Circuit Court for Baltimore City
Case No. 102228034

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1929

September Term, 2016

JAMES JEFFERSON

v.

STATE OF MARYLAND

Woodward, C.J.,
Friedman,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: December 7, 2017

In 2003, a jury in the Circuit Court for Baltimore City convicted appellant, James Jefferson, of first-degree murder, conspiracy to commit first-degree murder, and handgun offenses. Jefferson was tried jointly with Davon Heath, who was found guilty of second-degree murder, conspiracy to commit first-degree murder, and wearing and carrying a handgun. This Court affirmed the judgments. *James Jefferson, a/k/a Theodore Jefferson and Davon R. Heath v. State,* No. 1351, September Term, 2003 (filed Mary 18, 2005). Another co-defendant, Marvin Buckson, was tried separately and after his jury trial ended in a mistrial trial, he pleaded guilty to second-degree murder.[1]

In 2016, Jefferson filed a petition for writ of actual innocence pursuant to Md. Code (2008 Repl. Vol., 2016 Supp.) Criminal Procedure Article, § 8-301 and Md. Rule 4-332. His petition was based on the discovery of a police detective's notes of a post-arrest interview with Heath, his co-defendant, in which Heath related that, while in the

[1] The record before us indicates that the State sought to sever Buckson's case from Jefferson's and Heath's because it intended to introduce against Buckson testimony by a witness that Buckson had bragged that he, with Jefferson, had murdered the victim. As noted, Buckson's trial, which took place before Jefferson's and Heath's, ended in a mistrial. When he later pleaded guilty to second-degree murder (after Jefferson and Heath had been convicted), Buckson informed the court that he was pleading guilty "because I did it. I did it by myself." Jefferson and Heath subsequently used that statement as grounds for a new trial. Following a hearing on their motion, which included Buckson's testimony that he acted alone in killing the victim, the circuit court denied the motion for a new trial, finding that Buckson's claim that he was solely responsible for the murder was not sufficiently credible and, given his plea bargain, was designed to help his friends without hurting himself. Upon appeal, this Court held that Jefferson's and Heath's motion for a new trial was untimely and hence, the circuit court did not have jurisdiction to consider it. *Heath & Jefferson v. State,* Nos. 606 & 617, September Term, 2007 (filed March 10, 2010), slip op. at 13. But even if the court had jurisdiction, this Court would have concluded that the circuit court did not abuse its discretion in denying the motion for a new trial. *Slip op.* at 13.

Baltimore City Detention Center following their arrests, Jefferson and Buckson told Heath that Buckson had stabbed and shot the victim. Jefferson alleged that these interview notes were "withheld by the State" prior to his trial and that they "fully inculpate[] Buckson" and "exculpate[]" him. The circuit court concluded that the police notes were not "newly discovered evidence" because they could have been discovered with "due diligence" in time to move for a new trial and, moreover, that they were not, in fact, exculpatory. After the circuit court dismissed the petition without a hearing, Jefferson noted a timely appeal. For the reasons to be discussed, we affirm.

TRIAL

We summarized the evidence produced at trial in our unreported opinion affirming Jefferson's and Heath's convictions. We reproduce it here for context, and note that the trial transcripts are not in the record before us.

> The victim in this case, 24-year old Larnell Burris of Baltimore, who was known as Willie Earl, died of a stab wound to the chest and a gunshot wound to the chest. The victim suffered additional cutting wounds to his face, chest, back, and hands.
>
> The State presented evidence that the victim's body was found just after 8:00 a.m. on July 3, 2002, by Baltimore City police officers who were responding to a call to investigate a vacant house on Oliver Street. Upon their arrival at the scene, the officers were told by a bystander that there had been a shooting. The officers found the body on the second floor of the vacant home. They were unable to identify the body at that time.
>
> Baltimore City Police Detective Vernon Parker testified that police got their first lead as to the victim's identity several hours later, when an officer in another police district "stopped" witness Donte Brown, then 16 years old, apparently in connection with an unrelated matter. According to Parker, Brown "relayed to the officer that he had some information regarding a body that had just been discovered a few hours prior." Brown was then taken to meet with a homicide detective who tape recorded his

statement. Parker testified that Brown identified the victim as "Willie Earl" and accurately described the injuries that led to the victim's death.

Subsequently, Parker presented Brown with several photo arrays. Parker testified that Brown wrote on the back of the photo of Jefferson that it was Jefferson who shot the victim. On the back of the photo of Heath, Brown wrote that Heath gave Jefferson the gun that was used in the shooting. Parker added that, three months after Brown was initially interviewed by police, Brown made another statement in which he identified Marvin Buxton[2] as another person who was present at the time of the murder. Brown selected Buxton's photo from an array.

