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OPINION OF THE SUPREME COURT OF TENNESSEE (DECEMBER 11, 2018)

564 S.W.3d 809 (Tenn.2018)

IN THE SUPREME COURT
OF TENNESSEE AT NASHVILLE
February 7, 2018 Session

STATE OF TENNESSEE

v.

WESTLEY A. ALBRIGHT

No. M2016-01217-SC-R11-CD

Appeal by Permission from the Court of Criminal Appeals Circuit Court for Dickson County
No. 22CC-2013-CR-206 David D. Wolfe, Judge

Before: Jeffrey S. BIVINS, Chief Justice. Cornelia A. CLARK, Holly KIRBY, Roger A. PAGE, and Sharon G. LEE, JJ.

Factual and Procedural Background

In February 2013, an undercover officer swore out an affidavit of complaint alleging that he had been communicating with the Defendant over the Internet for approximately two months. The officer alleged that the Defendant believed the officer was a mother with a thirteen-year-old daughter and that the Defendant "expressed many times that he wanted to have sex

with both." The officer also alleged that the Defendant had requested that he be sent naked photographs of the mother and daughter via email. According to the affidavit, the officer set up a meeting and, when the Defendant showed up as arranged, the Defendant admitted to their communications. The officer also stated that the Defendant claimed that he was at the meeting only to get the mother's license plate number.

On the basis of this affidavit, the Defendant was arrested and subsequently indicted on two counts of solicitation of a minor. The Defendant entered into a plea-agreement with the State and, in September 2015, pled nolo contendere to one count of solicitation of a minor, a Class E felony.[1] The other count was

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[1] The crime to which the Defendant pled is defined as follows:

> (a) It is an offense for a person eighteen (18) years of age or older, by means of oral, written or electronic communication, electronic mail or Internet services, directly or through another, to intentionally command, request, hire, persuade, invite or attempt to induce a person whom the person making the solicitation knows, or should know, is less than eighteen (18) years of age, or solicits a law enforcement officer posing as a minor, and whom the person making the solicitation reasonably believes to be less than eighteen (18) years of age, to engage in conduct that, if completed, would constitute a violation by the soliciting adult of one (1) or more of the following offenses:
>
> (1) Rape of a child, pursuant to § 39-13-522;
>
> (2) Aggravated rape, pursuant to § 39-13-502;
>
> (3) Rape, pursuant to § 39-13-503;
>
> (4) Aggravated sexual battery, pursuant to § 39-13-504;

dismissed. In conjunction with his plea, the Defendant signed a written plea document providing, "I understand that if I plead NOLO CONTENDERE the court will find me guilty pursuant to the plea agreement set forth above." The Defendant was placed on judicial diversion,[2] with a probation term of one year, including the requirements that he register as a sex offender and that he "abide by the Specialized Probation Con-

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(5) Sexual battery by an authority figure, pursuant to § 39-13-527;

(6) Sexual battery, pursuant to § 39-13-505;

(7) Statutory rape, pursuant to § 39-13-506;

(8) Especially aggravated sexual exploitation of a minor, pursuant to § 39-17-1005;

(9) Sexual activity involving a minor, pursuant to § 39-13-529;

(10) Trafficking for commercial sex acts, pursuant to § 39-13-309;

(11) Patronizing prostitution, pursuant to § 39-13-514;

(12) Promoting prostitution, pursuant to § 39-13-515; or

(13) Aggravated sexual exploitation of a minor, pursuant to § 39-17-1004.

Tenn. Code Ann. § 39-13-528(a) (2014).

[2] Pursuant to Tennessee Code Annotated section 40-35-313(a)(1)(A) (2014), a trial court "may defer further proceedings against a qualified defendant and place the defendant on probation upon such reasonable conditions as it may require without entering a judgment of guilty[.]" We refer to this "unique legislative construct" as "judicial diversion." *State v. Dycus*, 456 S.W.3d 918, 925 (Tenn. 2015). When a defendant violates the terms of his judicial diversion probation, the trial court may revoke the defendant's diversion, enter an adjudication of guilt, "and proceed as otherwise provided." Tenn. Code Ann. § 40-35-313(a)(2).

ditions for Sex Offenders as adopted by the Tennessee Department of Correction." The specialized conditions included the following:

> 3. I will attend, participate in, and pay for treatment or counseling with an approved treatment provider as deemed necessary by the Board, the Court, or my [Probation] Officer. I will continue in such treatment as instructed for the duration of supervision unless my treatment provider, in consultation with my Officer, instructs me in writing that I have satisfactorily completed treatment.

On the same day as his plea hearing, the Defendant signed the documents reflecting the conditions of his probation, and, additionally, wrote his initials next to each of the specialized probation conditions.

The Defendant began his participation in the mandated sex offender treatment program with an assessment in November 2015. The Defendant then began attending group therapy sessions. According to the Defendant's therapist, James Berry Welch, the Defendant "attended all of his scheduled treatment groups." On January 6, 2016, the Defendant and Mr. Welch worked out a written treatment plan which the Defendant signed ("the Treatment Plan"). The Treatment Plan included as an objective that the Defendant "admit to 100 percent elements of the offense as described by his victims through the official victims' statement."

In spite of this objective agreed to by the Defendant, the Defendant continued to maintain during therapy that he had harbored no criminal intent during his communications with the undercover officer.

According to Mr. Welch, the Defendant claimed that his reason for meeting the woman with whom he believed he was communicating

> was he had been stalked by somebody, a friend. Somebody had told him about the website, Motherless.com, which is a notorious website for incest. He went on that website and was looking for people who he thought was this woman who was stalking him in order to gain enough information to confront her on that. And he met with the police officer so that—or he went to meet with the police officer and agreed to meet with the police officer so he could get a license plate number off the vehicle to turn that over to authorities because of this person stalking him.

Mr. Welch discharged the Defendant from therapy for non-compliance on February 17, 2016. On February 19, 2016, the Defendant filed a motion seeking to be relieved from certain conditions of his probation, asserting that "a confession should not be a condition of [his] probation" and that he "does not wish for his probation to be violated merely because he has refused to admit facts which he asserts are not true."

The Defendant's probation officer, Jessica D. Forbes, filed a Diversion Violation Report on February 26, 2016. The factual basis for the alleged violation was that the Defendant "was discharged from sex offender specific treatment for noncompliance with treatment goals."

An evidentiary hearing ensued. Ms. Forbes testified that she filed the Violation Report after receiving a letter from the Defendant's treatment provider

"indicating that [the Defendant] was no longer enrolled in treatment at that time" ("the Discharge Letter"). Although a copy of the Discharge Letter was admitted into evidence at the hearing, the record before this Court does not contain a copy of the letter.

Mr. Welch also testified, explaining that he discharged the Defendant from his therapy program because he failed to comply with his Treatment Plan, including the necessity that the Defendant be "honest." Mr. Welch stated that, "[b]asically all of the evidence I had indicates that [the Defendant] had been lying to me."

Shown the Discharge Letter on cross-examination, Mr. Welch agreed with its statement that, "[a]though [the Defendant] appeared to be in compliance with supervision and attended all required treatment groups, he was not able to give a credible statement of responsibility for his offense of conviction." Mr. Welch explained that, although the Defendant had admitted to exchanging emails with the undercover officer and admitted to attending the meeting arranged by the undercover officer, the Defendant "was not credible in his intentions or his reason or rationale for why" he had participated in those activities. In short, the Defendant refused to admit in therapy that he had engaged in any conduct that included any illegal sexual behavior or intent. Mr. Welch explained that, if the Defendant refused to admit that he had engaged in soliciting a minor, then treatment aimed at remedying such behavior was pointless. Asked specifically on cross-examination, "that's why he was discharged from your program is because he wouldn't admit that he had a sex problem," Mr. Welch responded, "Yes."

After the hearing, the trial judge denied the Defendant's motion to be relieved from certain conditions of probation and found that the Defendant had violated the terms of his judicial diversion. The trial court's written order includes the following findings of fact:

> 4. The Defendant followed all directives and participated in the [approved treatment] program by attending all meetings and complying with all directions. However, the Defendant's Sexual Offender Treatment Provider, J. Barry Welch, made the decision to discharge the Defendant from the program because the determination was made by him that the Defendant was not truthful regarding his intentions for committing the crime that he was convicted of committing. Specifically, Mr. Welch wrote a letter to the Defendant's probation officer which stated in part, "Although he appeared to be in compliance with supervision and attended all required treatment groups, he was not able to give a credible statement of responsibility for his offense of conviction."
>
> [. . .]
>
> 6. This Court believes that the Defendant has in fact been dishonest with his Sexual Offender Treatment Provider regarding his intentions for committing the offense of solicitation of a minor. The Court believes that Defendant has not been truthful about his motivations for committing the crime.

The trial court revoked the Defendant's judicial diversion and entered an adjudication of guilt. The court allowed the Defendant to remain on probation rather than require a period of incarceration. However, the court extended the Defendant's probation for an additional six months and ordered the Defendant "to comply with and fulfill the 'Specialized Probation Conditions for Sex Offenders.'"

The Defendant appealed to the Court of Criminal Appeals, which affirmed the trial court's judgment. *State v. Albright*, No. M2016-01217-CCA-R3-CD, 2017 WL 2179955, at *10 (Tenn. Crim. App. May 16, 2017), perm. app. granted (Tenn. Sept. 21, 2017). We granted the Defendant's application for permission to appeal in order to consider whether a criminal defendant who pleads nolo contendere to a sex crime and is placed on judicial diversion with probation, including sex offender treatment, must be informed in conjunction with his plea that his failure to admit to certain facts during sex offender treatment may lead to the revocation of his judicial diversion and probation.

Standard of Review

"If it is alleged that a defendant on judicial diversion has violated the terms and conditions of diversionary probation, the trial court should follow the same procedures as those used for ordinary probation revocations." *Alder v. State*, 108 S.W.3d 263, 266 (Tenn. Crim. App. 2002) (citing *State v. Johnson*, 15 S.W.3d 515, 519 (Tenn. Crim. App. 1999)). "These procedures are set forth in Tennessee Code Annotated section 40-35-311 (Supp. 2001)." *Id.*

Tennessee Code Annotated section 40-35-311 provides that a trial court may revoke a criminal defend-

ant's probation if the judge finds by a preponderance of the evidence that the defendant has violated the conditions of his probation. Tenn. Code Ann. § 40-35-311(e)(1) (2014). We review the trial court's decision in this regard for an abuse of discretion. *See State v. Gabel*, 914 S.W.2d 562, 564 (Tenn. Crim. App. 1995). "A trial court abuses its discretion when it applies incorrect legal standards, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *State v. Bell*, 512 S.W.3d 167, 189 (Tenn. 2015). However, "the interpretation of a probation condition and whether it affords a probationer fair warning of the conduct proscribed thereby are essentially matters of law and, therefore, give rise to *de novo* review on appeal." *United States v. Gallo*, 20 F.3d 7, 11 (1st Cir. 1994); *see also State v. Merriman*, 410 S.W.3d 779, 791 (Tenn. 2013) (holding that the review of a defendant's due process claim is de novo, with deference given to the trial court's factual findings).

Analysis

We deem it helpful to begin our analysis with a brief review of the pertinent provisions of the Tennessee Standardized Treatment Program for Sex Offenders, set forth at Tennessee Code Annotated sections 39-13-701 through-709 (2014) ("the Treatment Act"). The Treatment Act created a board charged with developing "guidelines and standards for a system of programs for the treatment of sex offenders that can be utilized by offenders who are placed on probation[.]" Tenn. Code Ann. § 39-13-704(d)(2).[3] Sex offenders placed on

[3] Another provision of the Treatment Act provides that

probation are required "to submit to an evaluation for treatment [and] risk potential," *id.* § 39-13-705(a), and "any plan of treatment recommended by the evaluation shall be a condition of the probation," *id.* § 39-13-705(b). The legislative intent underlying the Treatment Act is as follows:

> (a) The general assembly hereby declares that the comprehensive evaluation, identification, treatment, and continued monitoring of sex offenders who are subject to the supervision of the criminal justice system are necessary in order to work toward the elimination of recidivism by the offenders.
>
> (b) Therefore, the general assembly hereby creates a program that standardizes the evaluation, identification, treatment, and continued monitoring of sex offenders at each stage of the criminal justice system, so that the offenders will curtail recidivistic behavior, and so that the protection of victims and potential victims will be enhanced. The general assembly recognizes that some sex offen-

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> [e]ach sex offender sentenced by the court for an offense committed on or after January 1, 1996, is required, as a part of any sentence to probation, community corrections, or incarceration with the department of correction, to undergo treatment to the extent appropriate to the offender based upon the recommendations of the evaluation and identification made pursuant to § 39-13-705, or based upon any subsequent recommendations by the department of correction, the judicial branch or the department of children's services, whichever is appropriate.

Tenn. Code Ann. § 39-13-706(a).

> ders cannot or will not respond to treatment and that, in creating the program described in this part, the general assembly does not intend to imply that all sex offenders can be successful in treatment.

Id. § 39-13-702.

