MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Larry P. Prouse, III,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 1, 2024

Court of Appeals Case No.
23A-PC-725

Appeal from the Vigo Superior Court

The Honorable Charles D. Johnson, Judge

Trial Court Cause No.
84D01-1809-PC-007470

Memorandum Decision by Judge Felix
Judges Bailey and May concur.

Felix, Judge.

Statement of the Case

[1] Larry P. Prouse, III was convicted of murder, arson, abuse of a corpse, and altering the scene of death. After we affirmed his conviction on direct appeal, Prouse filed a petition for post-conviction relief ("PCR"). The PCR court denied Prouse's petition. Prouse appeals the PCR court's denial and presents the following issues for our review:

1. Whether the PCR court erred in denying his ineffective assistance of trial counsel claim;
2. Whether the PCR court erred in denying his ineffective assistance of appellate counsel claim; and
3. Whether the PCR court erred in denying his new evidence claim.

[2] We affirm.

Facts and Procedural History

[3] We previously set out the facts of this case in Prouse's direct appeal:

> Late in the evening of August 20, 2016, Prouse picked up Ashley McMickle from her friend Shawn Roberts's house and drove her to McDonald's. They returned about thirty minutes later and hung out with Roberts for a bit. Prouse and McMickle then left in Prouse's truck.
>
> Prouse and McMickle turned up at Leona and James Crowley's home sometime after midnight, purportedly with a man known only as Opie. Leona is Prouse's mother and James is his step-father. They did not know McMickle or Opie but allowed them into the home. Over the next several hours, everyone except

Leona—who was painting signs in another room—hung out in the living room of the small home and used methamphetamine together. At Prouse's request, Leona provided him with a knife from her tool box that he used to fashion a meth pipe out of a lightbulb. McMickle eventually fell asleep on one end of the sectional couch where they were sitting.

Sometime after 5:00 a.m., Prouse stabbed McMickle in the neck as she slept. She woke and attempted to fight off Prouse, but he overpowered her and continued stabbing her. James watched Prouse stab McMickle multiple times and then hit her with a baseball bat. Leona saw him stab McMickle in the shoulder, and unsuccessfully pleaded with Prouse to stop.

Opie ran out the front door during the attack, followed by the Crowleys' dog and then Leona. James went out the back door and started yelling for the dog. Leona and the dog eventually returned to the fenced-in backyard. In the meantime, Prouse dragged McMickle's dead body out of the house and onto the back patio. Prouse then threatened James and told him to leave with Leona. The Crowleys walked to Leona's mother's house, arriving around 6:30 a.m. James took a shower and then stepped out on the porch, when a man drove up and told James that his house was on fire. The man drove James and Leona to the scene.

The fire had been called in at 7:09 a.m. by an off-duty firefighter, who observed the back of the home engulfed in flames. Responding firefighters found two separate fires on the property—a large burn pile in the backyard and the residence fire. After fighting the fires, responders turned their attention to the burn pile where they then found McMickle's charred remains under boards. Her left arm was relatively unaffected by the fire due to its positioning and a tarp wrapped around it. She was identified the next day by her fingerprint.

Fire investigators determined that the fires were intentionally and separately set. Additionally, Terre Haute Fire Chief Norm Loudermilk opined that the fire on the burn pile was set first and likely started sometime between 6:30 a.m. and 6:50 a.m., while the house began burning around 6:50 a.m. The house fire was set at the rear door of the house and destroyed the living room, including the sectional couch.

The pathologist who performed the autopsy of McMickle determined that she died before being set on fire. McMickle's jaw was broken and six stab wounds were apparent during the autopsy—one in the neck, three to her left hand, and two to her left arm. These were mostly defensive wounds and not likely the cause of death. The pathologist determined the cause of death to be massive blood loss from a stab wound or wounds to a major blood vessel in one or more of her extremities, evidence of which was destroyed in the fire.

Within a few hours of the fire, Prouse showed up at Lori Miller's home, where his ex-wife Miranda Roe and his two-year-old daughter were living. He ran inside, mumbling and rocking back and forth. He told Roe that there was a house fire. Later that day, he told Roe that he had stabbed a woman about twenty times and then burned the woman in a fire that he had started.

