

## MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

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Herbert F. Breneman,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

April 24, 2023

Court of Appeals Case No.  
22A-CR-1575

Appeal from the Vanderburgh  
Superior Court

The Honorable Robert J. Pigman,  
Judge

The Honorable Kristina Hamby  
Weiberg, Magistrate

Trial Court Cause No.  
82D03-2107-F6-3701

**Memorandum Decision by Judge Bailey**  
Judges Brown and Weissmann concur.

**Bailey, Judge.**

## Case Summary

- [1] Herbert Frank Breneman appeals the denial of his motion to withdraw his plea of guilty to Possession of Methamphetamine, as a Level 6 felony;<sup>1</sup> four counts of Criminal Mischief, as Class A misdemeanors;<sup>2</sup> and one count of Criminal Mischief, as a Class B misdemeanor; together with his admission that he is a habitual offender.<sup>3</sup> Breneman presents the issue of whether the trial court abused its discretion by denying the motion to withdraw a guilty plea entered when Breneman was proceeding pro-se. We affirm.

## Facts and Procedural History

- [2] As a result of events that took place on July 8, 2021, the State charged Breneman with Possession of Methamphetamine, Battery against a Public Safety Official,<sup>4</sup> Resisting Law Enforcement,<sup>5</sup> and eight counts of Criminal Mischief. The State also alleged that Breneman is a habitual offender.

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<sup>1</sup> Ind. Code § 35-48-4-6.1.

<sup>2</sup> I.C. § 35-43-1-2.

<sup>3</sup> I.C. § 35-50-2-8.

<sup>4</sup> I.C. § 35-42-2-1.

<sup>5</sup> I.C. § 35-44.1-3-1.

Breneman was appointed a public defender to represent him as to those charges.

[3] On October 19, 2021, Breneman appeared at a pretrial hearing. At the outset of the hearing, Breneman advised the trial court that he wished to address a “preliminary matter” and explained that he intended to exercise his constitutional right to represent himself because his counsel was “incompetent.” (Supp. Tr. at 4.) The trial court did not contemporaneously respond.

[4] Defense counsel began to address the court regarding a motion that had been filed, and Breneman repeatedly yelled at counsel: “get off my case.” (*Id.* at 7.) Breneman interrupted the colloquy to call his counsel “a shit,” curse counsel, and again demand self-representation. (*Id.* at 8.) After Breneman had twice cursed his counsel and thrice demanded that he “get off my case,” the trial court paused the hearing and provided Breneman with warnings as to self-representation. The trial court asked Breneman if he understood “all that,” and Breneman responded: “Yes, Your Honor, I do. God bless and thank you.” (*Id.* at 9.) The trial court inquired whether Breneman still wanted to represent himself and Breneman responded: “Of course I do.” (*Id.*) Breneman requested a speedy trial and defense counsel was discharged after assuring the trial court that the defense file would be delivered to Breneman.

[5] On December 14, 2021, Breneman appeared pro-se at a pretrial hearing. The trial court asked Breneman whether he still wished to represent himself and Breneman responded affirmatively. Breneman advised the court that he had

reviewed the video footage of his arrest; he believed that he had been the victim of excessive force and denied that he had committed battery upon an officer. However, he admitted to having a “drug problem” and stated that “I can’t beat that at trial. ... I had the drugs on me.” (*Id.* at 23, 25.) Breneman addressed the prosecuting attorney and offered to plead guilty to only the possession charge; the prosecutor rejected the offer. Breneman advised the court that he was not ready to go to trial, and he asked for a continuance to allow more time to look over a file and file some motions. The trial court granted Breneman a continuance of the trial to January 6, 2022. Upon the State’s motion, three of the Criminal Mischief charges were dismissed.

[6] On January 6, Breneman appeared pro-se. During voir dire, Breneman approached the bench to say he was “really not prepared for trial” and had only recently received “charging paperwork.” (Tr. Vol. II, pg. 11-12) Breneman stated: “I’ll take a plea bargain for what I did wrong. ... But the habitual – it’s not right. Twenty years they can’t use a case [that old].” (*Id.* at 13.) After Breneman entreated the prosecutor to “work with him,” the prosecutor indicated that he was ready to proceed to trial but would ask for dismissal of the Resisting Law Enforcement and Battery charges if Breneman would “plead open” to the other charges. (*Id.* at 15.) The prosecutor declined to request dismissal of the habitual offender allegation for the stated reason that Breneman had fifteen prior felony convictions.

