

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.

APPELLANT PRO SE:

BRIAN HOUCHIN
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

BRIAN HOUCHIN,

Appellant,

vs.

STATE OF INDIANA,

Appellee.

)
)
)
)
)
)
)
)
)
)

No. 46A05-0706-PC-319

APPEAL FROM THE LAPONTE SUPERIOR COURT
The Honorable Steven E. King, Judge
Cause No. 46D02-9311-CF-44

December 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Brian Houchin, pro se, appeals the denial of his petition for post-conviction relief (PCR), by which he sought to challenge his conviction of criminal recklessness, a class D felony. That conviction was entered upon Houchin's guilty plea. Houchin presents the following restated issues for review:

1. Did the post-conviction court err in determining that Houchin did not receive ineffective assistance of trial counsel with respect to counsel's advice to plead guilty rather than assert a claim of self-defense?
2. Was the factual basis adequate to support Houchin's guilty plea?

We affirm.

The facts to which Houchin pled guilty are that on October 4, 1993, Houchin was serving a sentence at the Michigan City State Prison. On that date, he stabbed another inmate, Francis Roell, five times with a makeshift knife. On November 19, 1993, Houchin was charged with aggravated battery as a class B felony in connection with the incident. On February 4, 1994, Houchin and the State entered into a plea agreement whereby Houchin would plead guilty to the lesser offense of criminal recklessness, a class D felony, and would serve the resultant one-year sentence consecutive to the sentence he was then serving at Michigan City. At the guilty plea hearing, while the trial court was establishing a factual basis, Houchin indicated he stabbed the victim in response to a perceived threat. Houchin explained the victim "was making threats toward me, walked up on me with a belt with a lock on it, shoved me." *Transcript* at 16. At that point, Houchin's defense attorney questioned Houchin as follows:

Q [Defense Attorney] Notwithstanding that fact, there was contained in discovery statements from approximately four correctional officers, each of whom indicated that they witnessed you stab Mr. Roell. Do you recall that?

A [Houchin] Yes.

Q Additionally, you initialed a statement provided to me by Investigator Cadwell indicating that you stabbed Mr. Roell in your attempts to avoid an eminent sexual attack. Was that what happened?

A Yes.

Q Okay. Now, when you stabbed the victim, he was in fact lying down, was he not?

A Yes.

Q Okay. So you were not under assault at the time?

A Not at that time, no.

Q And I advised you that, even if we were successful in getting your statement to Investigator Cadwell suppressed and even if Mr. Roell refused to testify, the State could still make its case with the four correctional officers who were the eye-witnesses to the offense; correct?

A Yes.

Q So, I advised you that we did not have, in my opinion, the requisite evidence to make a successful plea of self-defense in this case, is that correct?

A That's correct.

Transcript at 16-17. At the conclusion of the hearing, the trial court concluded that a factual basis had been established and entered judgment of conviction for criminal

recklessness as a class D felony. He was sentenced to one year in prison, imposed consecutive to the sentence he was then serving.

1.

Houchin contends the post-conviction court erred in determining he did not receive ineffective assistance of trial counsel with respect to counsel's advice to plead guilty rather than assert a claim of self-defense.

With limited exceptions not applicable here, a conviction based upon a guilty plea must be challenged by a petition for post-conviction relief. *See Creekmore v. State*, 853 N.E.2d 523 (Ind. Ct. App. 2006), *clarified on reh'g*, 858 N.E.2d 230. Houchin challenged his conviction via a PCR petition, and that petition was denied. A petitioner appealing the denial of a PCR petition appeals from a negative judgment. *Wrinkles v. State*, 749 N.E.2d 1179 (Ind. 2001), *cert. denied*, 535 U.S. 1019 (2002). To prevail, Houchin must demonstrate that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id.*

Houchin has alleged that he received ineffective assistance of counsel. In order to prevail upon such a claim, he must demonstrate the existence of the two components of that claim, as established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Creekmore v. State*, 853 N.E.2d 523. He must first establish that counsel's performance was deficient. To succeed on such a claim, Houchin must show that counsel's representation fell below an objective standard of reasonableness and that the errors in representation were so serious that counsel was not functioning as counsel guaranteed by the Sixth

Amendment. *Id.* A showing of deficient performance alone is not enough, however, to prevail on a claim of ineffective assistance of counsel. The petitioner must also show that the deficient performance prejudiced the defense. *Id.* Because a petitioner must prove both elements, the failure to prove either element defeats the claim. *See Young v. State*, 746 N.E.2d 920 (Ind. 2001) (holding that because the two elements of *Strickland* are separate and independent inquiries, the court may dispose of the claim on the ground of lack of sufficient prejudice if it is easier).