Early the following morning, August 22, Prouse was found by police sleeping in his truck near his father's home. Roe and the child were inside the home sleeping on the floor. Further investigation revealed that Prouse had driven in a cornfield near Miller's home on the day of the fire. Investigators recovered clothing (shirt, underwear, and pants) and shoes owned by Prouse that had been discarded in that area. Testing revealed the presence of blood on the pants, as well as McMickle's DNA.

> On August 26, 2016, the State charged Prouse with murder (Count I), Level 4 felony arson (Count II), Level 6 felony abuse of a corpse (Count III), and Level 6 felony altering the scene of death (Count IV). A jury found Prouse guilty as charged on June 9, 2017. Thereafter, on August 3, 2017, the trial court sentenced Prouse to sixty years on Count I, eight years on Count II, and two years on Counts III and IV. Counts III and IV were ordered to be served concurrent with each other and consecutive to the other counts, for an aggregate sentence of seventy years in prison. . . .

Prouse v. State, 105 N.E.3d 1109, 1111–12 (Ind. Ct. App. 2018).

[4] Paul Jungers represented Prouse at trial, and Kay Beehler represented Prouse on his direct appeal. On direct appeal, Beehler presented two issues on Prouse's behalf for our review:

1. Whether his dual convictions for arson and altering the scene of death constitute double jeopardy in violation of Article 1, Section 14 of the Indiana Constitution; and
2. Whether the trial court committed fundamental error by allowing improper opinion testimony from an expert witness.

Prouse, 105 N.E.3d at 1111. We affirmed the trial court's decision, *id.* at 1113–14, and our Supreme Court denied transfer, *Prouse v. State*, 110 N.E.3d 1147 (Ind. 2018).

[5] On May 27, 2020, Prouse filed a PCR petition pro se. The trial court held a trifurcated evidentiary hearing on July 6, September 21, and November 30, 2021. On December 23, 2022, PCR court denied Prouse's petition. Prouse now appeals pro se. Additional facts will follow.

Discussion and Decision

Standard of Review

[6] Prouse argues that the PCR court erred in denying his PCR petition and he asks us to vacate his conviction and remand for a new trial. Our Supreme Court has explained the review for PCR decisions:

> Post-conviction actions are civil proceedings, meaning the petitioner (the prior criminal defendant) must prove his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). If he fails to meet this burden and receives a denial of post-conviction relief, then he proceeds from a negative judgment and on appeal must prove "that the evidence, as a whole, unmistakably and unerringly points to a conclusion contrary to the post-conviction court's decision." *Wilkes*, 984 N.E.2d at 1240 (quoting *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000)). When reviewing the 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." *Humphrey v. State*, 73 N.E.3d 677, 682 (Ind. 2017) (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000)).

Bobadilla v. State, 117 N.E.3d 1272, 1279 (Ind. 2019). Prouse contends that the PCR court erred in denying his claims that (1) he received ineffective assistance of trial counsel; (2) he received ineffective assistance of appellate counsel; and (3) there exists new evidence that warrants a new trial.

1. The PCR Court Did Not Clearly Err in Finding that Prouse Did Not Demonstrate He Received Ineffective Assistance of Trial Counsel

[7] "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)) (internal quotation marks omitted). In evaluating a defendant's ineffective-assistance-of-counsel claim, "we apply the well-established, two-part *Strickland* test." *Id.* at 1280 (citing *Humphrey*, 73 N.E.3d at 682). Under this test, "[t]he 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.* (citing *Ward v. State*, 969 N.E.2d 46, 51 (Ind. 2012)).

[8] Prouse argues that Jungers provided ineffective assistance of counsel because Jungers failed to (a) show Miranda Roe's lack of reliability and bias on the witness stand, (b) file a motion to suppress evidence regarding Prouse's clothes that police found in a neighbor's yard, and (c) object to certain testimony and evidence. The trial court determined that Prouse failed to show Jungers provided deficient performance on any of these claims. Prouse now argues that the trial court clearly erred. We will review each of Prouse's contentions, one at a time.

a. Roe's Testimony

[9] Prouse contends that Jungers was deficient in his questioning of Roe. "There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Counsel is afforded considerable discretion in choosing strategy and tactics and these decisions are entitled to deferential review." *Weisheit v. State*, 109 N.E.3d 978, 983 (Ind. 2018) (internal citations omitted) (citing *Stevens v. State*, 770 N.E.2d 739, 746–47 (Ind. 2002)). Additionally, "isolated mistakes, poor strategy, inexperience and instances of bad judgment do not necessarily render representation ineffective." *Id.* at 984 (citing *Stevens*, 770 N.E.2d at 747).