In this case, the Defendant was placed on probation and required to undergo sex offender therapy as a condition of his judicial diversion. The trial court granted judicial diversion as a part of the Defendant's nolo contendere plea. The Defendant was not specifically informed in conjunction with his plea that his court-mandated therapy would require him to admit that he had intended to solicit a minor and that his judicial diversion could be revoked if he refused to make this admission. The Defendant now contends that his due process rights were violated when his judicial diversion was revoked on the basis of his failure to meet a "hidden" requirement that was inconsistent with his nolo contendere plea.[4]

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[4] Preliminarily, we reject the State's contention that the Defendant has waived this due process argument by failing to raise it in the trial court. A fair reading of the Defendant's motion to be relieved from certain conditions of probation reflects the Defendant's position that he had not expected to be required to admit guilt during therapy because such an admission was inconsistent with his nolo contendere plea. Additionally, during argument at the judicial diversion revocation hearing, defense counsel asserted that the therapist's position was inconsistent with the plea agreement and that the therapist was "asking [the Defendant] to do . . . something this court didn't ask him to do." We consider these assertions sufficient to raise the issue that the Defendant had not been informed at the appropriate time that he would be expected to admit the allegations underlying the charged offense in order to successfully complete his probation

The Defendant's position encompasses two distinct analytical points: first, whether a nolo contendere plea precludes as a matter of law a requirement that a probated defendant make certain admissions during court-mandated sex offender therapy, and second, whether due process requires a defendant ordered to participate in sex offender treatment as a condition of probation to be specifically notified that his probation may be revoked if he refuses to make certain admissions during treatment.

Nolo Contendere Pleas and Required Subsequent Admissions

Tennessee Rule of Criminal Procedure 11 provides that a defendant facing criminal charges "may plead not guilty, guilty, or nolo contendere." Tenn. R. Crim. P. 11(a)(1).[5] The Latin phrase "nolo contendere" means

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requirements. Accordingly, we will address the Defendant's claim on the merits.

[5] As we noted in *Frazier v. State*, 495 S.W.3d 246, 250 n.1 (Tenn. 2016), a criminal defendant may plead guilty pursuant to a "best interest" plea as set forth in the United States Supreme Court case, *North Carolina v. Alford*, 400 U.S. 25 (1970). Frequently referred to as an "*Alford* plea," the defendant pleads guilty while maintaining his factual innocence of the crime. Although we noted in *Frazier* that our Rules of Criminal Procedure refer to *Alford* pleas as nolo contendere pleas, 495 S.W.3d at 250 n.1, we take this opportunity to clarify that there are technical differences between a "best interest"/*Alford* plea and a nolo contendere plea. Specifically, because "best interest"/Alford pleas are guilty pleas even though the defendant is protesting his innocence, a factual basis must be established on the record at the plea hearing before the trial court may accept the plea. *See Alford*, 400 U.S. at 37, 38 n.10; *Dortch v. State*, 705 S.W.2d 687, 689 (Tenn. Crim. App. 1985). No such factual basis is required for nolo contendere pleas. *State v. Crowe*, 168 S.W.3d 731, 747 (Tenn. 2005). Additionally, a defendant entering a "best interest"/

"I will not contest it." *Black's Law Dictionary*, p. 1048 (6th ed. 1990); *see also State v. Crowe*, 168 S.W.3d 731, 747 n.19 (Tenn. 2005). As explained by the United States Supreme Court,

> Throughout its history . . . the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency. Fed[eral] Rule [of] Crim[inal] Proc[edure] 11 preserves this distinction in its requirement that a court cannot accept a guilty plea "un-

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Alford plea may be estopped from denying his guilt in a subsequent civil action, *see, e.g.*, Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 Cornell L. Rev. 1361, 1373 (July 2003), while a defendant pleading nolo contendere is not subject to estoppel, *see, e.g.*, *Teague v. State*, 772 S.W.2d 932, 943 (Tenn. Crim. App. 1988); *see also* Tenn. R. Evid. 410(2). Nevertheless, as the United States Supreme Court recognized in *Alford*, there is no "material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence[.]" *Alford*, 400 U.S. at 37; *see also*, *e.g., State v. Faraday*, 842 A.2d 567, 588 n.17 (Conn. 2004) ("A guilty plea under the *Alford* doctrine is . . . the functional equivalent [to an unconditional] plea of nolo contendere which itself has the same legal effect as a plea of guilty on all further proceedings within the indictment. . . . The only practical difference is that the plea of nolo contendere may not be used against the defendant as an admission in a subsequent criminal or civil case.") (internal quotation marks and citations omitted); *Bibas*, *supra* ("Alford and nolo contendere pleas differ in two main ways: First, nolo contendere pleas avoid estoppel in later civil litigation, while Alford pleas do not. Second, defendants who plead nolo contendere simply refuse to admit guilt, while defendants making Alford pleas affirmatively protest their innocence. By and large, however, Alford is a new extension of the age-old nolo plea.").

> less it is satisfied that there is a factual basis for the plea"; there is no similar requirement for pleas of *nolo contendere*, since it was thought desirable to permit defendants to plead *nolo* without making any inquiry into their actual guilt.

North Carolina v. Alford, 400 U.S. 25, 35-36 n.8 (1970); *see also Crowe*, 168 S.W.3d at 746. As our Court of Criminal Appeals has recognized,

> A plea of nolo contendere admits every essential element of the offense, which is properly alleged in the charging instrument; and it is tantamount to an admission of guilt for purposes of the case in which the plea is entered. Once the plea has been entered, and the trial court has determined that it has been made voluntarily, nothing is left but to render judgment since there is no issue of fact. Moreover, a conviction following a plea of nolo contendere has all the effects of a plea of guilty insofar as the purposes of the case are concerned. The only difference of substance is that a conviction following the entry of a plea of nolo contendere cannot be used against the accused as an admission in any civil suit for the same act.

Teague v. State, 772 S.W.2d 932, 943 (Tenn. Crim. App. 1988) (citations and quotation marks omitted); *see also, e.g., United States v. Heller*, 579 F.2d 990, 998 (6th Cir. 1978) (recognizing that a nolo contendere plea admits every essential element of the offense charged, that the plea is an admission of guilt for the purposes of the case, and that "nothing is left but to

render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record") (internal quotation marks and citations omitted); *State v. Shrader*, 765 S.E.2d 270, 273 n.5 (W. Va. 2014) (recognizing that the plea of nolo contendere "'constitutes an implied confession of guilt'" (quoting *State ex rel. Clark v. Adams*, 111 S.E.2d 336, 340 (W. Va. 1959)).

Further, "[a] defendant may plead nolo contendere only with the consent of the court. Before accepting a plea of nolo contendere, the court shall consider the views of the parties and the interest of the public in the effective administration of justice." Tenn. R. Crim. P. 11(a)(2). As noted above, it is not necessary that a factual basis be established before a trial court may accept a plea of nolo contendere. *Crowe*, 168 S.W.3d at 747.[6]

Thus, although the Defendant did not verbally admit at his plea hearing to the underlying facts which resulted in the charge of soliciting a minor, the Defendant's plea of nolo contendere had the same effect as a plea of guilty insofar as the prosecution and his

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[6] Nevertheless, the trial court in this case determined at the plea hearing that a factual basis existed for the Defendant's offense. At least one federal court of appeals considers it the "better practice" for trial courts to inquire as to the evidence supporting a criminal charge before accepting a nolo contendere plea. *Ranke v. United States*, 873 F.2d 1033, 1037 (7th Cir. 1989); *see also Crowe*, 168 S.W.3d at 747 n.18 (noting that Tennessee Rule of Criminal Procedure 11 does not prohibit a trial court from requiring that a factual basis be established before accepting a nolo contendere plea and recognizing that the trial court "may determine that an inquiry into the factual basis is necessary to ensure that the plea is voluntarily, knowingly, and understandingly entered").

disposition were concerned. *See Alford*, 400 U.S. at 35 n.8 ("Throughout its history . . . the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty.").

Nevertheless, at least two jurisdictions have concluded that the closely-related *Alford* plea to a sex offense precludes requiring the defendant to admit to the conviction offense as a condition of probation. In *State v. Birchler*, No. 00AP-311, 2000 WL 1473152 (Ohio Ct. App. Oct. 5, 2000), the Ohio intermediate appellate court considered a defendant who had entered an *Alford* plea to assault and was sentenced to probation, including sex offender treatment. The defendant was terminated from his treatment program after he failed "to acknowledge specific criminal conduct against a victim or any victim at all." *Id.* at *1. The trial court revoked the defendant's probation on this basis, and the defendant appealed. The appellate court reversed the trial court because the defendant "did not have notice that he would be required to admit specific criminal conduct or that there was a victim of such conduct." *Id.* at *3. The appellate court reasoned as follows:

> We cannot reconcile [the defendant's] *Alford* plea and the requirement as a part of his counseling session that he admit he had a victim. An *Alford* plea is considered a qualified guilty plea because it allows a defendant to enter a guilty plea yet maintain his or her innocence. Requiring [the defendant] to admit that there was a victim or to specific criminal conduct against a victim would be

> in contradiction to his maintenance of factual innocence pursuant to *Alford*.

Id. at *2 (citation omitted);[7] *see also People v. Walters*, 627 N.Y.S.2d 289, 291 (N.Y. Cnty. Ct. Apr. 25, 1995) (reversing probation revocation for defendant's failure to admit guilt during sex offender therapy because requiring defendant to admit factual guilt during treatment after *Alford* plea was "directly inconsistent with" the *Alford* plea).

The problem with this reasoning is twofold. First, this approach treats an admission in the therapy context as the equivalent of guilt in the criminal context. However, as recognized by the West Virginia Supreme Court, "a distinction must be made between guilt as

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[7] Several years later, a different panel of the Ohio intermediate appellate court reached a different conclusion on similar facts. In *State v. Hughes*, No. CA2002-11-124, 2003 WL 21497235 (Ohio Ct. App. June 30, 2003), the defendant entered an *Alford* plea to two sex offenses and was subsequently discharged from his sex offender treatment (a condition of his community control release) because he "continued to maintain his innocence, asserting that he had committed no crime, and that there was no victim." *Id.* at *1. The defendant claimed on appeal that the ensuing revocation of his community control release was "incongruous" with his *Alford* plea. *Id.* Noting that, after accepting the defendant's *Alford* plea, the trial court "was obliged to treat [the defendant] as any other convicted defendant with regard to sentencing," *id.* at *3, the intermediate appellate court held that the trial court's instruction to the defendant that he would have to participate in the sex offender program was sufficient to notify the defendant of the conduct expected of him, *id.* The court further noted that it had found no authority "indicating that the trial court, when requiring completion of a program such as a sexual offender program, must detail the minutiae of the program's requirements." *Id.* The court affirmed the trial court's revocation of the defendant's community control sentence. *Id.*

a matter of law and guilt as an acknowledgement of responsibility for therapeutic purposes." *Shrader*, 765 S.E.2d at 279;[8] *see also People v. Birdsong*, 958 P.2d 1124, 1128 (Colo. 1998) (en banc) (recognizing that "an individual might be willing to admit to something in a therapeutic setting but not in a court of law").[9]

Second, this approach requires trial courts placing sex offenders on probation to consider the methodology by which the offender became convicted and, moreover, requires different information to be imparted to different offenders depending on that methodology. Thus, if a defendant pleads nolo contendere or enters a "best interest"/*Alford* plea, he would have to be specifically warned about the requirements of sex offender treatment. A "straight" plea of guilty, presumably, would not be entitled to this same level of actual notice. Query the notice required to be given a

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[8] Thus, in our view, the dissent's repeated assertions that the Defendant was discharged from his treatment program because he would not admit "guilt" to the charge of solicitation of a minor are misleading. The Defendant was discharged from his therapy program because, while admitting that he told the undercover officer that he wanted "topless" photographs of a minor female and that he wanted to have sex with her, he refused to acknowledge during treatment that he had harbored any pedophilic intent. The Defendant's steadfast refusal to acknowledge in therapy any illegal intent indicated his lack of good faith and rendered his therapy ineffective. Indeed, the trial court specifically found that the Defendant had been "dishonest" and "not truthful" during his therapy sessions.

[9] Moreover, the ultimate effect of an admission in the therapy setting is the successful completion of a probation requirement, and the admission has no additional impact on the defendant's sentence or any sentence that might be imposed upon him in the future.

defendant who pleads "not guilty" but is convicted after his or her trial, and query whether the notice would differ depending upon whether the defendant testified at trial that he had not committed the charged acts.

We emphasize that the methodology utilized for arriving at a conviction, whether it be upon a trial after a plea of not guilty, upon an *Alford* plea accompanied by a protestation of actual innocence, upon a plea of nolo contendere, or upon a "straight" plea of guilty, does not alter the legal fact of conviction for sentencing purposes.[10] Thus, we reject the Defendant's implicit request to create distinctions based on the method by which a defendant becomes convicted as to the notice that a trial court must provide to a defendant being placed on probation. *See Birdsong*, 958 P.2d at 1127 ("An *Alford* plea is a guilty plea. As such, the trial court's obligations to advise the defendant were no greater than with any other guilty plea."); *see also Zebbs v. Commonwealth*, 785 S.E.2d 493, 498 (Va. Ct. App. 2016) ("Once an accused has been found guilty and sentenced, any distinction between an ordinary guilty plea and an *Alford* plea of guilty ceases to be relevant for purposes of a subsequent violation of a suspended sentence.").

