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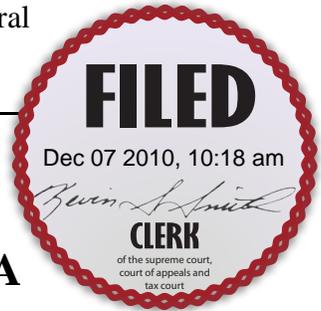
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**IN THE
COURT OF APPEALS OF INDIANA**

KEITH BILLINGSLEY,)
)
Appellant-Petitioner,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

No. 49A05-1003-PC-207

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa F. Borges, Judge
Cause No. 49G04-0701-PC-002565

DECEMBER 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

GARRARD, Senior Judge

Keith Billingsley, pro se, appeals the denial of his petition for post-conviction relief. We affirm.

Billingsley raises seven contentions, which we consolidate and restate as:

- I. Whether the court erroneously barred Billingsley from presenting evidence on two of his claims.
- II. Whether the court abused its discretion by denying Billingsley's request to subpoena a witness.
- III. Whether the court erred in determining that Billingsley received effective assistance of trial counsel.
- IV. Whether the court erred in determining that Billingsley's guilty plea was valid.

The facts as set forth by this Court in Billingsley's direct appeal disclose the following:

On January 4, 2007, Billingsley entered the Beverly Nursing Home in Indianapolis, Indiana. Inside the lobby he encountered a nursing home employee, Kay Cox, at the reception desk. He told Cox that he intended to apply for a job working in the nursing home's kitchen. After Cox informed Billingsley that no such job existed, he asked to use the telephone. Cox denied his request, but obliged when Billingsley asked her to place a call for him. As Cox was making the call, she saw Billingsley reach over the reception desk and snatch her purse from an open desk drawer. Cox immediately grabbed Billingsley by his shirt and pulled him over the desk to prevent him from escaping with her purse. A brief struggle ensued and Billingsley was able to wrest the purse away from Cox's grasp. Cox sustained injuries during the struggle. Before Billingsley could flee the building, another nursing home employee encountered him in the lobby and managed to wrest the purse away from Billingsley's grasp. Billingsley fled the building but was caught and detained until police arrived.

Billingsley v. State, Cause No. 49A05-0705-CR-262, slip. op. at 2 (Ind. Ct. App. April 11, 2008).

Billingsley pleaded guilty to robbery, a Class B felony, Indiana Code section 35-42-5-1 (1984), as part of a plea bargain that capped his potential sentence at fifteen years and dropped a habitual offender enhancement. He was sentenced to thirteen years. He challenged his sentence on direct appeal, and this Court affirmed the trial court's judgment. *See Billingsley*, slip. op. at 8-9.

Next, Billingsley filed a petition for post-conviction relief. The post-conviction court held a hearing and later denied Billingsley's petition. This appeal followed.

I. PRESENTATION OF EVIDENCE

Billingsley asserts that the post-conviction court erred by denying his request for an evidentiary hearing on the issues of whether there was an inadequate factual basis for his plea and whether the plea was involuntary and unintelligent.

Billingsley is misstating the procedural history of his case. The court conducted a hearing on Billingsley's petition for post-conviction relief. Thus, Billingsley is essentially claiming that the court barred him from presenting evidence during the hearing on the two issues identified above.

The record belies Billingsley's contention. During the hearing, Billingsley questioned his trial attorney regarding her representation. When that examination was concluded, the court asked Billingsley if he had any other evidence that he would like to offer. Billingsley responded, "Well, yes, I would like to start with my closing arguments then." P.C. Tr. p. 41.¹ The court explained to Billingsley that the parties should submit

¹ The record includes transcripts from Billingsley's guilty plea hearing and post-conviction hearing. We cite to the guilty plea transcript as "Tr." and the post-conviction transcript as "P.C. Tr."

arguments in their proposed findings and conclusions. Next, Billingsley asked the court to consider the record of prior proceedings in his case, and the court agreed to take judicial notice of its file. After further discussion, the court again asked Billingsley if he had any other evidence to offer, and Billingsley responded, “No, that’ll be – that’s all.” P.C. Tr. p. 45. Billingsley did not request any separate or additional hearing for other issues. In sum, he received a hearing and had the opportunity to present whatever evidence he wished. No error has been shown. *See Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied* (holding that the post-conviction court properly denied a petition for post-conviction relief where the petitioner declined to present evidence).

