UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1403

September Term, 2016

DAVID W. STARKEY

v.

STATE OF MARYLAND

Woodward, C.J.,
Kehoe,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: August 2, 2017

David W. Starkey appeals the denial, by the Circuit Court for Kent County, of his petition for writ of actual innocence. Because his petition failed to substantially comply with Rule 4-332(d), and because Starkey cannot claim that he is "actually innocent" of the offense that resulted in his convictions, we affirm.

BACKGROUND

In 2000, Starkey was convicted of first-degree murder and two counts of attempted first-degree murder and thereafter sentenced to a total term of life imprisonment, plus fifteen years. Upon appeal, this Court affirmed the judgments. *David Starkey v. State,* No. 1662, Sept. Term, 2000 (filed February 8, 2002). The record before us does not include the trial transcripts, but this Court's 2002 opinion states that the victims were three women who were driving home one evening in December 1999 when

> they noticed a black pickup truck behind them flashing its lights and blowing its horn. When they got to Bay Shore Road they noticed a truck behind them with its headlights bright. They then turned left onto Georgetown Road. The truck behind them then came up beside them and shots were fired. Ms. Clarkston [a passenger] was shot and died two days later. Ms. Wilson [the driver] was injured in her thigh and hand.
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> [Starkey's] explanation was that, after a day of hunting, he and [his brother] Daniel were riding in Daniel's black pickup truck driven by Daniel. A small dark colored car in front of them braked suddenly, causing Daniel to apply his brakes sharply. This irritated them, and they followed the car. It appeared to them that the driver of the car was intoxicated. They tried to pass but the car purposely prevented them from doing so. [Starkey] said that the shooting was accidental. He pointed the shotgun to scare the occupants, but the truck hit a bump and the gun went off.
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> Prior to the shooting, at 6:07p.m., a caller made a 911 call to report a possible drunk driver. The caller identified himself as David Starkey.

Slip Op. at 2-3.

In our discussion of the issues on appeal, we noted that "the jury, of course, was not obligated to believe [Starkey's] explanation that the shotgun discharged upon its own volition when the truck hit a bump in the road." *Slip Op.* at 7. Elsewhere, we referred to "the defense theory of an accidental shooting." *Id.* at 8. Hence, it is clear that Starkey admitted at trial that he had shot the victims, but claimed that the shooting was unintentional.

On July 7, 2016, Starkey filed, *pro se*, a petition for writ of actual innocence pursuant to the provisions of Maryland Code (2008 Repl. Vol., 2015 Supp.), Criminal Procedure Article ("C.P."), § 8-301 and Maryland Rule 4-332. He asserted that he had "discovered new evidence . . . that add up to numerous 'Brady' violations."[1] He attached a number of documents that he had obtained in April 2016 from the Kent County Sheriff's Office in response to a freedom of information request he had made the previous month. These documents consisted of investigatory notes prepared by the police in December 1999, in the days following the shooting. None of the documents contain any information that would exculpate Starkey or support his claim at trial that he had *accidentally* shot the victims.

[1] "The reference to *Brady* concerns '[i]nformation or evidence that is favorable to a criminal defendant's case and that the prosecution has a duty to disclose.'" *Yearby v. State,* 414 Md. 708, 711 n.2 (2010) (quoting Black's Law Dictionary 212 (9th ed. 2009)). *Brady* is a reference to *Brady v. Maryland*, 373 U.S. 83 (1963).

Starkey stated in his petition, however, that, "if he had the opportunity to present this documentational [sic] evidence to the jury at his original trial, the trial and/or sentence would have been significantly different, in light favorable to" him. But he did not state why these documents could not have been discovered in time to move for a new trial pursuant to Rule 4-331.[2] Nor did he explain in what manner his "newly discovered evidence" could have created a substantial or significant possibility that the result of his trial would have been different. And notably, he did not state that he was innocent of the crime or deny that he had shot the victims.

Less than three weeks after Starkey filed his petition, the circuit court ruled on it by stamping it "DENIED." The court provided no reasons for its ruling.

DISCUSSION

Starkey contends that the circuit court erred in denying his petition for the following reasons, which we have reordered: (1) it denied the petition without a hearing; (2) it failed to state reasons for its ruling on the record; (3) it failed to forward his petition to the Collateral Review Division of the Office of the Public Defender ("OPD"); (4) it failed to wait 90 days before rendering its ruling and, therefore, precluded the State's Attorney from filing a response to the petition; and (5) it failed to permit adequate time for OPD to respond to his *pro se* petition or to amend it.

[2] As relevant here, the last possible time to file a motion for a new trial based on newly discovered evidence under Rule 4-331 is "within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief[.]"

