

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Sudhakar Kunwar,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

January 14, 2022

Court of Appeals Case No.
21A-PC-526

Appeal from the Clinton Circuit
Court

The Honorable Bradley K. Mohler,
Judge

Trial Court Cause No.
12C01-2010-PC-950

Darden, Senior Judge.

Statement of the Case

[1] Sudhakar Kunwar, without the assistance of counsel, pleaded guilty to Level 6

felony sexual battery during his initial hearing. He later filed a petition for post-Court of Appeals of Indiana | Memorandum Decision 21A-PC-526 | January 14, 2022

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conviction relief in which he argued, among other claims, that his guilty plea was invalid. Concluding that Kunwar was equivocal when discussing the factual basis for his guilty plea, we reverse the post-conviction court's denial of his petition for post-conviction relief.

Issue

- [2] Kunwar raises three issues, of which one is dispositive: whether the post-conviction court erred in rejecting Kunwar's claim that his guilty plea was not knowing, voluntary, and intelligent.

Facts and Procedural History

- [3] Twenty-six-year-old Kunwar was born in the country of Nepal and moved to Indiana, where he lived in Frankfort for approximately three years before the incident at issue. In Nepal, he had graduated from high school and had studied at a university for one year. English was not Kunwar's native language; however, he learned "a little" English in Nepal. PCR Tr. Vol. 2, p. 7. He learned more English when he arrived in the United States, including when he was working in a factory, but he had no experience in the American legal system.
- [4] The State charged Kunwar on September 8, 2002, with Level 6 felony sexual battery under Case Number 12C01-2009-F6-799. The State alleged that on or about September 8, 2020, Kunwar, with the intent to arouse or satisfy his sexual desires, compelled a person identified as "victim one," or O.B., to submit to a

touching by force or imminent threat of force. PCR Tr. Vol. 3, p. 5. After being arrested on September 8, 2020, he was held in jail overnight before his initial hearing on September 9, 2020.

- [5] Shortly before his initial hearing, Kunwar was given and signed a document entitled “Initial Hearing Advisement of Rights.” Appellant’s App. Vol. 2, p. 24. At the top of the document, it stated, “You have constitutional rights as explained below. Please read this document carefully. If you understand, please initial and answer where indicated.” *Id.*
- [6] Under “Section 1 – Right to Counsel,” the document provided: “You have the right to have an attorney (counsel) represent you. If you are unable to hire an attorney, you may request that the Court appoint an attorney to represent you.” *Id.* Kunwar wrote his initials at the end of that paragraph. The document further stated: “Proceeding without an attorney could place you at a disadvantage. An attorney could help you review the case, review the discovery and evidence, investigate, evaluate defenses, prepare motions, prepare for trial, and/or negotiate with the State.” Kunwar also wrote his initials at the end of that paragraph.
- [7] Under “Section 2 – Trial Rights,” Kunwar placed his initials next to several statements, as follows:

[initials] You have a right to a public, speedy trial by jury. If the case is filed as a misdemeanor, the trial will be a bench trial (to the Judge) unless you submit a

written request for a jury trial within 10 days of the first trial setting.

[initials] You have a right to confront (face) and cross-examine (question) witnesses.

[initials] You have a right to subpoena (compel) witnesses to come in and testify for you.

[initials] You have a right against self-incrimination (right to remain silent).

[initials] You have a right to make the State prove your guilt beyond a reasonable doubt.

[initials] You have a right to appeal (challenge) your conviction and sentence to a higher court.

Id.

[8] Next, the advisement stated that the trial court could set conditions of bond and further set forth the possible penalties Kunwar faced for his offense. Finally, under “Section 5 – Immigration Status,” the document stated:

I understand that if I am not a legal citizen of the United States, a conviction may affect my status in this country, including deportation. I understand that I may speak with an attorney about the immigration consequences of the charge(s) and/or a conviction.

Id. at 25. Kunwar placed his initials at the bottom of the paragraph.

