

SUPREME COURT OF COLORADO

Moore v. People, 2014 CO 8

318 P.3d 511 (Colo. 2014) · Decided February 3, 2014

SUMMARY

The Colorado Supreme Court held that a defendant's challenge to the knowing, voluntary, and intelligent waiver of the constitutional right to testify is not reviewable on direct appeal and must instead be raised in a post-conviction proceeding. The court also held that a contemporaneous objection to the trial court's Curtis advisement is not required and that plain-error review does not apply. It vacated the court of appeals' discussion and ruling on the waiver issue while otherwise upholding the judgment of conviction.

CASE DETAILS

COURT	Supreme Court of Colorado
WRITING FOR THE COURT	Justice Hobbs; Justice Coats; Justice Eid
JURISDICTION	Colorado
DECIDED	February 3, 2014
DISPOSITION	other
PROCEDURAL POSTURE	Colorado granted certiorari to review the court of appeals' consideration of Moore's direct-appeal challenge to the validity of his waiver of the constitutional right to testify and its application of plain-error review.
STANDARD OF REVIEW	A challenge to the validity of a waiver of the right to testify raised in a post-conviction proceeding presents a question of law subject to de novo review. Plain-error review on direct appeal based on the defendant's failure to contemporaneously object to the advisement is inapplicable.
PRECEDENTIAL VALUE	Published precedential opinion of the Supreme Court of Colorado
PARTIES	Lessell Moore v. People

TOPICS

right to counsel state post-conviction relief appellate procedure criminal procedure due process

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the court of appeals erred by considering on direct appeal Moore's challenge to the validity of his waiver of the right to testify.
2. Whether a defendant must make a contemporaneous objection to the trial court's Curtis advisement to preserve a challenge to the waiver of the right to testify.
3. What procedures and burdens govern a post-conviction challenge to the validity of a waiver of the right to testify.

HOLDINGS

1. A defendant's challenge to whether the waiver of the right to testify was knowing, voluntary, and intelligent is not reviewable on direct appeal; it may be raised only in a post-conviction proceeding.
2. A defendant is not required to contemporaneously object to the trial court's Curtis advisement, and plain-error review premised on the absence of such an objection does not apply.
3. In a post-conviction proceeding, the essential inquiry is whether the defendant's waiver of the right to testify was knowing, voluntary, and intelligent; the adequacy or inadequacy of the Curtis advisement is not dispositive.
4. Trial courts should continue to advise defendants of the five Curtis elements concerning the right to testify and the consequences of testifying or not testifying, but no precise wording or formula controls the ultimate validity of the waiver.

KEY QUOTATIONS

"We reaffirm that a defendant's challenge to his or her waiver of the right to testify is not subject to review on direct appeal, but only in a post-conviction proceeding. The defendant need not make a contemporaneous objection to the trial court's advisement." (515-516)

"Indeed, application of the contemporaneous objection and plain error review standards based on the defendant's failure to object during his own advisement make little sense. The very premise of such an advisement is that a defendant may not understand the nature of the right or the consequences of waiving it." (518)

"We now determine that, in either scenario-whether the advisement contained the five elements or did not contain the five elements-the essential task before the trial court on post-conviction review is to determine whether defendant's waiver of the fundamental constitutional right to testify was knowing, voluntary, and intelligent." (519)

FACTUAL BACKGROUND

Moore went to trial on charges arising from his unlawful entry into the residence of a woman who had a restraining order against him and his violent assault of another woman found inside. The jury convicted him of attempted first-degree murder, two counts of first-degree burglary, first-degree assault, attempted sexual assault,

menacing, and violation of a protection order. Because Moore had four prior felony convictions, he was sentenced as a habitual offender to 224 years. During trial, the court gave a Curtis advisement concerning his right to testify, and Moore stated that he would follow his attorneys' advice and would not testify.

