## 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

Dexter Berry
Carlisle, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Supervising Deputy Attorney General
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

Dexter Berry,
*Appellant-Petitioner,*

v.

State of Indiana,
*Appellee-Respondent.*

June 8, 2021

Court of Appeals Case No. 20A-PC-992

Appeal from the Marion Superior Court

The Honorable Cynthia L. Oetjen, Judge
The Honorable Anne Flannelly, Magistrate

Trial Court Cause No. 49G04-1603-PC-8450

**Tavitas, Judge.**

## Case Summary

[1] Dexter Berry appeals the post-conviction court's ("PC court") denial of his petition for post-conviction relief ("PCR"). Berry was originally charged with a string of storage facility burglaries in 2012, as well as one nearby residential burglary. During the pendency of those charges, the State added several more charges, based on the discovery of additional storage units that had been burglarized on the same date at the same location. Berry pleaded guilty to four counts of burglary, and the State dismissed four counts of theft. Berry now contends that the later-added charges lacked sufficient probable cause and that he was never considered a suspect in those burglaries. Failure to discover the lack of probable cause, Berry argues, constitutes ineffective assistance of counsel.

[2] Berry explicitly raises three issues in his brief: (1) whether a magistrate judge abused her discretion by entering a final order on Berry's PCR petition; (2) whether a magistrate judge abused her discretion by vacating a second evidentiary hearing related to Berry's PCR petition; and (3) whether Berry received ineffective assistance of trial counsel. We find that the first issue is moot, that the vacatur of the second evidentiary hearing was not an abuse of discretion, and that Berry did not receive ineffective assistance of trial counsel.

[3] Berry's PCR petition and the substance of his brief suggest that, additionally, he claims he was the victim of prosecutorial misconduct and misconduct on the part of the clerk. *See* Appellant's Br. pp. 29-31; Appellant's App. Vol. II pp. 119-20. We, therefore, address those claims as well, concluding that they are

freestanding and, thus, not cognizable in the context of collateral review. We ultimately find that Berry has failed to meet his burden for any of his claims, and, accordingly, we affirm the denial of Berry's PCR petition.

## Issues

[4] Berry raises five issues, which we consolidate and restate as:

I. Whether a magistrate judge committed an abuse of discretion in entering the PCR final order or by vacating a second evidentiary hearing.

II. Whether Berry received ineffective assistance of trial counsel.

III. Whether the prosecutor or clerk committed misconduct.

## Facts

[5] On April 12, 2012, Berry broke and entered several storage units at a facility where Berry also owned a unit. Berry took numerous items from the units including a rifle, collectibles, and a television. Security footage from the facility captured Berry engaging in the burglaries. Police subsequently apprehended Berry during a nearby residential burglary. On May 2, 2012, the State charged Berry with Count I, burglary, a Class C felony; Count II, burglary, a Class C felony; Count III, theft, a Class D felony; and Count IV, theft, a Class D felony.

[6] On November 9, 2012, the State added four more charges: Count V, burglary, a Class C felony; Count VI, burglary, a Class C felony; Count VII, theft, a Class

D felony; and Count VIII, theft, a Class D felony. The later-added charges stemmed from burglaries occurring on the "same date and in the same area." Tr. Vol. II p. 19.

[7] On November 13, 2012, Berry, represented by Attorney Benjamin Jaffe, entered a guilty plea on Counts I, II, V, and VI. As part of the plea, Berry acknowledged that the agreement "constitutes an admission of the truth of all facts alleged in the charge[s] or counts to which the Defendant pleads guilty and that entry of the guilty plea will result in a conviction on those charges or counts." Appellant's App. Vol. II p. 64. Berry further acknowledged his "satisfaction with Defense Counsel's representation and competency in this matter. The Defendant believes this agreement to be in the Defendant's best interest." *Id*. at 65.

[8] At the hearing wherein Berry entered his plea of guilty, the following colloquy ensued:

> THE COURT: Have you talked this over with Mr. Jaffe, your lawyer?
>
> DEFENDANT: Yes, on several occasions.
>
> THE COURT: And he's explained everything and you've asked the questions you needed to ask?
>
> DEFENDANT: Yes, Judge.

THE COURT: Okay. Are you satisfied with the help and advice he's given you on these matters?

DEFENDANT: Yes, Your Honor.

