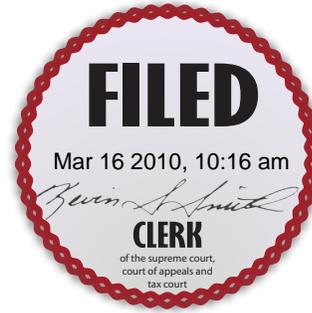


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

**ROY A. SMITH**  
Carlisle, Indiana

**GREGORY F. ZOELLER**  
Attorney General of Indiana

**KARL M. SCHARNBERG**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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ROY A. SMITH, )  
 )  
Appellant-Petitioner, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Respondent. )

No. 46A03-0907-PC-313

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APPEAL FROM THE LAPORTE SUPERIOR COURT NO. 2  
The Honorable Richard R. Stalbrink, Judge  
Cause No. 46D02-0609-PC-20

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**March 16, 2010**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Petitioner, Roy A. Smith (Smith), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

## ISSUES

Smith raises five issues on appeal, which we consolidate and restate as the following single issue: Whether his appellate counsel provided ineffective assistance of counsel.

## FACTS AND PROCEDURAL HISTORY

Anthony Fisher (Fisher) and Smith were inmates at the Indiana State Prison in Michigan City, Indiana. On March 29, 2009, Smith stabbed Fisher with scissors while Fisher was eating. The State charged Smith with Count I, attempted murder, a Class A felony, Ind. Code §§ 35-41-5-1; 35-42-1-1 and Count II, aggravated battery, a Class B felony, I.C. § 35-42-2-1.5. Smith waived his right to a jury trial, and a bench trial was held on June 22, 2004. The trial court found Smith guilty as charged on both counts. A sentencing hearing was conducted on July 23, 2004. The trial court vacated the aggravated battery conviction and sentenced Smith to thirty-four years in the Department of Correction for the attempted murder conviction, to run consecutive to his current term of incarceration.

On direct appeal, Smith argued that the trial court erred when it denied his motion to proceed *pro se* and that he received ineffective assistance of trial counsel. See *Smith v. State*, Case No. 46A04-0408-CR-449, slip op. at 5-7 (Ind. Ct. App. May 23, 2005). On the first issue, this court found that because his motion to proceed *pro se* was filed four days before

trial, the trial court was within its discretion to deny his motion. *See id.* Additionally, we determined that Smith's representation at trial was ineffective, but that the shortcomings of his representation would not have changed the outcome of the trial. *See id.* Thus, we affirmed his convictions.

On September 18, 2006, Smith filed a petition for post-conviction relief, which he amended on April 29, 2009. On May 15, 2009, a hearing was held on his petition. Smith requested not to be transferred to the hearing, relying instead on a memorandum he filed on March 26, 2009. Smith's petition was denied on June 2, 2009.<sup>1</sup>

Smith now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Standard of Review*

We initially note that *pro se* litigants such as Smith are held to the same standard as trained legal counsel and are required to follow procedural rules. *Evans v. State*, 809 N.E.2d 338 (Ind. Ct. App. 2004), *trans. denied*. Among other things, an appellant has a duty to provide this court with materials, via an appendix, transcripts, and exhibits, which reflect the errors alleged and permit this court to fully review the issues. *See Williams v. State*, 690

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<sup>1</sup> On December 28, 2009, the State filed a motion to strike portions of Smith's appendix. Specifically, the State argues that Smith erroneously included documents and transcripts from the trial court proceedings that were not included into evidence at the PCR hearing. In response, on January 7, 2010, Smith filed a motion to strike the State's brief and to deny the State's motion to strike portions of Smith's appendix. First, we hereby deny Smith's motion to strike the State's brief. As explained in more detail in Section II of this Memorandum Decision, we grant the State's motion to strike portions of Smith's appendix.

N.E.2d 162 (Ind. 1997). Smith's failure to provide materials to permit review of the issues constitute in wavier of the claimed error. *Richey v. State*, 426 N.E.2d 389, 395 (Ind. 1981).

