MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

John L. Smith,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

June 30, 2022

Court of Appeals Case No. 22A-PC-593

Appeal from the Marion Superior Court

The Honorable Jennifer P. Harrison, Judge

Trial Court Cause No. 49D20-1908-PC-32064

Najam, Judge.

Statement of the Case

[1] John L. Smith appeals the post-conviction court's denial of his petition for post-conviction relief. Smith presents a single issue for our review, namely, whether the post-conviction court erred when it found that he had knowingly, intelligently, and voluntarily entered into his guilty plea.

[2] We affirm.

Facts and Procedural History

[3] In 2017, the State charged Smith with three counts of unlawful possession of a firearm by a serious violent felon, as Level 4 felonies. The State then amended the charges to additionally allege that Smith was a habitual offender. On September 17, 2018, the court held a bifurcated jury trial. Following the first phase of the trial, the jury found Smith guilty of the three felony charges.

[4] Prior to the start of the second phase, Smith informed the court that he wished to plead guilty to the habitual offender enhancement. *See* Tr. at 99.[1] The court then placed Smith under oath and engaged in the following colloquy with him:

> THE COURT: Okay. And you've gone over the prior convictions that you have been convicted of previously with your lawyer, . . . is that correct?

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[1] Our reference to "Tr." refers to the trial transcript. We note that, while both parties cite the trial transcript, neither party provided a copy of the transcript in the record on appeal. Still, the post-conviction court took judicial notice of the trial record, and we have obtained a copy of the trial transcript from Odyssey.

[SMITH]: Yeah, a lot of paperwork.

THE COURT: A lot of paperwork, yes, it is. And is it true that you wish to waive the right to have the jury hear . . . the habitual offender enhancement phase in this case?

[SMITH]: Yes, that's correct.

* * *

THE COURT: . . . if you want to have a jury trial for the habitual offender enhancement, that's why they're here, I haven't discharged them. But if you want to plead guilty to the habitual offender enhancement, you can. So what would you like to do Mr. Smith?

[SMITH]: I don't understand what good it is going to do for me to say yea that's going to, you know, hang me, if I saw naw, if I say yeah, I'm still going to get hung, so it's about a quick [sic] question.

THE COURT: Okay, but it's not a trick question because you have a constitutional right to do it. Now, it is a mitigator if you plead guilty to this enhancement phase.

[SMITH]: Well, that's me right there on the paper right I can't deny that.

THE COURT: Okay. And you can't deny that you have these prior felony convictions unrelated?

[SMITH]: Right.

THE COURT: Okay, okay but I'm required to go over this with you, do you understand Mr. Smith?

[SMITH]: I understand everything about your job, Judge.

* * *

THE COURT: You heard me. Okay. And so, um, do you admit you have these two prior unrelated felony convictions and they're unrelated in time as to this case, they don't overlap this case, do you admit to that?

[SMITH]: Yes.

* * *

THE COURT: Right, ok, yes, thank you. Um, you are admitting those convictions of your own free will?

[SMITH]: Yes.

THE COURT: Okay. State is there anything further that the court has not covered?

THE STATE: . . . just that . . . [the court] could require the state to go through exactly what we just went through, you would have the ability to call witnesses, to cross examine witnesses, to have that public [jury trial] if you wanted, you understand that?

[SMITH]: That sounds good. Yeah, I understand that.

THE STATE: Okay. But what you are telling the court is in lieu of that jury trial, you are pleading guilty and saying that you have those—you've been convicted of the convictions that are on that piece of paper in front of you, and as the court indicated to you that would be a mitigator at sentencing, is that correct?

[SMITH]: I don't know what mitigator means?

THE STATE: Um, something in your favor.

[SMITH]: Okay. Well, all right, yeah, yes.

THE STATE: That all make sense?

[SMITH]: Nope, but yes.

THE COURT: Okay, so Mr. Smith would you like the jury to come back in to hear what your two (2) prior convictions are?

[SMITH]: People[are] tired, they want to do go home.

THE COURT: Okay, so that's yes or no sir?

[SMITH]: No, they don't have to come back.

THE COURT: No, they don't have to come back, okay. So, do you understand that you are waiving and giving up your right to have the jury hear that you are a habitual offender?

[SMITH]: Yes.

> THE COURT: And are you pleading guilty to the habitual offender enhancement?
>
> [SMITH]: They all put a new charge on me besides the charge I already had so, yes.

Id. at 101-06.

[5] The court then found a "knowing and voluntary" waiver of Smith's right to a jury trial on the enhancement. *Id*. at 107. The court entered judgment of conviction on all counts and sentenced Smith to concurrent sentences of eight years on the felony convictions, with one count enhanced by six years for the habitual offender adjudication, for an aggregate sentence of fourteen years in the Department of Correction. Smith appealed his felony convictions and asserted that the State had presented insufficient evidence. *Smith v. State*, No. 18A-CR-2596, 2019 WL 2572067, at *2 (Ind. Ct. App. June 24, 2019). This Court affirmed his convictions. *Id*. at *3.