[9] At the beginning of the initial hearing, the trial court read the following advisement to Kunwar and another defendant:

You have the right to an attorney, if you cannot afford an attorney, you can ask for one to be appointed. You have a right to have a trial. For a new charge, it could be a trial to a – a jury, public speedy trial by jury. For a violation, the trial can be to a Judge. You have a right to face and question witnesses. You have a right to subpoena witnesses and require them to appear and testify. You have a right to remain silent. That means you cannot be forced to testify against yourself. You have a right to make the State prove that you are guilty. For new charges, they must do so by proof beyond a reasonable doubt. For violations they must do so by preponderance of the evidence. You have a right to appeal any conviction and sentence.

Id. at 46.

[10] Next, the trial court asked Kunwar if he had read and understood the advisement of rights form and if he had heard and understood the trial court’s oral advisement of rights. Kunwar answered “Yes” to both questions. Tr. Vol. 3, p. 5. The trial court then described the charge against Kunwar and the possible penalties he faced. Kunwar indicated he understood the nature of the charge and the possible penalties.

[11] After that exchange, the trial court stated to Kunwar that he had three choices: he could enter a plea of not guilty and hire an attorney, enter a plea of not guilty and ask the court to appoint an attorney, and/or plead guilty as charged. Kunwar initially stated he was guilty about “this particular [sic] in what everyone says,” but “with the whole situation what [sic] happened, I’m not guilty.” *Id.* at 6. The trial court then stated that unless Kunwar testified under

oath that he committed the crime at issue, the court would have to enter a not guilty plea on Kunwar's behalf.

[12] Under further questioning by the trial court, Kunwar stated he was not under the influence of alcohol or medication or suffering from any medical issues that would affect his ability to understand the proceedings. He further stated no one had forced him to plead guilty or offered him anything in exchange for his guilty plea.

[13] At that point, the trial court informed Kunwar that if he pleaded guilty and admitted under oath that he had committed Level 6 felony sexual battery, he would waive his right to a trial, as well as "each of those rights that I just read over with you and the rights that are listed on the written form that you signed." *Id.* at 7-8. Kunwar indicated that he understood. The trial court further stated Kunwar would waive his right to counsel, which would include "the right to have an attorney appointed if you cannot afford one." *Id.* at 8. Kunwar again stated that he understood.

[14] Finally, the trial court advised Kunwar that, as a consequence of pleading guilty to the offense, he would have to register as a sex offender for at least ten years and follow all residency restrictions. When asked if he understood, Kunwar responded, "Yes." *Id.* at 9. The following discussion then occurred:

The Court: Do you have any questions about any of those things that I've gone over?

Kunwar: No.

The Court: And, knowing all of those things, do you still want to plead guilty?

Kunwar: Well there – there is a video of me going into that apartment, but, she’s the one who invited me there.

The Court: Okay. I mean, if you want time to think about it, I can give you time to think about it. Uhm. Would you like to think about it for a day and I’ll bring you back tomorrow?

Kunwar: No, I – I mean I plead guilty.

Id.

[15] After reiterating the possible sentence, including the requirement to register as a sex offender, and after Kunwar once again indicated he understood, Kunwar pleaded guilty to sexual battery as a Level 6 felony. The trial court then placed him under oath, and the prosecutor questioned Kunwar about the factual basis for the offense. The following exchange occurred:

[Prosecutor]: And, on that that date, do you agree, that with the intent to arouse or satisfy either your sexual desires or the sexual desires of victim one, uh, you submitted to touching, or you had victim one submit to touching by force or imminent threat of force?

MR. KUNWAR: (Sighs)

[Prosecutor]: I’ll—I’ll re-read my question to you. Do you agree, that—that on that date, September 7th, here in Frankfort, Clinton County, you, Sudhakar Kunwar, with the intent to arouse your sexual desires compelled victim one, with the initials, O.B., to submit to touching by force or imminent threat of force?

MR. KUNWAR: Yes.

