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**IN THE
COURT OF APPEALS OF INDIANA**

SCOTT E. STIDHAM,
Appellant-Petitioner,

vs.

STATE OF INDIANA,
Appellee-Respondent.

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No. 40A04-0706-CR-324

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-0002-CF-171

January 3, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Petitioner Scott Stidham appeals following his guilty plea and conviction for Operating a Motor Vehicle as a Habitual Traffic Violator as a Class D felony,¹ for which he received a three-year suspended sentence and a lifetime suspended license. Upon appeal, Stidham challenges the post-conviction court's denial of his motion to withdraw his guilty plea. We affirm.²

FACTS

On February 22, 2000, Stidham was charged with Class C felony operating a motor vehicle with a lifetime suspension and with Class A misdemeanor operating a motor vehicle while intoxicated. On November 1, 2000, Stidham pled guilty to Class D felony operating a motor vehicle as a habitual traffic violator. At the plea hearing, the following colloquy between the trial court, Stidham, and defense counsel occurred with respect to the factual basis for Stidham's plea:

[The Court]: Is it true that on February the 5th of 2000, here in Jennings County, Indiana, Mr. Stidham, you did operate a motor vehicle while your driving privileges were validly suspended as being a Habitual Traffic Violator?

[Stidham]: I was behind the wheel and the truck was running.

[The Court]: Mr. Kummerer, do you wish to examine your client further on the issue of operating?

[Michael Kummerer]: Okay, Judge. Uh, [Stidham], we have discussed what the Court of Appeals and the Courts have held, constitutes driving, or excuse me, operating a motor vehicle, in the State of Indiana. And I've advised you that the cases hold that operating a vehicle, while the ignition is operable, while you're in that or being in the vehicle, behind the driver's seat, while the ignition is operating constitutes driving under our Court decisions. I've advised you of that and based on that you've pled, you're pleading guilty to offense, is that correct?

¹ Ind. Code § 9-30-10-16 (1999).

² The record in this case is noticeably incomplete. It fails to include documentation of Stidham's original judgment of conviction. As the State points out, it also fails to include the probable cause affidavit, the facts of which Stidham apparently admitted. The post-conviction court relied on this affidavit in denying Stidham relief, and Stidham risks waiver of appellate review in failing to include it in the record. *See Miller v. State*, 753 N.E.2d 1284, 1287 (Ind. 2001).

[Stidham]: Yes, sir.

Guilty Plea Tr. pp. 9-10.

On January 2, 2001, the trial court sentenced Stidham to three years, which the court suspended so long as Stidham enrolled in an inpatient alcohol treatment program by January 22. The court additionally imposed a lifetime suspension of Stidham's driving privileges. Stidham was ultimately discharged from probation on November 1, 2004.

On February 5, 2007, Stidham filed a motion to vacate judgment and withdraw guilty plea. Following a May 1, 2007 hearing, the post-conviction court denied Stidham's motion.

DISCUSSION AND DECISION

On appeal, Stidham challenges the trial court's denial of his motion to set aside his conviction and to withdraw his guilty plea. Stidham contends his defense counsel erroneously advised him regarding the elements of his crime and that withdrawal of the plea made in reliance on counsel's advice is necessary in order to correct a manifest injustice.

Indiana Code section 35-35-1-4(c) (1999) provides the applicable standard governing Stidham's request to withdraw his plea after the imposition of his sentence:

After being sentenced following a plea of guilty, or guilty but mentally ill at the time of the crime, the convicted person may not as a matter of right withdraw the plea. However, upon motion of the convicted person, the court shall vacate the judgment and allow the withdrawal whenever the convicted person proves that withdrawal is necessary to correct a manifest injustice. A motion to vacate judgment and withdraw the plea made under this subsection shall be treated by the court as a petition for postconviction relief under the Indiana Rules of Procedure for Postconviction Remedies. For purposes of this section, withdrawal of the plea is necessary to correct a manifest injustice whenever:

- (1) the convicted person was denied the effective assistance of counsel;
- (2) the plea was not entered or ratified by the convicted person;
- (3) the plea was not knowingly and voluntarily made;
- (4) the prosecuting attorney failed to abide by the terms of the plea agreement; or

(5) the plea and judgment of conviction are void or voidable for any other reason.