The State called Brown to the stand, but Brown indicated he did not want to testify. . . . Over defense counsel's objection, the court accepted Brown's tape-recorded statement into evidence.

In the statement, Brown indicated that, shortly before the murder, he was standing on a corner "drinking and smoking" with the victim, Jefferson, Heath, and another young man. Jefferson and the victim got into an argument over "money and drugs," and Jefferson pulled out a knife and stabbed the victim in the chest. At that point, Heath ran into a nearby house and returned moments later with a gun, which he gave to Jefferson. The victim ran, but Jefferson followed and shot at him.

After the tape was played, direct examination of Brown continued. Brown denied that it was his voice on the tape, that he knew anything about the case, or that he ever identified Jefferson or Heath. He stated that he was at home with his mother when the incident occurred and that he did not see what happened. Thereafter, on cross-examination, Brown testified to the effect that he fabricated the story after he was stopped in connection with the unrelated matter so that the police would let him go.

The State also called witness Gervin Williams to the stand. Williams, who was 18 years old at the time of the victim's death, testified that he was a cousin of Marvin Buxton, an alleged accomplice of [Jefferson and Heath]. Williams had known the victim almost all of his life, and he also knew Jefferson and Heath. Williams testified that he found the victim's body in the vacant house, then called the police anonymously to urge them to investigate the house. Williams said he did not want to get

[2] Although our 2005 opinion spelled Buckson's name as "Buxton," it appears that Buckson is the proper spelling.

involved in the police investigation, so he left the scene when the police arrived.

The prosecutor asked Williams if he recalled making a taped statement to the police in which he stated that he saw Jefferson and Buxton arguing with the victim shortly before the murder. Williams indicated that the police told him what to say on the tape. The court then accepted as substantive evidence the tape recording of William's statement, and the statement was played for the jury.

In the taped statement, Williams indicated that in the early morning hours of July 3, 2002, he saw the victim arguing in an alley with Buxton, and Buxton appeared to be very angry. Williams then saw Jefferson go into the alley. Shortly thereafter, Williams heard gunshots. Williams did not indicate, either in the taped statement or at trial, that Heath was involved in the incident.

The defense rested without presenting evidence.

PETITION FOR WRIT OF ACTUAL INNOCENCE

As noted, in 2016, Jefferson filed a petition for writ of actual innocence. In that petition he related that on May 26, 2011, he received "the police file" in his case in response to a Maryland Public Information Act request that he had filed with the Baltimore City Police Department. The material he received, and upon which he based his petition for writ of actual innocence, included four pages of hand-written notes on plain paper of a "second interview" with Heath, which was conducted by Detective Parker and a Detective Cherry. The notes, taken by Detective Parker, were dated August 12, 2002, sometime after Heath and Jefferson had been charged. Jefferson asserted in his petition that the notes "consisted of a conversation" that had occurred between Buckson, Heath, and himself, which Heath later relayed to the detectives. The notes include the following:

Gervin had the torch. left his fingerprints on the torch

Teddy [Jefferson] said Marvin [Buckson] did the shooting

Marvin admitted shooting Willie Earl

Marvin jumped J-Boy – James Dubose – burning him with cigarette
robbery – same night of murder (little earlier)

Willie Earl riding bike on Bethal Street
Stops to talk with Marvin – fight breaks out – Marvin stabs Willie Earl

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Gervin Williams . . . Gervin was with them time of shooting

***

Keisha was with J-Boy when he was assaulted by Marvin, Teddy [Jefferson] was present

***

Willie Earl drops bike – starts talking to Marvin right before the murder
late night – around 3:00am

Willie Earl has bike in the street Marvin & Willie Earl start fighting.
Marvin pulls knife – stabs Willie Earl – on Oliver St.
front of Teddy's house

Teddy [Jefferson] is sitting on his own steps watching Marvin & Willie Earl. Gervin is also with Teddy on the steps

Willie Earl runs – cuts into alley Marvin chases Teddy & Gervin join in

The final note reflects that Heath informed the detectives that "Marvin [Buckson] is relaying most of this" to Heath and "Teddy [Jefferson] adds things/events that Marvin misses."