[10] Prouse claims that Jungers did not attack Roe's credibility or establish that Roe was biased against Prouse because of their divorce and custody dispute over their son. The record shows otherwise. On cross-examination, Jungers questioned Roe about inconsistent statements, and Roe eventually testified that she had made untruthful statements to law enforcement. Additionally, Jungers asked Roe if she and Prouse had any issues related to the custody of their son. Regardless of how Jungers asked these questions, the weight given to Roe's answers was ultimately within the province of the jury. *See Keller v. State*, 47 N.E.3d 1205, 1208 (Ind. 2016) (citing *Woodson v. State*, 542 N.E.2d 1331, 1334 (Ind. 1989)). Thus, the PCR court did not err in denying Prouse's claim that Jungers provided ineffective assistance of counsel in his questioning of Roe.

b. Failure to File a Motion to Suppress Evidence

[11] Prouse argues that Jungers was deficient for failing to file a motion to suppress evidence that Prouse claims was the product of an illegal search. To determine if trial counsel was ineffective for failing to pursue this motion, we must determine the likelihood that this motion would be successful. *See Ware v. State*, 78 N.E.3d 1109, 1114 (Ind. Ct. App. 2017).

[12] On the night of the murder, Prouse left the scene and drove to Lori Miller's house, where Roe was staying. On his way, Prouse drove onto Miller's neighbor's property, parked his truck, and left some of his clothes near the neighbor's cornfield. During their investigation, law enforcement officers collected the abandoned clothes from the neighbor's property, and forensic tests revealed that blood and the victim's DNA were on the clothing.

[13] Prouse argues that the collection of this clothing without a warrant violated his Fourth Amendment right against unreasonable search and seizure. "To trigger Fourth Amendment protections, a search arises out of an intrusion by a government actor upon an area in which a person maintains a 'reasonable expectation of privacy.'" *Holder v. State*, 847 N.E.2d 930, 935 (Ind. 2006) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967)). An individual has a reasonable expectation of privacy in their own home; however, "objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." *Id.* at 936 (quoting *Katz*, 389 U.S. at 361).

[14] At the PCR hearing, Jungers testified that he chose not to file a motion to suppress the clothing evidence "because the items were found on property that belonged to another individual which [Prouse] didn't have a reasonable expectation to privacy to their property and that is why we did not do it." Tr. Vol. II at 117. Prouse has failed to demonstrate he had a reasonable expectation of privacy on the neighbor's property or show that the motion to suppress had a likelihood of success. Therefore, we conclude that the PCR court did not err in denying Prouse's ineffective assistance of trial counsel claim regarding Jungers's failure to file a motion to suppress.

c. Failure to Object

[15] Prouse argues that Jungers provided deficient counsel because he failed to object to the admission of: (1) alleged hearsay during Roe's testimony, (2) Roe's emotional testimony, (3) the mention of the dog's death in closing argument, (4) knives, and (5) testimony related to the Diablo Motorcycle Gang. "[T]o prevail on a claim of ineffective assistance due to failure to object, the defendant must show a reasonable probability that the objection would have been sustained if made." *Passwater v. State*, 989 N.E.2d 766, 772 (Ind. 2013) (citing *Wrinkles v. State*, 749 N.E.2d 1179, 1192 (Ind. 2001)).