Here, Smith did not attend the post-conviction relief hearing and instead, provided the trial court with a memorandum in support of his argument. However, he has not presented this court with the memorandum, making it impossible to determine what evidentiary arguments he advanced at that hearing. As a result, we are left to determine his arguments based on his appellate brief. Furthermore, Smith has provided us with material in the record that was not before the post-conviction relief court, and thus is not a proper subject for appellate review. *See In re A.P.*, 882 N.E.2d 799, 802, n.2 (Ind. Ct. App. 2008), *reh'g denied*.

The petitioner has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). Because Smith is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole unerringly and unmistakably leads us to believe there is no way within the law that a post-conviction court could have denied his post-conviction relief petition. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*, 540 U.S. 830 (2003). "The post-conviction court is the sole judge of the evidence and the credibility of the witnesses." *Hall v. State*, 849 N.E.2d 466, 469 (Ind. 2006). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*.

Post-conviction hearings do not afford defendants the opportunity for a “super appeal.” *Moffitt v. State*, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004), *trans. denied*. Rather, post-conviction proceedings provide a narrow remedy for collateral challenges to convictions that must be based on grounds enumerated in the post-conviction rules. *Ross v. State*, 877 N.E.2d 829, 832 (Ind. Ct. App. 2007), *trans. denied*. This Smith has done by alleging that his appellate counsel provided ineffective performance in violation of Article 1, Section 13 of the Indiana Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. *See* Post-Conviction Rule 1(l)(a).

In order to demonstrate ineffective assistance of trial counsel Smith must establish both prongs of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh’g denied*; *Lee v. State*, 880 N.E.2d 1278, 1280 (Ind. Ct. App. 2008). The defendant must prove (1) his or her counsel’s performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) there is a reasonable probability that, but for counsel’s failure to meet prevailing professional norms, the result of the proceeding would have been different. *Johnson v. State*, 832 N.E.2d 985, 996 (Ind. Ct. App. 2005), *reh’g denied, trans. denied* (citing *Strickland*, 446 U.S. at 690). Essentially, the defendant must show that counsel was deficient in his or her performance and the deficiency resulted in prejudice. *Johnson*, 832 N.E.2d at 1006. Because all criminal defense attorneys will not agree on the most effective way to represent a client, “isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.” *Bieghler v. State*, 690 N.E.2d 188, 199 (Ind. 1997), *reh’g denied, cert. denied*,

525 U.S. 1021 (1998). Thus, there is a strong presumption that counsel rendered adequate assistance and used reasonable professional judgment. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.*

## II. *Motion to Strike*

We must address the State's Verified Motion to Strike Portions of the Appellant's Appendix, alleging that portions of the appellant's appendix were not part of the record in the post-conviction relief hearing, including among other things, portions of the trial transcript and trial record, a supplemental case report, crime scene photographs and diagrams of the special management unit, charging information, affidavit for probable cause and arrest warrant in the underlying trial, and letters from counsel to Smith. The State is correct that these sections were not part of the record in the post-conviction relief hearing. Evidence that was not part of the record before the post-conviction court is not a proper subject for appellate review. *See In re A.P.*, 882 N.E.2d at 802 n.2. The record from the trial court and the transcript were not admitted at the May 15, 2009 PCR hearing. Thus, we grant the State's motion to strike portions of Smith's appendix. Inasmuch as it is improper to support an appellant's argument with evidence that is outside of the post-conviction court's record, waiver notwithstanding, we will address each of Smith's contentions, as we reach the same result whether we consider the entire record or only those pursuant to the State's motion to strike.

### III. *Ineffective Assistance of Appellate Counsel*

Smith claims he was denied effective assistance of appellate counsel on direct appeal. We analyze ineffective assistance of appellate counsel claims using the same standard applicable to ineffective assistance of trial counsel claims. *Williams v. State*, 724 N.E.2d 1070, 1078 (Ind. 2000), *cert. denied*, 531 U.S. 1128 (2001). Thus, Smith must show both defective performance and prejudice. *Terry v. State*, 857 N.E.2d 396, 402-03 (Ind. Ct. App. 2006), *trans. denied*. Claims of errors by appellate counsel generally fall into three categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Henley v. State*, 881 N.E.2d 639, 644 (Ind. 2008). With respect to this particular claim of ineffective assistance of counsel, our supreme court has stated:

To show that counsel was ineffective for failing to raise an issue on appeal thus resulting in waiver for collateral review, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. To evaluate the performance prong when counsel waived issues upon appeal, 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 . . . [E]valuat[ing] the prejudice prong . . . requires an examination of whether the issues which . . . appellate counsel failed to raise [] would have been clearly more likely to result in reversal or an order for a new trial.

