

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.



APPELLANT PRO SE

Samuel Lee Jackson
Pendleton, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Tiffany A. McCoy
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Samuel Lee Jackson,

Appellant,

v.

State of Indiana,

Appellee.

March 16, 2021

Court of Appeals Case No.
20A-PC-1538

Appeal from the Allen Superior
Court

The Honorable David M. Zent,
Judge

Trial Court Cause No.
02D06-1204-PC-54

Brown, Judge.

- [1] Samuel Lee Jackson appeals the denial of his petition for post-conviction relief. Jackson raises several issues which we revise and restate as whether the post-conviction court abused its discretion in its ruling on his requests for judicial notice, and in denying his motions for discovery requests and to set an evidentiary hearing. We affirm.

Facts and Procedural History

- [2] The relevant facts as discussed in Jackson's direct appeal follow:

[O]n June 18, 2000, Glendora Shorts had an argument and physical altercation with Jackson, her boyfriend of ten years. As Jackson left Shorts' house, he threatened to kill her and her children. Shortly after midnight, Shorts' daughter, D.B., left Shorts' upstairs bedroom where she had been watching a movie with her mother and went to the bathroom, which was on the same floor as the bedroom. While in the bathroom, D.B. heard four "punching" sounds. She left the bathroom and found that her mother's bedroom door was closed and could not be opened all the way. D.B. was able to see someone wearing a red shirt through a crack in the door; Jackson had been wearing a red shirt earlier in the day. D.B. then heard a voice she clearly recognized as Jackson's say "I'm naked and you can't come in here, your mom know [sic] I'm here." She ran downstairs to the basement bedroom of her brother, R.S., who called 911. R.S. then heard someone that he was "positive" was Jackson yelling at D.B. After police arrived at the residence, D.B. noticed that the front door was open, and she went upstairs with an officer to Shorts' bedroom. Shorts was found lying in a pool of blood. A pathologist determined Shorts died from multiple blunt force injuries to the head consistent with being beaten with a baseball bat; a bat with red stains and hair stuck to it was found on the front porch. The State charged Jackson with murder and residential entry on June 22, 2000; the habitual offender allegation

was added in July 2000. . . . The jury returned guilty verdicts for both charges and found Jackson to be an habitual offender. The trial court sentenced Jackson to an aggregate term of ninety-five years

Jackson v. State, 758 N.E.2d 1030, 1032-1033 (Ind. Ct. App. 2001) (citations omitted). This Court affirmed Jackson’s convictions. *Id.* at 1037-1038. Jackson’s trial counsel also represented him on appeal (Jackson’s “defense counsel”).

- [3] Jackson filed a *pro se* petition for post-conviction relief on April 12, 2012. The court ordered him to submit his case via affidavit,¹ and on January 16, 2014, he filed an amended petition in which, according to the post-conviction court’s Findings of Fact and Conclusions of Law, he requested representation by the public defender. The chronological case summary (“CCS”) indicates that a notice was issued on the same day to “State PD Owens.” Appellant’s Appendix Volume II at 8. The public defender amended the petition on Jackson’s behalf on March 16, 2017. In August 2017, the court held a hearing at which Jackson appeared in person and by post-conviction counsel and, upon request by Jackson’s counsel, admitted a certified copy of the trial record.

¹ Specifically, an August 23, 2012 order indicated that the court “now stay[ed] all further proceedings until such time as the Petition[er] informs the Court that he is prepared to proceed and further in fact receives Petitioner’s Affidavit in Support of his Petition for Post[-]Conviction Relief.” Appellant’s Appendix Volume II at 78.

- [4] At some point after Jackson and the State rested, the court allowed Jackson to make a statement and to speak with counsel, and his post-conviction counsel informed the court that Jackson shared he would like to “proceed *pro se* at this point, . . . and that he would like to amend his petition to include a claim of ineffective assistance of trial counsel.” Transcript Volume II at 8. Jackson proceeded *pro se*, raised the issues of ineffective assistance of trial and of appellate counsel, and answered in the negative when the court asked him if the things about which he was speaking were in the petition that he sought to file. The court instructed Jackson’s post-conviction counsel to withdraw and confirmed Jackson wished to proceed *pro se* while admonishing that “[w]e’re not gonna flip flop back and forth” and that “if you’re gonna represent yourself, your [sic] gonna represent yourself, right.” *Id.* at 12.
- [5] On February 16, 2018, Jackson *pro se* filed an amended petition, a motion to set an evidentiary hearing, a request for the court to subpoena his defense counsel, and a supporting affidavit for the subpoena request. On February 20, 2018, the State filed a motion to require Jackson to submit his case by affidavit, the post-conviction court denied Jackson’s motion for a hearing “and other matters related to said request,” granted the State’s motion, ordered Jackson to submit his case by affidavit, and set a filing schedule which included a deadline for Jackson to submit his case by affidavit on or before July 2, 2018. Appellant’s Appendix Volume II at 98. On April 23, 2018, Jackson filed a motion for leave to amend his petition, which the court granted. His amended petition included claims of effective assistance of counsel.

