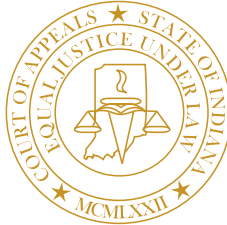


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE Court of Appeals of Indiana

Bernard G. DeStefano,
Appellant-Petitioner

v.

State of Indiana,
Appellee-Respondent



October 10, 2024

Court of Appeals Case No.
23A-PC-3100

Appeal from the Monroe Circuit Court
The Honorable Erik C. Allen, Special Judge
Trial Court Cause No.
53C02-2205-PC-923

Memorandum Decision by Judge Tavitas
Judges May and Weissmann concur.

Tavitas, Judge.

Case Summary

- [1] Following a jury trial in 2004, Bernard DeStefano was convicted of: (1) rape, a Class A felony; (2) criminal deviate conduct, a Class A felony; (3) criminal confinement, a Class B felony; and (4) unlawful possession of a firearm by a serious violent felon, a Class B felony. The jury also determined that DeStefano was an habitual offender. This Court affirmed DeStefano's convictions in 2005. *DeStefano v. State*, No. 53A05-0406-CR-309 (Ind. Ct. App. June 8, 2005) (mem.), *trans. denied*. DeStefano then filed a pro se petition for post-conviction relief, which the post-conviction court ("PC Court") denied.
- [2] DeStefano appeals this denial and argues that the PC Court erred by rejecting DeStefano's claims that: (1) the State violated DeStefano's *Brady* rights by failing to disclose exculpatory evidence; (2) DeStefano did not knowingly or intelligently agree to not mention the State's lack of DNA evidence; (3) DeStefano's due process rights were violated by the State's failure to correct false and perjured testimony; (4) the prosecutor committed misconduct by using false and perjured testimony; and (5) the prosecutor committed misconduct by relying on false testimony in the State's closing argument. We conclude that all of DeStefano's claims of error are waived. Accordingly, we affirm.

Issue

- [3] DeStefano presents five issues for our review, which we consolidate and restate as whether DeStefano's claims are waived for purposes of post-conviction relief.

Facts

[4] In DeStefano's direct appeal, this Court set forth the facts underlying DeStefano's convictions as follows:

The facts most favorable to the convictions reveal that DeStefano was P.D.'s nephew by marriage and, between the ages of nine to fifteen, had lived with P.D. and her husband, Bob. P.D. and her husband were currently helping DeStefano with transportation to and from school, tutoring him in math, and allowing him to use their home computer. At approximately 7:15 a.m. on February 3, 2004, P.D. was at home getting ready for work when DeStefano rang the doorbell. When P.D. answered the door, DeStefano told her that he wanted to use the computer to check his e-mail before he went to work. P.D. let DeStefano in and then continued to get ready for work. DeStefano asked if "Uncle Bob" was home, and P.D. told him that [Bob] had left earlier that morning.

While P.D. was in the bathroom, DeStefano came up behind her, put his left arm around her neck, and held a gun to her head. DeStefano told P.D. to do everything he told her and cocked the gun while saying something like "just to make sure you believe me." P.D. was terrified and told DeStefano that she believed him and that he did not "need to do this." P.D. asked DeStefano what he wanted, and he leaned back against the bathroom door frame, pointed the gun at P.D, waived the gun up and down her body and said, "ok take it off, take it all off." P.D. took her clothes off, and DeStefano told her to get on the bed. When P.D. started to cry, DeStefano told her to stop or he would hurt her. P.D. laid down on the bed, and DeStefano took his clothes off.

P.D. complied with DeStefano's demands that she scoot further back on the bed, and then DeStefano laid on top of her. DeStefano began kissing P.D. and trying to have "sex" with her and "rape" her. Because DeStefano was such a large man, P.D.

was unable to move or go anywhere. P.D. tried to talk to DeStefano, but he told her to keep quiet or he would hurt her. P.D. felt that DeStefano did not have a complete erection and that he only partially penetrated her. DeStefano leaned back and said “looks like you’re gonna have to help me.” DeStefano then forced P.D. to perform oral sex on him. After P.D. performed oral sex, DeStefano again laid on top of P.D. and penetrated her. DeStefano then collapsed and began to cry. When DeStefano started getting dressed, P.D. asked permission to get dressed as well.

