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IN THE
COURT OF APPEALS OF INDIANA

GLENN L. HEPP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A03-0904-PC-133
	)	
STATE OF INDIANA ,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Mary R. Harper, Judge
Cause No. 64D05-0810-PC-10139

July 30, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Glenn L. Hepp ("Hepp") pleaded guilty in Porter Superior Court to two counts of Class D felony sexual battery. Hepp now seeks post-conviction relief, arguing that his guilty plea lacked a sufficient factual basis. We affirm.

Facts and Procedural History

On or about November 15, 1998, Hepp approached the first victim in the game room of the Ramada Inn in Portage, Indiana. He grabbed her breast, unzipped his pants, and exposed himself to her. He grabbed himself and said, "Suck my dick." Tr. p. 13. Hepp then fled. A short time later he approached a second victim at the swimming pool of the nearby Days Inn, grabbed her breast and fled. Hepp was arrested and charged with a number of crimes including two counts of Class D felony sexual battery.

On April 13, 1999, Hepp agreed to plead guilty to two counts of Class D felony sexual battery, and the State agreed to dismiss the remainder of the pending charges. At the change of plea hearing, Hepp admitted all of the material allegations of the charges. The State and Hepp's defense counsel stipulated that the victims would reasonably perceive that Hepp acted with force or imminent threat of force. When asked by the trial court, Hepp agreed with that stipulation. Hepp also agreed that the allegations in the probable cause affidavit were true. The trial court accepted Hepp's change of plea and sentenced him to a term of three years executed with one year suspended on each crime, each sentence to be served consecutively.

Nine years later, Hepp filed a pro se petition for post-conviction relief alleging that his guilty plea was predicated on a factual basis that was insufficient. Following a hearing on Hepp's petition, the post-conviction court determined that an adequate factual

basis existed for Hepp's guilty plea and entered findings of fact and conclusions of law denying Hepp's petition. Hepp now appeals.

Discussion and Decision

Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. McCary v. State, 761 N.E.2d 389, 391 (Ind. 2002). Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Davidson v. State, 763 N.E.2d 441, 443 (Ind. 2002). The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5) (2006); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

The post-conviction court entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6) (2006). "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error – 'that which leaves us with a definite and firm conviction that a mistake has been made.'" Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (quoting State v. Moore, 678 N.E.2d 1258, 1261 (Ind. 1997). Although we accept findings of fact unless they are clearly erroneous, we give conclusions of law no deference. Fisher, 810 N.E.2d at 679.

Hepp argues that the post-conviction court erred when it denied his petition for post-conviction relief because his guilty plea lacked a sufficient factual basis. Specifically, Hepp claims that the stipulation as to the compulsion element of Class D felony sexual battery was incorrect and that, had he known this, he would not have pleaded guilty to two counts of Class D felony sexual battery.[1]

Indiana Code section 35-42-4-8(a)(1) states that "[a] person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person, touches another person when that person is compelled to submit to the touching by force or the imminent threat of force commits Class D felony sexual battery."

At the change of plea hearing, Hepp admitted all of the essential elements of Class D felony sexual battery including the allegation that the victims were compelled to submit to the touching by force or threat of force. Tr. p. 21. Hepp acknowledged that he had read the probable cause affidavit and admitted that the facts contained in the probable cause affidavit were true. Id. at 22. The parties stipulated to the admission of the affidavit to supplement the factual basis admitted to by Hepp. Id. It is difficult to ascertain the complete factual basis supporting the guilty plea because Hepp failed to include the probable cause affidavit in the appendix or introduce it at the post-conviction hearing.

[1] Hepp also argues that the factual basis of his guilty plea was insufficient because the stipulation as to the compulsion element of Class D felony sexual battery was incorrect. However, because of our decision on the stipulation, we do not need to address whether the factual basis of Hepp's guilty plea is sufficient.

Hepp specifically questions whether the element of compulsion was supported by an adequate factual basis. At the guilty plea hearing, the trial court asked the parties about the element of compulsion by force or imminent threat of force. The State replied that "the parties would stipulate that the manner of approaching the victims, as well as the conduct, would reasonably be perceived as force or an imminent threat of force, and I believe that would satisfy the factual basis element requirements for the crimes." Tr. p. 19.[2] Defense counsel stated, "We will stipulate that that, will [in] fact, infer the imminent threat of force that is required in the statute." Id. at 20. The trial court asked Hepp if he agreed with the stipulation, and Hepp unequivocally answered, "Yes, Ma'am." Id.

The admissions and stipulations offered at the change of plea hearing form a sufficient factual basis to support Hepp's guilty plea. Our supreme court has held that a defendant's admission of guilt after being read the factual allegations suffices to establish a factual basis for the entry of the guilty plea. Lowe v. State, 455 N.E.2d 1126, 1129 (Ind. 1983). The post-conviction court determined that Hepp admitted that he acted in accordance with the allegations recited by the State and that he agreed that the victims felt compelled to submit to his unlawful touching by force or threat of force. The post-conviction court properly concluded that a sufficient factual basis supported Hepp's guilty plea and therefore properly denied his petition for post-conviction relief.

Hepp also argues that he would not have pleaded guilty if he had not been misled into pleading guilty by his counsel, the State, and the trial court. Specifically, Hepp believes that no evidence was presented that he compelled his two victims to submit to

[2] The transcript citation refers to the transcript of the Change of Plea hearing.

touching by force or imminent threat of force and that only the victims could provide evidence to support that element.

Hepp's voluntariness argument completely ignores the discussions between the State and his counsel, his responses to the judge accepting the plea in open court, and the stipulation as to the compulsion element that established the required facts underlying that element and removed the State's burden to present evidence supporting that element, i.e. the victims' testimony. That Hepp chooses to ignore everything that occurred in open court during his guilty plea does not require us to do so as well.

At his guilty plea hearing the State and Hepp's counsel agreed that the evidence at issue would have been presented at trial. Id. at 847. Because of the stipulation, the victims' testimonies were made unnecessary at the change of plea hearing. The trial court judge clearly and properly asked Hepp if he agreed with the stipulation, and Hepp responded in the affirmative, "Yes, Ma'am." Tr. p. 20. Hepp could have chosen to proceed to trial, where the State would have been required to carry its burden to present evidence supporting the compulsion element, but he did not choose to do so.

Hepp fails to establish that the post-conviction court committed clear error in determining that the factual basis for Hepp's guilty plea was sufficient and that his plea was voluntary. The post-conviction court therefore properly denied Hepp's petition for post-conviction relief.

Affirmed.

RILEY, J., and KIRSCH, J., concur.