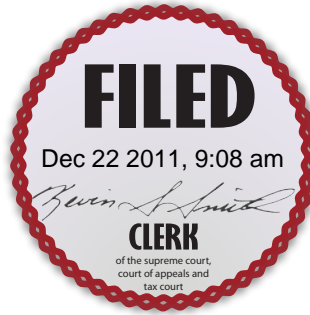


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**IN THE
COURT OF APPEALS OF INDIANA**

SHAWN THOMAS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 39A04-1105-CR-259

APPEAL FROM THE JEFFERSON CIRCUIT COURT
The Honorable Ted R. Todd, Judge
Cause No. 39C01-1012-FB-152
Cause No. 39C01-1011-FA-141

December 22, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Shawn Thomas appeals from the trial court's denial of his Motion for Withdrawal of Guilty Plea. The sole issue on appeal is: Did the trial court abuse its discretion in denying Thomas's request to withdraw his guilty plea before the court accepted the plea and sentenced Thomas?

We affirm.

On November 6, 2010, Thomas and others, including Ashley Jansen, conspired to break into the residence of Ryan Gray to rob him of property, specifically to rob him of a synthetic drug known as "White Lightning." *Guilty Plea Transcript* at 14. On that day, Thomas and the others entered Gray's residence after Jansen, who was staying with Gray at the time, unlocked the front door that Gray had previously locked and sent a text to Thomas and the others directing them to come to Gray's residence. Once inside Gray's residence, Thomas and the others beat and robbed Gray of his "White Lightning," among other things. *Id.* As a result of this incident, on November 8, 2010, the State charged Thomas under Cause No. 39C01-1011-FA-141 (Cause FA-141) with Count I, class A felony burglary, Count II, class A felony conspiracy to commit burglary, Count III, class B felony robbery, and Count IV, class B felony conspiracy to commit robbery.

On December 10, 2010, while Thomas was incarcerated in Cause FA-141, the State charged him under Cause No. 39C01-1012-FB-152 (Cause FB-152) with Count I, class B felony burglary, and Count II, class D felony theft. These charges stemmed from an incident that occurred on March 15, 2010, during which Thomas broke into and entered the dwelling of Jeffrey Buchanan, a structure used for religious worship, with the intent to commit a theft therein. In fact, Thomas took a television from the home.

On January 12, 2011, Thomas entered into a plea agreement with the State that encompassed both causes and called for a total aggregate sentence of twenty-five years. The plea agreement provided Thomas with an advisement of his rights, the sentencing ranges for the offenses to which he was pleading, and advised him of the rights he was waiving by pleading guilty. Further, as part of the plea agreement, Thomas acknowledged that the facts as contained in the probable cause affidavits in the two causes were true and that they provided a sufficient factual basis for his guilty plea.

On that same date, the court held a hearing on the guilty plea. Thomas acknowledged that he understood the plea agreement and his rights as set forth therein. The charging informations were read aloud and Thomas agreed therewith. A factual basis was then made for each offense to which Thomas was pleading. Thereafter, Thomas pleaded guilty pursuant to the terms of the plea agreement to Counts I and III under Cause FA-141 and to Count I under Cause FB-152, and the State dismissed the remaining charges. At the conclusion of the hearing, the trial court took Thomas's guilty plea under advisement.

On February 9, 2011, Thomas filed a motion to withdraw his guilty plea. On April 20, 2011, the trial court held a hearing on Thomas's motion. At the beginning of that hearing, Thomas filed an amended motion to withdraw his guilty plea. In his amended motion, Thomas contended that he should be allowed to withdraw his guilty plea because (1) "due to his incarceration he was not clear-headed in evaluating his options, and made a hasty decision to plead guilty;" (2) the sentence set forth in the plea agreement "is not just when considering all the circumstances;" and (3) his guilty plea was not knowing and voluntary "in that it lacked a factual basis." *Appellant's Appendix* at 30. After hearing evidence and

argument, the trial court denied Thomas's motion for withdrawal of his guilty plea. The court immediately proceeded to sentence Thomas pursuant to the terms of the plea agreement. Accordingly, Thomas was sentenced to twenty-five years for Count I (Cause FA-141), fifteen years on Count III (Cause FA-141), and fifteen years on Count I (Cause FB-152), with the sentences to be served concurrently.

Thomas now challenges the trial court's denial of his motion to withdraw his guilty plea. On appeal, Thomas argues that the trial court abused its discretion when it denied his motion to withdraw his guilty plea prior to sentencing because his guilty plea was not knowingly and intelligently made due to the lack of an adequate factual basis for the plea and the fact that he was not on medication for his bi-polar condition at the time he entered his guilty plea.

Motions to withdraw guilty pleas are governed by Ind. Code Ann. § 35-35-1-4 (West, Westlaw current through 2011 1st Regular Sess.). After the plea of guilty but before sentencing, a court may grant the motion for "any fair or just reason." *Id.* The court, however, is required to grant the motion to prevent "manifest injustice" and is required to deny the motion when the State would be "substantially prejudiced." *Id.*; *see also Smallwood v. State*, 773 N.E.2d 259 (Ind. 2002). The trial court's decision is reviewed for abuse of discretion. *Smallwood v. State*, 773 N.E.2d 259. Upon appeal:

The trial court's ruling on a motion to withdraw a guilty plea arrives in our Court with a presumption in favor of the ruling. *Coomer v. State*, 652 N.E.2d 60, 62 (Ind. 1995). One who appeals an adverse decision on a motion to withdraw must therefore prove the trial court abused its discretion by a preponderance of the evidence. *Weatherford v. State*, 697 N.E.2d 32, 34 (Ind. 1998).

Johnson v. State, 734 N.E.2d 242, 245 (Ind. 2000).