[Prosecutor]: And, you agree that this is an offense in Indiana called sexual battery?

MR. KUNWAR: Yes.

[Prosecutor]: And, you agree that your actions of compelling her to submit to that touching uhm, by you grabbing her breast, with the—

MR. KUNWAR:—Yes—

[Prosecutor]:—intent to arouse your sexual desires is an offense?

MR. KUNWAR: That part, no. After I touched, I left.

[Prosecutor]: Do you agree that when you touched her breast, you did so with the intent to arouse your sexual desires?

MR. KUNWAR: Or hers, yes.

[Prosecutor]: Or hers. And, you did so again with uh, you compelled her what [sic] the threat of force or imminent threat of force?

MR. KUNWAR: No, no force, no threatening.

[Prosecutor]: Do you agree that by you touching her, you were using force?

MR. KUNWAR: Yes. Huh.

[Prosecutor]: And, that force compelled her to uhm, be touched.

MR. KUNWAR: Well, uh, that's, it's like uhm, we were in a different room before that. Where there was a like uh, like a lot of talking between us. And, then when it, there was a lot of talk about sexual stuff, and then she gave me her room number. She told me when can [sic] hang out. I did not go into her house by the force or like, —

[Prosecutor]:—But, do you agree that you compelled her to submit to the touching or [sic] her breast?

MR. KUNWAR: Yes.

[Prosecutor]: And, that was done so [sic] with the intent to arouse your sexual desires?

MR. KUNWAR: Or hers, yeah.

THE COURT: Okay, Court will find a factual basis uh, to the, to support the plea, we'll find, in this case, the Defendant, is guilty of sexual battery, as a level six felony.

Tr. Vol. 3, pp. 11-13.

[16] Next, the trial court scheduled a sentencing hearing. Kunwar requested bond, but the trial court stated Kunwar would remain in jail until sentencing.

[17] The trial court presided over Kunwar's sentencing hearing on September 11, 2020. O.B. provided a written statement that has not been included in the record of this appeal. Kunwar gave a statement of allocution, as follows:

On my behalf, I want you to know that uhm, before all this happened that ten second [sic] what I did, which I was wrong, before that we had talked at laundry room, they have, the police has [sic] the video, unfortunately we do not have a sound. Then, we – we were talking and then I was walking our dog around our apartment, just like every day. I've never had an problem with woman [sic], I've never disrespected woman [sic] in my life, my wife is back there, but, that, uh, I study, I go to college, I try, I want to go to school and we – I – I went in that laundry room, like we didn't know, we know there were laundry room [sic], but me and my dog, I told my wife, hey, I'm gonna go and then we went there and then there was her and we were talking and then how she said uhm, so many things, like female stuff, and I said I was – I was married, I'm not into those things, but I sometimes enjoy company, have fun, just stuff like that. And, she said, oh, uh, uh, we, I – I was the, I was a stranger to her. I was a stranger

[sic] man living a different apartment. I don't know what she has, I, because this is the first time I've ever met [sic] in my life, so, she says, "why don't you come into my room, I have a golden retriever." I love golden retrievers, every, uh, we love dog [sic]. So, whenever I went in there, I did not know what I-walk [sic] into. I reread [sic] it, I cannot take that back, whatever happened, that ten second, but after that, I said, "hey, I'm so sorry, I should have never done this," and then I (inaudible) asked for her the water. And, then she didn't have water, and then that was the holy [sic] story.

Id. at 18-19.

[18] After the parties provided their perspectives on sentencing considerations, the trial court sentenced Kunwar to 365 days, with 125 days executed and the remainder suspended to probation. The trial court further determined that Kunwar would serve the executed portion of his sentence on home detention. After reading the terms of probation and home detention to Kunwar, the trial court asked if he had any questions about the sentence. Kunwar stated he had a green card and asked if the conviction would affect his immigration status. The trial court responded:

Okay, so understand, you didn't tell me last time that you were here on a green card, understand, [sic] conviction can affect your status in this country. I don't know what that is, but you do have to report that to them. Understand, it can affect your ability to either stay or get renewed, you understand that?

