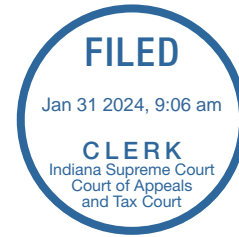


MEMORANDUM DECISION

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 Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



APPELLANT PRO SE

Jeremy L. Dale
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

Jeremy L. Dale,
Appellant-Petitioner,

v.

State of Indiana,
Appellee-Respondent.

January 31, 2024

Court of Appeals Case No.
21A-PC-1694

Appeal from the Marion Superior
Court

The Honorable Angela D. Davis,
Judge

Trial Court Cause No.
49D27-2002-PC-5116

Memorandum Decision by Judge Tavit
Judges Pyle and Foley concur.

Tavit, Judge.

Case Summary

- [1] Jeremy Dale was convicted of burglary, criminal confinement, battery, and carrying a handgun without a license, and his convictions were affirmed on direct appeal. Dale petitioned for post-conviction relief and argued that he was denied the effective assistance of counsel. The post-conviction court (“PC Court”) denied relief, and Dale now argues that the PC Court’s determination was clearly erroneous. Based on the record before us, Dale has not shown that the PC Court clearly erred, and we, accordingly, affirm.

Issue

- [2] Dale raises one issue on appeal, which we restate as whether the PC Court clearly erred by denying his ineffective assistance of counsel claims.

Facts

- [3] The facts underlying Dale’s convictions are set forth, in part, in his direct appeal:

At approximately 2 o’clock in the afternoon on Wednesday, August 20, 2003, Johnny Lee Sanders (“Sanders”) and William Roell (“Roell”) were in the office of a used car dealership owned by Sanders’ son. Sanders and Roell, a current employee, had been using the small office space to assemble a new bicycle and child safety seat.

Three men entered the office and inquired about purchasing a 1993 green Oldsmobile on the lot. Sanders and one of the men began negotiating about the vehicle. When offered what he considered an inadequate down payment, Sanders indicated that in order to make the deal, he would need a copy of a lease or

rental agreement as proof of residence under the “buy here, pay here” credit program. Dale reached into his pants pocket and produced a gun, saying, “[T]his is my lease.” Another man standing adjacent to Roell also drew a gun. The third man did not display a weapon. Dale uttered a series of profanities and demanded money. Sanders attempted to disarm Dale and, during the struggle for control over the weapon, the firearm discharged—wounding Sanders’ right calf.

Meanwhile, Roell was hit by the second armed man and told not to move. At this time, Sanders tried to escape, but Dale grabbed his shirt pulling him back into the office. As Sanders slipped from his grasp and managed to make it outside, he fell as a result of the leg wound. Dale stuck the gun in Sanders['] face and pulled the trigger, but it jammed. He began to beat Sanders over the head with the gun, while rummaging through his pockets. Dale yelled to one of the other men to search Sanders’ pockets and also removed three gold chains from Sanders’ neck. One of the other men found additional cash in another of Sanders’ pockets while the third man ransacked the office. Several onlookers ran toward the dealership, and the three men fled the scene. Sanders’ bullet wound required hospital treatment, and the head wound he suffered required the insertion of ten staples.

The next day, Sanders and Roell spoke with Detective Benjamin and described the size, height, and race of the robbers to the investigating officer. Subsequently, on or about September 20, 2003, when independently shown a photo array by Detective Benjamin, Sanders’ identified Dale as his assailant and Roell identified Dale as one of the three robbers.

Dale v. State, No. 49G01-0311-FA-19764, slip. op. pp. 1-3 (Ind. Ct. App. July 13, 2006) (mem.) (record citations omitted), *trans. denied*.

[4] The State alleged that, in addition to Dale, the two other men involved in the robbery were Dario Lee and Keith Taylor. In the probable cause affidavit,

Detective Benjamin stated that the following occurred during law enforcement's investigation of the crime:

[S]anders stated he thought Virginia Asher . . . might be involved because she called him on his cell phone to see if he was ok while he was on his way to the hospital.

On August 21, 2003, both Roell and Sanders came to the I.P.D. robbery office to view the mugbook. Sanders and Roell picked Dario Lee . . . as one of the three involved. On August 24, 2003 I [Detective Benjamin] received an anonymous call that one of the suspects involved was Asher[']s boyfriend. All she knew [was] that his first name was Dario. I convinced the caller to look at Lee's picture[,] and she identified him as Asher[']s boyfriend. On September 17, 2003 I put together a photo array for Roell[,] and he picked Lee out as the person who struck him in the head.

I located Asher[,] and she gave me the names of Taylor and [Dale] as being involved in the robbery. She stated she overheard the three discussing the robbery after it occurred. She stated the four of them were at an apartment after the robbery but she did not know the address. On September 20, 2003 I put together two photo arrays with Taylor #5 and [Dale] #4 and showed them to Sanders and Roell. Both identified Taylor and [Dale].