Under section 35-35-1-4(c), Stidham's challenge is a petition for post-conviction relief. A petitioner for post-conviction relief must establish his grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When the court denies relief, the petitioner appeals from a negative judgment, such that he must demonstrate on appeal that "the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the [lower] court." *Ivy v. State*, 861 N.E.2d 1242, 1244 (Ind. Ct. App. 2007) (quoting *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004) (internal quotations omitted)), *trans. denied*. We may reverse the court's decision as contrary to law only if the evidence is without conflict and leads to the conclusion opposite that reached by the court below. *Id.*

Stidham, who essentially claims ineffective assistance of counsel, was required to establish that withdrawal of his plea was necessary in order to correct a manifest injustice. To establish ineffective assistance of counsel, Stidham must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Lambert v. State*, 743 N.E.2d 719, 730 (Ind. 2001). "Manifest injustice" is a "necessarily imprecise standard," and a trial court's ruling comes to us with a presumption that it is correct. *Ivy*, 861 N.E.2d at 1245 (internal quotation omitted).

Stidham points to two cases, specifically *Johnson v. State*, 518 N.E.2d 1127 (Ind. Ct. App. 1988), and *Clark v. State*, 611 N.E.2d 181 (Ind. Ct. App. 1993), *trans. denied*, and argues that, contrary to defense counsel's representations at the plea hearing, the fact that an individual is in the driver's seat of a car with an operable ignition does not necessarily constitute "operating" a vehicle for purposes of Indiana Code section 9-30-10-16. In *Johnson*, 518 N.E.2d

at 1128, this court held that a defendant, who was sitting inside of a disabled vehicle attempting to start it, purportedly for a tow, was not “operating” the vehicle. In reaching this holding, the *Johnson* court noted that the State had presented no evidence that the defendant had operated the car or that it was operable at the time of the defendant’s arrest. *Id.* at 1127. In *Clark*, this court similarly determined that a defendant found sleeping inside of a vehicle parked in a parking spot with the engine running, was not “operating” that vehicle. 611 N.E.2d at 181-82.

Regardless of whether defense counsel’s representation to Stidham at the plea hearing regarding the legal definition of “operating” a motor vehicle was oversimplified, Stidham fails to demonstrate that this representation was prejudicial or that his entering into a plea in reliance on this representation constitutes manifest injustice. While the fact that an individual is inside of a car with an operable ignition may not establish the allegation that he is per se “operating” the car, neither does it refute that allegation. Stidham pointed to no facts at the hearing suggesting, similar to *Johnson* or *Clark*, that he was asleep inside the car, that it was parked in a parking lot, or that the ignition was inoperable, nor does he point to any other facts which might undermine the State’s allegation. To the contrary, the alleged circumstances of this case were that Stidham was found inside of his car after it had left the roadway and crashed into a tree, circumstances which lead to the reasonable inference that he had operated the car. *See Garland v. State*, 452 N.E.2d 1021, 1022 (Ind. Ct. App. 1983) (finding sufficient evidence to infer defendant had operated car when car had been driven into snowbank on highway median and defendant was found inside with engine running). We conclude Stidham has failed to demonstrate that the facts of his case lead unerringly and unmistakably to the conclusion, opposite that of the post-conviction court, that he was not “operating” his motor vehicle. Accordingly, we similarly

conclude he has failed to demonstrate that he received ineffective assistance of counsel or that withdrawal of his plea is necessary to correct a manifest injustice.

The judgment of the post-conviction court is affirmed.

BARKER, C. J., and DARDEN, J., concur.