Id. at 26. Kunwar said that he understood, but he further stated that his wife, who is an American citizen, was pregnant. He did not appeal following the conclusion of the sentencing hearing.

[19] Kunwar, by counsel, filed a petition for post-conviction relief on October 13, 2020. He alleged that: (1) he was denied his sixth amendment right to the assistance of counsel; and (2) his guilty plea was not made knowingly, intelligently, and voluntarily. The State filed an answer, disputing Kunwar's claims. On March 1, 2021, the post-conviction court held an evidentiary hearing, at which Kunwar testified. The post-conviction court subsequently issued findings of fact and conclusions of law denying Kunwar's petition, and this appeal followed.

Discussion and Decision

[20] Kunwar argues the post-conviction court erred in rejecting his claim that his guilty plea was not knowing, voluntary, and intelligent.¹ Post-conviction proceedings provide defendants with the opportunity to raise issues not known

¹ Kunwar also argues that the post-conviction court erred in rejecting his claim that he did not knowingly, voluntarily, and intelligently waive his right to counsel. Kunwar further argues that jail officials violated his right to freely exercise his religious beliefs under the First Amendment and the State of Indiana's Religious Freedom Restoration Act (RFRA), Indiana Code section 34-13-9-0.7 (2015) et seq., by failing to accommodate his dietary requirements while he was in jail. Kunwar did not raise the RFRA issue in his petition for post-conviction relief or during the post-conviction hearing, and as a result he has waived that claim for appellate review. *See Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001) (claims not raised in post-conviction court proceedings are unavailable on appeal).

or available at the time of the original proceeding. *Huddleston v. State*, 951 N.E.2d 277, 280 (Ind. Ct. App. 2011), *trans. denied*. A petitioner for post-conviction relief has the burden of establishing the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

[21] A petitioner who appeals the denial of their petition is in the position of one who has received a negative judgment. *Griffin v. State*, 617 N.E.2d 550, 552 (Ind. Ct. App. 1993). As a result, on appeal we reverse a post-conviction court's judgment only when the evidence is without conflict and leads unerringly to a result different than that reached by the post-conviction court. *Smith v. State*, 565 N.E.2d 1114, 1116 (Ind. Ct. App. 1991), *trans. denied*. The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. *Id.* We give no deference to the post-conviction court's conclusions of law. *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013).

[22] With respect to Kunwar's claim that he did not knowingly, voluntarily, and intelligently plead guilty to Level 6 felony sexual battery, the State claims our analysis of this issue must be limited to Kunwar's immigration concerns. The State argues that Kunwar did not present to the post-conviction court any other challenges to the voluntariness of his guilty plea. We disagree. During the evidentiary hearing, Kunwar, through counsel, presented a broader argument to the post-conviction court. Specifically, he claimed that he did not clearly understand the proceedings during the guilty plea hearing, as supported by his equivocal claims of innocence in the record and his denial that he compelled

O.B. by force or threats. Kunwar also argued that “a little more in depth explanation and uhm, dire warnings would have helped him make a better decision.” Tr. Vol. 2, p. 12.

[23] The United States Supreme Court has determined: “Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial.” *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1212, 23 L. Ed. 2d 274 (1969). Trial courts must ensure that a guilty plea is voluntarily entered because “[i]gnorance, incomprehension, coercion, terror, inducements, [and] subtle or blatant threats might be a perfect cover-up of unconstitutionality.” *Id.* at 242-43, 89 S. Ct. at 1712.

[24] The Indiana Supreme Court has stated, “No plea of guilty should be accepted when it appears to be doubtful whether it is being intelligently and understandingly made, or when it appears that, for any reason, the plea is wholly inconsistent with the realities of the situation.” *Harshman v. State*, 232 Ind. 618, 621, 115 N.E.2d 501, 502 (1953). It therefore follows that “[b]ecause of the grave nature of a guilty plea, the trial court has a duty to closely scrutinize the situation and be sure that the offered plea is freely and understandingly given” *Brimhall v. State*, 258 Ind. 153, 162, 279 N.E.2d 557, 563 (1972).