In order to escape, P.D. tried to convince DeStefano that she did not want him to get in trouble. P.D. told DeStefano that if he agreed to get sex counseling she would not tell anybody about what had happened. P.D. then told DeStefano that she needed to be at work at 8:00 a.m. and that if she was late, people would start calling. DeStefano agreed to allow P.D. to go to work as long as she would not tell anyone about what had happened. DeStefano left through the garage door, at which time P.D. observed that he had parked his truck across the driveway such that she would be unable to leave. After DeStefano left, P.D. got in her car to drive to work. When she reached the entrance to her neighborhood, she saw DeStefano sitting and waiting in his truck.

P.D. walked into the school where she worked as a school nurse and told the assistant principal to have security stop DeStefano if he came to the school. P.D. called her husband and tried to tell him what had happened, but she was unable to because she was crying too much. DeStefano then telephoned P.D. and told her that he had tried to contact a sex counselor, but that the person he needed to talk to was unavailable. P.D.’s husband called her again, and this time she was able to tell him that DeStefano had had a gun and had raped her that morning. Upon her husband’s advice, P.D. asked the assistant principal to take her to the hospital. The assistant principal had been told that P.D. had been crying “uncontrollably.” At the hospital, P.D. reported that

DeStefano had raped her and fondled and licked her breasts. The examining nurse discovered oral secretions around P.D.'s right breast. The examining nurse also noted that P.D. was very frightened and that she would hide behind the curtain so no one could see her.

After leaving P.D.'s home, DeStefano went to his brother's house, knocked on the door, and gave the gun to his brother. DeStefano arrived at his home shortly after 8:00 a.m. and was agitated, upset, and shaking.

During the course of the investigation into P.D.'s allegations, Detective Rick Crussen of the Bloomington Police Department conducted a videotaped interview of DeStefano at the police department. During the interview, DeStefano admitted to Detective Crussen that he had had sexual intercourse with P.D., but claimed that it was consensual. DeStefano also provided Detective Crussen with information about the gun.

On February 4, 2004, the State filed an information charging DeStefano with Count I, Rape, Count II, Criminal Deviate Conduct, Count III, Criminal Confinement, and Count IV, Unlawful Possession of a Firearm by a Serious Violent Felon. The State also alleged DeStefano to be an habitual offender. At the initial hearing, the trial court appointed a public defender to represent DeStefano.

DeStefano, No. 53A05-0406-CR-309, slip op. at 2-4 (record citations omitted).

- [5] On February 6, 2004, DeStefano filed a request for a fast and speedy trial. On February 26, 2004, DeStefano filed a motion to represent himself, which the trial court granted.

- [6] On March 23, 2004, DeStefano moved to suppress his videotaped statement to Detective Crussen and any evidence relating thereto, in which DeStefano claimed that the detective failed to honor his requests to stop the interview. At the hearing on DeStefano's motion to suppress, the prosecutor stated, "We do not have DNA results." Trial Tr. Vol. I p. 141. The prosecutor also stated that DeStefano had admitted to consensual sex with the victim and that "we send DNA to the lab . . . only when it is a question of identity or a question of primarily identity . . . ," or when "the Defendant says no sex ever took place. That didn't happen in this case so we do not have DNA results. Therefore we will not have DNA results by this trial date." *Id.* at 141-42. The prosecutor also expressed concern that DeStefano would criticize the investigation by noting the lack of DNA testing.
- [7] The trial court asked DeStefano if he wished to proceed to trial or wait for the State to send the DNA to the laboratory for testing, which would delay his trial. DeStefano insisted on his speedy trial rights and agreed to proceed to trial without the DNA evidence. The trial court warned DeStefano of "ambush[ing]" the State at trial by claiming that he did not know about the lack of DNA testing or had been deprived of such evidence. *Id.* at 143. DeStefano stated, "That's fine." *Id.* at 144. The State then sought clarification as to whether DeStefano agreed to not ask why there was no DNA evidence, and DeStefano agreed not to "discuss DNA results" and not to "ask any of the witnesses about DNA results." *Id.* at 145.