[16] Prouse has failed to make a cogent argument for any of these claims in violation of Indiana Appellate Rule 46(A)(8)(a). In his brief, Prouse lists multiple rules of evidence then provides a disjointed list of facts from his trial. Prouse provides no indication as to the specific grounds for the objections that Jungers allegedly should have made. "We will not step in the shoes of the advocate and fashion

arguments on his behalf, 'nor will we address arguments' that are 'too poorly developed or improperly expressed to be understood.'" *Miller v. Patel*, 212 N.E.3d 639, 657 (Ind. 2023) (quoting *Dridi v. Cole Kline LLC*, 172 N.E.3d 361, 364 (Ind. Ct. App. 2021)). Prouse's failure to present cogent argument here substantially impedes our review of these arguments, so we will not address the merits thereof. *Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015) (citing *Guardiola v. State*, 268 Ind. 404, 406, 375 N.E.2d 1105, 1107 (1978)).

2. The PCR Court Did Not Clearly Err in Finding that Prouse Did Not Demonstrate He Received Ineffective Assistance of Appellate Counsel.

[17] We also apply the *Strickland* test to evaluate Prouse's claim that he received ineffective assistance of appellate counsel. *See Harris v. State*, 861 N.E.2d 1182, 1186 (Ind. 2007) (citing *Taylor v. State*, 717 N.E.2d 90, 94 (Ind. 1999)). Ineffective assistance of appellate counsel claims fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Garrett v. State*, 992 N.E.2d 710, 724 (Ind. 2013). Prouse argues that Beehler (a) waived certain issues on direct appeal and (b) failed to adequately present the issues raised on appeal. For both claims, Prouse fails to demonstrate that Beehler provided deficient performance.

a. Issues Not Raised on Direct Appeal

[18] "To show that counsel was ineffective for failing to raise an issue on appeal, the petitioner must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential." *Reed v. State*, 856 N.E.2d 1189, 1195

(Ind. 2006) (citing *Ben-Yisrayl*, 738 N.E.2d at 261). In determining if appellate counsel's waiver of an issue satisfies the performance prong of the *Strickland* test, "we apply the following test: (1) whether the unraised issues are significant and obvious from the face of the record and (2) whether the unraised issues are 'clearly stronger' than the raised issues." *Id.* (citing *Timberlake v. State*, 753 N.E.2d 591, 605–06 (Ind. 2001)). We rarely find ineffective assistance of counsel where the defendant argues that appellate counsel failed to raise an issue on direct appeal because "the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel." *Id.* at 1196 (citing *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997)). Prouse argues that Beehler should have presented (i) a speedy trial claim and (ii) a failure to preserve evidence claim.

i. Speedy Trial Claim

[19] Prouse claims that Beehler was ineffective because she failed to raise an argument that Prouse was denied his right to a speedy trial under Indiana Criminal Rule 4[1] (amended eff. Jan. 1, 2024). "The right to a speedy trial is one of this country's most basic, fundamental guarantees—one much older than the nation itself." *Watson v. State*, 155 N.E.3d 608, 614 (Ind. 2020) (citing *Klopfer v. North Carolina*, 386 U.S. 213, 223–24 (1967)). "Both the Sixth Amendment to

[1] Indiana's Criminal Rule 4 was amended on June 23, 2023 and made effective on January 1, 2024. "'[N]ew rules of criminal procedure' generally 'do not apply retroactively to cases that became final before the new rule was announced.'" *M.H. v. State*, 207 N.E.3d 412, 419 (Ind. 2023) (quoting *State v. Mohler*, 694 N.E.2d 1129, 1133 (Ind. 1998)). Thus, we apply the rule in effect during the pendency of Prouse's trial and appeal.

the United States Constitution and Article 1, Section 12 of the Indiana Constitution guarantee an accused the right to a speedy trial." *Small v. State*, 112 N.E.3d 738, 741 (Ind. Ct. App. 2018) (citing *Cundiff v. State*, 967 N.E.2d 1026, 1027 (Ind. 2012)). This right is further protected by Criminal Rule 4. *Id.* (citing *Austin v. State*, 997 N.E.2d 1027, 1037 (Ind. 2013)).

[20] Prouse contends that Beehler should have argued that the trial court erred in granting the State's continuance under Criminal Rule 4(D) . On direct appeal, we would have reviewed Prouse's Criminal Rule 4(D) argument for abuse of discretion. *Small*, 112 N.E.3d at 741.

