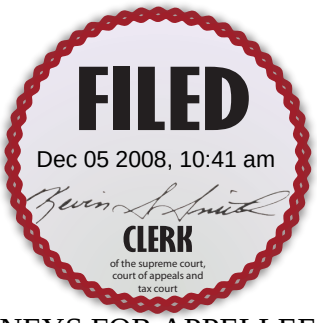

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IN THE
COURT OF APPEALS OF INDIANA

CALVIN KINNEY,	)	
	)	
Appellant/Petitioner,	)	
	)	
vs.	)	No. 46A03-0804-PC-180
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Respondent.	)	

APPEAL FROM THE LaPORTE SUPERIOR COURT
The Honorable Kathleen B. Lang, Judge
Cause No. 46D01-0210-FA-92

December 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Petitioner Calvin Kinney appeals from the denial of his motion to correct error, which he filed following the denial of his petition for post-conviction relief ("PCR"). Kinney contends that his guilty pleas to Class A felony Cocaine Dealing and Class B felony Cocaine Dealing were not knowing, intelligent, and voluntary. We affirm.

FACTS AND PROCEDURAL HISTORY

On or about October 18, 2002, Kinney knowingly delivered pure or adulterated cocaine, and, on or about October 23, 2002, he knowingly delivered more than 3 grams of pure or unadulterated cocaine. After having originally charged Kinney with Class A felony cocaine dealing, the State filed an amended charging information with the trial court on November 19, 2004, which reflected an additional charge of Class B felony cocaine dealing. The chronological case summary does not reflect that the trial court ever granted the State leave to add the Class B felony charge or that the State ever requested such permission.

On November 22, 2004, Kinney pled guilty to Class A felony and Class B felony cocaine dealing. Pursuant to a plea agreement, Kinney was to be sentenced to ten years of incarceration for Class B felony cocaine dealing, with five years suspended to probation, and the executed portion was to be served on work release. The Class A felony conviction was to be held in abeyance, and in the event that Kinney complied with all of the terms of his work release and probation, the State would move to dismiss the charge. If, on the other hand, Kinney violated any terms of his work release or probation, the trial court would sentence him for the Class A felony conviction.

On August 11, 2005, the State filed a petition to revoke Kinney's placement in work release, alleging that he had violated the terms of his placement by accumulating four "Minor Violation[s]" within a thirty-day period and by leaving his place of employment. Appellant's App. p. 70. On October 27, 2005, the trial court ordered Kinney to serve the remainder of his ten-year sentence for Class B felony cocaine dealing in the Department of Correction and sentenced him to twenty-five years of incarceration for Class A felony cocaine dealing, with both sentences to be served concurrently. On direct appeal, this Court affirmed Kinney's sentence. *See Kinney v. State*, No. 46A03-0601-CR-40 (Ind. Ct. App. June 5, 2006).

On September 7, 2007, Kinney filed his petition for post-conviction relief ("PCR"). After a hearing, the post-conviction court denied Kinney's PCR petition in full on February 22, 2008. On March 31, 2008, the post-conviction court denied Kinney's motion to correct error.

DISCUSSION AND DECISION

Standard of Review

Our standard for reviewing the denial of a PCR petition is well-settled:

> In reviewing the judgment of a post-conviction court, appellate courts consider only the evidence and reasonable inferences supporting its judgment. The post-conviction court is the sole judge of the evidence and the credibility of the witnesses. To prevail on appeal from denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court.… Only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, will its findings or conclusions be disturbed as being contrary to law.

Hall v. State, 849 N.E.2d 466, 468, 469 (Ind. 2006) (internal citations and quotations omitted).

Indiana Code section 35-35-1-2 (2002) requires the court accepting the guilty plea to determine that the defendant: (1) understands the nature of the charges; (2) has been informed that a guilty plea effectively waives several constitutional rights, including trial by jury, confrontation of witnesses, compulsory process, and proof of guilt beyond a reasonable doubt without self-incrimination; and (3) has been informed of the maximum and minimum sentences for the crime charged. The Indiana Supreme Court has emphasized that a "plea entered after the trial judge has reviewed the various rights which a defendant is waiving and made the inquiries called for in the statute is unlikely to be found wanting in a collateral attack." *State v. Moore*, 678 N.E.2d 1258, 1265 (Ind. 1997) (quoting *White v. State*, 497 N.E.2d 893, 905 (1986)).

"However, defendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor or defense counsel will present colorable claims for relief." *Id*. at 1266 (citing *White*, 497 N.E.2d at 905-06). "In assessing the voluntariness of the plea, 'we will review all the evidence before the court which heard his post-conviction petition, including testimony given at the post-conviction trial, the transcript of the petitioner's original sentencing, and any plea agreements or other exhibits which are a part of the record.'" *Id*. (quoting *White*, 497 N.E.2d at 905).

Whether Kinney's Guilty Plea was Knowing, Intelligent, and Voluntary

At the outset, we would observe that Kinney does not claim that the trial court failed to advise him as required by Indiana Code section 35-35-1-2, and the record

establishes both that he was properly advised and that he indicated understanding of the advisements. Moreover, Kinney does not argue that he was coerced or misled into pleading guilty. Kinney nonetheless contends that his guilty plea was not knowing, intelligent, or voluntary, and draws our attention to several circumstances to support this claim. Kinney claims that a combination of (A) his lack of representation at the time he pled guilty, (B) his alleged inability to understand the plea agreement, (C) the alleged illegality of the Class A felony cocaine dealing sentence being held in abeyance, and (D) the State apparently failing to seek leave to file the Class B felony charge somehow rendered his plea involuntary.

