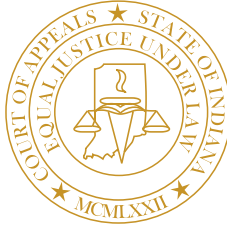


MEMORANDUM DECISION

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 Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.

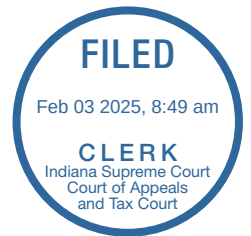


IN THE Court of Appeals of Indiana

Cissy Chantel Mae Russell,
Appellant-Petitioner

v.

State of Indiana,
Appellee-Respondent



February 3, 2025

Court of Appeals Case No.
24A-PC-356

Appeal from the Wells Circuit Court
The Honorable Kenton W. Kiracofe, Judge
Trial Court Cause No.
90C01-2211-PC-6

Memorandum Decision by Judge Weissmann
Judges Pyle and Felix concur.

Weissmann, Judge.

- [1] Convicted of Level 4 felony burglary, Cissy Russell appeals pro se the denial of her petition for post-conviction relief (PCR). She argues that the post-conviction court erred by denying her motion for change of judge and by concluding that she did not receive ineffective assistance of trial counsel. We find no such errors and affirm.

Facts

- [2] This is the second time Russell's burglary conviction has come before this Court. The underlying facts, as stated in her direct appeal, are as follows:

Russell is the estranged half-sister of Kelly Gartin ("Kelly"). In September 2014, Kelly lived with her husband, Andrew Gartin ("Andrew"), in a house in rural Wells County, and Russell lived in Connecticut. On the morning of September 23, 2014, the Gartins each left for work by 7:30 a.m. Kelly was the last person to leave the house, and she closed the entry door but left it unlocked. Later that morning, the Gartins' neighbor, James LeMaster, heard a truck engine revving on the Gartins' property. LeMaster called Kelly to let her know that there was a noise coming from her property, and he then proceeded to the Gartins' property to investigate.

Once at the property, LeMaster saw two vehicles behind the Gartins' residence: a red pickup truck and a silver pickup truck. LeMaster recognized the red truck as belonging to the Gartins. The rear bumper of the silver truck was approximately twelve to fifteen feet from the door of the Gartins' residence. Both trucks were stuck in the mud. LeMaster found a woman, later identified as Russell, standing by the bed of the silver pickup truck. Russell appeared to be nervous, and she looked as if she had been sweating profusely. When LeMaster asked Russell who she was,

Russell initially said she was Kelly's aunt. However, Russell later apologized to LeMaster and informed him that she was not Kelly's aunt, but her half-sister. LeMaster asked Russell why she was there, but Russell did not answer.

LeMaster conversed with Russell for approximately an hour before Kelly arrived. During that time, LeMaster noticed a number of items in the bed of the silver pickup truck, including a large rectangular object, but they were all covered up with blankets. During her conversation with LeMaster, Russell stated that she had traveled to Indiana from the East Coast to help a friend move and then to see her mother. However, Russell and Kelly's mother, Rabecka Grossman, was actually on vacation in another state at that time. And, prior to leaving for her vacation, Grossman had informed Russell that Grossman would be out of town from September 22 through September 29, 2014.

At around noon, Andrew arrived at the property, having learned from Kelly via text that there was a disturbance at their home. Andrew asked Russell why she was there, and Russell stated she was there to help a friend move. Russell said she had driven to the rear of the Gartins' home "to see if [they] would come out and talk to her because she thought someone was home." Andrew also saw items in the bed of the silver pickup truck that were covered with blankets.

Kelly arrived at the property approximately fifteen to twenty minutes after Andrew had arrived, and she asked Russell why Russell was there. Russell responded that she was there to throw some things in the Gartins' dumpster and to see Kelly and then see [Grossman]. Russell stated that she had driven to the back of the Gartins' house because she thought that would cause Kelly to come out of the house to speak with her. While she spoke to Kelly, Russell sat on top of the large rectangular object covered with a blanket in the bed of the silver pickup truck. LeMaster then pulled Russell's truck out of the mud using a tractor, and Russell left the property in the silver pickup truck.

After Russell left, [the Gartins] noticed that items were missing from their home, including a chainsaw, jewelry boxes, DVDs, Andrew's prescription drugs, children's games, and a gun safe. The gun safe was approximately the same size as the large covered rectangular object on which Russell had been sitting in the bed of her pickup truck. The gun safe weighed approximately 100 to 150 pounds when empty, but it had had nine guns in it on September 23. The safe had been located in the Gartins' bedroom, which was on the opposite side of the house from the entrance near which Russell's pickup truck had been parked.

