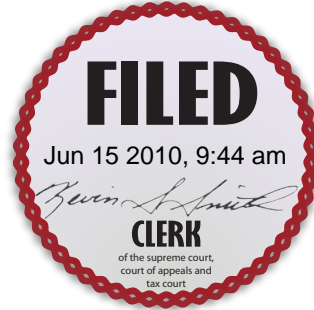


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**JEFFREY A. BALDWIN**  
Baldwin, Dakich & Maxwell  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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KELLY SWEGMAN, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 49A04-0912-PC-738  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Marc T. Rothenberg, Judge  
Cause No. 49F09-0810-PC-291

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**June 15, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Kelly Swegman appeals the post-conviction court's denial of his petition for post-conviction relief. Swegman raises three issues, which we revise and restate as:

- I. Whether the post-conviction court erred in denying Swegman's petition for post-conviction relief because there is no record that he was advised of certain constitutional rights as required by Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969);
- II. Whether there was a sufficient factual basis to support Swegman's guilty plea; and
- III. Whether the post-conviction court erred in denying Swegman's petition because the trial court failed to conduct a sufficient inquiry as to Swegman's understanding of the risk of joint representation.

We affirm.<sup>1</sup>

The relevant facts follow.<sup>2</sup> In 1981, Swegman appeared before the trial court on a charge and pled guilty.<sup>3</sup> In February 2009, Swegman filed a petition for post-conviction

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<sup>1</sup> We note that the State did not file an appellee's brief. This circumstance in no way relieves us of our obligation to decide the law as applied to the facts in the record in order to determine whether reversal is required. Blunt-Keene v. State, 708 N.E.2d 17, 19 (Ind. Ct. App. 1999). However, we do not have the burden of controverting arguments advanced for reversal. Id. Swegman needs to establish only *prima facie* error, which is error at first sight or appearance. Id.

<sup>2</sup> Swegman failed to include a copy of the post-conviction court's order in his brief. We direct Swegman's attention to Ind. Appellate Rule 46(A)(10), which requires an appellant's brief to "include any written opinion, memorandum of decision or findings of fact and conclusions thereon relating to the issues raised on appeal."

<sup>3</sup> The post-conviction court's order states: "In 1981 [Swegman] pled guilty and was sentenced for the crime of Possession of Marijuana or [Hashish], a Class D Felony. [Swegman] received a two (2) year suspended sentence, and was placed on two (2) years of probation." Appellant's Appendix (Post-Conviction Court's Order at 1). In his brief, Swegman states that "[i]n 1981, Swegman and his co-defendant, Cynthia VanTreese, were charged with Possession of Marijuana or Hashish, a Class D felony," and that he "entered a plea of guilty and was sentence [sic] in 1981." Appellant's Brief at 2. However, Swegman does not point to and our review of the record does not reveal what offense Swegman was charged with. We direct Swegman's attention to Ind. Appellate Rule 46(A)(5), which requires that the statement of case contain page references to the record on appeal or appendix, and Ind. Appellate Rule 46(A)(6), which requires that the statement of facts "shall be supported by page references to the Record on Appeal or Appendix in accordance with Rule 22(C)."

relief.<sup>4</sup> At the beginning of the post-conviction hearing, Swegman’s trial counsel asked the post-conviction court to take judicial notice of “its file” and Exhibits A, B, and C. Transcript at 5. The post-conviction court stated, “I will take judicial notice that [sic].” Id. at 6. Petitioner’s Exhibit A consists of an affidavit of the court reporter of the Superior Courts of Marion County indicating that she made a diligent search for the complete record of Cause No. 980-9557 but there were no records available for the case. Petitioner’s Exhibit B consists of an affidavit of Milton Thompson indicating that he was the deputy prosecutor assigned to prosecute Cause No. 980-9557 and that he did not have any recollection of the case. Petitioner’s Exhibit C consists of an affidavit of Dennis Zahn indicating that he did not have recollection of the case.<sup>5</sup>

Swegman testified that he did not recall the trial court advising him of the right to confront and cross examine witnesses, the right to a trial by jury, or the right to be proven guilty beyond a reasonable doubt. Swegman testified that he did not recall the trial court asking if he understood that he would be waiving his right against self-incrimination. Swegman also testified that he did not recall either the trial court or the prosecutor reading into the record a series of facts that he was asked to either admit or deny.

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<sup>4</sup> The record does not contain a copy of Swegman’s petition for post-conviction relief. We direct Swegman’s attention to Ind. Appellate Rule 50(A)(2)(f), which requires an appellant’s appendix to include “pleadings and other documents from the Clerk’s Record in chronological order that are necessary for resolution of the issues raised on appeal.”