*Henley*, 881 N.E.2d at 645 (citations and quotations omitted). The decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel. *Reed v. State*, 856 N.E.2d 1189, 1196 (Ind. 2006). Therefore, we must consider

the totality of an attorney's performance to determine whether the client received constitutionally adequate assistance . . . [and we] should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's

choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made.

*Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998).

Ineffective assistance is very rarely found in cases where a defendant asserts that appellant counsel failed to raise an issue on direct appeal. *Reed*, 856 N.E.2d at 1196. Additionally, the defendant's burden before the post-conviction court is to establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel. *Timberlake*, 753 N.E.2d at 604.

#### A. *Personal Jurisdiction*

Smith first claims his appellant counsel was ineffective for failing to challenge the trial court's exercise of personal jurisdiction. Specifically, the focus of his argument appears to be that Ind. Trial Rule 4.1, regarding service on individuals, required the State to provide him with proper service of his arrest warrant and because the State did not do so, the trial court lost jurisdiction over him.

Jurisdiction of the person "refers to the particular parties who are brought before the court, and the right of that particular court to exercise jurisdiction over those parties." *Tyman v. State*, 459 N.E.2d 705, 707 (Ind. 1984). A challenge to personal jurisdiction may be raised either as an affirmative defense or in a motion to dismiss. *Brockman v. Kravic*, 779 N.E.2d 1250, 1255 (Ind. Ct. App. 2002). Judgments entered in the absence of personal jurisdiction are voidable, and a timely objection is required to preserve a challenge to the lack of personal jurisdiction or jurisdiction over the case. *Id.* Thus, a defendant can waive personal

jurisdiction by failing to make a timely objection. *Truax v. State*, 856 N.E.2d 116, 122 (Ind. Ct. App. 2006).

Here, Smith appeared before the trial court on three separate occasions before filing motions to quash affidavit and dismiss evidence on November 18, 2003 and a motion to quash arrest warrant on November 25, 2003. However, Smith has failed to provide the motions in the record, and, thus, we are unable to determine whether personal jurisdiction formed the basis of his objections. As the appellant, Smith has a duty to provide this court with materials, via an appendix, transcripts, and exhibits, which reflect the errors alleged and permit this court to fully review the issue. *Williams v. State*, 690 N.E.2d 162 (Ind. 1997). Providing materials that are not adequate to permit review results in waiver of the issue. *Id.* Because Smith has not provided all the motions in order to determine whether he properly raised personal jurisdiction, Smith has waived this argument.

Even assuming that Smith had not waived his personal jurisdictional challenge, he does not prevail. First, T.R. 4.1 applies to proper service in a civil action, and is therefore inapplicable to the facts of this case. Second, he was incarcerated in the Indiana State Prison in Michigan City, Indiana. The State charged him with attempted murder and aggravated battery of a fellow inmate. Every trial court in Indiana has personal jurisdiction of a person who commits an act within the state that constitutes an element of a criminal offense. *See* I.C. § 35-41-1-1.

## B. *Self-Defense*

Second, Smith argues his appellate counsel was ineffective because his counsel “refused to include in Smith’s direct appeal the issue of trial counsel’s conceding and admitting Smith’s guilt despite [sic] Smith having entered a plea of not guilty.” (Appellant’s Br. p. 18).

The record reflects that during opening statement, Smith’s trial counsel stated,

Judge, we think the evidence will show that Anthony Fisher was about to take the life of Roy Smith, and we’ll develop that I think through the cross-examination of Mr. Fisher. And we think that what Mr. Smith did was an act of calculated self-defense to avoid his annihilation by Mr. Fisher which annihilation had been known or made known to Mr. Smith by Mr. Fisher previous to this incident. And we believe that what Mr. Smith did was in protection of himself in the prison environment that is very much an animal environment where it could – kill or be killed. We didn’t kill anybody. We didn’t have the intent to kill anybody. We did stab him but that was in self-defense to make a statement as it were to keep this man from killing us.