[6] On May 25, 2018, Jackson filed requests, as well as affidavits in support, for the court to issue subpoenas duces tecum for defense counsel and the County Jail in Allen County. The court denied the request on June 8, 2018, and found that Jackson failed to state any just cause or need for the requested information, and that his requests were unduly burdensome, had a lack of sufficient specificity, and “appeared to be nothing but fishing expeditions.” *Id.* at 126. On June 8 and June 27, 2018, Jackson filed a request for interrogatories of his defense counsel.

[7] On July 16, 2018, the State filed a motion to dismiss Jackson’s petition and asserted he had not submitted his case for post-conviction relief by affidavit on or before July 2, 2018. Jackson filed a motion to depose his defense counsel on August 10, 2018, alleging that he needed to complete discovery of counsel prior to filing his affidavits. The post-conviction court issued an order three days later which stated that Jackson’s request to depose defense counsel was forwarded to the prosecuting attorney for a response within thirty days of the date of the order, and on the same day, Jackson filed an Objection to Dismiss concerning the State’s July 16, 2018 motion. On August 17, 2018, the post-conviction court denied the State’s July 16, 2018 motion and advised Jackson to inform the court when he was prepared to proceed in order that a hearing may be set. On August 30, 2018, the State filed a response to Jackson’s motion to depose, pointed to the court’s August 17, 2018 order and indicated that it was apparent the court had “decided to dispense with the submission of affidavits in this case, and instead simply to hold an evidentiary hearing” whenever Jackson was prepared to

proceed.² Appellant's Appendix Volume II at 152. The State further argued Jackson made no showing that the proposed deposition's purpose was anything other than exploratory, or how the cost of the deposition would be paid.

[8] On October 5, 2018, Jackson filed another motion to set an evidentiary hearing and "included his request for subpoenas" for his defense counsel. *Id.* at 155. Later that month, he filed a potential exhibit list which indicated that he intended to submit and refer to certain items, including the "Brief of the Appellee," his direct appeal in *Jackson*, 758 N.E.2d at 1030, and various lines from pages 88, 124, and 125 of "Vol. 1." *Id.* at 158. The court scheduled a hearing on Jackson's petition for March 1, 2019, and it issued a subpoena for Jackson's defense counsel which was served on December 6, 2018. *See* November 29, 2018 Subpoena, Cause No. 02D06-1204-PC-54.

[9] On January 22, 2019, the court issued an order cancelling the March 1, 2019 hearing and the subpoena for Jackson's defense counsel, indicating that because Jackson was not represented by counsel, the case should be submitted by affidavit. The court further ordered Jackson to submit his case by affidavit by April 1, 2019. On February 6, 2019, Jackson filed a motion to reconsider or to

² Continuing, the State indicated that, even "if it had somehow been necessary for Mr. Jackson to depose [his defense counsel] to prepare an adequate submission of his case by affidavit, it would no longer be necessary for that purpose" given that Jackson had not stated a "reason why he cannot adequately question [his defense counsel] at the forthcoming evidentiary hearing, and therefore no reason why a deposition is needed in addition to the evidentiary hearing." Appellant's Appendix Volume II at 152-153.

certify order for interlocutory appeal, and the court denied the motion and later ordered Jackson to submit the case by affidavit by May 17, 2019.

[10] On March 25, 2019, Jackson filed motions to depose counsel and for the funds to do so at the public's expense, which the court denied. The court granted a request for a continuance and ordered Jackson to submit the case by affidavit by November 6, 2019. On May 8, 2019, Jackson filed a motion for leave to depose counsel by affidavit, and the court granted the motion two days later and ordered him to "send appropriate paperwork to counsel." *Id.* at 206. On July 25, 2019, Jackson filed a Motion to Reconsider Giving Petitioner An Evidentiary Hearing alleging that the "matter and claims before the [c]ourt at this time cannot be properly resolved by affidavit and will require an evidentiary hearing" to "develop the evidence required" for his ineffective assistance claims. *Id.* at 210, 212. The court denied the motion.