II. DENIAL OF WITNESS SUBPOENA

Billingsley claims it was error to deny his request to subpoena the victim to testify. Indiana Post-Conviction Rule 1(9)(b) provides that when a pro se petitioner requests the issuance of a subpoena, “If the court finds the witness’ testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds the proposed witness’ testimony is not relevant and probative, it shall enter a finding on the record and refuse to issue the subpoena.” Thus, the court has discretion to determine whether to grant or deny the petitioner’s request for a subpoena. *Johnson v. State*, 832 N.E.2d 985, 994 (Ind. Ct. App. 2005), *trans. denied*.

Billingsley argues that the victim’s testimony would have been relevant to his claim that he did not commit the crime of robbery. However, additional testimony from the victim to support this claim would have been in the nature of newly discovered

evidence regarding the events that constituted the offense. As such, it would not have been admissible in a post-conviction relief hearing to challenge his guilty plea. *See Norris v. State*, 896 N.E.2d 1149, 1153 (Ind. 2008) (stating that defendants who plead guilty may not “use post-conviction proceedings to later revisit the integrity of their plea in light of alleged new evidence seeking to show that they were in fact not guilty”).

Billingsley also argues that the victim’s testimony would have been relevant to his claim that he received ineffective assistance of trial counsel. However, Billingsley’s trial counsel testified at the post-conviction hearing. Any testimony the victim could have provided as to trial counsel’s investigation of the case would have been cumulative of the trial counsel’s testimony and therefore inadmissible. *See Conner v. State*, 711 N.E.2d 1238, 1258 (Ind. 1999) (determining that the post-conviction court properly excluded evidence of petitioner’s mental health and difficult childhood, and shortcomings in the public defender’s office, because that evidence was cumulative). The trial court did not abuse its discretion by denying Billingsley’s request to issue a subpoena.

III. ASSISTANCE OF TRIAL COUNSEL

As we turn to the merits of Billingsley’s petition for post-conviction relief, we note our standard of review. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Ritchie v. State*, 875 N.E.2d 706, 713 (Ind. 2007). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment and must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 714.

Billingsley contends that he was denied the effective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner must show the lawyer's performance fell below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Oliver v. State*, 843 N.E.2d 581, 591 (Ind. Ct. App. 2006), *trans. den.* If a petitioner is convicted pursuant to a guilty plea, and later claims that his counsel rendered ineffective assistance because counsel overlooked or impaired a defense, the petitioner must show that a defense was indeed overlooked or impaired and that the defense would have likely changed the outcome of the proceeding. *Id.*

Billingsley first claims that his trial counsel failed to properly explain to him the elements of the offense of robbery as applied to the facts of his case. This claim is based on Billingsley's misreading of the elements of robbery. A defendant commits robbery as a Class B felony by (1) knowingly or intentionally (2) taking property from another person or from the presence of another person (3) by using or threatening the use of force on any person or by putting any person in fear and (4) resulting in bodily injury to any person other than the defendant. I.C. § 35-42-5-1. Billingsley argues that the evidence establishes that he never hit or struggled with the victim or placed her in fear, so he did not commit robbery. He concludes that if his trial counsel had advised him accordingly, he would not have pleaded guilty. Billingsley fails to acknowledge that the force that is necessary to accomplish the taking of property and to elude the person in possession of the property satisfies the force element of robbery. *Cooper v. State*, 656 N.E.2d 888, 889

(Ind. Ct. App. 1995). At Billingsley's sentencing hearing, he acknowledged that the victim grabbed him and pulled him over the counter when he reached for the victim's purse. Furthermore, Billingsley does not dispute, and in fact cites to, the victim's statement to the police, in which she stated that Billingsley "broke away" from her and ran away with her purse after she pulled him over the counter. Appellant's App. p. 26. The use of force to break away from the victim satisfies the force element of robbery. *See Cooper*, 656 N.E.2d at 889 (determining that there was sufficient evidence of use of force because the appellant used force to get away from the victim, who attempted to detain him).

