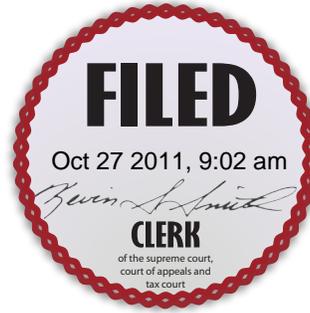


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

BART M. BETTEAU
Betteau Law Office, LLC
New Albany, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

GEORGE HILL,)
)
 Appellant-Petitioner,)
)
 vs.) No. 31A04-1103-PC-163
)
 STATE OF INDIANA,)
)
 Appellee-Respondent.)

APPEAL FROM THE HARRISON SUPERIOR COURT
The Honorable Roger D. Davis, Judge
Cause No. 31D01-1004-PC-5

October 27, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Petitioner George Hill appeals the denial of his petition for post-conviction relief (“PCR”), arguing that the post-conviction court erroneously denied his request for a change of judge. We affirm.

FACTS AND PROCEDURAL HISTORY

Our opinion in Hill’s direct appeal instructs us as to the underlying facts leading to this post-conviction appeal:

On January 22, 2008, Hill pleaded guilty to burglary, as a Class B felony, after he had burglarized the dwelling of Mary Cole in May of 2001. Among other things, Hill had stolen from Cole \$18,562.80 in jewelry, for which Cole had recovered \$1,000 on an insurance claim. Pursuant to the guilty plea, Hill agreed to serve ten years executed and one year suspended to probation. And as a condition of his probation, Hill agreed to pay restitution to Cole. The amount of Hill’s restitution was to be determined by the court at a subsequent hearing.

Hill v. State, 31A04-0803-CR-167 slip op. p. 2 (Ind. Ct. App. October 29, 2008). Following a hearing on February 20, 2008, the trial court ordered Hill to pay \$17,562.80 as a condition of his probation. *Id.* at 2-4. On direct appeal, this court remanded and ordered the trial court to determine Hill’s ability to pay restitution as a condition of his probation. *Id.* at 7.

On April 1, 2010, Hill, by counsel, filed a PCR petition. Also on April 1, 2010, Hill, by counsel, filed a petition requesting a change of judge. The post-conviction court conducted an evidentiary hearing on Hill’s petition for a change of judge on July 27, 2010. During this hearing, Hill, by counsel, presented argument in support of his petition seeking a change of judge. On August 24, 2010, the post-conviction court issued an order denying Hill’s request for a change of judge.

The post-conviction court subsequently conducted an evidentiary hearing on Hill's PCR petition on March 1, 2011. During this hearing, Hill, by counsel, presented argument in support of his PCR petition. Hill, by counsel, also sought to introduce a "YouTube" video which allegedly contained general statements made by the post-conviction judge relating to his judicial record. On March 4, 2011, the post-conviction court issued an order denying Hill's request for PCR. This appeal follows.

DISCUSSION AND DECISION

"Indiana law allows for collateral attack of a judgment of conviction and sentence through a petition for post-conviction relief." *Lambert v. State*, 743 N.E.2d 719, 725 (Ind. 2001) (quotation omitted). Post-conviction procedures, however, do not afford the petitioner with a super-appeal. *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999). Instead, they create a narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules. *Id.* A petitioner who has been denied post-conviction relief appeals from a negative judgment and as a result, faces a rigorous standard of review on appeal. *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001); *Collier v. State*, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999), *trans. denied*.

Post-conviction proceedings are civil in nature. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Therefore, in order to prevail, a petitioner must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Stevens*, 770 N.E.2d at 745. When appealing from the denial of a PCR petition, a petitioner must convince this court that the evidence, taken as a whole, "leads unmistakably to a conclusion opposite that reached by

the post-conviction court.” *Stevens*, 770 N.E.2d at 745. “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*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). We therefore accept the post-conviction court’s findings of fact unless they are clearly erroneous but give no deference to its conclusions of law. *Id.*

I. Whether the Post-Conviction Court Erroneously Denied Hill’s Petition Seeking a Change of Judge

Hill’s appeal from the denial of PCR is based entirely on his contention that the post-conviction court erroneously denied his petition for a change of judge. In raising this contention, Hill claims that the post-conviction court’s judgment must be vacated and new PCR proceedings ordered because the judge erroneously declined to disqualify himself. Hill maintains that the post-conviction judge demonstrated disqualifying bias through statements he allegedly made during a campaign speech at some unspecified time after the judge accepted Hill’s guilty plea and sentenced Hill in the underlying criminal matter.

Under Post-Conviction Rule 1(4)(b), “[w]ithin ten [10] days of filing a petition for post-conviction relief under this rule, the petitioner may request a change of judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner.”

Post-Conviction Rule 1(4)(b) provides that a petitioner’s motion for change of judge “shall be granted if the historical facts recited in the affidavit [filed in support of the motion] support a rational inference of bias or prejudice.” This

rule “requires the judge to examine the affidavit, treat the historical facts recited in the affidavit as true, and determine whether these facts support a rational inference of bias or prejudice.” [*Lambert v. State*, 743 N.E.2d 719, 728 (Ind. 2001)] (quoting *State ex rel. Whitehead v. Madison County Cir. Ct.*, 626 N.E.2d 802, 803 (Ind. 1993)). “[A] change of judge is neither ‘automatic’ nor ‘discretionary,’ [but] calls for a legal determination by the trial court.” *Id.* (quoting *Sturgeon v. State*, 719 N.E.2d 1173, 1181 (Ind. 1999)). It is presumed that the [post-conviction] court is not biased against a party and disqualification is not required under the rule unless the judge holds a “personal bias or prejudice.” *Id.* (quoting P-C.R. 1(4)(b)). Typically, “a bias is ‘personal’ if it stems from an extrajudicial source—meaning a source separate from the evidence and argument presented at the proceedings.” *Lambert*, 743 N.E.2d at 728.