- [8] On April 5, 2004, the trial court granted DeStefano's motion to suppress his statement to Detective Crussen because, upon review of the videotape of the interview, the trial court determined that Detective Crussen failed to "scrupulously honor[]" DeStefano's requests that the questioning cease. Trial Appendix at 111.
- [9] A jury trial was held on April 6-8, 2004, at which DeStefano represented himself. During *voir dire*, DeStefano asked one of the potential jurors: "[A]re you familiar with the fact how [characters on television crime shows] match genetics and blood samples and hair? Would you need to have some of that evidence to prove guilt or innocence?" Trial Tr. Vol. II p. 41. The potential juror replied, "I would probably like to see that." *Id.* Another potential juror responded, when asked the same question, "I would need evidence." *Id.* The prosecutor claimed that DeStefano had violated the agreement to not mention DNA evidence or the lack thereof. The prosecutor, therefore, requested that Detective Crussen be allowed to testify that the reason the State did not have DNA evidence was "because it was his understanding that this was a consensual act and therefore there was no DNA request made." *Id.* at 59. The trial court agreed but instructed the prosecutor to limit her questioning: "we're only opening the door wide enough to allow you to discuss that particular issue with Detective Crussen." *Id.* at 60.
- [10] During trial, DeStefano asked the victim whether a rape kit was collected from her and whether it had been tested for the presence of semen. He also asked the victim whether she agreed that, other than her testimony, no evidence

corroborated her claim. The prosecutor argued that DeStefano had again opened the door to evidence regarding DeStefano's claim to Detective Crussen that he had consensual sex with the victim. The trial court agreed and permitted Detective Crussen to testify that no DNA analysis was performed on the rape kit because DeStefano admitted that he and the victim had consensual sex. On cross-examination of Detective Crussen, DeStefano insinuated that the detective had coerced DeStefano to make such a statement. On redirect examination, Detective Crussen explained that he told DeStefano that if the analysis of the rape kit indicated that DeStefano had sexual contact with the victim, the detective needed to hear DeStefano's "version of the event." Trial Tr. Vol. III p. 73. That led to DeStefano telling the detective that the sexual intercourse was consensual. *Id.*

[11] As part of his defense, DeStefano testified on his own behalf. His testimony included the following statement:

I don't know what triggered me being in bed with [the victim] naked and all that stuff. I have no idea where that came from. The gun and all that stuff, I have no idea where that came from. All I know is I got up off that piano bench and I went through the garage and I got in my truck and I left

Id. at 197. At the conclusion of the trial, the jury found DeStefano guilty on all counts and found him to be an habitual offender. On May 11, 2004, the trial court sentenced DeStefano to an aggregate term of 170 years of incarceration.

[12] On direct appeal, DeStefano was represented by counsel and argued that the trial court erred by admitting portions of DeStefano's suppressed statement and that his convictions for criminal confinement and unlawful possession of a firearm by a serious violent felon were part of a single episode of criminal conduct for sentencing purposes. As to the first issue, we concluded:

After consideration, we agree that DeStefano, by referring to genetics, violated the court's pre-trial order not to mention DNA results. In so doing, DeStefano opened the door to that part of his videotaped statement in which he told Detective Crussen that he had had consensual sexual intercourse with P.D. Further, the trial court appropriately limited Detective Crussen's testimony to that portion of DeStefano's previously suppressed statement which was necessary to explain the State's lack of evidence of DNA results.

DeStefano, No. 53A05-0406-CR-309, slip op. at 10. We also rejected DeStefano's claim that the trial court erred by permitting Detective Crussen to testify that he did not coerce DeStefano into claiming that he had consensual sex with the victim. *Id.* at 15. Although we rejected DeStefano's claim that his crimes constituted a single episode of criminal conduct, we remanded with instructions that the trial court attach the habitual offender enhancement to one of the sentences rather than listing it as a separate offense. *Id.* at 17-18.