We first address Thomas's claim that there was an insufficient factual basis for his guilty plea. Specifically, Thomas challenges the factual basis provided to support his conviction for burglary as a class A felony under Cause FA-141.

We begin by noting that a court may not accept a guilty plea unless the court determines that a sufficient factual basis exists to support the plea. *Rhoades v. State*, 675 N.E.2d 698 (Ind. 1996); *see also* I.C. § 35-35-1-3 (West, Westlaw current through 2011 1st Regular Sess.). A trial court's finding of an adequate factual basis is presumptively correct. *Rhoades v. State*, 675 N.E.2d 698. Additionally, the standard for a sufficient factual basis to support a guilty plea is less rigorous than that required to support a conviction. *Id.* A factual basis may be established by relatively minimal evidence about the elements of the crime from which the court could reasonably conclude that the defendant is guilty. *Graham v. State*, 941 N.E.2d 1091 (Ind. Ct. App. 2011).

The factual basis for a burglary conviction must establish that the defendant did knowingly break and enter into a dwelling house or place of human habitation with intent to commit a felony therein. Ind. Code Ann. § 35-43-2-1 (West, Westlaw current through 2011 1st Regular Sess.). The "breaking" element of burglary may be established by evidence showing even the slightest use of force to gain unauthorized entry. *Davis v. State*, 743 N.E.2d 751 (Ind. 2001) (citing *Trice v. State*, 490 N.E.2d 757 (Ind. 1986)). This includes opening an unlocked door or pushing a door that is slightly ajar. *Id.*

Thomas maintains that he did not break into Gray's home because he merely walked through a door that was opened by someone else. In *Gebhart v. State*, 525 N.E.2d 603 (Ind.

1988), our Supreme Court was presented with this very same issue. In that case, the defendant argued that the evidence was insufficient to support his burglary conviction because he did not break and enter the residences; he simply walked through a door that was opened by one of his accomplices who had crawled into the house through a window. Our Supreme Court rejected defendant's argument, noting that while the defendant may not have performed each individual element of the crime charged, he is liable for the acts of his accomplices. The accomplices testified that they gained entry into the homes by crawling into the houses through a window. Such testimony supplied direct evidence of the breaking element of burglary.

Here, the factual basis consisted of evidence that Jansen, a confederate and active participant in the burglary of Gray's home, sent a text message to Thomas and the others summoning them to Gray's house, unlocked the front door that Gray had previously locked, and opened the door so Thomas and the others could enter Gray's home. During the guilty plea hearing, Thomas admitted that it was Jansen that opened the door so that he and the others could gain entry. As was the case in *Gebhart*, this evidence sufficiently establishes the breaking element of burglary. There is no dispute that Thomas entered the home with intent to commit a theft therein. Further, the probable cause affidavit, the facts of which Thomas acknowledged were true in his plea agreement, are consistent with the facts as set forth at the guilty plea hearing. Based on the foregoing, the trial court did not abuse its discretion in concluding that this evidence provided a sufficient factual basis for the burglary offense under Cause FA-141.

We further note that during the guilty plea hearing, the trial court read the charges to

Thomas and Thomas admitted his guilt to the charges encompassed by the plea agreement. This court has before noted that this, alone, is sufficient to establish a factual basis for a guilty plea. *See Oliver v. State*, 843 N.E.2d 581 (Ind. Ct. App. 2006) (holding that an adequate factual basis may be established by the defendant's admission of the truth of the allegations contained in the information read in court), *trans. denied*.

As noted above, the evidence necessary for establishing a factual basis is considerably less than that needed for a conviction. A review of the record clearly establishes that a sufficient factual basis was provided for the burglary count under FA-141. Therefore, Thomas's claim of an insufficient factual basis does not provide a fair and just reason for permitting him to withdraw his guilty plea and certainly does not demonstrate that withdrawal was necessary to prevent a manifest injustice.

We next consider Thomas's claim that his plea was not knowing and voluntary because he "was not clear-headed in evaluating his options, and made a hasty decision to plead guilty." *Appellant's Appendix* at 30. During the hearing on his motion to withdraw, Thomas claimed that his guilty plea was not voluntary because he had previously been diagnosed with bi-polar disorder, had been prescribed medication for that condition, but had not been receiving his medication while incarcerated and thus, was not taking his medication at the time of his guilty plea hearing. Thomas maintains that he thinks more clearly when he is on his medication.

When questioned by the State, Thomas admitted that he had not been taking his medication for months prior to committing the crimes and that he was not taking his medication at the time of the hearing on his motion to withdraw his guilty plea. Thomas

further admitted that at the time he pleaded guilty, he did not inform the court or his attorney about his concerns regarding his mental state. A review of the guilty plea hearing shows that Thomas's answers to the court's and counsel's questions were clear and lucid. There is nothing in the record indicating that Thomas was not thinking clearly at the time of his guilty plea hearing.

Thomas's only evidence that his guilty plea was not knowing and voluntary is his testimony that the medication prescribed for his condition "helps him think clearer." *Transcript* at 7. Thomas did not state that he was not thinking clearly at the time of the guilty plea hearing. Moreover, Thomas acknowledged to the court and in the plea agreement that his plea was knowingly and voluntarily made. Thomas's claim that his guilty plea was not knowing and voluntary is entirely unsupported by the record before us. We thus conclude that Thomas has not demonstrated that the trial court abused its discretion in denying his amended motion to withdraw his guilty plea on this basis. Thomas failed to prove by a preponderance of the evidence that he had any fair and just reason for the court to permit the withdrawal of his guilty plea, and he certainly did not demonstrate that withdrawal was necessary to prevent a manifest injustice.

Judgment affirmed.

RILEY, J., and MATHIAS, J., concur.