[6] On May 7, 2021, Smith filed an amended petition for post-conviction relief in which he asserted that, prior to accepting his guilty plea, the court did not advise him that "he was waiving his right to remain silent[.]" Appellant's App. Vol. 2 at 49. Accordingly, Smith alleged that his guilty plea was "[i]nvoluntary[.]" *Id*. Thereafter, Smith filed a motion in which he asked the post-conviction court to take judicial notice of the underlying trial record, which motion the court granted. Smith then asked the court to cancel the previously scheduled evidentiary hearing because "his pleadings rely entirely on

the trial record" and because he would not offer any "exhibits or witness testimony" at a hearing. *Id*. at 64. The court granted that motion, canceled the hearing, and directed the parties to submit proposed findings. Following the submission of the proposed findings, the court found that Smith's guilty plea was "valid and voluntary." *Id*. at 77. Accordingly, the court denied Smith's petition for post-conviction relief. This appeal ensued.

Discussion and Decision

[7] Smith contends that the post-conviction court erred when it denied his petition for post-conviction relief. As our Supreme Court has made clear, post-conviction proceedings are not a "super-appeal." *Garrett v. State*, 992 N.E.2d 710, 718 (Ind. 2013) (quotation marks omitted). Rather, they provide "a narrow remedy to raise issues that were not known at the time of the original trial or were unavailable on direct appeal." *Id*. As the petitioner in such proceedings bears the burden of establishing relief in the post-conviction court, when he appeals from the denial of his petition, he "stands in the position of one appealing from a negative judgment." *Id*. To obtain our reversal of a negative judgment, the appealing party "must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court." *Id*. We will not defer to the post-conviction court's legal conclusions. *Bobadilla v. State*, 117 N.E.3d 1272, 1279 (Ind. 2019) (quotation marks omitted). Here, the post-conviction court did not hold an evidentiary hearing and ruled on a paper record. As such, we review the post-

conviction court's findings *de novo*. *See Lee v. State*, 892 N.E.2d 1231, 1236-37 (Ind. 2008).

[8] Smith contends that his guilty plea was not knowing, intelligent, or voluntary because the trial court did not adequately advise him of his *Boykin* rights prior to accepting his guilty plea. Our Supreme Court has explained:

> "In considering the voluntariness of a guilty plea we start with the standard that the record of the guilty plea proceeding must demonstrate that the defendant was advised of his constitutional rights and knowingly and voluntarily waived them." *Turman v. State*, 271 Ind. 332, 392 N.E.2d 483, 484 (1979) (citing *Boykin* [*v. Alabama*], 395 U.S. [238,] 242, 89 S. Ct. 1709). And *Boykin* requires that a trial court accepting a guilty plea "must be satisfied that an accused is aware of his right against self-incrimination, his right to trial by jury, and his right to confront his accusers." *Dewitt v. State*, 755 N.E.2d 167, 171 (Ind. 2001) (citing *Boykin*, 395 U.S. at 243, 89 S. Ct. 1709). The failure to advise a criminal defendant of his constitutional rights in accordance with *Boykin* prior to accepting a guilty plea will result in reversal of the conviction. *Youngblood v. State*, 542 N.E.2d 188, 188 (Ind. 1989) (quoting *White v. State*, 497 N.E.2d 893, 905 (Ind.1986)). Accordingly, a defendant who demonstrates that the trial court failed to properly give a *Boykin* advisement during the guilty plea hearing has met his threshold burden for obtaining post-conviction relief.

Ponce v. State, 9 N.E.3d 1265, 1270 (Ind. 2014) (footnote omitted). Once the defendant demonstrates that the trial court did not advise him that he was waiving his *Boykin* rights by pleading guilty, "the burden shifts to the State to prove that the petitioner nonetheless knew that he was waiving such rights." *Id*. at 1273.

[9] On appeal, Smith argues that he met his threshold burden under *Ponce* and that the burden then shifted to the State to prove that he understood that he was waiving his *Boykin* rights. But he maintains that the State did not present any evidence to prove that he was aware that he was waiving his rights by pleading guilty. We agree with Smith that the court did not specifically advise him of his right against self-incrimination before it accepted his guilty plea. But we disagree with Smith that his plea must be vacated.

[10] First, we note that Smith has not cited any authority to demonstrate that *Boykin* applies to habitual offender allegations as opposed to actual crimes. *Cf. Harris v. State*, 964 N.E.2d 920, 927 (Ind. Ct. App. 2012) ("It is well settled that a habitual offender finding does not constitute a separate crime, nor does it result in a separate sentence. Rather, a habitual offender finding results in a sentence enhancement imposed upon the conviction of a subsequent felony.") (citation omitted), *trans. denied*; *see also Hopkins v. State*, 889 N.E.2d 314, 317 (Ind. 2008) (observing that the issue of whether *Boykin* applies to habitual-offender proceedings was an open question not addressed by the parties in that case). Here, the cases Smith relies on address pleas to actual crimes and not habitual offender allegations. In particular, the defendant in *Ponce* pleaded guilty to two counts of Class A felony delivery of cocaine. 9 N.E.3d at 1269. And, in *Bautista v. State*, the defendant pleaded guilty to two counts of Class A felony child molesting. 163 N.E.3d 892, 894 (Ind. Ct. App. 2021). Neither of those cases addressed a guilty plea to a habitual offender allegation.

