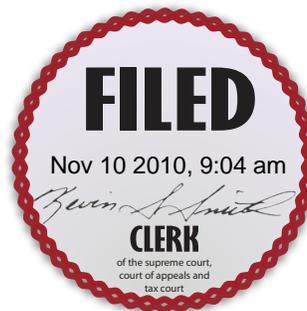


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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KENNETH J. DEBORD,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 87A01-1006-PC-290

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APPEAL FROM THE WARRICK CIRCUIT COURT  
The Honorable David O. Kelley, Judge  
Cause No. 87C01-0908-PC-264

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**November 10, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Kenneth J. DeBord appeals the post-conviction court's denial of his petition for post-conviction relief. He contends that he was not advised of certain constitutional rights as required by *Boykin v. Alabama*, 395 U.S. 238 (1969) – specifically, the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers – when he pled guilty to operating a vehicle while intoxicated. Concluding that the record fails to establish that DeBord heard the trial court's *en masse* advisement of constitutional rights before his individual hearing and that DeBord understood those rights and the concept of waiver, the post-conviction court erred by denying relief. We therefore reverse and remand.

## Facts and Procedural History

In December 2001, DeBord was involved in a car accident in Warrick County. His blood alcohol content was 0.13 at the time.

The State charged DeBord with operating a vehicle while intoxicated, criminal recklessness, and one other count, which is not apparent from the record on appeal.

In July 2002, DeBord pled guilty to operating while intoxicated. The State agreed to defer the criminal recklessness count for one year and to dismiss it at that time if DeBord successfully completed his probation. The State also agreed to dismiss the remaining count. The trial court sentenced DeBord to one year suspended to probation.

Over seven years later in September 2009, DeBord filed a petition for post-conviction relief. He alleged that he was not advised of his *Boykin* rights at the time he pled guilty.

The post-conviction court held a hearing on the petition in November 2009. DeBord offered and the post-conviction court admitted the transcript of his guilty plea hearing into evidence. The relevant portion of the transcript reflects the following:

COURT: . . . Uh . . . Mr. De[B]ord, you have heard your attorney and the State recite to the Court what they are recommending and do you understand your Constitutional rights?

[DEBORD]: Yes, Your Honor. I do.

Petitioner's Ex. 1, p. 5. The State offered another transcript into evidence:

[T]he State has a transcript, um, from the beginning of that day. It is under another Defendant, Bruce W. [Merritt], uh, that is the beginning of Court on the date that Mr. De[B]ord pled guilty . . . .

Tr. p. 3. The post-conviction court admitted the transcript of Merritt's hearing into evidence. At Merritt's hearing, the trial court provided all of the defendants assembled in the courtroom with an *en masse* advisement of their constitutional rights:

Mr. Merritt, I am going to explain to you your Constitutional rights. While I do that I want everyone else to listen to them so maybe I don't have to do it more than once, but that is okay, I'll do it as many times as they want. First of all, you are entitled to be represented by an attorney. If you can't afford an attorney, the Court will appoint an attorney to represent you. You are entitled to a trial where the State has to present evidence to establish your guilt beyond a reasonable doubt. You have a right to see, hear, question, cross-examine each and every witness that is called by the State. You have a right to use the subpoena powers of the Court to produce witnesses to testify for you. You have a right to testify yourself. You have a right to remain . . . silent. In the event that you have a trial and you are found guilty and you think that finding is incorrect, you have a right to appeal that decision from this Court to the Indiana Court of Appeals, Indiana Supreme Court. During the appeal process, you are also entitled to be represented by an attorney in the same manner that you are entitled to be represented by an attorney here. If you can't afford one, the Court will appoint an attorney to represent you for the appeal. In the event that you elect to enter a plea of guilty to the charges, you are waiving the Constitutional rights that I have explained. The Court will proceed with judgment of conviction. You will receive a sentence without a trial. If you want a trial by jury, you have to request that within ten days. Otherwise, it

will be by the Court. . . . Mr. Merritt, do you understand those Constitutional rights?

State's Ex. A, p. 3-4. DeBord testified at the post-conviction hearing that he was out of the courtroom for some time talking to his attorney and could not specifically remember if he was present for the *en masse* advisement:

Q: If you recall, was your Court morning or afternoon?

A: It was morning.

Q: Okay. Uh, approximately what time'd you get to the Court house, if you remember?

A: Uh, I always got here early so probably 8:30 time frame.

Q: Okay. Uh, were you, uh, do you recall, were you in the Court room when, uh, apparently this State versus Merritt was called, that docket?

A: I do not recall that at all.

Q: Okay. Uh, did you come to the Court room and sit in the Court room the entire time or did you do anything else?

A: No, I came in the Court room and, uh, my attorney, uh, showed up, uh, just I think it was just prior to the Judge coming into the Court room-

Q: Okay.

A: -and we went out and went into a little office area.

Q: Okay.

A: And we talked there, we talked in the hallway and, uh, I do remember we were out there until just before I went up.

\* \* \* \* \*

Q: Okay. So at this time you can't give a definitive answer of whether or not you were in the Court room when the Judge read the rights to the entire Court?

A: Uh, I cannot say one hundred percent for sure, no.

Q: But when your case was called, um, do you remember the Judge asking you if you understood your constitutional rights?

A: I do not, there again, I do not recall, uh, you know, that exactly happening, no.

Tr. p. 7-8 (direct exam), 9 (cross exam).

