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IN THE
COURT OF APPEALS OF INDIANA

CHARLES DURHAM,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A04-0901-PC-42
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey L. Marchal, Magistrate
Cause No. 49G06-0010-PC-184544

June 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Respondent Charles Durham appeals the denial of his petition for post-conviction relief. Upon appeal, Durham contends that the factual basis presented at his guilty plea hearing was insufficient to support his guilty plea. We affirm.

FACTS AND PROCEDURAL HISTORY

At some time prior to August 19, 2000, Laray Burks's vehicle was stolen. Burks's vehicle eventually came into the possession of Jeffrey Liggins, who parked the vehicle near his Indianapolis residence. On August 19, 2000, after seeing Liggins driving Burks's vehicle, Durham went with Burks to Liggins's residence. Durham approached Liggins's door and asked Liggins to come outside. Liggins came outside and the three men became engaged in a conversation.

As the conversation escalated, Burks pulled out a handgun and pointed it toward Liggins. Durham, aware that Burks was brandishing a handgun, approached and hit Liggins. When Liggins tried to run away, Durham grabbed Liggins to keep him from running. Durham held on to Liggins for a couple of seconds, but let go of him after Burks began shooting at Liggins. Burks ran after Liggins and fired additional shots. Each shot missed Liggins. Durham later admitted that while he did not know if Burks would actually hit Liggins, he knew that Burks would at least shoot at Liggins.

On October 18, 2000, the State charged Durham with one count of Class A felony attempted murder and one count of Class B felony criminal confinement. The State later amended the charging information, charging Durham with one count of Class C felony attempted battery with a deadly weapon. Durham pled guilty to the attempted battery with a

deadly weapon charge in exchange for the State's dismissing the attempted murder and criminal confinement charges. On February 21, 2001, the trial court accepted Durham's guilty plea and subsequently sentenced Durham to five years imprisonment with two years suspended and one year of supervised probation. Durham did not file a direct appeal.

On August 17, 2007, Durham filed a *pro se* petition for post-conviction relief ("PCR petition"). Durham, by counsel, filed an amended PCR petition on June 19, 2008, alleging that the trial court committed reversible error in accepting Durham's guilty plea because Durham had allegedly simultaneously maintained his innocence. Durham's PCR petition was subsequently denied. This appeal follows.

DISCUSSION AND DECISION

A post-conviction procedure is not an opportunity for a "super-appeal." *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002) (citations and quotations omitted). A petitioner who has been denied post-conviction relief appeals from a negative judgment, and must convince the appellate court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id*. "In other words, the defendant must convince this Court that there is no way within the law that the court below could have reached the decision it did." *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Where, as here, the post-conviction court's factual determinations were based solely upon a paper record, we owe no deference to the factual findings of the post-conviction court and

review said findings *de novo*.[1] *See Moshenek v. State*, 868 N.E.2d 419, 424 (Ind. 2007).

In order to convict Durham of Class C felony attempted battery with a deadly weapon, the State was required to prove that Durham (1) engaged in the commission of a substantial step toward (2) knowingly or intentionally (3) touching another person (4) in a rude, insolent, or angry manner (5) by means of a deadly weapon. Indiana Code § 35-42-2-1(a)(3) (2000); *see Berry v. State*, 819 N.E.2d 443, 449 (Ind. Ct. App. 2004) (stating that attempted battery with a deadly weapon occurs when a person knowingly or intentionally takes a substantial step toward touching another person in a rude, insolent, or angry manner by means of a deadly weapon), *trans. denied*. "The requisite culpability for attempted battery with a deadly weapon exists if the defendant's conscious objective is to shoot another person, or where the defendant is at least aware of a high probability that, by his or her conduct of shooting, one of the bullets would strike another person." *Stewart v. State*, 866 N.E.2d 858, 864 (Ind. Ct. App. 2007).

The State sought to convict Durham of battery with a deadly weapon as an accomplice rather than as the actual perpetrator of the crime. To do so, the State needed to prove that Durham knowingly or intentionally aided, induced, or caused another person to commit attempted battery with a deadly weapon, regardless of whether that other person had been

[1] We note that although the post-conviction court held a hearing on Durham's PCR petition, the post-conviction court's determination was based solely upon the paper record created below. Neither Durham nor the State presented any testimony. Durham merely offered into evidence before the post-conviction court certified copies of the transcripts of the guilty plea and sentencing hearings, the Affidavit for Probable Cause, the charging information, and the plea agreement. Likewise the State merely requested that the post-conviction court take judicial notice of its file. Therefore, our review upon appeal from the denial of Durham's PCR petition shall be *de novo*.

prosecuted, convicted, or acquitted of that offense. Indiana Code § 35-41-2-4 (2000); *Berry*, 819 N.E.2d at 449-50. The defendant may be convicted as a principal upon evidence that he aided or abetted in perpetration of the charged crime. *Berry*, 819 N.E.2d at 450.

