MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kimberly Binney,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 3, 2023

Court of Appeals Case No.
21A-CR-975

Appeal from the
Cass Circuit Court

The Honorable
Stephen R. Kitts, II, Judge

Trial Court Cause Nos.
09C01-1909-F2-16
09C01-1909-F2-17

Memorandum Decision by Judge Vaidik
Judges Riley and Bailey concur.

Vaidik, Judge.

Case Summary

[1] Kimberly Binney appeals the trial court's denial of her motion to withdraw her guilty plea, arguing the court erred in denying the motion without holding a hearing. Because convening a hearing on a pre-sentencing motion to withdraw a guilty plea is within the trial court's discretion, we affirm.

Facts and Procedural History

[2] After searches of Binney's car and home revealed a large amount of methamphetamine and other illegal substances, the State charged her with fourteen drug-related offenses. In March 2021, pursuant to a plea agreement, Binney pled guilty to Level 2 felony dealing in methamphetamine and the State moved to dismiss the remaining charges. After pleading guilty but before her sentencing hearing, Binney obtained new representation and moved to withdraw her guilty plea, arguing she received ineffective assistance of counsel. Without holding a hearing, the trial court denied the motion to withdraw.

[3] Binney now appeals.

Discussion and Decision

[4] Binney argues under Indiana Code section 35-35-1-4(b) she was "entitled" to a hearing on her motion to withdraw. Appellant's Br. p. 9. Section 35-35-1-4(b) addresses pre-sentencing motions to withdraw as follows:

> 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.

Section 35-35-1-4(b) is silent as to the requirement of hearings on pre-sentencing motions to withdraw. But Binney notes that the following subsection—Indiana Code section 35-35-1-4(c)—requires hearings on post-sentencing motions to withdraw as long as there is an issue of material fact and urges us to extend that rule to pre-sentencing motions filed under Section 35-35-1-4(b).[1]

[5] Binney categorizes this claim as one of "first impression," and her argument presumes Section 35-35-1-4(b) is ambiguous and that we must look elsewhere to determine the proper procedure for hearings under that statute. Appellant's Br. p. 10. This is incorrect. Although cited by neither party, our Supreme Court has

[1] Section 35-35-1-4(c) governs post-sentencing motions to withdraw and states that such motions shall be treated as petitions for post-conviction relief. Under the post-conviction-relief rules, if a party raises an issue of material fact, an evidentiary hearing on the motion is required. Ind. Post-Conviction Rule 1 § 4(g).

already addressed hearings under Section 35-35-1-4(b) in *Fletcher v. State*, 649 N.E.2d 1022 (Ind. 1995). There, a defendant brought a pre-sentencing motion to withdraw his guilty plea under Section 35-35-1-4(b) and the trial court denied it without a hearing. He appealed, arguing he was "entitled" to a hearing. *Id.* at 1023. Our Supreme Court rejected this argument, noting the language of Section 35-35-1-4(b), including its requirement that the motion state facts in support and its allowance of counter-affidavits in response, "appears to contemplate a summary proceeding" rather than a hearing. *Id.* Therefore, the Court held "[c]onvening a hearing is merely a discretionary option of the trial court." *Id.*; *see also Mescher v. State*, 686 N.E.2d 413 (Ind. Ct. App. 1997) (under *Fletcher*, whether to conduct a hearing on defendant's pre-sentencing motion to withdraw a guilty plea is within the discretion of the court), *reh'g denied*, *trans. denied*.

[6] Although it has been almost thirty years since *Fletcher*, Section 35-35-1-4(b) has not been amended, and the case law remains undisturbed. Binney's argument effectively asks us to overrule this precedent, which we cannot do.[2]

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[2] In her reply brief, Binney argues "the trial court abused its discretion when it failed to even hold a hearing" on her motion to withdraw. Appellant's Reply Br. p. 5. To the extent Binney is making an alternative argument that a hearing should have been held even if not required by statute, she waived the argument by (1) saving it for her reply brief and (2) failing to further develop it or support it with citations to relevant legal authority *See* Ind. Appellate Rule 46(C) ("No new issues shall be raised in the reply brief."); App. R. 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22."). In addition, she does not challenge the merits of the denial of the motion to withdraw.

[7] Affirmed.

Riley, J., and Bailey, J., concur.