Andrew called the Wells County Sheriff's Department to report the stolen items. Detective Randy Steele's subsequent investigation of the crime included photographing the Gartins' residence. Detective Steele suggested that the Gartins attempt to contact Russell. Kelly was able to reach Russell's husband on his cell phone, but he was unaware of Russell's trip to Indiana. Detective Steele also reached Russell's husband on his cell phone and asked him to have his wife contact Steele.

In the early morning of September 24, Russell called the Wells County Sheriff's Department from a gas station on Interstate 76 in Portage County, Ohio, and spoke with a dispatcher. Russell told the dispatcher that she had gotten a message from Andrew that she was going to be arrested, and she asked the dispatcher what she should do. The dispatcher told Russell to stay where she was and a deputy would be sent to speak with her. Deputy Mark Millhoff of the Portage County Sheriff's Office went to Russell's location at approximately 2:30 a.m. on September 24 and found Russell in the silver pickup truck. After obtaining Russell's consent to a search of her truck, Deputy Millhoff searched the bed of the pickup truck and found only moving blankets and a "hand truck moving dolly." Russell then gave a statement to Deputy Millhoff in which she denied ever entering the Gartins' residence or outbuildings. Russell also stated that she had transported various garbage items from Connecticut to

Indiana, where she had intended to dispose of them. Deputy Millhoff advised Russell that she was free to leave.

On October 2, law enforcement in Stark County, Ohio, discovered items from the Gartins' home that had been dumped alongside a trail located in Canal Fulton, Ohio. These items included Andrew's prescription bottles and a necklace that the Gartins' daughter had made. The officers collected the items and sent them to the Wells County Sheriff's Department.

The State charged Russell with burglary, as a Level 4 felony. At the ensuing jury trial, the court admitted into evidence, without objection, State's Exhibit 23, which consisted of records the State had subpoenaed from Verizon Wireless for a cell phone belonging to Russell. The trial court also admitted, over Russell's objection to an "insufficient foundation," Exhibit 24, which was a map of areas of Ohio from which Russell had placed cell phone calls on September 23 and 24. . . . The map depicted the locations of Russell's cell phone at the dates and times of three calls. . . . One of the calls depicted in Exhibit 24 was placed near Canal Fulton, Ohio, at "0946 hours" on September 24

Russell v. State, No. 90A02-1602-CR-355, *1-3 (Ind. Ct. App. Nov. 15, 2016) (mem.) (internal citations and footnote omitted).

- [3] During Russell's jury trial, her attorney attempted to sow doubt among the jurors that Russell—given her size and stature—could have carried a 150-pound gun safe across the Gartins' home or lifted it into the bed of her truck. This strategy proved unsuccessful. The jury found Russell guilty of Level 4 felony burglary, and the trial court entered judgment of conviction. This Court later affirmed Russell's conviction on direct appeal, after which Russell pro se filed her PCR petition. In her petition, Russell alleged that her trial counsel was

ineffective by not presenting various evidence, pursuing certain lines of questioning, and making particular arguments during trial.

- [4] Russell's PCR petition was assigned to the same trial court in which she was tried and convicted of the Gartin burglary. At the outset of the post-conviction proceedings, Russell filed an unverified motion for change of judge, alleging the presiding judge was biased against her. The post-conviction court denied Russell's motion and set her PCR petition for an evidentiary hearing. After the hearing, the court denied Russell's petition, concluding she did not receive ineffective assistance of trial counsel.

Discussion and Decision

- [5] Russell appeals the denial of her PCR petition, arguing that the post-conviction court erred by denying Russell's motion for change of judge and by concluding that Russell did not receive ineffective assistance of trial counsel. We review both issues for clear error. *Seabolt v. State*, 240 N.E.3d 1249, 1260 (Ind. 2024) (motion for change of judge); *Bobadilla v. State*, 117 N.E.3d 1272, 1279 (Ind. 2019) (PCR petition for ineffective assistance). Finding none, we affirm the post-conviction court's judgment.

I. The Post-Conviction Court Did Not Err by Denying Russell's Motion for Change of Judge

- [6] Russell's unverified motion for change of judge did not specify a procedural basis for its requested relief. But given the allegations of bias, the post-conviction court treated the motion as one under Indiana Post-Conviction Rule

1(4)(b). That rule permits a PCR petitioner to request a change of judge “by filing an affidavit that the judge has a personal bias or prejudice against the petitioner.” Ind. Post-Conviction Rule 1(4)(b). The PCR court ultimately denied Russell’s motion because it was neither verified nor accompanied by an affidavit, as required by the rule. *See generally Tabor v. State*, 461 N.E.2d 118, 125 (Ind. 1984) (justifying denial of unverified motion for change of venue under former Indiana Criminal Rule 12 (now Rule 2.4), which required motion to be verified).

