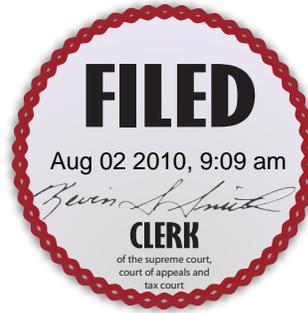


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DAVID HOPPER, )  
 )  
 Appellant-Defendant, )  
 )  
 vs. )  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Plaintiff. )

No. 31A01-1003-PC-89

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APPEAL FROM THE HARRISON SUPERIOR COURT  
The Honorable Roger D. Davis, Judge  
Cause Nos. 31D01-0906-PC-8, 31D01-0004-CM-307

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**August 2, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

David Hopper appeals the post-conviction court's denial of his petition for post-conviction relief. Hopper raises one issue, which we revise and restate as whether the post-conviction court erred in denying his petition for post-conviction relief. We affirm.

The relevant facts follow. In April 2000, the State charged Hopper with public intoxication as a class B misdemeanor and possession of marijuana as a class A misdemeanor. On May 8, 2000, the trial court held an initial hearing<sup>1</sup> and the trial court talked to him about the right to have a lawyer. Hopper signed an "Advice of Rights" and entered a plea of not guilty.<sup>2</sup>

On July 31, 2000, Hopper without counsel entered into a plea agreement in which Hopper pled guilty to possession of marijuana as a class A misdemeanor, and the State agreed to dismiss the charge of public intoxication as a class B misdemeanor. The State agreed to recommend that Hopper be sentenced to one year in the Harrison County Jail with all but time served suspended. Hopper also signed a Misdemeanor Written Advisement and Waiver of Rights form which provided in part:

9. You have the right to be represented by an attorney. If you cannot afford an attorney, the Court will appoint an attorney for you. You have the right to a continuance in which to hire an attorney and to have your attorney prepare your case and subpoena witnesses. If you choose to proceed without an attorney, you will be giving up these rights.
10. You have the right to a public and speedy trial [sic] by jury; the right to confront and cross-examine witnesses against you; the right to

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<sup>1</sup> The record does not contain a copy of the transcript of this initial hearing.

<sup>2</sup> The record does not contain a copy of the "Advice of Rights."

subpoena witnesses at no cost; the right to require that the State prove you guilty beyond a reasonable doubt at a trial at which you do not have to testify, but in which you may testify if you wish; and the right to appeal any decision made by the Judge. By pleading guilty you will give up and waive each and every one of these rights.

State's Exhibit 1. That same day, the trial court held a guilty plea hearing and Hopper indicated that he had read, signed and "go[ne] over in detail the Plea Agreement and written advisement form." Defendant's Exhibit C. The trial court accepted the plea agreement and sentenced Hopper to one year with all time suspended except for time served.

On June 29, 2009, Hopper filed a petition for post-conviction relief and request for specific findings of fact and conclusions of law. Hopper argued that he was denied his right to due process and his right to counsel because he "entered a plea of guilty *pro se* in the absence of a valid waiver of counsel," and because "his alleged guilty plea was tainted by illegal acts of the prosecutor in engaging in plea negotiations with the Accused who had not waived counsel." Appellant's Appendix at 5-6. After a hearing, the post-conviction court found that Hopper was advised of his right to counsel and denied Hopper's petition.

Before discussing Hopper's allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of

post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. “A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made.” Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

The issue is whether the post-conviction court erred in denying Hopper’s petition for post-conviction relief. Hopper argues that he did not knowingly, intentionally, and voluntarily waive his right to counsel because a hearing was not conducted, he was not advised of the disadvantages of self-representation, and he did not unequivocally demand the right of self-representation.

Generally, the Sixth Amendment to the U.S. Constitution and Article 1, section 13 of the Indiana Constitution guarantee a criminal defendant the right to appointed counsel. Jones v. State, 783 N.E.2d 1132, 1138 (Ind. 2003). The right to counsel can be relinquished only by a knowing, voluntary, and intelligent waiver of the right. Id. at 1132 n.2. Waiver of assistance of counsel may be established based upon the particular facts

and circumstances surrounding the case, including the background, experience, and conduct of the accused. Id. at 1132. A defendant's request to proceed *pro se* must be clear and unequivocal. Stroud v. State, 809 N.E.2d 274, 279 (Ind. 2004).

