

STATEMENT OF THE CASE

Appellant Daniel J. Emery seeks review of the denial of his petition for post-conviction relief. We affirm.

ISSUES

Emery raises two issues, which we restate as:

- I. Whether the post-conviction court erred by denying Emery's request for an evidentiary hearing; and
- II. Whether the post-conviction court erred by denying Emery's petition.

FACTS

On March 26, 1992, Emery pleaded guilty to criminal recklessness, a class D felony. On April 16, 1992, the trial court sentenced Emery to two years. Appellant's App. p. 41. Emery did not appeal.

Next, Emery filed a Motion for Reduction of Sentence. In the Motion, Emery asserted that he had gotten married while he was incarcerated and was needed at home to support his family. Appellant's App. p. 56. On December 10, 1992, the trial court granted Emery's Motion by ordering Emery released from incarceration. Appellant's App. p. 44. In addition, the trial court placed Emery on probation for two years and, as a condition of probation, ordered Emery to serve one day per month in the Miami County Jail. *Id.* Emery did not appeal and has served his sentence.

Emery is currently incarcerated for other convictions, including a habitual offender determination. Emery's conviction for criminal recklessness is one of the felony

convictions upon which the habitual offender determination is based. Appellant's App. p. 139.

The current case began on March 15, 2004, when Emery filed a petition for post-conviction relief as to his conviction and sentence for criminal recklessness. Emery requested an evidentiary hearing, and the trial court denied Emery's request. Emery submitted an Affidavit and memoranda of law in support of his petition. On September 1, 2009, the post-conviction court denied Emery's petition.

DISCUSSION AND DECISION

I. DENIAL OF A HEARING

Emery contends that the post-conviction court was required to hold an evidentiary hearing on his petition. A post-conviction court may rule upon a petition without holding an evidentiary hearing under the following circumstances: “[i]f the pleadings conclusively show that [a] petitioner is entitled to no relief, the court may deny the petition without further proceedings.” Ind. Post-Conviction Rule 1(4)(f).¹ Thus, if the petition alleges only errors of law, then the court may determine without a hearing whether the petitioner is entitled to relief on those questions. *Allen v. State*, 791 N.E.2d 748, 753 (Ind. Ct. App. 2003), *transfer denied*. The need for a hearing is not avoided, however, when a determination of the ultimate issues hinges, in whole or in part, upon unresolved factual questions of a material nature. *Clayton v. State*, 673 N.E.2d 783, 785 (Ind. Ct. App. 1996). If the facts pled raise an issue of possible merit, then the

¹ Indiana Post-Conviction Rule 1(4)(g) also permits a post-conviction court to dispose of a petition without holding an evidentiary hearing, but only if a party files a motion for summary disposition. In this case, neither party filed a motion for summary disposition. Therefore, Indiana Post-Conviction Rule 1(4)(g) is inapplicable to this case, and we limit our discussion to Post-Conviction Rule 1(4)(f).

petition should not be disposed of under section 4(f). *Allen*, 791 N.E.2d at 753. This is true even though the petitioner has only a remote chance of establishing his claim. *Clayton*, 673 N.E.2d at 785.

In this case, Emery raised four issues in his petition. We will examine each in turn to determine if any of them presents an unresolved material question of fact.

A. *BOYKIN* CLAIM

In his petition for post-conviction relief, Emery asserted a “violation of his rights under **BOYKIN V. ALABAMA.**” Appellant’s App. p. 142 (emphasis in original). Specifically, “[p]etitioner was misinformed that he completely [sic] waived the right to appeal when he could of [sic] appeal [sic] the sentencing of a guilty plea proceeding.” *Id.* Emery failed to state any additional facts or cite to authorities to support this claim in his subsequent post-conviction filings, including his Affidavit.

In *Boykin*, the United States Supreme Court held that it was reversible error for a trial judge to accept a petitioner’s guilty plea without an affirmative showing that it was intelligent and voluntary. *See Hall v. State*, 849 N.E.2d 466, 469 (Ind. 2006) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23, L.Ed.2d 274 (1969)). More 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.* at 469 (citing *Boykin*, 395 U.S. at 243, 89 S.Ct. 1709).

