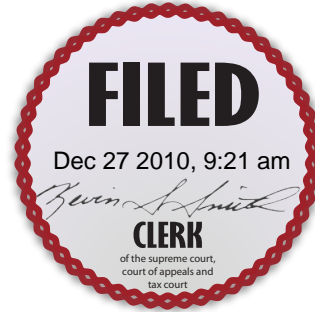


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MIGUEL ALVARADO,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 12A02-1001-CR-159

APPEAL FROM THE CLINTON CIRCUIT COURT
The Honorable Linley E. Pearson, Jr., Judge
Cause No. 12C01-0906-FD-106

December 27, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Miguel Alvarado entered pleas of guilty to criminal confinement¹ and battery,² and then moved to change those pleas before sentencing. The court denied his motion, entered the convictions, and sentenced him therefore. Alvarado argues he did not enter the plea knowingly or voluntarily and the trial court should have allowed him to withdraw the plea before sentencing. We affirm.

FACTS AND PROCEDURAL HISTORY

Approximately two months after Alvarado entered his guilty plea, he filed a Motion for Change of Plea. The trial court scheduled a hearing on Alvarado's motion. At that hearing, the following dialogue occurred concerning Alvarado's motion:

THE COURT: -- Mr. Alvarado are -- are you expecting an attorney here today?

DEFENDANT: Your Honor, they didn't give me pretty much no attorney -- no nothing. Uhm, I have pled guilty, but then I changed my plea. Uhm, I have paperwork here stating that. And uhm, and I was supposed to be here for my sentence I suppose.

THE COURT: Well, we're here ready for sentencing today. You're not wanting to do -- you're not wanting to proceed today?

DEFENDANT: Well, I was actu -- actually here for a change because see I changed my plea and that's what he gave me a chance to do. It says right there.

THE COURT: Ok. So the Court has not ordered this plea withdrawn. Uh, it just says it was set for hearing today. I -- I would suggest if you're wanting to make that attempt Mr. Alvarado, that you use the services of an attorney.

DEFENDANT: Yes, I would just like to plead not guilty and --

THE COURT: -- right. The Court's -- the Court's already found you guilty. We -- the Court -- went through your rights with you. A factual basis was established. So I'm not going to uh, overturn that [sic] the guilty plea that was entered

¹ Ind. Code § 35-42-3-3.

² Ind. Code § 35-42-2-1.

back on July 16, 09. Now, if you want an attorney to be present with you at sentencing, we'll talk about that, but I'm not going to overturn the guilty plea.

DEFENDANT: Wow. Okay, uhm --

THE COURT: -- so it's up to you. You have a right to be represented by an attorney and I'll assist you in that if that's what you want.

(Tr. of Additional Evidence at 32.) Alvarado and the Court discussed whether Alvarado could be released on bond pending sentencing, and the Court then asked him again if he wanted counsel to assist him at sentencing.

DEFENDANT: Uh, is there any plea towards anything?

THE COURT: You -- you've already pled guilty, sir.

DEFENDANT: Yes.

THE COURT: I -- I can't undo that. So here are your choices: proceed to sentencing today or you can ask that the case be continued for sentencing if you want to hire an attorney.

(*Id.* at 35.) Alvarado requested the court appoint counsel to assist him at sentencing. The court appointed counsel and reset the hearing for forty days later.

At sentencing, the court said to Alvarado:

And there was a hearing that you had with a special judge uh -- . . . -- and the - he uh, denied your request to withdraw your pleas so we're here today for sentencing. I know you wrote me a letter saying you'd like to do all of this again. I never ever overrule a judge that I have come in here and do something for me. You know what I'm saying. Whatever that judge does that day is what it stands. So that's where we are today. It's on sentencing.

(Tr. at 3.)

