MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

David Andrew Dimmett,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

December 28, 2022

Court of Appeals Case No.
22A-PC-1484

Appeal from the
Vanderburgh Superior Court

The Honorable
Robert J. Pigman, Judge

Trial Court Cause No.
82D03-2008-PC-3481

Foley, Judge.

[1] David Andrew Dimmett ("Dimmett") appeals the post-conviction court's denial of his amended petition for post-conviction relief and raises the following two issues for our review:

I. Whether the post-conviction court erred when it found that Dimmett's habitual offender admission was knowing, intelligent, and voluntary;

II. Whether the post-conviction court erred when it found that Dimmett's habitual offender admission was supported by an adequate factual basis.

Finding no reversible error, we affirm.

Facts and Procedural History

[2] On July 31, 2017, the State charged Dimmett with: Count 1, dealing in a narcotic drug as a Level 2 felony; Count 2, dealing in a schedule II controlled substance as a Level 2 felony; Count 3, dealing in a schedule III controlled substance as a Level 4 felony; Count 4, dealing in a schedule I controlled substance as a Level 5 felony; Count 5, possession of a narcotic drug as a Level 6 felony; Count 6, possession of a narcotic drug as a Level 6 felony; and Count 7, possession of marijuana as a Class A misdemeanor. The State also alleged that Dimmett was a habitual offender. Count 4 was later dismissed, and the State added a Count for possession of a narcotic drug as a Level 3 felony; the counts were renumbered for trial.

[3] On October 29–30, 2018, a bifurcated jury trial was held, and Dimmett was found guilty on all seven counts. After the jury verdict and prior to the jury being released, but outside the presence of the jury, Dimmett admitted to being a habitual offender during the following colloquy:

> THE COURT: . . . There's an Habitual Offender Enhancement alleging some prior convictions. Is that proceeding necessary?
>
> MR. SMITH: It is not, Your Honor.
>
> THE COURT: Ok, Mr. Dimmett you have a right to another trial essentially. You can present evidence, call witnesses to testify, cross examine anybody who testifies against you like we did during the trial on the issue of whether you have those prior convictions. Your Counsel has represented to me that you were going to admit that you have those, is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Is that a free and voluntary act on your part?
>
> THE DEFENDANT: Yes sir.
>
> THE COURT: No one's forced you to do that and you . . .
>
> THE DEFENDANT: (Interrupting) No sir.
>
> THE COURT: Okay. All right . . .

[4] Tr. Vol. 3 p. 69–70. On December 7, 2018, Dimmett was sentenced and filed a direct appeal. On July 16, 2019, this court affirmed the convictions and

sentences in an unpublished opinion, and the Indiana Supreme Court later denied transfer. *Dimmett v. State,* No. 19A-CR-123, 2019 WL 3129329 (Ind. Ct. App. July 16, 2019), *trans. denied*.

[5] On August 20, 2020, Dimmett, pro se, filed a petition for post-conviction relief alleging ineffective assistance of counsel. On September 3, 2021, Dimmett amended his petition alleging that his admission to the habitual offender enhancement was: (1) not knowing, intelligent, and voluntary; and (2) not supported by a factual basis.[1] On December 3, 2021, the post-conviction court held an evidentiary hearing on the amended petition. On June 1, 2022, the post-conviction court denied Dimmett's amended petition, concluding that Dimmett failed to prove by a preponderance of the evidence the claims in his amended petition. Dimmett now appeals.

Discussion and Decision

[6] Dimmett claims that the post-conviction court erred when it found that his habitual offender admission was knowing, intelligent, and voluntary, and was supported by an adequate factual basis. When appealing the denial of a post-conviction petition, a defendant may present limited collateral challenges to a conviction. Ind. Post-Conviction Rule 1(1)(b); *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019). "The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal." *Gibson*, 133 N.E.3d at 681. The

[1] Ind. Code § 35-35-1-3(b).

defendant has the burden to establish "his grounds for relief by a preponderance of the evidence." P-C.R. 5. When the appellant appeals from a negative judgment denying post-conviction relief, he "must demonstrate that the evidence, when taken as a whole, is without conflict and 'leads unerringly and unmistakably to a conclusion opposite to that reached by the trial court.'" *Atchley v. State*, 730 N.E.2d 758, 762 (quoting *Benefiel v. State*, 716 N.E.2d 906, 912 (Ind. 1999)). When a defendant fails to meet this standard of review, we will affirm the post-conviction court's denial of relief. *Id.*

I. Waiver of *Boykin* Rights

[7] Dimmett contends that his admission to the habitual offender allegation was not knowing, intelligent, and voluntary because the trial court failed to specifically advise him that he was waiving his right to a jury trial and his right against self-incrimination.