PROCEDURAL HISTORY

Moore was convicted after a jury trial and sentenced as a habitual offender. On direct appeal, he argued that an allegedly defective Curtis advisement rendered his waiver of the right to testify unknowing and involuntary. The court of appeals considered the issue, applied plain-error review, rejected the challenge, and otherwise upheld the conviction while ordering vacation of a first-degree-burglary assault/menacing conviction. The Colorado Supreme Court disapproved and vacated the court of appeals' discussion and holding concerning the waiver issue, upheld the judgment of conviction otherwise, and held that Moore could pursue the waiver claim in a post-conviction proceeding.

DISPOSITION

other

REMAND INSTRUCTIONS

Moore may raise the validity of his waiver of the right to testify in a post-conviction proceeding. The court of appeals' discussion and holding on that issue were disapproved and vacated; the judgment of conviction was otherwise upheld.

CASES CITED

- People v. Curtis, 681 P.2d 504 (Colo. 1984)
- People v. Blehm, 983 P.2d 779 (Colo. 1999)
- People v. Harding, 104 P.3d 881 (Colo. 2005)
- People v. Thomas, 867 P.2d 880, 887 (Colo. 1994)
- People v. Milton, 864 P.2d 1097, 1101 (Colo. 1993)
- People v. O'Hara, 240 P.3d 283, 291 (Colo. App. 2010)
- People v. Gibson, 203 P.3d 571, 574 (Colo. App. 2008)
- People v. Gomez, 211 P.3d 53, 55, 57 (Colo. App. 2008)
- People v. Ziglar, 45 P.3d 1266, 1268 n.4 (Colo. 2002)
- Bedor v. Johnson, 292 P.3d 924, 929 (Colo. 2013)
- People v. Montoya, 251 P.3d 35, 45 (Colo. App. 2010)
- People v. Mozee, 723 P.2d 117, 124-25 (Colo. 1986)
- People v. Simpson, 69 P.3d 79, 81 (Colo. 2003)
- White v. Denver District Court, 766 P.2d 632, 636 (Colo. 1988)
- People v. Trujillo, 190 Colo. 497, 549 P.2d 1812 (1976)
- Allen v. People, 157 Colo. 582, 404 P.2d 266 (1965)

- Johnson v. Zerbst, 304 U.S. 458, 465 (1938)

OPINION

HOBBS, J.

JUSTICE HOBBS delivered the Opinion of the Court. T1 In *People v. Moors*, No. 08CA1805, 2010 WL 5013681 (Colo.App. Dec. 9, 2010), we granted certiorari to determine whether the court of appeals erred in reviewing defendant's claim that his waiver of the right to testify was not knowing, voluntary, and intelligent, and whether contemporaneous objection in the trial court is required to preserve this issue.¹ See *People v. Curtis*, 681 P.2d 504 (Colo.1984), as modified by *People v. Blehm*, 983 P.2d 779 (Colo.1999); see also *People v. Harding*, 104 P.3d 881 (Colo.2005).

Moore challenged his conviction on direct appeal before the court of appeals on multiple grounds, including that the trial court gave him a defective Curtis advisement and thus his waiver of the right to testify was not knowing and voluntary. T2 The court of appeals rejected Moore's challenge to the validity of his waiver of the right to testify and upheld his conviction, but ordered the trial court to vacate his first degree burglary assault/menacing conviction.

In reviewing Moore's appeal, the court of appeals applied a plain error standard because Moore had not made a contemporaneous objection to the sufficiency of his Curtis advisement in the trial court. The court of appeals held that the trial court's advisement did not constitute plain error. ¶3 We hold that the court of appeals erred in considering Moore's challenge, on direct appeal, of his waiver of the right to testify.

In reaching this holding, we modify our decisions in *Blehm* and *Harding*. We reaffirm that a defendant's challenge to his or her waiver of the right to testify is not subject to review on direct appeal, but only in a post-conviction proceeding.

The defendant need not make a contemporaneous objection to the trial court's advisement. Moore may raise the issue of the validity of his waiver of the right to testify in a post-conviction proceeding, as we discuss in this opinion.