In the present case, Billingsley acknowledged in his plea agreement that he was satisfied with his trial counsel's representation and competency and that he believed that the plea agreement was in his best interest. Furthermore, the record demonstrates that Billingsley's trial counsel properly advised him of the nature of the robbery charge. She stated during a pre-trial hearing that she had told Billingsley that he could be found guilty of robbery even though the victim fought him. In addition, during the guilty plea hearing, counsel stated to Billingsley, "I have advised you that because she decided to fight back, that is not a legal defense and still amounts to a robbery." Tr. p. 20. He subsequently agreed with his counsel's statement that he was guilty of robbery. Consequently, Billingsley cannot demonstrate that his trial counsel impaired his defense or that, had his case gone to trial, the defense would likely have changed the outcome of the proceeding. *See Oliver*, 843 N.E.2d at 592 (determining that the defendant received adequate assistance of trial counsel).

Next, Billingsley contends that his trial counsel failed to adequately investigate the case and raise a proper defense. An attorney has “a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Terry v. State*, 857 N.E.2d 396, 403 (Ind. Ct. App. 2006), *trans. denied* (quoting *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984)). We give a great deal of deference to counsel’s judgments regarding the scope of an investigation. *Id.*

Billingsley contends that his trial counsel: (1) failed to thoroughly investigate the facts; (2) failed to follow up on the victim’s statement to the police by deposing her and other key witnesses; (3) failed to “challenge the validity of the [probable cause] affidavit;” and (4) failed to discuss the case with Billingsley in sufficient length to allow him to make a knowing and intelligent guilty plea. Appellant’s Br. p. 18. We disagree. Billingsley’s trial counsel testified that she chose not to depose any witnesses because if she had, the State would have filed a habitual offender charge against Billingsley. Counsel further testified that she specifically chose not to depose the victim because counsel thought it would be better to cross-examine her at trial without giving her a “heads up” on potential lines of questioning. P.C. Tr. p. 21. These are legitimate strategic decisions that we will not second-guess. Furthermore, all of Billingsley’s proposed avenues of further investigation are based on his premise that he did not commit the crime of robbery because he believes that he did not use force to take the victim’s purse. As we noted above, the force he used to get away from the victim is sufficient to fulfill the force element of the robbery statute. Because Billingsley’s legal argument is

incorrect, he cannot demonstrate that he was prejudiced by his counsel's alleged failures to investigate the case to support that argument. *See Terry*, 857 N.E.2d at 404 (holding that the appellant could not demonstrate prejudice from his counsel's failure to investigate the ownership of a pager found at the scene of the crime because other evidence demonstrated that the appellant had committed the crime at issue).

The court did not err by rejecting Billingsley's claims of ineffective assistance of trial counsel.

IV. GUILTY PLEA

Billingsley raises three challenges to the validity of his guilty plea. He first contends that the post-conviction court erred by determining that there was a sufficient factual basis for his guilty plea. A court shall not enter judgment upon a plea of guilty or guilty but mentally ill at the time of the crime unless it is satisfied from its examination of the defendant or the evidence presented that there is a factual basis for the plea. Ind. Code § 35-35-1-3 (1984). An adequate factual basis for the acceptance of a guilty plea may be established in several ways: (1) by the State's presentation of evidence on the elements of the charged offenses; (2) by the defendant's sworn testimony regarding the events underlying the charges; (3) by the defendant's admission of the truth of the allegations in the information read in court; or (4) by the defendant's acknowledgment that he understands the nature of the offenses charged and that his plea is an admission of the charges. *Oliver*, 843 N.E.2d at 588.

In this case, at the guilty plea hearing the trial court reviewed the plea agreement with Billingsley, including a description of the offense at issue, and asked him if he

wanted to plead guilty to that offense. Billingsley responded affirmatively. The trial court further asked Billingsley if he understood that as a result of the guilty plea, the trial court would enter a judgment of conviction on the robbery charge without trial. Billingsley again responded in the affirmative. Thus, Billingsley acknowledged that he understood the nature of the charged offense and that his plea was an admission of the charges. Furthermore, Billingsley described under oath his attempt to take the victim's purse and how the victim grabbed him and pulled him over a counter before he ran away. Billingsley repeatedly denied that he struck or struggled with the victim, but the trial court stated, [when the victim] struggles to get that property back or to hold on to that person to prevent that person from walking out with her property, that is robbery." Tr. p. 25. After that explanation, when asked if he was guilty of robbery, Billingsley conceded, "Yes." *Id.* Thus, Billingsley's sworn testimony also establishes a factual basis for the offense of robbery, and we find no error. *See Oliver*, 843 N.E.2d at 589 (determining that a sufficient factual basis existed for the guilty plea where the defendant admitted to the truth of the allegations in the charging information, and the defendant's statement at sentencing further established a factual basis for the plea).