[21] If a defendant moves for an early trial, they must be brought to trial within 70 days. Ind. Crim. R. 4(B)(1). "However, Criminal Rule 4(D) provides for a ninety-day extension under certain circumstances." *Small*, 112 N.E.3d at 741.

> Criminal Rule 4(D) provides that a trial court may grant the State a continuance when it is satisfied "(1) that there is evidence for the State that cannot then be had; (2) that reasonable effort has been made by the State to procure the evidence; and (3) that there is just ground to believe that such evidence can be had within ninety days." *Chambers v. State*, 848 N.E.2d 298, 303–04 (Ind. Ct. App. 2006).

Id. at 741–42. The State is not required to show the evidence was critical to the case. Rather, the State needs only to prove that the evidence was "unavailable and that the State be entitled to present it." *Id.* at 743 (quoting *Wilhelmus v. State*, 824 N.E.2d 405, 413 (Ind. Ct. App. 2005)).

[22] Here, Prouse filed a motion for a speedy trial on January 4, 2017, and the trial court set his trial for March 6, 2017. On February 15, 2017, Prouse filed a motion to continue the trial date; the trial court granted the motion and set the trial date for April 17, 2017. On April 12, 2017, the State filed a motion to continue the trial pursuant to Criminal Rule 4(D).

[23] The State filed its motion to continue so it could retrieve data from McMickle's cellphone. Shortly after Prouse had been arrested, law enforcement officers retrieved five cellphones from his vehicle and three cellphones from the Crowleys' house. Investigators identified a Kyocera phone they believed to belong to McMickle, and they filed a search warrant to retrieve data from the phone. However, it was too damaged from the fire to confirm it belonged to McMickle. In March 2017, investigators filed a search warrant to conduct a chip-off procedure, a new procedure available to investigators, on the Kyocera. Investigators also hired Special Agent Kevin Horan to interpret the cellphone data and serve as an expert witness. Data from the chip-off procedure indicated that the Kyocera "was likely the phone that Ashley McMickle was using at or around the time of her death," Prior Case Appellant's App. Vol. II at 209–10, and, on April 10, 2017, the State filed a search warrant to collect further data from the Kyocera.

[24] Prouse argues that the State failed to make reasonable efforts to find this evidence earlier in their investigation; however, the record proves otherwise. We assess the reasonableness of the State's efforts "according to the circumstances of the particular case." *Dilley v. State*, 134 N.E.3d 1046, 1050

(Ind. Ct. App. 2019) (citing Smith v. State, 982 N.E.2d 393, 401 (Ind. Ct. App. 2013)). Here, the investigation started with eight cellphones with unidentified numbers and owners. Prior to filing for a continuance, in an effort to retrieve data from the Kyocera, investigators filed multiple search warrants, conducted a novel procedure to retrieve cellphone data, and hired an expert witness to interpret the data. We also note that the State's motion asserted that it would be able to retrieve data from the Kyocera within three days and then it would be sent to their expert. Ultimately, the trial court set the jury trial for June 5, 2017, which was less than 60 days from the prior trial date.

[25] Based on the record Beehler was provided for the direct appeal, we cannot say that this issue is a better or more obvious issue from the face of the record. Accordingly, even if Beehler had argued that the trial court abused its discretion in granting the continuance on appeal it was not "clearly more likely to result in reversal" than the issues presented on appeal. *Reed*, 856 N.E.2d at 1195. We conclude that the PCR court did not err in denying Prouse's claim that Beehler provided ineffective appellate counsel for failing to raise a Criminal Rule 4(D) issue on direct appeal.

ii. Failure to Preserve Evidence Claim

[26] Prouse asserts that Beehler should have argued that, by failing to preserve exculpatory evidence, the State violated his due process provided by the United States Constitution.

> [T]he State's duty to preserve exculpatory evidence is: "limited to evidence that might be expected to play a significant role in the

> suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Holder v. State*, 571 N.E.2d 1250, 1255 (Ind. 1991)) (quoting California v. Trombetta, 467 U.S. 479, 488–89 (1984)).

Albrecht v. State, 737 N.E.2d 719, 724 (Ind. 2000). If evidence falls below the level of constitutional materiality and is found to be only "useful evidence," the defendant must show that the State's failure to preserve this evidence was in bad faith. *Id* (citing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)).