Other jurisdictions also have rejected special treatment for sex offenders entering nolo contendere

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[10] We recognize that, in this case, the Defendant was placed on judicial diversion and that, accordingly, his conviction was not filed of record nor was he "sentenced" until after the revocation hearing. *See Dycus*, 456 S.W.3d at 926 (recognizing that judicial diversion and the resulting probationary period "do not constitute a sentence") (citations omitted). In the context of this discussion, this distinction is immaterial.

or *Alford* pleas. For instance, the Delaware Supreme Court has spoken in strong language about this issue in *Betts v. State*, 983 A.2d 75 (Del. 2009). In *Betts*, the defendant pled nolo contendere to six counts of a sex crime. *Id.* at 76. His plea agreement required him to register as a sex offender and to complete a sexual disorders counseling program. *Id.* The defendant subsequently "refused to discuss his conduct underlying the offenses" and was discharged from treatment for that reason. *Id.* The trial court then revoked the defendant's probation. *Id.* On appeal, the defendant argued that his nolo plea prevented the state from requiring that he discuss the underlying conduct during treatment. *Id.*

The Delaware Supreme Court rejected this contention and affirmed the trial court's order of revocation, reasoning as follows:

> "There is no merit to [defendant's] argument that he can not be required to 'admit' guilt as part of his treatment program because he entered a plea of *nolo contendere*. [Defendant's] plea does not confer upon him a right to violate a condition of his bargained-for plea agreement."
>
> . . . [A] *nolo contendere* plea does not receive elevated constitutional protections over a traditional guilty plea, nor do any special promises accompany the plea offer.
>
> . . . When a sentencing judge foregoes incarcerating a potential recidivist, he does so because of reliance on the counseling process. The judge offers probation, on the rational assumption that effective counseling acts as

> a viable preventative alternative to incarceration. If the sentenced defendant refuses to participate in preventative counseling, he undermines the viability of that alternative to incarceration. [The defendant] gained the benefit of this bargain; he must uphold his concomitant obligations.
>
> Irrespective of the type of plea agreement, the sexual offender may not bargain out of trial and potential incarceration, avoid counseling, and refuse a polygraph. Until he fully engages in counseling, [the defendant] remains a serious public threat, in violation of his plea agreement.

Id. at 77 (quoting *Whalen v. State*, 2000 WL 724683, at *1 n.7 (Del. May 18, 2000) (Table)) (citation omitted). We wholeheartedly agree with this analysis.

Similarly, in *State ex rel. Warren v. Schwarz*, 579 N.W.2d 698 (Wis. 1998), the Wisconsin Supreme Court considered a defendant who had entered an *Alford* plea to a sex offense and was placed on probation, including sex offender therapy. *Id.* at 703-04. The defendant refused to admit in therapy that he had committed the offense, and his probation was subsequently revoked on that basis. The defendant appealed, arguing that "acceptance of an *Alford* plea necessarily contemplates that defendants will be allowed to maintain their factual innocence, even while completing the terms of probation which have been imposed upon them." *Id.* at 706.

The Wisconsin Supreme Court rejected this contention, noting that "[a] defendant's protestations of innocence under an *Alford* plea extend only to the

plea itself" and asserting that, "[w]hatever the reason for entering an *Alford* plea, the fact remains that when a defendant enters such a plea, he becomes a convicted sex offender and is treated no differently than he would be had he gone to trial and been convicted by a jury." *Id.* at 707. The Wisconsin court continued: "Put simply, an *Alford* plea is not the saving grace for defendants who wish to maintain their complete innocence. Rather, it is a device that defendants may call upon to avoid the expense, stress and embarrassment of trial and to limit one's exposure to punishment." *Id.* The Wisconsin Supreme Court affirmed the trial court's revocation of the defendant's probation. *Id.*

Also, in *State v. Faraday*, 842 A.2d 567, 572 (Conn. 2004), the Connecticut Supreme Court considered a defendant who entered an *Alford* plea to sexual assault. The defendant was placed on probation including the requirement that he attend sex offender treatment. *Id.* at 573. The defendant was discharged from his treatment program because he refused to admit guilt of the underlying charges, and the defendant's probation was revoked. *Id.* On appeal, the defendant argued that "the trial court could not revoke his probation based on his failure to admit guilt because such a requirement was inconsistent with his guilty plea under the *Alford* doctrine." *Id.* at 587.

The Connecticut Supreme Court rejected this argument, noting that "[t]he entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty. By entering such a plea, a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he nonetheless consents to being treated as if he were guilty with no

assurances to the contrary." *Id.* at 588 (citations omitted). The Connecticut court noted that, when accepting the defendant's plea, the trial court "did not, in any way, indicate that the defendant could unconditionally maintain his innocence for any and all purposes," and concluded that, although the defendant was "free to maintain the innocence associated with his plea," he also was required to comply with the conditions of his probation if he wanted to maintain the "conditional liberty" created thereby. *Id.* at 588-89 (citation omitted); *see also, e.g., Birdsong*, 958 P.2d at 1130 (holding that, "by accepting the *Alford* plea [to a sex offense], the trial court did not in any way obviate later revocation proceedings for failure to admit guilt in a therapeutic context"); *State v. Jones*, 926 P.2d 1318, 1321 (Idaho Ct. App. 1996) (holding that the defendant's *Alford* plea to a sex offense "did not exempt him from fulfilling the terms of his probation, including the requirement of full disclosure which was deemed essential to successful participation in sexual abuse counseling and rehabilitation"); *State v. Alston*, 534 S.E.2d 666, 670 (N.C. Ct. App. 2000) (rejecting defendant's claim that his refusal to admit sex offense in sex offender therapy should be excused because he entered an *Alford* plea, holding that the defendant's "protestations of innocence under his '*Alford* plea' did not extend to future proceedings," that "his claim of innocence was applicable only to the plea itself, a plea of guilty," and that the *Alford* plea "bestowed upon defendant no rights, promises, or limitations with respect to the punishment imposed . . . and authorized the trial court to treat defendant as any other convicted sexual offender") (citations omitted); *Ellerbe v. State*, 80 S.W.3d 721, 723 (Tex. Ct. App. 2002) ("A plea of nolo contendere does not relieve a defendant from having

to admit to the commission of an offense so as to fully participate in a treatment program as a condition of community supervision."); *Carroll v. Commonwealth*, 682 S.E.2d 92, 101 (Va. Ct. App. 2009) (rejecting defendant's argument that, because he entered *Alford* plea to sex offense, his probation could not be revoked for failing to admit crime in therapy, noting that, although "there is an inconsistency between any defendant's protestations of innocence and the probation condition that he admit his guilt," nevertheless, "[a] defendant who has entered an *Alford* plea is not an innocent person for the purposes of criminal sentencing and probation").

We agree with the reasoning of these decisions and hold that a defendant pleading nolo contendere to a sex offense may nonetheless be mandated to participate in sex offender treatment which may require admissions to the conduct underlying the conviction(s).

Due Process Requirements

We turn now to the Defendant's argument that he is entitled to relief because the trial court did not specifically inform him about the requirements of his mandated sex offender therapy. With respect to the revocation of judicial diversion or probation, "a defendant who is granted probation has a liberty interest that is protected by due process of law." *State v. Stubblefield*, 953 S.W.2d 223, 225 (Tenn. Crim. App. 1997) (citing *Practy v. State*, 525 S.W.2d 677, 680 (Tenn. Crim. App. 1974)); *see also, e.g., United States v. Twitty*, 44 F.3d 410, 412 (6th Cir. 1995) (stating that, "since revocation of probation may result in loss of liberty, the Fifth Amendment requires that a defendant be accorded due process") (citing *Gagnon v.*

Scarpelli, 411 U.S. 778, 781-82 (1973); *United States v. Dodson*, 25 F.3d 385, 388 (6th Cir. 1994)). The due process to which a probated defendant is entitled includes "notice or fair warning of what conduct might result in revocation." *Twitty*, 44 F.3d at 412 (citations omitted); *see also Stubblefield*, 953 S.W.2d at 225 (stating that "it is fundamental to our system of justice through due process that persons who are to suffer penal sanctions must have reasonable notice of the conduct that is prohibited") (citing *United States v. Harriss*, 347 U.S. 612, 617 (1954); *State v. Ash*, 729 S.W.2d 275, 279 (Tenn. Crim. App. 1986)).

On the basis of these principles, the Defendant claims that he was entitled to "fair warning" that his judicial diversion could be revoked if he refused to admit in his treatment program the same facts that he was not required to admit in his plea hearing. He contends that, because he was not timely informed of this potential ground for revocation, his due process rights were violated when the trial court revoked his judicial diversion.

This Court previously has not considered this precise issue. We begin our analysis recognizing that our Court of Criminal Appeals has addressed the due process argument in a case involving a regular guilty plea. In *State v. Gillman*, the defendant pled guilty to one count of rape and was placed on probation with the requirement that she participate in sex offender treatment. No. M2005-01863-CCA-R3-CD, 2006 WL 2960598, at *1 (Tenn. Crim. App. Oct. 18, 2006). Eventually, she was discharged from her treatment program for noncompliance based upon her refusal to accept responsibility for her crime, and the trial court revoked her probation. *See id.* at *1-4.

On appeal, the Court of Criminal Appeals first noted that "due process requires that probationers only be held responsible for violations of those conditions of probation of which they were reasonably apprised." *Id.* at *4 (citing *Stewart v. State*, No. M1999-00684-CCA-MR3-CD, 2000 WL 374756 (Tenn. Crim. App. Apr. 7, 2000)). The court then framed the issue as "whether the [defendant] was sufficiently on notice that, as a condition of her probation, she would have to admit her offense while enrolled in the sex-offender treatment program." *Id.* at *6. Noting that this was an issue of first impression, the *Gillman* court recognized that courts in other states were split on the issue. The *Gillman* court then considered authority from Colorado, Connecticut, Florida, and North Dakota before holding that a defendant must be given notice that she may be required to admit to criminal conduct as part of a sexual offender treatment program. *Id.* at *6-7.

We reject the Court of Criminal Appeals' analysis in *Gillman.* The *Gillman* analysis is unpersuasive. First, the defendant in the Colorado case cited by the *Gillman* court had received actual notice in the sentencing hearing that he would be required to admit guilt as part of a sex offender treatment program. Thus, the case was inapposite. *See People v. Ickler*, 877 P.2d 863, 867 (Colo. 1994) (en banc). Similarly, the cited Connecticut statute has been construed by courts in that state as providing defendants with constructive notice that their probation could be revoked for failure to admit criminal conduct during treatment. *See Faraday*, 842 A.2d at 587 (construing

Conn. Gen. Stat. Ann. § 53a-32a).[11] The Florida intermediate appellate court decision relied upon by the *Gillman* court subsequently was overruled by the Florida Supreme Court. The Florida Supreme Court expressly rejected the proposition "that where a probationer is not told prior to the entry of a plea that an admission of wrongdoing is required [in sex offender treatment], the probationer does not have sufficient notice of the admission requirement for the probationer's refusal to admit sexual misconduct to be a willful violation." *Staples v. State*, 202 So.3d 28, 34 (Fla. 2016) (overruling *Diaz v. State*, 629 So.2d 261 (Fla. Dist. Ct. App. 1993)). Finally, the North Dakota Supreme Court decision relied upon by the *Gillman* court, which held that revocation of a defendant's probation is not permitted unless a trial court has given the defendant "actual, definite notice" that his "failure to admit guilt as part of treatment would constitute a violation of probation," *Morstad v. State*,

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[11] Connecticut General Statute section 53a-32a (West 2001) provides as follows:

> If a defendant who entered a plea of nolo contendere or a guilty plea under the Alford doctrine to [certain sex offenses] and was ordered to undergo sexual offender treatment as a condition of probation, becomes ineligible for such treatment because of such defendant's refusal to acknowledge that such defendant committed the act or acts charged, such defendant shall be deemed to be in violation of the conditions of such defendant's probation and be returned to court for proceedings in accordance with [the statute regarding probation revocation].

518 N.W.2d 191, 194 (N. D. 1994), has not been adopted in any other state jurisdiction.[12]

Respectfully, we disagree with the *Gillman* court and the North Dakota Supreme Court that a sex offender placed on probation, including sex offender treatment, must be given "actual, definite notice" that his probation may be revoked if he refuses to admit during treatment that he engaged in the underlying criminal conduct, regardless of what type of plea the defendant enters. In our view, with regard to this case, common sense indicates that a reasonable person in the Defendant's position would realize that court-ordered sex offender treatment would involve some acknowledgement of the underlying criminal conduct. First, the Defendant was made aware at his plea hearing that he was going to have to register as a sex offender. An individual's registration as a sex offender is tantamount, in and of itself, to an admission that the individual has committed a sex offense. Second, as set forth above, the Defendant also was made aware in conjunction with his plea that he was going

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[12] The dissent cites to one federal case and several state cases for the proposition that due process requires a defendant sentenced to probation be given "actual notice" when non-criminal conduct may lead to revocation. *See United States v. Simmons*, 812 F.2d 561, 565 (9th Cir. 1987); *People v. Calderon*, 356 P.3d 993, 997 (Colo. Ct. App. 2014); *State v. Boseman*, 863 A.2d 704, 712 (Conn. App. Ct. 2004); *State v. Monson*, 518 N.W.2d 171, 173 (N.D. 1994); *State v. Budgett*, 769 A.2d 351, 354 (N.H. 2001); *State v. Katon*, 719 A.2d 430, 433 (Vt. 1998). None of these cases, however, holds that a defendant required to successfully complete sex offender treatment must be told explicitly at his plea hearing that his suspended sentence may be revoked if he refuses to acknowledge during treatment that he committed the underlying criminal conduct.

to have to participate in sex offender treatment. One does not participate in sex offender treatment unless one is a sex offender. The Defendant pled nolo contendere to solicitation of a minor, a sex offense. Accordingly, the Defendant was provided with at least implied notice that he would need to acknowledge during treatment that he had engaged in criminal conduct.[13]

Moreover, it is disingenuous for the Defendant to claim that he had no awareness that his mandated sex offender treatment program would require him to acknowledge that he had committed the elements of the sex offense to which he had pled no contest, including the mens rea element.[14] *See State v. Coleman*, 632 A.2d 21, 23 (Vt. 1993) (recognizing that "it is well known that any therapy treatment begins with recognition of the problem, in this case, an admission of guilt") (Morse, J., concurring); *see also State v. Reilly*, 760 A.2d 1001, 1011 (Conn. Ct. App. 2000) (recognizing that notice of conduct required or

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[13] The Defendant was given actual, written notice that he would be expected to admit to the conduct underlying his criminal charge no later than January 6, 2016, when the Defendant signed his Treatment Plan which included as the first objective that the Defendant "admit to 100 percent elements of the offense as described by his victims through the official victims' statement." The Defendant did not file a motion to be relieved from this requirement until February 19, 2016, after he had been terminated from treatment.

