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IN THE
COURT OF APPEALS OF INDIANA

ANTHONY A. HOPKINS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A05-0705-PC-279
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Judge
The Honorable Amy J. Barbar, Magistrate
Cause No. 49G02-9903-PC-43913

December 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Anthony A. Hopkins appeals the post-conviction court's denial of one of his claims for post-conviction relief. Specifically, he contends that the post-conviction court erred in concluding that he did not plead guilty to being a habitual offender but rather stipulated to the underlying felonies. Therefore, Hopkins' argument continues, the trial court's failure to advise him of his *Boykin* rights caused his guilty plea to be involuntary and unintelligent, requiring it to be vacated. Because Hopkins admitted to the habitual offender enhancement, and not just to the underlying felonies, we conclude that he, in fact, pled guilty to being a habitual offender. Because the record shows that the trial court did not advise Hopkins of all of his *Boykin* rights, his plea was thus unknowing and involuntary and must be vacated. Accordingly, we reverse the post-conviction court on this issue and remand for further proceedings.

Facts and Procedural History

The facts underlying this appeal, taken from the Indiana Supreme Court's opinion in Hopkins' first direct appeal, are as follows:

> The facts most favorable to the judgment indicated that in the early morning of March 9, 1999, the victims, George Martinez and Paula McCarty, were on their way to Martinez's home. They encountered Defendant and his brother, Edward, who were stranded on the roadside attempting to get a jump from another car. Martinez and Defendant had engaged in drug transactions in the past. Martinez and McCarty stopped the car and assisted Defendant and his brother. Defendant told Martinez that his car had been breaking down. Martinez told Defendant that if he had anything he did not want to get caught with, they could stop by his house and drop it off.
>
> Soon after Martinez and McCarty returned home, Defendant and Edward showed up. Defendant asked Martinez to hold onto his gun for him. About fifteen minutes later, Defendant and Edward returned. When Martinez returned Defendant's gun, Defendant locked the door and then

> pointed the gun at Martinez and ordered Martinez and McCarty into the basement and told them to take their clothes off. McCarty resisted and Defendant hit her on the head with the gun. Once in the basement, Defendant took $4,500 from Martinez and $40 from McCarty. Defendant said that that was not enough, gave Edward the gun, and went upstairs to look for drugs and more money. Defendant found approximately two or three pounds of marijuana upstairs. Defendant yelled, "Where's it at?," as he searched the house.
>
> While Defendant was still upstairs, Edward shot Martinez in the shoulder as Martinez and McCarty both pleaded for their lives. Edward was about three feet away and the bullet entered Martinez's shoulder, ricocheted into his neck, hit his carotid artery, and exited through his ear. Martinez lost consciousness. McCarty assumed that Martinez was dead, and testified that she thought Edward had blown the back of Martinez's head off. Martinez survived, but was in an intensive care unit for thirteen days as a result of being shot.
>
> After Edward shot Martinez, Defendant returned to the basement and took the gun from Edward. Defendant then shot McCarty. As Defendant shot her, McCarty moved around so that he wouldn't hit her in the head. When she fell to the ground she pretended to be dead. Defendant and Edward went upstairs and left the house. Martinez regained consciousness and they were able to call for help. McCarty had been shot in the chest, and suffered a severed spinal cord, punctured lung, paralysis in her arm, and is now confined to a wheelchair.

Hopkins v. State, 759 N.E.2d 633, 636 (Ind. 2001).

In March 1999, the State charged Hopkins with two counts of attempted murder, two counts of Class A felony robbery, two counts of Class B felony criminal confinement, and one count of Class C felony carrying a handgun without a license. The State later added a habitual offender charge. Following a March 2000 jury trial, Hopkins was convicted as charged.[1] As described in much detail later in this opinion, defense counsel then told the court that Hopkins wanted to "admit to the elements involved in the habitual offender," Trial Tr. p. 737, and the trial court ultimately concluded that the State

[1] Judgment of conviction was entered for both counts of robbery as a Class B felony and for both counts of criminal confinement as a Class D felony.

had proved that Hopkins was a habitual offender. The trial court sentenced Hopkins to consecutive terms totaling 166 years.

