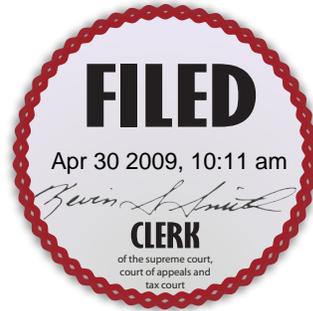


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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LENN IVY, )  
 )  
 Appellant-Defendant, )  
 )  
 vs. ) No. 49A04-0808-PC-478  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Patricia Gifford, Judge  
Cause No. 49G04-8802-PC-15425

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**April 30, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Lenn Ivy appeals the denial of his post-conviction relief (“PCR”) petition, which challenged a conviction for Class B felony burglary. We affirm.

### **Issues**

The combined and restated issues we address are:

- I. whether Ivy received ineffective assistance of trial counsel; and
- II. whether there was a sufficient factual basis for Ivy’s guilty plea to burglary.

### **Facts**

In 1988, Ivy pled guilty to one count of Class B felony burglary and was sentenced to a term of imprisonment of six years. The probable cause affidavit for Ivy’s arrest was used to support the factual basis. That affidavit revealed that a witness picked Ivy out of a police photo array as an individual he had observed on January 18, 1988, leaving a residence in Indianapolis carrying a television to a car and saying to him, “Brother, you’re not going to tell.” App. p. 22. The owner of the residence later reported that her door had been kicked in and a number of items were missing, including several television sets.

On November 18, 2005, Ivy filed a pro se PCR petition. The petition specifically alleged that he received ineffective assistance of counsel and that there was an insufficient factual basis for his guilty plea. The reason given for counsel’s ineffectiveness was that he “did not conducted [sic] no [sic] pre-trial investigation, filed

no motions.” Id. at 53. Ivy later filed an “addendum” to his PCR petition, which alleged he was illegally apprehended by police on February 10, 1988, and that this illegal seizure should have required any evidence obtained after that date to be suppressed.

The post-conviction court originally scheduled a hearing for August 23, 2006. However, it continued the hearing because neither Ivy’s trial attorney nor the original deputy prosecutor had responded to subpoenas to appear. On January 10, 2007, the post-conviction court conducted a hearing, although the trial attorney and deputy prosecutor again failed to appear. The post-conviction court informed Ivy that it was taking judicial notice of the original trial/guilty plea record. On June 11, 2008, the post-conviction court denied Ivy’s petition.<sup>1</sup> Ivy now appeals.

### **Analysis<sup>2</sup>**

Post-conviction proceedings provide defendants the opportunity to raise issues not known or available at the time of the original trial or direct appeal. Stephenson v. State, 864 N.E.2d 1022, 1028 (Ind. 2007), cert. denied. “In post-conviction proceedings, the defendant bears the burden of proof by a preponderance of the evidence.” Id. We review factual findings of a post-conviction court under a “clearly erroneous” standard but do not defer to any legal conclusions. Id. We will not reweigh the evidence or judge the

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<sup>1</sup> The reason for the delay in ruling on Ivy’s petition is not clear. Both Ivy and the State had filed proposed findings and conclusions for the case by March 2, 2007.

<sup>2</sup> Ivy’s brief is not entirely cogent. To the extent he is attempting to raise freestanding claims of error, aside from ineffective assistance of counsel or inadequate factual basis for his guilty plea, such claims cannot be addressed in a post-conviction proceeding. See Martin v. State, 760 N.E.2d 597, 599 (Ind. 2002). Ivy also mentions the possibility that the prosecution violated Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), by not disclosing evidence favorable to him. He fails to identify the substance of any such evidence and we will not examine this claim further.

credibility of the witnesses and will examine only the probative evidence and reasonable inferences therefrom that support the decision of the post-conviction court. Id.

At the outset, we acknowledge Ivy's argument that the post-conviction court erred by taking judicial notice of his original trial/guilty plea proceedings. Ivy is correct that a post-conviction court may not take judicial notice of the record from the original proceedings unless exceptional circumstances exist. See Bahm v. State, 789 N.E.2d 50, 58 (Ind. Ct. App. 2003) (citing State v. Hicks, 525 N.E.2d 316, 317 (Ind. 1988)), trans. denied. The original record "must be admitted into evidence just like any other exhibit." Id. The post-conviction court clearly erred when it took judicial notice of Ivy's trial/guilty plea proceedings. See id.