The State maintains that Starkey is not entitled to relief because he did not assert in his petition that he is "actually innocent." Accordingly, the State contends that the circuit court did not err in "summarily rejecting Starkey's petition" and in declining to hold a hearing.

We agree with Starkey that the circuit court was obliged to do more than stamp his petition "DENIED." Nonetheless, for the reasons to be discussed we certainly agree with the State that Starkey's petition has no merit and its dismissal was proper. To be clear, however, we do not countenance the circuit court's failure to state its reasons for denying the petition.

"Generally, the standard of review when appellate courts consider the legal sufficiency of a petition for writ of actual innocence is *de novo.*" *Smallwood v. State,* 451 Md. 290, 308 (2017). Having reviewed Starkey's petition, we conclude that the petition failed to comply substantially with the requirements of Rule 4-332(d). And we further conclude that Starkey cannot assert a claim of actual innocence. We hold, therefore, that the court did not err in denying relief and in doing so without a hearing. *See* C.P., § 8-301(e)(2) ("The court may dismiss a petition without a hearing if the court finds that the petition fails to assert grounds on which relief may be granted."); Rule 4-332(i)(1) ("[T]he court may [ ] dismiss the petition if it finds as a matter of law that the petition fails to comply substantially with the requirements of section (d) of this Rule or otherwise fails to

assert grounds on which relief may be granted[.]"). Consequently, we need not address Starkey's remaining allegations of error.[3]

When filing a petition for writ of actual innocence, the petitioner must, among other things, state:

> 6.) that the request for relief is based on newly discovered evidence which, with due diligence, could not have been discovered in time to move for a new trial pursuant to Rule 4-331;
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> 7.) a description of the newly discovered evidence, how and when it was discovered, why it could not have been discovered earlier . . . [;]
>
> 8.) that the newly discovered evidence creates a substantial or significant possibility, as that standard has been judicially determined, that the result may have been different, and the basis for that statement;
>
> 9.) that the conviction sought to be vacated is based on an offense that the petitioner did not commit.

Rule 4-322(d).

Starkey's petition failed to state why he could not have discovered his "newly discovered evidence" in time to move for a new trial pursuant to Rule 4-331. As noted,

[3] As for Starkey's allegation that the circuit court erred by failing to transmit his petition to the Office of the Public Defender ("OPD"), we note that Rule 4-332(e)(3) provides: "If the petitioner has requested an attorney *and has alleged an inability to employ one*, the court shall send a copy of the petition and attachments to the Collateral Review Division of the Office of the Public Defender." (Emphasis added.) Rule 4-332(d)(10) states that the petition for actual innocence shall state "if the petitioner is not already represented by counsel, whether the petitioner desires to have counsel appointed by the court and, if so, *facts establishing indigency.*" (Emphasis added.) Starkey's petition included a request that he "be appointed advisory counsel in this matter," but he did not state any facts establishing his indigency or inability to employ an attorney. Accordingly, the circuit court cannot be faulted for failing to forward Starkey's petition to the OPD.

the documents he alleged to be "newly discovered evidence" consisted of notes that the police had taken during its investigation within the days after the incident. These notes (which were dated December 3, 1999, December 6, 1999, and December 9, 1999) should have been readily discoverable *prior* to Starkey's June 2000 trial, and certainly in time to move for a new trial following his conviction. As the Court of Appeals has noted, "[t]o qualify as 'newly discovered,' evidence must not have been discovered, *or been discoverable by the exercise of due diligence*[.]" *Argyrou v. State,* 349 Md. 587, 600-601 (1998) (emphasis added). In short, Starkey's petition failed to provide any reasons to support an allegation that his petition was based on evidence that could not have been discovered in time to move for a new trial.

Starkey's petition also failed to explain how the documents he obtained in 2016 would have changed the result of the trial. The police notes in no way exculpate Starkey, nor do they, in any conceivable fashion, support Starkey's defense at trial that his shooting of the victims was accidental.

Finally, Starkey failed to state in his petition that he did not commit the offense that lead to the convictions. Given his admission at trial that he had pointed a shotgun at the victims to scare them, and the gun discharged accidentally, Starkey cannot claim to be "actually innocent" of the crimes for which he was convicted. *Cf. Smallwood, supra,* 451 Md. 323 ("Just because evidence exists suggesting Petitioner could have been found NCR [not criminally responsible]" prior to his trial, "his actions caused [the victim's] death, and

he was adjudicated 'guilty' of murdering her" and, therefore, he "was not 'actually innocent' of the crime [first-degree murder] for which he was convicted.").

JUDGMENT OF THE CIRCUIT COURT FOR KENT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.