*Id*. at 69. Berry further admitted the factual basis for the charges:

DEPUTY PROSECUTOR MURPHY: Yes, Your Honor. Defendant, Dexter Berry on April 28th, 2012, went to a storage facility at 6940 Shore Terrance in Marion County, Indiana. He went to several specific storage units within the building and was able to jimmy the locks and get inside the units without permission from the persons that were leasing the units. He was able to get inside and take various items from different people. With respect to Count 1 he jimmied the lock to unit 18 in this storage facility. That was a unit that was being leased by Justin Spack. Mr. Spack did not give the Defendant permission to be inside the unit or take anything inside. The Defendant took a refrigerator and some furniture. With regard to Count 2, the Defendant went to unit 35. Again jimmied the lock. He took a moving cart without permission from the person who leased the unit and had property inside, Ms. Brenda Nell. With regard to Count 5, he went to unit 21. This was a unit of Tony Bennett. He again jimmied the lock, took a rifle, some football gear, coins and cards without permission from Tony Bennett. With respect to Count 6, he went to unit 458. This was Albert Thompson's unit. He jimmied the lock, took a T.V. screen from inside, some radios and some other electronics without the permission of Albert Thompson.

THE COURT: Did you hear Mr. Murphy?

DEFENDANT: Yes, ma'am.

THE COURT: Do you agree with what he said?

DEFENDANT: Yes, ma'am.

*Id*. at 78-79.

[9] On January 13, 2016, Berry filed a pro se petition for PCR. Berry amended the petition on September 9, 2016. The petition raised allegations of professional misconduct by prosecutors and clerks, as well as ineffective assistance of trial counsel. Berry alleged that Attorney Jaffe failed to adequately investigate the charges and that, in so doing, failed to recognize that four of the charges lacked probable cause. That error was then compounded, Berry argued, because an uniformed Attorney Jaffe subsequently advised Berry to plead guilty to charges for which there was insufficient evidence upon which to convict Berry.

[10] After a series of filings related to discovery and continuances, the PC court held an evidentiary hearing on June 20, 2017. At the hearing, Berry did not testify; rather, he called Attorney Jaffe as his lone witness. The bulk of Attorney Jaffe's testimony consisted of professions that Attorney Jaffe could not remember particulars about Berry's case or what Attorney Jaffe *would* have done. *See, e.g.*, Tr. Vol. II p. 32 ("I don't recall negotiating anything. I know that you pled guilty. My recollection is that you pled guilty. That's about as much as I recall about the involvement in this case."). At one point, Attorney Jaffe remarked of Berry: "If I saw you in the mall, I wouldn't know who you were." Tr. Vol. II. p. 32. Berry also submitted copies of letters Berry received after an apparent records request from the Indianapolis Metropolitan Police Department ("IMPD"), although he did not submit copies of the requests themselves.

[11] On February 21, 2020, after a series of additional non-pertinent filings, the PC court denied Berry's petition for PCR.[1] The PC court found, inter alia:

> . . . [T]he post-conviction evidence shows no misconduct by the prosecutor and also shows: that trial counsel was fully prepared and willing to proceed to trial if Berry had chosen not to plead guilty, that Mr. Jaffe would not have allowed his client to plead guilty to any charges which were not supported by evidence, and that Berry was not placed in a position of grave peril.
>
> * * * * *
>
> . . . [T]rial counsel's post-conviction testimony and the Guilty Plea Hearing transcript show that Berry was fully informed of all charges against him and the evidence in support thereof. The court's minutes also show that Berry was present, in person and with counsel, at hearings on October 17, 2012, and November 7, 2012, at which the State's motion to add these counts was addressed and ultimately granted. In addition, Berry chose not to testify during his post-conviction evidentiary hearing, or to present transcripts of said two pretrial hearings. There is no evidence to show that Berry was uninformed or that these charges were unsupported by probable cause. There is also no evidence that Mr. Jaffe was uninformed of the State's evidence supporting counts 5, 6, 7, and 8, or that he failed to share the details about said supporting evidence with his client. With no deficient performance or prejudice here, this claim fails.
>
> * * * * *

[1] A pending second evidentiary hearing was cancelled on the same day.

> Petitioner presented no evidence to contradict trial counsel's post-conviction testimony and has failed to show any deficient performance regarding Mr. Jaffe's advice or his investigation. Accordingly, this claim fails.

Appellant's App. Vol. II pp. 12-16. Berry now appeals.

## Analysis

[12] 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), *reh'g denied, cert. denied*; 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.2d 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). Our post-conviction rules define eight categories of cognizable claims available on collateral review; among them, claims that: "the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state . . . [and claims] that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence . . . ." P.-C.R. 1(1)(a).