[11] On August 19, 2019, Jackson filed a Motion To Compel Attorney To Produce and requested discovery from his defense counsel, and the court ordered the Public Defender's Office to produce, within thirty days, the portions of Jackson's file that were discoverable. Following the denial of his request that the court certify the order for interlocutory appeal, Jackson filed a motion to continue, which the court granted, and a motion to reconsider the court's order granting his request to produce the portions of his file. In the motion to reconsider, Jackson indicated that the discoverable materials he was requesting were "not portions of the Defendant's File, but [his defense counsel]," and he was requesting his defense counsel to produce answers to the questions he previously submitted. *Id.*

at 236. On September 26, 2019, the court granted the motion to reconsider in part and ordered Jackson’s defense counsel to answer the questions in the interrogatories filed in June 2018, within thirty days of the order, provide notice to the court of his answers, and serve a copy of the responses on Jackson. The post-conviction court also granted Jackson’s request for continuance and ordered him to submit his case by affidavit by December 31, 2019, and that proposed findings of fact and conclusions of law were due on or before April 30, 2020.

[12] On October 21, 2019, Jackson filed an affidavit in support of his petition for post-conviction relief. In January 2020, he filed a Motion For Post-Conviction Court to Take Judicial Notice of Own Records that requested judicial notice of the “Record [o]f Proceedings and or Record on Appeal in relation to the jury/bench trial held in this case . . . from which is a record of this State and to make them part of the P-CR record as an exhibit.” *Id.* at 229. He further stated that

since the Petitioner (1) cannot present the Record on Appeal and or the Record of the Proceedings in that he will not be presented in person to the Court for the purpose of this action to present evidence on his own behalf, nor (2) is the Petitioner a licensed attorney from whom could obtain the record which is required even if he had access to the Court of Appeals.

[] Petitioner also cannot afford to hire legal counsel for the purpose of obtaining the Record on Appeal and or the Record of the Proceedings and presenting it to the Court as an exhibit for evidence.

Id. at 228-229. In February 2020, the court granted the motion to take judicial notice in part, indicating that it took judicial notice of its own “[c]ourt [f]ile (CCS

and all motions, pleadings filed),” and did not know what exactly Jackson believes is necessary for his claims, or where exactly those records were currently located. *Id.* at 232. It further noted Jackson was represented by an attorney at trial and on appeal and at one time had state public defender representation in the post-conviction proceeding, and it advised that he should contact his attorney to obtain any records or copies of records he wished to make a part of the post-conviction record.

[13] On February 27, 2020, the State filed a response and supplemental response to Jackson’s affidavit in support of his petition for post-conviction relief, and indicated that it would “also make the exhibit volume of the original trial record” available to the court for viewing if requested. Appellee’s Appendix II at 32. The State indicated that in the exhibit volume of the original trial record, each document bore a certificate signed by the clerk of the county circuit and superior courts stating that it was a true and complete copy of “the record on file in ‘this office.’” *Id.* at 33.

[14] In March 2020, Jackson filed a response to the court’s judicial notice order indicating an understanding that the court “would take judicial notice of its own records rather than the Record of the Proceedings / Record on Appeal,” and he requested that the court take notice of such documents and make them part of the record. Appellant’s Appendix Volume II at 233. The court denied Jackson’s request and indicated that it had “reviewed the Original Exhibit Volume,” that it would take judicial notice of copies of several exhibits which had been attached, and that findings of fact and conclusions of law were still due April 30, 2020.

Appellee's Appendix Volume II at 35. Following timely filings of proposed findings by both the State and Jackson, the court denied his petition.

Discussion

[15] Before discussing Jackson's allegations of error, we observe that the purpose of a petition for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006). A post-conviction petition is not a substitute for an appeal. *Id.* Further, post-conviction proceedings do not afford a petitioner a "super-appeal." *Id.* The post-conviction rules contemplate a narrow remedy for subsequent collateral challenges to convictions. *Id.* If an issue was known and available but not raised on appeal, it is waived. *Id.*

[16] We note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher*, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. *Id.* "A post-conviction court's 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." *Id.* In this review, we accept findings of fact unless clearly erroneous,

but we accord no deference to conclusions of law. *Id.* The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. *Id.*

[17] We further note that Jackson is proceeding *pro se*. Such litigants are held to the same standard as trained counsel and are required to follow procedural rules. *Evans v. State*, 809 N.E.2d 338, 344 (Ind. Ct. App. 2004), *trans. denied*. See also *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014) (“Even if a court may take reasonable steps to prevent a good faith *pro se* litigant from being placed at an unfair disadvantage, an abusive litigant can expect no latitude.”). To the extent Jackson fails to cite to the record or develop an argument with respect to the issues he attempts to raise on appeal, those arguments are waived. See *Cooper v. State*, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding that the defendant’s contention was waived because it was “supported neither by cogent argument nor citation to authority”); *Shane v. State*, 716 N.E.2d 391, 398 n.3 (Ind. 1999) (holding that the defendant waived argument on appeal by failing to develop a cogent argument), *trans. denied*.

[18] Jackson contends his post-conviction counsel left him “to fend for himself *pro se*,” and he argues that the post-conviction court improperly denied his request to take judicial notice, and points to *Hubbell v. State*, 58 N.E.3d 268, 277 (Ind. Ct. App. 2016), *trans. denied*. Appellant’s Brief at 7. He further argues the court abused its discretion in denying his motions for discovery requests and to set an evidentiary hearing.