[14] We emphasize that the Defendant pled nolo contendere, not "not guilty," and a nolo plea has the same impact as a guilty plea insofar as the case itself is concerned. *See Teague*, 772 S.W.2d at 943. Indeed, the Defendant acknowledged in his written plea document that his plea would result in the trial court finding him guilty.

prohibited by conditions of probation may arise from a "common sense inference" and that actual notice must be delivered only where the conditions cannot be "reasonably interpreted" to require or prohibit the conduct at issue).[15]

As stated by the United States Court of Appeals for the First Circuit,

> fair warning is not to be confused with the fullest, or most pertinacious, warning imaginable. Conditions of probation do not have to be cast in letters six feet high, or to describe every possible permutation, or to spell out every last, self-evident detail. Conditions of probation may afford fair warning even if they are not precise to the point of pedantry. In short, conditions of probation can be written—and must be read—in a commonsense way.

United States v. Gallo, 20 F.3d 7, 12 (1st Cir. 1994) (citations omitted). Thus, the trial court was not required to deliver "actual, definite notice" to the Defendant that his sex offender treatment would require certain admissions.

Based upon the reasons set forth above, we expressly overrule *Gillman*.

We also find it helpful to analogize to the due process requirements attendant upon guilty pleas under current Tennessee law for our holding that "actual, definite notice" was not required. As we recently

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[15] The *Reilly* court specifically acknowledged Connecticut General Statute section 53a-32a, *see supra* n.10, as a "statutory exception to actual notice." 760 A.2d at 1009 n.18.

reiterated in *Ward v. State*, the Due Process Clause of the United States Constitution requires that guilty pleas be accepted only if they are knowing, voluntary, and intelligent. 315 S.W.3d 461, 465 (Tenn. 2010) (citations omitted). If a defendant does not understand the consequences of his plea, it cannot be considered voluntary or knowing. *Id.* "However, neither our federal nor state constitution requires that an accused be apprised of every possible or contingent consequence of pleading guilty before entering a valid guilty plea. Courts are constitutionally required to notify defendants of only the direct consequences—not the collateral consequences—of a guilty plea." *Id.* at 466-67 (citations omitted). "The distinction between a collateral and a direct consequence has often been formulated as turning on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Id.* at 467 (internal quotation marks and citation omitted). In *Ward*, we determined that the registration requirements imposed by Tennessee's Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act, Tenn. Code Ann. §§ 40-39-201 through-215 (2006 & Supp. 2009) ("the Registration Act"), are a collateral consequence of a guilty plea. Accordingly, a trial court is not constitutionally required to inform a defendant pleading guilty to a sex offense about the Registration Act's registration requirements. *Id.* at 472.[16]

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[16] The *Ward* Court, however, also concluded that a sentence of community supervision for life, which must be imposed for certain crimes pursuant to Tennessee Code Annotated section 39-13-524 (2006 & Supp. 2009), "is a direct and punitive consequence of a plea of guilty" to any of those enumerated crimes. *Ward*, 315 S.W.3d at 476. "Consequently, trial courts have an affirmative duty to ensure that a defendant is informed and

If a defendant who is required to abide by the requirements of the Registration Act fails to do so, he or she can be convicted of a Class E felony. Tenn. Code Ann. § 40-39-208(b) (2014). Moreover, "[n]o person violating [the Registration Act] shall be eligible for suspension of sentence, diversion or probation until the minimum sentence is served in its entirety." *Id.* If due process does not require a defendant pleading guilty to a sex offense to be informed about the requirements of the Registration Act and the potential penalties for failing to comply with the Act, it makes no sense to require a trial court to inform a defendant pleading guilty or nolo contendere to a sex offense that failing to comply with the requirements of his required sex offender therapy may lead to the revocation of his probation. Indeed, at least two federal courts of appeal have concluded that "the condition that a defendant admit his guilt as part of a required rehabilitation program is a collateral consequence." *Duke v. Cockrell*, 292 F.3d 414, 417 (5th Cir. 2002) (citing *Warren v. Richland Cnty. Cir. Ct.*, 223 F.3d 454, 458 (7th Cir. 2000), *cert. denied* 531 U.S. 1168 (2001)).

In sum, we hold that the Defendant is not entitled to relief on the basis that the trial court did not specifically inform him that his refusal to admit to criminal conduct during his sex offender therapy could result in the revocation of his judicial diversion.

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aware of the lifetime supervision requirement prior to accepting a guilty plea." *Id.*

Conclusion

For the foregoing reasons, we hold that a trial court placing a sex offender on judicial diversion or probation that includes sex offender treatment as a condition is not required to inform the offender that his or her failure to admit to certain facts or states of mind in therapy may result in the revocation of his or her judicial diversion or probation.[17]

Additionally, in this case, the trial court did not violate the Defendant's due process rights by revoking his judicial diversion. The trial court was not required to inform the Defendant that he would be required to admit the elements of his criminal conduct as a part of his sexual offender treatment plan. Accordingly, we affirm the judgment below.

/s/ Jeffrey S. Bivins
Chief Justice

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[17] Nevertheless, we encourage trial courts, as a matter of best practices, to advise defendants required to participate in sex offender therapy that the successful completion of such therapy may require admissions regarding the conduct underlying the defendant's conviction(s).

DISSENTING OPINION OF JUSTICE LEE (DECEMBER 11, 2018)

SHARON G. LEE, dissenting.

Westley Albright, with the trial court's consent, entered a nolo contendere plea to the charge of solicitation of a minor without being required to admit his guilt. The trial court granted Albright judicial diversion with one year of probation. Albright complied with all the stated conditions of his diversion. He attended and participated in all scheduled treatment group meetings, paid for sex offender treatment, and underwent an assessment. Albright even took a lie-detector test. Yet the trial court revoked Albright's diversion, convicted him of solicitation of a minor, and extended his probation by six months, because of his noncompliance with an unstated condition of diversion. This unstated condition was that Albright had to admit during treatment that he was guilty of solicitation. Because he would not or could not make this forced admission, Albright's therapist discharged him from the treatment program, and the trial court revoked his diversion.

The problem here is that the trial court never told Albright that admitting guilt in treatment was a condition of diversion and that failure to do so could result in revocation. This lack of fair warning violated Albright's due process rights under the Fourteenth Amendment to the United States Constitution and Article 1, section 8 of the Tennessee Constitution. Under the due process clauses of the federal and state constitutions, Albright had a right to fair warning of

the conduct that might result in a revocation of his diversion.[1]

Several reasons support the conclusion that Albright's due process rights were violated by lack of fair notice. First, a plea of nolo contendere is fundamentally inconsistent with a requirement of admission of guilt in treatment. When entering a nolo contendere plea in exchange for judicial diversion, a defendant does not admit guilt and is neither adjudicated guilty nor sentenced. A defendant can only enter a nolo contendere plea with the trial court's consent. The prosecution need not establish a factual basis for the nolo contendere plea. The plea cannot be used against the defendant as an admission in a later case. It is inherently unfair and inconsistent for a trial court to accept a nolo contendere plea, not make the defendant admit guilt in court, and then not tell the defendant that he would later have to admit guilt in treatment to comply with the terms of diversion.[2]

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[1] *See Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973) (concluding that "the loss of liberty entailed" by the revocation of probation is a "serious deprivation" for which a defendant must be accorded due process); *State v. Stubblefield*, 953 S.W.2d 223, 225 (Tenn. Crim. App. 1997)) (noting that a defendant's "liberty interest" in probation must be "protected by due process of law"); *see also United States v. Simmons*, 812 F.2d 561, 565 (9th Cir. 1987) (same).

[2] *See State v. Katon*, 719 A.2d 430, 434 (Vt. 1998) (Dooley, J., concurring) (observing that the underlying problem was the mutual inconsistency between the plea and sentence); *see also People v. Walters*, 627 N.Y.S.2d 289, 291 (Schoharie Cnty. Ct. 1995) (concluding that "[t]o require [a] defendant to admit to his factual guilt during treatment, upon threat of incarceration, is directly inconsistent with [an *Alford*] plea agreement"); *State v. Birchler*, No. 00AP-311, 2000 WL 1473152, at *2 (Ohio Ct. App. Oct. 5, 2000) ("Requiring [defendant] to admit that there was a victim

Had Albright entered a guilty plea and admitted his guilt to the trial court, he would have no reason to complain. Cases involving defendants who pleaded guilty and then claimed a due process violation when their probation was revoked based on their refusal to admit guilt in treatment do not apply. Unlike Albright, the defendants in those cases admitted their guilt by entering guilty pleas, were adjudicated guilty, and were sentenced.[3] It is fair to require a defendant who has pleaded guilty to admit in sex offender treatment what he has already admitted in court. But when a defendant does not admit guilt when entering his plea, as in Albright's case, due process requires that the trial court give the defendant fair warning that admission of guilt in treatment is a condition of his judicial diversion.

Second, Albright did not receive actual notice that an admission of guilt was a condition of his diversion. When Albright entered the nolo contendere plea, the trial court did not tell Albright about the required treatment, much less that he would have to

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or to specific criminal conduct against a victim would be in contradiction to his maintenance of factual innocence pursuant to *Alford*."). An *Alford* plea "is one in which the defendant is 'unwilling or unable to admit his participation in the acts constituting the crime.'" *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

[3] *See, e.g.*, *United States v. Gallo*, 20 F.3d 7, 9 (1st Cir. 1994) (guilty plea to possession of unregistered firearm); *People v. Ickler*, 877 P.2d 863, 865 (Colo. 1994) (en banc) (guilty plea to second degree sexual assault); *State v. Reilly*, 760 A.2d 1001, 1004 (Conn. App. Ct. 2000) (guilty plea to third degree sexual assault); *Staples v. State*, 202 So.3d 28, 30 (Fla. 2016) (guilty plea to traveling to meet minor); *Ward v. State*, 315 S.W.3d 461, 463 (Tenn. 2010) (guilty plea to aggravated sexual battery).

admit guilt during the treatment. Instead, the trial court advised Albright, "You're handing me this plea, I'm going to put it in a drawer or in the court file for one year." The trial court added, "if you do everything you're supposed to do, report to the Sexual Offender Register, obey all of those requirements, stay out of trouble, don't commit any new offense, pay your court costs and so forth, that at the end of that year this case will be dismissed." The order of probation required Albright to abide by the "Specialized Probation Conditions for Sex Offenders." Again, there was no mention of mandatory treatment or admission of guilt. The "Specialized Probation Conditions for Sex Offenders" required Albright to "attend, participate in, and pay for treatment or counseling with an approved treatment provider as deemed necessary by the Board, the Court or my Officer" and "continue in such treatment as instructed for the duration of the supervision unless my treatment provider, in consultation with my Officer, instructs me in writing that I have satisfactorily completed treatment." Neither the trial court nor the probation documents referenced a mandatory admission of guilt in treatment.

Third, assuming implied notice is sufficient, Albright did not have implied notice of the unstated condition that he would have to admit guilt in treatment. Albright could not know from being told to register as a sex offender or to attend treatment that if he did not admit guilt during treatment, to the satisfaction of his therapist, his diversion could be revoked. The contents and requirements of sex offender treatment or the mandates of a particular sex offender therapist are not a matter of common knowledge, much less a matter of common sense. Rather, common sense

suggests that if a defendant is not required to admit guilt when he enters his plea and not told he will have to admit guilt in treatment, then he does not know about this unstated requirement. Common sense also suggests that an admission of guilt in treatment that is coerced by the threat of incarceration is not an effective therapeutic tool.

Fourth, implied notice, even if shown, does not satisfy due process requirements. Implied notice is properly imputed to a defendant when the basis of the revocation is criminal conduct.[4] But when the underlying conduct is not criminal, as here, due process requires that the defendant receive actual notice.[5]

In *Ward v. State*, 315 S.W.3d 461, 467 (Tenn. 2010), we held that a trial court must notify defendants of direct, not collateral, consequences of their guilty pleas. But *Ward* does not apply here. Ward was seeking to withdraw a guilty plea, claiming that the guilty plea was not knowing and voluntary. Here, Albright is challenging the revocation of his diversion based on a violation of an unstated condition for which he did not have fair warning as required by the Due Process Clause. Nolo contendere pleas with judicial diversion are not the norm. It is not a heavy burden

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[4] *Roberts v. State*, 546 S.W.2d 264, 265 (Tenn. Crim. App. 1977); *see also Reilly*, 760 A.2d at 1009 (noting that where probation revocation is based on criminal activity, the probationer has imputed knowledge that further criminal acts could result in revocation and due process notice requirements are met).

[5] *Simmons*, 812 F.2d at 565; *People v. Calderon*, 356 P.3d 993, 997 (Colo. Ct. App. 2014); *State v. Boseman*, 863 A.2d 704, 712 (Conn. App. Ct. 2004); *State v. Monson*, 518 N.W.2d 171, 173 (N.D. 1994); *State v. Budgett*, 769 A.2d 351, 354 (N.H. 2001); *Katon*, 719 A.2d at 433.

on a trial court to advise a defendant who enters a nolo contendere plea, receives judicial diversion, and is required to participate in treatment, that admitting guilt during treatment is a condition of his diversion.

Last, Albright complied with all the stated conditions of his diversion. He attended all his scheduled sessions as well as participated in and paid for counseling with an approved treatment provider. Albright did not refuse to make any admissions in treatment. He admitted certain acts but claimed he did not have the requisite mental intent attributed to them by the therapist. His therapist did not believe him and concluded that Albright did not give a credible statement of responsibility for the solicitation offense. Albright and his therapist disagreed on Albright's mental intent. Albright did not refuse treatment; his therapist refused to treat him.