Ivy is mistaken, however, to the extent he seems to claim that this error requires reversal of the denial of his PCR petition. This being a PCR proceeding, it was not the State's burden to prove that Ivy's plea was supported by a sufficient factual basis and that he received effective assistance of counsel. It was Ivy's burden to prove the opposite. We reiterate that a petitioner for post-conviction relief has the burden of establishing grounds for relief by a preponderance of the evidence, because of the presumption of regularity that attaches to final judgments. Hall v. State, 849 N.E.2d 466, 472 (Ind. 2006). What that means in this case is that it was Ivy, not the State, who had to produce the record of his original trial/guilty plea proceedings to establish his entitlement to post-

conviction relief.<sup>3</sup> The fact that the post-conviction court gratuitously, albeit erroneously, took judicial notice of those proceedings only served to provide some basis upon which the court could assess the merits of Ivy's PCR claims.

### *I. Ineffective Assistance of Counsel*

To establish a claim alleging a violation of the Sixth Amendment right to effective assistance of counsel, a defendant must establish the two components set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Overstreet v. State, 877 N.E.2d 144, 151-52 (Ind. 2007), cert. denied. First, a defendant must show that counsel's performance was deficient, i.e. that it fell below an objective standard of reasonableness. Id. at 152. Second, a defendant must show that the deficient performance prejudiced the defense. Id. To show prejudice where a defendant has pled guilty, the defendant must show a reasonable probability that he or she would not have been convicted if the case had gone to trial. Segura v. State, 749 N.E.2d 496, 498-99 (Ind. 2001). Counsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption. Overstreet, 877 N.E.2d at 152.

Ivy's precise PCR contentions have been a moving target throughout the proceedings. On appeal, he asserts that trial counsel should have filed motions to suppress the police photo array identification of him, as well as his seizure and arrest several days before the identification occurred. However, Ivy fails to present cogent analysis as to why either of those events was improper. It is true that Ivy's presentation

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<sup>3</sup> Ivy's apparent attempt to pick and choose certain items from the record he wanted to present to the post-conviction court would not have met this burden.

of his PCR case may have been somewhat hampered by the inability to locate his trial counsel. Nonetheless, we will not presume trial counsel was ineffective without some explanation for why that was the case. See Ind. Appellate Rule 46(A)(8)(a); Cooper v. State, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (noting that arguments not supported by cogent argument are waived for appellate review).

## ***II. Factual Basis for Plea***

There must be a sufficient factual basis to support a guilty plea before a trial court may accept it. Dewitt v. State, 755 N.E.2d 167, 172 (Ind. 2001). “A factual basis exists when there is evidence about the elements of the crime from which a trial court could reasonably conclude that the defendant is guilty.” Id. Relatively minimal evidence can be adequate to meet this test, and the factual basis of a guilty plea need not be established beyond a reasonable doubt. Id. To be entitled to post-conviction relief, a defendant must prove that he or she was prejudiced by the lack of a factual basis. Id.

Ivy does not dispute that the trial court relied upon the probable cause affidavit to provide a factual basis for his guilty plea to burglary. That document provides evidence that Ivy was seen coming from a house, later reported as forcibly entered and burglarized, carrying a television set to a car and saying to a witness, “Brother, you’re not going to tell.” App. p. 22. Although this does not constitute a direct admission of guilt on Ivy’s part, it clearly is sufficient to provide a factual basis for his guilty plea. Additionally, Ivy’s attempt to challenge the probable cause affidavit’s reference to his seizure on

February 10, 1988, is unavailing for the reason we have already given: a failure to cogently explain why that seizure was improper.

### **Conclusion**

Ivy has failed to establish that he received ineffective assistance of trial counsel, and there was a sufficient factual basis for his guilty plea. Other arguments Ivy attempts to raise on appeal either are inappropriate for PCR proceedings or not support by cogent argument. The post-conviction court properly denied Ivy's PCR petition.

Affirmed.

BAKER, C.J., and MAY, J., concur.