Next, Billingsley argues that the post-conviction court should have determined that his guilty plea was invalid because he protested his innocence during sentencing. A valid guilty plea is a confession of guilt made directly to a judicial officer and necessarily admits the incriminating facts alleged. *Carter v. State*, 739 N.E.2d 126, 128 (Ind. 2000). Therefore, an Indiana trial court may not accept a guilty plea that is accompanied by a denial of guilt. *Id.* at 129.

In this case, as we noted above, at the guilty plea hearing Billingsley acknowledged that he took the victim's purse from her, but he repeatedly stated that he did not hit the victim or struggle with her. Nevertheless, after Billingsley's counsel and the court explained to Billingsley that the facts of the case could nonetheless satisfy the elements of the offense of robbery, Billingsley admitted that he was guilty of robbery. He may now regret his admission and seek to retract it, but the record demonstrates that Billingsley did not maintain his innocence while pleading guilty. *See Oliver*, 843 N.E.2d at 589 (determining that the defendant did not protest his innocence while pleading guilty to theft).

Billingsley cites the case of *Wingham v. State*, 780 N.E.2d 1164 (Ind. 2002), but that case is distinguishable. In *Wingham*, we determined that a defendant's guilty plea was invalid because the defendant denied that he was intoxicated when he was pulled over by the police and did not retract that denial during the guilty plea hearing. 780 N.E.2d at 1165. In this case, Billingsley denied that he hit or struggled with the victim, but after further discussion with his counsel and the court on the elements of robbery, Billingsley conceded that he had committed the offense of robbery. Therefore, *Wingham* is not controlling.

Finally, Billingsley contends that the post-conviction court erred by rejecting his argument that his guilty plea was not knowing, voluntary, and intelligent. A court shall not accept a plea of guilty without first determining that the defendant understands the nature of the charge against him. Ind. Code § 35-35-1-2 (2003). Our Supreme Court has stated four principles to be considered when a defendant challenges his guilty plea on

grounds that he did not understand each element of the charge at the time that he pleaded guilty:

(1) that a defendant has a constitutional right to ‘real notice of the true nature of the charge’ to which the defendant pleads guilty;

(2) that that right will have been honored where the record of the guilty plea hearing ‘contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused[;] even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explained the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit;’ and

(3) where intent is a ‘critical element of the offense . . . , notice of that element is required,’ [and]

(4) even where the notice required has not been given and cannot be presumed, a defendant is not entitled to relief if the error is harmless beyond a reasonable doubt.

Patton v. State, 810 N.E.2d 690, 696 (Ind. 2004) (internal quotations and citations omitted).

In this case, during the guilty plea hearing the court reviewed the plea agreement with Billingsley. The trial court read to Billingsley the portion of the plea agreement that described the robbery charge. Billingsley agreed that he intended to plead guilty to that charge. Subsequently, when Billingsley’s counsel asked Billingsley to describe the crime, he repeatedly denied struggling with or hitting the victim. The trial court and Billingsley’s counsel discussed the elements of robbery with Billingsley, and he ultimately agreed that he was guilty of robbery. We conclude that he was provided with an explanation of the charge by the trial judge and that the post-conviction court did not err by concluding that Billingsley knowingly, voluntarily, and intelligently pleaded

guilty. *See Oliver*, 843 N.E.2d at 590 (determining that the defendant knowingly, voluntarily, and intelligently pleaded guilty to theft despite objecting that he did not know where the property that he took had come from).

CONCLUSION

For the reasons stated above, we affirm the judgment of the post-conviction court.

Affirmed.

RILEY, J., and CRONE, J., concur.