[25] In assessing the voluntariness of a plea, we review all of the evidence before the post-conviction court, including testimony given at the post-conviction hearing,

the transcript of the petitioner's original sentencing, and any plea agreements or other exhibits that are a part of the record. *Cornelius v. State*, 846 N.E.2d 354, 357-58 (Ind. Ct. App. 2006), *trans. denied*. A petitioner must plead specific facts from which a finder of fact could conclude by a preponderance of the evidence that the trial judge's failure to make a full inquiry rendered the guilty plea involuntary or unintelligent. *White v. State*, 497 N.E.2d 893, 905 (Ind. 1986).

[26] In *Ellis v. State*, 67 N.E.3d 643 (Ind. 2017), Ellis petitioned for post-conviction relief after he pleaded guilty to four felonies, including two counts of attempted murder, as an accomplice. During the guilty plea hearing, the trial court advised Ellis of the rights he was forfeiting by pleading guilty, as well as his possible sentence. But although Ellis stated that he intended to plead guilty, he also stated, "I didn't do nothing, you know, sir. I was involved to the point that I did hit somebody, but I didn't cut nobody. I did not rob nobody, sir." *Id.* at 645. The post-conviction court rejected Ellis' claim that the trial court should have rejected his guilty plea, but the Indiana Supreme Court reversed. The Court concluded Ellis' statement equated to a denial of guilt, despite Ellis' plea of guilty, and his guilty plea was invalid.

[27] Similarly, in *Huddleston*, 951 N.E.2d at 279, the State charged Huddleston with murder as an accomplice, and he pleaded guilty on the third day of trial. During the guilty plea colloquy, Huddleston repeatedly stated that he wanted to plead guilty to murder, and he agreed with the trial court that he was guilty.

But he also denied that he intended or knew that the victim would be killed,

and he further denied knowing that the actual killer intended to commit murder.

[28] The post-conviction court rejected Huddleston’s claim that his guilty plea was not entered knowingly, voluntarily, and intelligently, but a panel of this Court reversed. Huddleston claimed that he wanted to plead guilty, and was in fact guilty, but he also denied intending or knowing that his companion would commit murder. Under those circumstances, a panel of this Court determined “that Huddleston’s ultimate ‘yes’ to the question of whether he was guilty of murder” was insufficient to override his prior statements expressly denying he had the required mental culpability for the offense. *Id.* at 281.

[29] Our review of the record shows that prior to entering the guilty plea, the trial court advised Kunwar of his rights, as required by statute. But our analysis does not end there. Considering the entirety of the record, including the guilty plea proceedings and the evidence introduced at the post-conviction hearing, we are not convinced that Kunwar entered an unequivocal plea of guilty to the charged offense. Although Kunwar repeatedly stated that he intended to enter a plea of guilty, however, he also repeatedly questioned and expressed reservations about the particular underlying facts surrounding his offense. He initially stated he was guilty about “this particular [sic] in what everyone says,” but “with the whole situation what [sic] happened, I’m not guilty.” Tr. Vol. 3, p. 6. But later in the hearing, when the trial judge again asked Kunwar if he wanted to plead guilty, he stated: “Well there – there is a video of me going

into that apartment, but, she's the one who invited me there." *Id.* at 9.

Subsequently, when the prosecutor questioned Kunwar to establish a factual basis, Kunwar vigorously denied the use of force or threatened use of force and raised tangential issues, including his claim that the victim invited him into her apartment. These statements are also equivocal in nature and inconsistent with an unqualified admission of guilt. Requiring trial courts to reject guilty pleas from defendants who maintain their innocence vindicates fundamental rights and is more than "exalt[ing] form over substance." *Ellis*, 67 N.E.3d at 651 (quoting *Patton v. State*, 517 N.E.2d 374, 376 (Ind. 1987)).