Appellee's App. Vol. II p. 22-23.

- [5] The State charged Dale with: (1) robbery, a Class A felony; (2) criminal confinement, a Class B felony; (3) battery, a Class C felony; and (4) carrying a

handgun without a license, which was enhanced to a Class C felony due to Dale's prior violent felony conviction.¹

[6] According to Dale, he was represented by Attorney Mark Kamish at his initial hearing; Attorney "T. Miller" during a pre-trial conference; and Attorney Brian Lamar during the investigation of the case, at a pre-trial conference, and at trial. Appellant's App. Vol. II p. 31. Dale, Lee, and Taylor were tried together before a jury. According to Dale, Asher did not testify at the trial. Lee asserted an alibi defense, and the jury found him and Taylor not guilty; however, the jury found Dale guilty as charged.

[7] Dale filed a direct appeal and challenged the sufficiency of the evidence to support his conviction. According to Dale, he was represented by Attorneys Emily Witney and Elizabeth A. Gabig. A panel of this Court affirmed Dale's convictions. *Dale*, No. 49G01-0311-FA-19764.

[8] On February 5, 2020, Dale filed a pro se petition for post-conviction relief.² Dale alleged that his trial counsel was ineffective because counsel failed to: (1) challenge the probable cause affidavit; (2) challenge Sanders' and Roell's

¹ The State charged Taylor with: (1) robbery, a Class A felony; and (2) criminal confinement, a Class B felony. The State charged Lee with: (1) robbery, a Class A felony; (2) criminal confinement, a Class B felony; (3) battery, a Class C felony; and (4) carrying a handgun without a license, a Class A misdemeanor.

² Dale filed previous petitions for post-conviction relief on February 1, 2007, June 17, 2014, and July 7, 2016, all of which the post-conviction court permitted him to withdraw without prejudice. On April 17, 2017, Dale filed another petition for post-conviction relief, which he designated as successive, and which asserted the same grounds as the instant petition. This Court declined to authorize the filing of that petition. *Dale v. State*, No. 49A02-1705-SP-1043 (Ind. Ct. App. June 23, 2017).

identifications; (3) “impeach” Detective Benjamin, who testified regarding the identification procedures; and (4) “object to prosecutorial misconduct.”

Appellant’s App. Vol. II pp. 20-21.

[9] Dale filed a “motion summons for subpoena [sic]” on April 17, 2020, in which he sought to subpoena Attorney Lamar and several other witnesses but none of the other attorneys. *Id.* at 110. Dale did not state the reason the witnesses’ testimony was required or the substance of the witnesses’ expected testimony, and the trial court denied the motion pursuant to Post-Conviction Rule 1(9)(b).³ *Id.* at 114.

[10] The PC Court held an evidentiary hearing on Dale’s petition for post-conviction relief on March 2, 2021, at which Dale represented himself. At the outset of the hearing, Dale asked the PC Court to take judicial notice of the records in Dale’s underlying case, including pre-trial depositions and the trial transcript. The PC Court explained that it could not take judicial notice of these documents because they were not in the “Court’s record” and stated that Dale would need

³ Post-Conviction Rule 1(9)(b) provides, in relevant part:

[I]f the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness’ testimony is required and the substance of the witness’ expected testimony. If the court finds the witness’ testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds the proposed witness’ testimony is not relevant and probative, it shall enter a finding on the record and refuse to issue the subpoena. . . .

Dale does not appeal the PC Court’s ruling denying his motion to subpoena witnesses.

to have those documents admitted into evidence if he wished to rely upon them.
Tr. Vol. II pp. 5-6.

[11] Dale testified and argued the following:

- Counsel should have objected to the probable cause affidavit because: (1) the witnesses identified Dale, Lee, and Taylor, but Lee and Taylor were found not guilty; and (2) Asher was involved in the crime, provided false statements, and “set [Dale, Lee, and Taylor] up” *Id.* at 52-53.
- The witness identifications of Dale were suggestive and should have been challenged because: Sanders and Roell “were in the same room” when they made the identifications; were permitted to speak to one another; expressed doubt about their identifications; believed “all [B]lack people look alike”⁴; and were encouraged by Detective Benjamin to select Dale, Lee, and Taylor. *Id.* at 55.
- Counsel should have cross-examined Detective Benjamin regarding the suggestive identifications.
- Counsel failed to argue Dale’s alibi theory of the case.
- Counsel should have raised a claim of prosecutorial misconduct because the State relied on false identifications and did not reveal the

⁴ Dale’s testimony suggests that he, Lee, and Taylor are all Black.

identity of the anonymous informant mentioned in the probable cause affidavit, who Dale suggested might have been Asher.

