MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Amy E. Karozos
Public Defender of Indiana

Katherine Province
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ian McLean
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Jason M. Middleton,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

October 14, 2021

Court of Appeals Case No. 21A-PC-1034

Appeal from the Rush Superior Court

The Honorable Brian D. Hill, Judge

Trial Court Cause No. 70D01-2006-PC-132

Altice, Judge.

Case Summary

[1] Jason Middleton appeals the post-conviction court's denial of his petition for post-conviction relief. He contends that he was not advised of certain constitutional rights as required by *Boykin v. Alabama*, 395 U.S. 238 (1969) when he pled guilty to dealing in methamphetamine, a Class B felony.

[2] We affirm.

Facts & Procedural History

[3] The facts are not in dispute. On February 10, 2014, Middleton entered into a plea agreement with the State, pursuant to which he agreed to plead guilty to dealing in methamphetamine, a Class B felony. In exchange, the State agreed to dismiss certain other charges and to an eight-year, executed sentence. The written plea agreement, which was signed by Middleton, contained an advisement of certain constitutional rights – including his *Boykin* rights – that he would be waiving by pleading guilty.

[4] Thereafter, a change of plea hearing was held on March 4, 2014. Prior to Middleton's case being called, the trial court held a hearing for an unrelated criminal defendant, Donald McCullough. During that hearing, the court personally addressed McCullough as follows:

> In [the plea agreement], you've indicated you understand certain rights guaranteed by the Constitution and Statutes. And those would include the right to be represented by counsel. The right to the appointment of counsel if you were indigent. The right to remain silent. The right to a speedy and public trial by jury. The

> right to confront and cross-examine the State's witnesses against you. And the right to call your own witnesses and present your own defense. You also have the right to require the State to prove the charges against you beyond a reasonable doubt. And the right to appeal your case if you were tried and found guilty. Do you understand those rights?

Appendix at 46. When McCullough answered in the affirmative, the trial court then asked if he understood that by pleading guilty, he was waiving those rights. McCollough again responded affirmatively. The court then proceeded briefly with the taking of McCollough's guilty plea and imposition of the sentence provided in the agreement.

[5] Immediately thereafter, the trial court turned to Middleton's case. The court swore Middleton in, obtained identifying information, and then engaged him in the following colloquy:

> COURT: You're here, uh, today for … the Court to Consider a Plea Agreement which has been signed and filed by yourself and your attorney and the State. I'm not a party to that agreement. I do not have to follow it. However, if I do accept your guilty plea, I will be bound by the terms outlined in that agreement. Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> COURT: In that document, you've indicated you understand certain rights guaranteed you by the Constitution and Statutes. And I just read those rights to Mr. McCullough a few minutes ago. Did you hear me read those rights?

DEFENDANT: Yes, I did

COURT: Do you wish me to repeat or further explain any of them?

DEFENDANT: No, I do not.

COURT: Do you understand that by pleading guilty, you're waiving or giving up those rights?

DEFENDANT: Yes, sir.

Id. at 50-51. The court then proceeded with the change of plea hearing, accepting the guilty plea and sentencing Middleton to eight years of incarceration pursuant to the plea agreement.

[6] On June 1, 2020, Middleton filed a pro se petition for post-conviction relief, which was amended by counsel on April 7, 2021, to allege a *Boykin* claim. The State responded to the amended petition and claimed that that the trial court had provided an *en masse* advisement of rights to Middleton. Thereafter, on May 3, 2021, Middleton filed a motion for summary disposition, along with a memorandum of law and designated evidence. The following day, the post-conviction court denied Middleton's amended petition for post-conviction relief, providing as follows:

1. During the guilty plea hearing, [Middleton] was personally present in the courtroom, and he was advised of his rights. He was questioned by the Court of whether in fact he understood those rights, and he answered in the affirmative.

> 2. [Middleton]'s guilty plea was knowing, intelligent, and voluntary and the Court made an independent determination that [Middleton] understood his rights. Therefore, [Middleton]'s Amended Petition for Post-Conviction Relief should be and is hereby **DENIED**.

Id. at 81. Middleton now appeals.

Standard of Review

[7] In a post-conviction proceeding, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). Here, the post-conviction court granted summary disposition pursuant to Ind. Post-Conviction Rule 1(4)(g), which provides:

> The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court may ask for oral argument on the legal issues raised. If an issue of material fact is raised, then the court shall hold an evidentiary hearing as soon as reasonably possible.