[13] 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.2d 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.2d at 681 (quoting *DeWitt v. State*, 755 N.E.2d 167, 169-70 (Ind. 2001)).

[14] Berry proceeds pro se, and we, therefore, reiterate that "a pro se litigant is held to the same standards as a trained attorney and is afforded no inherent leniency simply by virtue of being self-represented." *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014). "This means that 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." *Picket Fence Prop. Co. v. Davis*, 109 N.E.3d 1021, 1029 (Ind. Ct. App. 2018) (citing *Basic v. Amouri*, 58 N.E.3d 980, 983-84 (Ind. Ct. App. 2016)), *trans*. *denied*. Although we prefer to decide cases on their merits, arguments are waived where an appellant's noncompliance with the rules of appellate procedure is so substantial it impedes our appellate consideration of the errors. *Id.*

[15] Indiana Appellate Rule 46(A)(8)(a) requires that the argument section of a brief "contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the

authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . . ." We will not consider an assertion on appeal when there is no cogent argument supported by authority and there are no references to the record as required by the rules. *Id.* "'We will not become an advocate for a party or address arguments that are inappropriate or too poorly developed or expressed to be understood.'" *Picket Fence*, 109 N.E.3d at 1029 (quoting *Basic*, 58 N.E.3d at 984).

[16] As an initial matter, we observe that all of Berry's claims rely on the notion that probable cause to charge him with two burglaries—to which he admitted and pleaded guilty—and two thefts was lacking. The record does not support that premise. The letters Berry evidently received from the IMPD, which appear to be the primary basis for Berry's claims, reference "Case Reports 12-0086016 & 12-093061." Appellant's App. Vol. II p. 212. Berry provides no additional context and does not link those isolated numbers to any other evidence. The fact that "no one was ever named as a suspect or offender in either case report" may be pertinent to Berry's claims, and it may not. *Id*. at 215. Attorney Jaffe testified that it was normal for the State to add charges during the pendency of a case and that the lack of a new formal arrest would not affect the validity of those charges. *Id*. at 9.

[17] Moreover, because Berry does not provide copies of the records requests themselves, we cannot assess whether the "IMPD [having] no documents responsive to the request" is meaningful in any way. *Id*. at 213. Berry's poorly compiled appendix has tended to raise questions rather than answer them; the

appendix includes documents devoid of context, and, thereby, has created a substantial impediment to our review. It is Berry's burden to prove the elements of his claims. We are not required to sift through scattershot or incomplete appendices and unexplained references in an attempt to thread a single unifying needle through ostensibly disjointed pieces of an argument. *See, e.g., Horton v. State,* 51 N.E.3d 1154, 1162 (Ind. 2016); *Basic*, 58 N.E.3d at 983-85; *see also In re Marriage of Gertiser*, 45 N.E.3d 363, 366 n.2 (Ind. 2015).

## *I. Magistrate Judge*

[18] Berry claims that a magistrate judge abused her discretion by signing a final order, something which magistrates were formerly not empowered to do. As the State correctly points out, however, we previously remanded for the purpose of having the trial court approve and sign those orders. Accordingly, the issue is moot. *See, e.g., Shepherd v. State*, 157 N.E.3d 1209, 1221 (Ind. Ct. App. 2020) ("'Mootness arises when the primary issue within the case has been ended or settled or in some manner disposed of, so as to render it unnecessary to decide the question involved.' Put another way, when a court is not able to render effective relief to a party, the case is deemed moot and subject to dismissal.") (quoting *C.J. v. State*, 74 N.E.3d 572, 575 (Ind. Ct. App. 2017), *trans. denied*), *trans. denied*.[2]

[2] We pause to note, moreover, that Berry appears to rely on statutory language that was not in effect at the time his PCR petition was denied. *See* Ind. Code § 33-23-5-9 (2019) ("Except as provided under subsection (b), a magistrate shall report findings in an evidentiary hearing, a trial, or a jury's verdict to the court. The

[19] Berry further argues that the magistrate judge "abused her discretion by acting outside her authority" when she vacated Berry's pending second evidentiary hearing.[3] Appellant's Br. p. 22. Berry cites no authority for this claim, and we are disinclined to accept it. The determination to grant a hearing is a matter within the sound discretion of the PC court. Indeed, when a petitioner proceeds pro se, a PC court may eschew hearings altogether. *See, e.g., Laboa v. State*, 131 N.E.3d 660, 664 (Ind. Ct. App. 2019). The magistrate judge did not abuse her discretion in vacating Berry's pending second evidentiary hearing.

