



Dusty Kidd appeals the revocation of his probation. He asserts his waiver of his right to counsel was not knowing, intelligent or voluntary. We reverse and remand.

### **FACTS AND PROCEDURAL HISTORY**

On July 15, 2008, Kidd appeared for a hearing on the State's petition to order his suspended sentence be executed. The Court and Kidd had the following discussion:

The Court: Mr. Kidd, your case, you're here for an Initial Hearing on a Verified Petition to Revoke Suspended Sentence. Before I conduct that hearing, I need to make sure you understand your rights. You do have the right to counsel to represent you. If you want an attorney, but can't afford one, I'd consider appointment of counsel. You cannot be compelled to make any statement or to testify against yourself. You do have the right to remain silent. Anything you'd say, however, could be used against you. You have a right to have a hearing on the allegations made in the Petition to Revoke. At that hearing, the State would have to prove those allegations by a preponderance of the evidence from evidence presented in open court at a final hearing. At that hearing, you'd have a right to confront the witnesses against you and to see, hear and cross examine those witnesses. You'd also have the right to call witnesses in your own behalf and I would assist you in that right by issuing subpoenas at no cost to you. If the Court revokes your probation after conducting a final hearing, you would be entitled to appeal the Court's decision. If you admit the allegations made in the Petition to Revoke today, you would give up and waive each of these rights. If the Court finds you have violated a condition of your probation, the Court could continue you on probation, could modify the conditions of your probation or could Order the execution of your suspended sentence. If the Court Orders the execution of any part of your sentence, you'd be entitled to credit for time served on these charges. Do you understand these rights?

Mr. Kidd: Yes, sir.

The Court: Do you have any questions on any of these rights?

Mr. Kidd: No, sir.

The Court: The Petition in your case, in pertinent part, states: you were found guilty of the offense of Invasion of Privacy, a Class D felony, committed to the Indiana Department of Corrections

[sic] for three (3) years on February 5 of 2008. The Court suspended all but two hundred, twenty-two (222) days of that sentence and the balance was placed on formal probation. Specific terms of probation were imposed on the sentencing date by written Order of the Court. It's alleged you violated the terms and conditions of probation in the following manner: you failed to report to Probation for appointments on February 21, March 27 April 9 May 8th and June 10 of 2008; also that you were assigned to complete "Thinking for a Change" class. You missed seven (7) sessions of that program and a report from Darrel Hughes was attached to the Petition that was filed; also that of June 6 of 2008, you were behind Three Hundred and Twenty Dollars (\$320.00) on probation fees and owed Thirty Dollars (\$30.00) for an outstanding drug screen fee. Those are the allegations that are contained in this Petition. Do you understand those allegations?

Mr. Kidd: Yes. I was, how much time was that, how many days did I have left over from the sentencing?

The Court: How many days probation?

Mr. Kidd: Well, on the suspended sentence.

The Court: Officer Criswell indicated when you were originally placed on probation, it was for a period of eight hundred and seventy-three (873) days, three (3) years minus two hundred and twenty-two (222) days, which was what was served. Any other questions?

Mr. Kidd: (No Audible Answer)

The Court: Here in a second, I'm going to ask you to either admit or deny that you violated the terms and conditions of probation as alleged in this Petition. If you admit to the Petition today, you are giving up and waiving all those rights I read through a few moments ago. If you admit to the Petition today, then I would set the matter for a Dispositional Hearing. At that hearing, you, Probation Officer Criswell and the State would each be allowed to make recommendations as to what you believe should happen with respect to the violation. If you deny the allegation today, I'd set the matter for a Pre-Hearing Conference and/or a Final Hearing. If we proceed to a final hearing, I would hear evidence presented by the parties and I would make a determination of whether there was a violation of probation, so when I ask you to admit or deny, do you understand what I am asking you to do?

Mr. Kidd: Yes.

The Court: Very well, at this time, Mr. Kidd, I'll ask you to either admit

or deny that you violated the terms and conditions of probation as alleged in this Petition. Do you admit or do you deny?

Mr. Kidd: Admit.

The Court: Has anyone forced or threatened you to get you to admit?

Mr. Kidd: No.

The Court: Have any promises been made about what will happen if you admit?