A. Lack of Trial Counsel at Guilty Plea Hearing

Kinney notes that he was unrepresented at his guilty plea hearing. The record most favorable to the post-conviction court's judgment indicates, however, that this was entirely Kinney's own doing. At a hearing on November 19, 2004, Kinney expressed his desire to proceed without an attorney, even after being advised of numerous pitfalls of self-representation and that it was "not a good idea to represent yourself[.]" Appellant's App. p. 26. On November 22, 2004, the day Kinney pled guilty, the trial court again advised him that he had the right to an attorney, and Kinney indicated that the trial court was correct when it stated that he could afford an attorney but that it was his choice not to have one.

We conclude that Kinney may not now be heard to complain of a situation that he himself created. "'The doctrine of invited error is grounded in estoppel.'" *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005) (quoting *Witte v. Mundy*, 820 N.E.2d 128, 133

(Ind. 2005)). "Under this doctrine, 'a party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct.'" *Id*. (quoting *Witte*, 820 N.E.2d at 133-34).

B. Whether Kinney Could Not Understand the Plea Agreement

Kinney also contends that the plea agreement was too complicated for him to comprehend. This claim, however, is fatally undercut by the following exchange at Kinney's guilty plea hearing, which establishes that Kinney perfectly understood the terms of his plea agreement:

> THE COURT: What do you understand the plea agreement to be?
> [Kinney]: Ten years, five suspended, five, do two and half on Work Release, modify on two and a half, and if I stay good through Work Release, and my probation, then the A will be taken off.

Appellant's App. p. 39. The record does not support Kinney's claim that his plea agreement was beyond his comprehension, thereby rendering his plea involuntary.

C. Whether Kinney's Plea Agreement was Illegal

Kinney further contends that holding the sentence for the Class A felony cocaine dealing conviction in abeyance was illegal. This precise question was addressed and resolved by the Indiana Supreme Court in *Debro v. State*, 821 N.E.2d 367, 372 (2005). In that case, Debro pled guilty to criminal recklessness pursuant to a written plea agreement. *Id*. at 369. The agreement provided, *inter alia*, that the trial court would not actually enter judgment on the criminal recklessness charge if Debro committed no criminal offenses for a year, completed a Batterer's Treatment Program, and did not use alcohol or drugs while in the Program. *Id*. When the trial court soon thereafter found

that Debro had committed another criminal offense, it imposed judgment of conviction and sentenced Debro to 180 days in jail. *Id*. at 370.

The Indiana Supreme Court, while noting that withholding of judgment as provided for in Debro's plea agreement was clearly contrary to statute, nevertheless denied Debro relief, applying the following reasoning:

> As we recently explained, "[D]efendants who plead guilty to achieve favorable outcomes give up a plethora of substantive claims and procedural rights, such as challenges to convictions that would otherwise constitute double jeopardy. Striking a favorable bargain including a consecutive sentence the court might otherwise not have the ability to impose falls within this category." *Lee v. State*, 816 N.E.2d 35, 40 (Ind. 2004) (quotation omitted). *Withheld judgments and deferred sentences fall into this category as well.*

Id. at 372 (emphasis added).

So, as *Debro* makes clear, deferred sentences, such as the one at issue here, are properly included in plea agreements, even though they may not be otherwise legally sanctioned. Kinney's agreement provided him with a significant benefit, to say the least: the possibility that a Class A felony conviction would simply be stricken from his record. As in *Debro*, however, "[h]aving failed to fulfill his part of the agreement, [Kinney] may not now be heard to complain." *Id*.

D. Whether the Class B Felony Cocaine Dealing Charge was Properly Brought

Finally, Kinney contends that the Class B felony cocaine dealing charge to which he pled guilty was improperly filed and unsupported by a factual basis and that these circumstances contributed to rendering his guilty plea involuntary. As previously mentioned, there is no indication in the record that the State requested leave to add the

Class B felony charge or that the trial court allowed it. We conclude, however, that Kinney waived any objection he might have once had to the additional charge when he pled guilty to it. It is well-settled that a defendant may not question pre-trial proceedings following a guilty plea. *See, e.g.*, *McKrill v. State*, 452 N.E.2d 946, 948 (Ind. 1983) (concluding, in case where trial court had not yet ruled on defendant's motion to dismiss when he pled guilty, that "[b]y proceeding without having obtained a ruling on the motion and without protest, the Petitioner waived such ruling."); *Branham v. State*, 813 N.E.2d 809, 811 (Ind. Ct. App. 2004) ("A defendant cannot question pre-trial orders after a guilty plea is entered.") (citing *Ford v. State*, 618 N.E.2d 36, 38 (Ind. Ct. App. 1993)). By pleading guilty to the allegedly defective amended charging information, Kinney has waived the issue for appellate consideration.

As for Kinney's claim that there is no factual basis for the Class B felony cocaine dealing charge, this is raised for the first time on appeal and will not be addressed. *See Whitfield v. State*, 699 N.E.2d 666, 669 (Ind. Ct. App. 1998) ("However, because this argument was raised for the first time on appeal, it will not be considered."), *trans. denied*. In summary, Kinney has failed to carry his burden to establish that the evidence clearly and unmistakably leads to a conclusion that his guilty plea was not knowing, intelligent, and voluntary.

The judgment of the post-conviction court is affirmed.

RILEY, J., and BAILEY, J., concur.