[13] Seventeen years later, on May 9, 2022, DeStefano filed a petition for post-conviction relief. In his petition, DeStefano claimed ineffective assistance of appellate counsel and newly discovered evidence. Specifically, he claimed that his appellate counsel was ineffective for failing to raise claims on direct appeal

of “prosecutorial misconduct/false testimony.” Appellant’s App. Vol. II p. 16. In support of this claim, DeStefano argued that Detective Crussen falsely testified that DeStefano admitted to consensual sex with the victim. DeStefano also claimed that his appellate counsel was ineffective for failing to raise on direct appeal a claim that DeStefano appeared before the jury in shackles. DeStefano further claimed that his appellate counsel was ineffective because he failed to argue that the trial court did not adequately advise DeStefano of the dangers of proceeding pro se. In support of his newly discovered evidence claim, DeStefano stated that the victim would testify that she gave false testimony and that she had made false accusations of sexual misconduct in the past. Lastly, DeStefano claimed that the police intentionally destroyed all the physical evidence in his case so that no DNA tests could be performed on the evidence, which he argued was also a due process violation.

- [14] The PC Court held an evidentiary hearing on DeStefano’s petition on May 5, 2023. At the post-conviction hearing, DeStefano asked Detective Crussen whether the rape kit had been sent to the State Police Laboratory. Detective Crussen testified, based on a letter that DeStefano handed the detective but which was not admitted into evidence, that “as far as the evidence being sent to the lab, from reading [the] letter you just showed me, it appears that it was either sent or a discussion was had as to whether it should be sent. But because of the speedy trial request, it wasn’t going to be processed.” PC Tr. Vol. II p. 18. DeStefano also asked the former prosecutor about whether the rape kit was sent to the lab. She testified that “the rape kit may or may not have been sent to

the lab,” and “I think my assumption would have been it would have been [sent] because it was a sexual assault.” *Id.* at 38-39. The former prosecutor also testified that the decision to send the kit to the laboratory was up to the police, “but when the discussion happened that [DeStefano] wanted the [speedy] trial and not the rape kit, I no longer pursued that. *Id.* at 39. She also testified that the rape kit “was not actually sent . . . into the lab to be analyzed. It might have been at the lab. It might have been going to the lab. But it was not sent into the lab to be analyzed. We stopped that, yes[,] because Mister DeStefano wanted his speedy trial.” *Id.* at 63.

[15] DeStefano testified on his own behalf at the post-conviction hearing and stated with regard to the rape kit:

I based my decision [on going to trial] because [the prosecutor] said she didn’t send it. She turned around and said she didn’t send it. I didn’t want to wait. If it was already there in the process of being tested, I would have waited. Therefore, I would have made my decision knowing that it was up there in line to be tested. I made my decision based on the fact she said it wasn’t sent. So, I made my decision based on her bulls**t a** lie.

Id. at 142. At the end of the evidentiary hearing, the PC Court took the matter under advisement. On December 7, 2023, the PC Court entered findings of facts and conclusions of law, in which it denied DeStefano’s petition. DeStefano now appeals.

Discussion and Decision

Post-Conviction Standard of Review

- [16] Post-conviction proceedings are civil proceedings in which a defendant may present limited collateral challenges to a conviction and sentence. *Gibson v. State*, 133 N.E.3d 673, 681 (Ind. 2019); Ind. Post-Conviction Rule 1(1)(b). “The scope of potential relief is limited to issues unknown at trial or unavailable on direct appeal.” *Gibson*, 133 N.E.3d at 681. “Issues available on direct appeal but not raised are waived, while issues litigated adversely to the defendant are res judicata.” *Id.* The petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Id.*; P.-C.R. 1(5).
- [17] When, as here, the petitioner “appeals from a negative judgment denying post-conviction relief, he ‘must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court’s decision.’” *Gibson*, 133 N.E.3d at 681 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000)). When reviewing the PC Court’s order denying relief, we will “not defer to the post-conviction court’s legal conclusions,” and the “findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.” *Bobadilla v. State*, 117 N.E.3d 1272, 1279 (Ind. 2019). When a petitioner “fails to meet this ‘rigorous standard of review,’ we will affirm the post-conviction court’s denial of relief.” *Gibson*, 133 N.E.3d at 681 (quoting *DeWitt v. State*, 755 N.E.2d 167, 169-70 (Ind. 2001)).