(Appellant’s App. p. 73). Smith’s trial counsel strategy was to raise the issue of self-defense, which is an affirmative defense; it admits that Smith committed the stabbing, but it seeks to negate or lessen the criminal culpability that would otherwise result from this action. *See Clark v. State*, 834 N.E.2d 153, 157 (Ind. Ct. App. 2005), *trans. denied*.

In his direct appeal, Smith argued that he received ineffective assistance of trial counsel. This court subsequently found that Smith’s trial counsel had been ineffective for failing to mount a defense on Smith’s behalf, as his counsel did not object to exhibits, only cross-examined one witness, and called no witnesses for the defense. *Smith v. State*, Case No. 46A04-0408-CR-449, slip op. at 6 (Ind. Ct. App. May 23, 2005). Nevertheless, we held

that Smith had not shown “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 7 (citing *Strickland*, 466 U.S. at 694).

Given that this court has already found Smith’s trial counsel to have been ineffective, we must now determine whether Smith’s appellate counsel was ineffective by failing to challenge the trial counsel’s self-defense affirmative defense strategy. This requires us to examine whether this issue would have been likely to result in reversal or an order for a new trial. *See Henley*, 881 N.E.2d at 645.

Few points of law are so clearly established as the principle that “[t]actical or strategic decisions will not support a claim of ineffective assistance.” *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002). The decision of what issues to raise on appeal is one of the most important strategic decisions to be made by appellate counsel. *Reed*, 856 N.E.2d at 1196. We afford great deference to counsel’s discretion to choose strategy and tactics, and strongly presume that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Id.* Thus, based on the totality of the circumstances, we cannot say that Smith’s appellate counsel was ineffective for failing to challenge the self-defense affirmative defense.

### *C. Exculpatory Evidence*

Third, Smith contends that his appellant counsel was ineffective for failing to include in his direct appeal that the State had intentionally or negligently withheld and destroyed exculpatory evidence, thus violating his right to due process under *Brady v. Maryland*, 373

U.S. 83, 87, 83 S. Ct. 1194, 1196-1197 (1963), *cert. denied*, 534 U.S. 1105, 122 S. Ct. 905 (2002).

“Due process requires the State to disclose to the defendant favorable evidence which is material to either his guilt or punishment.” *Stephenson v. State*, 742 N.E.2d 463, 491 (Ind. 2001) (citing *Kyles v. Whitley*, 514 U.S. 419, 432, 115 S. Ct. 1555, 1565 (1995)). The suppression of evidence by the State that is favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Shanabarger v. State*, 798 N.E.2d 210, 217 (Ind. Ct. App. 2003), *trans. denied*. To establish a *Brady* violation, the defendant must satisfy the following factors: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Id.* at 217-218. Additionally, a *Brady* violation arises if the defendant, using reasonable diligence, could not have obtained the information. *Id.* at 218. Exculpatory evidence has been defined as that which clears or tends to clear a defendant from alleged guilt. *Id.* Evidence will be considered material under *Brady* only if there is reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* Put another way, the defendant must show that the evidence at issue reasonably could be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Id.*

Smith points to the following four pieces of evidence that he argues would have exculpated him: (1) video surveillance of the March 19, 2003 stabbing; (2) fingerprints and blood samples taken from the weapon used to stab the victim; (3) blood samples taken from various locations of the scene of the stabbing; and (4) blood stained clothing removed from another prisoner immediately following the stabbing.

With respect to each of his claims, Smith has failed to demonstrate that the evidence was favorable to him, that the evidence was suppressed by the State or that prejudice must have ensued. *See Shanabarger*, 798 N.E.2d 210 at 217. Additionally, based on the overwhelming evidence of guilt presented at trial, we cannot say that the verdict would have been any different.