<sup>5</sup> Petitioner’s Exhibit C does not reveal Zahn’s relation to the case. The transcript suggests that Zahn was Swegman’s trial counsel.

Swegman testified that he did not realize that he was pleading guilty to a felony. The post-conviction court denied Swegman's petition.

Before discussing Swegman'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.

#### I.

The first issue is whether the post-conviction court erred in denying Swegman's petition for post-conviction relief because there is no record that he was advised of

certain constitutional rights as required by Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). In Boykin, the United States Supreme Court held that it was reversible error for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary. Id. at 242, 89 S. Ct. at 1711. More particularly, Boykin 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. Id. at 243, 89 S. Ct. at 1712. The Court made clear, "[w]e cannot presume a waiver of these three important federal rights from a silent record." Id.

We find Hall v. State, 849 N.E.2d 466 (Ind. 2006), instructive. In Hall, the Court held:

A petitioner who pursues a claim for post-conviction relief challenging a plea of guilty on the ground that he was not advised of his Boykin rights is not entitled to relief solely because the guilty plea record is lost and cannot be reconstructed. Rather, the petitioner has the burden of demonstrating by a preponderance of the evidence that he is entitled to relief.

849 N.E.2d at 467. The Court emphasized that post-conviction proceedings are collateral and that a petitioner for post-conviction relief has the burden of establishing grounds for relief by a preponderance of the evidence. Id. at 472.

Here, Swegman put forth no evidence of whether he was advised of his Boykin rights. Swegman argues that he "testified that he was not advised of his right to confront

and cross examine his accusers.” Appellant’s Brief at 5. However, Swegman testified that he did not *recall* the trial court advising him of the right to confront and cross examine witnesses or the right to a trial by jury. Swegman also testified that he did not *recall* the trial court asking if he understood that he would be waiving his right against self-incrimination. The affidavits of the deputy prosecutor and Swegman’s trial counsel both revealed that they did not have recollection of the case. We cannot say that Swegman established that he was not advised of his Boykin rights and was entitled to post-conviction relief. 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.

## II.

The next issue is whether there was a sufficient factual basis to support Swegman’s guilty plea. The post-conviction court’s order states:

[Swegman] also alleged that there was not a sufficient factual basis and that [Swegman] did not admit to any fact which constituted the offense. Again, [Swegman] has failed to establish these allegations, and further the Court notes that the written Plea Agreement states the agreement “constitutes an admission of the truth of all facts alleged in the (information/indictment/count) to which he/she pleads guilty [. . .].” Finally, [Swegman] alleges that he did not know that he was pleading

guilty to a felony. [Swegman] has failed to establish this allegation (the Court also notes that the Information that was filed on December 11, 1980, states that [Swegman] violated IC 35-48-4-11, a “Class D-Felony.” The Information also states that the Marijuana had “an aggregate weight of over 30 grams [ . . .].”

Appellant’s Appendix (Order at 6-7).<sup>6</sup>

We observe that generally a post-conviction court may not take judicial notice of records from the original proceedings. See State v. Hicks, 525 N.E.2d 316, 317 (Ind. 1988); Bahm v. State, 789 N.E.2d 50, 59 (Ind. Ct. App. 2003) (holding that a post-conviction court may not take judicial notice of the transcript of evidence from the original proceedings unless exceptional circumstances exist and that the transcript must be admitted into evidence just like any other exhibit), clarified on reh’g, 794 N.E.2d 444, trans. denied; Moser v. State, 562 N.E.2d 1318, 1321 (Ind. Ct. App. 1990) (“[U]nder the general rule, the post-conviction court may not take judicial notice of the original proceedings absent an exceptional situation.”).

Swegman did not include the court’s file in the record before us, but even assuming that the post-conviction court did not err by taking judicial notice of the file in this case, we cannot say that the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court.

A trial court may not accept a plea of guilty unless it determines that a sufficient factual basis exists to support the plea. Dewitt v. State, 755 N.E.2d 167, 172 (Ind. 2001) (citing Ind. Code § 35-35-1-3(b)). “A factual basis exists when there is evidence about

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<sup>6</sup> The record does not contain the charging information or the plea agreement.

the elements of the crime from which a trial court could reasonably conclude that the defendant is guilty.” Id. The factual basis of a guilty plea need not be established beyond a reasonable doubt. Id. Rather, relatively minimal evidence can be adequate. Id. To be entitled to post-conviction relief, the defendant must prove that he was prejudiced by the lack of a factual basis. Id.

