MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

N.J.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 14, 2022

Court of Appeals Case No. 22A-JV-1220

Appeal from the Randolph Circuit Court

The Honorable Jay L. Toney, Judge

Trial Court Cause No. 68C01-2111-JD-138

Mathias, Judge.

[1] N.J. appeals the Randolph Circuit Court's order modifying his placement to the Department of Correction. N.J. presents two issues for our review, but we

address a single dispositive issue, namely, whether the trial court committed fundamental error when it modified his placement without an evidentiary hearing and absent a modification report filed by the probation department. We affirm.

Facts and Procedural History

[2] In November 2021, N.J. was residing at the Youth Opportunity Center "following a series of disrupted placements." Appellant's App. Vol. 2, p. 15. N.J. had been placed there following adjudications for criminal trespass and conversion. On November 14, N.J. picked up a staff member by his legs and "slamm[ed]" him to the floor. *Id.* at 9. The State filed a delinquency petition alleging that N.J. had committed battery and criminal mischief, misdemeanors if committed by an adult. N.J. admitted those allegations, and the trial court ordered that N.J. would be placed with the Department of Correction ("DOC"). The trial court then suspended that commitment and placed him at home, with his mother. The court ordered N.J. to "comply with [certain] rules and supervision[.]" *Id.* at 66.

[3] N.J. was living at home when, in March 2022, he tested positive for fentanyl. N.J. admitted to his school's resource officer that he had used fentanyl both on the school bus and in a shed at his home. On March 30, the probation department filed a request that the trial court place N.J. in secure detention pending further proceedings. The court granted that request and directed the probation department to place N.J. in secure detention "as may be appropriate and available." *Id.* at 6.

[4] On April 13, the probation department filed a verified petition to modify N.J.'s placement to the DOC. In its petition, the probation department stated that it had "been looking for residential placement for [N.J.] and due to his adjudication in this cause, and failed placement history, placement has not been available." *Id.* at 67. The probation department also stated that Mother reported being unable "to keep him supervised and safe" at home. *Id.* at 66. The probation department also stated that a "Modification Report is not being prepared for filing."[1] *Id.* at 67.

[5] The court held a hearing on the petition to modify N.J.'s placement. N.J. appeared at that hearing with his mother and his counsel. Elizabeth Krieg, Chief Probation Officer for the Randolph County Probation Department, advised the court that N.J. had used fentanyl on a school bus and at home. Krieg stated that she had seen police reports showing that N.J. had "drugs in the house" and had driven his mother's car without permission. Tr. p. 5. Krieg also stated that she had "looked . . . for a secure residential program" for N.J., but that with "every referral" she had made, "the recommendation [came] back that for him—his needs would best be met in a secured setting to provide treatment." *Id.* Krieg said that, given the "six to eight[-]month waiting list" for secure residential facilities, she recommended that N.J. be placed in the DOC, "where he can receive group counseling, educational services, [and] counseling

[1] Indiana Code section 31-37-22-4 provides in relevant part that the probation department was required to prepare a modification report along with its petition to modify N.J.'s placement.

services[.]" *Id.* The State expressed its full support for the probation department's recommendation. At no point did N.J. object to Krieg's statements to the trial court.

[6] Instead, N.J.'s counsel argued only against placing N.J. in the DOC and asked that N.J. remain at home while he waits to get into a secured residential facility. N.J.'s mom also spoke during the hearing. She told the trial court that she had been trying to get N.J. away from his friends and that she "hadn't heard" that N.J. had used fentanyl. *Id.* at 6. N.J.'s mom concluded with a plea that "somebody" help her with N.J. *Id.*

[7] Finally, the trial court asked N.J. whether he knew how dangerous fentanyl is, and N.J. acknowledged that it was dangerous to himself and others around him. The court concluded the hearing by granting the probation department's request to place N.J. in the DOC. This appeal ensued.

Discussion and Decision

[8] N.J. contends that the trial court violated his right to due process when it modified his placement without an evidentiary hearing and without a modification report filed by the probation department. During the hearing on the petition to modify N.J.'s placement, no witnesses were sworn, and no evidence was submitted. Rather, the probation officer, the prosecutor, N.J.'s mother, and N.J., without having been sworn under oath, discussed the reasons underlying the verified petition to modify with the trial court.

[9] At no point did N.J. object to the manner in which the parties proceeded before the trial court. Nor did he object or otherwise complain about the lack of a modification report. Thus, to demonstrate reversible error on this issue, he must show that the trial court committed fundamental error in the manner in which it proceeded. But N.J. does not argue fundamental error on appeal; thus, the issue is waived.[2] *See Curtis v. State*, 948 N.E.2d 1143, 1148 (Ind. 2011).

[10] Waiver notwithstanding, as our case law makes clear, "[a]n error is fundamental, and thus reviewable on appeal, if it made a fair trial impossible or constituted a clearly blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm." *Nix v. State*, 158 N.E.3d 795, 800 (Ind. Ct. App. 2020) (quoting *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018)), *trans. denied*. Fundamental error "is extremely narrow and encompasses only errors so blatant that the trial judge should have acted independently to correct the situation." *Durden*, 99 N.E.3d at 652 (quotation marks and citation omitted).

[11] "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 33 (1976) (quotation omitted). Here, N.J. was represented by counsel during the hearing on the petition to modify his placement. The probation department's petition for modification setting out its reasons for the request was

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[2] N.J. argues on appeal that the trial court violated his right to due process, but the case law he cites does not address fundamental error.

verified. N.J. did not dispute the allegations included in that petition, including the probation officer's statement that N.J. had used fentanyl on a school bus and at home. Neither did N.J. dispute the probation officer's description of N.J.'s history of adjudications and failure to abide by the rules of the Youth Opportunity Center and the rules at home. Finally, N.J. did not request an evidentiary hearing or that a modification report be prepared, and he did not assert that both were required.

[12] Given N.J.'s acquiescence to these issues during the hearing, we cannot say that the trial court should have acted independently to postpone the hearing to get a modification report and to hold an evidentiary hearing. N.J. has not shown that the trial court committed fundamental error when it modified his placement to the DOC.

[13] Affirmed.

Robb, J., and Foley, J., concur.