#### D. *Miranda Rights*

Fourth, Smith argues that his appellant counsel was ineffective for failing to raise the claim that the State failed to advise Smith of his *Miranda*<sup>2</sup> rights before he made an incriminating statement. In his brief, Smith argues that after the stabbing, he was confined in the Indiana State Prison's Special Management Unit (SMU) and was subjected to "harsh, restrictive, and brutal conditions." (Appellant's Rely Br. p. 5). As a result of those conditions, he argues, he made the statement to prison officials that Fisher told him that he had "defied [Fisher] for the last time" which was a "fictitious statement or confession in order to avoid being subjected to the coercive conditions of the SMU unit." (Appellant's Br.

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 694 (1966).

p. 26). His trial counsel then asked Fisher, during cross-examination, whether he had told Smith that he had “defied him for the last time.” (Appellant’s App. p. 74).

“The Fifth Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during ‘custodial interrogation’ without a prior *Miranda* warning.” *Gauvin v. State*, 878 N.E.2d 515, 520 (Ind. Ct. App. 2007), *trans. denied* (quoting *Ritchie v. State*, 875 N.E.2d 706, 716 (Ind. 2007)). A person who has been taken into custody or otherwise deprived of his freedom of action in any significant way must, before being subject to interrogation by law enforcement officers, be advised of his rights to remain silent and to the presence of an attorney and be warned that any statement he makes may be used as evidence against him. *Gauvin*, 878 N.E.2d at 520. “Statements elicited in violation of *Miranda* are generally inadmissible in a criminal trial and subject to a motion to suppress.” *Id.* (citing *Brabandt v. State*, 797 N.E.2d 855, 861 (Ind. Ct. App. 2003)).

Based on the record provided to us, it is clear that Smith requested that he “wished to speak only with legal counsel present.” (Appellant’s App. p. 33). However, Smith does not point to anything specific in the record, which consists of incomplete reports, to demonstrate that he was questioned without the presence of counsel, and, thus, results in a waiver of the argument. *See Lyles v. State*, 834 N.E.2d 1035, 1049 (Ind. Ct. App. 2005).

Additionally, to the extent Smith argues that his statement was involuntary, we note that coercive police activity is a necessary prerequisite to finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment. *A.A. v. State*, 706 N.E.2d 259, 262 (Ind. Ct. App. 1999). The critical inquiry is whether, upon

considering the totality of the circumstances, a defendant's statements were induced by violence, threats, promises or other improper influence. *Id.* Apart from the fact that Smith was in the SMU, based on the totality of the circumstances, he has not directed us to anything in the record, again consisting of incomplete reports, to support the contention that he was subjected to harsh conditions and coerced into making the statement to jail officials. Therefore, the issue is waived. *See Lyles*, 834 N.E.2d at 1049.

That being said, even if we assume the statement was made in violation of the federal constitution and erroneously admitted, it is subject to harmless error analysis. *Hendricks v. State*, 897 N.E.2d 1208, 1215 (Ind. Ct. App. 2008). A federal constitutional error is reviewed *de novo* and must be harmless beyond a reasonable doubt. *Id.* "The State bears the burden of demonstrating that the improper admission of a defendant's statement did not contribute to the conviction." *Id.* (citing *Finney v. State*, 786 N.E.2d 764, 768 (Ind. Ct. App. 2003)).

We find there is overwhelming evidence that supports Smith's conviction. The State offered testimony from a witness that saw Smith walk up behind Fisher while he was eating breakfast and attack him. Another corrections officer identified Smith as the attacker and testified that scissors found under the table had fallen out of Smith's hands. Given the strength of this eyewitness testimony, the statement Smith made that he had "defied [Fisher] for the last time" was unnecessary for his conviction. (Appellant's App. p. 74).