> According to *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), a trial court must be satisfied that [the] 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. *See also* Ind. Code § 35-35-1-2 (noting that the trial court shall not accept a plea of guilty without first determining that the defendant has been informed that he is waiving certain rights). 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 v. State*, 755 N.E.2d 167, 171 (Ind. 2001). Rather, *Boykin* only requires a conviction to be vacated if the defendant did not know

> or was not advised at the time of his plea that he was waiving his *Boykin* rights. *Id.*

Winkleman v. State, 22 N.E.3d 844, 851 (Ind. Ct. App. 2014). Once the petitioner 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." *Ponce v. State*, 9 N.E.3d 1265, 1273 (Ind. 2014).

[8] Here, in arguing that the trial court erred, Dimmett relies on *Bell v. State*, 173 N.E.3d 709, 718 (Ind. Ct. App. 2021).[2] *Bell* is distinguishable and does not control our decision today. At issue in *Bell* was whether Bell's appellate counsel's failure to raise the issue of Bell's waiver of a jury trial during the habitual offender phase of his trial as fundamental error on direct appeal was ineffective assistance of counsel. The *Bell* panel found that the post-conviction court's decision was contrary to law "to the extent that the [post-conviction] [c]ourt disposed of Bell's claims via harmless error analysis" instead of fundamental error analysis. *Bell*, 173 N.E.3d at 718. Also, the trial court in *Bell* failed to advise Bell of a right to a trial on the habitual offender allegations, instead stating, ". . . you have a right to a hearing like, not exactly a trial." *Id*. at 713.

[2] We note that the issue raised by the defendant in *Bell* was ineffective assistance of appellate counsel which Dimmett did not raise here.

[9] We find this case to be more similar to *James v. State* and *Winkleman v. State*. In *James*, the trial court did not explicitly advise the defendant of his right to confront witnesses nor of the right to remain silent during the habitual offender phase of his trial; instead, the trial court only informed the defendant of his right to a jury trial and told him that he "ought to kind of be familiar with the jury process now." *James v. State*, 130 N.E.3d 1186, 1190 (Ind. Ct. App. 2019). This court concluded that the defendant "was aware of the rights he was waiving to plead guilty during the [habitual criminal offender] phase because he had just exercised those rights during the felony phase." *Id.* at 1191.

[10] Although the trial court did not explicitly identify to Dimmett of all his *Boykin* rights, the advisement was sufficient for the post-conviction court to conclude that Dimmett knew he was waiving the right to a jury trial and his right against self-incrimination. The trial court informed Dimmett that he had "a right to another trial essentially" where he could "call witnesses to testify" and "cross examine anybody who testifies against [him] like [they] did during the trial on the issue of whether [he had] those prior convictions." Tr. Vol. 3 p. 69. At this point in the trial, Dimmett's *Boykin* rights were already "on display for all to see" because he had just sat through a jury trial where Dimmett elected not to testify after an advisement of his right to testify during the felony phase of the trial. *Winkleman*, 22 N.E.3d at 851. Accordingly, when the trial court told Dimmett that he had "a right to another trial," the trial court was referring to another jury trial, just like the immediately concluded trial where the jury found Dimmett guilty. Tr. Vol. 3 p. 69; *see also James*, 130 N.E.3d at 1190 (the trial

"court's language indicates [that] the process for the [habitual criminal offender] phase would be the same as the felony phase" that had just concluded). Moreover, just before the habitual offender colloquy, the trial court asked the jury to "step back in the jury room for just a moment" and did not discharge the jury, which indicated that Dimmett's right to a jury trial was available for the next phase of the trial.

[11] With this context before us, we are not persuaded that Dimmett "could not be expected to know that those rights would carry over to the habitual offender phase." Appellant's Br. at 13. Like the defendant in *James*, Dimmett's waiver was made knowingly, intelligently, and voluntarily based upon "the trial court's partial advisement, which occurred just after the jury had returned its verdicts on [his] underlying felonies." *James*, 130 N.E.3d at 1191; *see also Winkleman*, 22 N.E.3d at 851 (this court concluded that the defendant failed to establish that he did not know he was waiving his *Boykin* rights since he pleaded guilty "in the midst of a jury trial, where the *Boykin* rights [were] on display for all to see"). The post-conviction court did not err in when it found that Dimmett knew that he was waiving his *Boykin* rights.

