MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Perry Nickell,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 23, 2022

Court of Appeals Case No. 22A-CR-1707

Appeal from the Marion Superior Court

The Honorable Sheila A. Carlisle, Judge

Trial Court Cause No. 49D29-2101-F4-190

Mathias, Judge.

[1] Perry Nickell, who goes by Kayleeann Marie Nickell, appeals the trial court's revocation of her probation. Nickell asserts that the trial court failed to establish

a proper factual predicate for the admission of her probation violations. However, Nickell may not raise such a challenge on direct appeal. Thus, we dismiss this appeal without prejudice, but we also remand with instructions that the trial court correct a scrivener's error in its sentencing order.

Facts and Procedural History

[2] In June 2021, Nickell pleaded guilty to Level 5 felony burglary. In exchange, the State agreed to dismiss charges of Level 4 felony burglary and Level 6 felony residential entry. The parties agreed that the trial court would impose a three-year sentence, with all three years suspended and two of those years suspended to reporting probation. The court accepted Nickell's plea agreement and sentenced her accordingly.

[3] In March 2022, the State filed a notice of probation violation, which notice the State twice amended. In the second amended notice, the State alleged that Nickell had committed the following violations of the conditions of her probation: failing to report; failing to pay $400 in restitution; committing two new offenses, namely, Level 6 felony auto theft and Class A misdemeanor theft, in Hamilton County; and committing two other new offenses, namely, two counts of Level 6 felony failure to warn by a carrier of a dangerous communicable disease, in Marion County.

[4] On June 22, Nickell entered into a written Agreed Entry on Probation Violation with the State. In the Agreed Entry, Nickell stated that she understood that the State was required "to establish and prove by a preponderance of the evidence"

that she committed the alleged violations of her probation. Appellant's App. Vol. 2, p. 102. She then admitted to the allegations as delineated above. The Agreed Entry further stipulated that Nickell would serve her original, three-year sentence in the Department of Correction and have her $400 restitution order reduced to a civil judgment.

[5] The trial court held a hearing on the Agreed Entry. At that hearing, the court attempted to establish the factual basis for Nickell's admissions as follows:

> THE COURT: . . . [The State] allege[s] that you failed to report to probation as directed. Is that true?
>
> [NICKELL]: That is correct.
>
> THE COURT: [The State] also allege[s] that you failed to pay all court-ordered fines, costs, fees, and restitution as directed. Is that true?
>
> [NICKELL]: Yes, Your Honor.
>
> THE COURT: Now, [the State alleges] that you failed to refrain from committing a new criminal offense . . . . One is a Hamilton County case . . . and the second is a Marion County cause . . . . Are those cases both pending?
>
> [NICKELL]: Yes, ma'am.
>
> THE COURT: *Are you admitting, then, that there was probable cause for those charges to be filed*?
>
> [NICKELL]: Yes, Your Honor.

> THE COURT: Okay. We'll show admissions on [the a]llegations . . . and . . . the Court will accept the agreement of the parties. . . .

Tr. Vo. 2, pp. 11-12 (emphasis added). The court then revoked Nickell's placement on probation, ordered her to serve three years in the Department of Correction, and directed her to pay the $400 not as a civil judgment on restitution but as "Court Costs and Fees." Appellant's App. Vol. 2, p. 16. This appeal ensued.

Discussion and Decision

[6] On appeal, Nickell asserts that the trial court failed to establish a proper factual basis for her admissions, and, thus, her admissions were insufficient as a matter of law to allow for the revocation of her probation. Specifically, Nickell asserts that, at the hearing on her Agreed Entry, the trial court erroneously asked Nickell if she agreed that the State had established probable cause to file the new criminal charges against her rather than determining whether the State would be able to establish those allegations by a preponderance of the evidence. *See Heaton v. State*, 984 N.E.2d 614, 616-17 (Ind. 2013) ("the correct burden of proof for a trial court to apply in a probation revocation proceeding is the preponderance of the evidence standard," not "proof only by probable cause").

[7] However, our Supreme Court has held that criminal defendants may not challenge the validity of the factual basis for a guilty plea by way of a direct appeal. *Tumulty v. State*, 666 N.E.2d 394, 395-96 (Ind. 1996). Our Supreme Court has extended that holding to juveniles who admit to civil delinquency

allegations. *J.W. v. State*, 113 N.E.3d 1202, 1206-07 (Ind. 2019). And our Court has held that our Supreme Court's precedent applies just as well to probationers who have admitted to alleged probation violations. *Kirkland v. State*, 176 N.E.3d 986, 988-89 (Ind. Ct. App. 2021). As we summarized in *Kirkland*:

> although our supreme court has yet to directly address the issue of whether *Tumulty* applies to admissions to probation violations, it recently held in *J.W. v. State*, 113 N.E.3d 1202, 1204 (Ind. 2019), that juveniles may not challenge the validity of admissions to delinquency adjudications on direct appeal. Rather, the court held that the interests of finality in judgments, freedom of parties to settle disputes, and the need for factual development of claims favored extending *Tumulty* to the juvenile-law counterpart to a criminal plea. *Id.* at 1206-07. We see no reason why these interests are not equally applicable to cases involving admissions to probation violations, which, like juvenile delinquency adjudications, are civil in nature but present issues pertinent to criminal law

Id. at 989. Thus, in *Kirkland*, we dismissed the probationer's appeal "without prejudice so that he may pursue post-conviction relief proceedings if he so chooses." *Id.*

[8] Following that line of authority, we conclude that Nickell's argument on appeal is not properly before us. We therefore dismiss her appeal without prejudice. *See id.*

[9] However, we also note that the parties agree that the trial court's order for Nickell to pay $400 in court costs and fees is a scrivener's error, and the parties further agree that remanding with instructions for the trial court to correct this

portion of the sentencing order such that Nickell be ordered to pay $400 in restitution as a civil judgment is appropriate. We therefore dismiss this appeal and remand with instructions.

[10] Dismissed and remanded.

Bradford, C.J., and Pyle, J., concur.