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IN THE COURT OF APPEALS OF INDIANA

STEVE BROWN,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-1002-PC-227
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0410-PC-193020

September 9, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Steve Brown appeals the denial of his petition for post-conviction relief, arguing that the post-conviction court erroneously determined that he pleaded guilty voluntarily. Finding no error, we affirm.

FACTS

On October 26, 2004, the State charged Brown with two counts of murder and one count of class A misdemeanor carrying a handgun without a license. On March 23, 2006, at the final pretrial conference, Brown's attorney tendered a guilty plea agreement, which Brown had signed, to the trial court. The plea agreement provided that Brown would plead guilty to carrying a handgun without a license and class A felony voluntary manslaughter in exchange for the dismissal of the two murder charges.

The trial court began asking Brown certain questions about his guilty plea. When the trial court asked Brown, "[d]o you understand that by pleading guilty to this charge you admit that it's true?" Brown replied, "I don't got no choice." Appellant's App. p. 136-37. The ensuing discussion made plain that Brown was not yet prepared to plead guilty:

> Brown: From my understanding, if I don't sign [the plea agreement], if I don't take it, I'm going to get a hundred and something years.
>
> Court: No. That's not true. This [plea agreement] caps your liability at—this caps your exposure on executed time at thirty years. If you're convicted of [murder], you don't even start off till forty-five years and you face up to sixty-five years. Do you understand that?
>
> Brown: Yeah.

Court: So, what you're gaining here is knowing that you can't get any more than thirty. . . .

Brown: If it was up to me, I'd rather take my chances with the sixty-five.

Court: Okay. Well, then that's what we'll do. We'll go to trial on Monday. It is up to you. . . .

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Defense counsel: So you don't want to take the plea agreement?

Brown: I didn't do it. I ain't taking it, man.

***

Defense counsel: You do not want to take the plea agreement? Is that what you're saying?

Brown: Yeah.

Court: All right. We'll see you Monday.

Id. at 137-38.

Following this discussion, the trial court recessed. Brown's attorney then entered Brown's holding cell, and the two had a conversation about the situation. An unknown time later, but still on the same day, Brown and his attorney reentered the courtroom of their own volition and stated that Brown did, in fact, wish to plead guilty. At that time, the trial court began the guilty plea hearing anew. At no point during the second hearing did Brown maintain his innocence or indicate that he did not wish to plead guilty. The trial court accepted the plea agreement, and at the April 13, 2006, sentencing hearing, the trial court sentenced Brown to thirty years imprisonment.

Brown brought a direct appeal of his sentence, arguing that the trial court had abused its discretion in imposing the sentence. Brown v. State, No. 49A04-0605-CR-246 (Ind. Ct. App. June 21, 2007). This court affirmed.

On May 1, 2008, Brown filed a petition for post-conviction relief, arguing that he had newly discovered evidence, that he had received ineffective assistance of trial counsel, and that he had entered his guilty plea involuntarily. On December 1, 2009, the post-conviction court denied Brown's petition, finding, among other things, that Brown had pleaded guilty voluntarily: "[t]he record is clear that despite an expressed desire at the guilty plea hearing to reject the plea agreement, [Brown] voluntarily returned to court later that same day and knowingly pled guilty to two separate criminal offenses. He specifically acknowledged a desire to go forward with the guilty plea." Appellant's App. p. 76. Brown now appeals.

DISCUSSION AND DECISION

The sole argument made by Brown on appeal is that the post-conviction court erroneously determined that he pleaded guilty voluntarily. 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); Perry v. State, 904 N.E.2d 302, 307 (Ind. Ct. App. 2009), trans. denied. 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.

It is well established that a trial court may not accept a guilty plea from a defendant who simultaneously maintains his innocence. Johnson v. State, 734 N.E.2d

242, 245 (Ind. 2005). Here, there were two separate guilty plea hearings. At the first hearing, Brown was reluctant to plead guilty and ultimately decided to take his chances with a trial. He maintained his innocence at that time. Appropriately, the trial court halted the guilty plea hearing and declared that the matter would proceed to trial on the following Monday. Some time later, Brown and his attorney voluntarily returned to court and informed the trial court that Brown had changed his mind and wished to plead guilty.

The trial court then held a new guilty plea hearing. During the second hearing, Brown neither made any protestations of innocence nor evinced a reluctance to plead guilty. He affirmed to the trial court that he entered the guilty plea of his own free will, that he understood that he did not have to plead guilty, and that he wished to plead guilty.

Brown argues that because a second transcript was not prepared and the transcript states "proceedings resume," appellant's app. p. 138, we should not find that two distinct hearings took place. We find this to be a distinction without a difference. The trial court declared the hearing to be complete and indicated that the matter would proceed to trial. When Brown and his attorney subsequently reentered the courtroom and indicated Brown's desire to plead guilty, the trial court began anew and started the guilty plea hearing from the beginning. We find these facts sufficient to establish that Brown made no simultaneous protestations of innocence during the subsequent guilty plea proceedings. See Johnson, 734 N.E.2d at 246 n.3 (explaining that "we continue to hold that in non-capital cases, only 'a plea of guilty tendered by one who in the same breath protests his innocence . . . is no plea at all'") (quoting Harshman v. State, 232 Ind. 618, 621, 115 N.E.2d 501, 502 (1953)) (emphasis in original).

In other words, under these circumstances, we do not find that Brown maintained his innocence while he simultaneously indicated a desire to plead guilty. There were two separate hearings—or at least a sufficient break in the proceedings—and at the second hearing, Brown gave every indication that he wanted to plead guilty and made no protestations of innocence. Given this record, therefore, we find that the post-conviction court did not err by finding that Brown pleaded guilty voluntarily.[1]

The judgment of the post-conviction court is affirmed.

NAJAM, J., and MATHIAS, J., concur.

[1] To the extent that Brown highlights statements made by himself and other witnesses at the sentencing hearing that he was innocent, we note that a claim of innocence at sentencing is not a claim made simultaneously with the plea and does not invalidate the plea. E.g., Johnson, 734 N.E.2d at 245-46.