On direct appeal, the Indiana Supreme Court reversed Hopkins' conviction for the attempted murder of Martinez due to an improper jury instruction but affirmed his other convictions. *Id.* at 639. In July 2002, Hopkins was retried for the attempted murder of Martinez, and the jury found him guilty as charged. The trial court sentenced Hopkins to fifty years and ordered this sentence to run consecutively to his other sentences. This Court affirmed Hopkins' conviction for the attempted murder of Martinez on direct appeal. *Hopkins v. State*, No. 49A02-0209-CR-780 (Ind. Ct. App. Sept. 30, 2003).

In September 2004, Hopkins filed a *pro se* petition for post-conviction relief, which was amended by counsel in April 2006. In his petition, Hopkins first alleged that appellate counsel during his second direct appeal was ineffective for failing to argue that his consecutive sentences for the two attempted murders and the two criminal confinements were improper under the version of Indiana Code § 35-50-1-2 in effect at the time the crimes were committed because the crimes constituted a single episode of criminal conduct and the aggregate sentence was therefore limited to the presumptive sentence for the next higher class of felony. Second, Hopkins alleged that his "plea to the habitual offender adjudication" was not voluntary and intelligent because the trial court did not advise him of his *Boykin* rights. Appellant's App. p. 75. Following a hearing, in November 2006 the post-conviction court entered findings of fact and conclusions of law granting relief in part and denying relief in part. Regarding the first claim, the post-conviction court concluded that appellate counsel "was ineffective for failing to raise as

error in the direct appeal that the sentences imposed upon Hopkins violated the consecutive sentencing limits of I.C. 35-50-1-2" and set the matter for resentencing.[2] *Id.* at 118. As for the second claim, the court denied relief. In March 2007, Hopkins filed a motion to correct error with respect to the second claim, which the court granted. However, the court still denied relief in an order that provides, in pertinent part:

> 1. Petitioner claims he was denied due process when the trial court failed to advise him of his *Boykin* rights during his "plea to the habitual offender adjudication." However, the Court finds that the proceeding in the habitual offender phase was more in the nature of a court trial than a guilty plea hearing.
>
> 2. After verdicts were taken on the underlying offenses, the Court removed the jury from the courtroom. Petitioner's counsel informed the Court that Petitioner wished to "admit to the elements involved in the habitual offender." (Exhibit 1, p. 737).
>
> 3. The Petitioner was sworn in and the following colloquy took place (Exhibit 1, p. 737-740):
>
> THE COURT: Mr. Hopkins, you're aware that you have the continuing right to have this phase of the trial determined by the jury which has previously been sworn in this cause – is that correct sir?
>
> PETITIONER: Yes.
>
> THE COURT: And it's your choice to waive that jury trial and to proceed by stipulation and admit your guilt on the – or and admit that the State has proven the habitual offender sentence enhancement – is that correct sir?
>
> (*Page 738-40 the Petitioner and the Court discuss ramifications to an appeal and sentencing ranges with the habitual).*
>
> THE COURT: Okay – I believe I asked you, but let me repeat or – just to cover my bases, that you have the right to – continued right to counsel throughout the habitual phase of this trial. Do you understand that?
>
> PETITIONER: Yes.
>
> THE COURT: Okay. Do you want to proceed with the stipulation of the habitual sentencing enhancement, at this time?
>
> PETITIONER: Yes, ma'am.
>
> *The State then presented its evidence in the form of documents and fingerprints, and exhibits were admitted without objection of counsel.*
>
> *Page 742:*

[2] Hopkins filed a Notice of Appeal before his resentencing. According to the CCS, it appears that Hopkins has not been resentenced because of this appeal.

THE COURT: Okay, Mr. Hopkins, is that true as stated by the Prosecutor?

PETITIONER: Yes, ma'am.

After further discussion of the sentencing parameters, the Court went on as follows (Page 746):

THE COURT: Okay, the Court finds that the State has proven that Anthony Hopkins accumulated three – two or more – in this case, three, prior unrelated convictions . . . [a]nd we will show that the sentence enhancement has been – habitual sentence enhancement has been proven.