[27] Here, Prouse argues that the State failed to preserve fingernail scrapings and clothing from James and Leona Crowley. However, the State never collected this evidence from the Crowleys. Since the State never possessed the clothing or fingernail scrapings, we need not address the exculpatory nature of the evidence or whether the State acted in bad faith in handling this evidence. *See Brown v. State*, 222 N.E.3d 362, 369 (Ind. Ct. App. 2023). Simply, the State could not have failed to preserve evidence it never possessed. Further, it was this failure to investigate that trial counsel relied on while arguing that law enforcement investigated this matter poorly. Because Prouse has not demonstrated that the State violated his due process rights in this regard, we conclude that the PCR court did not err in denying his ineffective assistance of appellate counsel claim based on Beehler's failure to raise the preservation of evidence issue.

b. Method and Manner Beehler Presented Issues

[28] Prouse contends that the way Beehler presented arguments on appeal was inadequate and deficient. "Claims of inadequate presentation of certain issues, when such were not deemed waived in the direct appeal, are the most difficult for convicts to advance and reviewing tribunals to support." *Bieghler*, 690 N.E.2d at 195 (citing Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W. Va. L. Rev. 1, 23 (1994)). "These claims are reviewed under the highest standards of deference to counsel's performance and relief will be awarded only where 'the appellate court is confident it would have ruled differently.'" *Timberlake*, 753 N.E.2d at 607 (citing *Bieghler*, 690 N.E.2d at 196).

[29] We reiterate that, on direct appeal, Beehler presented two issues for our review: (1) whether his dual convictions for arson and altering the scene of death constitute double jeopardy and (2) whether the trial court committed fundamental error by allowing improper opinion testimony from an expert witness. *Prouse*, 105 N.E.3d at 1111. Prouse argues that Beehler was ineffective because, in her appellate brief, she presented these arguments individually. He claims that Beehler "should have ran all issues together." Appellant's Br. at 48.

[30] Had Beehler organized her appellate brief in the way Prouse argues it should have been written, Beehler would have been in violation of the Appellate Rules. First, appellants are required to "concisely and particularly" present "*each* issue" on appeal. Ind. App. R. 46(A)(4) (emphasis added). Second, when arguing these issues, the appellant's brief must identify each issue and provide cogent reasoning in support of his argument for each issue. *Id.* at 46(A)(8)(a)–

(c). Arguing all the issues together could have resulted in a complete waiver of Prouse's argument on appeal. *See Miller*, 212 N.E.3d at 657; *Pierce*, 29 N.E.3d as 1267. Thus, we conclude that the PCR court did not err in denying Prouse's claim that Beehler provided ineffective assistance of appellate counsel due to her presentation of the issues on appeal.

3. The PCR Court Did Not Clearly Err in Finding Prouse Did Not Demonstrate There Existed New Evidence

[31] Prouse contends that he is entitled to a new trial on the basis that there is newly discovered evidence. Post-Conviction Rule 1(1)(a)(4) states in relevant part that a "person who has been convicted of, or sentenced for, a crime by a court of this state" may file a PCR petition based on the alleged existence "of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice."

> [N]ew evidence will mandate a new trial only when the defendant demonstrates that: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.

Kubsch v. State, 934 N.E.2d 1138, 1145 (Ind. 2010) (quoting *Taylor v. State*, 840 N.E.2d 324, 329–30 (Ind. 2006)).

[32] "The burden of showing that all nine requirements are met rests with the petitioner for post-conviction relief," *Kubsch*, 934 N.E.2d at 1145, and Prouse has fallen well short of this burden. Most notably, Prouse has not presented any new facts or evidence for our review. Rather, Prouse reiterates his argument about the clothing and fingernail scrapings that were not collected from the Crowleys, and we have already addressed this claim. Since Prouse has failed to meet the first requirement, we need not address the other eight requirements; thus, we conclude that the PCR court did not err in denying Prouse's claim that new evidence required a new trial.

Conclusion

[33] We conclude that the PCR court did not err in denying Prouse's claims of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and newly discovered evidence. We therefore affirm the PCR court's decision.

[34] Affirmed.

Bailey, J., and May, J., concur.

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