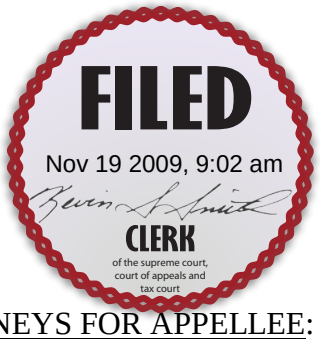

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IN THE
COURT OF APPEALS OF INDIANA

STEVEN T. MARBLEY-EL,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 71A03-0907-PC-295
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0808-PC-35

November 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Steven T. Marbley-El appeals the post-conviction court's denial of his petition for relief. We affirm.

Issue

Did the post conviction court err by denying Marbley-El's petition for relief?

Facts and Procedural History

On October 10, 2006, Marbley-El walked into a St. Joseph County bank and demanded money from a teller. He was apprehended by police as he fled the scene with the money. On October 11, 2006, the State charged Marbley-El with robbery as a class C felony. On December 20, 2006, Marbley-El pled guilty to the charge pursuant to a written plea agreement. On January 19, 2007, the trial court sentenced him to six years, which is two years more than the four-year advisory sentence for a class C felony. See Ind. Code § 35-50-2-6. On August 25, 2008, Marbley-El filed pro se a petition for post-conviction relief. On April 24, 2009, the post-conviction court held a hearing on the petition. On June 1, 2009, the post-conviction court entered written findings of fact and conclusions thereon, denying the petition. Marbley-El now appeals. Additional facts will be stated below as necessary.

Discussion and Decision

Marbley-El claims that the post-conviction court erred by denying his petition for relief. Our standard of review is well settled.

> A petitioner who has been denied post-conviction relief faces a rigorous standard of review. As such, the petitioner must convince the court on review that the evidence as a whole leads unerringly and unmistakably to a

> decision opposite that reached by the post-conviction court. Stated differently, this Court will disturb a post-conviction court's decision as being contrary to law only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. Further, the reviewing court accepts the post-conviction court's findings of fact unless clearly erroneous.

Dewitt v. State, 755 N.E.2d 167, 169-70 (Ind. 2001) (citations, quotation marks, and brackets omitted).

Specifically, Marbley-El claims that his guilty plea was not knowing, intelligent, and voluntary because the trial court failed to fully advise him of his rights at the guilty plea hearing. Before accepting a guilty plea, the trial court must be satisfied that the accused is aware of his right to trial by jury, his right against self-incrimination, and his right to confront his accusers. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Dewitt*, 755 N.E.2d at 171. "*Boykin* only requires a conviction to be vacated if the defendant did not know *or* was not advised at the time of his plea that he was waiving his *Boykin* rights." *Dewitt*, 755 N.E.2d at 171 (citation omitted). To determine whether a plea is knowing, intelligent, and voluntary, we review all the evidence before the post-conviction court, including the transcripts of the post-conviction trial and the petitioner's original sentencing hearing, and any plea agreements or other documents that are part of the record. *Williams v. State*, 498 N.E.2d 1332, 1334 (Ind. Ct. App. 1986), *trans denied* (1987).

Marbley-El contends that pursuant to the U.S. Supreme Court's decision in *Blakely v. Washington*, his *Boykin* rights were expanded so that the trial court was required to advise him of his right to a jury determination of any factor that increased his penalty beyond the statutory maximum. *See Blakely v. Washington*, 542 U.S. 296 (2004). In *Blakely*, the

Supreme Court held that a defendant's Sixth Amendment right to trial by jury included both the right to a jury determination as to guilt or innocence *and* the right to a jury determination of any fact which increases the penalty for a crime beyond the prescribed statutory maximum. *See id.* at 313.

When *Blakely* was decided, Indiana's sentencing statutes provided for a "presumptive term" for each class of felony, as well as upper and lower limits within which the trial court could deviate upon a finding of aggravating or mitigating circumstances. For example, Indiana Code Section 35-50-2-6 stated in relevant part, "A person who commits a Class C felony shall be imprisoned for a fixed term of four (4) years, with not more than four (4) years added for aggravating circumstances or not more than two (2) years subtracted for mitigating circumstances." In 2005, the Indiana Supreme Court held that these presumptive sentences were in essence "statutory maximums" as defined by *Blakely* and that, as a result, any aggravating facts used to enhance a presumptive term must be found by a jury. *See Smylie v. State*, 823 N.E.2d 679, 683-84 (Ind. 2005).

Marbley-El fails to recognize the significance of our legislature's 2005 sentencing statute revisions. In response to *Blakely* and *Smylie*, the Indiana General Assembly eliminated fixed presumptive terms in favor of "advisory sentences" that fall within appropriate ranges for each class of felony. For example, pursuant to the current version of Indiana Code Section 35-50-2-6, "[a] person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years." Under this amended statutory regime, according to our

supreme court, "even with judicial findings of aggravating circumstances, it is now impossible to 'increase [ ] the penalty for a crime beyond the prescribed statutory maximum'" as prohibited by *Blakely*. *Anglemyer v. State*, 868 N.E.2d 482, 489 (Ind. 2007), (quoting *Blakely*, 542 U.S. at 301), *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007). *See also* Ind. Code § 35-38-1-7.1(d) (trial court "may impose any sentence … authorized by statute … regardless of the presence or absence of aggravating or mitigating circumstances.").

The advisory sentencing statutes were enacted on April 25, 2005. Marbley-El committed this robbery on October 10, 2006. His crime and all the proceedings that flowed therefrom occurred after the advisory sentencing statutes were enacted. Marbley-El argues that his claim of error has nothing to do with sentencing but rather deals with the guilty plea process. We understand the distinction he is attempting to make, but we agree with the post-conviction court that the legislative sentencing amendments are significant to this case. At the time Marbley-El committed this robbery, the Indiana advisory sentencing scheme was in effect. Therefore, Marbley-El was not and could not be sentenced beyond the statutory maximum with or without the intervention of a jury, and *Blakely* simply does not apply. *See Anglemyer*, 868 N.E.2d at 491 n.9 (holding that advisory sentencing amendments applied to defendant's case because his crimes were committed after they were enacted). *See also Miller v. State*, 884 N.E.2d 922, 926 (Ind. Ct. App. 2008) (noting that *Blakely* rule is not applicable under Indiana's current advisory sentencing scheme), *trans. denied*. Clearly, the trial court was not required to inform Marbley-El of a right that did not apply to him. In sum,

the trial court properly advised Marbley-El of his *Boykin* rights, and his plea was thus knowingly, voluntarily, and intelligently made. The post-conviction court did not err in denying Marbley-El's petition.

Affirmed.

MAY, J., and BROWN, J., concur.