- [12] Dale essentially contended that, based on the lack of other direct or circumstantial evidence of his involvement, the identifications were the only evidence against him at trial. Dale acknowledged that either Lee or Taylor presented testimony from an expert witness, who “spoke on the identification being weak,” but the State discredited this testimony. *Id.* at 67.
- [13] Aside from Dale, no other witnesses—including his attorneys—testified. Dale attempted to introduce into evidence documents he claimed were portions of Sanders’ and Roell’s pre-trial depositions. The PC Court declined to admit the documents because nothing in the documents identified the documents as depositions,⁵ the documents did not include oaths from the witnesses, and the documents did not include any certification of authenticity.
- [14] On June 14, 2021, the PC Court issued findings of fact and conclusions of law denying post-conviction relief. The PC Court found:

10. [Dale] relies on his own testimony, his pleadings in the PCR chronology and the Case Chronological Summary in the principal case.

⁵ The documents contain numbered lines and typed paragraphs prefaced with alternating “Q’s” and “A’s”; however, the documents do not include cover pages, headings, or signature pages that indicate the documents are from a formal deposition. Moreover, the speakers are not identified.

11. His main arguments are that the identification was unduly suggestive and not challenged by his trial counsel, and that his own theory of the case was not argued by his counsel;
12. He does not argue that such strategies employed by his trial counsel were strategically deficient, or that he would prevail on such an argument had it been employed;
13. He called no witnesses beside himself, therefore asking no questions of his trial or appellate counsel.
14. His evidence are assertions without corroboration or authority, and arguments about the sufficiency of the evidence decided by a jury.
15. Petitioner presents no evidence beyond his claims which are based on his disagreement with the outcome.
16. Petitioner fails in his burden of proof.

Appellant's App. Vol. II p. 148. Dale now appeals.

Discussion and Decision

[15] Dale argues that the PC Court clearly erred by denying his ineffective assistance of counsel claims. Based on the limited record before us, Dale has not carried his burden of persuasion.

[16] We note that Dale proceeds in this matter pro se. 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.’” *Stark v. State*, 204 N.E.3d 957, 963 (Ind. Ct. App. 2023) (quoting *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.” *Id.* (quoting *Picket Fence Prop. Co. v. Davis*, 109 N.E.3d 1021, 1029 (Ind. Ct. App. 2018)). “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.* (citing *Picket Fence Prop. Co.*, 109 N.E.3d at 1029).

I. Standard of Review

[17] 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*, 141 S. Ct. 553 (2020); Ind. Post-Conviction Rule 1(1)(b). The petitioner bears the burden of establishing his claims by a preponderance of the evidence. *Gibson*, 133 N.E.3d at 681; P.-C.R. 1(5).

[18] 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), *cert. denied*, 534 U.S. 1164, 122 S. Ct. 1178 (2002)). When reviewing the post-conviction 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)).

[19] Dale seeks post-conviction relief on the grounds that he was denied the effective assistance of trial counsel. To prevail on his ineffective assistance of counsel claims, Dale must show that: (1) counsel’s performance fell short of prevailing professional norms; and (2) counsel’s deficient performance prejudiced his defense. *Id.* at 682 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)).

[20] 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), *cert. denied*, 555 U.S. 972, 129 S. Ct. 458 (2008)). We strongly presume that counsel 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.*

[21] “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.*

II. The PC Court did not clearly err by denying Dale’s ineffective assistance of counsel claims⁶

[22] Dale argues that he was denied the effective assistance of counsel because trial counsel failed to challenge the probable cause affidavit, which Dale contends contains false statements. Dale also argues that counsel failed to investigate Asher and failed to challenge the witness identifications. Lastly, Dale argues that counsel failed to argue prosecutorial misconduct on the grounds that the

⁶ In addition to his ineffective of assistance of counsel claims, Dale also asserts, in the Statement of Facts section of his brief, that the PC Court did not allow him admit “any evidence” during the evidentiary hearing, including the documents he claimed were depositions and the trial transcript:

due to the State knowing about facts being withheld from [the] jury at trial, and facts that trial attorney allowed them to do so by not investigating [the] case, filing objections, facing all accusers, and allowing the State of Indiana to withhold exculpatory evidence of impeachment and not allowing jury to know about critical physical evidence.

Appellant’s Br. p. 9.

Our appellate rules require that arguments be supported by “cogent reasoning” and contain citations to the legal authority and parts of the record relied upon. App. R. 46(A)(8). To the extent Dale challenges the trial court’s findings of fact or exclusion of evidence, his argument does not comply with these rules, which impairs our ability to resolve his concerns. *See Miller v. Patel*, 212 N.E.3d 639, 657 (Ind. 2023) (noting that appellate courts will neither “step in the shoes of the advocate and fashion arguments on his behalf” nor “address arguments that are too poorly developed or improperly expressed to be understood”). Accordingly, any challenge Dale raises on this score is waived. *See Lee v. State*, 91 N.E.3d 978, 990 (Ind. Ct. App. 2017) (holding that post-conviction relief petitioner’s failure to present a cogent argument waived the issue for appellate review), *trans. denied*.