[7] On appeal, Russell argues only that she should not have been held to the purportedly strict standards of Post-Conviction Rule 1(4)(b) because she is not a lawyer and was proceeding pro se. She relies on *Haines v. Kerner*, 404 U.S. 519 (1972), which involved a district court’s dismissal of a pro se plaintiff’s complaint under Federal Rule of Civil Procedure 12(B)(6) for failing to state a claim upon which relief could be granted. *Id.* at 520. The United States Supreme Court reversed the dismissal, stating pro se complaints, “however inartfully pleaded,” must be held to “less stringent standards than formal pleadings drafted by lawyers.” *Id.* Thus, according to *Haines*, a pro se complaint fails to state a claim only if it appears “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 520-21 (internal quotations marks omitted).

[8] Contrary to Russell’s assertion, *Haines*—a federal court ruling interpreting a federal rule of procedure—does not apply to her motion for change of judge, which was filed in state court and under state law. *See Rickels v. Herr*, 638

N.E.2d 1280, 1283 (Ind. Ct. App. 1994) (observing that federal rules of procedure do not control in state court and that pro se litigants in state court are held to the same standards as trained attorneys). Indeed, the Indiana Supreme Court long ago held that a PCR petitioner was “not entitled to be excused from complying with [Post-Conviction Rule 1(4)(b)] simply because he chose to file [a] motion [for change of judge] pro se and without the advice of counsel.” *Ferrier v. State*, 274 Ind. 585, 586, 413 N.E.2d 260, 261 (1980) (affirming denial of motion that was untimely and did not attempt to show good cause for untimeliness, as required by P-C.R. 1(4)(b)).

[9] For this reason, the post-conviction court did not err in denying Russell’s motion for change of judge.

II. The Post-Conviction Court Did Not Err by Concluding that Russell Did Not Receive Ineffective Assistance of Trial Counsel

[10] In her PCR petition, Russel specifically alleged that she received ineffective assistance of trial counsel because her attorney failed to:

1. present evidence that Kelly and Andrew Gartin had motive to frame Russell for burglary;
2. call a witness who offered to testify that Russell had a filing cabinet in the bed of her truck the day before the burglary;
3. present an “alternate timeline” for the cellphone evidence placing Russell in Canal Fulton, Ohio, the morning after the burglary; and
4. cross-examine Andrew Gartin regarding a discrepancy in the brand of safe he reported as stolen to police and his insurance company.

[11] “The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to counsel and mandates ‘that the right to counsel is the right to the effective assistance of counsel.’” *Bobadilla*, 117 N.E.3d at 1279 (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). When reviewing an ineffective assistance of counsel claim, we apply the two-part test established in *Strickland*. *Id.* at 1280-81. Under this test, “the defendant must prove: (1) counsel rendered deficient performance, meaning counsel’s representation fell below an objective standard of reasonableness as gauged by prevailing professional norms; and (2) counsel’s deficient performance prejudiced the defendant, i.e., but for counsel’s errors the result of the proceeding would have been different.” *Id.* at 1281.

[12] The post-conviction court concluded that Russell did not receive ineffective assistance of trial counsel, in part, because her attorney’s alleged failures did not fall below objective standards of reasonableness. Russell challenges this conclusion as clearly erroneous. To prevail, she “must establish that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court’s decision.” *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000). Failure to meet this “rigorous standard of review” will result in an affirmance of the post-conviction court’s judgment. *DeWitt v. State*, 755 N.E.2d 167, 169-70 (Ind. 2001).

A. Motive to Frame

[13] Russell testified at the evidentiary hearing that the Gartins had motive to frame her for burglary because of a dispute involving a family business in which Russell and Kelly both held a partnership interest. According to Russell, the Gartins had embezzled \$300,000 to \$400,000 worth of gold and silver from the business, and Russell had threatened to report them to police. Russell explained that there was a lot of animosity between her and Kelly as a result, and Russell's attorney was aware of it prior to trial.

[14] Russell claims her trial counsel's failure to present evidence of Russell's dispute with the Gartins fell below an objective standard of reasonableness. According to Russell, evidence that the Gartins had motive to frame her for burglary would have strengthened her trial counsel's strategy of arguing that it was physically impossible for Russell to have moved the Gartins' 150-pound safe. Russell, however, offered only her self-serving testimony as evidence of the dispute. And to the extent the dispute proved the Gartins had motive to frame Russell for burglary, it also reasonably suggests that Russell had motive to commit burglary against the Gartins. Therefore, Russell's testimony about the dispute does not unmistakably and unerringly point to a conclusion that her trial counsel's performance fell below an objective standard of reasonableness.