Accordingly, we disapprove of and vacate the court of appeals' discussion and holding regarding the issue of the validity of Moore's waiver of the right to testify; otherwise, we uphold its judgment of conviction in this case.

I. T4 In October 2007, defendant Lessell Moore went to trial on a variety of charges stemming from an illegal entry into the residence of a woman who had a restraining order against him. Finding a different woman inside the residence, Moore ordered the woman into a back room and violently assaulted her. A jury convicted Moore of attempted first degree murder, two counts of first degree burglary, first degree assault, attempted sexual assault, menacing, and violation of a protection order.

Moore had four prior felony convictions on his record, all the result of guilty pleas. As a habitual offender, he was sentenced to 224 years. ¶5 During the trial, the trial court administered a Curtis advisement apprising Moore of his right to testify.

The court first explained that Moore had a right not to testify and, if he chose not to testify, the court would instruct the jury about this right. The court then advised Moore that he had a right to testify, that no one could prevent him from testifying, and that, if he did testify, the prosecution could cross-examine him regarding any relevant issues, as well as his prior felony convictions.

It explained that, if the prosecution disclosed Moore's convictions to the jury, the court would instruct the jurors *515to consider them only as they bore upon his credibility. The court additionally stated that the prosecution "may ask [Moore] whether the convictions were by a guilty plea, or whether [he] actually went to trial, and [he was] found guilty by trial."

At the conclusion of the colloquy, Moore said that he would follow his attorneys' advice and would not take the stand. The court found that Moore was alert and responsive, understood the advisement, and made a knowing and intelligent choice not to testify. T6 Moore appealed his conviction on several grounds, including that his conviction should be reversed based on an allegedly inadequate Curtis advisement that rendered his waiver of the right to testify not knowing and voluntary.² Moore argued to the court of appeals that his waiver of the right to testify was not knowing or intelligent because the trial court misstated the law when it advised him that the prosecution could ask whether his prior felony convictions resulted from trials or pleas.

Moore based this argument on the 2008 Colorado Court of Appeals decision in *People v. Gomez*, 211 P.3d 53, 57 (Colo. after his own trial, which held a similar advisement to be incorrect as a matter of law, Moore argued that his waiver could not have been knowing or voluntary in the face of this defective advisement and that therefore his waiver was invalid. T7 The court of appeals acknowledged a split among divisions on limiting review of the validity of defendant's waiver to a post-conviction proceeding, as opposed to on direct appeal.

The court of appeals then chose to address Moore's claim, observing that: (1) the prosecution had not challenged Moore's raising of the claim on direct appeal, instead arguing that "a remand is unnecessary because this Court can conclude from the existing record that the trial court's advisement... did not affect the defendant's decision to waive his right to testify"; (2) our decision in *Bighm*, which required such a claim to be raised via post-conviction motion, did not "cast the procedural issue as jurisdictional"; and (8) the court could resolve the issue without a fact-intensive inquiry.³ It proceeded to apply a plain error standard of review and concluded that "even if the advisement was defective, the error was not plain."

Moore, 2010 WL 5013681, at *1. The court of appeals reasoned that the law regarding this alleged error was unsettled at the time of trial, and "[w]hen the state of the law is unclear[,]... and only

becomes clear as a result of later authority, the district court's error is perforce not plain." *Id.* at *3 (quoting *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir.1997)).

IL 18 We hold that the court of appeals erred in considering Moore's challenge, on direct appeal, of his waiver of the right to testify. In reaching this holding, we modify our decisions in *Blekm* and *Harding*. We reaffirm that a defendant's challenge to his or her waiver of the right to testify is not subject to review on direct appeal, but only in a post-conviction proceeding.

The defendant need not make a contemporaneous objection to the trial court's advisement. Moore may raise the issue of the validity of his waiver in a post-conviction proceeding, as we discuss in this opinion. Accordingly, we disapprove of and vacate the court of appeals' discussion and holding regarding the issue of the validity of Moore's waiver of the right to testify; otherwise, we uphold its judgment of conviction in this case.⁴ *516A.