“When a defendant asserts the right to self-representation, the court should tell the defendant of the ‘dangers and disadvantages of self-representation.’” Poynter v. State, 749 N.E.2d 1122, 1126 (Ind. 2001) (quoting Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541 (1975)). “There are no prescribed ‘talking points’ the court is required to include in its advisement to the defendant; it need only come to a considered determination that the defendant is making a voluntary, knowing, and intelligent waiver.” Id. (quoting Leonard v. State, 579 N.E.2d 1294, 1296 (Ind. 1991)). This determination must be made with the awareness that the law indulges every reasonable presumption against a waiver of this fundamental right. Id.

In Sedberry v. State, 610 N.E.2d 284, 287 (Ind. Ct. App. 1993), trans. denied, a panel of this court held that where a defendant waives his or her right to counsel and pleads guilty, there is no need to advise a defendant about the perils of proceeding *pro se* because the defendant will not be attempting to conduct a trial. See also Redington v. State, 678 N.E.2d 114, 118 (Ind. Ct. App. 1997) (relying on Sedberry and holding that a defendant at a guilty plea hearing will not be exposed to the pitfalls of self-representation), reh'g denied, trans. denied; Greer v. State, 690 N.E.2d 1214, 1217 (Ind. Ct. App. 1998) (citing Redington and holding that when a probationer who proceeds *pro se* chooses to admit rather than to challenge his alleged probation violation, his knowing,

intelligent, and voluntary waiver of counsel may be established even if the record does not show that he was warned of the pitfalls of self-representation), trans. denied. Hopper argues that Sedberry and its progeny were wrongly decided or are distinguishable. The State argues that Sedberry should govern this case. Even assuming that the trial court was required to inform Hopper of the pitfalls of self-representation, we cannot say that Hopper met his burden.<sup>3</sup>

Here, Hopper does not argue that the evidence introduced at the post-conviction hearing supports the proposition that he was not advised of the pitfalls of self-representation or that he did not unequivocally assert his right to proceed *pro se*. Rather, Hopper appears to base his arguments on the fact that there is no transcript of the initial hearing. Specifically, Hopper argues that the record “certainly does not indicate that a hearing was held and a record created of Hopper’s purported waiver.” Appellant’s Brief at 8. Hopper argues that “[b]ecause of the lack of any record whatsoever, no evidence exists that Hopper was adequately advised as to the disadvantages of self-representation.” Id. at 9. Hopper also argues that “[t]he lack of a record also means that there is no evidence that Hopper unequivocally demanded his right of self-representation.” Id.

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<sup>3</sup> We recognize that a panel of this court recently declined to follow Sedberry, Redington, and Greer “to the extent they seem to establish two different standards for reviewing a waiver of counsel: one for defendants who choose to go to trial and a different, less demanding standard for defendants who choose to plead guilty.” Hopper v. State, 925 N.E.2d 499, 503 (Ind. Ct. App. 2010), trans. granted.

Also, while Hopper involved the same defendant as in the instant appeal, the two cases can be distinguished from each other by a hallmark feature: in Hopper, the defendant supported his appeal with record evidence. Here, however, he has not identified any evidence that suggests that he did not unequivocally demand his right of self-representation.

The fact that the record of the hearing can neither be found nor reconstructed does not, in and of itself, require granting post-conviction relief. Hall v. State, 849 N.E.2d 466, 470 (Ind. 2006). In Hall, the post-conviction petitioner alleged that he had not been advised of his Boykin<sup>4</sup> rights before pleading guilty but was unable to find or reconstruct a record of his guilty plea hearing. Id. at 468. The Court in Hall held that the absence of a record was not enough to warrant post-conviction relief:

The fact that the record of a guilty plea hearing can neither be found nor reconstructed does not of itself require granting post-conviction relief. Rather, as with any claim made in a petition for post-conviction relief, a claim that the petitioner's conviction was obtained in violation of federal or state constitutional safeguards must be proven by a preponderance of the evidence. And of course the law of this jurisdiction has long imposed on petitioners seeking post-conviction relief the burden of establishing their grounds for relief.

Id. at 470. The Court concluded that the petitioner's testimony which "said nothing about any advisement or lack of advisement of rights" was insufficient to carry his burden of proof. Id. at 472.

Here, the record reveals that the trial court held an initial hearing on May 8, 2000. See Defendant's Exhibit D. However, the record does not contain a transcript of this hearing.<sup>5</sup> The record does reveal that Hopper signed an "Advice of Rights" at the initial

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<sup>4</sup> Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969), "requires that the record must show, or there must be an allegation and evidence which show, that the defendant was informed of, and waived, three specific federal constitutional rights: the privilege against compulsory self-incrimination, right to trial by jury, and the right to confront one's accusers." Hall, 849 N.E.2d at 469.