### E. *Bias*

Finally, Smith argues his appellate counsel was ineffective for declining to raise on appeal that the trial judge was biased against Smith. Specifically, he argues that the judge exhibited bias on nine different occasions: (1) when the judge found probable cause for Smith's arrest when the affidavit for probable cause was insufficient; (2) when the judge determined probable cause and also by presiding over Smith's trial as fact-finder; (3) when the judge failed to act on Smith's repeated complaints about his trial counsel; (4) when the judge refused Smith's request to call witnesses or to introduce evidence, while affording the prosecution opportunities to do so, even recessing the court to give the State the opportunity; (5) when the judge threatened to hold a witness in contempt when the witness refused to take an oath prior to his testimony; (6) when the judge informed Smith's appellate counsel that she did not have to include issues Smith wanted her to include; (7) when the judge allowed Smith's appellate counsel to violate attorney-client privilege when appellate counsel entered letters written by Smith directing her to include certain issues in his appeal and by reading the letter into the record; (8) when the judge participated in a deception designed to make Smith believe that State's Exhibit D was the arrest warrant; and (9) when the judge refused the victim's request to submit an affidavit in lieu of sworn testimony at Smith's trial.

When the impartiality of the trial judge is challenged on appeal, we will presume that the judge is unbiased and unprejudiced. *Smith v. State*, 770 N.E.2d 818, 823 (Ind. 2002). To rebut the presumption, the defendant "must establish from the judge's conduct actual bias or prejudice that places the defendant in jeopardy." *Id.* "To assess whether the judge has

crossed the barrier into impartiality, we examine both the judge's actions and demeanor.”  
*Timberlake v. State*, 690 N.E.2d 243, 256 (Ind. 1997).

Of the nine issues, Smith has only properly supported issues two and six by providing a clear argument and citations to the record; thus, we will only address those two issues.<sup>3</sup> With respect to issue two, he argues that the trial judge was biased because he not only signed the probable cause affidavit and viewed evidence pertaining to Smith's guilt, but he then presided over his case. In support of his argument, Smith cites to a United States Supreme Court case that holds that where a judge, who was conducting a one-man grand jury proceeding and then cited one of the witnesses for contempt, could not then preside over that witness' trial for contempt arising out of the grand jury proceeding. *In re Murchison*, 349 U.S. 133, 138-39, 75 S. Ct. 623, 626-27, 99 L.Ed. 942 (1955). However, our supreme court has stated that the federal constitutional provision requiring grand juries is not applicable to the states and the states may initiate criminal prosecutions by information. *Beverly v. State*, 543 N.E.2d 1111, 1116 (Ind. 1989). Additionally, *Beverly* held that the fact that a judge signed the affidavit for probable cause and the arrest warrant and then presided over the trial did not constitute a showing of actual prejudice or bias which justifies reversal. *Id.* 1115. The same holding applies to Smith's case.

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<sup>3</sup> For the remainder of the issues, Smith either failed to provide a complete record or merely states a claim but does not direct us to anything in the record to support his claim. “Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority or portions of the record.” *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), *trans. denied*; *see also* Ind. Appellate Rule 46(A)(8)(a).

Smith also argues that the trial judge was biased against him because the judge informed Smith's appellate counsel that she did not have to include issues Smith wanted her to include. The trial judge held a hearing at Smith's appellate counsel's request concerning the conflict that existed between Smith's concerns over the case and his appellate counsel's obligation to the court. Throughout the hearing, Smith exuded the attitude that his appellate counsel was required to include every argument he presented to her through his weekly letters. Smith's appellate counsel stated,

And just for the [c]ourt's edification, there are a number of issues that Mr. Smith has believed from the beginning of his prosecution were meritorious and wanted raised with this [c]ourt. This [c]ourt did address those issues and ultimately denied his request for a dismissal of the information. He also now wants those issues raised on appeal. Unfortunately, based on my knowledge as a criminal attorney, that these issues are not meritorious, and I believe that I would be breaching my duties to this [c]ourt, to the appellate court to raise issues that are not meritorious [].

(Appellant's App. pp. 115-16). In response, the trial judge imparted to Smith that despite the fact that he believes that he can include any issue that he sees as relevant to his case, attorneys are bound by the Rules of Professional Responsibility that limit an attorney to

advancing issues that are non-frivolous. *See* Ind. Professional Conduct Rule 3.1. Smith has not demonstrated actual bias or prejudice.

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court did not err when it determined that Smith had failed to prove that his appellate counsel performed ineffectively.

Affirmed.

VAIDIK, J., and CRONE, J., concur.