Mr. Kidd: No.

The Court: By admitting, you are admitting that the allegations contained in that Petition are true. Is that correct?

Mr. Kidd: That's correct.

The Court: Very well, Mr. Kidd, I'm going to find that your admission is freely and voluntarily made, that there is a factual basis for your admission. I will accept your admission. Pursuant to your admission, I do hereby find you've violated the terms and conditions of probation as alleged in this Petition. I am going to show the matter set for a Dispositional Hearing.

(Tr. at 94-98) (formatting altered). The Court revoked Kidd's probation and ordered him to serve his suspended sentence.

## **DISCUSSION AND DECISION**

Kidd asserts the court did not adequately determine whether he waived his right to counsel knowingly, intelligently, and voluntarily. Probation revocation implicates a probationer's liberty interest, so a probationer is entitled to some due process protections.

*Eaton v. State*, 894 N.E.2d 214, 216 (Ind. Ct. App. 2008), *trans. denied* 898 N.E.2d 1233 (Ind. 2008). In *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972), the Supreme Court held:

The minimum requirements of due process include: (a) written notice of the claimed violations of probation; (b) disclosure to the probationer of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a written statement by the factfinder as to the evidence relied on and reasons for revoking probation.

*Eaton*, 894 N.E.2d at 216. If a probationer admits violating his conditions of probation, the procedural safeguards of *Morrissey* are not necessary. *Id.* A probationer facing revocation also has a right to counsel. Ind. Code § 35-38-2-3. This right to counsel can be waived, of course, but the waiver must be voluntary, knowing and intelligent. *Eaton*, 894 N.E.2d at 216-17.

The State asserts Kidd’s waiver was knowing, intelligent, and voluntary because “Kidd received essentially the same advisements as the probationer in” *Greer v. State*, 690 N.E.2d 1214 (Ind. Ct. App. 1998), *trans. denied* 698 N.E.2d 1189 (Ind. 1998). There we held “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.

*Greer* is distinguishable because Greer received an explicit advisement of his right to counsel:

THE COURT: [Y]ou have a right to be represented by an attorney. And if you wish to have an attorney and can’t afford one and attorney will be appointed to represent you. Let me ask Mr. Curtis Greer first, are you making arrangements to get an attorney?

CURTIS GREER: No, ma’am. I just plan on pleading—just plead guilty and . . .

THE COURT: To admitting the allegation here?

CURTIS GREER: Right.

THE COURT: Okay. And Mr. Greer, let me be sure that you understand that you have the right to have an attorney and that one can be appointed for you at no cost to you if you wish, do you understand that?

CURTIS GREER: Yes.

*Id.* at 1215. The court then listed Greer’s remaining rights and explained the possible outcomes of his case. Greer acknowledged he understood the rights and affirmed he still wished to admit he violated probation.

By contrast, Kidd waived his right to counsel without a specific advisement regarding that right and the consequences of waiving it. As we explained in *Eaton*, “the key distinction between the right to counsel and most of the rights listed in *Morrissey* is that the right to counsel, which in this context is statutory, will often be the vehicle by which all the other rights are protected.” 894 N.E.2d at 218. Accordingly, while “certain procedural safeguards are not necessary when a respondent admits a probation violation at his initial hearing on the matter, we nonetheless conclude that a probationer is entitled to an adequate advisement regarding the right to be represented by counsel.” *Id.* at 217.

In *Eaton*,

[a]t the initial hearing on the Petition, the trial court advised Eaton, *inter alia*, that he had “the right to an attorney either by hiring one or having one appointed,” and Eaton indicated that he understood his rights. When the trial court asked Eaton if he wanted to hire an attorney or have one appointed, he responded, “Currently I’m indigent so if I did have an attorney it would have to be an appointed one.” Without pursuing the question of counsel further, the trial court asked Eaton if he intended to admit or deny the allegations in the Petition. Eaton indicated that he intended to admit the allegations in the Petition in part, and soon thereafter admitted that he had violated the terms of his probation by testing positive for cocaine and by being convicted of battery.