It is undisputed that the detective's handwritten notes at issue here were not provided to the defense in discovery, but that they were in the prosecutor's file and under the State's Attorney's "open file" policy then in effect, the file was available for

inspection by defense counsel.[3] It is also undisputed that a typewritten "progress report" on police stationary, also dated August 12, 2002, was provided to the defense in pre-trial discovery.[4] This report is labeled "FOLLOW UP INVESTIGATION 2nd Interview Davon Heath." The report, directed to the Commanding Officer of the Homicide Unit from Detectives Parker and Thomas Martin, then states in its entirety:

> On or about 25 July 2002, Det. Bob Cherry received a telephone call from the grandmother of Davon Heath, who called on his behalf, requesting that we writ Davon out of jail, because he had additional information he wished to share with investigators.

[3] The record indicates that, in a petition for post-conviction relief, Jefferson alleged that the State's failure to provide these notes to the defense constituted a *Brady* violation. The State maintained that there was not a *Brady* violation because the "version of Maryland Rule 4-263 in effect at the time of trial did not have the current rule's requirement that any statements by co-defendants be disclosed; it merely required disclosure of statements made by witnesses the State planned to call" and "the State manifestly did not intend to call Davon Heath as a witness in his own trial." It appears that the post-conviction court held a hearing on the allegation, where Detective Parker testified that he had turned the notes over to the State's Attorney prior to Jefferson's and Heath's trial. The State did not dispute that fact and it conceded that the notes were "not actually known to" Jefferson or his trial counsel before trial or within the time allowed to move for a new trial. At the time we are deciding this appeal, it appears that the post-conviction court has yet to rule on the *Brady* violation claim. We express no opinion.

[4] In his Reply brief filed in this Court, Jefferson asserts, for the first time as far as we can discern, that this report "also was undisclosed." In his petition for writ of actual innocence, however, Jefferson acknowledged that he and defense counsel had been aware pre-trial that Heath had spoken with the police "post-arrest." He referred to the August 12, 2002 police report in his petition multiple times, yet he never claimed that it had been withheld from discovery. Rather, in his petition he maintained that the police report was not a substitute for the handwritten police notes because, in his view, the police report mischaracterized the substance of the Heath interview because it failed to state that Heath had relayed that Buckson alone had confessed to stabbing and shooting the victim. In its response to the petition, the State asserted that the police report "was turned over to [defense] counsel in discovery." In his reply to that response, Jefferson did not refute the State's claim and, in essence, acknowledged that the defense had received the police report pre-trial.

> As a result, on 12 August 2002, Detectives Parker and Cherry obtained a writ of Habeas Corpus and transported Mr. Heath from BCDC to the Homicide Unit. He was advised of his rights to remain silent and spoke with your investigators.
> Mr. Heath provided the names and addresses of two individuals who may have witnessed some part of the incident surrounding the death of Larnell Burrus (AKA: "Willie Earl"). *Heath also stated that he has had conversations with Teddy Jefferson and Marvin Buckson while at BCDC, where both subjects admitted to their participation in the murder of "Willie Earl."*
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> As a result of Heath's information, Detectives Parker and Cherry responded to the residences of both parties, however, neither subject was home. Further attempts forthcoming.
>
> ASA Mark Cohen was advised accordingly.
>
> At the conclusion of the interview, Heath was returned to BCDC without incident.

(Emphasis added.)

In his petition for writ of actual innocence, Jefferson asserted that this report of the detective's August 12th interview with Heath mischaracterized its substance because the report stated that Buckson and himself had "admitted to [Heath] their participation in the murder of 'Willie Earl,'" when, in Jefferson's view, the hand-written notes "fully exonerates" him because they reveal that Buckson, in Jefferson's presence, had confessed to Heath that he, Buckson, had stabbed and shot the victim.

Jefferson admitted in his petition that "the content of Heath's post-arrest visit was revealed during trial." He pointed to a bench conference during the cross-examination of Detective Parker where Heath's August 12, 2002 interview with the detectives was mentioned. He maintained, however, that at the bench conference the prosecutor

proffered that Heath did not "implicate anybody" during the August 12th interview, but rather "was naming people who would not implicate him." [5]

Jefferson asserted that the State had intentionally concealed the handwritten notes from him and his defense counsel and had not produced them despite defense counsel's request for such information. In support of his claim that his attorney had "made reasonable inquiries into obtaining any and all favorable evidence that pertained" to him and to "Heath's post-arrest visit with police," Jefferson relied upon a pre-trial "omnibus motion" of the kind the Court of Appeals has often criticized.[6] In that motion, the defense requested that the State produce, among other documents, the following:

> 1.(a) any material or information which tends to negate the guilt of the Defendant as to the offense(s) charged, (b) any material or information within his/her possession or control which would tend to reduce the Defendant's punishment for such offense(s).
>
> 8. [A] copy of each written or recorded statement made by a Co-Defendant, and/or accomplice, and/or accessory after the fact to a State agent *which the State intends to use at a hearing or trial.*
>
> 9. [T]he substance of each oral statement made by a Co-Defendant, and/or accomplice, and/or accessory after the fact to a State agent *which the State intends to use at a hearing or trial.*
>
> 10. [A] copy of all reports of each oral statement made by a Co-Defendant, and/or accomplice, and/or accessory after the fact to a State agent *which the State intends to use at a hearing or trial.*

(Emphasis added.)