An appellate court reviews the grant of a motion for summary disposition in post-conviction proceedings the same way as a motion for summary judgment. *Brown v. State*, 131 N.E.3d 740, 742 (Ind. Ct. App. 2019) (citing *Norris v. State*, 896 N.E.2d 1149, 1151 (Ind. 2008)), *trans. denied, cert. denied*. Thus, summary disposition is a matter for appellate de novo review. *Id.*

Discussion & Decision

[8] Middleton contends that the trial court erred by finding that he was advised of his *Boykin* rights - the privilege against compulsory self-incrimination, right to trial by jury, and the right to confront one's accusers – at the time he pled guilty. In *Boykin*, the United States Supreme Court held that it is reversible error for a trial court to accept a guilty plea without an affirmative showing that the plea is intelligent and voluntary. *Hall v. State*, 849 N.E.2d 466, 469 (Ind. 2006) (citing *Boykin*, 395 U.S. at 242).

> 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. 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. 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. *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) (cleaned up) (emphasis supplied).

[9] The record plainly shows that the trial court failed to give Middleton a *Boykin* advisement during *his* change of plea hearing. Thus, Middleton met his

threshold burden for obtaining post-conviction relief. This is not to say, however, that he is automatically entitled to post-conviction relief.

[10] Even where a plea was not taken in accordance with *Boykin*, the plea may still stand if the State affirmatively shows that the plea was voluntary and intelligent. *Id*. at 1272.

> Stated somewhat differently, 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. And where the record of the guilty plea hearing itself does not establish that a defendant was properly advised of and waived his rights, evidence outside of that record may be used to establish a defendant's understanding.

Id. at 1273.

[11] Here, the evidence establishes that minutes before Middleton's hearing, and while Middleton was in the courtroom, the trial court provided McCullough with a proper *Boykin* advisement. The trial court did not provide the same advisement to Middleton but took steps to verify that Middleton heard the rights read to McCullough. The trial court also asked Middleton if he wished for the court to repeat the advisement or explain any of the rights mentioned therein further. Finally, the trial court verified that Middleton understood his rights and that by pleading guilty he would waive those rights.

[12] *Boykin* colloquies have been required for over half a century, and we recognize that the trial court failed in its duty to properly advise Middleton in this regard.

Further, we do not condone the trial court's apparent belated attempt to transform the individual advisement of McCullough into an *en masse* advisement. In other words, we agree with Middleton that an *en masse* advisement should be just that, an advisement of all the defendants at the same time. *See, e.g., James v. State*, 454 N.E.2d 1225, 1226, 1228 (Ind. Ct. App. 1983) (approving an *en masse* procedure where court took "a roll call" and then "addressed the entire group" and advised them "contemporaneously" of their rights before personally polling each defendant on his plea and whether he understood his rights).

[13] With that being said, we still cannot conclude that Middleton is entitled to post-conviction relief. Middleton's signed plea agreement specifically set out his *Boykin* rights, along with other constitutional and statutory rights, and his recognition that he would be waiving these rights upon pleading guilty. At the hearing, the trial court referenced this portion of the plea agreement and then obtained Middleton's express acknowledgment that he heard those same rights read to McCullough a few minutes earlier and that he understood those rights and that by pleading guilty he would be waiving them. Against these facts indicating that Middleton had a subjective awareness of the *Boykin* rights that he was waiving, we observe that Middleton presented no evidence that he, in fact, did not know about these rights when pleading guilty.[1] Indeed, Middleton

[1] For example, Middleton did not testify/aver that he did not read the plea agreement or that, contrary to his statements at the hearing, he did not actually pay attention during the trial court's advisement of McCullough. *Cf. N.M. v. State*, 791 N.E.2d 802, 806-07 (Ind. Ct. App. 2003) (juvenile and her mother were

asked the post-conviction court to rule on the merits of his petition without holding an evidentiary hearing, which essentially signaled that he had no additional evidence to present.

[14] The undisputed evidence before us, considered in its entirety, establishes that the State carried its burden of affirmatively showing that Middleton understood his *Boykin* rights and that he was waiving them by pleading guilty. Thus, Middleton's plea was knowing, intelligent, and voluntary, and the post-conviction court did not err in denying his petition for post-conviction relief.

[15] Judgment affirmed.

Bradford, C.J. and Robb, J., concur.

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not adequately advised of right to appointed counsel at public expense where trial court did not so advise, signed written advisement did not inform of this right, and juvenile's mother testified that although there was a video recording of the judge being played prior to the initial hearing, the video was already playing when she entered the room, no one told her to watch it, and she could not say that she heard it).