The right to an appeal is not included among the federal constitutional rights discussed in *Boykin*. Thus, as a matter of law, the trial court would not have violated Emery's *Boykin* rights by erroneously advising him that he was waiving his right to appeal his sentence. The post-conviction court did not err by rejecting Emery's request for an evidentiary hearing as to this claim.

B. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In his petition for post-conviction relief, Emery contended that he was deprived of his right to effective assistance of trial counsel under the federal and state constitutions because counsel failed to advise him that he could have appealed his original sentence. Emery contended, without elaboration, that counsel's error prejudiced him. Emery failed to state any additional facts to support this claim in his subsequent post-conviction filings, including his Affidavit.

Indiana Post-Conviction Rule 1, § 3 requires all petitions to be submitted "in a form in substantial compliance with the standard form appended to this Rule." Item 9 of that form requires the petitioner to "[s]tate concisely and in the same order the facts which support each of the grounds" Appendix to Post-Conviction Rule 1. "[W]ithout specific factual allegations in support of the claim of inadequacy of representation no evidentiary hearing is required." *Tyson v. State*, 868 N.E.2d 855, 858 (Ind. Ct. App. 2007), *transfer denied* (quoting *Hutchinson v. State*, 540 N.E.2d 109, 110 (Ind. Ct. App. 1989)). Here, Emery's assertion in his petition that trial counsel failed to advise him of his right to an appeal and that he was prejudiced as a result is nothing more than a conclusory allegation. Furthermore, Emery presented no additional facts in

support of this claim in subsequent filings. Consequently, the post-conviction court did not err by declining to hold an evidentiary hearing on this claim.

C. IMPROPER AGGRAVATING FACTORS

Next, Emery contended in his petition that the trial court cited an improper aggravating factor while sentencing him. Specifically, Emery asserted that his criminal history was not an aggravating factor because his past crimes were misdemeanors and were therefore unrelated to his conviction for criminal recklessness.

When an individual has pleaded guilty and wishes to challenge a trial court's exercise of sentencing discretion, the individual must file a direct appeal, or, if the time for filing a direct appeal has run, request a belated appeal under Indiana Post-Conviction Rule 2. *See Collins v. State*, 817 N.E.2d 230, 233 (Ind. 2004). The fact that the trial court at a guilty plea hearing does not advise the defendant in an open plea situation that the defendant has the right to appeal the sentence to be imposed does not warrant an exception to this rule. *See id.* Consequently, Emery could not have properly presented his sentencing claim in post-conviction proceedings as a matter of law, and the post-conviction court did not err by declining to hold an evidentiary hearing on that claim.

D. VOLUNTARINESS OF SENTENCE MODIFICATION

Finally, Emery argued in his petition that when the trial court granted his request to modify his sentence, it imposed a longer sentence than was authorized by the parties' original plea agreement, thereby violating that agreement. Determining whether Emery served a sentence longer than that permitted by the plea agreement could be a factual question. Nevertheless, for reasons discussed below, the trial court properly disposed of

Emery's sentencing claim as a question of law without reaching the factual issue. Thus, the post-conviction court did not err by declining to hold an evidentiary hearing on this claim.

In summary, the post-conviction court did not err by denying Emery's request for an evidentiary hearing on his petition for post-conviction relief.

II. DENIAL OF PETITION FOR POST-CONVICTION RELIEF

Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Walker v. State*, 903 N.E.2d 1022, 1024 (Ind. Ct. App. 2009), *transfer denied*. A petitioner who has been denied post-conviction relief appeals from a negative judgment, and he or she 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. *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002), *reh'g denied*.