State knowingly used false testimony and failed to disclose the identity of the anonymous informant mentioned in the probable cause affidavit.

[23] Dale's arguments contain no citations to the trial transcript, the transcript is not included in this appellate record, and Dale does not ask us to take judicial notice of that transcript. *See* App. R. 46(A)(8)(a) (requiring that arguments be supported by the parts of the record relied upon); App. R. 9(F)(5) (noting that the notice of appeal must include "[a] designation of all portions of the Transcript necessary to present fairly and decide the issues on appeal"). When the appellant fails to include citations to the record, this Court will not independently "search the record to reverse the lower court." *See In re Estate of Carnes*, 866 N.E.2d 260, 266 (Ind. Ct. App. 2007) (quoting *In re Stuart's Estate*, 130 Ind. App. 130, 131, 159 N.E.2d 321, 322 (Ind. Ct. App. 1959)).

[24] Moreover, Dale's evidence before the PC Court consisted almost entirely of his own testimony, which the PC Court was not obligated to believe. *Popplewell v. State*, 428 N.E.2d 15, 17 (Ind. 1981). Dale's testimony shined no light on counsel's strategic and tactical reasoning, and none of Dale's attorneys were called to testify. It is well established that when counsel is not called as a witness to testify in support of a petitioner's arguments, "the post-conviction court may infer that counsel would not have corroborated the petitioner's allegations.'" *Middleton v. State*, 64 N.E.3d 895, 899-900 (Ind. Ct. App. 2016) (quoting *Oberst v. State*, 935 N.E.2d 1250, 1254 (Ind. Ct. App. 2010), *trans. denied*), *trans. denied*. Counsel might have had legitimate reasons

for the decisions Dale now challenges, and without counsel's testimony, this Court is hesitant to declare those decisions objectively unreasonable.

[25] Regarding Dale's claim that counsel should have raised the issue of prosecutorial misconduct because the State did not disclose the identity of the anonymous informant, Dale relies on *Glover v. State*, 253 Ind. 121, 251 N.E.2d 814 (Ind. 1969). In that case, the defendant was charged with burglary, and at trial, a police officer testified during the State's redirect examination that a "reliable" informant had provided him with the defendant's name. *Id.* at 122. The officer subsequently refused to identify the confidential informant during the defendant's recross-examination. *Id.* at 122-123. The trial court ruled that the officer was not required to reveal the informant's identity. *Id.* at 124.

[26] On appeal, our Supreme Court reversed that ruling. The Court noted that this was not a case where a defendant "seeks to find out in preparing his defense preliminary to trial, the name of informers, nor is it a case in which the government refuses to identify and name a participant in the crime." *Id.* at 124-125. Rather, the issue was whether the State could affirmatively introduce evidence regarding the reliability of information provided by an informant and then seek to "close the door" on the matter. *Id.* at 126. The Court ultimately held: "If the identity of an informant is to be protected, then it is up to the prosecuting attorney not to bring into the case evidence relating to the informant[]." *Id.* at 127.

[27] Dale has not shown that *Glover* is applicable here, as he does not explain at which point counsel should have requested the identity of the anonymous informant in this case or whether the State “opened the door” to the reliability of the informant at trial. He has also not shown that any statements the State relied upon at trial were false, let alone that the State knew that they were false.

[28] As for Dale’s claim that the pre-trial identifications were suggestive, the only evidence on this matter before the PC Court was Dale’s own testimony; the PC Court did not consider the documents Dale claimed were Sanders’ and Roell’s pre-trial depositions because they were not authenticated.⁷ We also note that, the identification procedures were challenged at trial and, on direct appeal, this Court wrote that Sanders and Roell identified Dale “when independently shown a photo array” *Dale*, No. 49G01-0311-FA-19764, slip. op. p. 3. On the record before us, we cannot say that the PC Court clearly erred by denying Dale’s ineffective assistance claims.

Conclusion

[29] The PC Court did not clearly err by denying Dale’s ineffective assistance of counsel claims. Accordingly, we affirm.

⁷ Dale contends, in one sentence in the Statement of the Case section of his brief, that counsel should have entered the depositions into the record. Appellant’s Br. p. 9. This argument is waived because it was not raised in his petition for post-conviction relief. See Post-Conviction Rule 1(8) (“All grounds for relief available to a petitioner under this rule must be raised in his original petition.”). Additionally, Dale’s argument is not sufficiently developed for our review.

[30] Affirmed.

Pyle, J., and Foley, J., concur.