## *II. Ineffective Assistance of Trial Counsel ("IATC")*

[20] Berry argues that his trial counsel rendered IATC. To prevail on his IATC claim, Berry must show that: (1) Attorney Jaffe's performance fell short of prevailing professional norms; and (2) Attorney Jaffee's deficient performance prejudiced Berry's defense. *Gibson*, 133 N.E.3d at 682 (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064).

[21] A showing of deficient performance "requires proof that legal representation lacked 'an objective standard of reasonableness,' effectively depriving the defendant of his Sixth Amendment right to counsel." *Id.* (quoting *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007)). We strongly presume that counsel

---

court shall enter the final order."). That language was removed from the code, effective July 1, 2019. That section of the code has now been repealed entirely.

[3] So far as we can discern from Berry's filings, the evidence he sought to admit at the second hearing was no different than the evidence already admitted during the first hearing.

exercised "reasonable professional judgment" and "rendered adequate legal assistance." *Id.* Defense counsel enjoys "considerable discretion" in developing legal strategies for a client. *Id.* This "discretion demands deferential judicial review." *Id.* Finally, counsel's "[i]solated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Id.*

[22] "To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the proceedings below would have resulted in a different outcome." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.* With respect to guilty pleas, our Supreme Court has recognized that a litigant "can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Bobadilla*, 117 N.E.3d at 1285 (cleaned up).

[23] The gravamen of Berry's complaint is that the State's later-added charges lacked probable cause and that, not only did Attorney Jaffe fail to recognize and object to that fact, he advised Berry to plead guilty to the charges anyway. Berry did not establish that Attorney Jaffe failed to object to the later-added charges, nor did Berry establish that the charges lacked probable cause. Rather, Attorney Jaffe testified that he had no pertinent recollections of the case and that he

would never have advised Berry to plead guilty to charges for which there was no basis. Furthermore, we have long recognized that "[a] plea entered after the trial judge has reviewed the various rights which a defendant is waiving and made the inquiries called for in the statute is unlikely to be found wanting in a collateral attack." *White v. State*, 497 N.E.2d 893, 905 (Ind. 1986). We are not left with a "definite and firm conviction" that Attorney Jaffe's performance fell short of the objective standards of reasonableness, and Berry's IATC claim falls at the first hurdle.

## *III. Prosecutorial Misconduct*[4]

[24] Again, the thrust of Berry's complaint is that the prosecutor charged Berry with offenses without sufficient probable cause to support the charges. Berry's misconduct claims fail for a "fundamental" reason: they are not cognizable on post-conviction review. *Myers v. State*, 33 N.E.3d 1077, 1115 (Ind. Ct. App. 2015).

> "Post-conviction procedures do not provide a petitioner with an opportunity to present freestanding claims that contend the original trial court committed error." *Wrinkles v. State*, 749 N.E.2d 1179, 1187 n.3 (Ind. 2001). Rather, "'[i]n post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of

[4] We do not address Berry's freestanding allegations of misconduct on the part of the clerk, as they are no more cognizable than his claims of prosecutorial misconduct. Those allegations consist of little more than conclusory statements that lack citations to any authority and cogency. *See* Ind. App. R. 46(A)(8)(a); *Miami Sand & Gravel, LLC v. Nance*, 849 N.E.2d 671, 678 (Ind. Ct. App. 2006) (". . . failure to present a cognizable argument waives an issue for appellate review. . . .") (citing *Topp v. Leffers*, 838 N.E.2d 1027, 1029 n.1 (Ind. Ct. App. 2006), *trans. denied*).

> the right to effective counsel *or issues demonstrably unavailable at the time of trial or direct appeal*.'" *Bunch v. State*, 778 N.E.2d 1285, 1289-90 (Ind. 2002) (quoting *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002)). "An available grounds for relief not raised at trial or on direct appeal is not available as a grounds for collateral attack." *Canaan v. State*, 683 N.E.2d 227, 235 (Ind. 1997).

*Id.* at 1115-16 (emphasis added). Berry has not established that his claims of prosecutorial misconduct were demonstrably unavailable at trial. In fact, he argues that the claims *were* discoverable: that is the nature of his IATC argument. Those claims, therefore, are freestanding claims of trial error, and, thus, are not cognizable in a PCR proceeding.

## Conclusion

[25] The PC court did not clearly err when it denied Berry's petition for PCR. We affirm.

[26] Affirmed.

Najam, J., and Pyle, J., concur.