[11] Further, subsequent to our Supreme Court's decision in *Ponce*, this Court decided *Winkleman*. In that case, during the first phase of his jury trial, but before the jury convicted him, Winkleman pleaded guilty to a habitual offender enhancement. On appeal, Winkleman argued that the trial court had failed to advise him of his *Boykin* rights before he pleaded guilty to the enhancement and that the failure required that his plea be vacated. This Court rejected Winkleman's claim. In so doing, the Court initially observed that Winkleman stated to the trial court that it was "not necessary" for the trial court to advise him of his rights. *Winkelman v. State*, 22 N.E.3d 844, 851 (Ind. Ct. App. 2014). Additionally, the Court relied on the fact that Winkleman had admitted to the habitual offender enhancement "'in the midst of a trial, where the *Boykin* rights are on display for all to see.'" *Id*. at 852 (quoting *Hopkins*, 889 N.E.2d at 317). The Court then concluded that Winkleman had "failed to establish on this record that he did not know he was waiving his *Boykin* rights." *Id*.

[12] Similar to *Winkleman*, Smith pleaded guilty to the habitual offender enhancement just after the completion of the first phase of his jury trial. *Id*. Further, during that part of his trial, Smith explicitly exercised his right not to testify. *See* Tr. at 68. And as Smith asked the post-conviction court to cancel the evidentiary hearing, he did not present any evidence to demonstrate that he was unaware of his *Boykin* rights. Based on this record, and on *Winkleman*, the post-conviction court determined that Smith had failed to show that he did not know he was waiving his *Boykin* rights when he pleaded guilty to the habitual offender enhancement.

[13] Still, Smith suggests that we should not follow *Winkleman* because it "failed to properly apply *Ponce's* burden-shifting scheme." Appellant's Br. at 25. To support his assertion, Smith relies on this Court's opinion in *Bautista*, which "criticized" *Winkleman*. *Id.* In *Bautista*, a different panel of this Court stated that

> [t]he *Winkleman* court failed to properly apply the burden of proof articulated in [*Ponce*]. Specifically, the *Winkleman* court concluded that "Winkelman has failed to establish on this record that he did not know he was waiving his *Boykin* rights." 22 N.E.3d at 852. However, under [*Ponce*], a defendant does not bear the burden to establish that he did not know he was waiving his *Boykin* rights; rather "a defendant who demonstrates that the trial court failed to properly give a *Boykin* advisement during the guilty plea hearing has met his threshold burden for obtaining post-conviction relied." 9 N.E.3d at 1270.

163 N.E.3d at 899 n.6.

[14] We reject Smith's argument for two reasons. First, we find that *Ponce* is distinguishable and does not control our decision today. As discussed above, *Ponce* involved a felony drug dealing conviction following an uninformed guilty plea and, thus, was not in the context of a defendant admitting to a habitual offender enhancement immediately following a jury trial. And, while the Court in *Bautista* declined to find a distinction between the burden of proof in direct appeals and post-conviction proceedings, it did not address the distinction between actual crimes and habitual offender adjudications. Thus, *Bautista* also does not apply.

[15] Second, to the extent that Smith's claim is that *Winkleman* is not good law because it contravenes our Supreme Court's precedent, we note that our Supreme Court denied the defendant's request for transfer in that case. "We are aware that when the [S]upreme [C]ourt denies a petition for transfer, it is not necessarily approving either the result or the reasoning in that case, because the petition may not place the issue in question squarely before the [S]upreme [C]ourt." *Roberts v. State*, 725 N.E.2d 441, 446 (Ind. Ct. App. 2000), *trans. denied*. "Nevertheless, we may ascribe some meaning to the denial of transfer." *Id*. In *Winkleman*, this Court stated that a defendant who sought to set aside a habitual offender guilty plea must do more than show only that he was not advised of his *Boykin* rights at the habitual phase of trial; he must show that he "did not know or was not advised" of the *Boykin* rights at the time of his habitual offender guilty plea, 22 N.E.3d at 851, and, in that case, Winkleman failed to do so. Our Supreme Court chose not to address that determination.

[16] Similarly, here, the post-conviction court determined that Smith had not shown by a preponderance of the evidence that he did not know he was waiving his *Boykin* rights when he admitted to being a habitual offender following the first phase of his trial. And, again, we observe that Smith exercised his right not to testify during his jury trial. On appeal, Smith has not established that the evidence as a whole unmistakably and unerringly leads to a conclusion contrary to that of the post-conviction court, and, therefore, we affirm. *See Dewitt*, 755 N.E.2d at 170-71 (applying a "rigorous" post-conviction standard of review, our Supreme Court affirmed the post-conviction court's decision that defendant

knew he was waiving *Boykin* rights when he pleaded guilty to burglary charge and held that "we cannot conclude that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court").

[17] Affirmed.

Bradford, C.J., and Bailey, J., concur.