

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.



ATTORNEYS FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

**SUSAN K. CARPENTER**  
Public Defender of Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**STEPHEN T. OWENS**  
Deputy Public Defender  
Indianapolis, Indiana

**KARL M. SCHARNBERG**  
Deputy Attorney General  
Indianapolis, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

JUAN HERRERA, )

Appellant-Defendant, )

vs. )

No. 20A04-0809-PC-558

STATE OF INDIANA, )

Appellee-Plaintiff. )

---

APPEAL FROM THE ELKHART CIRCUIT COURT  
The Honorable Terry C. Shewmaker, Judge  
Cause No. 20C01-0601-FA-15

---

**April 9, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Juan Herrera (Herrera), appeals the denial of his Amended Petition for Post-Conviction Relief.

We affirm.

## ISSUE

Herrera raises one issue, which we restate as: Whether the post-conviction court erred when it determined that he had failed to prove that his guilty plea was not knowingly, intelligently, or voluntarily given.

## FACTS AND PROCEDURAL HISTORY

Herrera is not a citizen of the United States and does not speak or understand the English language. On January 30, 2006, Herrera was charged with two counts of dealing cocaine weighing three grams or more, as Class A felonies, Ind. Code § 35-48-4-1, and one count of possession of cocaine with intent to deliver weighing more than three grams, a Class A felony, I.C. § 35-48-4-1, in Elkhart County, Indiana. Herrera agreed to provide information to the Organized Crime Unit at the Goshen Police Department concerning other individuals involved in criminal activities. There was discussion about Herrera receiving an eight year sentence in exchange for his cooperation, but no agreement to that effect was ever reached with the State. Herrera's trial counsel used the secretary from his office as an interpreter, to explain to Herrera the possible consequences of the charges he was facing. Herrera was offered a plea agreement by the State, considered the agreement with his trial counsel to determine whether it was in his best interest to accept, and ultimately decided that

it was. On August 17, 2006, Herrera pled guilty as charged pursuant to the written plea agreement, all sentences to run concurrently, with the executed portion of his sentence to be capped at thirty-five years. In addition, the State agreed to dismiss the charges he was facing under another cause number.<sup>1</sup> On September 21, 2006, the trial court sentenced Herrera to thirty-five years on each count, to be served concurrently.

On December 8, 2006, Herrera filed a Petition for Post-Conviction Relief. On May 5, 2008, Herrera filed a motion seeking leave to amend his petition, which was granted by the trial court that same day. On May 22, 2008, an evidentiary hearing was held on Herrera's Amended Petition for Post-Conviction Relief. On July 31, 2008, the trial court issued an order denying the Amended Petition for Post-Conviction Relief.

Herrera now appeals. Additional facts will be provided as necessary.

### DISCUSSION AND DECISION

Herrera argues that the post-conviction court erred when it denied his Amended Petition for Post-Conviction Relief. Specifically, he contends that he proved to the post-conviction court that his guilty plea was not entered into knowingly, intelligently, or voluntarily.

Post-conviction hearings do not afford defendants the opportunity for a “super appeal.” *Moffitt v. State*, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004), *trans. denied*. The

---

<sup>1</sup> The cause number for the charges which were dismissed is hand written at the bottom of his plea agreement, and appears to be “20C01-0604-FD-11.” (Appellant's App. p. 19). We do not have any further information about what charges were dismissed, but we glean from the cause number that the most serious charge would have been a Class D felony.

petitioner has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *see also id.* Because Herrera is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole unerringly and unmistakably leads us to believe there is no way within the law that a post-conviction court could have denied his post-conviction relief petition. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*, 540 U.S. 830 (2003). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*.

“Defendants who can prove that they were actually misled by the judge, the prosecutor, or defense counsel about the choices before them will present colorable claims for relief.” *White v. State*, 497 N.E.2d 893, 905-06 (Ind. 1986). Our review of the voluntariness of a guilty plea “focuses on whether the defendant knowingly and freely entered the plea.” *State v. Moore*, 678 N.E.2d 1258, 1266 (Ind. 1997). We review all the evidence before the post-conviction court, including testimony given at the post-conviction trial, the transcript of the original sentencing, and any plea agreements or other exhibits which are part of the record. *Id.*

In essence, Herrera’s claim is that he believed that he would get more of a benefit in exchange for the information which he gave to the Goshen Police Department. However, this is a difficult claim for him to advance because we are confronted with a written plea

agreement which shows otherwise. A plea agreement is a contract, an explicit agreement between the State and the defendant which is binding upon both parties when accepted by the trial court. *Griffin v. State*, 756 N.E.2d 572, 574 (Ind. Ct. App. 2001), *reh'g denied, trans. denied*. As such, the principles of contract law can provide guidance in the consideration of plea agreements. *Id.* The primary goal of contract law is to give effect to the parties' intent; when the terms of a contract are clear and unambiguous, they are conclusive of that intent, and the court will not construe the contract or look to extrinsic evidence. *Id.*

Moreover, reviewing the transcripts of the guilty plea and sentencing hearing, which the post-conviction court admitted into evidence, we note that Herrera was provided the assistance of a sworn translator and informed of the terms of the plea agreement on the record. We also note that Herrera was specifically asked by the trial court whether he had received any promises other than his plea agreement or if he had been given anything of value to cause him to plead guilty to the three charges, to which Herrera replied "no." (Petitioner's Exhibit 1, p. 16). Additionally, the trial court inquired as to whether he had been offered any leniency or special treatment other than his plea agreement to cause him to enter a plea of guilty to the charges, to which Herrera replied, "no." (Petitioner's Exhibit 1, p. 16). Further, the trial court asked Herrera if he felt that his plea of guilty was his own free and voluntary act, to which Herrera replied, "yes." (Petitioner's Exhibit 1, p. 16).

The only evidence which Herrera presents which might tend to demonstrate that his plea was involuntary or coerced is his own statement that he believed, because of his cooperation, he would get a sentence of eight years despite the fact that he signed the plea

agreement which left to the trial court the discretion to enter a sentence for up to thirty-five years executed. However, such a “belief” is better characterized as “hope.” Herrera stated at the post-conviction hearing that he understood that at sentencing his attorney would be “fighting to get less [than thirty-five years] because he thought it was unfair.” (Tr. p. 21). As such, Herrera understood that the plea agreement gave him only a chance at getting less than thirty-five years, but nevertheless, signed the agreement. Therefore, we conclude that the post-conviction court did not err when it determined that Herrera did not prove that his act of pleading guilty pursuant to the plea agreement was not knowing, intelligent, or voluntary.

#### CONCLUSION

Based on the foregoing, we conclude that the post-conviction court did not err when it denied Herrera’s Amended Petition for Post-Conviction Relief.

Affirmed.

DARDEN, J., and VAIDIK, J., concur.