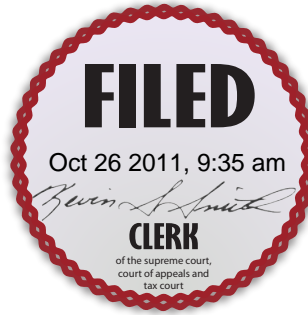


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

PHILLIP BUHRT,)
)
 Appellant-Petitioner,)
)
 vs.) No. 20A05-1101-PC-43
)
 STATE OF INDIANA,)
)
 Appellee-Respondent.)

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Evan S. Roberts, Judge
Cause No. 20D01-1004-FA-2

October 26, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-petitioner Phillip Buhrt appeals the denial of his petition for post-conviction relief, claiming that his guilty pleas in 1988 to attempted murder, robbery with a deadly weapon, and rape, were not knowingly and voluntarily entered. Specifically, Buhrt claims that his petition should have been granted because he was not advised of his rights in accordance with Boykin v. Alabama, 395 U.S. 238 (1969). Concluding that Buhrt's petition was properly denied, we affirm the judgment of the post-conviction court.

FACTS

In 1987, Buhrt was arrested for the three offenses stated above. Brent Zook, who has practiced law since 1978, was appointed as Buhrt's public defender. On February 25, 1988, Buhrt pleaded guilty to all charges without the benefit of a plea agreement and was subsequently sentenced on May 5, 1988.

On March 27, 2007, Buhrt filed a petition for post-conviction relief, claiming that, at the time of his guilty plea, he was not advised of his privilege against compulsory self-incrimination, the right to a jury trial, and the right to confront his accusers as Boykin required. Therefore, Buhrt argues that, because he was not advised of these rights, his guilty plea to the offenses was not knowingly and voluntarily made and must be set aside.

At the post-conviction hearing on October 10, 2010, Buhrt testified that the trial court did not inform him of the Boykin rights and that Zook did not discuss those rights with him, prior to pleading guilty. However, it was established that before Buhrt's guilty

plea hearing, Zook had prepared a typewritten plea agreement that included a list of the Boykin rights.

Although Buhrt sought to withdraw his guilty plea at the May 5, 1988, sentencing hearing, the affidavit he submitted to the trial court specifically stated that he had reviewed the proposed plea agreement that the State had offered and that he had agreed to its terms. Thus, Judge Duffin, the trial judge in the case, declined Buhrt's request to withdraw his guilty plea. Judge Duffin noted, among other things, that Buhrt was receiving a substantial benefit by pleading guilty because he was not subjected to the habitual offender enhancement. Nonetheless, the State subsequently withdrew the plea offer.¹

It is also undisputed that the recordings of Buhrt's guilty plea hearings are missing and that Buhrt had contacted the court reporters about locating those recordings. However, the court personnel were not able to locate the tapes. Judge Duffin testified at the hearing that, while he could not recall the specifics of Buhrt's case, he "unequivocally" advised all defendants of their Boykin rights before accepting a guilty plea. Tr. p. 27. Crowder, the deputy prosecutor who handled Buhrt's case, testified that Judge Duffin was "meticulous," and that he "would have always advised each defendant of those rights." Id. at 30.

¹ The precise date as to when the State withdrew its plea offer is not apparent from the record. One of the attached exhibits, which is the proposed plea offer by the State, contains the handwritten notation purportedly made by Zook, indicating that "Prosecutor changed his mind and withdrew any offers prior to the plea." State's Ex. 1. Indeed, the "Negotiated Plea Agreement and Disclosure" sets forth the Boykin rights. Id.

Zook testified that even though he had no independent recollection of whether he specifically informed Buhrt of his rights, he would advise his clients of the Boykin rights before they entered a guilty plea as a “matter of routine business practice.” Id. at 45. And Zook had prepared a plea agreement that specifically included the Boykin rights. Id. at 46. At the conclusion of the hearing, the post-conviction court denied Buhrt’s request for relief.