[18] We also note that DeStefano proceeded pro se before the PC Court and does so again on appeal. We hold pro se litigants to the same standard as we do licensed attorneys. *Stark v. State*, 204 N.E.3d 957, 963 (Ind. Ct. App. 2023) (citing *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014)). Thus, “pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so.” *Id.* (quoting *Picket Fence Prop. Co. v. Davis*, 109 N.E.3d 1021, 1029 (Ind. Ct. App. 2018)). On appeal, “[w]e will not become an advocate for a party, or address arguments that are inappropriate or too poorly developed or expressed to be understood.” *Lowrance v. State*, 64 N.E.3d 935, 938 (Ind. Ct. App. 2016) (citation and internal quotation marks omitted), *trans. denied*.

A. Brady claim

[19] On appeal, DeStefano argues that the PC Court erred by denying his claim for relief based on the State’s failure to turn over allegedly exculpatory evidence in contravention of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). DeStefano claims that the prosecuting attorney withheld details about the location of the rape kit that was performed on the victim and about whether the rape kit had been sent to the State Police Laboratory for testing.

[20] DeStefano, however, presented no claim of a *Brady* violation in his petition for post-conviction relief. A post-conviction petitioner may not present a new claim for relief for the first time on appeal. *Jones v. State*, 151 N.E.3d 790, 805 (Ind. Ct. App. 2020) (citing *Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001)),

trans. denied; see also P.-C.R. 1(8) (“All grounds for relief available to a petitioner under this rule must be raised in his original petition.”).¹

B. Agreement not to wait for DNA results

[21] The same is true for DeStefano’s claim that he did not knowingly or intelligently agree to not mention the DNA results, or the lack thereof, at trial. DeStefano again argues that, had he known that the rape kit had been sent to the lab, he would have waited for the DNA results rather than insisting on going to trial. DeStefano, however, did not present this as a claim in his petition for post-conviction relief, and he may not present it now for the first time on appeal. *See id.* (citing *Allen*, 749 N.E.2d at 1171); P.-C.R. 1(8).

[22] Nor is DeStefano’s claim saved by his labeling it as fundamental error. For over twenty years, our Supreme Court has held that claims of fundamental error are not reviewable in post-conviction proceedings. *See Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002) (“[I]t [is] wrong to review [a] fundamental error claim in a postconviction proceeding.”). Instead, the fundamental error rule applies only to direct appeals. *Id.* “In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable

¹ After the post-conviction hearing, DeStefano moved to amend his petition to add several grounds for relief, including a *Brady* claim. The PC Court, however, denied DeStefano’s motion to amend his petition, and DeStefano makes no argument in his Appellant’s Brief that the PC Court erred by denying his motion to amend. In his Reply Brief, DeStefano does argue that the PC Court misled him into believing that he did not need to amend his petition. DeStefano, however, cannot present an argument for the first time in his reply brief. *French v. State*, 778 N.E.2d 816, 826 (Ind. 2002).

at the time of trial or direct appeal.” *Id.* (citing *Canaan v. State*, 683 N.E.2d 227, 235 n.6 (Ind. 1997)).