[5] The trial transcripts are not in the record before us.

[6] *Ray v. State*, 435 Md. 1, 15 (2013); *Edmund v. State,* 398 Md. 562, 569 (2007); *Denicolis v. State*, 378 Md. 646, 660 (2003).

Jefferson maintained in his petition that the detective's notes at issue should have been turned over in response to the above demand. The State responded that, because it did not intend to call Davon Heath as a witness in his own trial, Heath's statements to the police were not required to be disclosed to the defense.[7] Moreover, the State pointed out that Jefferson had not alleged in his petition that his trial counsel had requested "either a review of the prosecutor's file under the State's Attorney's Office's 'open file' policy, or a review of the detective's file." The State noted that Jefferson's trial counsel was "an experienced defense attorney, who would be aware that the prosecutor's discovery obligations would not necessarily lead him to disclose each and every page of either the detective or the State's files, and that a file review could potentially reveal documents that had 'fallen through the cracks' of discovery." In short, the State maintained that Jefferson had "failed to demonstrate that the interview notes could not have been discovered by due diligence before the time for a motion for new trial expired" and, for that reason, the State's position was that he had "not shown that the interview notes are newly discovered evidence under the statute."

The State also took issue with Jefferson's allegation that, had these notes been turned over to the defense, "the outcome" of his trial "would have been different" because the notes contradicted the State's theory of the case. Although acknowledging that the notes "state that per Davon Heath" Jefferson "did not participate in the stabbing and was sitting on the steps watching it," the State pointed out that the notes also indicate

[7] Whether there was or was not a *Brady* violation is an issue we need not decide in the appeal *sub judice*. *See* footnote 3, *supra*.

that Heath told the detectives that "Willie Earl runs – cuts into alley Marvin chases Teddy [Jefferson] & Gervin join in." Thus, the State maintained that, "[n]ot only does this place [Jefferson] in the fatal alley when the murder was consummated, in the company of both co-defendant and State's witness Gervin Williams, it indicates that [Jefferson] was not just present but a part of the violence." Finally, the State contended that, even if the notes had been given to the defense, "there is absolutely zero possibility that it would have caused a different result at trial, because there is no theory under which Heath's statement to police or the detective's notes from the interview would be admissible in evidence."

CIRCUIT COURT RULING

The circuit court dismissed the petition for writ of actual innocence, without a hearing, after concluding that Jefferson had failed to assert grounds upon which relief could be granted. The court's conclusion was based on its finding that the detective's notes were "not newly discovered" evidence because Jefferson's "counsel could have requested an interview of [Heath] prior to or at the time of trial, and the failure to do so demonstrated a lack of 'due diligence,' measured by 'whether the evidence was, in fact discoverable, and not whether [Jefferson] or [Jefferson's] counsel was at fault for not discovering it,' *Jackson v. State,* 164 Md. App. 679, 690 (2005)." The court further found that the notes were "not exculpatory as claimed" because Heath "did not state that [Jefferson] was not involved but rather that he affirmatively participated in the crime – specifically, [Heath] stated that after the victim was initially assaulted by others, the victim 'cuts into alley . . . Marvin chases [and Jefferson] and Gervin ***join in***' (emphasis

supplied) and, therefore, such a statement does not create a substantial or significant possibility that the result may have been different." In a footnote, the court also stated that it was "uncertain as to how" the detective's notes "would have been admissible" at trial.

DISCUSSION

Section 8-301 of the Criminal Procedure Article allows certain convicted persons to petition for a writ of actual innocence based on "newly discovered evidence." The statute provides, in pertinent part, that:

> (a) A person charged by indictment or criminal information with a crime triable in circuit court and convicted of that crime may, at any time, file a petition for writ of actual innocence in the circuit court for the county in which the conviction was imposed if the person claims that there is newly discovered evidence that:
>
> (1) creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined; and
>
> (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.
>
> ***
>
> (g) A petitioner in a proceeding under this section has the burden of proof.

