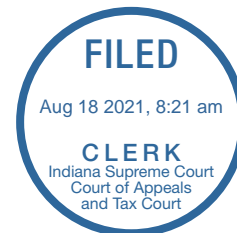


## MEMORANDUM DECISION

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.



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## IN THE COURT OF APPEALS OF INDIANA

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Trayshaun Pernel, *Appellant,*

v.

State of Indiana, *Appellee.*

August 18, 2021

Court of Appeals Case No.  
20A-PC-1373

Appeal from the Allen Superior  
Court

The Honorable Frances C. Gull,  
Judge

Trial Court Cause No.  
02D05-1810-PC-80

**Pyle, Judge.**

## Case Summary

- [1] Trayshaun Pernell (“Pernell”) appeals the denial of his post-conviction petition. He argues that the post-conviction court erred in determining that the victim’s affidavit did not constitute newly discovered evidence mandating a new trial. Concluding that the post-conviction court did not err, we affirm the denial of Pernell’s petition.

### Issue

Whether the post-conviction court erred in denying Pernell’s petition.

### Facts

- [2] The underlying facts in this case, taken from this Court’s opinion in Pernell’s direct appeal, are as follows:

On September 4, 2014, Dytrell Allen [(“Allen”)] was shot multiple times outside a house in Fort Wayne. The first bullet struck Allen as he was exiting the house and walking toward his girlfriend’s car. After the first shot, Allen fell to the ground and crawled to the side of the car. Allen was laying on his back, unable to move, when he saw [Kulon] Lewis walk around the car. Lewis shot Allen several more times and walked away. Then, Pernell walked around the car and shot Allen in the face, shattering his jaw. Lewis and Pernell fled the scene. Allen survived the encounter but was left paralyzed from the waist down.

*Pernell v. State*, No. 02A03-1508-CR-1087, slip op. at 2-3 (Ind. Ct. App. June 17, 2016), *trans. denied*.

[3] Allen identified Pernell from a photo array, and, in November 2014, the State charged Pernell with attempted murder as a Level 1 felony, aggravated battery as a Level 3 felony, and a firearm enhancement pursuant to INDIANA CODE § 35-50-2-11. At a June 2015 jury trial, Allen testified that he had known Pernell before the shooting. Allen further testified that although Pernell had tried to cover his face with a hood during the shooting, the hood had fallen off, and Allen had clearly seen Pernell's face. Allen identified Pernell in court as one of the shooters.

[4] The jury convicted Pernell of Level 1 felony attempted murder and found that he had used a firearm in the commission of the offense. The trial court sentenced Pernell to forty (40) years for the attempted murder conviction, enhanced by twenty (20) years for the use of the firearm. On direct appeal, this Court affirmed Pernell's attempted murder conviction but vacated the firearm enhancement. *Id.*

[5] In October 2018, Pernell filed a petition for post-conviction relief. In his petition, Pernell alleged, among other things, that newly discovered evidence mandated the vacation of his attempted murder conviction. In support of this allegation, Pernell attached an affidavit from Allen. In this affidavit, Allen recanted his trial testimony identifying Pernell as one of the shooters. Allen specifically stated that while he had been hospitalized following the shootings, family and friends had told him that they had believed Pernell had been one of the shooters. In reliance on the beliefs of his family and friends, Allen had identified Pernell as the shooter. Then, according to Allen, one year after the

shootings, Allen began receiving threatening messages from an individual who claimed that he, not Pernell, had been the second shooter. Allen explained that he had not initially believed this messenger. However, according to Allen, this messenger described the shootings with details that only someone at the scene could have known. The messenger's descriptive details convinced Allen that the messenger was, in fact, the second shooter. Allen further stated that, to verify that Pernell was innocent, Allen had visited Pernell's Facebook page and looked at photographs of Pernell. Allen explained that, after looking at the photographs, Allen knew that Pernell was not the second shooter. Allen further explained that he knew the messenger's identity but was unwilling to disclose it because the messenger had threatened Allen and his family. Allen concluded his affidavit with a hope and desire that Pernell be "completely exonerated and released from prison as soon as possible." (App. Vol. 2 at 106).

[6] The trial court held a hearing on Pernell's petition in November 2019. At the beginning of the hearing, the post-conviction court admitted into evidence the June 2015 trial record and Allen's affidavit. When the trial court told Pernell that he could call his first witness, Pernell responded that he was "gonna rest on the record." (PCR Tr. Vol. 2 at 4). The State also did not call any witnesses to testify.

[7] In June 2020, the post-conviction court issued a detailed eleven-page order denying Pernell's petition. The post-conviction court concluded that Pernell had failed to meet his burden of showing that Allen's affidavit constituted newly discovered evidence mandating a new trial. Specifically, the post-

conviction court found three reasons how Pernell had failed to prove that Allen's affidavit was worthy of credit.

[8] First, the post-conviction court pointed out it needed an opportunity to see and hear Allen testify to determine whether his recantation was worthy of credit. According to the post-conviction court, Pernell had foregone the most, if not the only, effective means of proving that Allen's recantation was worthy of credit because Pernell failed to call Allen to testify. In addition, the post-conviction court pointed out that Pernell had given no explanation regarding why he had failed to call Allen to testify.