[7] Breneman reiterated that he was not ready for trial, and requested a continuance so that he could hire private counsel. He expressed sentiments

such as “I’m getting forced into a corner” and “I’m in the hole and they’ve got their foot on my neck.” (*Id.* at 16.) The trial court reminded Breneman that he had waived his right to counsel. Breneman continued to assert that he was overwhelmed and unprepared, and he again attempted to negotiate in open court with the prosecuting attorney. The trial court reminded Breneman that the trial date “was affirmed again yesterday” and jury selection had begun. (*Id.* at 18.) The trial court then denied the motion for a continuance and stated: “we’re going to proceed to trial today.” (*Id.*) Breneman responded: “Just show I plead open to the court then, man – you’re railroading me either way.” (*Id.*)

[8] The trial court provided Breneman with advisements related to his decision to plead guilty, and Breneman stated that he understood his rights and that he would be giving up certain rights by pleading guilty. Breneman provided a factual basis for the Possession of Methamphetamine and Criminal Mischief charges; he admitted he is a habitual offender. The trial court stated that judgment of conviction would be entered upon one count of Criminal Mischief as a Class B misdemeanor rather than a Class A misdemeanor, due to the lesser value of the damaged property. Upon the State’s motion, the trial court dismissed the charges of Resisting Law Enforcement and Battery.

[9] On February 11, 2022, the trial court conducted a hearing, to which Breneman refused to be transported from jail. The trial court observed that Breneman had filed a motion to withdraw his guilty plea and had made a request for appointed counsel. The trial court denied Breneman’s motion to withdraw his guilty plea but declared Breneman indigent and appointed a public defender to represent

him. On February 23, a subsequent hearing was conducted and Breneman again refused to be transported to court. Defense counsel appeared and consented to the setting of a sentencing hearing.

[10] On March 16, defense counsel appeared and requested a continuance to review the grounds for Breneman's pro-se motion to withdraw his guilty plea. Over the State's objection, the continuance was granted. Breneman interjected that he "was pressured" and "had a lot going on." (*Id.* at 45.) But he agreed that he should be represented by counsel in the future.

[11] On April 13, the parties appeared at a subsequent hearing and agreed upon a date for the sentencing hearing. Breneman interjected: "I would like to withdraw my guilty plea being [sic] the fact that I got the whole paperwork the night before trial." (*Id.* at 50.) He reiterated that he was innocent, had been the victim of a beating, and insisted that he "wasn't in the right state of mind being [sic] that I got two deaths in the family." (*Id.* at 51.) The trial court did not entertain the oral motion for withdrawal of the guilty plea.

[12] On May 25, the State and defense counsel appeared for a sentencing hearing. Breneman refused to be transported from jail to court. The trial court issued a summons to Breneman and continued the matter. On June 8, the parties convened for a sentencing hearing. At the outset, Breneman interjected that he had "a preliminary matter" and explained: "I wasn't in the right state of mind when I negotiated a plea agreement. I was overwhelmed. I had deaths in the family, and the other thing is this, I was innocent. I have an attorney now and

I’m trying to restart this so I can fight my case.” (*Id.* at 58.) He subsequently clarified that he “was guilty of some things.” (*Id.*) The trial court denied the oral motion for withdrawal of the guilty plea and continued with the sentencing hearing.

- [13] The trial court accepted Breneman’s plea and entered judgments of conviction on one count of Possession of Methamphetamine and five counts of Criminal Mischief. The trial court also accepted Breneman’s admission as to his habitual offender status. Breneman received a one-year sentence for Possession of Methamphetamine, enhanced by four years due to his status as a habitual offender. He received concurrent sentences of one year each for his Class A misdemeanor convictions and 180 days for his Class B misdemeanor conviction. Accordingly, the trial court imposed an aggregate sentence of five years, all to be served in the Department of Correction. Breneman appeals.

## Discussion and Decision

- [14] Indiana Code Section 35-35-1-4(b) governs a pre-sentence motion to withdraw a guilty plea:

After entry of a plea of guilty, or guilty but mentally ill at the time of the crime, but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant’s plea. The motion to withdraw the plea of guilty or guilty but mentally ill at the time of the crime made under this subsection shall be in writing and

verified. The motion shall state facts in support of the relief demanded, and the state may file counter-affidavits in opposition to the motion. The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

[15] According to Indiana Code Section 35-35-1-4(c):

[W]ithdrawal of the plea is necessary to correct a manifest injustice whenever:

- (1) the convicted person was denied the effective assistance of counsel;
- (2) the plea was not entered or ratified by the convicted person;
- (3) the plea was not knowingly and voluntarily made;
- (4) the prosecuting attorney failed to abide by the terms of a plea agreement; or
- (5) the plea and judgment of conviction are void or voidable for any other reason.

Under subsection (e), a defendant “has the burden of establishing his grounds for relief by a preponderance of the evidence.”