The post-conviction court denied DeBord's petition for post-conviction relief in the following order:

1. On the date of DeBord's plea, the Court advised the entire court room of their rights.
2. During his plea hearing, the Court asked DeBord if he understood his Constitutional rights and he responded "yes, your honor. I do."
3. The Chronological case summary in the underlying case also verifies that on the initial hearing date of April 5, 2002, DeBord was advised of his Constitutional rights.
4. *DeBord testified that he was out of the Court room for some time on the date of his plea and could not specifically recall if he was there for the mass advisement.*

\* \* \* \* \*

The Plaintiff in a PCR action carries the burden of proof by a preponderance of the evidence. With that evidence he must show that any alleged omitted advisements would have changed his decision and that he was also not advised of his Constitutional rights at the preliminary hearing.

The Plaintiff . . . addresses neither of these requirements with his evidence.

Because the Plaintiff has offered no evidence to address the issues needed to be addressed in order to prevail on his Petition, the Court must deny that Petition.

Appellant's App. p. 4-5 (citations omitted). DeBord filed a motion to correct error, which was denied.

DeBord now appeals.

### **Discussion and Decision**

DeBord appeals the denial of his petition for post-conviction relief. In a post-conviction proceeding, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the

petitioner stands in the position of one appealing from a negative judgment. *Henley*, 881 N.E.2d at 643. The reviewing court will not reverse the judgment unless the petitioner shows that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which is that which leaves us with a definite and firm conviction that a mistake has been made. *Id.* at 644. The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). We accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. *Id.*

DeBord contends that the post-conviction court erred by finding that he was advised of his *Boykin* rights at the time he pled guilty.

In *Boykin v. Alabama*, 395 U.S. 238 (1969), the United States Supreme Court held that it is reversible error for a trial court to accept a defendant's guilty plea without an affirmative showing that the plea is intelligent and voluntary. *Hall v. State*, 849 N.E.2d 466, 469 (Ind. 2006) (citing *Boykin*, 395 U.S. at 242). Particularly, *Boykin* requires that the record must show, or there must be an allegation and evidence which show, that the defendant was informed of and waived three specific federal constitutional rights: the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Id.* (citing *Boykin*, 395 U.S. at 242-43).

The trial court must preserve the colloquy on the record where the trial court determines for itself, without surmise, that the defendant has been informed of each right he is about to waive. *Barker v. State*, 812 N.E.2d 158, 163 (Ind. Ct. App. 2004), *trans. denied*. In the absence of a record that clearly demonstrates that the necessary specifics were discussed, we will not defer to the trial court's ability to determine the question of voluntariness. *Id.* We will not presume a defendant's waiver of his *Boykin* rights if the record is silent as to the defendant's knowledge and understanding of these rights. *Id.*

A trial court's *en masse* advisement of rights is an acceptable procedure so long as it is coupled with the court's personal interrogation of the defendant to determine whether the defendant understands both his rights and the concept of waiver. *Griffin v. State*, 617 N.E.2d 550, 552 (Ind. Ct. App. 1993). A trial court bears the responsibility of creating a record in which the trial court determines for itself, without surmise, that the defendant heard and understood the *en masse* advisement containing both the *Boykin* rights and the concept of waiver. *Id.* at 553. When the record is silent regarding the defendant's knowledge and understanding of his rights and the concept of waiver, the defendant is entitled to post-conviction relief. *Barker*, 812 N.E.2d at 163.

Here, the post-conviction court found that the trial court advised the defendants in the courtroom of their rights. Indeed, a review of the *en masse* advisement establishes that the trial court advised the defendants of the privilege against compulsory self-incrimination ("You have a right to remain . . . silent."), the right to trial by jury ("You are entitled to a trial where the State has to present evidence to establish your guilt beyond a reasonable doubt. . . . If you want a trial by jury, you have to request that within

ten days.”), and the right to confront one’s accusers (“You have a right to see, hear, question, cross-examine each and every witness that is called by the State.”).

However, the record fails to establish whether DeBord heard the *en masse* advisement and therefore whether he understood his *Boykin* rights. Although DeBord argues that he may or may not have been in the courtroom at the time of the advisement, we note that the relevant inquiry, which cannot be resolved definitively on this record, is whether he heard and understood the advisement. The trial court is responsible for creating this record. The fact that DeBord answered affirmatively at his own hearing when the trial court asked if he understood his constitutional rights does not cure the defect because it is not clear whether DeBord was present during the *en masse* advisement.

A proper colloquy would have been preserved on the record if the trial court had asked DeBord at his own hearing whether he had heard the *en masse* advisement and understood his rights and the concept of waiver, and DeBord confirmed his understanding. *See Griffin*, 617 N.E.2d at 553 (finding error where record failed to show that defendant heard and understood *en masse* advisement containing both *Boykin* rights and concept of waiver). Alternatively, a proper colloquy would have been preserved on the record if the trial court had asked DeBord and the rest of the defendants, individually or collectively, after the *en mass* advisement whether they understood their rights and the concept of waiver, and the defendants confirmed their understanding. *See Barker*, 812 N.E.2d at 164 (finding no error where trial court conducted *en masse* advisement of

rights, trial court asked defendants as a group whether they understood rights they were giving up, and defendants all responded affirmatively).

In the absence of any record making an affirmative showing that DeBord heard the *en masse* advisement and understood his rights and the concept of waiver, we must reverse.

Reversed and remanded for further proceedings consistent with this opinion.

MAY, J., and ROBB, J., concur.