*Id.* at 215 (citations omitted). Eaton’s waiver of counsel was not knowing, voluntary, or intelligent because Eaton was inadequately advised of his right to counsel: he “admitted some of the allegations in the Petition without ever having been advised of the

consequences of proceeding *pro se* and without the trial court determining if he was competent to represent himself.” *Id.* at 218. We explained:

The waiver of the right to the assistance of counsel must be shown to have been voluntarily made. It is the duty of the trial court to establish a record which shows that an accused who has elected to waive counsel and proceed *pro se* has done so voluntarily, knowingly, and intelligently. A serious and weighty responsibility is imposed upon the trial judge to determine whether there was an intelligent and competent waiver. The constitutional right of an accused to be represented by counsel invokes of itself the protection of the trial court. To discharge the duty imposed, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. A defendant must be made aware of the consequences of the choice he is making so that he makes his choice with his eyes wide open. Merely making the defendant aware of his constitutional right to counsel is insufficient. A strong presumption exists against waiver of the constitutional right to counsel.

*Id.* at 216-17 (quoting *Mitchell v. State*, 417 N.E.2d 364, 369 (Ind. Ct. App. 1981)). We accordingly concluded:

[I]n a probation revocation context, the trial court must determine the defendant’s competency to represent himself and establish a record of the waiver and that the record must show that the defendant was made aware of the nature, extent and importance of the right to counsel *and to the necessary consequences of waiving such a right.*

While we decline to establish definite guidelines for such advisements in this context, they should be adequate to ensure that a probationer knows what he is doing and that his choice is made with eyes open. There are no magic words a judge must utter to ensure a defendant adequately appreciates the nature of the situation. Rather, determining if a defendant’s waiver was knowing and intelligent depends on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.

*Id.* (internal citations and quotations omitted) (emphasis supplied).

The advisement Kidd received regarding counsel does not appear to be significantly different from that in *Eaton*, and it therefore was inadequate. This trial court’s pronouncement to Kidd included within the litany of other rights Kidd would

waive by pleading guilty a mention of his right to counsel and the Judge's statement he would "consider" appointing counsel if Kidd could not afford a lawyer. This was inadequate to insure his waiver of counsel was knowing, intelligent, and voluntary. Therefore we reverse and remand for further proceedings consistent with this opinion.

*See id.*

Reversed and remanded.

BARNES, J., concurring.

BAKER, C.J., dissenting with separate opinion.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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DUSTY KIDD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 33A05-0812-CR-706
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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**BAKER, Chief Judge, dissenting.**

I respectfully dissent. I believe that the outcome herein is controlled by Greer v. State, 690 N.E.2d 1214 (Ind. Ct. App. 1998), in which a panel of this court explained that a trial court need not explain the pitfalls of self-representation to a person alleged to have violated probation:

a probationer who chooses to admit his probation violation places himself in a situation similar to that of a defendant who chooses to plead guilty to criminal charges. Neither person is in danger of “conviction” at the hands of the State. It is unnecessary to warn such a person of the pitfalls of self-representation, for those pitfalls exist only when he is confronted with prosecutorial activity which is designed to establish his culpability. It is therefore clear 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 found that the probationer therein had knowingly, intelligently, and voluntarily waived his right to counsel because

[a]t his initial hearing, Greer was advised of many things, including the following: that he had the right to be represented by an attorney; that an attorney might be appointed to represent him; and that certain consequences would or might result if he admitted the alleged violation of probation.

Id.

Here, as in Greer, the trial court advised Kidd that he had the right to be represented by an attorney, that an attorney might be appointed to represent him if he could not afford one, and that certain consequences would or might result if he admitted the alleged violation of probation. The majority attempts to distinguish Greer by stating that, whereas Greer received an explicit advisement of his right to counsel, Kidd did not. The record belies that conclusion, however, inasmuch as the trial court explicitly informed Kidd that “You do have the right to counsel to represent you. If you want an attorney, but can’t afford one, I’d consider appointment of counsel.” Tr. p. 94-98.

Furthermore, Kidd has not alleged that he did not understand that he had the right to be represented by an attorney. Kidd answered the trial court’s questions and asked a question of his own, indicating that he understood the trial court’s advisements. Under these circumstances, I can only conclude that Kidd knowingly, intelligently, and voluntarily waived his right to counsel. Therefore, I would affirm.