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ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

**SUZY ST. JOHN**  
Marion County Public Defender  
Indianapolis, Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**JODI KATHRYN STEIN**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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ROY L. HARRISON, )  
 )  
Appellant-Respondent, )  
 )  
vs. ) No. 49A02-1010-CR-1094  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Petitioner. )

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APPEAL FROM THE MARION SUPERIOR COURT  
CRIMINAL DIVISION, ROOM 19  
The Honorable Rebekah F. Pierson-Treacy, Judge  
Cause No. 49F19-1003-CM-19148

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**July 6, 2011**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Roy L. Harrison (Harrison), appeals the trial court's revocation of his probation.

We reverse and remand.

## ISSUE

Harrison raises two issues for our review, which we restate as the following single issue: Whether the probable cause affidavit was properly admitted before the trial court.

## FACTS AND PROCEDURAL HISTORY

On March 11, 2010, the State filed an Information charging Harrison with Count I, operating a vehicle while intoxicated, a Class A misdemeanor, Ind. Code § 9-30-5-2; Count II, operating a vehicle with a BAC of .15 or more, a Class A misdemeanor, I.C. § 9-30-5-1(b); Count III, public intoxication, a Class B misdemeanor, I.C. § 7.1-5-1-3; and Count IV, operating a vehicle after never receiving a license, a Class C misdemeanor, I.C. § 9-24-18-1. On April 29, 2010, Harrison entered into a plea agreement with the State, whereby he agreed to plead guilty to Count I, operating a vehicle while intoxicated, in exchange for the dismissal of the remaining charges. That same day, Harrison was sentenced to 365 days in the Marion County Jail, with 353 days suspended to probation.

On June 30, 2010, the State filed a notice of probation violation, alleging that Harrison had been arrested and charged with criminal trespass. During the probation revocation hearing on September 10, 2010, the State sought to admit a probable cause affidavit which stated that on June 21, 2010, Officer Chris McKay (Officer McKay) of the Indianapolis

Metropolitan Police Department was dispatched to Valleybrook Mobile Home Park in Indianapolis, Indiana, on the report of a person trespassing. When Officer McKay arrived, he encountered Harrison, who had been placed on a trespass list on May 24, 2010. After confirming with “control” that Harrison was indeed on the trespass list, Officer McKay arrested Harrison and charged him with criminal trespass. (Appellant’s App. p. 32). Harrison objected to the admission of this probable cause affidavit based on the fact that the State had not “laid a proper foundation or proffered to the – proffered to the [c]ourt that this probable cause affidavit is reliable based on all the different levels of hearsay.” (Transcript p. 9). Without actually admitting the probable cause affidavit, the trial court found as follows:

This probable cause affidavit in this case that was dismissed today is a standard probable cause affidavit. It lists the date that this happened, [and] the officer who was dispatched to the location. So it’s from IMPD dispatch to this location on the report of a person trespassing. When the officer arrived, according to this information, the officer saw this defendant and had the list of trespass that is provided by that location, according to [the probable cause affidavit]. And he was on the – the defendant’s name was on that list. And so they arrested him for trespassing. This is a very common offense that happens in my court multiple times every week based on this exact kind of information from a probable cause and the officers testify to it.

(Tr. pp. 12-13). The trial court found that Harrison had violated his probation and imposed a ten-day sentence to the Marion County Jail.

Harrison now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

Harrison argues that the trial court abused its discretion when it improperly considered the probable cause affidavit, which he claims contained “untrustworthy triple hearsay evidence....” (Appellant’s Br. p. 5).

The grant of probation is a favor and not a right to which a criminal defendant is entitled. *Smith v. State*, 904 N.E.2d 282, 285 (Ind. Ct. App. 2009). However, because probation revocation implicates the defendant’s liberty interests, he is entitled to some procedural due process before the State can revoke that favor. *Id.* In probation revocation proceedings, the minimum requirements of due process include: (a) written notice of the claimed violations of probation; (b) disclosure to the probationer of the evidence against him; (c) an opportunity to be heard and present evidence; (d) the right to confront and cross-examine adverse witnesses; and (e) a neutral and detached hearing body. *Id.* The State must prove the violation by a preponderance of the evidence. I.C. § 35-38-2-3(e).

Here, during the probation revocation hearing, Harrison and the State debated whether the probable cause affidavit should be admitted into evidence. The trial court asked Harrison’s probation officer, the only witness to testify, if he had “a certified copy of anything regarding the probable cause affidavit in [the trespass] case?” (Tr. p. 8). The State responded affirmatively and asked to introduce the probable cause affidavit into evidence. Harrison objected based on the fact that the affidavit “has multiple levels of hearsay.” (Tr. p. 8). However, there is no indication in the record that the State either formally submitted the affidavit into evidence or requested judicial notice of it. Relying on the probable cause

affidavit over Harrison's objections, the trial court determined that Harrison had violated his probation:

The probable cause – I'm finding that it is probable cause. [] But as far as probable cause, this is standard information and the officers went and saw somebody that – they had an allegation that somebody was there and when they went he was there. He was on the trespass list, so that's why I'm finding it to be valid and I'm finding that there was probable cause actually already by a judicial officer in that case. And I am finding it as well again, and therefore proving the violation in this case.

(Tr. p. 13). Based on the fact that the probable cause affidavit was not properly admitted into evidence, we reverse and remand for a new probation revocation hearing.<sup>1</sup>

#### CONCLUSION

Based on the foregoing, we conclude that the probable cause affidavit was not properly admitted into evidence and therefore cannot be used to establish Harrison's alleged violation of probation.

Reversed and remanded.

DARDEN, J., and BARNES, J., concur.

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<sup>1</sup> Because we are remanding back to the trial court for another hearing, we need not determine whether the probable cause affidavit is substantially trustworthy or reliable.