Waiver of Right to Testify 19 Our case law establishes that the intensely personal and fundamental nature of a defendant's right to testify imposes upon trial courts the "serious and weighty responsibility" of ascertaining whether the accused has intelligently and competently waived this right. *Curtis*, 681 P.2d at 514 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S.Ct.

1019, 82 L.Ed. 1461 (1938)). As we noted in *Curtis*, "[a] waiver is an intentional relinquishment of a known right or privilege. The courts do not presume acquiescence in the loss of fundamental constitutional rights, and therefore indulge every reasonable presumption against waiver." *Id.* (emphasis in original). 110 In *Curtis*, we recognized that the due process clauses of the United States and Colorado Constitutions afford criminal defendants the right to testify in their own defense.

Id.; see also U.S. Const., amend. XIV, § 1; Colo. Const., art. II, § 25. We concluded that the right to testify is one so inherently personal and basic that it can only be surrendered by the accused's knowing, voluntary, and intelligent⁵ waiver. *Curtis*, 681 P.2d at 511. Several considerations underlie the fundamental nature of this right, including the powerful evidentiary impact of a defendant's firsthand account of events, the importance of granting defendants a forum to "have their say" in court-notwithstanding any contrary advice from counsel-and the concomitant sense of legitimacy conferred on trial proceedings when defendants have the option to exercise this right.

See *id.* at 518-14; *People v. Thomas*, 867 P.2d 880, 887 (Colo.1994). To this end, we identified five elements for a trial court advisement: [A] trial court exercising appropriate judicial concern for the constitutional right to testify should seek to assure that waiver is voluntary, knowing and intentional by advising the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecution will be allowed to cross-examine him, that if he has been convicted of a felony the prosecutor will be entitled to ask him about it and thereby disclose it to the jury, and that if the

felony conviction is disclosed to the jury then the jury can be instructed to consider it only as it bears upon his credibility.

In connection with the privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right. Curtis, 681 P.2d at 514 (emphasis added).

We observed that the purposes of this advisement are to ensure that a defendant's waiver of this right is voluntary, knowing, and intelligent, to preclude post-conviction disputes between defendant and counsel on this issue, and to facilitate appellate review. Id. at 515. Giving such an advisement, we posited, would enable trial courts to "accurately determine whether [the] waiver was indeed intelligent and competent, and that determination will be readily reviewable on appeal."

Id. at 516. Accordingly, we required trial courts to make a specific advisement about the right to testify and the consequences of waiver. The underlying premise of such an advisement is the importance of a defendant understanding the substance of the right. 11 In Blehm, we reaffirmed Curtis's central holdings that a defendant's waiver of the right to testify must be knowing, voluntary, and intelligent, and the trial court must make an on-the-record advisement explaining the nature of this right.

Blehm, 983 P.2d at 782. We also restated the principle that, although the advisement need not conform to any pre-scribed litany or formulaistic recitation, it should include the elements identified in Curtis and avoid misleading a defendant about the consequences of a decision not to testify. Id. at 787.

In Blehm, we held that a defendant's opportunity to challenge whether his or her waiver of the right to testify was *517knowing, voluntary, and intelligent is through a post-conviction proceeding and not on direct appeal. Id. at 785. 12 Prior to Blehm, defendants were required to raise challenges to the validity of their waiver of the right to testify on direct appeal.

The idea was that trial courts could "eliminate speculation as to what a particular defendant might believe to be the salient consequences of testifying...." Id. at 787 (quoting *People v. Milton*, 864 P.2d 1097, 1101 (Colo.1998)). Appellate courts could then assess the validity of the waiver based on their review of the record alone, obviating the need for a separate evidentiary hearing.

Id. at 788. Thus, in cases where the trial court's on-the-record advisement was deficient, courts concluded that the defendant's waiver was invalid,. Id. 113 In Blehm, however, we reevaluated the propriety of the approach we took in Curtis.