In relevant part, the post-conviction court’s conclusions of law provide that

22. The facts of this case are similar to the facts of Hall v. State, 849 N.E.2d 466 (Ind. 2006). In Hall, the Defendant alleged a non-knowing or voluntary plea for want of his Boykin rights advisements. At the PCR hearing, conducted 18 years after the plea, the trial judge testified that he was aware that defendants must be advised of their Boykin rights before pleading guilty. Hall’s attorney testified that the trial judge’s guilty plea hearings always included Boykin advisements. The deputy prosecuting attorney testified that he was concerned to ensure that Boykin rights, as well as all other rights of the defendant, were mentioned in guilty plea hearings because any failure of advisement might be a ground for reversal. Hall, 849 N.E.2d at 468. The Hall court denied post-conviction relief, finding that the Defendant failed to prove that he was not advised of his Boykin rights.

23. The Court recognizes that this case is distinguishable from Hall in that defendant testified here that he did not receive his Boykin advisements. However, in light of the testimony of Judge Duffin, . . . Crowder and . . . Zook, defendant’s credibility is questionable given the self-serving nature of his testimony and his experience with the law prior to this case.

24. Having considered the record before the court, the court finds that there is sufficient evidence supporting the presumption of regularity and that the record in this case is missing, not silent. Defendant’s knowledge of his Boykin rights has been shown by the evidence to this court’s satisfaction that defendant had the required knowledge at the time of the plea. Based

upon the testimony of Judge Duffin, . . . Crowder and . . . Zook and evidence presented along with the defendant's understanding of the court process, the court finds defendant was advised of and understood the Boykin rights and their waiver. . . . Defendant has failed to prove by a preponderance of the evidence that he was not advised of his Boykin rights at the time of his guilty plea.

Appellant's Br. p. 16-17. Buhrt now appeals.

DISCUSSION AND DECISION

I. Standard of Review

Post-conviction proceedings do not grant a petitioner a "super-appeal" but are limited to those issues available under the Indiana Post-Conviction Rules. Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001) (citing Ind. Post-Conviction Rule 1(1)). Post-conviction proceedings are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5).

A petitioner who appeals the denial of post-conviction relief faces a rigorous standard of review, as the reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. Kien v. State, 866 N.E.2d 377, 381 (Ind. Ct. App. 2007). The appellate court must accept the post-conviction court's findings of fact and may reverse only if the findings are clearly erroneous. Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007). If a post-conviction petitioner was denied relief, he or she must show that the evidence as a whole leads unerringly and unmistakably to an opposite conclusion than that reached by the post-conviction court. Ivy v. State, 861 N.E.2d 1242, 1244 (Ind. Ct. App. 2007).

II. Buhrt's Contentions

As discussed above, Buhrt contends that his petition for post-conviction relief should have been granted because he was not advised of his Boykin rights prior to pleading guilty. Therefore, Buhrt maintains that his guilty pleas to the charged offenses were not knowingly or voluntarily made.

We initially observe that if an issue was known and available to a petitioner and could have been presented on direct appeal but it was not, it is waived. Timberlake, 753 N.E.2d at 597. Here, Buhrt has presented no reason as to why his claim could not have been raised in a direct appeal of the denial of his motion to withdraw his guilty plea, which he opted not to pursue. As a result, Buhrt has arguably waived his claim.

Waiver notwithstanding, Buhrt is requesting that we believe that his testimony is correct and that Judge Duffin, Crowder, and Zook, are either lying or mistaken about the advisement of the Boykin rights. Such is a credibility issue, and we will not reweigh the evidence or judge the credibility of the witnesses. Graham v. State, 941 N.E.2d 1091, 1096 (Ind. Ct. App. 2011). In short, Buhrt has failed to demonstrate that the post-conviction court believed the wrong witnesses. See State v. Damron, 915 N.E.2d 189, 193 (Ind. Ct. App. 2009) (observing that because the petitioner failed to offer any evidence, other than his own self-serving testimony, to establish that he was not informed of the Boykin rights, he failed to satisfy his burden of establishing that his guilty plea was unknowing and involuntary), trans. denied. As a result, Buhrt cannot point to anything in the record demonstrating that the evidence as a whole leads unerringly and unmistakably

to an opposite conclusion reached by the post-conviction court. For all of these reasons, we conclude that Buhr's request for relief was properly denied.

The judgment of the post-conviction court is affirmed.

KIRSCH, J., and BROWN, J., concur.