

## 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

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Christopher M. Swisher,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff*

August 30, 2021

Court of Appeals Case No.  
21A-PC-789

Appeal from the  
Delaware Circuit Court

The Honorable  
John M. Feick, Judge

Trial Court Cause No.  
18C04-1902-PC-2

**Vaidik, Judge.**

# Case Summary

- [1] Christopher M. Swisher appeals the denial of his petition for post-conviction relief. We affirm.

## Facts and Procedural History

- [2] In November 2018, Swisher and the State entered into a written plea agreement under which Swisher would plead guilty to three Level 6 felonies: theft, failure to register as a sex offender, and escape. The plea agreement provided Swisher had the right against self-incrimination, the right to trial by jury, and the right to confront his accusers—known as *Boykin* rights, *see Boykin v. Alabama*, 395 U.S. 238 (1969)—and that he was waiving these rights by pleading guilty. *See* Appellant’s App. Vol. II p. 114. The agreement was signed by Swisher, his attorney, and the deputy prosecutor. That same day, the trial court held a guilty-plea hearing and advised Swisher as follows:

As a person charged with a crime, you have certain rights and also those rights you waive by pleading guilty. You’re entitled to an early, public trial by jury in the county in which the offense was allegedly committed, you’re presumed innocent unless and until the State proves you guilty beyond a reasonable doubt. You have the right to confront all witnesses against you, to see, hear, question, and cross examine those witnesses. You also have the right to have witnesses appear on your behalf and if necessary, subpoenas shall be issued requiring them to appear. You have the right to be present and participate at any hearing or trial concerning the charges in this matter. **However, anything you say can be used against you.** Do you understand by pleading guilty, you give up those rights?

DEFENDANT: Yes, sir.

THE COURT: I have in front of me a document entitled plea agreement. It contains the signature of your attorney and that of the deputy prosecutor. Is that your signature on this, also?

DEFENDANT: Yes, sir, it is.

THE COURT: Have you read and do you understand the agreement?

DEFENDANT: Yes, sir, I have.

*Id.* at 121-22 (emphasis added). The court accepted Swisher's guilty plea and sentenced him to five years.

[3] In 2019, Swisher filed a pro se petition for post-conviction relief, which was later amended by counsel. Swisher alleged his guilty plea wasn't knowing, intelligent, and voluntary because the trial court did not fully advise him of his right against self-incrimination. Swisher moved for summary disposition and asked the post-conviction court to rule on the merits of his petition without holding an evidentiary hearing. The post-conviction court did so and denied relief.

[4] Swisher now appeals.

## Discussion and Decision

- [5] Swisher contends the post-conviction court erred in denying relief. A person who files a petition for post-conviction relief must establish the grounds for relief by a preponderance of the evidence. *Hollowell v. State*, 19 N.E.3d 263, 268-69 (Ind. 2014). If the post-conviction court denies relief, and the petitioner appeals, the petitioner must show that the evidence leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 269.
- [6] Swisher argues his guilty plea wasn't knowing, intelligent, and voluntary because the trial court "did not fully advise him of his right against self-incrimination at the guilty plea hearing." Appellant's Br. p. 8. According to *Boykin*, "a trial court 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 before accepting a guilty plea." *Dewitt v. State*, 755 N.E.2d 167, 171 (Ind. 2001); *Maloney v. State*, 684 N.E.2d 488, 491 (Ind. 1997) ("*Boykin* requires that the record show a defendant knew he was giving up certain rights by pleading guilty."); *see also* Ind. Code § 35-35-1-2. However, *Boykin* "does not require that the record of the guilty plea proceeding show that the accused was formally advised that entry of his guilty plea waives certain constitutional rights, nor does *Boykin* require that the record contain a formal waiver of these rights by the accused." *Dewitt*, 755 N.E.2d at 171 (cleaned up). Rather, *Boykin* only requires a conviction to be vacated if the defendant was not advised at the

time of his plea—**and did not otherwise know**—that he was waiving his *Boykin* rights. *Id.* (citing *Davis v. State*, 675 N.E.2d 1097, 1103 (Ind. 1996)).<sup>1</sup>

[7] The State argues that although the trial court didn't use the exact words that Swisher had "the right against self-incrimination," it "used language that meaningfully conveyed the substance of the right" when it told him anything he said could be used against him. Appellee's Br. p. 11. But even assuming Swisher is correct that the trial court did not fully advise him of his right against self-incrimination, he is not entitled to any relief. Swisher's plea agreement provided he had the right against self-incrimination and was waiving this right by pleading guilty. The trial court confirmed Swisher had read, understood, and signed the plea agreement. Because Swisher asked the post-conviction court to rule on the merits of his petition without holding an evidentiary hearing, Swisher didn't testify and thus presented no evidence that he didn't know about his right against self-incrimination when he pled guilty—such as that he did not actually read his plea agreement or could not read or understand it. As our Supreme Court has reiterated, a "petitioner for post-conviction relief has the burden of establishing his grounds for relief by a preponderance of the

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<sup>1</sup> Swisher cites *Hunt v. State*, 487 N.E.2d 1330 (Ind. Ct. App. 1986), where we held a trial court's failure to make an independent determination of a defendant's understanding of the rights he was waiving was automatically grounds for post-conviction relief. However, that part of *Hunt* is no longer good law. See *Maloney*, 684 N.E.2d at 490-91 (noting a split in the Court of Appeals on the issue and concluding the *Hunt* view was no longer good law). Swisher also cites *State v. Lime*, 619 N.E.2d 601 (Ind. Ct. App. 1994), *reh'g denied, trans. denied*, but that case relies on *Hunt*.

evidence.” *Hall v. State*, 849 N.E.2d 466, 472 (Ind. 2006). Swisher has not met that burden here. We therefore affirm the post-conviction court.

[8] Affirmed.

Kirsch, J., and May, J., concur.