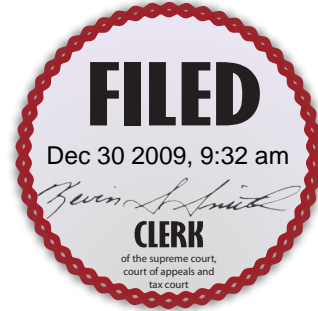


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL J. PAYNE,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 45A05-0711-CR-627

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Diane Ross Boswell, Judge  
Cause No. 45G03-0506-MR-5

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**December 30, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Michael James Herbert Payne appeals his conviction of Murder,<sup>1</sup> a felony. Payne claims he received ineffective assistance of counsel at trial in that counsel did not properly raise a claim of self-defense.

We affirm.

In the early morning hours of February 20, 2004, Payne met his girlfriend of eight months, Jessalyn Bloodsaw, at Bloodsaw's apartment in Gary, Indiana. Payne was upset with Bloodsaw and questioned her about their relationship, as he had done earlier that morning. They argued in Bloodsaw's bedroom. When Bloodsaw hugged Payne in an attempt to calm him down, the couple fell onto the bed and a gun came out of Payne's pocket. Payne put the gun into the pouch of his hooded sweatshirt and continued to argue with Bloodsaw, eventually becoming physically aggressive toward her.

During the argument, Bloodsaw's cell phone rang several times. The calls were from Ralph Russell, Bloodsaw's ex-boyfriend and the father of her child,<sup>2</sup> with whom her child was staying the night. Payne answered the phone twice, angrily telling Russell to call Bloodsaw back later. Russell called at least one more time with no answer.

After his unsuccessful attempts to speak with Bloodsaw, Russell called a friend, Tony Jackson, around 4:00 a.m. and asked for a ride over to Bloodsaw's apartment. Upon arriving at the apartment, Jackson parked on the street and stayed in the car while Russell walked up to the door, which would not open. Russell threw a snowball at Bloodsaw's second-story

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<sup>1</sup> Ind. Code Ann. § 35-42-1-1 (West, PREMISE through 2009 1st Regular Sess.)

<sup>2</sup> Payne and Russell had never met.

bedroom window and angrily yelled to be let in. Payne and Bloodsaw looked out the window. Payne said, “That’s your baby daddy. He must got some holler for me.” *Transcript* at 79. Payne then threw Bloodsaw’s phone and exited the apartment. He pulled out his gun and, after a brief hesitation, went down the stairs. Bloodsaw immediately called the police and woke her roommate, LaDonna Russell (Russell’s sister).

In the meantime, Payne opened the main door to the apartment building, and Russell stepped into the doorway, face to face with Payne. Within seconds, the men began “tussling”. *Id.* at 199. Upon seeing the struggle, Jackson exited his car and began to cross the street toward the apartment building. At the same time, Payne fired a fatal shot into Russell’s head just behind his left ear. The shot was fired at close range with the gun possibly against Russell’s head. Russell, who was unarmed, died within minutes.

After shooting Russell, Payne opened the door to the apartment building and fired at least two shots toward Jackson, causing Jackson to flee. Payne then went up to Bloodsaw’s apartment and pounded on her door. When Bloodsaw refused to let him in, Payne ran away. Bloodsaw and LaDonna then went down the stairs and found Russell laying in a pool of blood just inside the door. Bloodsaw, LaDonna, and Jackson gave statements to police that morning. About twelve hours after the shooting, Payne came to the Gary Police Department with his attorney and several family members. Payne had no apparent injuries. He turned over the 9mm handgun used in the shooting without its clip. Payne, who did not give a formal statement to police, was released later that day.

On June 7, 2005, the State charged Payne with murder. On the first day of Payne’s

jury trial, August 20, 2007, defense counsel filed a supplemental discovery pleading indicating that Payne intended to claim self-defense. The State objected arguing that, pursuant to Ind. Code Ann. § 35-41-3-11(c) (West, PREMISE through 2009 1st Regular Sess.), Payne was required to file a written motion of his intent to pursue such a defense not later than twenty days before the omnibus date. The trial court sustained the State's objection and precluded Payne from presenting a self-defense claim. Payne was subsequently convicted as charged and sentenced to forty-five years in prison.

Payne timely initiated a direct appeal of his conviction and sentence. On April 1, 2008, we granted Payne leave to initiate a Davis/Hatton proceeding, whereby the direct appeal was held in abeyance while he pursued post-conviction relief (PCR) in the trial court. In his PCR petition, Payne alleged that his trial counsel was ineffective for failing to timely file a notice of his intention to claim self-defense. Payne's PCR petition was denied on March 4, 2009, following a hearing. Payne did not file a notice of appeal from the ruling on his PCR petition. Therefore, we do not have the PCR record or transcript before us,<sup>3</sup> and Payne is proceeding solely on the basis of his direct appeal, which was held in abeyance until May 27, 2009. As set forth above, Payne challenges the effectiveness of his trial counsel.