The effect on Albright of requiring him to admit guilt—without notice—in treatment is significant. Because he would not or could not truthfully make this admission, the trial court revoked Albright's judicial diversion, convicted him of solicitation, and extended his probation.

In sum, the trial court accepted Albright's nolo contendere plea and granted judicial diversion without advising him, orally or in writing, that he would later have to admit guilt in treatment as a condition of his diversion. In doing so, the trial court inadvertently set Albright up for failure when he later did not admit guilt in treatment. Perhaps recognizing the unfairness of this result, the majority "encourages trial courts, as a matter of best practices, to advise defendants required to participate in sex offender therapy that the successful completion of such therapy

may require admissions regarding the conduct underlying the defendant's conviction(s)." This is where I depart from the majority. Fair notice of unstated conditions is not just a best practice; it is required by our federal and state constitutions. Because Albright did not have fair warning of this unstated condition of judicial diversion, the revocation of diversion violated his due process rights and was inherently unfair.

/s/ Sharon G. Lee
Justice

OPINION OF COURT OF CRIMINAL APPEALS (MAY 16, 2017)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE
December 13, 2016 Session

STATE OF TENNESSEE

v.

WESTLEY A. ALBRIGHT

No. M2016-01217-CCA-R3-CD

Appeal from the Circuit Court for Dickson County
No. 22CC-2013-CR-206 David D. Wolfe, Judge

Before: J. Ross DYER, J.. D. Kelly THOMAS, JR., J., and Camille R. MCMULLEN, J.

Factual and Procedural History

On April 23, 2013, a Dickson County Grand Jury returned a two-count indictment charging the defendant with solicitation of a minor to commit aggravated statutory rape in violation of Tennessee Code Annotated section 39-13-528, a Class E felony, and especially aggravated sexual exploitation of a minor in violation of Tennessee Code Annotated section 39-17-1005, a Class C felony. These charges arose as the result of the defendant's text messages and email exchanges with an undercover detective from the Dickson County Sheriff's Office who was posing as the mother of a

thirteen-year-old girl. According to the Affidavit of Complaint, the defendant expressed a desire to engage in sexual acts with the mother and her minor daughter and arranged a meeting at a local ball field for that purpose. In advance of the meeting, the defendant sent a photograph of himself to the undercover detective and requested nude photographs of the mother and minor. When questioned by the detective, the defendant admitted to the communications but stated he was only going to the ball field to obtain the license plate number of the minor's mother.

On September 16, 2015, the defendant entered a plea of nolo contendere to the solicitation of a minor charge in exchange for the dismissal of the aggravated sexual exploitation of a minor charge and a suspended sentence of one year. After the successful conclusion of the defendant's one-year probationary period, the solicitation of a minor charge was to be dismissed but not be expunged from his record.

During the plea hearing, the trial judge questioned the defendant extensively regarding his understanding of the plea, and the defendant acknowledged he understood his right to trial, the requirements of his probation, and the ramifications of his plea. The defendant admitted the plea was voluntary. The defendant additionally acknowledged the terms of his probation by signing an order indicating, in part, that he would "observe any special conditions imposed by the Court as listed below: register as a sex offender [and] pay court costs/fines" and "abide by the Specialized Probation Conditions for Sex Offenders as adopted by the Tennessee Department of Correction." The defendant then initialed each specialized condition of probation separately, including the requirements that he

"attend, participate in, and pay for treatment or counseling with an approved treatment provider" and "continue in such treatment as instructed for the duration of supervision unless [his] treatment provider, in consultation with [his] Officer, instructs [him] in writing that [he has] satisfactorily completed treatment."

The defendant subsequently selected James Barry Welch from a list of sexual offender treatment providers approved by the State to provide the mandated treatment. The goal of the treatment program was one-hundred percent honesty, community safety, and no more victims. In furtherance of this goal, Mr. Welch conducted an assessment and developed a treatment plan that included group therapy. The defendant signed off on the objectives listed in the treatment plan, including:

> Client will admit to 100 percent elements of the offense as described by his victims through the official victims' statement . . . Client will complete a written statement of responsibility describing all elements of his crime, to include grooming and cover-up actions . . . Client will complete a sexual autobiography which will include all deviant or illegal sexual fantasies or behaviors, the veracity and completeness which will be verified by polygraph examination or other means . . . Client will complete a sexual history following that.

According to Mr. Welch, it is typical for patients to initially deny wrongdoing. However, once treatment begins and they are faced with their treatment goals, most patients admit to the charges against them and move forward. The defendant did not do this. As his

treatment progressed, the defendant continued to maintain his innocence. The defendant told Mr. Welch and the group that he never intended to engage in sexual acts with a minor. Rather, he claimed he had a stalker and searched motherless.com, a website notorious for incest, to locate and confront the stalker. He then arranged a meeting with this alleged stalker so he could obtain her license plate number and turn it over to authorities. When the defendant arrived for the meeting, he discovered the person he had been communicating with was an undercover police officer, and he was arrested.

Mr. Welch and the group confronted the defendant regarding the weaknesses in his story. They asked him questions like, "Why would you tell somebody that you want to do an illegal sex act with a child if you didn't intend to do that?" The defendant refused to offer any further explanation. According to Mr. Welch, all evidence indicated the defendant was lying about why he went to motherless.com and arranged the meeting, so he asked the defendant to undergo a specific-incident polygraph examination. Mr. Welch told the defendant that if he passed the examination, he would send a favorable report to the defendant's probation officer indicating there is no need for treatment. Otherwise, he would unfavorably discharge the defendant due to his failure to comply with the requirements of the program.

The defendant underwent the specific-incident polygraph examination and failed. Mr. Welch subsequently gave the defendant the opportunity to return to the group and explain why he failed. If the defendant had admitted to lying, he could have stayed and received treatment. Instead, the defendant continued

to deny he intended to engage in sexual acts with a minor. Mr. Welch then informed the defendant in front of the group that he was being discharged from treatment. The other group members begged the defendant to tell the truth so he could stay. At that point, the defendant changed his story and indicated he intended to have sex with the minor's mother, not the minor. Mr. Welch proceeded with discharging the defendant because engaging in sexual activity with a consenting adult does not violate the law or require treatment.

According to Mr. Welch, the defendant had a problem that needed to be addressed, but the defendant was not willing to address it. For example, participation in group therapy is a required component of treatment. While the defendant attended all scheduled group meetings, he was hesitant to speak and would "dance around questions." Additionally, Mr. Welch worked with the group on cognitive distortion and issued homework assignments on the topic. While these assignments were not mandatory, Mr. Welch spoke to the defendant about them and informed the defendant they could be completed without admitting guilt. The defendant still did not complete them. Mr. Welch testified he could not treat the defendant if he would not admit he had a problem or at least show progress towards being able to admit he had a problem. Ultimately, Mr. Welch discharged the defendant due to his "failure to comply with his treatment program." Due to the defendant's discharge from treatment, he never progressed to the point of completing a sexual autobiography to be verified by polygraph examination or completing a sexual history.

After Mr. Welch discharged the defendant from treatment, he and another therapist wrote a letter to Jessica Forbes, the defendant's probation officer, notifying her that the defendant had been discharged from the program due to noncompliance with treatment goals, explaining: "Although he appeared to be in compliance with supervision and attended all required treatment groups, he was not able to give a credible statement of responsibility for his offense of conviction." Ms. Forbes requested a revocation warrant by completing a Diversion Violation Report wherein she indicated the defendant was in violation of Probation Rule Number 12, mandating the defendant "will abide by the Specialized Probation Conditions for Sex Offenders as adopted by the Tennessee Department of Correction." Ms. Forbes then referenced Special Condition Number 3, which states:

> I will attend, participate in, and pay for treatment or counseling with an approved treatment provider as deemed necessary by the Board, the Court, or my Officer. I will continue in such treatment as instructed for the duration of supervision unless my treatment provider, in consultation with my Officer, instructs me in writing that I have satisfactorily completed treatment.

Thereafter, the trial court issued a revocation warrant on February 17, 2016, indicating the defendant violated the terms of his probation when he was discharged from sex offender treatment for noncompliance with treatment goals in violation of Probation Rule Number 12 and Special Condition Number 3. In response, the defendant filed a "Motion to be Relieved from Certain Conditions of Probation and to Avoid

Unnecessary VOP Allegation," arguing he received probation as a result of entering a no contest plea wherein he was not required to admit to the facts asserted against him. The completion of a sex offender assessment was one of the many conditions of probation, and the assessment required the defendant to participate in a sex offender treatment class. Mr. Welch, the therapist conducting the class, required the defendant to admit to the facts alleged by the State against him, but the defendant would not admit the facts because they are false. Due to the defendant's position that the facts asserted by the State are untrue, he requested that the trial court relieve him of the condition of completing sex offender treatment as a condition of his probation.

The trial court subsequently held a hearing during which it considered both the revocation warrant and the defendant's motion. After hearing arguments from the attorneys and testimony from Ms. Forbes and Mr. Welch, the trial court found the defendant to be in violation of his probation and denied the defendant's motion. When doing so, the trial court noted that Probation Rule Number 10 required the defendant to comply with any special conditions imposed by the court, including registration as a sex offender. The trial court then stated, "The only requirement he had was to complete successfully the sex offender registry and his probation. The sex offender registry requires the therapy that is described in this Court. It is required that he successfully complete it, and the Court finds he did not." Accordingly, the trial court found the defendant violated his conditional plea and revoked his deferred diversion, making the conviction permanent. The trial court further extended the defend-

ant's probation for six months so he could complete treatment.

Following the hearing, the trial court entered a written order memorializing its ruling, including these findings of fact and conclusions of law:

> 2. Following entry of his plea, the [d]efendant signed a form given to him by his probation officer entitled "Specialized Probation Conditions for Sex Offenders." As part of said conditions, the [d]efendant acknowledged that he "will attend, participate in, and pay for treatment or counseling with an approved treatment provider as deemed necessary by the Board, the Court or my Officer. I will continue in such treatment as instructed for the duration of my supervision unless my treatment provider, in consultation with my Officer, instructs me in writing that I have satisfactorily completed treatment."
>
> 3. The [d]efendant selected an approved treatment program with an entity known as Associates for Sexual Assault Prevention (ASAP).
>
> 4. The [d]efendant followed all directives and participated in the program by attending all meetings and complying with all directions. However, the [d]efendant's sexual offender treatment provider, J. Barry Welch, made the decision to discharge the defendant from the program because the determination was made by him that the [d]efendant was not truthful regarding his intentions for committing the crime that he was convicted of com-

> mitting. Specifically, Mr. Welch wrote a letter to the [d]efendant's probation officer which stated in part, "Although he appeared to be in compliance with supervision and attended all required treatment groups, he was not able to give a credible statement of responsibility for his offense of conviction."
>
> [. . .]
>
> 6. This Court believes that the [d]efendant has in fact been dishonest with his sexual offender treatment provider regarding his intentions for committing the offense of solicitation of a minor. The Court believes the [d]efendant has not been truthful about his motivations for committing the crime.

Based on these findings, the trial court ordered the defendant is "adjudicated GUILTY of violating his court ordered probation; therefore, the [d]efendant's judicial diversion in accordance with T.C.A. § 40-35-313 is hereby REVOKED and the [d]efendant is hereby adjudicated GUILTY of the [C]lass E felony which he plead[ed] to at the time his plea agreement was entered" and extended the defendant's probation for six months to allow compliance with the Specialized Probation Conditions for Sex Offenders. This timely appeal followed.

Analysis

On appeal, the defendant argues: (1) the trial court violated his due process rights by failing to advise him at the time he entered his nolo contendere plea that, as a condition of his probation, he would be required to confess to the solicitation of a minor; (2) the

trial court violated his due process rights by relying on a probation rule not referenced in the revocation warrant; and (3) the trial court erred when revoking his deferred judicial diversion despite his completion of the objective requirements of the sex offender treatment program. In response, the State contends: (1) the defendant waived the first issue by raising it for the first time on appeal; (2) the evidence supports probation revocation based on the conditions included in the revocation warrant; and (3) the trial court properly revoked the defendant's probation and diversion status due to the defendant's failure to satisfactorily participate in the treatment program. Upon review, we affirm the findings of the trial court.

I. Notice of Admitting Guilt

The defendant first asserts the trial court erred when revoking his deferred diversion because the trial court failed to provide notice the confession of guilt was a condition of his probation. In response, the State contends the defendant waived this issue on appeal by failing to complain of lack of notice at the probation revocation hearing. We conclude the issue is properly before this Court but lacks merit.

"[A] defendant who is granted probation has a liberty interest that is protected by due process of law. Also, it is fundamental to our system of justice through due process that persons who are to suffer penal sanctions must have reasonable notice of the conduct that is prohibited." *State v. Stubblefield*, 953 S.W.2d 223, 225 (Tenn. Crim. App. 1997) (citations omitted). Defendants are presumed to be on notice that, as a condition of probation, they are required to comply with the criminal laws this state. *Id.* Revocation

of probation is subject to an abuse of discretion standard of review. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991).

Prior to his probation revocation hearing, the defendant filed a motion to be relieved of the requirement that he complete sex offender treatment because "confession should not be a condition of [his] probation." He further addressed this argument during the probation revocation hearing. This was enough to preserve the notice issue for appeal.

With respect to notice of the terms of his probation, including the requirement he participate in sex offender treatment, the defendant testified during his plea hearing that he understood the terms of his probation. He further acknowledged the terms of his probation by signing an order indicating, in part, that he would "observe any special conditions imposed by the Court as listed below: register as a sex offender [and] pay court costs/fines" and "abide by the Specialized Probation Conditions for Sex Offenders as adopted by the Tennessee Department of Correction." The defendant then initialed each specialized condition of probation separately, including the requirements that he "attend, participate in, and pay for treatment or counseling with an approved treatment provider" and "continue in such treatment as instructed for the duration of supervision unless [his] treatment provider, in consultation with [his] Officer, instructs [him] in writing that [he has] satisfactorily completed treatment."