Houchin contends counsel rendered ineffective assistance in recommending that he plead guilty. In essence, Houchin's argument on this point is that he would have prevailed on a claim of self-defense. His confidence in the prospects of prevailing on such a claim is overly optimistic. A valid claim of self-defense is a legal justification for an otherwise criminal act. *Pinkston v. State*, 821 N.E.2d 830 (Ind. Ct. App. 2004); *see also* Ind. Code Ann. § 35-41-3-2(a) (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007). To prevail, the defendant must show he (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. *Pinkston v. State*, 821 N.E.2d 830. The amount of force that an individual may use to protect himself or herself must be proportionate to the urgency of the situation. *Id.* When more force is used than is reasonably necessary under the circumstances, the right of self-defense is extinguished. *Id.*

Four guards witnessed Houchin's attack upon Roell. Houchin admitted to an investigator that Roell was lying down when he was attacked and that Roell was not assaulting Houchin at the time. In the face of that evidence, it seems highly unlikely that Houchin could have convinced a jury that he was justified in setting upon the prostrate Roell with a knife, or that stabbing Roell five times was proportional to the threat, if any, confronting Houchin at the time of the attack. Yet, Houchin would have been required to prove those things, and more, in order to prevail on a claim of self-defense.

In view of the nature and strength of the evidence against Houchin, counsel's advice that a claim of self-defense would likely not succeed, and thus his advice to plead guilty, was not unreasonable. Therefore, it did not constitute deficient performance. Having failed to establish the first element under *Strickland*, Houchin's claim of ineffective assistance of counsel fails. *Young v. State*, 746 N.E.2d 920.

2.

Houchin contends the trial court did not establish an adequate factual basis to support his guilty plea.

Ind. Code Ann. § 35-35-1-3(b) (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007) states, "the court shall not enter judgment upon a plea of guilty unless it is satisfied from its examination of the defendant or the evidence presented that there is a factual basis for the plea." The requirement of a factual basis ensures that when a plea is accepted there is sufficient evidence from which a court can conclude that the defendant could have been convicted had he stood trial. *Oliver v.*

State, 843 N.E.2d 581 (Ind. Ct. App. 2006), *trans. denied*. The finding that an adequate factual basis exists is a subjective determination committed to the trial court's wide discretion. *Id.* Such latitude is essential because of the varying degrees and kinds of inquiries required under the varied circumstances that confront trial courts. *Id.* "A factual basis exists when there is evidence about the elements of the crime from which a court could reasonably conclude that the defendant is guilty." *Id.* at 588. The determination that an adequate factual basis exists arrives before us clothed with a presumption of correctness. *Oliver v. State*, 843 N.E.2d 581. We review claims of error in that respect for an abuse of discretion. *See id.*

Houchin first claims the factual basis was inadequate in that he did not "admit to being guilty of the elements of the offense of criminal recklessness." *Appellant's Brief* at 14. This mischaracterizes the nature of what the court must elicit at the guilty plea hearing. Houchin's argument implies that the court must obtain an explicit admission from the defendant that he committed the legal elements of the statutory definition of the offense to which he was pleading guilty. To the contrary, the court is required merely to establish that the defendant admits to committing acts that *constitute* the elements of the offense in question and which therefore permit a reasonable conclusion that the defendant is guilty of that offense. *See Oliver v. State*, 843 N.E.2d 581.

An adequate factual basis may be established in the following ways: (1) The State's presentation of evidence on the elements of the charged offense; (2) the defendant's sworn testimony regarding the underlying events; (3) the defendant's

admission of the truth of the allegations in the information read in court; or (4) the defendant's acknowledgment that he understands the nature of the offenses charged and that his plea is an admission of the charges. *Id.*

In this case, Houchin acknowledged at the guilty plea hearing that he understood the nature of the offense charged and that his plea was an admission of the charge. He also offered sworn testimony regarding the underlying events. As to the latter, he testified that he attacked Roell with a knife at a time when Roell was not assaulting him and was in fact lying down. Houchin stabbed Roell five times with a knife. This testimony was sufficient to establish the elements of criminal recklessness and therefore to establish an adequate factual basis. Either way, an adequate factual basis was established to support the guilty plea.

Houchin next contends that a factual basis was not established because he maintained at the hearing that he acted in self-defense and thus was not guilty of the offense. As a matter of law, a trial court may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time. *Id.* This court has observed, however, that there is a difference between cases where the defendant actually denies guilt based upon having not committed a necessary element of the offense and cases where the defendant denies guilt based upon his or her subjective legal interpretation of the elements of the offense. *See Wingham v. State*, 780 N.E.2d 1164 (Ind. Ct. App. 2002).

At the hearing, Houchin claimed that he acted in self-defense. As he explained, however, this claim was based upon his subjective belief that his actions fit within the legal parameters of the defense of self-defense. Counsel clarified in questioning Houchin at the hearing that Houchin's belief in that regard was not correct. Counsel correctly explained that the defense of self-defense was not available here because Houchin attacked Roell when Roell was lying down and not attacking Houchin. *See* discussion in Issue 1 above. Houchin acknowledged the advice. Under these circumstances, we conclude that Houchin's initial claim of self-defense was premised upon Houchin's misunderstanding of the elements of self-defense and not on a failure to admit facts that negated the existence of the affirmative defense in this case. In short, Houchin did not ultimately assert a cognizable claim of self-defense at the hearing.

Because there was an adequate factual basis to support the acceptance of Houchin's guilty plea and trial counsel did not render ineffective assistance of counsel, the post-conviction court did not err in denying Houchin's PCR petition.

Judgment affirmed.

SHARPNACK, J., and RILEY, J.,M concur.