[16] “[A] trial court’s ruling on a motion to withdraw a guilty plea arrives in this Court with a presumption in favor of the ruling[,]” and a defendant seeking to



overturn such a ruling faces a “high hurdle[.]” *Coomer v. State*, 652 N.E.2d 60, 62 (Ind. 1995). We review the denial of a motion to withdraw a guilty plea for an abuse of discretion. Ind. Code § 35-35-1-4(b). “In determining whether a trial court has abused its discretion in denying a motion to withdraw a guilty plea, we examine the statements made by the defendant at his guilty plea hearing to decide whether his plea was offered ‘freely and knowingly.’” *Brightman v. State*, 758 N.E.2d 41, 44 (Ind. 2001) (quoting *Coomer*, 652 N.E.2d at 62).

[17] Breneman contends that he has shown that withdrawal of his plea is necessary to correct a manifest injustice because he was denied the effective assistance of counsel. But Breneman was not denied counsel – indeed, he insisted upon self-representation. When Breneman’s attorney attempted to argue on Breneman’s behalf in open court, Breneman cursed his attorney and repeatedly yelled at him to get off the case. He later reaffirmed his intention to proceed pro-se. As late as one day before trial, Breneman maintained that position. At some point after the parties appeared for trial, Breneman apparently recognized his legal peril and changed his mind about self-representation. But, as the prosecutor pointed out, by then prospective jurors had convened and the witnesses (including some out-of-state witnesses) had been summoned.

[18] Looking to the statements made by Breneman when he pled guilty, he assured the trial court that he understood the nature of the charges against him. Breneman affirmed that he understood his rights, including the right to a speedy trial, a trial by jury, the right of confrontation, the right to present evidence, and

the right to have the State prove the charges against him beyond a reasonable doubt. Breneman stated that he understood he was giving up these rights by pleading guilty. He provided a factual basis for the offenses to which he pled guilty and indicated that he understood the potential penalties. The trial court asked Breneman: “will you assure the Court that nobody’s made promises, force, or threats to obtain your plea of guilty and it was voluntarily made by you,” and Breneman responded: “Yes, your Honor.” (Tr. Vol. II, pgs. 27-28.)

[19] Additionally, the circumstances surrounding the entry of Breneman’s guilty plea suggest that the plea was the product of active negotiation between Breneman and the State. Just prior to stating his intention to plead guilty, Breneman had actively entreated the prosecutor to engage in plea negotiations in open court. Breneman repeatedly insisted that the State drop the habitual offender allegation; the prosecuting attorney responded that Breneman had fifteen prior felony convictions and thus the State would not request dismissal of the enhancement allegation. Apparently convinced that the State would not concede its allegation, Breneman agreed to plead guilty as charged, except that the State would request dismissal of Resisting Law Enforcement and Battery charges.

[20] Based upon the record of the guilty plea hearing, Breneman has not persuaded us that he was denied the effective assistance of counsel or that his guilty plea was otherwise involuntary. Nonetheless, he asks that we reverse the trial court’s decision on withdrawal of his guilty plea because the “record should contain a comprehensive inquiry by the trial court into the defendant’s decision

to proceed pro-se.” Appellant’s Brief at 16. He directs our attention to *Poynter v. State*, 749 N.E.2d 1122 (Ind. 2001). There, our Supreme Court referenced four factors appropriate for consideration by a trial court in determining whether the waiver of right to counsel is knowing, intelligent, and voluntary. That is:

- (1) the extent of the court’s inquiry into the defendant’s decision;
- (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation, (3) the background and experience of the defendant, and (4) the context of the defendant’s decision to proceed pro se.

*Id.* at 1127-28.

[21] According to Breneman, the trial court scarcely addressed these factors at the October 19, 2021, pre-trial hearing. Too, Breneman suggests that he was showing signs of mental instability and his odd speech should have prompted heightened inquiry on the part of the trial court. The contention that Breneman’s waiver of counsel is invalid because the trial court did not perform its duties adequately must be presented in a petition for post-conviction relief. *See e.g., Crain v. State*, 875 N.E.2d 446 (Ind. Ct. App. 2007). In *Crain*, the defendant pleaded guilty and argued on direct appeal that his waiver of the right to counsel was not valid because the trial court did not sufficiently advise him of the advantages of being represented. We held that Crain’s argument regarding the waiver of his right to counsel must be presented in a petition for post-conviction relief, not on direct appeal. *Id.* at 447 (citing *Creekmore v. State*,

853 N.E.2d 523, 532 (Ind. Ct. App. 2006)). Because this was the only issue Crain raised on appeal, we dismissed the purported appeal. *Id.* Likewise, Breneman's claim that his waiver of his right to counsel was not made knowing, voluntarily, and intelligently due to an inadequate trial court record of its analysis is required to be brought through post-conviction proceedings.

## Conclusion

[22] Breneman did not demonstrate that the withdrawal of his guilty plea was necessary to correct a manifest injustice or that the trial court abused its discretion when it denied Breneman's pre-sentence motion to withdraw his guilty plea. Breneman's claim that his waiver of counsel is invalid must be brought through post-conviction proceedings.

[23] Affirmed.

Brown, J., and Weissmann, J., concur.