Subsequent to the defendant's receipt and recognition of the terms of his probation, he entered into the mandated sexual offender treatment. Ultimately, the defendant was unfavorably discharged by Mr. Welch due to his failure to completely participate in

treatment by providing a credible statement of responsibility for his actions. At the revocation hearing, Mr. Welch clarified that had the defendant been able to pass a specific-incident polygraph examination in which he denied intending to solicit sex from a minor, he would have instead sent a favorable report to the defendant's probation officer indicating no further need for treatment. The defendant, however, was unable to do so. The defendant was then given multiple opportunities to explain his actions to Mr. Welch and the treatment group but refused. The defendant's actions were tantamount to failing to fully participate in the program, so he was unfavorably discharged by Mr. Welch prior to the completion of his probation.

In its order revoking the defendant's probation, the trial court found the defendant was dishonest during treatment regarding his intentions when sending messages to the undercover agent via motherless.com. The trial court further found Mr. Welch discharged the defendant from treatment due to this dishonesty, so he was guilty of violating his probation. Based on our review of the record, the defendant was sufficiently on notice that he had to attend, participate in, and pay for sexual offender treatment for the duration of his probation or until satisfactory completion of treatment. While it would have been helpful for the Specialized Probation Conditions for Sex Offenders to include a more detailed description of the requisite treatment or counseling, a reasonable person would believe this treatment or counseling requires honesty regarding the underlying actions of the defendant. The defendant is not entitled to relief on the issue.

We note that in *State v. Edith Mae Gillman*, No. M2005-01863-CCA-R3-CD, 2006 WL 2960598 (Tenn. Crim. App. Oct. 18, 2006), this Court reversed a trial court's order revoking probation because the appellant was not on notice that admitting guilt was a criterion for compliance with the treatment program. *Id.* at *7. When doing so, we stated, "[I]t appears that successful completion of a sexual offender program wherein guilt must be admitted *may* be a condition of probation." *Id.* at *6 (emphasis added). Looking to other states for guidance, we found "where the trial court failed to include specific probation instructions requiring admissions of guilt, reticence does not constitute a violation of probation." *Id.* We, however, stopped short of requiring the defendant to explicitly agree on the record that he was accepting probation on the basis he would admit to his sex crimes. *Id.* at *6 n.3.

The present matter is factually distinct from *Edith Mae Gillman*. In *Edith May Gillman*, the defendant repeatedly admitted to the commission of the charged sex crime during the course of treatment and would later recant her admissions. Here, Mr. Welch repeatedly gave the defendant the opportunity to offer a credible explanation for his actions, and the defendant could not do so. According to Mr. Welch, had the defendant been able to give a credible explanation that did not involve the commission of a sex crime, he would have favorably discharged the defendant from the program. This would have fulfilled the terms of terms of the defendant's probation without the admission of guilt. The defendant, however, was unable to do this, and ultimately discharged from treatment due to his dishonesty and failure to participate in treatment. The

defendant had ample notice of these probation requirements.

II. Notice of Probation Violation

The defendant next argues he did not receive proper notice of the probation violation relied on by the trial court when revoking his deferred judicial diversion. Trial courts follow the same procedure for terminating a defendant's deferred diversion used for revocation of probation. *Alder v. State*, 108 S.W.3d 263, 266 (Tenn. Crim. App. 2012). Trial courts have statutory authority to revoke probation upon a finding by a preponderance of the evidence the defendant violated a condition of probation. Tenn. Code Ann. § 40-35-311(e). To overturn the trial court's revocation, the defendant must show the trial court abused its discretion. *State v. Shaffer*, 45 S.W.3d 553, 554 (Tenn. 2001). "In order to find such an abuse, there must be no substantial evidence to support the conclusion of the trial court that a violation of the conditions of probation has occurred." *Id.* (citing *Harkins,* 811 S.W.2d at 82). The proof of a probation violation is sufficient so long as it allows the trial court to make a conscientious and intelligent judgment. *Harkins*, 811 S.W.2d at 82.

Both the Tennessee Supreme Court and the United States Supreme Court have recognized that "the full panoply of rights due a defendant" in criminal prosecutions do not apply to probation revocation hearings. *See Black v. Romano*, 471 U.S. 606, 613 (1985) (stating that "the flexible, informal nature of the revocation hearing, . . . does not require the full panoply of procedural safeguards associated with criminal trial"); *Bledsoe v. State*, 387 S.W.2d 811, 814 (1965) (stating

that "the defendant [in a probation revocation hearing] is not entitled to the same guarantees as a person who is not convicted and is merely on trial upon an accusation of crime"). Such a defendant is instead entitled to the "minimum requirements of due process," including: (1) written notice of the claimed violation(s); (2) disclosure of the evidence against him or her; (3) the opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless good cause is shown for not allowing confrontation); (5) a neutral and detached hearing body, members of which need not be judicial officers or lawyers; and (6) a written statement by the fact-finder regarding the evidence relied upon and the reasons for revoking probation. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973).

In 1996, the legislature enacted the Tennessee Standardized Treatment Program for Sex Offenders in an effort to standardize "the evaluation, identification, treatment, and continued monitoring of sex offenders at each stage of the criminal justice system, so that the offenders will curtail recidivistic behavior, and so that the protection of victims and potential victims will be enhanced." Tenn. Code Ann. § 39-13-702. Accordingly, offenders who are placed on probation as part of a negotiated settlement of their case are required to submit to an evaluation for treatment. Tenn. Code Ann. § 39-13-705(b). Any resulting plan of treatment then becomes a condition of probation. *Id.*

In the present matter, as a condition of his probation, the defendant agreed to register as a sex offender and abide by the Specialized Probation Conditions for Sex Offenders, including attendance and participation in an approved treatment program for

the duration of probation or until being notified in writing of his satisfactory completion of treatment. After receiving notice of the defendant's discharge from treatment due to his noncompliance with treatment goals, Ms. Forbes requested a revocation warrant. The trial court then issued and served the defendant with an Affidavit Violation of Diversion that provided the following notice of his alleged probation violations:

> Deponent further states that the aforesaid has not properly conducted himself but has violated the conditions of his probation in material respect by:
>
> Probation Rule No. 12: If convicted of a sex offense, I will abide by the Specialized Probation Conditions for Sex Offenders as adopted by the Board of Probation and Parole.
>
> Specialized Condition No. 3. which states: I will attend, participate in, and pay for treatment or counseling with an approved treatment provider as deemed necessary by the Board, the Court, or my Officer. I will continue in such treatment as instructed for the duration of my supervision unless my treatment provider, in consultation with my Officer, instructs me in writing that I have satisfactorily completed treatment.
>
> Violation: On 02/17/2016, Offender was discharged from the sex offender specific treatment for noncompliance with treatment goals.

During the subsequent revocation hearing, the State called two witnesses: Jessica Forbes and Barry Welch. The defendant had the opportunity to cross-

examine each witness and did. The defendant also had the opportunity to call witnesses on his own behalf but did not. The defendant had access to the discharge letter relied on by Ms. Forbes when requesting the revocation warrant and even asked the trial court to place that letter under seal, and the trial court granted the request. After considering the testimony and evidence presented during the hearing, the trial court noted that Probation Rule Number 10, mandating the defendant register as a sex offender, also required sex offender treatment. Following the hearing, the trial court entered its written order revoking the defendant's deferred diversion and extending his probation for six months to allow for completion of treatment. When doing so, the trial court did not mention Probation Rule Number 10 and instead relied upon the defendant's noncompliance with the same Specialized Probation Conditions for Sex Officers requiring the defendant to "attend, participate in, and pay for treatment or counseling" and to continue in such treatment for the duration of his probation or until receiving written notice of satisfactory completion referenced in the revocation warrant.

The revocation warrant put the defendant on notice of the charges against him, namely that his discharge from treatment for noncompliance with treatment goals violated Probation Rule Number 12 and Special Condition Number 3. When orally ruling, the trial court noted the defendant's premature discharge from treatment also violated Probation Rule Number 10, which required the defendant to register as a sex offender. However, trial courts speak through their written orders. *Williams v. City of Burns*, 465 S.W.3d 96, 119 (Tenn. 2015). In its written order revoking

the defendant's deferred diversion and extending his probation, the trial court relied on Special Condition Number 3. Moreover, the purpose of the written notice requirement "is to provide forewarning to the person sought to be charged of the existence of the particular facts in question or to enable him of acquiring a means of knowing it." *State v. James C. Wolford*, No. 03C01-9708-CR-00319, 1999 WL 76447, at *7 (Tenn. Crim. App. Feb. 18, 1999). As demonstrated by his simultaneous request to be relieved of the requirement that he attend sex offender treatment for the duration of his probation, the defendant undoubtedly knew in advance of his revocation hearing that his untimely discharge from treatment was the basis for his alleged probation violation. The defendant is not entitled to relief on this basis.

III. Objective Requirements of Probation

Finally, the defendant argues he complied with the objective requirements of treatment, and the trial court abused its discretion when revoking his probation based on the subjective decision of the treatment provider. In response, the State contends the trial court properly exercised its discretion when revoking the defendant's probation and deferred diversion after finding he had been dishonest with his treatment provider. We agree with the State.

As discussed supra, Tennessee Code Annotated section 39-15-705 required the defendant to submit to an evaluation for sex offender treatment, and the subsequent plan of treatment was to become a condition of probation. The probation order also required the defendant to abide by the Specialized Probation Conditions for Sex Offenders, which included attendance

and participation in an approved treatment program for the duration of probation or until being notified in writing of his satisfactory completion of the treatment program. Relying on *State v. William A. Marshall*, No. M2001-02954-CCA-R3-CD, 2002 WL 31370461 (Tenn. Crim. App. Oct. 14, 2002), the defendant claims he complied with all objective requirements of treatment and was arbitrarily discharged due to Mr. Welch's subjective belief he was dishonest about the veracity of the State's charges against him. We disagree. Unlike the defendant in *William A. Marshall*, the defendant in the present matter did not comply with the objective standards of treatment and, therefore, did not satisfy the probation condition requiring treatment.

In *William A. Marshall*, the trial court examined the meaning and effect of the term "complete" with respect to sex offender treatment. *Id.* at *7. This Court found Marshall completed treatment despite his therapist's subjective belief he had not internalized the dogma and may be a continued threat to the community, thus requiring additional treatment. *Id.* There, the treatment program did not have a finite deadline, and no participants had ever completed it. *Id.* Marshall's progress in the program, however, was on track with other participants. *Id.* Moreover, Marshall had completed a total of ten modules of treatment, including the "preventative relapse module." *Id.* This Court acknowledged that the General Assembly has recognized "'some sex offenders cannot or will not respond to treatment,'" and "'it did not intend to imply that all sex offenders can be successful in treatment'" by enacting the Tennessee Standardized Treatment Program for Sex Offenders. *Id.* at *8; citing Tenn. Code Ann. § 39-13-702(b). This Court held that due to

Marshall's completion of all objective standards of the treatment program, while perhaps not cured, he completed treatment and, therefore, fulfilled the condition of his probation requiring it. *Id.* at *9.

This Court has subsequently analyzed and distinguished *William A. Marshall* on multiple occasions. For example, in *State v. Joe Shelton Berry*, No. M2004-03052-CCA-R3-CD, 2005 WL 2438390 (Tenn. Crim. App. Sept. 27, 2005), we affirmed the trial court's revocation of probation after Berry, who pled no contest to rape, was discharged from the mandated sex offender treatment class due to ongoing deceptive activity that prevented him from being assessed for future risk and completing the program. *Id.* at *3. The treatment provider testified at the revocation hearing that during group therapy sessions, Berry would "'almost [tell] the truth but then refuse to'" and "vaguely acknowledge his criminal actions but later deny them," so he was discharged for not fully participating and holding back the rest of the group. *Id.* at *1-2. Berry "refused to be honest and try to work out his problems," so the treatment provider refused to allow him back into the program. *Id.* at *3. This Court, relying on the treatment provider's testimony and the trial court's accreditation of that testimony, concluded the record contained sufficient evidence to support the trial court's finding that Berry did not meet the objective standards of treatment. *Id.* When doing so, this Court factually distinguished the case from *William A. Marshall* because, despite attending every session, Berry's "lack of candor, lackadaisical attitude, and inadequate participation" prevented him from fulfilling the objective standards of treatment. *Id.*

In *State v. Jackie Lee Holliman*, No. M2005-02139-CCA-R3-CD, 2007 WL 316406 (Tenn. Crim. App. Sept. 19, 2006), we again considered whether the trial court properly found Holliman violated his probation where he was discharged from sex offender treatment due to his inability to progress out of the initial stage of treatment after one and a half years of therapy. *Id.* at *3-4. At the revocation hearing, the treatment provider offered testimony regarding Holliman's dishonesty during group therapy and disparaging comments made about his victim, both of which prevented him from progressing to the "victim empathy" stage of treatment. *Id.* This Court found that unlike the defendant in *William A. Marshall*, who had completed all ten modules of treatment before his treatment provider determined he could not be discharged because he had not been cured, the record lacked evidence Holliman had completed any objective portion of his treatment program. *Id.* at *9. Relying on *Joe Shelton Berry*, this Court additionally noted "he was dismissed from the treatment program for cause, and the record supports the trial court's reliance upon the defendant's blameworthy failure at treatment as a basis for revocation." *Id.* Accordingly, we held the record supported the trial court's finding Holliman did not comply with the court-ordered condition that he receive sex offender treatment. *Id.*

Later, in *State v. Reams*, this Court considered the revocation of Reams' probation for driving on a suspended license and being discharged from sex offender treatment due to dishonesty with his treatment provider. *Reams*, 265 S.W.3d at 428. After pleading guilty to two counts of attempted aggravated sexual battery and one count of sexual battery, Reams received

an effective sentence of eight years of probation, and the trial court ordered sex offender treatment as a condition of probation. *Id.* at 425. Reams' sex offender treatment provider placed him in level two group therapy following his initial assessment. *Id.* One of the goals of treatment required Reams to "admit to 100 percent of the elements of the offenses described by the victim." *Id.* at 429. Due to his dishonesty regarding his contact with the victim, the treatment provider felt Reams "had not advanced in meeting the treatment program's goals" and demoted him to level one therapy. *Id.* at 428. Reams did not progress as quickly as expected after demotion. *Id.* After giving information during a polygraph examination that conflicted with information given during group therapy and being unable to provide an explanation for the conflict, the treatment provider terminated Reams from the program. *Id.* at 429. Following service of a revocation warrant and a hearing, the trial court revoked his probation and ordered him to serve his sentence in confinement. *Id.* at 430.

