

Carl Erlewein, Jr., appeals the post-conviction court's denial of his petition for post-conviction relief. Erlewein raises two issues, which we consolidate and restate as whether the post-conviction court erred by denying Erlewein's petition for post-conviction relief. We affirm.

The relevant facts follow. In 1987, the State charged Erlewein with theft as a class D felony. On January 7, 1987, Erlewein appeared for an initial hearing and requested appointment of counsel. The trial court set an indigency hearing for January 14, 1987. On January 7, 1987, the State also filed an information alleging that Erlewein was an habitual offender. Later in the day, Erlewein entered into a plea agreement with the State in which Erlewein agreed to plead guilty to theft as a class D felony, the State agreed to dismiss the habitual offender information, and Erlewein agreed to be sentenced to four years in the Indiana Department of Correction with two years suspended to probation. That afternoon, Erlewein reappeared before the trial court without counsel, withdrew his motion for appointment of counsel, and informed the trial court that he wished to plead guilty to theft as a class D felony. The following discussion occurred during the guilty plea hearing:

THE COURT: Now, Mr. Erlewein, this morning you indicated to me that you wanted me to appoint you a lawyer, I set an indigence hearing for January the 14th, 1987 to determine your indigence hearing and your right to that court appointed lawyer. Now, Mr. Erlewein, are you withdrawing your motion for appointment of pauper counsel?

[ERLEWEIN]: Yes sir.

* * * * *

THE COURT: Now then, if you enter a plea of guilty, you will waive or give up the following constitutional rights that you have. . . . [Y]ou'll waive the right you have to assistance of counsel or in other words lawyer.

Now, if you cannot afford to hire your own lawyer, the court will appoint you a lawyer to represent you if that is your desire and if you qualify. Qualifications being, that you be an indigent, therefore without the money or means in which to hire your own lawyer. Do you wish the court to appoint you a lawyer?

[ERLEWEIN]: No sir.

THE COURT: Now then Mr. Erlewein, you asked me this morning to appoint you a lawyer, is that correct?

[ERLEWEIN]: Yes sir.

THE COURT: Now, are you now withdrawing your motion for me to appoint you a lawyer to represent you in this case?

[ERLEWEIN]: Yes sir.

THE COURT: But you understand that if you wanted me to appoint you a lawyer to represent you and if you were qualified for that court appointed lawyer and that qualification being that you being indigent, or in other words without the money or means in which to hire your own lawyer to represent you in this cause, that I would appoint a lawyer to represent you, do you not?

[ERLEWEIN]: Yes.

THE COURT: But you do not want me to appoint you a lawyer to represent you, is that correct?

[ERLEWEIN]: Yes.

THE COURT: You do not want me to, is that correct?

[ERLEWEIN]: Yes.

THE COURT: Now Mr. Erlewein, if you have been convicted of prior offenses that fact may effect disposition of the charge that is now pending against you. If you intend to enter a plea of guilty, they must be freely and voluntarily entered and there can have been nor [sic] force, promise or threats made or used by anyone against you to cause you to enter the plea. If there have been, you should inform the court of that fact now. Have there been?

[ERLEWEIN]: No sir.

Appellant's Appendix at 57-64. The trial court accepted Erlewein's guilty plea and sentenced him according to the plea agreement.

On February 20, 2002, Erlewein filed a petition for post-conviction relief, and he filed an amended petition on January 24, 2005. Erlewein alleged that his guilty plea was not knowingly, intelligently, or voluntarily entered into because of his lack of counsel

and that the prosecutor coerced him into pleading guilty. Erlewein submitted the case by affidavit. The post-conviction court denied Erlewein's petition for post-conviction relief, finding that "[t]he record or transcript clearly shows that [Erlewein] freely and voluntarily chose to proceed without a lawyer and that the Court accepted [Erlewein's] knowing and voluntary plea of guilty" and that Erlewein's claim was barred by laches. Id. at 86.

Before discussing Erlewein's allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. 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. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – that which leaves us with a definite and firm conviction that a mistake has been made." Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

The post-conviction court found that Erlewein's claim was barred by laches. Erlewein argues that the post-conviction court's finding is clearly erroneous, and the State concedes that it failed to establish that Erlewein's post-conviction petition was barred by laches. Consequently, we will address only Erlewein's argument that the post-conviction court's finding regarding his guilty plea is clearly erroneous.

According to Erlewein, his guilty plea was not entered into knowingly, intelligently, or voluntarily due to coercion by the prosecutor and his lack of counsel. The Sixth Amendment to the United States Constitution and Article 1, § 13 of the Indiana Constitution guarantee a criminal defendant the right to appointed counsel. Jones v. State, 783 N.E.2d 1132, 1138 (Ind. 2003). "Accordingly, when a criminal defendant waives his right to counsel and elects to proceed pro se, we must decide whether the trial court properly determined that the defendant's waiver was knowing, intelligent, and voluntary."¹ Id.