Emery claims that when the trial court modified his sentence in 1992, it illegally extended his sentence beyond what he had agreed to in his original plea agreement, and that had he known of the illegality, he would not have agreed to the modification. For this reason, Emery concludes that his conviction and sentence must be vacated.²

In *Chism v. State*, 807 N.E.2d 798, 799 (Ind. Ct. App. 2004), a defendant, Chism, pleaded guilty to two felonies and was sentenced. Subsequently, Chism filed a motion to correct erroneous sentence. *Id.* at 799-800. In 1999, the trial court granted in part and

² Emery is not raising on appeal the other three claims he presented in his petition for post-conviction relief.

denied in part the motion and modified Chism's sentence. *Id.* at 800. Chism did not appeal. *Id.* Several years later, Chism filed a second motion to correct erroneous sentence, contending that the trial court's 1999 order modifying Chism's sentence was erroneous. *Id.* The trial court denied Chism's second motion. *Id.* On appeal, a panel of this Court concluded that the second motion was an attack on the 1999 ruling, and the alleged defect in that ruling was available for review in 1999. *Id.* at 801. This Court concluded that Chism had waived the claim of error in his second motion to correct erroneous sentence because he did not appeal the 1999 ruling and raise the claim at that time. *Id.*

In this case, when the trial court granted Emery's motion in 1992 and modified his sentence, Emery could have determined whether his sentence, as modified, exceeded the sentence set forth in his original plea agreement. Thus, the claim Emery is raising now was available in 1992, but Emery did not appeal the trial court's order modifying his sentence. Thus, as in *Chism*, we conclude that Emery's claim is waived.

Waiver notwithstanding, we find no reversible error. In *Lee v. State*, 816 N.E.2d 35, 37 (Ind. 2004), a defendant, Lee, pleaded guilty to robbery. The trial court sentenced him to serve eight years, to be served consecutively to a sentence for an unrelated theft conviction. *Id.* Lee served his sentences and was released, but he was determined in a subsequent criminal prosecution to be a habitual offender based on the robbery and theft convictions. *Id.* Lee filed a petition for post-conviction relief as to his robbery conviction, claiming that the trial court did not have the authority to order him to serve his sentence for robbery consecutively to his sentence for theft. *Id.* The trial court denied

Lee's petition. *Id.* On transfer, our Supreme Court determined that Lee's claim of sentencing error had merit, but the trial court's sentencing error did not require vacatur of Lee's guilty plea and conviction for robbery because Lee had knowingly, intelligently, and voluntarily pleaded guilty. *Id.* at 39-40. In addition, the Court determined that Lee had bargained for the sentence he received and had benefitted from it, so he could not subsequently complain of its illegality. *Id.* at 40. Finally, the Supreme Court concluded that because Lee had completed his sentence, any error was moot. *Id.* at 40 n.2.

In this case, assuming without deciding that Emery has a meritorious claim that his modified sentence was longer than his original sentence and was illegal, he is not entitled to vacatur of his conviction for criminal recklessness. Emery does not contend that his original guilty plea was entered unknowingly or involuntarily. Furthermore, the trial court's subsequent modification of Emery's sentence was unrelated to Emery's guilt or innocence. Instead, Emery's sole ground for sentence modification was that he had recently gotten married and needed to be home to support his family. Appellant's App. p. 56. Under these circumstances, as in *Lee*, any sentencing error resulting from the trial court's grant of Emery's Motion for Reduction of Sentence can be severed from the remainder of the original plea agreement.

Furthermore, Emery is not entitled to relief as to any error in the length of his modified sentence because he requested the sentence modification and benefitted from it. The trial court ordered Emery released from incarceration and placed him on probation, on the condition that he serve one day per month in jail. Having been restored to freedom by the order modifying his sentence, he may not now complain of errors in that order.

See Lee, 816 N.E.2d at 40 (concluding that Lee could not complain of his sentences, which the trial court erroneously ordered him to serve consecutively, because by pleading guilty Lee reduced his potential prison time by thirty years).

Finally, Emery does not dispute that he has completed his sentence for the conviction at issue. As was the case in *Lee*, Emery's challenge to the validity of his modified sentence is moot.

For these reasons, Emery has failed to demonstrate that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.

CONCLUSION

We affirm the judgment of the post-conviction court.

Affirmed.

KIRSCH, J., and BARNES, J., concur.