One of the issues considered by this Court on appeal was again whether the trial court erred in revoking Reams' probation because he had complied with all objective standards of sex offender treatment. *Id.* at 432. Reams argued *William A. Marshall* controlled, and the State argued *Joe Shelton Berry* applied. *Id.* at 432-33. With respect to Reams' compliance with the treatment program, we noted he "attended his treatment classes; participated as far as turning in a homework assignment and confronting another defendant, who also attended treatment; and paid for treatment, although he was behind on payments." *Id.* at 433. However, like the defendant in *Joe Shelton Berry*,

Reams had also been demoted because his dishonesty was holding back the group. *Id.* Accrediting the testimony of the treatment provider who opined Reams could not satisfy the first step of treatment due to his repeated dishonesty, we held the trial court did not abuse its discretion when finding the defendant violated the terms of his probation by getting discharged from sex offender treatment due to his own "'blameworthy failures at treatment.'" *Id.* at 432-433 (quoting *Jackie Lee Holliman*, 2007 WL 316406).

In the present matter, our review of the record reveals that like the defendants in *Joe Shelton Berry*, *Jackie Lee Holliman*, and *Reams*, the defendant has not fulfilled the objective standards of treatment. At the revocation hearing, Mr. Welch testified that the defendant's treatment goals included admission to one-hundred percent of the elements of the offense, completion of a written statement of responsibility describing the elements of his crime, completion of a sexual autobiography to be verified by polygraph examination, and completion of a sexual history. Unlike the defendant in *William A. Marshall*, who completed all ten modules of treatment prior to being discharged based on his inability to be cured, Mr. Welch discharged the defendant prior to meeting a single goal of treatment. This discharge did not occur due to a subjective belief the defendant could not be cured. Rather, Mr. Welch discharged the defendant because he refused to admit to or discuss the State's charges against him, so he could not progress in treatment.

Like attendance and payment of treatment fees, the admission of guilt, completion of a written statement of responsibility, completion of a sexual autobiography, and completion of a sexual history were

also objective requirements of the defendant's treatment. *See State v. Edith Mae Gillman*, No. M2005-01863-CCA-R3-CD, 2006 WL 2960598, at *7 (Tenn. Crim. App. Oct. 18, 2006) (noting that along with attendance and participation, the admission of guilt is an objective measure of compliance with sex offender treatment). Moreover, the trial court accredited Mr. Welch's testimony that the defendant's dishonesty impeded his ability to progress in treatment by relying on it when revoking the defendant's probation and deferred diversion, and this Court will not reweigh evidence on appeal. The record contains substantial evidence to support the trial court's finding the defendant violated his probation when he was discharged from the treatment program for failing to meet program goals. The defendant is not entitled to relief on this issue.

CONCLUSION

Based upon the foregoing authorities and reasoning, the judgment of the trial court is affirmed.

/s/ J. Ross Dyer
Judge

CORRECTED JUDGMENT OF THE TRIAL COURT (MARCH 30, 2016)

IN THE CRIMINAL/CIRCUIT COURT
FOR DICKSON COUNTY, TENNESSEE
23rd Judicial District, Division I

STATE OF TENNESSEE

v.

WESTLEY A. ALBRIGHT,

Defendant.

Case Number: 22CC-2013-CR-206
Count: 1

Before: David WOLFE, Judge

Counsel for the State: Billy H. Miller, Jr.
Counsel for the Defendant: Tim Potter (Retained)

Defendant: Westley A. Albright
Date of Birth: 02/27/1973
Sex: Male
Race: White
SSN: 411-06-8965
Driver License #: 0710271555
Issuing State: TN
State ID #:220005047722
County Offender ID # (if applicable): 53120
TOMIS/TDOC #: None
State Control #: 220005047722

Arrest Date: 2/28/13

Come the parties for entry of judgment.

On the 16th day of September, 2015, the defendant:

- Pled Nolo
- Is found: Guilty
- **Indictment**: Class (circle one) 1st E Felony
- Indicted Offense Name AND TCA §: 39-13-528—Solicitation of a Minor Law Enforcement
- Offense Date: 12/19/2012
- County of Offense: DICKSON
- Conviction Offense Name AND TCA §:39-13-528—Solicitation of a Minor Law Enforcement
- **Conviction**: Class (circle one) 1st E Felony
- Is this conviction offense methamphetamine related? No.
- Sentence Imposed Date: 09/16/2015

After considering the evidence, the entire record, and in the case of sentencing, all factors in Tennessee Code Annotated Title 40, Chapter 35, all of which are incorporated by reference herein. It is ORDERED and ADJUDGED that the conviction described above is imposed hereby and that a sentence and costs are imposed as follows:

- Offender Status: Standard
- Release Eligibility: Standard 30%
- Sentenced to: TDOC
- Sentence Length: 1, years 6 Months

- Alternative Sentence: Sup Prob 1 Years 6 Months Effective: March 31, 2016

WAS DRUG COURT ORDERED AS A CONDITION OF THE ALTERNATIVE SENTENCE?

- No

Court Ordered Fees and Fines:

- $797.50 Court Costs
- $750.00 Fine Assessed
- $50.00 CICF

Costs to be Paid by: Defendant

Special Conditions

- The Defendant having been found guilty is rendered infamous and ordered to provide a biological specimen for the purpose of DNA analysis.

DEFENDANT ENTERED A NOLO CONTENDRE CONDITIONAL GUILTY PLEA ON SEPTEMBER 16, 2015. THE COURT WOULD FIND THAT THE DEFENDANT HAS VIOLATED THE TERMS OF HIS CONDITIONAL PLEA AND THEREFORE A FINAL JUDGMENT SHALL BE ENTERED ON MARCH 30, 2016 AND DEFENDANT'S ORIGINAL PROBATION OF ONE (1) YEAR WILL BE EXTENDED SIX (6) MONTHS.

/s/ David Wolfe
Judge's Signature

/s/ Billy H. Miller, Jr.
Counsel for State/Signature

03/30/2016
Date of Entry of Judgment

VIOLATION OF PROBATION HEARING TRANSCRIPT—RELEVANT EXCERPT (MARCH 30, 2016)

IN THE CIRCUIT COURT FOR
DICKSON COUNTY, TENNESSEE

IN THE MATTER OF:
STATE OF TENNESSEE,

Plaintiff,

v.

WESTLEY A. ALBRIGHT,

Defendant.

Case No. 2013-CR-206

Before: Hon. David D. WOLFE, Judge.

[March 30, 2016 Transcript, p. 52]

. . . required to do that.

And I would also argue, just like Mr. Welch argued, that what is the point of going through sex offender treatment if he says he has no problem and there's nothing to treat. So he's required to go through that, he clearly, all of the evidence pointed that he has a problem, he was dishonest with his treatment provider, and he was required to go through it and that is something that he should still—that we would ask

the Court to find that he was in violation of his probation because he did not complete it.

MR. POTTER: Your Honor, if it please the Court, one sentence. When Mr. Albright entered his plea and the State gave its recitation of the facts, Mr. Albright didn't contest those facts and he does not contest those facts now.

Those facts are that he sent inappropriate emails to an undercover officer to solicit an undercover officer, and then met that undercover officer and was arrested for it. All of those elements of the crime he evidently told Mr. Welch that he did. It's the intention, it's the intention that he is now being punished for. And that's subjectively judged.

THE COURT: All right. A couple of things I want to make clear. Number one, as I have indicated, Mr. Albright entered a plea before this Court, and this Court is well familiar with the case because I heard Motions to Suppress regarding the introduction of the statements, the recordings, and there was a great deal of testimony about it. And actually the Court file contains numerous copies of those emails between Mr. Albright and the other individual. One of which I quoted to Mr. Welch, the therapist, regarding that.

Mr. Albright was charged with—or actually entered and pleaded no contest to solicitation of a minor, law enforcement being the actual person, under TCA 39-13-528. As a part of that, he entered a no contest plea and as a part of that agreement he was to be treated as a class E. felony and placed on probation for one year. And it was a

judicial diversion, which means that the sentencing of him would be—the final sentencing would be reserved depending on whether or not he had actually completed his probation successfully.

The sentence and his waiver of the Jury trial and appeal rights which Mr. Albright's signature appears on September the 16th, 2015 carried the following punishment. An E. felony, one year suspended to supervised probation under TCA 40-35-313, SOR during probation. That's sex offender registry and that is clearly what was stated in Court and what was the discussion.

The next page of the Court file contains the Probation Order signed by Mr. Albright and Ms. Forbes as his probation officer and approved by this Court. Among the regular probation requirements was number 10, "I'll observe any special conditions imposed by the Court as listed below. Register as a sex offender, pay Court costs and fines."

Mr. Potter eloquently argues that Mr. Albright should never have admitted that he was guilty of any solicitation of a minor, that he did solicit the mother, but the plea that he entered in this case was solicitation of a minor, which is a sex crime, and is one that would involve the sex offender registry.

When I look at the letter that was introduced from Mr. Welch and the admissions that were made in that by Mr. Albright, he discusses the fact that he did discuss with this lady on the emails having a threesome with the daughter, but that he never intended to have sex with the daughter.

They exchanged photographs and he asked for topless photographs of this minor child that he thought he was talking to the mother of, but that topless he didn't really interpret to mean nude. And frankly, this Court simply did not find any of that explanation that he had given to be credible whatsoever.

As a result of that, he entered a no contest plea and he wants to walk a fine line between the fact that he wants to take advantage of the Tennessee Code Annotated 40-35-313 conditional plea, conditional diversion. The only requirement he had was to complete successfully the sex offender registry and his probation. The sex offender registry requires the therapy that is described in this Court. It is required that he successfully complete it, and the Court finds that he did not. Therefore, I find that he has violated his conditional plea and he is revoked on the plea as far as 40-35-313. Therefore, this will become a permanent conviction on his record.

I do not find that the sentence in his behavior on probation warrants extension of that. I don't know what the State's position is on any additional sentence. He has apparently other than that done well on probation. So it's my ruling that he will remain to serve out the balance of his probation. Because he did not violate any other laws he is not getting anything else. However, he will engage in an additional therapy, and I'm going to extend his probation for an additional six months. That he enroll in another therapy as a condition of his probation, which I think I have the right to do.

So this Court's Ruling is that he's revoked from the 40-35-313. His probation is revoked and extended for an additional six month period in order to attend and complete a counseling session.

Mr. Albright will choose whether or not he wants to convince another therapist that it was all just a big discussion without intent. Everything I know about this case indicates that it was just the opposite of that and that Mr. Albright had every intention, from what I have seen in this record, and I simply do not believe the explanation given in this case. That's the Judgment of the Court.

MR. POTTER: Judge, if it please the Court, we will be appealing this action. One of the things I would ask for is pending appeal the letter that was introduced by Mr. Welch, that be placed under seal by this Court. I think that it contains information that goes beyond the scope of this action that Mr. Albright was charged with. It is therapy notes. That's protected by HIPAA. In fact, one of the things he signed, that's why I asked Mr. Welch if he had had any conversations with Detective Levasseur or anyone else involved in the case, because the only person they were obligated perhaps or had a right to release the information to was Ms. Forbes, his probation officer. I don't want that being obtained by the public. I think the Court can place that under seal. However, it will be a topic to be considered on appeal.

THE COURT: Let me see the letter. General, do you have a response?

GENERAL WOJNAROWSKI: I'll leave that to the Court's discretion. But obviously much of that letter was already addressed on the record here in Court.

THE COURT: Well, I do agree that what has been discussed on the record is public record. What is contained within the letter beyond that, the Court will order that letter to be sealed as an Exhibit for a possible appeal. But like you say, much of it has been discussed and testified to in open Court and that cannot be sealed now that it's out there. So . . .

MR. POTTER: These are therapy notes, Your Honor, and therapy notes are black letter parts of HIPAA.

THE COURT: I have ordered them sealed, and what's been testified to clearly I can't order—I can't seal what has already been unsealed or testified to. But I am going to order that.

MR. POTTER: And, Your Honor, I'm trying to anticipate a problem. I'm trying to anticipate a problem. But while this matter is pending on appeal, and you understand how long that could take. Again, we might be back before Your Honor on the same issue, because if Mr. Albright has another therapy session and refuses to tell that therapist what that therapist subjectively believes—

THE COURT: You have every right, Mr. Potter, to seek a suspension or a stay order from the Court of Criminal Appeals. And it's my belief and my opinion that my ruling is just and correct, and therefore, I am going to order that it be followed and enforced pending an appeal. This appeal could take a year, a year and a half. I don't intend to

allow the disposition of this case to be delayed that long. Mr. Albright can comply with the Court's Order pending that appeal, and absent an order from the Court of Appeals that stays this Court's order.