[19] The decision to take judicial notice of a matter, like other evidentiary decisions, is reviewed for an abuse of discretion. *Horton v. State*, 51 N.E.3d 1154, 1158 (Ind. 2016). Ind. Evidence Rule 201(a) governs the kinds of facts that may be judicially noticed and provides that “[t]he court may judicially notice . . . the existence of . . . records of a court of this state.” Ind. Evidence Rule 201(c) provides that “[t]he court . . . (1) may take judicial notice on its own; or (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.” Ind. Post-Conviction Rule 1(9)(b), provides in part that, in the event a petitioner elects to proceed *pro se*, the court “at its discretion may order the cause submitted upon affidavit” and “need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing.”

[20] In *Hubbell*, this Court reversed the denial of a post-conviction petition on the basis that the post-conviction court refused to obtain a certified copy of Hubbell’s direct appeal record on his behalf upon request, reasoning that Hubbell’s inability to produce a certified copy of the record precluded him from presenting evidence needed to assert claims he raised which “cannot be addressed on their merits without access to” the record. 58 N.E.3d at 277. Unlike in *Hubbell*, the post-conviction court here, upon request by Jackson through and by his post-conviction counsel, admitted a certified copy of the trial record at the August 2017 hearing, which Jackson cited in his October 21, 2019 affidavit.

[21] Following the admission of the record, Jackson indicated at the hearing he would like to proceed *pro se*, and the post-conviction court confirmed his wish to do so.

To the extent Jackson cites Ind. Evidence Rule 201(c), we note that, when Jackson requested a “Record [o]f Proceedings and or Record on Appeal” in January 2020, the court granted the motion, took judicial notice of its court file, CCS, all motions, and any filed pleadings, and indicated that it did not know what exact material Jackson believed was necessary for his claims. Appellant’s Appendix Volume II at 229. The court further indicated in March 2020 it had reviewed the Original Exhibit Volume and ultimately took judicial notice of several exhibits. As to any of Jackson’s claims that would require reference to the trial record, we additionally observe his case by affidavit referenced substance within the record and that Jackson never accompanied his requests for judicial notice with specificity as to the records needed, nor did he provide the court with the reasons for his requests. *See* Ind. Evidence Rule 201(c)(2) (noting the court must take judicial notice if a party requests it and “the court is supplied with the necessary information”). Under these circumstances, we cannot say that the court erred in its ruling on Jackson’s motion for judicial notice.

[22] Regarding the motions for discovery requests, we note that, if “a PCR court does not believe a proposed witness’s expected testimony would be relevant and probative, it must make a finding on the record to that effect before refusing to issue a subpoena.” *Graham v. State*, 941 N.E.2d 1091, 1096 (Ind. Ct. App. 2011) (citing Ind. Post-Conviction Rule 1(9)(b)), *aff’d on reh’g*. When it denied Jackson’s February 2018 motions for subpoenas duces tecum, the post-conviction court found Jackson had failed to state any just cause or need for the requested information, and that his requests were unduly burdensome and had a lack of

sufficient specificity. Previous to these findings, the court had ordered Jackson to submit his case by affidavit, and leading up to the court's January 2019 order Jackson did not clarify or otherwise explain, in his October 2018 motion or elsewhere, the relevance or probative nature of his discovery requests. Under these circumstances, we cannot say Jackson has shown reversal is necessary on this basis.

[23] To the extent Jackson argues that the post-conviction court abused its discretion by failing to hold an evidentiary hearing, Ind. Post-Conviction Rule 1(9)(b) provides that, in the event petitioner elects to proceed pro se, the court “at its discretion may order the cause submitted upon affidavit” and “need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing.” Generally, “if the PCR court orders the cause submitted by affidavit under Rule 1(9)(b), it is the court’s prerogative to determine whether an evidentiary hearing is required, along with the petitioner’s personal presence, to achieve a ‘full and fair determination of the issues raised[.]’” *Smith v. State*, 822 N.E.2d 193, 201 (Ind. Ct. App. 2005), *trans. denied*. We review the post-conviction court’s decision to forego an evidentiary hearing when affidavits have been submitted under Rule 1(9)(b) under an abuse of discretion standard. *Id.* Jackson does not point to any specific claim in his petition for post-conviction relief or develop a cogent argument that any of his claims required a factual determination. Under these circumstances, we cannot say that reversal is warranted. *See id.* (holding that “other than claiming that the affidavits he and the State submitted raised issues of

fact, [the petitioner] has failed to show how an evidentiary hearing would have aided him”).

[24] For the foregoing reasons, we affirm the post-conviction court’s order.

[25] Affirmed.

Vaidik, J., and Pyle, J., concur.