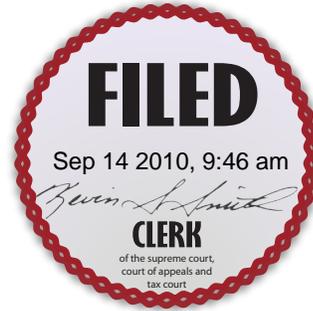


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MARK A. JENKINS,)

Appellant-Petitioner,)

vs.)

No. 82A04-1005-PC-319

STATE OF INDIANA,)

Appellee-Respondent.)

APPEAL FROM THE VANDERBURGH SUPERIOR COURT

The Honorable Robert J. Tornatta, Judge

Cause No. 82D03-0911-PC-9

September 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Mark A. Jenkins, pro se, appeals the post-conviction court's denial of his petition for post-conviction relief. Jenkins raises two issues for our review:

1. Whether a sufficient factual basis supports Jenkins' guilty plea.
2. Whether Jenkins was advised of his right of confrontation, making his guilty plea knowing and voluntary.

We affirm.

FACTS AND PROCEDURAL HISTORY

Almost thirty years ago, on December 29, 1980, the State charged Jenkins with three counts of Forgery, as Class C felonies, under Cause Number 80CR-261. The trial court appointed counsel to represent Jenkins. And on November 21, 1981, the court held a guilty plea hearing. The parties presented a plea agreement to the trial court, wherein Jenkins agreed to plead guilty to one count of forgery, as a Class C felony, in Cause Number 80CR-261 in exchange for the State's dismissal of the other two forgery counts.

At the guilty plea hearing, the court advised Jenkins of the charges and his rights. Jenkins answered that he understood the charges against him and was agreeing to waive his rights. Jenkins then pleaded guilty to one count of forgery, as a Class C felony, and the State dismissed the other two counts of forgery, as Class C felonies. The court entered judgment of conviction accordingly and sentenced Jenkins to six years executed, with credit for time served.

On November 9, 2009, Jenkins filed a pro se petition for post-conviction relief. In the petition he alleged that the trial court had not established an adequate factual basis before accepting his guilty plea and that his plea had not been knowingly and voluntarily

made because he had not been adequately advised of his right to confront witnesses. The post-conviction court denied relief without a hearing. Jenkins now appeals.

DISCUSSION AND DECISION

Jenkins appeals the post-conviction court's denial of his 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. Ind. Post-Conviction Rule 1(5); Saylor v. State, 765 N.E.2d 535, 547 (Ind. 2002). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Saylor, 765 N.E.2d at 547. 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 of law in accordance with Indiana Post-Conviction Rule 1(6). “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. Our review on appeal is limited to these findings and conclusions. Pruitt v. State, 903 N.E.2d 899, 905 (Ind. 2009).

Issue One: Factual Basis for Guilty Plea

Jenkins first contends that the trial court did not establish a factual basis for the plea. Indiana Code Section 35-35-1-3(b) provides in relevant part that “the court shall not enter judgment upon a plea of guilty unless it is satisfied from its examination of the defendant or the evidence presented that there is a factual basis for the plea.” 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. Oliver v. State, 843 N.E.2d 581, 588 (Ind. 2006) (citing Butler v. State, 658 N.E.2d 72, 76 (Ind. 1995)). But the trial court's failure to establish a factual basis constitutes reversible error only if the post-conviction petitioner also shows that he suffered prejudice as a result of that failure. State v. Eiland, 723 N.E.2d 863, 865 (Ind. 2000).

Here, Jenkins asserts that the trial court did not establish a factual basis before it accepted his guilty plea. The State argues that Jenkins has not included in the record on appeal all of the documents necessary to review that issue. For example, at the guilty plea hearing, the trial court referred to the pre-sentence investigation report, the charging information, and the plea agreement. But Jenkins has not included a copy of these documents in the record on appeal. We find that Jenkins has waived this issue for review. Waiver notwithstanding, we consider whether he has shown another necessary element for relief, namely, that he suffered prejudice from the alleged error.

Before post-conviction relief can be granted on grounds of failure to establish a factual basis for a guilty plea, a petitioner must also prove that he was prejudiced by that error. Eiland, 723 N.E.2d at 864. In other words, a guilty plea entered despite the lack of a factual basis will not be set aside unless the petitioner shows that the trial court's error affected his decision to plead guilty. See Herman v. State, 526 N.E.2d 1183, 1185 (Ind. 1988). Here, Jenkins does not claim that the lack of a factual basis affected his decision to plead guilty.

To show prejudice, Jenkins argues as follows:

Jenkins testified in his affidavit [to the post-conviction court] that he had steadfastly maintained his innocence to his attorneys, that his attorneys would not investigate his claim of innocence, and that although his desire and intent was always to exercise his right to trial by jury that he pleaded guilty because his attorney advised him to.

Appellant's Brief at 12. These arguments relate the alleged prejudice to Jenkins' trial counsel's representation and conduct, not to the trial court's alleged failure to establish a factual basis. Thus, these arguments are unavailing.

