process. Cox v. State, 850

N.E.2d 485, 488 (Ind. Ct. App. 2006). Specifically, a probationer is entitled to a written notice of the alleged violation, disclosure of the evidence against him, the opportunity to present evidence, the right to confront and cross-examine witnesses, and a neutral and detached hearing body. Cooper v. State, 900 N.E.2d 64, 66 (Ind. Ct. App. 2009). Additionally, the probationer is entitled to “representation by counsel.” Id. (quoting Ind. Code § 35-38-2-3(e)).

It is well settled that whenever a probationer proceeds without counsel, the record must reflect that the defendant voluntarily, knowingly, and intelligently waived his right to counsel. Bumbalough v. State, 873 N.E.2d 1099, 1102 (Ind. Ct. App. 2007). Whether a probationer’s waiver is knowing, voluntary, and intelligent depends upon the facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. Eaton v. State, 894 N.E.2d 213, 218 (Ind. Ct. App. 2008), trans. denied.

Furthermore, whenever a probationer proceeds without counsel and chooses to admit rather than to challenge his alleged probations violation, his knowing, intelligent, and voluntary waiver of counsel may be established even if the record does not show that he was warned of the pitfalls of self-representation. Greer v. State, 690 N.E.2d 1214, 1217 (Ind. Ct. App. 1998). A trial court’s finding that a defendant waived his right to counsel is reviewed de novo. Miller v. State, 789 N.E.2d 32, 37 (Ind. Ct. App. 2003).

In support of Whitmer’s argument, he directs us to Hagy v. State, 639 N.E.2d 693, 695 (Ind. Ct. App. 1994), in which this court determined that the probationer had not made a knowing, voluntary, and intelligent waiver of her right to counsel. We reasoned

that the probationer “was never advised of the dangers and disadvantages of proceeding pro se,” before allowing the State to present its case against her. Id. at 694-95.

Conversely, in Greer, this court distinguished Hagy and concluded that the probationer had made voluntary, knowing and intelligent waiver of his right to counsel even though he had not been advised about the disadvantages of self-representation. 690 N.E.2d at 1219. Specifically, we determined that “when a probationer who proceeds pro se chooses to admit rather than to challenge his alleged probation violation, his knowing, intelligent, and voluntary waiver of counsel may be established even if the record does not show that he was warned of the pitfalls of self-representation.” Id. at 1217. The Greer court explained that the pitfalls of self-representation “exist only when [the probationer] is confronted with prosecutorial activity which is designed to establish his culpability.” Id. Thus, because the probationer had chosen to admit rather than deny the alleged probation violation, the trial court did not have to advise him regarding the disadvantages of self-representation. Id. at 1219.

We find that the case herein is more analogous to Greer than to Hagy. Specifically, there was no indication that Hagy intended to admit to the State’s allegations. By contrast, Whitmer did admit to violating the terms of his probation as did Greer. Consequently, like Greer, Whitmer was not faced with the State’s attempt to establish his culpability, and the trial court did not have to warn Whitmer of the disadvantages of self-representation.

Moreover, the facts in the instant case show that the trial court repeatedly advised Whitmer that he had a right to counsel and that one would be provided for him if he was

indigent. In addition, the trial court advised Whitmer that he had the right to force the State to prove the allegations against him by a preponderance of the evidence and that he could present his own evidence. Indeed, even after Whitmer stated that he wanted to admit to the probation violations, the trial court again emphasized Whitmer's rights, explained that if he admitted to the violations, he could go to prison, and asked Whitmer again how he wanted to handle the situation. Whitmer responded, "I just want to get back to my wife." Tr. p. 4-6.

The trial court once again stressed that if Whitmer admitted to violating his probation, he could go to prison and that Whitmer "ought not make the decision on the hope that [he] would go home." Id. at 6. The trial court yet again asked Whitmer whether he wanted an attorney and whether he wanted to admit or deny the allegations. Whitmer responded that he wanted to waive his right to counsel and admitted to violating the terms of his probation. In light of these circumstances, we cannot say that Whitmer's waiver of counsel was not knowing, voluntary, and intelligent.

Nevertheless, Whitmer points out that he has been diagnosed with bipolar disorder and attention deficit hyperactivity disorder (ADHD) and that the trial court never inquired into his mental status. Initially, we observe that this information is self-reported, uncorroborated, and contained only in the presentence investigation report which was filed on September 14, 2009. Thus, Whitmer's mental competency was not at issue when he waived his right to counsel and admitted to the probation violations on September 4, 2009.

Even assuming solely for argument's sake that Whitmer suffers from bipolar disorder and ADHD, it does not necessarily follow that Whitmer was incapable of making a knowing, voluntary, and intelligent waiver of his right to counsel. See Leonard v. State, 579 N.E.2d 1294, 1296-97 (Ind. 1991) (holding that the defendant voluntarily, knowingly, and intelligently waived his right to counsel even though he had a "well-documented history of mental illness/psychosis"). And Whitmer does not indicate how these disorders affected his ability to make a knowing, voluntary, and intelligent waiver of his right to counsel. To the contrary, Whitmer coherently answered the trial court's questions. For instance, when discussing the criminal conversion charge against Whitmer, he explained that "some guy took the sunglasses from a store and then put it off on me." Tr. p. 3. Likewise, when addressing the allegation that Whitmer had failed to report to the probation department, he stated that "I don't have a car or anything to get to probation." Id. at 4. In short, Whitmer has not demonstrated that his mental competency and stability was such that he was incapable of giving a knowing, voluntary, and intelligent waiver of his right to counsel, and we affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

DARDEN, J., and CRONE, J., concur.