We concluded that sound reasons existed for modifying the process of appellate review in order to accomplish the original aims of Curtis. Specifically, we concluded that the Curtis framework did

not facilitate appellate review and eliminate post-conviction disputes as intended, because: (1) appellate courts frequently permitted defendants to assert claims of invalid waiver in post-conviction proceedings, regardless of whether the defendant raised the issue on direct appeal; and (2) appellate courts were reluctant to automatically render a defendant's waiver invalid based solely on a defective advisement, where it seemed likely that the defendant had knowingly, voluntarily, and intelligently waived the right to testify.

Id. at 790-91. We concluded that the review process outlined in *Curtis* failed to account for situations in which facts outside the record were critical to determining whether the defendant had knowingly, voluntarily, and intelligently waived this right.

Accordingly, we held that defendants' claims of invalid waiver were "best addressed in post-conviction proceedings where an evidentiary hearing is available if necessary to ascertain facts not present in the original trial record." *Id.* at 792. 114 Thus, under *Blehm*, "defendants need not and should not raise allegations of an invalid waiver on direct appeal of a conviction.

Instead, such claims may be raised only in a post-conviction motion." *Id.* (emphasis added). We explained that the inquiry in such a post-conviction proceeding centers on a defendant's assertion that his or her waiver was not effective because it was not knowing, voluntary, and intelligent. Consistent with the fundamental right explained in *Curtis*, the post-conviction inquiry should focus upon whether the defendant was aware that he had a right to testify, whether the defendant knew of the consequences of testifying, and whether the defendant understood that he could testify notwithstanding the contrary advice of counsel....

If, after the post-conviction hearing, the trial court concludes that the defendant's waiver was not voluntary, knowing and intelligent, the defendant is entitled to a new trial. *Id.* We now turn to the court of appeals' erroneous decision to consider Moore's direct appeal challenge to his waiver of the right to testify in this case. B. Contemporaneous Objection Not Required and Waiver Issue Not Reviewable on Direct Appeal 1 15 Despite *Blehm*'s direction that defendants should raise waiver challenges only in post-conviction proceedings, panels of the court of appeals have since diverged on the issue of whether to address these claims on direct appeal.

Compare *People v. O'Hara*, 240 P.3d 283, 291 (Colo.App.2010) *aff'd* on other grounds, 271 503 (2012) (holding that *Blehm* foreclosed an inquiry into the sufficiency of defendant's *Curtis* advisement on direct appeal), and *People v. Gibson*, 203 P.3d 571, 574 (Colo.App.2008) ("This is a direct appeal, not a post-conviction proceeding.

Therefore, under *Blehm*, we shall not address this claim."), with *Moore*, 2010 WL 5018681, at *1, and *Gomez*, 211 P.3d at 55. Court of appeals panels choosing to address challenges to the validity of a waiver on direct appeal have relied primarily on principles of judicial economy in support of review. See *Moore*, 2010 WL 5018681, at *1 (citing the Attorney General's argument that the court

could "conclude from the existing record that the trial court's advisement [] did not affect the defendant's decision to waive his right to testify" as a basis for addressing the issue); Gomez, 211 P.3d at 55 ("We first consider the... argument that we should not address Curtis because 'defendants need not and should not raise allegations of an invalid waiver on direct appeal of a conviction.

Instead, such claims may be raised only in a post-conviction motion.'. We reject this argument based on judicial economy."); see also *People v. Ziglar*, 45 P.3d 1266, 1268 n. 4 (Colo.2002) ("Under Blehm, the proper forum for attacking a Curtis advisement is a post-conviction hearing, not direct appeal.... Hence, the propriety of addressing this issue on direct appeal is questionable.

However, in light of our decision that the second Curtis advisement was unnecessary, we choose to address the issues raised."). 16 We perceive no sound justification for deviating from Blehm 's holding that a defendant's challenge to the knowing, voluntary, and intelligent waiver of the right to testify may be raised only through a post-conviction proceeding.