MR. POTTER: Is Your Honor denying the stay?

THE COURT: I'm denying the stay.

MS. FORBES: Your Honor, the expiration date is six months from the original date in September?

THE COURT: From the original expiration date an additional six months to allow him to do what he has to do. In other words, therapy.

(WHEREUPON, hearing adjourned.)

ORIGINAL JUDGMENT OF THE TRIAL COURT (SEPTEMBER 16, 2015)

IN THE CRIMINAL/CIRCUIT COURT
FOR DICKSON COUNTY, TENNESSEE
23rd Judicial District, Division I

STATE OF TENNESSEE

v.

WESTLEY A. ALBRIGHT,

Defendant.

Case Number: 22CC-2013-CR-206
Count: 2

Before: David WOLFE, Judge

Counsel for the State: Billy H. Miller, Jr.
Counsel for the Defendant: Tim Potter (Retained)

Defendant: Westley A. Albright
Date of Birth: 02/27/1973
Sex: Male
Race: White
SSN: 411-06-8965
Driver License #: 0710271555
Issuing State: TN

Come the parties for entry of judgment.

On the 16th day of September, 2015, the defendant:

- Dismissed/Nolle Prosequi

- **Indictment**: Class (circle one) 1st C Felony
- Indicted Offense Name AND TCA §: 39-13-528—Solicitation of a Minor
- Offense Date: 12/19/2012
- County of Offense: DICKSON
- Is this conviction offense methamphetamine related? No.

WAS DRUG COURT ORDERED AS A CONDITION OF THE ALTERNATIVE SENTENCE?

- No

/s/ David Wolfe
Judge's Signature

/s/ Billy H. Miller, Jr.
Counsel for State/Signature

09/16/2015
Date of Entry of Judgment

ORDER OF DEFERRAL (JUDICIAL DIVERSION) (SEPTEMBER 16, 2015)

IN THE CRIMINAL/CIRCUIT COURT
FOR DICKSON COUNTY, TENNESSEE
23rd Judicial District, Division I

STATE OF TENNESSEE

v.

WESTLEY A. ALBRIGHT,

Defendant.

Case Number: 22CC-2013-CR-206
Count: 1

Before: David WOLFE, Judge

Counsel for the State: Billy H. Miller, Jr.
Counsel for the Defendant: Tim Potter (Retained)

Defendant: Westley A. Albright
Date of Birth: 02/27/1973
Sex: Male
Race: White
SSN: 411-06-8965
State ID #:220005047722
County Offender ID # (if applicable): 53120
State Control #: 220005047722
Arrest Date: 2/28/13

On the 16th day of September, 2015, the defendant:

- Pled Nolo Contendere

- **Indictment**: Class (circle one) 1st E Felony
- Indicted Offense Name AND TCA §: 39-13-528—Solicitation of a Minor Law Enforcement
- Offense Date: 12/19/2012
- County of Offense: Dickson
- Deferred Offense Name AND TCA §:39-13-528—Solicitation of a Minor Law Enforcement
- **Deferred Offense**: Class (circle one) E Felony

Upon review of the case, the court finds the facts stated above as well as the following (For Item .3, Check ONE of the Two Boxes):

1. The defendant is eligible for deferral of the prosecution pursuant to Tennessee Code Annotated section (T.C.A.) 40-35-313:
2. The Tennessee Bureau of Investigation has certified (per attached certificate) that the defendant does not have a prior felony or Class A misdemeanor conviction;
3. The defendant was not charged with a violation of a criminal statute the elements of which constitute abuse, neglect or misappropriation of the property of a vulnerable person as defined in Title 68, Chapter 11, Part 10;
4. The defendant consents to T.C.A. 40-35-313 deferral, as evidenced by the defendant's signature below: AND
5. The defendant should be granted a deferral of charges pursuant to T.C.A. 40-35-313.

It is, therefore. ORDERED that the prosecution in this case is deferred pursuant to T.C.A. 40-35-313, and the defendant is placed on probation. The terms and conditions ordered by this court apply to the defendant's probation and are incorporated herein by reference thereto.

Probation Term

Total Length 1 year Beginning Date September 16, 2015 Ending Date September 16, 2016

- Supervised

Defendant's Contact Information (unless otherwise provided to the probation officer by the court):

Address: 5330 Highway 49
West Vanleer TN 37181

Special Condition

If the Defendant successfully completes his one year diversionary probation, he will be released from all reporting and other requirements of the Tennessee Sexual Offender Registration Act (Tenn. Code. Ann. 40-39-201, et seq.)

Costs:

- $1631.50 Other: cost

Enter this the 16th day of September, 2015

/s/ David Wolfe
Judge's Signature

/s/ Billy H. Miller, Jr.
Counsel for State/Signature

/s/ Tim Potter
Counsel for the Defendant

**ENTERING OF GUILTY PLEA—
RELEVANT EXCERPTS
(SEPTEMBER 16, 2015)**

IN THE CIRCUIT COURT FOR
DICKSON COUNTY, TENNESSEE
AT CHARLOTTE

STATE OF TENNESSEE,

Plaintiff(s),

v.

WESTLEY A. ALBRIGHT,

Defendant(s).

22CC-2013-CR-206

Before: Hon. David D. WOLFE, Judge

[September 16, 2015 Transcript, p. 7]

Mr. Albright, raise your right hand and be placed under oath.

WESTLEY A. ALBRIGHT, having been first duly sworn or affirmed, testified as follows:

EXAMINATION

BY THE COURT:

Q. State your full name for the record.

A Westley Allen Albright.

Q. Mr. Albright, you're charged in a two count indictment a Class E felony and a Class C felony. It's been indicated that you're going to enter a plea.

THE COURT: Is this a no contest?

MR. POTTER: Yes, sir.

MR. MILLER: Yes, Your Honor.

BY THE COURT:

Q You're going to be entering a plea of no contest to Count I of that indictment and receive a sentence of one year to the Tennessee Department of Corrections under the conditional or judicial diversion statute, which I'll explain to you more fully in just a moment. And during that time you'll be placed on the Sexual Offender Register.

Have you seen or been shown a copy of the charges against you?

A Yes, sir.

Q Have you gone over those charges with your lawyer and discussed with him the facts of the case and any possible defenses that you may have?

A Yes, sir, I have.

Q I'm aware of the fact that there's been a motion to suppress filed in this case, and we had a hearing on that. And depending on my ruling—and although I denied that, Mr. Potter I'm sure has explained to you that one of your options is to take that up to the Court of Criminal Appeals. They may find that I was incorrect in my ruling on the motion and so forth. But that would just exclude that particular piece of evidence.

But have you gone over everything with him? Do you need anymore time to discuss it with your lawyer?

A No, sir.

Q It's been indicated you want to enter a plea of no contest for this offense. But do you understand that you also have the right to plead guilty—I'm sorry, not guilty to the charge entirely, and if you plead not guilty, do you understand that you'd have the right to a speedy and public trial by a Jury in this court?

A Yes, sir, I do.

Q Do you understand that at that trial you would be presumed to be innocent until such time, if ever, the State proved your guilt beyond a reasonable doubt to the satisfaction of all 12 jurors, and their verdict would have to be unanimous before you could be convicted of any offense?

A Yes, sir.

Q Are you aware that you would have the right to have an attorney to represent you at every stage of these proceedings, and if you could not afford an attorney, one would be appointed to represent you if I was satisfied you were unable to hire your own lawyer?

A Yes, sir.

Q Are you aware that at that trial you would have the right to confront and cross examine all witnesses the State might call to testify against you, and you would also have the right to compel

or bring in your own favorable witnesses by the use of a subpoena?

A Yes, sir.

Q Are you aware that if you went to trial, you would be presumed to be innocent and you would not have to testify or prove anything, and no inference of guilt would arrive by your failure or refusing to testify in the matter?

A Yes, sir.

Q Are you aware that if you went to trial and you were found guilty of an offense, sentenced for that offense, that you would have the right to appeal that judgment or conviction to the Court of Criminal Appeals, and that you would have the right to an attorney to help with you that appeal, and one could be appointed for you if you're unable to hire your own lawyer?

A Yes, sir.

Q Do you understand that if you plead no contest, there's not going to be a further trial of any kind except to determine the sentence, and I'll accept the agreement that your lawyer has worked out for the State of Tennessee? Do you understand that?

A Yes, sir.

Q Do you understand that as Mr. Potter and Mr. Miller have pointed out, you're entering a no contest plea. That means you're going to have a judicial diversion for one year. During that time—and I want to make sure you understand judicial division. It's a little bit unusual.

You're going to be entering a plea of no contest. In other words, saying, I give up, I choose not to contest this charge. And the State has laid out the factual basis that will be supporting that plea. Do you understand that?

A Yes, sir.

Q That's what the State would prove if they went to trial. You're saying, I'm not going to contest that. That's going to result in me entering what is called a conditional finding of guilt. You're handing me this plea, I'm going to put it in a drawer or in the court file for one year.

And during that time, if you do everything you're suppose to do, report to the Sexual Offender Register, obey all of those requirements, stay out of trouble, don't commit any new offense, pay your court costs and so forth, that at the end of that year this case will be dismissed.

Now, normally it would be—you would be able to apply to have your record expunged, so that if anyone runs your criminal history it would not show up. But because of this quirk in the law, they will not allow that to take place. So even though the case may be dismissed pursuant to this agreement, you will not be able—and you won't have to report to the Sexual Offender Register anymore after one year, you won't be able to have it removed from your record. Do you understand that?

A Yes, sir. If the law was to change, would I be eligible to—

Q Well, I'm not a fortune teller. If the law were to change, it would depend on how they change the law. I mean, you know, that's beyond my—the State Legislature makes the law, so that's the only thing I can say. And you've got a good lawyer—

A But it doesn't lock me in, I guess is what I'm—

Q Well, you've got a lawyer that can give you the advice on whether or not that is. But I want you to understand that this is going to be on your record and can't be expunged because of that. And because of that, it will be there to enhance, which means to make more severe the punishment that you would receive if you were ever again convicted of any kind of criminal offense. Do you understand that?

A Yes, sir.

Q All right. Do you understand all the rights that I've explained to you thus far?

A Yes, sir.

Q Do you want to waive those rights by entering this conditional plea?

A Yes, sir.

Q Is your decision to plead no contest to this matter voluntary and not the result of force, threats, or promises, apart from the plea agreement between your lawyer and the district attorney?

A Yes, sir.

Q Anyone forcing you to do this?

A No.

Q Are you aware that I don't have to accept your plea unless I'm satisfied there is a factual basis for the entry of this plea?

A Yes, sir.

Q And that you are, in fact, guilty, even though I know you're not admitting your guilt, I have to find that you are guilty. You've heard what the State said the evidence would be. You were here during the suppression hearing we had earlier in the court. You've heard what Detective Levasseur and some of the other witnesses testified about, correct?

A Yes, sir.

Q Are you satisfied with your attorney's services?

A I am.

Q Do you feel like Mr. Potter has given you competent service?

A Yes, sir.

THE COURT: Mr. Potter, do you know of any reason that I should not accept this plea?

MR. POTTER: No, sir, I don't. As I've explained to Mr. Albright and answered some of his inquiries to the Court, as I understand it, at the end of the year, assuming he's in compliance with everything that he is suppose to do, this Court will dismiss the charge against him.

And if someone theoretically ran a criminal background check of Mr. Albright, an NCIC check of some type, it would show that he was charged with this offense, it would also show that it was dismissed on his record.

But typically, what an ordinary expungement would do would expunge from someone's criminal history any reference to the charge itself. And it's been explained to Mr. Albright that under the current state of the law, that's not what would—that's not what would show—notwithstanding, he still would have a dismissal of the charge if he does everything he's supposed to do.

THE COURT: Well, Mr. Albright needs to understand one other thing.

BY THE COURT:

Q And that is, this is a judicial diversion. I'm going to approve the agreement your lawyer has made with the State of Tennessee.

You were charged with a Class C felony, which carries a significantly greater penalty, and that was dismissed as a part of this. I'm aware of the facts in this case, having heard that motion to suppress. If you violate—I've told you what will happen if you don't violate. And Mr. Potter is correct, it would show up—if they check your record, even though I said it would result in a conviction in the future, it will show up that it was dismissed if you do everything successfully.

But if you don't successfully complete the judicial diversion, then it will be a permanent conviction on your record. And secondly, I can have you brought back in front of me and I can sentence you to a greater sentence within the range of punishment available for the crime for which you've pled.

And one of the things you need to understand is that it will not be a probated sentence. Because of the nature of this offense and because of the facts of the case, if you violate your probation, you're going to serve the maximum amount that I can give you under the law. It's not a threat.

It's just a statement that you've gotten the advantage of an issue that was raised by your lawyer, that creates an issue for the district attorney's office that they want to resolve this matter without the risk of an appeal where the Court of Appeals might rule that I made an incorrect decision on that motion to suppress. And they want to make this matter—have this matter concluded.

So you're reaping the benefit of that, but you're still under probation for a year and you're facing even a greater sentence than that if you ever violate that, or you don't register, or you don't do the things you have to do. Because I will have no hesitation to put you in prison for two years, which is the maximum I can give you under a Class E felony on a Range I. Do you understand that?

A Yes, sir.

Q All right. I have no reason to think that you won't successfully complete your probation, but I'm just telling you what will happen in the event you don't.

A I understand.

THE COURT: Anything further, Gentlemen?

MR. MILLER: No, Your Honor.

MR. POTTER: No, sir.

THE COURT: That's the judgment of the Court. You need to step back here and see the probation officer.

THIS CONCLUDES THIS MATTER
IN ITS ENTIRETY