Jenkins further testified that "if the guilty plea court would have made an inquiry into the facts of the case it would have discovered that Jenkins was maintaining his innocence." Id. But Jenkins' testimony at the guilty plea hearing belies that argument.

At the plea hearing, the trial court questioned Jenkins as follows:

By the Court: Mr. Jenkins before I can accept a plea of guilty from you I have to be satisfied that you understand your constitutional rights and that you understand that you are going to be waiving certain rights by pleading guilty. I also have to be satisfied that the decision to do that is a free and voluntary decision on your part. Therefore I am going to ask you a series of questions. If there are any of them that you do not understand simply ask and we will explain it to you further. You should also—if there is any question in your mind about an appropriate answer feel free to ask Mr. [Lamont, defense counsel] before you answer. You can consult with him at any time. You are charged in two separate causes[,] in 80CR-261 with three counts of forgery which is a Class C felony that carries a standard term of imprisonment of five (5) years with not more than three (3) years added for aggravating circumstances and not more than three (3) years subtracted for mitigating circumstances, together with a fine not to exceed ten thousand dollars. . . . Do you understand the nature of the charges against you?

By Defendant: I do.

By the Court: Do you understand that by pleading guilty to these charges you are admitting the truth of all the elements contained in the Information and any crimes or offenses included there and upon the entry of a plea the Court will proceed with judgment and sentencing?

By Defendant: I do.

* * *

By the Court: While you can't be compelled to testify against yourself if you want to you are competent to testify on your own behalf. You also have the right to be present anytime the State of Indiana introduces evidence or testimony. You have the right to cross examine the witnesses even though you remain silent. Do you understand that?

By Defendant: Yes.

By the Court: You understand you will be waiving it by entering a guilty plea?

By Defendant: Yes.

* * *

By the Court: Have you read the pre-sentence investigation report[?] I believe [you have] because you have signed a review sheet. Is there anything in that report that you wish to change or add to or subtract from?

By Defendant: No.

* * *

By the Court: The Court notes that you have signed the plea bargain instrument. Have you signed it as a free and voluntary act?

By Defendant: I have.

By the Court: Nobody has exerted any pressure or threats or compulsion to get you to sign it?

By Defendant: No.

Appellant's App. At 48-53.

By his responses, Jenkins admitted "the truth of all elements contained in the Information and any crimes or offenses included there[.]" Appellant's App. at 49. He also testified that he was not pleading guilty due to "any pressure or threats or compulsion[.]" *Id.* at 52. Jenkins' mere assertion that he would have chosen to enter a different plea if the trial court had inquired into the facts of the case is insufficient to show prejudice.¹ Jenkins has not demonstrated that he would not have pleaded guilty but for the trial court's failure to establish a factual basis for the plea. As such, he has not shown that the post-conviction court erred when it denied his petition for post-conviction relief.

Issue Two: Knowing and Voluntary Plea

Jenkins also contends that his guilty plea was not entered into knowingly and voluntarily because the trial court did not advise him of a Boykin right. Specifically, Jenkins asserts that the trial court did not advise him of his right to "physically confront, face, see or hear" the State's witnesses in court. Appellant's Brief at 16. We cannot agree.

Under Boykin v. Alabama, 395 U.S. 238, 243 (1969), a trial court must be satisfied that an accused is aware of his rights against self-incrimination, to trial by jury, and to confront his accusers before accepting a guilty plea. The Boykin court held that

¹ Jenkins' argument in this regard also relies on his claim that the trial court did not establish a factual basis before accepting his guilty plea. But, again, Jenkins has waived this issue for review.

the record must affirmatively show, or there must be an allegation and evidence which shows, that the defendant was informed of, and waived, these rights. Id. But 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. Barron v. State, 164 Ind. App. 638, 330 N.E.2d 141, 144 (1975). As our Supreme Court pointed out in Williams v. State, 325 N.E.2d 827, 832 (1975), the “essence of Boykin is that the record must affirmatively show that a defendant entering a guilty plea does so voluntarily and intelligently.”

Jenkins concedes that the trial court advised him of his right to confront witnesses but argues that the advisement of his right “to be present anytime [sic] the State introduces evidence or testimony [did] not meaningfully convey to Jenkins that he had the right to physically confront, face, see or hear the witness in court.” Id. at 15-16. In support Jenkins cites Coy v. Iowa, 487 U.S. 1012 (1988). But Coy does not address Boykin rights. Instead, the Court discussed the right to cross-examination as including the right to physically face the witness. Because the right to cross-examine includes the right to be in the presence of the witness, an advisement that a defendant has the right to confront witnesses would be sufficient under Boykin also to communicate the right to physically face witnesses.

Here, the trial court advised Jenkins that he had the right to be present when the State presented evidence or testimony and that he had the right to cross-examine witnesses. Such advisements adequately informed Jenkins that he had the right to be

physically present and face witnesses under Boykin. And when asked by the trial court, Jenkins testified that he was waiving those rights. Jenkins has not shown that his plea was not knowing and voluntary. As such, the post-conviction court did not err when it denied his petition for post-conviction relief.

Affirmed.

BAKER, C.J., and MATHIAS, J., concur.