See *Bedor v. Johnson*, 292 P.3d 924, 929 (Colo.2018) ("The principles of stare decisis provide that this Court will follow the rule of law it has established in earlier cases.... We will depart from our precedent, however, 'where sound reasons exist for doing so.'" (citing Blehm, 983 P.2d at 788)). 117 The issue on post-conviction review, whether the defendant's waiver of the right to testify was knowing, voluntary, and intelligent, is a question of law subject to de novo review.

See *Harding*, 104 P.3d at 885; Blehm, 983 P.2d at 792 n. 9. While appellate courts are ordinarily well-positioned to review legal issues on direct appeal, a defendant's challenge to the knowing, voluntary, and intelligent waiver of the right to testify likely will require a post-conviction court to look beyond the trial court's advisement into facts that the defendant brings forward that are not contained in the direct appeal record.

Post-conviction review focuses not only on the sufficiency of the advisement itself, but also on the actual knowing, voluntary, and intelligent nature of a defendant's waiver. See Blehm, 983 P.2d at 791-92. Requiring defendants to assert such claims via Crim. P. 85(c) "avoids piecemeal litigation by requiring... defendant[s] [to] raise all relevant issues in one postconviction proceeding."

People v. Montoya, 251 P.3d 35, 45 (Colo.App.2010). 18 In prior cases, we have not required a defendant to contemporaneously object to the Curtis advisement. See *Harding*, 104 P.3d at 883 n. 1 (no contemporaneous objection during colloquy); see also Blehm, 983 P.2d at 783, 785 (no contemporaneous objection during advisement to defendant Blehm; no contemporaneous objection during colloquy with defendant Saint-Veltri).

Indeed, application of the contemporaneous objection and plain error review standards based on the defendant's failure to object during his own advisement make little sense. The very premise of such an advisement is that a defendant may not understand the nature of the right or the

consequences of waiving it. Hence, it is illogical to oblige a defendant to object contemporaneously to the trial court's advisement.

119 Trial courts should continue to give the five elements of the Curtis advisement, the purpose of which is to safeguard the knowing, voluntary, and intelligent nature of defendant's understanding of the right to testify in deciding whether or not to testify. Nevertheless, the precise wording the trial court utilizes does not govern whether or not the defendant's waiver is in fact knowing, voluntary, and intelligent, and direct appeal plain error review posited on contemporaneous objection to the advisement is inapplicable.

As we noted in *People v. Mozee*, 723 P.2d 117, 124-25 (Colo.1986), "[u]nderlying our concern in Curtis was the belief... that a defense attorney, acting in a good faith and with a zeal to prevent the client's conviction, might overbear a defendant's desire to testify." *Id.* at 125. Given that it is the defendant's right alone to testify or to waive the right to testify, we do not penalize the defendant for failing to object to the adequacy of the Curtis advisement.

C. Post-Conviction Process for Challenging the Defendant's Waiver 120 We now turn to the post-conviction process for determining whether a defendant *519challenging the validity of his waiver of the right to testify is entitled to relief,.

In doing so, we modify our decisions in *Blehm* and *Harding*. 1 21 In *Blehm* we described two types of advisements, those that were "adequate" and those that were "inadequate." An adequate advisement is given when the trial court informs the defendant of each of the five elements we identified in *Curtis*. See *Blehm*, 983 P.2d at 798. An inadequate advisement is one where the defendant is not informed of those five elements.

Id. at 794. In *Blehm*, we said that a defendant who is advised of the five elements is not entitled to either an evidentiary hearing or a new trial. *Id.* In contrast, we said that a defendant who is not advised of the five elements is entitled to a post-conviction hearing to determine whether his waiver of the right to testify was in fact knowing, voluntary, and intelligent, and, if the district court concludes that the defendant's waiver was not valid, the defendant is entitled to a new trial.

Id. 122 We now determine that, in either scenario-whether the advisement contained the five elements or did not contain the five elements-the essential task before the trial court on post-conviction review is to determine whether defendant's waiver of the fundamental constitutional right to testify was knowing, voluntary, and intelligent.