<sup>5</sup> Hopper cites Eaton v. State, 894 N.E.2d 213 (Ind. Ct. App. 2008), trans. denied; Atkinson v. State, 810 N.E.2d 1190 (Ind. Ct. App. 2004); and Dowell v. State, 557 N.E.2d 1063 (Ind. Ct. App. 1990), trans. denied, cert. denied, 502 U.S. 861, 112 S. Ct. 181 (1991), in support of his argument that "consistent with the requirement of a hearing and record sufficient to demonstrate a knowing, intelligent

hearing and that, according to Hopper's testimony at the post-conviction hearing, the trial court talked to him about the right to have a lawyer at the initial hearing. Id.

Hopper does not point to any evidence presented at the post-conviction hearing that suggests that he was not informed of the pitfalls of self-representation at the initial hearing or that he did not unequivocally demand his right of self-representation at the initial hearing. To the extent that Hopper argues that he was not informed of the pitfalls of self-representation, we observe that there was no testimony or evidence presented at the post-conviction hearing regarding whether the trial court did so inform him. There was also no testimony or evidence regarding whether the trial court inquired into Hopper's educational background at the initial hearing.

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and voluntary waiver of counsel, it has been specifically held that where the record is unclear or silent as to waiver, it cannot be inferred." Appellant's Brief at 7. Initially, we note that none of the cases cited by Hopper involve a petition for post-conviction relief. Rather, the cases involved direct appeals. Further, it does not appear that any transcript was missing in the cases cited by Hopper. See Eaton, 894 N.E.2d at 215, 217 (citing to the transcript of the initial hearing in discussing the trial court's statements to the defendant); Atkinson, 810 N.E.2d at 1192 (citing to the transcript to show that the record was devoid of any advisement or discussion by the trial court regarding the pitfalls of self-representation); Dowell, 557 N.E.2d at 1066 (noting that the defendant had not been advised of the dangers and disadvantages of self-representation and that the magistrate at the initial hearing informed the defendant only of his constitutional rights and the charges against him).

Hopper also cites Spears v. State, 621 N.E.2d 366 (Ind. Ct. App. 1993). In Spears, the defendant signed a Waiver of Attorney and a Demand to Proceed *Pro Se* form and was ordered to attend a Status of Counsel hearing, but "no hearing on the record before the trial court was actually held." 621 N.E.2d at 368. On appeal, the court concluded that the defendant had demonstrated *prima facie* error because the trial court failed to conduct a hearing on the record. Id. Hopper argues that Spears is instructive because "[e]ven when faced with the two separate documents signed by Spears, the Court found that the waiver of the right to counsel was not valid – because the trial court had failed to conduct a hearing on the matter." Appellant's Brief at 7. Here, unlike in Spears, Hopper concedes that an initial hearing occurred and that the trial court talked to him about the right to have a lawyer at the initial hearing.

In summary, we cannot say that Hopper established by a preponderance of the evidence that he was not advised of the pitfalls of self-representation or that he did not unequivocally demand his right of self-representation and was entitled to post-conviction relief.<sup>6</sup> See Hall, 849 N.E.2d at 472 (holding that the petitioner did not carry his burden of proof where the record was missing and the petitioner said nothing about any advisement or lack of advisement of rights); Mansfield v. State, 850 N.E.2d 921, 925 (Ind. Ct. App. 2006) (holding that the petitioner did not establish that he was not advised of his Boykin rights where the petitioner merely proved that the record was missing and where the petitioner testified that even he could not remember whether he was advised of his Boykin rights), trans. denied.

For the foregoing reasons, we affirm the post-conviction court's denial of Hopper's petition for post-conviction relief.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.

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<sup>6</sup> Hopper argues that “[e]ven if the trial court’s written advisement and questioning at the guilty plea hearing would otherwise have effected a valid waiver of counsel, the preceding plea bargaining so tainted Hopper’s plea that it still must be set aside.” Appellant’s Brief at 16. Hopper relies upon Hood v. State, 546 N.E.2d 847 (Ind. Ct. App. 1989). In Hood, while the defendant was in jail awaiting his initial hearing, the prosecutor told him that the State would forego filing an habitual offender count if he would plead guilty without counsel. 546 N.E.2d at 848. At a hearing, the defendant waived formal arraignment, waived his right to an attorney, and pled guilty to both counts. Id. On appeal, the court held that “[a] jailhouse conference with an uncounseled defendant who has not knowingly, voluntarily, and intelligently waived his right to counsel, however, is inherently unfair.” Id. at 849. Here, the record does not disclose any evidence that the prosecutor conditioned Hopper’s plea upon the requirement that Hopper never obtain or consult counsel. Further, we cannot say that Hopper established that he was not advised of the pitfalls of self-representation at the initial hearing which occurred before Hopper pled guilty. Thus, we do not find Hood instructive.