The individual who aids another person in committing a crime is as guilty as the actual perpetrator. *Id*. Under accomplice liability, an accomplice is criminally responsible for all acts committed by a confederate which are a probable and natural consequence of their concerted action. *Id*. The accomplice need not participate in each and every element of the crime in order to be convicted of it. *Id*. Mere tangential involvement is sufficient to convict a person as an accomplice. *Id*.

> In determining whether a person aided another in the commission of a crime, our supreme court has long considered the following four factors: (1) presence at the scene of the crime; (2) companionship with another engaged in criminal activity; (3) failure to oppose the crime; and (4) a defendant's conduct before, during, and after the occurrence of the crime. While the defendant's presence during the commission of the crime or his failure to oppose the crime are, by themselves, insufficient to establish accomplice liability, the jury may consider them along with the other facts and circumstances tending to show participation. In order to sustain a conviction as an accomplice, there must be evidence of the defendant's affirmative conduct, either in the form of acts or words, from which an inference of common design or purpose to effect the commission of a crime may be reasonably drawn. But it is not necessary for the State to show that a defendant was a party to a preconceived scheme; it must merely demonstrate concerted action or participation in an illegal act.

Id. (citations omitted).

In appealing from the denial of his PCR petition, Durham contends that the factual basis presented at his guilty plea hearing was insufficient to support his guilty plea. Specifically, Durham claims that the post-conviction court committed reversible error in

accepting his guilty plea because he allegedly simultaneously maintained his innocence. The Indiana Supreme Court has held that "a judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time." *Ross v. State*, 456 N.E.2d 420, 423 (Ind. 1983). "To accept such a plea constitutes reversible error." *Id.* Therefore, the question on appeal is whether Durham maintained his innocence at the guilty plea hearing.

Durham contends that he maintained his innocence in making the following statement during his guilty plea hearing:

> Yes. I actually grabbed him because if he would have run, I figured [Burks] would have shot him then if he'd have ran. Where if I had held him, he might have had a chance not to get shot. But if he'd have ran, [Burks] probably would have shot him. So, really, actually, that's really why I grabbed him.

Petitioner's Ex. A, p. 32. Durham claims that this statement amounts to a claim of innocence because it allegedly establishes that Durham did not intend for Liggins to be shot. We disagree.

In order to maintain his innocence during his guilty plea, Durham would have to make a statement that explicitly negates one of the required elements of the crime that he was pleading guilty to. Durham was charged with attempted battery with a deadly weapon as an accomplice. Therefore, any statement maintaining his innocence would have to negate a concerted effort or participation in the incident by Durham. *See Berry*, 819 N.E.2d at 450. Because Indiana Code section 35-42-2-1(a)(3) provides that a defendant can be convicted of attempted battery if the defendant engages in a substantial step toward *knowingly or*

intentionally touching another person in a rude, insolent, or angry manner by means of a deadly weapon, it is not enough for Durham to say that he did not *intend* for Liggins to be shot. Durham would also need to deny that he *knew* that there was a high probability that Burks would shoot Liggins. *See* Indiana Code § 35-41-2-2(b) (2000) (providing that "a person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so"). Durham made no such denial during the guilty plea hearing.

In fact, Durham made numerous statements at the plea hearing acknowledging that he knew Burks was armed and that there was a high probability that Burks would shoot Liggins. This indicates that Durham's state of mind satisfied the "knowing" *mens rea* element of attempted battery with a deadly weapon. *See Stewart*, 866 N.E.2d at 864 (stating that a defendant may be convicted of attempted battery with a deadly weapon if the defendant is aware of the high probability that, by the conduct of shooting, one of the bullets would strike another person). Therefore, the trial court properly accepted Durham's plea, and the post-conviction court did not commit reversible error in denying Durham's request for post-conviction relief.

The judgment of the post-conviction court is affirmed.

CRONE, J., and BROWN, J., concur.