[9] Second, the post-conviction court found that "Allen's account of his claimed motive for falsely identifying [Pernell] [was] wholly uncorroborated, extremely dubious on its own terms, and effectively impossible to investigate." (App. Vol. 2 at 81). According to the post-conviction court, Allen's affidavit "might conceivably have gained some semblance of credibility if any of the friends and family members had been identified and had affirmed that they did what Allen [had] said they did." (App. Vol. 2 at 81). However, that did not occur. The post-conviction court further explained that "[t]he dubiousity of Allen's new story [was] further increased by the absence of any apparent reason for Allen to believe his friends and family members, who had not observed the shooting, had any idea who the second shooter was." (App. Vol. 2 at 82). According to the post-conviction court, Allen's claimed motive for falsely identifying Pernell strongly tended to show that Allen's affidavit was not worthy of credit. Third, the post-conviction court found that the messenger's "claimed eagerness to

inculcate himself as the second shooter . . . [was] at least as dubious an anything else in Allen’s new story.” (App. Vol. 2 at 82).

[10] The post-conviction court concluded that Allen’s affidavit was “entirely unworthy of credit,” and that Pernell’s failure to show that the new evidence was worthy of credit defeated his claim of newly discovered evidence. (App. Vol. 2 at 82). In addition, the post-conviction court concluded that Pernell had not shown that Allen’s testimony could be produced in the event of a retrial. Specifically, the post-conviction court pointed out that Allen’s affidavit had said nothing about the possibility of Allen testifying at a retrial, and Pernell had “wisely refrain[ed] from asserting that the affidavit could be admitted in lieu of live testimony at a retrial.” (App. Vol. 2 at 83).

[11] Pernell now appeals the denial of his petition.

## **Decision**

[12] Pernell argues that the post-conviction court erred in denying his petition. A defendant who has exhausted the direct appeal process may challenge the correctness of his conviction and sentence by filing a post-conviction petition. *Parish v. State*, 838 N.E.2d 495, 499 (Ind. Ct. App. 2005), *trans. denied*. Post-conviction procedures do not provide an opportunity for a super appeal. *Id.* Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Id.* Post-conviction proceedings are civil proceedings, and a defendant must establish his claims by a preponderance of the evidence. *Id.*

[13] In reviewing the judgment of a post-conviction court, this Court considers only the evidence and reasonable inferences supporting its judgment. *Hall v. State*, 849 N.E.2d 466, 468 (Ind. 2006). The post-conviction court is the sole judge of the evidence and the credibility of witnesses. *Id.* at 468-69. To prevail on appeal from the denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 469. Only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, will the court's findings or conclusions be disturbed as being contrary to law. *Id.*

[14] Pernell argues that the post-conviction court erred in determining that Allen's affidavit did not constitute newly discovered evidence mandating a new trial. New evidence mandates a new trial only when a petitioner demonstrates that: (1) the evidence has been discovered since trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) it is worthy of credit; (8) it can be produced upon retrial of the case; and (9) it will probably produce a different result at trial. *Whedon v. State*, 900 N.E.2d 498, 504 (Ind. Ct. App. 2009), *trans. granted, summarily aff'd.* "We analyze these nine factors with care, as the basis for newly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized." *Id.* (cleaned up). The burden of showing that all nine requirements are met rests with post-conviction relief petitioner. *Id.* at 468.

[15] Here, the post-conviction court determined that Pernell failed to prove two of the nine requirements. Specifically, the post-conviction court found that Pernell had failed to prove that Allen's affidavit was worthy of credit and that Allen's testimony could be produced in the event of a retrial. Because the nine requirements are written in the conjunctive, we need only address whether Pernell has met his burden to show that Allen's affidavit is worthy of credit. *See id.*

[16] Generally, a witness testifies at the post-conviction hearing about the newly discovered evidence. In such cases, whether that witness' testimony is worthy of credit is a factual determination to be made by the post-conviction court judge who has the opportunity to see and hear the witness testify. *Whedon*, 900 N.E.2d at 504. Where, as here, the witness does not testify and instead submits an affidavit, we find that the determination of whether the affidavit is worthy of credit is also a factual determination to be made by the post-conviction court. We further note that it is not within an appellate court's province to replace a post-conviction court's credibility assessment with its own. *Id.*

[17] Here, Allen identified Pernell in a photo array before trial. At trial, Allen testified that he had known Pernell before the shooting. Allen also testified that, although Pernell had tried to cover his face with a hood during the shooting, the hood had fallen off, and Allen had clearly seen Pernell's face. Allen further identified Pernell in court as one of the shooters. Three years later, Allen recanted his trial testimony in an affidavit. Specifically, Allen stated that he had identified Pernell as one of the shooters based on the beliefs



of his unidentified family and friends. According to Allen, it was an unidentified messenger, who knew specific details about the scene of the shootings, who had been the second shooter. Although Allen's affidavit was admitted into evidence at the post-conviction hearing, Pernell did not call Allen to testify.

[18] The post-conviction court concluded that Allen's affidavit was not credible and that Pernell had, therefore, failed to prove that his newly discovered evidence was worthy of credit. Pernell has failed to persuade us that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Accordingly, Pernell has failed to demonstrate that he is entitled to a new trial.<sup>1</sup> See *Whedon*, 900 N.E.2d at 505.

[19] Affirmed.

Bailey, J., and Crone, J., concur.

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<sup>1</sup>Although Pernell asks us to remand the case with instructions for the State to further investigate his claims, the State is correct that Pernell has "ignore[d] the fact that it was his burden to establish the grounds for post-conviction relief by a preponderance of the evidence. The State was and is under no obligation to investigate the claims of newly discovered evidence and help [Pernell] obtain relief." (State's Br. 13-14).