On appeal, Erlewein's sole argument is based upon Hood v. State, 546 N.E.2d 847 (Ind. Ct. App. 1989). In Hood, the defendant was charged with theft and forgery. 546 N.E.2d at 848. While in jail awaiting his initial hearing, the prosecutor told the defendant

¹ Erlewein concedes that, while generally a defendant waiving his right to counsel should be informed of the pitfalls of self-representation, the nature of the warnings in the context of a guilty plea hearing is different. "A guilty plea hearing is, of course, a proceeding of an entirely different nature than a trial." Redington v. State, 678 N.E.2d 114, 118 (Ind. Ct. App. 1997), reh'g denied, trans. denied. "A criminal defendant at a guilty plea hearing will not be confronted with the necessity of being educated on the subjects of trial procedure, evidence examining witnesses or making objections." Id. A defendant at a guilty plea hearing is not exposed to the pitfalls of self-representation that the general warnings address, and "[w]here the reason underlying the admonishments is absent, a trial court is not required to engage in superfluous warnings which have no bearing to the proceeding at hand." Id.

that that State would forego filing an habitual offender count if he would plead guilty without counsel. Id. During the guilty plea hearing, the prosecutor stated,

I might state to the Court that prior to this hearing the State and the defendant entered into conversations with respect to this case and the State of Indiana represented to Mr. Hood that if he were to plead guilty to the crimes as charged *today*, the State of Indiana would not file any habitual offender riders to those charges

Id. at 848-849 (emphasis in original). The defendant waived his right to counsel, pleaded guilty, and later sought post-conviction relief. Id. at 849. During the post-conviction proceedings, the defendant argued that his guilty plea was not made knowingly, intelligently, and voluntarily. Id.

On appeal from the denial of his petition for post-conviction relief, while noting the importance of counsel during plea bargaining, we held:

[W]e need not decide whether prosecutorial plea bargaining with an uncounseled defendant vitiates the voluntariness of the ensuing plea per se. Our fact situation is even more egregious. Here, not only did the State plea bargain with an uncounseled defendant, it also made the uncounseled defendant's waiver of his right to counsel as a condition of the plea agreement.

Generally, it is not improper to threaten an habitual offender charge to induce plea bargaining. Jackson v. State (1986), Ind., 499 N.E.2d 215. Further, under ordinary circumstances, a record containing the required advisements would be a determinative factor in the affirmation of the denial of a petition for post-conviction relief based on a claim the guilty pleas were not entered knowingly and intelligently. The threat here, however, was made to an uncounseled defendant and, to avoid the threatened conduct, the defendant was required to proceed without the assistance of counsel.

That additional condition compels the determination that the resultant plea is involuntary per se. Thus there is no merit to the State's assertion that the guilty plea court's exhaustive advisement of defendant's

right to counsel and Hood's assurance his pleas were voluntarily made the voluntariness of the pleas a factual issue.

Hood's waiver of counsel at his guilty plea hearing and his assurance to the court that he was not acting under threats or coercion was tainted by prior state action. The prosecutor's offer of a plea bargain premised on Hood's tender of guilty pleas without legal counsel forecloses inquiry as to the voluntariness or intelligence of Hood's waiver of counsel in open court notwithstanding the guilty plea court's thorough advisements and inquiries. Thus his convictions based on those pleas are reversed.

Id. at 849-850 (footnote omitted).

Here, the only evidence that Erlewein submitted in the post-conviction proceedings was an affidavit that provided:

That Robert E. Lee, Deputy Prosecuting Attorney for Fayette County, Indiana came to the Fayette County Jail on the morning of January 7, 1987, after an initial hearing had been held, earlier on that day, in which petitioner Erlewein had requested the appointment of counsel to represent him in this case. Said deputy prosecuting attorney coerced the un-counseled Erlewein by means of threats to enter into an uncounseled guilty plea. That had not the deputy prosecuting attorney coerced Erlewein into the plea, and had Erlewein conferred with counsel; Erlewein would not have plead guilty.

Appellant's Appendix at 33-34. According to Erlewein, his affidavit stands for the proposition that the prosecutor told him that the State would forego habitual offender charges if he would plead guilty to the charges and waive his right to counsel.

We think this is too broad a reading of Erlewein's affidavit. The affidavit does not allege that the prosecutor required Erlewein to proceed without counsel as a condition of the plea agreement and only makes vague references to threats and coercion by the prosecutor. Consequently, we disagree with Erlewein that we "should follow the course charted by the panel in Hood." Appellant's Reply Brief at 2. Erlewein presented no

evidence that his guilty plea was conditioned upon his waiver of counsel, and, thus, Hood is inapplicable here. Erlewein makes no other argument concerning his guilty plea or lack of counsel and has failed to demonstrate that the post-conviction court's judgment is clearly erroneous.

For the foregoing reasons, we affirm the post-conviction court's denial of Erlewein's petition for post-conviction relief.

Affirmed.

KIRSCH, C. J. and MATHIAS, J. concur