We depart from *Blehm*'s focus on the adequacy of the advisement. The adequacy of the advisement is not dispositive of whether a defendant is entitled to an evidentiary hearing. The post-conviction proceeding commences with defendant's challenge to the validity of the waiver of the right to testify as it appears in the record of the proceeding.⁶ 123 Pursuant to Crim.

P. 35(c)(8)(IV), if the defendant fails to state adequate factual or legal grounds for relief, the trial judge may deny the motion. If the defendant does, however, meet this burden, the trial judge must direct the prosecution to respond and may then either enter judgment on the pleadings or hold an evidentiary hearing. Crim. P. 85(c)(8)(V).

As the party challenging under Crim. P. 35(c) the validity of the waiver that appears in the trial court record, the defendant, in order to obtain an evidentiary hearing, must allege specific facts that if proved at the hearing establish a prima facie case that the waiver of the right to testify was not knowing, voluntary, and intelligent. See *People v. Simpson*, 69 P.3d 79, 81 (Colo.2003) ("To warrant a hearing, a defendant need only assert facts that, if true, would provide a basis for relief.") (citing *White v. Denver Dist.*

Court, 766 P.2d 632, 636 (Colo.1988); *People v. Trujillo*, 190 Colo. 497, 549 P.2d 1812 (1976) (no evidentiary hearing required where defendant's motion for post-conviction relief only presented question of law); *Allen v. People*, 157 Colo. 582, 404 P.2d 266 (1965) (evidentiary hearing was not required where the defendant did not introduce any new facts but merely argued that the trial court erred in failing to investigate and ascertain that defendant was indigent)).

Then, because the fundamental right to testify is at issue, the prosecution bears the burden of demonstrating that defendant's waiver was knowing, voluntary, and intelligent. *Harding*, 104 P.3d at 885. { 24 We emphasize that the content of a trial court's advisement, standing alone, does not conclusively establish whether a defendant's waiver of the right to testify was or was not knowing, voluntary, and intelligent.

Post-conviction courts should not tether their determination of whether a defendant validly waived the right to testify to any precise formula or particular behavior. Rather, they are tasked with pursuing the more general inquiry of whether the defendant waived this right knowingly, voluntarily, and intelligently. "[C]ourts should not presume acquiescence in the loss of the right to testify, and therefore should indulge every reasonable presumption against waiver....

The fundamental fairness of a criminal trial is called into question if this right is relinquished in any other way." *Blehm*, 983 P.2d at 786 (citing *Curtis*, 681 P.2d at 511, 514). 125 As we also recognized in *Blehm*, the Crim. P. 85 post-conviction inquiry should focus upon whether the defendant was *520aware that he or she had a right to testify, whether the defendant knew of the consequences of testifying, and whether the defendant understood that he or she could testify notwithstanding the contrary advice of counsel.

983 P.2d at 792. We observed that the primary reason to reserve a waiver challenge for post-conviction review is that off-the-record evidence may be required so that the trial court can find facts and make a determination whether or not to grant a new trial. *Id.* at 791-792. \$26 The

prosecution cannot ordinarily put the defendant or defendant's counsel on the stand in trial court proceedings.

However, a defendant's assertion that his or her waiver of the right to testify is not valid often puts into controversy what the defendant did or did not understand in waiving the right; what the attorney did or did not say; and any other pertinent circumstances relating to defendant's condition at the time of the waiver, for example, whether defendant was impaired, intoxicated, suffering a language barrier, or coerced to a degree that renders the waiver not knowing, voluntary, and intelligent.

As the moving party on the issue of the validity of the waiver, the defendant's factual allegations will trigger whether or not the trial court convenes an evidentiary hearing on those allegations. If a defendant does not make and prove factual allegations warranting a judgment on the pleadings or an evidentiary hearing in the post-conviction proceeding, the trial court's advisement at trial containing the five Curtis elements prevails and the waiver is deemed valid.

This is because the advisement is evidence reflecting that the waiver was knowing, voluntary, and intelligent, which, if not contested by evidence showing otherwise, stands in support of the validity of the waiver. 127 Thus, in *Blehm*, we enunciated a presumption that defendant's waiver is knowing, voluntary, and intelligent when the trial court's on-the-record advisement includes the five Curtis elements: Where the trial court's on-the-record advisement includes the five essential Curtis elements, the record conclusively demonstrates that the defendant made a valid waiver of the right to testify.

