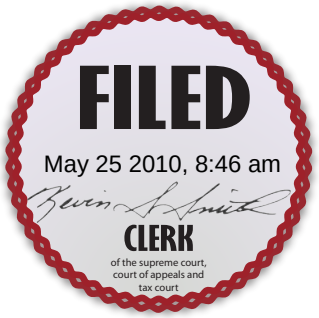

ATTORNEY FOR APPELLANT:

JEFFREY A. BALDWIN
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CYNTHIA VANTREESE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0912-PC-1271
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Rothenberg, Judge
Cause No. 49F09-8010-PC-290

May 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Cynthia VanTreese[1] appeals the denial of her petition for post-conviction relief ("PCR petition"), which challenged her 1981 conviction for Class D felony possession of marijuana or hashish. We affirm.

Issue

VanTreese raises three issues, which we consolidate and restate as whether the post-conviction court properly concluded that she failed to prove her 1981 guilty plea was entered in violation of her federal constitutional rights.

Facts

In May 1981, VanTreese pled guilty to Class D felony possession of marijuana or hashish in Marion County. She had been charged for the crime along with Kelly Swegman, with whom she was living at the time. VanTreese and Swegman were represented by the same attorney.

In February 2009, VanTreese filed a PCR petition challenging her 1981 conviction. The trial court conducted a hearing on the petition on July 27, 2009. It was established that the trial judge who conducted the guilty plea hearing in 1981 was deceased. A court reporter for the Marion County Superior Courts could find no records associated with the case. Additionally, neither the deputy prosecutor nor the defense attorney had any independent recollection of the case. VanTreese testified that she could not recall being advised of her right to a jury trial, right to cross-examine witnesses, and

[1] VanTreese's name also is spelled in the record as "Vantrease." We use "VanTreese," as that is the spelling used by her attorney in the brief.

right to require the State to prove her guilt beyond a reasonable doubt. She also could not recall ever being advised on the risk of her and Swegman being jointly represented, or recall a factual basis being established for the plea. She also claimed to have not realized she was pleading guilty to a felony.

On September 21, 2008, the post-conviction court denied VanTreese's PCR petition. It found she had failed to establish she was not properly advised before pleading guilty. VanTreese now appeals.

Analysis

Post-conviction proceedings provide defendants the opportunity to raise issues not known or available at the time of the original trial or direct appeal. Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007), cert. denied. "In post-conviction proceedings, the defendant bears the burden of proof by a preponderance of the evidence." Id. We review factual findings of a post-conviction court under a "clearly erroneous" standard but do not defer to any legal conclusions. Id. We will not reweigh the evidence or judge the credibility of the witnesses and will examine only the probative evidence and reasonable inferences therefrom that support the decision of the post-conviction court. Id.

We note that the State has not filed an appellee's brief. Therefore, we apply a less stringent standard of review and may reverse if VanTreese has established prima facie error in the post-conviction court's ruling. See Willis v. State, 907 N.E.2d 541, 544 (Ind. Ct. App. 2009). "Prima facie error is 'error at first sight, on first appearance, or on the face of it.'" Id. (quoting Parker v. State, 822 N.E.2d 285, 286 (Ind. Ct. App. 2005)).

This rule is not for VanTreese's benefit, but to relieve us of the burden of controverting her arguments. See id. Still, we are obligated to properly decide the law as applied to the facts of the case. See id. at 544-45.

The record of a guilty plea hearing 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, the right to trial by jury, and the right to confront one's accusers. State v. Damron, 915 N.E.2d 189, 191 (Ind. Ct. App. 2009), trans. denied (citing Hall v. State, 849 N.E.2d 466, 469 (Ind. 2006)). In Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969), the Supreme Court made it clear that a waiver of these important federal rights cannot be presumed from a silent record. See id.

A lost record, however, is not necessarily the same as a silent record. Id. "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." Hall, 849 N.E.2d at 470. Rather, a post-conviction petitioner has the burden of proving by a preponderance of the evidence that a guilty plea was accepted and conviction obtained in violation of federal or state constitutional safeguards. Id. There is a presumption of regularity that attaches to final judgments, and a post-conviction petitioner who pled guilty must overcome that presumption. Id.

> Otherwise, and perversely, the finality of a guilty plea would decrease rather than increase as time marches on, as judges, lawyers, and reporters die or forget the details of proceedings,

> tape recordings become misplaced or disintegrate in crowded courthouse vaults, and the possibility of definitively proving that Boykin advisements were given to a particular defendant fades into oblivion. Parties should not be permitted to "game" the system in such a manner.

Jackson v. State, 826 N.E.2d 120, 128 (Ind. Ct. App. 2005), trans. denied. The inability of a defendant, trial judge, prosecutor, or defense attorney to remember what precisely was said at one plea hearing conducted decades ago is not enough to warrant post-conviction relief. Id. at 129.

VanTreese asserts in her brief that she testified at the post-conviction hearing, "she was not advised of her right to confront and cross examine her accusers [or] of her right to trial by jury." Appellant's Br. p. 5. That was not her testimony. In fact, she was asked whether she remembered or recalled being advised of those rights when she pled guilty, and VanTreese said she did not. There is a considerable difference between saying one was not advised of something, and saying one does not remember being advised of something.

This case is entirely parallel with cases such as Hall, Jackson, and Damron. It is a "lost record" case, not a "silent record" one.[2] The death of the trial judge, the disappearance of the record, and the failure of VanTreese, the prosecutor, and her attorney to remember exactly what was said at her 1981 guilty plea hearing clearly is

[2] There is no indication here that the record was lost because of intentional misconduct by the State; such misconduct, if established, may impact whether a presumption of regularity should attach to a final judgment. See Damron, 915 N.E.2d at 192-93.

insufficient to establish that she was not advised of her federal constitutional rights before pleading guilty.[3]

Conclusion

The post-conviction court properly concluded that VanTreese failed to establish that she was entitled to vacation of her 1981 guilty plea to Class D felony possession of marijuana or hashish. We affirm the denial of post-conviction relief.

Affirmed.

BAILEY, J., and MAY, J., concur.

[3] For the same reasons, we reject VanTreese's arguments regarding whether she was advised of the perils of joint representation before pleading guilty and whether there was a factual basis for her plea. As with her other claims, VanTreese only asserted that she did not remember being so advised and did not remember whether a factual basis was established.