Here, the record reveals that Swegman indicated that he did not recall whether the trial court or the prosecutor read into the record a series of facts that he was asked to either admit or deny. Further, Swegman does not argue that a factual basis or any lack thereof would have affected his decision to plead guilty. Accordingly, we cannot say that the evidence unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. See State v. Eiland, 723 N.E.2d 863, 864-866 (Ind. 2000) (addressing the petitioner’s claim in the post-conviction context that the trial court had not inquired into the factual basis before accepting her guilty plea, holding that a petitioner must demonstrate prejudice, and adopting and incorporating the opinion of the Court of Appeals which held that petitioner presented no evidence indicating that she was prejudiced by the lack of a factual basis).

### III.

The next issue is whether the post-conviction court erred in denying Swegman’s petition because the trial court failed to conduct a sufficient inquiry as to Swegman’s



understanding of the risk of joint representation.<sup>7</sup> Swegman appears to argue that the trial court failed to meet its burden of insuring that Swegman was informed of his right to counsel. Swegman cites Latta v. State, 743 N.E.2d 1121 (Ind. 2001), and argues that the trial court is delegated the burden of insuring whether the defendant knew enough to make the choice an informed one. Swegman also argues that “there was less in the case at bar to indicate that Swegman understood the risk of joint representation than there was in the *Latta* case where the Supreme Court of Indiana condemned the trial court’s ‘quite brief,’ ‘conclusory’ inquiry of his understanding of the risks associated with joint representation.” Appellant’s Brief at 8.

In Latta, the Court observed that “the Court of Appeals concluded that the proceedings in the trial court constituted fundamental error – error so egregious that the entire proceeding was undermined – and was therefore available in postconviction proceedings despite waiver.” 743 N.E.2d at 1131. The Court held that “[t]here are several problems with this analysis” and that “[t]he flaw the Court of Appeals identified in Latta’s conviction is at bottom ineffective assistance of counsel based on impaired counsel arising from joint representation,” and that “[b]ecause it involves balancing the conflicting Sixth Amendment interests, the merits of the claim may depend on the

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<sup>7</sup> In its order, the post-conviction court stated: “[Swegman] alleges that ‘It was not established on the record that [Swegman] was making a knowingly [sic] and voluntarily [sic] waiver of joint representation with the co-defendant [. . .].’ It is the *Petitioner* who has the burden on this issue, and [Swegman] has not met it.” Appellant’s Appendix (Post-Conviction Court’s Order at 6).

circumstances leading up to the defendant's consent to joint representation, but it has nothing to do with fundamental error." Id. at 1131-1132.

Here, in its order, the post-conviction court noted:

that in his proposed Findings of Fact and Conclusions of Law, [Swegman] indicates that Mr. Zahn was ineffective regarding a supposed conflict of interest. [Swegman] did not allege ineffective assistance of counsel in his original Petition, thus any argument regarding alleged ineffective assistance of counsel is waived by [Swegman] under Ind. P.C. 1, Sec. 8. Additionally, even if (for the sake of argument) the allegation was available to [Swegman], [Swegman] has not established the two components from *Strickland v. Washington*, 466 U.S. 668 (1984).

Appellant's Appendix (Post-Conviction Court's Order at 6 n.3). Swegman does not argue that the post-conviction court erred by finding waiver on any ineffective assistance claim. At one point in the argument section of his brief, Swegman states: "The federal constitutional right to effective assistance of counsel necessarily includes representation that is free from conflicts of interest." Appellant's Brief at 7 (quoting Edwards v. State, 807 N.E.2d 742, 745 (Ind. Ct. App. 2004)). However, Swegman does not include a standard of review regarding the review of ineffective assistance claims or develop a cogent argument.<sup>8</sup> Consequently, we conclude that any issue involving ineffective assistance of trial counsel based upon joint representation is waived. See, e.g., Cooper v. State, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding that the defendant's contention was waived because it was "supported neither by cogent argument nor citation to authority");

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<sup>8</sup> In his statement of the issues, Swegman phrases the issue as: "Did the Post-Conviction Court err in finding that Swegman was adequately advised of the perils of joint representation with his co-defendant? Did the Post-Conviction Court err in finding that Swegman did not prove prejudice by virtue of joint representation?" Appellant's Brief at 1.

Shane v. State, 716 N.E.2d 391, 398 n.3 (Ind. 1999) (holding that the defendant waived argument on appeal by failing to develop a cogent argument).

To the extent that Swegman attempts to raise a freestanding claim, Swegman may not raise the freestanding claim that the trial court erred by failing to conduct a sufficient inquiry as to Swegman’s understanding of the risk of joint representation. Rather, in “post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal.” Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002). Here, Swegman has not demonstrated that his argument was unavailable at the time of trial or direct appeal. Consequently, we will not address the argument as a freestanding claim. See, e.g., id. (holding that it is wrong to review the petitioner’s fundamental error claim in a post-conviction proceeding).

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

Affirmed.

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