- [30] Notwithstanding the trial court's advisements, we conclude, similar to the courts in *Ellis* and *Huddleston*, that Kunwar's guilty plea was equivocal as to his guilt to the charged offense and the factual predicate in support thereof. As a result, his guilty plea was not knowingly, intelligently, and voluntarily entered. Kunwar is entitled to a new initial hearing.

Conclusion

- [31] For the reasons stated above, we reverse the post-conviction court's judgment and remand for further proceedings not inconsistent with this opinion.
- [32] Reversed and remanded.

Robb, J., concurs

Brown, J., dissents with opinion.

I N T H E
C O U R T O F A P P E A L S O F I N D I A N A

Sudhakar Kunwar,
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Brown, Judge.

[33] I respectfully dissent. I would conclude that Kunwar has not established that he did not knowingly, voluntarily, and intelligently enter his guilty plea.

[34] At the March 1, 2021 hearing on his petition for post-conviction relief, Kunwar, who was born in January 1994, stated that he had been in the United States for five years. He indicated he worked in a factory at NTK Corporation, he was from Nepal, English is not his first language, and his first language was Nepalese. When asked if he learned English in his country, he answered “[a] little bit, yes,” and when asked “it wasn’t until you came here that you really were speaking English more,” he answered “[t]hat’s right.” Post-Conviction Transcript Volume II at 7. When asked about his education he testified that he

was a high school graduate and studied at a university for one year, and that his major was engineering and he had an English class. The court asked “[i]s all of your work instruction, all your communication with the people you work in English,” Kunwar answered “English and Japanese cause we have a lot of Japanese people,” and the court asked “[b]ut none of your work is done is [sic] Nepalese? Is that correct,” he replied “[y]es, sir.” *Id.* at 11.

[35] Further, and of particular note, Kunwar acted pro se on appeal, sufficiently followed our Appellate Rules, and filed his own Motion to Proceed in Forma Pauperis, his Conforming Appendix, and his Appellant’s Brief.

[36] At the September 9, 2020 guilty plea hearing, the trial court verbally advised Kunwar of his rights. Kunwar placed his initials next to each of his rights set forth in the “Initial Hearing Advisement of Rights,” which included a statement that he understood that, if he was not a legal citizen, a conviction may affect his status in this country, including deportation. Appellant’s Appendix Volume II at 24. The court advised Kunwar of his rights to a trial, to an attorney, to question witnesses, and to subpoena witnesses, and Kunwar indicated that he understood those rights. He further indicated that he understood the charge against him and the possible penalties including the sentencing range and advisory sentence. The court explained to him that, by pleading guilty, he would waive certain rights including his right to a trial, his right to an attorney, and each of the rights listed on the written advisement he signed, and Kunwar indicated that he understood.

[37] Additionally, an acknowledgement by his attorney at the post-conviction relief hearing demonstrates that it was Kunwar's decision, albeit perhaps not the wisest one, to plead guilty when he did. His counsel stated that "the Court didn't miss any steps, but I think maybe, in his case, a little more in-depth explanation and, uhm, dire warnings would have helped him make a better decision." Post-Conviction Transcript Volume II at 12.

[38] While he stated "there is video of me going into that apartment, but, she's the one who invited me there," there was "no force, no threatening," and "I did not go into her house by the force," Kunwar admitted that he "compelled her to submit to the touching or [sic] her breast," that by touching her he was using force, and when asked if he did so "with the intent to arouse your sexual desires," he answered "[o]r hers, yeah," and his statements did not contest the facts supporting the elements of the charged offense. *See* Post-Conviction Exhibit 1 at 9, 12-13 (Guilty Plea Transcript at 7, 10-11).

[39] Based upon the record, I would find that Kunwar knowingly, voluntarily, and intelligently entered his guilty plea and would affirm the post-conviction court's denial of his petition for post-conviction relief.