B. Filing Cabinet Witness

[15] Russell's friend Anne Nicolakis-DeFeo testified at the evidentiary hearing that, the day before the burglary, Russell came to Nicolakis-DeFeo's Connecticut

home to help move some beds, dressers, and other furniture. According to Nicolakis-DeFeo, she observed a five-foot filing cabinet and a moving dolly in the bed of Russell's truck that day, before Russell drove to Indiana. Nicolakis-DeFeo also stated that she contacted Russell's attorney before trial and offered to testify about what she observed in the bed of the truck. Russell's attorney declined the offer, Nicolakis-DeFeo said.

- [16] Russell claims her trial counsel's failure to call Nicolakis-DeFeo as a witness fell below an objective standard of reasonableness. Russell contends evidence that she had a file cabinet in the bed of her truck the day before the burglary also would have strengthened her trial counsel's strategy of arguing that it was physically impossible for Russell to have moved the Gartins' 150-pound safe. But Russell ignores that Nicolakis-DeFeo's testimony suggests Russell was capable of moving heavy objects, such as beds and dressers. It also places a moving dolly in Russell's possession prior to the burglary. Such evidence reasonably could have undercut Russell's trial strategy. Thus, Nicolakis-DeFeo's testimony does not unmistakably and unerringly point to a conclusion contrary to the post-conviction court's decision.

C. Alternative Cellphone Timeline

- [17] The gas station where Portage County Sheriff's Deputy Mark Millhoff searched Russell's truck the day after the burglary was located near Ravenna, Ohio. At the evidentiary hearing, Russell testified that Deputy Millhoff arrived at the gas station at 2:20 a.m. and searched her truck until around 4:00 a.m. The State's

cellphone evidence placed Russell's phone near Canal Fulton, Ohio, at 9:46 a.m. that day. And according to Russell, when driving from Indiana to Connecticut, Canal Fulton is 35 to 40 miles closer to Indiana than Ravenna. In other words, Russell claims the cellphone evidence shows that, while driving home to Connecticut, she turned around in Ravenna, backtracked roughly 40 miles to Canal Fulton, and then turned around again and proceeded home.

[18] Though her PCR petition references an “alternate timeline,” we understand Russell to claim that her trial counsel’s failure to emphasize the “absurdity of backtracking” from Ravenna to Canal Fulton fell below an objective standard of reasonableness. Appellant’s Br., p. 18; *see* Tr. Vol. II, p. 28 (Russell describing the cellphone evidence as “illogical”). Our review of the record, however, reveals that Russell’s attorney made such an argument at trial. When discussing the State’s cellphone evidence during closing argument, Russell’s attorney stated:

[D]oes it really make any sense[?] I mean think about it ladies and gentlemen about placing a pin up here and we know [Deputy] Millhoff was here at 4:00, about 4:00 in the morning and then over here at Canal Fulton. Now that’s back over here, it just doesn’t make any sense. It doesn’t have any flow.

Tr. Vol. IV, p. 514.

[19] For this reason, the evidence does not unmistakably and unerringly point to a conclusion contrary to the post-conviction court’s decision.

D. Safe Brand Discrepancy

- [20] Among the evidence admitted at Russell's jury trial was a Wells County Sheriff's Office Victim Loss Report that Andrew Gartin completed after the burglary. In this report, Andrew identified the stolen safe as being "Sentry Safe" brand. But according to Russell, Andrew reported to his insurance company that the stolen safe's brand was "Pro Vault."
- [21] Russell claims her trial counsel's failure to cross-examine Andrew regarding the alleged discrepancy in the brand of safe he reported stolen fell below an objective standard of reasonableness. But Russell presented no evidence of the discrepancy at the evidentiary hearing. She points to a document attached to her PCR petition, identified therein as Andrew's "insurance claim," but this document was never admitted into evidence. App. Vol. II, p. 26. Moreover, the document appears to list "Pro Vault" as a brand of safe only under the heading, "Replacement Description." *Id.* at 38. The document lists no brand for the safe seemingly referenced under the heading, "Original Description." *Id.* Russell has therefore failed to establish that the evidence unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision.
- [22] Ultimately, the performance of Russell's trial counsel was not deficient because counsel's alleged errors did not fall below objective standards of reasonableness. For this reason, the post-conviction court did not err in finding that Russell did not receive ineffective assistance of counsel.

Conclusion

[23] Finding the post-conviction court did not err by denying Russell's motion for change of judge and by concluding that Russell did not receive ineffective assistance of counsel, we affirm the court's denial of Russell's PCR petition.

Pyle, J., and Felix, J., concur.

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