4. This case is analogous to the situation addressed in *Garrett v. State*, 737 N.E.2d 388 (Ind. 2000). The Court held that "a stipulation that seeks to establish certain facts does not constitute a guilty plea. . . . The stipulation at issue only acknowledged that Garrett had been convicted of the prior offenses and sentenced on certain dates. Thus, it established only the fact that the prior offenses existed and did not amount to a guilty plea." [*Id.*] at 392.

5. The proceedings herein were not tantamount to a guilty plea. Thus, the trial court was not required to advise the Petitioner on various rights that could be waived by pleading guilty.

Appellant's App. p. 124-25. As such, the post-conviction court denied Hopkins relief on this claim. Hopkins now appeals.

Discussion and Decision

A defendant who has exhausted the direct appeal process may challenge the correctness of his convictions and sentence by filing a petition for post-conviction relief. *Carew v. State*, 817 N.E.2d 281, 285 (Ind. Ct. App. 2004), *trans. denied*. Post-conviction procedures do not provide an opportunity for a "super-appeal"; rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Id.*; *see also Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006). Post-conviction proceedings are civil proceedings, so a defendant must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Carew*, 817 N.E.2d at 285.

A petitioner who appeals the denial of post-conviction relief faces a rigorous standard of review. *Benefiel v. State*, 716 N.E.2d 906, 911 (Ind. 1999), *reh'g denied*. The reviewing court may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court. *Hall v. State*, 849 N.E.2d 466, 468 (Ind. 2006). Furthermore, while we do not defer to the post-conviction court's legal conclusions, we accept its factual findings unless they are clearly erroneous. *Carew*, 817 N.E.2d at 285. To prevail on appeal, the petitioner must establish that the evidence is uncontradicted and leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Hall*, 849 N.E.2d at 469.

Hopkins contends that "[t]he post-conviction court incorrectly concluded in its Order on petitioner's Motion to Correct Error that the proceeding in the Habitual Offender phase was more in the nature of a trial to the court rather than a guilty plea hearing." Appellant's Br. p. 8. Accordingly, he argues that the trial court's failure to advise him of his *Boykin* rights "caused his plea to be involuntary and unintelligent, which requires that the guilty plea be vacated." *Id.* at 13.

Here, the following colloquy took place at Hopkins' first trial outside the presence of the jury and before the habitual offender phase was set to begin:

> MR. GELLER: Yes, Judge, (inaudible) . . . . Judge, my client will *admit to the elements involved in the habitual offender*.
>
> * * * * *
>
> THE COURT: Mr. Hopkins, you're aware that you have the continuing right to have this phase of the trial determined by the Jury which has previously been sworn in this cause – is that correct?
> DEFENDANT ANTHONY HOPKINS: Yes.
> THE COURT: And it's your choice to waive that jury trial and to *proceed by stipulation and admit your guilt on the – or admit that the State has proven the habitual offender sentence enhancement* – is that correct, sir?

DEFENDANT ANTHONY HOPKINS: Is it – can I ask you a question on this?
THE COURT: Um hum . . . .
DEFENDANT ANTHONY HOPKINS: As far as me *pleading guilty* on that. If I appeal my case and over turn it – does that still stand – if I *pled guilty* for the habitual?

* * * * *

THE COURT: Okay – it is correct that if you appeal and the Court of Appeals over turns the conviction upon which the Court attaches the sentencing enhancement, then that's out – because it's not a new crime. It's enhancement of that sentence. It is also possible that the Court of Appeals could reverse and remand for retrial – if the reversal wasn't for insufficiency of the evidence. So, it could get reversed. It could come back and we could retry that count in theory and then the sentencing enhancement could again attach. Do you understand that?
DEFENDANT ANTHONY HOPKINS: Yes, ma'am.

* * * * *

THE COURT: Okay – I believe I asked you, but let me repeat or – just to cover my bases, that you have the right to – continuing right to counsel throughout the habitual phase of this trial. Do you understand that?
DEFENDANT ANTHONY HOPKINS: Yes, ma'am.
THE COURT: Okay. Do you want to *proceed with the stipulation of the habitual sentencing enhancement* at this time?
DEFENDANT ANTHONY HOPKINS: Yes, ma'am.

[The State then set forth the dates of the commission, conviction, and sentencing of the three felony offenses used to establish Hopkins' habitual offender status, and the exhibits were admitted into evidence without objection from Hopkins.]