C. Perjured Testimony

[23] DeStefano also argues that he was denied his fundamental due process right to a fair trial because the State knowingly used false testimony at trial. DeStefano refers to Detective Crussen’s testimony regarding the whereabouts of the rape kit. DeStefano then argues: “The [prosecutor] knew Detective Crussen was lying, she knew the rape kit had been sent out and sitting in line at the lab. She did so, because it was the only way to get inadmissible evidence to be introduced.” Appellant’s Br. p. 29. Although DeStefano did argue in his post-conviction petition that the State used perjured testimony, he referred only to that part of Detective Crussen’s testimony stating that DeStefano admitted having consensual sex with the victim. DeStefano argued in his petition that:

The State asked the Court too [sic] allow Detective Crussen to testify that no DNA testing was needed and no analysis was done on [the rape kit] because the Defendant had admitted to consensual sex.

This statement was a lie! Nowhere did the Defendant admit to consensual sex during his interview with Detective Crussen.

Appellant’s App. Vol. II p. 16.

[24] On appeal, however, DeStefano shifts his argument and claims that the State knowingly allowed Detective Crussen to lie about the location of the rape kit.

Again, DeStefano cannot present this argument for the first time on appeal. *Jones*, 151 N.E.3d at 805 (citing *Allen*, 749 N.E.2d at 1171); P.-C.R. 1(8).²

D. Prosecutorial Misconduct—Suborning Perjury

[25] DeStefano’s fourth argument is difficult to discern, but it appears that he claims that the prosecutor committed misconduct by lying about the whereabouts of the rape kit and permitted Detective Crussen to lie about the whereabouts of the rape kit. That is, DeStefano again claims that the rape kit was waiting to be tested at the laboratory but that the prosecutor misled him into believing that the rape kit had not been sent to the laboratory at all. He, therefore, argues that he was placed in a position of grave peril to which he should not have been subjected—which is the standard for prosecutorial misconduct. *See Ryan v. State*, 9 N.E.3d 663, 667 (Ind. 2014) (noting that, if a prosecutor engages in misconduct, the reviewing court must determine whether the conduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected).

[26] DeStefano did argue in his post-conviction petition that his appellate counsel was ineffective for failing to present a claim of prosecutorial misconduct based on the State’s use of allegedly perjured testimony. His post-conviction petition

² We also note that the evidence presented to the PC Court does not support DeStefano’s claim that the prosecutor lied regarding the whereabouts of the rape kit. It was clear from her testimony that the decision to send the kit to the laboratory was up to the police, and that there was confusion about whether the kit had been sent to the laboratory or whether it was sent to the laboratory but not tested for DNA. What is clear is that, regardless of whether the kit was actually sent to the laboratory, the prosecutor did not request DNA testing because DeStefano’s identity was not at issue; only the question of whether he raped the victim was at issue. Indeed, DeStefano’s own trial testimony established that he was in bed, naked, with the victim.

referred only to Detective Crussen’s testimony that DeStefano admitted to consensual sex with the victim. DeStefano claimed that this was false and that he never admitted to consensual sex with the victim. On appeal, however, DeStefano claims that the prosecutor committed misconduct for using and relying on false testimony that the rape kit had not been sent to the laboratory, when it had actually been sent to the laboratory but not tested. This is different from the claim that DeStefano presented in his petition for post-conviction relief, and he cannot now present it for the first time on appeal. *Jones*, 151 N.E.3d at 805 (citing *Allen*, 749 N.E.2d at 1171); P.-C.R. 1(8).

E. Prosecutorial Misconduct—Closing Argument

[27] Lastly, DeStefano claims that the prosecutor committed misconduct by telling the jury, during the State’s closing argument, that the rape kit was not sent to the laboratory and that the reason it was not sent to the laboratory was that DeStefano did not want to wait for the kit to be tested. Yet again, however, DeStefano did not present this claim in his petition for post-conviction relief, and he cannot present this claim for the first time on appeal. *See id.* (citing *Allen*, 749 N.E.2d at 1171); P.-C.R. 1(8).

Conclusion

[28] DeStefano did not raise any of the claims in his petition for post-conviction relief that he now argues on appeal. These issues are, therefore, waived. Accordingly, we affirm the PC Court’s denial of DeStefano’s petition for post-conviction relief.

[29] Affirmed.

May, J., and Weissmann, J., concur.

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