A claim of ineffective assistance of trial counsel requires the appellant to show that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance

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<sup>3</sup> Payne appears to have filed with the trial court an unsuccessful motion to file a belated notice of appeal. Such relief is not permitted with respect to post-conviction rulings. *See Howard v. State*, 653 N.E.2d 1389 (Ind. 1995)

prejudiced the defendant so much that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Davidson v. State*, 763 N.E.2d 441, 444 (Ind. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). *See also Taylor v. State*, 840 N.E.2d 324 (Ind. 2006) (the failure to satisfy either component will cause an ineffective assistance of counsel claim to fail).

Initially, we feel compelled to address the parties’ (both at trial and on appeal) and the trial court’s misunderstanding of I.C. § 35-41-3-11, the effects-of-battery statute. Said statute applies only where, in conjunction with an insanity or self-defense claim, the defendant “raises the issue that the defendant was at the time of the alleged crime suffering from the effects of battery as a result of the past course of conduct of the individual who is the victim of the alleged crime”. I.C. § 35-41-3-11(b). *See also Marley v. State*, 747 N.E.2d 1123, 1127 (Ind. 2001) (“the statute typically comes into play with respect to efforts to introduce evidence of battered women’s syndrome in defense of a charge against the mistreated victim”). As our Supreme Court has observed, while the statute imposes notice requirements on a defendant claiming self-defense in this limited context, the general self-defense statute does not contain a notice requirement. *See Marley v. State*, 747 N.E.2d 1123.

In the instant case, the effects-of-battery statute is wholly inapplicable, as it is undisputed that Payne and Russell had never met before the shooting. Therefore, the trial court improperly applied the effects-of-battery statute to conclude that Payne’s notice of intent to claim self-defense was untimely filed. Payne’s trial counsel was deficient in failing to argue the inapplicability of the statute.

Deficient performance aside, Payne has failed to establish prejudice. As set forth above, Payne is required to show a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Davidson v. State*, 763 N.E.2d 441; *Slusher v. State*, 823 N.E.2d 1219 (Ind. Ct. App. 2005). He has not done so here, nor did he do so in the PCR proceedings.

A valid claim of self-defense is a legal justification for an otherwise criminal act. Ind. Code Ann. § 35-41-3-2(a) (West, PREMISE through 2009 1st Regular Sess.). To prevail on such a claim, the defendant must show he: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm. *Pinkston v. State*, 821 N.E.2d 830 (Ind. Ct. App. 2004), *trans. denied*. The amount of force that an individual may use to protect himself must be proportionate to the urgency of the situation. *Id.* When a person uses more force than is reasonably necessary under the circumstances, the right of self-defense is extinguished. *Id.*

On appeal, Payne "admit[s] that there was no evidence presented to the trial court during Payne's trial that he acted without fault or of his reasonable fear of great bodily harm." *Appellant's Brief* at 13. To be sure, the trial record establishes that Payne angrily left Bloodsaw's apartment while armed with a gun in order to confront Russell, who was unarmed. Shortly after Payne initiated the encounter, Payne shot Russell point-blank in the side of the head. In light of this evidence, there is simply no indication that a self-defense strategy would have been successful. Therefore, on the record before us, Payne cannot

establish prejudice.

In this case, Payne's only chance at establishing prejudice with respect to his ineffective assistance claim hinged on him developing an additional evidentiary record at the PCR hearing. *See Slusher v. State*, 823 N.E.2d at 1221-22 (“[f]ar more common are issues that are not visible at all on the face of the trial record, or that require additional record development to assess...the prejudice resulting from the claimed error”). Such a hearing was held, and Payne testified at the hearing. The PCR transcript and record, however, are not before us due to Payne's failure to timely file his notice of appeal from the denial of his PCR petition. Nonetheless, we observe that in its order, the PCR court summarized Payne's self-defense testimony as follows:

During the post-conviction relief hearing, the defendant testified to his version of the events. He testified that when he arrived downstairs Russell rushed him in front of the downstairs entry door. Payne felt he had no means of escape. He thought Russell was reaching for a gun because Russell had rushed him, they tussled and Payne did not know what Russell was going to do.

*Appellee's Appendix* at 4. We agree with the post-conviction court that this testimony, even if believed, does not establish justification for using deadly force. *See id.* at 6 (“had [Payne] testified consistently with the testimony he gave at the hearing on the petition for [PCR], he could not have prevailed in relying upon the defense at trial”).

In sum, Payne has not established a reasonable probability that the result of the proceeding would have been different had trial counsel properly presented a claim of self-defense. In light of the lack of prejudice, Payne's claim of ineffective assistance of trial counsel fails.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.