II. Factual Basis

[12] Dimmett next claims that his admission to the habitual offender count was invalid because of an insufficient factual basis pursuant to Indiana Code section 35-35-1-3(b). That code section provides that "[t]he court shall not enter judgment upon a plea of guilty . . . unless it is satisfied from its examination of

the defendant or evidence presented that there is a factual basis for the plea." Ind. Code § 35-35-1-3(b)[3]. We note that "habitual offender determinations are not findings of guilt of a separate offense." *Kindred v. State*, 521 N.E.2d 320, 326 (Ind. 1988). Instead, habitual offender determinations result "in a sentence enhancement imposed upon the conviction of a subsequent felony." *Greer v. State*, 680 N.E.2d 526, 527 (Ind. 1997). "The factual basis requirement primarily ensures that when a plea is accepted there is sufficient evidence that a court can conclude that the defendant could have been convicted had he stood trial." *Butler v. State*, 658 N.E.2d 72, 76 (Ind. 1995). "A finding of factual basis is a subjective determination that permits a court wide discretion—discretion that is essential due to the varying degrees and kinds of inquiries required by different circumstances." *Id.* at 76–77.

[13] An adequate factual basis for the acceptance of a guilty plea may be established by: (1) the State's presentation of evidence on the elements of the charged offenses; (2) the defendant's sworn testimony regarding the events underlying the charges; (3) the defendant's admission of the truth of the allegations in the information read in court; or (4) the defendant's acknowledgement that he understands the nature of the crimes charged and that his plea is an admission of the charges. *Carney v. State*, 580 N.E.2d 286, 289 (Ind. Ct. App. 1991), *trans. denied*. Sometimes, relatively minimal evidence can be adequate. *Dewitt*, 755

[3] This statue does not specifically reference admissions to habitual offender enhancements and based upon the resolution of this issue, the court need not determine whether the statute applies to habitual offender enhancements.

N.E.2d at 172. Moreover, "[t]he standard for demonstrating a sufficient factual basis to support a guilty plea is less rigorous than that which is required to support a conviction." *Graham v. State*, 941 N.E.2d 1091, 1098 (Ind. Ct. App. 2011). Therefore, a trial court's finding of factual basis to support a guilty plea is presumptively correct. *Id.* at 1098. "To be entitled to post-conviction relief, the defendant must prove that he was prejudiced by the lack of a factual basis." *Dewitt*, 755 N.E.2d at 172.

[14] Here, the trial court only referenced the "Habitual Offender Enhancement alleging some prior convictions" then asked if Dimmett "[was] going to admit [to] those, is that correct?" Dimmett then replied, "Yes sir." Tr. Vol 3 p. 69–70. The trial court did not read the habitual offender allegations and the habitual offender charging document was not entered into evidence. Therefore, the record fails to support that an adequate factual basis was established. *See Hitlaw v. State*, 178 Ind. App. 124, 126, 381 N.E.2d 527, 528 (1978) (a probable cause affidavit containing sufficient facts, entered into evidence without objection, established an adequate factual basis of defendant's guilt); *see also Lowe v. State*, 455 N.E.2d 1126, 1129 (Ind. 1983) (defendant's admission to the truth of the allegations read in court was sufficient to establish a factual basis for the entry of his guilty plea).

[15] However, "before post-conviction relief can be granted on grounds of failure to establish a factual basis for a guilty plea," Dimmett must demonstrate prejudice. *State v. J.E.*, 723 N.E.2d 863, 864 (Ind. 2000). Here, Dimmett did not establish how the lack of a factual basis affected his decision to admit to being a habitual

offender. *See* Appellant's Br. p. 15 (Dimmett acknowledges that he has the burden of showing that the insufficient factual basis affected his decision to plead guilty but does not present any evidence demonstrating prejudice); *see also Herman v. State*, 526 N.E.2d 1183, 1185 (Ind. 1988) ("The efforts in the litigation below do not meet the requisite burden. There is no showing that the trial court's failure to advise appellant of these rights or to require a more detailed factual basis affected appellant's decision to plead guilty."). Moreover, Dimmett did not present any evidence challenging the validity of the alleged felony convictions nor the habitual offender determination as applied to him. Dimmett's only quibble is that the colloquy was not sufficient to meet the factual basis requirement which is not enough for us to reverse the post-conviction court's decision. Accordingly, Dimmett failed to show prejudice, and thus, the post-conviction court did not err in denying Dimmett's petition for post-conviction relief.

Conclusion

[16] Based on the foregoing, we conclude that the post-conviction court did not err when it denied Dimmett's post-conviction relief.

[17] Affirmed.

Robb, J., and Mathias, J., concur.