Pruitt v. State, 903 N.E.2d 899, 939 (Ind. 2009) (brackets in original). The ruling on a motion for a change of judge is reviewed under the clearly erroneous standard. *Garland v. State*, 788 N.E.2d 425, 433 (Ind. 2003) (citing *Sturgeon*, 719 N.E.2d at 1182). Reversal will require a showing which leaves us with a definite and firm conviction that a mistake has been made.” *Sturgeon*, 719 N.E.2d at 1182.

A. Whether the Post-Conviction Court Demonstrated Disqualifying Bias Through Statements Allegedly Made During a Campaign Speech Occurring at Some Unspecified Time After Hill Pled Guilty and was Sentenced in the Underlying Criminal Matter

Hill claims that the post-conviction court erroneously denied his request for a change of judge because the post-conviction court restricted Hill from presenting evidence that would demonstrate that the post-conviction judge had a personal bias or prejudice toward him. Specifically, Hill argues that the post-conviction judge abused its discretion in excluding certain evidence and in determining that the judge could not be called as a witness during the post-conviction proceedings. The admission and exclusion of evidence lies within

the sound discretion of the trial court; therefore we review the admission or exclusion of evidence for an abuse of that discretion. *Mays v. State*, 907 N.E.2d 128, 131 (Ind. Ct. App. 2009) (citing *State v. Lloyd*, 800 N.E.2d 196, 198 (Ind. Ct. App. 2003)), *trans. denied*. Such an abuse occurs when the decision is clearly against the logic and effect of the facts and circumstances. *Id.* (quotation omitted).

1. Whether the Post-Conviction Court Abused its Discretion in Excluding Certain Evidence

Hill argues that the post-conviction court abused its discretion in excluding the proffered “YouTube” video of the post-conviction judge making statements that Hill asserts would show personal bias or prejudice toward him.¹ The State, on the other hand, argues that the trial court acted within its discretion in excluding the video because Hill failed to make a proper showing that the video was authentic and had not been altered in any way. Hill asserts that in order to introduce the video for substantive purposes, the sponsoring witness must only testify that she was familiar with the post-conviction judge’s appearance and voice and that she was certain that the person talking in the video was the post-conviction judge. We disagree. Pursuant to the “silent witness” theory, video may be admitted as substantive evidence, but there must be a strong showing of authenticity and competency, including proof that the video has not been altered in any way. *McHenry v. State*, 820 N.E.2d 124, 128 (Ind. 2005); *Edwards v. State*, 762 N.E.2d 128, 136 (Ind. Ct. App. 2002). This higher

¹ We note that we are unable to review the comments that were allegedly made by the post-conviction judge for bias or prejudice because Hill has failed to provide us with a copy of or link to the video on appeal.

standard is applied because the videotape must “speak for itself” and because such “silent witnesses” cannot be cross-examined. *Edwards*, 762 N.E.2d at 136.

Here, Hill attempted to have the video admitted as substantive evidence of comments allegedly made by the post-conviction judge. Hill’s sponsoring witness was Hill’s counsel’s live-in girlfriend, Christen Harris, who found the video on YouTube. Harris testified that she believed that the video was of a campaign speech allegedly made by the post-conviction judge in 2008. Harris testified that she was familiar with the post-conviction judge’s voice and physical appearance, and she was certain that the person in the video was the post-conviction judge. Harris testified that it appeared that the video had to have been uploaded to YouTube on September 29, 2008, but that she could not tell who uploaded the video to YouTube or when the speech was allegedly given. Harris further testified that she was not present when the speech was allegedly given, and that she could not say that the video was an unaltered, true and accurate representation of the speech. Because Harris could not provide proof that the video had not been altered in any way, we conclude that the post-conviction court acted within its discretion in determining that Harris’s testimony was insufficient to authenticate the video. Thus, the trial court did not abuse its discretion in excluding the video.

2. Whether the Post-Conviction Judge Erroneously Excluded Himself from Being Called as a Witness

Hill also argues that the post-conviction judge abused its discretion in excluding his own testimony. Hill sought to call the post-conviction judge as a witness for the purpose of

authenticating the above-described video. Indiana Rule of Evidence 605 flatly prohibits a judge from testifying in proceedings over which he is presiding. *McDonald v. State*, 775 N.E.2d 1195 n.2 (Ind. Ct. App. 2002); Ind. Evidence Rule 605. Thus, the trial court did not abuse its discretion in this regard.²

In sum, the post-conviction judge acted within its discretion in excluding the proffered video and his own testimony. Additionally, Hill failed to show how the proffered video and desired testimony, if admitted, would have demonstrated any personal bias or prejudice by the post-conviction judge. The speech, which allegedly included general statements about the post-conviction judge's judicial record, was allegedly given after Hill had pled guilty and was sentenced in the underlying criminal matter. Accordingly, we affirm the post-conviction court's denial of Hill's PCR petition and request for a change of judge because Hill has failed to convince us that the evidence, taken as a whole, leads unmistakably to a conclusion opposite that reached by the post-conviction court or that the evidence leads to a conclusion opposite that reached by the post-conviction court.

The judgment of the post-conviction court is affirmed.

ROBB, C.J., and BARNES, J., concur.

² It is worth noting that other options for authenticating the video were available to Hill, including testimony from the alleged sponsor of the campaign event or an individual who attended the alleged speech, and he could have taken advantage of these options if he had chosen to do so.