THE COURT: Okay, Mr. Hopkins, is that true as stated by the Prosecutor?
DEFENDANT ANTHONY HOPKINS: Yes, ma'am.

* * * * *

THE COURT: Okay, the Court *finds that the State has proven that Anthony Hopkins accumulated three – two or more – in this case, three, prior unrelated felony convictions.* The commission, conviction and sentencing on the first occurring before the commission, conviction, and sentencing [on the second]; the second which occurred before the commission, conviction and sentencing on the third – all of which occurred before the commission and conviction of Mr. Hopkins in the present case. And we will show that the sentence enhancement has been – *habitual sentence enhancement has been proven*.

Trial Tr. p. 737-47 (emphases added). The trial court then brought the jurors back into the courtroom and informed them what had just transpired. Specifically, the court stated, "Okay – the good news is that [phase two] of this trial, the Defendant[] and the State *resolved by stipulation or admission*." *Id.* at 748 (emphasis added).

Citing *Garrett v. State*, 737 N.E.2d 388 (Ind. 2000), the State characterizes Hopkins' admission as a stipulation to the evidence underlying the enhancement. In *Garrett*, the defendant claimed that his stipulation to prior convictions during the habitual offender phase of the trial was tantamount to a guilty plea, requiring all the attendant advisements. The Indiana Supreme Court held otherwise, stating "The stipulation at issue only acknowledged that Garrett had been convicted of the prior offenses and sentenced on certain dates. Thus, it established only the fact that the prior offenses existed and did not amount to a guilty plea." *Id.* at 392. The parties still made opening and closing arguments, and the case was submitted to the jury for its consideration.

Here, however, the parties did not make open and closing arguments during the habitual offender phase of the trial, and the case was not submitted to the jury for its consideration. In addition, Hopkins used the words "pleading guilty" and "pled guilty" and testified that he was admitting that "the State has proven the habitual offender *sentence enhancement*," not that he was just admitting to the underlying convictions. *Garrett* is thus inapposite.

Instead, we find this case to be more akin to *Vanzandt v. State*, 730 N.E.2d 721 (Ind. Ct. App. 2000), upon which Hopkins relies on appeal. Specifically, in *Vanzandt*, the trial court asked Vanzandt, "[Y]our attorney has just advised the Court that you wish

to admit to the enhancement?", to which Vanzandt responded in the affirmative. *Id.* at 725 (record citation omitted). On appeal, this Court held that because Vanzandt testified that he was admitting to the *enhancement*, Vanzandt, in fact, entered a plea of guilty to the habitual offender charge. Because Hopkins, too, admitted to the enhancement, his stipulation was the equivalent of a guilty plea.[3] Accordingly, the trial court was required to advise him of his *Boykin* rights, which include the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Because the record shows that the trial court only advised Hopkins of his right to trial by jury, his guilty plea to being a habitual offender was thus unknowing and involuntary and must be vacated. We therefore reverse the post-conviction court on this issue.

Reversed and remanded for further proceedings.

BAILEY, J., concurs.

BAKER, C.J., dissents with separate opinion.

[3] We note that in our Supreme Court's opinion in Hopkins' first direct appeal, the Court stated in the Background section of the opinion, "Defendant then pled guilty to being a habitual offender." *Hopkins*, 759 N.E.2d at 637. This bolsters our conclusion that Hopkins, in fact, pled guilty to being a habitual offender.

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	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

Baker, Chief Judge, dissenting.

I respectfully dissent from the majority opinion. I acknowledge that Hopkins said more than was necessary to stipulate to the facts underlying a habitual offender enhancement and that the trial court's language was not as precise as it might have been during the dialogue with Hopkins on this issue. But it is readily apparent that Hopkins, the State, and the trial court intended and understood that he was stipulating to the facts underlying the charge rather than pleading guilty thereto. I simply cannot conclude that a factual stipulation—a useful and efficient tool for criminal defendants and the judicial system—magically transforms into a guilty plea unless the defendant takes an explicit, affirmative action indicating his desire to do so. Here, that did not occur. Consequently, I believe that the conclusion reached by the majority elevates form over substance to an untenable degree and I respectfully dissent.