DISCUSSION AND DECISION

1. Validity of Guilty Plea

Alvarado argues the trial court did not properly advise him of his rights before he pled

guilty. Where a defendant contends his guilty plea should be set aside because it was not knowingly, intelligently or voluntarily entered, the remedy is exclusively through Post-Conviction Rule 1. *Jones v. State*, 675 N.E.2d 1084, 1090 (Ind. 1996). As our Supreme Court explained in *Jones*:

[D]efendant cannot assert this issue on direct appeal since the validity of a guilty plea may not be challenged by a motion to correct errors or direct appeal but instead must be brought by filing a petition for post conviction relief.

[O]ne consequence of pleading guilty is the restriction of the ability to challenge the conviction on direct appeal. Additionally, expanding the right to appeal guilty pleas on direct appeal would make settlements difficult, and would dramatically increase the caseload in appellate courts.

This Court has created an avenue for claims addressing the validity of guilty pleas by adopting Indiana Post-Conviction Rule 1, and in fact, we have just recently held that, “Post-conviction relief is exactly the vehicle for pursuing claims for validity of guilty pleas.” Therefore, the issue of whether defendant’s guilty plea was knowing and voluntarily may not be decided by this court on direct appeal, but instead should be pursued by filing a petition for post-conviction relief.

Id. at 1089-90 (internal citations omitted).

Because this argument may be raised only in a petition for post conviction relief, we decline to address it further in this direct appeal. *See id.*

2. Motion to Withdrawal

Alvarado also claims the trial court erroneously denied his pre-sentencing motion to withdraw his guilty plea. After entry of a plea of guilty, but before imposition of sentence, a court may allow a defendant by motion to withdraw his plea of guilty for any “fair and just reason,” unless the State has been substantially prejudiced by reliance on the plea. Ind. Code § 35-35-1-4(b). If, however, a “defendant proves that withdrawal of the plea is necessary to

correct a manifest injustice,” the court *must* allow the defendant to withdraw his guilty plea. *Id.*

We review the court’s ruling on the motion only for an abuse of discretion. *Id.* Thus the ruling arrives before us with “a presumption in favor of the ruling.” *See Coomer v. State*, 652 N.E.2d 60, 62 (Ind. 1995).

Alvarado asserts “the Court fundamentally erred when the Court refused to allow the Appellant to testify based upon the merits of his motion and further, did not allow the Appellant to present any argument to the Court as to the substance of the motion to withdraw the guilty plea.” (Br. of Appellant at 3.) Alvarado claims the court denied him the opportunity to meet his statutory obligation to prove manifest injustice.

However, the very text of the rule required Alvarado’s motion “state facts in support of the relief demanded.” Ind. Code § 35-35-1-4(b). Thus, pursuant to the statute, Alvarado was required to meet his burden in his motion. Nothing in the statute entitled him to a hearing on his motion, and we decline to graft such a requirement into the statute. *See Dommer v. Dommer*, 829 N.E.2d 125, 142 (Ind. Ct. App. 2005) (“We decline to read a marital exception into Indiana’s Wiretap Act when the language of the statute does not suggest the legislature intended such an exception.”), *trans. denied*.

We also note Alvarado’s Appendix does not contain a copy of his Motion for Change of Plea, which presumably would have explained why he was asking the trial court to permit him to withdraw his guilty plea. Without knowing what facts Alvarado asserted to the trial court in support of his motion, we cannot determine whether the trial court erred by refusing

to withdraw his guilty pleas, and Alvarado accordingly has waived any such argument for appeal. *See, e.g., Nealy v. Am. Family Mut. Ins. Co.*, 910 N.E.2d 842, 849 (Ind. Ct. App. 2009) (Ind. Appellate Rule 46(A)(8)(a) requires an argument “contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on” Non-compliance with that rule results in waiver of the argument on appeal.), *trans. denied*.

Because Alvarado alleges only procedural error in the court’s denial of his motion to withdrawal, and has not explained in his Brief of Appellant what facts created an alleged manifest injustice or an abuse of discretion, we need not review the merits of the trial court’s denial of his motion.

Alvarado has not demonstrated reversible error, and we accordingly affirm his convictions and sentences therefor.

Affirmed.

ROBB, J., and VAIDIK, J., concur.