"Thus, to prevail on a petition for writ of innocence, the petitioner must produce evidence that is newly discovered, i.e., evidence that was not known to petitioner at trial." *Smith v. State,* 233 Md. App. 372, 410 (2017) (citing *Hawes v. State*, 216 Md. App. 105, 134-136 (2014)). Moreover, "[t]o qualify as 'newly discovered,' evidence must not have been discovered, *or been discoverable by the exercise of due diligence*," in time to move for a new trial. *Argyrou v. State,* 349 Md. 587, 600-601 (1998) (emphasis added.) *See*

also Rule 4-332(d)(6) (the petition for a writ of actual innocence must allege that it "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."). As this Court explained in *Smith, supra,* the

> requirement, that the evidence could not with due diligence, have been discovered in time to move for a new trial, is a "threshold question." *Argyrou*, 349 Md. at 604. *Accord Jackson v. State*, 216 Md. App. 347, 364, *cert. denied,* 438 Md. 740 (2014). "[U]ntil there is a finding of newly discovered evidence that could not have been discovered by due diligence, no relief is available, 'no matter how compelling the cry of outraged justice may be.'" *Argyrou,* 349 Md. at 602 (quoting *Love v. State*, 95 Md. App. 420, 432 (1993)).

233 Md. App. at 416.

In this appeal, Jefferson asserts that the circuit court erred in dismissing his petition without a hearing. The court, however, "may dismiss a petition [for writ of actual innocence] without a hearing if the court finds that the petition fails to assert grounds on which relief may be granted." Crim. Proc., § 8-301(e)(2). *See also* Rule 4-332(i)(1) ("the 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[.]")). "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 Jefferson's petition, the State's response thereto, and Jefferson's reply to the State's response, we hold that the circuit court did not err in dismissing the petition without a hearing. The crux of Jefferson's request for writ of actual innocence

is his discovery that Heath had informed the police that Buckson had confessed to stabbing and shooting the victim. The exculpatory matter was not the detective's notes of the Heath interview, but Buckson's alleged confession that he had committed the crime. That alleged confession, however, does not qualify as "newly discovered evidence" for actual innocence purposes because Jefferson himself was present when Buckson allegedly confessed to Heath. As the Court of Appeals made plain in *Douglas v. State,* 423 Md. 156, 180 (2011), "if a petition [for writ of actual innocence] asserts, as 'newly discovered,' evidence that was clearly known during trial, then the evidence cannot be 'newly discovered,' and the trial court may dismiss the petition without a hearing."

According to the detective's notes, Heath had related to the detectives that Buckson "relay[ed] most" of the information he was sharing about the victim's murder, and Jefferson "add[ed] things/events that [Buckson] miss[ed]." In short, prior to his trial, Jefferson was well aware of Buckson's alleged confession that he had stabbed and shot the victim because Jefferson not only was present when the confession was allegedly made to Heath, he actively participated in the conversation.

Moreover, prior to trial Jefferson and his defense counsel were aware of the August 12th police report, which stated that Heath had met with the detectives post-arrest and that Heath informed them that he had "had conversations with Teddy Jefferson and Marvin Buckson while at BCDS, where both subjects admitted to their participation in the murder of 'Willie Earl.'" Having participated in those jail-house conversations, Jefferson would have been aware of what information Heath may have shared with the

detectives, including Buckson's alleged confession. An exercise of due diligence could have uncovered the detective's notes of the interview with Heath, either pre-trial through an examination of the State's Attorney's "open records file" or, as Jefferson later did, through a pre or post-trial public information request directed at the Baltimore City Police Department.[8] But we emphasize that, the ultimate "actual innocence evidence" was not the detective's notes, but Buckson's alleged confession to Heath that he had committed the murder, something known to Jefferson before trial. The fact that the *detective's notes* were not known to Jefferson before trial does not make Buckson's alleged confession to Heath "newly discovered."

Because Jefferson's petition failed to assert grounds upon which relief could be granted, the circuit court did not err in dismissing it without a hearing.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[8] Jefferson and Heath were tried in June 2003 and sentenced on August 12, 2003. As noted in a previous opinion of this Court, they noted a timely appeal and our mandate was filed on July 27, 2005, "leaving [Jefferson and Heath] until July 27, 2006 to file a timely motion for new trial based on newly discovered evidence." *Davon Heath & James Jefferson v. State of Maryland,* Nos. 606 & 607, September Term, 2007 (filed March 10, 2010), slip op. at 2. Thus, Jefferson had approximately three years from trial in which, through the exercise of due diligence, he could have discovered the detective's notes and, assuming they were "newly discovered evidence," made a timely motion for a new trial.