Thus, if the trial court determines that the advisement was adequate, the defendant is not entitled to an evidentiary hearing on the issue of the validity of the waiver. *Blehm*, 983 P.2d at 792. Contrary to our use of the word "conclusively" in this context, we now determine that a defendant is not precluded from introducing off-the-record evidence in a post-conviction proceeding to demonstrate the invalidity of his waiver of the right to testify.

As we observed earlier in this opinion, a successful challenge to the validity of a waiver of the right to testify that appears in the record of the trial court proceeding will likely involve off-the-record evidence demonstrating that the waiver was not knowing, voluntary, and intelligent. 128 Similarly, even where a defendant does not receive an adequate advisement, a defendant still must make factual allegations which, if proved, would warrant an evidentiary hearing in the post-conviction proceeding.

Thus, contrary to *Blehm*, 983 P.2d at 794, an inadequate advisement does not automatically entitle a defendant to a post-conviction hearing. As discussed earlier in this opinion, the defendant who is challenging the validity of the waiver has the burden under Crim. P. 35(c) to first come forward with evidence demonstrating that the waiver was not knowing, voluntary, and intelligent.

If the defendant does so, the prosecution then must show that the waiver was knowing, voluntary, and intelligent. To the extent that Harding put the initial burden on the prosecution, we overrule that aspect of Harding. See 104 P.3d at 885.7 D. Application to this Case 129 Moore was not required to make a contemporaneous objection to the trial court's Curtis advisement, and plain error review is inapplicable.

The court of appeals *521 should not have reviewed Moore's claim that the Curtis advisement in his case rendered his waiver of the right to testify not knowing and voluntary. Moore may raise this issue in a post-conviction proceeding. II. 130 Accordingly, we disapprove of and vacate the court of appeals' discussion and holding in regard to Moore's challenge to the validity of his waiver of the right to testify; otherwise, we uphold the court of appeals judgment of conviction in this case.

JUSTICE COATS concurs in part and dissents in part, and JUSTICE EID joins in the concurrence in part and the dissent in part.. We granted certiorari on the following issues: 1. Whether the court of appeals erred under *People v. Blehm*, 983 P.2d 779 (Colo.1999), when it addressed defendant's Curtis advisement on direct appeal. 2. Whether the court of appeals erred in concluding that defendant's Curtis advisement was not plainly erroneous..

He succeeded only in his claim that his first degree burglary assault/menacing conviction should be vacated.. Judge Booras concurred in the judgment but noted that she would decline to address the validity of the Curtis advisement because doing so is contrary to the procedure outlined in *Blehm*..

In *People v. Ziglar*, 45 P.3d 1266, 1268 n. 4 (Colo.2002), we questioned the propriety of addressing a Curtis challenge on direct appeal in light of *Blehm*. We entertained the direct appeal there in light of our decision, as a matter of law, that there is no requirement for a trial court to give an amended Curtis advisement during the habitual phase of the trial.

In the case before us, Moore alleged on direct appeal that his waiver of the right to testify was not knowing and voluntary, a matter for post-conviction proceedings.. In *People v. Mozee*, 723 P.2d 117, 121 n. 4 (Colo.1986), we noted that we had used the word "intentionally" in the Curtis opinion but did not mean to establish any particular distinction between the constitutional standard for waiver of a defendant's right to testify and waiver of other fundamental rights, which, in our jurisprudence, must generally be knowingly, voluntarily and intelligently made..

If there is no record of defendant having waived the fundamental right to testify, the court of appeals on direct review may reverse the conviction and order a new trial.. Our discussion of the burden of proof today pertains only to the waiver of the fundamental right to testify in one's own defense, the waiver of the right to counsel, and the waiver of the right to a jury trial.

It does not alter the burden of proof in post-conviction proceedings generally.

