Circuit Court for Prince George's County
Case No. CT-03-1248-X

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1454

September Term, 2022

ARTHUR JOSEPH ROYAL

v.

STATE OF MARYLAND

Berger,
Shaw,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: November 20, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

In 2004, a jury sitting in the Circuit Court for Prince George's County found Arthur Joseph Royal, Appellant, guilty of first-degree felony murder and robbery with a dangerous weapon. The court sentenced him to life imprisonment without the possibility of parole. On direct appeal, we affirmed the judgments in an unreported opinion. *Royal v. State*, No. 1784, Sept. Term, 2004 (filed May 15, 2006). Thereafter, Appellant unsuccessfully sought postconviction relief.

In 2022, Appellant filed a petition for writ of actual innocence, alleging a *Brady* violation. After the circuit court issued a memorandum opinion and order denying that petition without a hearing, Appellant noted this appeal, raising a single question, which we have rephrased slightly[1]:

> Did the circuit court err in denying Appellant's petition for writ of actual innocence without a hearing when Appellant met the pleading requirements of the applicable statute and rule?

Because the circuit court did not err in denying the petition without a hearing, we affirm.

BACKGROUND

We quote our unreported opinion in Appellant's direct appeal for background concerning the crimes:

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[1] Appellant's informal brief presents the following question:

> Did the Circuit Court err when the court denied Appellant's Petition for Writ of Actual Innocence without a hearing subsequent to the amended order of the Honorable Judge Cotton granting Appellant a hearing, when Appellant met the pleading requirements of § 8-301/4-332 for a hearing to be held and relief granted based on the newly discovered evidence?

> The victim, Dr. Thomas Arthur Gay, was shot in the driveway of his home in Mitchellville. The State presented evidence that [Appellant] and another man, Chris Kargbo, approached Dr. Gay as he got out of his car at about 10:30 P.M. on July 22, 2003. One of the two men shot Dr. Gay in the face. They took his wallet, then left him lying in the driveway. Dr. Gay died from the injury three days later.
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> After the shooting, [Appellant] and Kargbo went to the nearby home of a friend, Usman Taiwo, and asked to use his computer. [Appellant] and Kargbo had Dr. Gay's wallet with them. Over the next several hours, [Appellant], Kargbo, and Taiwo purchased numerous items from internet sites using one of Dr. Gay's credit cards. They designated a fictitious person as the purchaser and listed the address next door to Taiwo's home as the delivery address.
>
> Police were able to trace the internet purchases to Taiwo's home. They obtained a search warrant and went to Taiwo's home at a time when Taiwo was not there. [Appellant] and Kargbo alerted Taiwo by cell phone that the police were at his home and warned him not to go there. Taiwo did so anyway and ultimately cooperated with the police. Thereafter, the police were unable at first to locate [Appellant] and Kargbo. The men were eventually found in Louisiana and were arrested and charged in the case.

Royal v. State, *supra*, slip op. at 1-2.

At trial, Appellant did not testify, but his trial counsel acknowledged that he had been in possession of Dr. Gay's credit card and had used it to make unauthorized purchases on the internet. Moreover, it was uncontroverted that Appellant had done so during a three-hour time period, beginning approximately forty-five minutes after the shooting.[2]

[2] After Appellant was arrested, he gave a statement to police detectives, claiming that he had found Dr. Gay's wallet at a shopping mall (the now-defunct Capital Plaza), but the jury was not presented with that claim.

Usman Taiwo testified for the State.[3] According to him, Appellant and Kargbo went to his house on the night of the shooting and awakened him, asking to use his computer. For the next few hours, Appellant and Kargbo did so, visiting various websites to buy parts for Kargbo's vehicle and items of clothing, using Dr. Gay's American Express card for payment, while Taiwo played video games. According to Taiwo, Kargbo initially produced the wallet containing the stolen credit card, which he subsequently passed on to the others.

Taiwo also used that credit card to buy several pairs of sneakers. In each instance, they arranged for the goods to be shipped to the address next door to Taiwo, under a fictitious name. When they finished making their purchases, Appellant handed the credit card to Kargbo, who, according to Taiwo, refused to take it back, prompting Appellant to say, "Stop being a p-ssy." Taiwo then asked Kargbo and Appellant "who they robbed." In response, both Kargbo and Appellant "snickered." Following up, Taiwo asked them whether they were "scared," and in response, Kargbo replied, "we was scared," while both he and Appellant "snicker[ed]."

In addition, the State presented testimony from Appellant's employer, who told the jury that, on July 30, 2003 (which was the same day that police executed a search warrant

[3] Although there was no evidence of a plea agreement between the State and Taiwo, he was not prosecuted for unauthorized use of Dr. Gay's credit card, and Appellant's defense counsel was permitted to argue that fact to the jury.

at Usman Taiwo's home[4]), Appellant failed to show up for work. The State further presented testimony from a police detective, who told the jury that Appellant and Kargbo were located in Louisiana shortly afterward. Based on that evidence, the State successfully persuaded the trial court to instruct the jury on flight as evidence of a defendant's guilt.

In closing argument, Appellant's trial counsel emphasized that there were no witnesses to the shooting, no murder weapon was recovered, and there was no other forensic evidence, save for the computer forensics, connecting Appellant to the murder. In addition, Appellant's trial counsel tried to pin the blame on the co-defendant, Kargbo, who was tried separately.[5] Appellant's trial counsel also impugned the veracity of Taiwo's testimony, pointing out that he was not prosecuted despite clear evidence that he had illegally used Dr. Gay's credit card to make unauthorized purchases.

After deliberating for approximately four hours, the jury found Appellant guilty of first-degree felony murder and robbery with a deadly weapon but acquitted him of conspiracy to commit robbery with a deadly weapon. The court thereafter sentenced

[4] Appellant and Kargbo were aware that police officers had executed the warrant. According to Taiwo, who was not home at the time the warrant was executed, Appellant and Kargbo called him to warn him not to come home because "there was a rack of feds at [his] house."

[5] The State had intended to try Appellant and Kargbo in a single proceeding but inadvertently failed to consolidate their cases. Three weeks prior to Appellant's trial date, the prosecutor realized the error and filed a motion to consolidate, which the circuit court thereafter denied. Kargbo's trial resulted in a mistrial, and ultimately, after two more trials also resulted in mistrials, the State reached a plea agreement whereby Kargbo pleaded guilty to manslaughter and conspiracy to commit robbery with a dangerous weapon. The court sentenced him to concurrent terms of four years' imprisonment for manslaughter and twenty years' imprisonment, all but ten years suspended, for conspiracy.

Appellant to life imprisonment without the possibility of parole for first-degree felony murder and merged the conviction for armed robbery for sentencing purposes.

In 2008, Appellant filed, with the assistance of counsel, a postconviction petition, raising claims of ineffective assistance of both trial and appellate counsel; a claim that he was denied his right to counsel of choice; and a free-standing claim that he was actually innocent of the armed robbery and murder of Dr. Gay.[6] The postconviction court denied those claims, and we denied Appellant's application for leave to appeal from that denial.

In 2022, Appellant filed a petition pro se for writ of actual innocence in the Circuit Court for Prince George's County, asserting that there was newly discovered evidence that creates a substantial or significant possibility that, had it been presented at trial, the result would have been different. According to Appellant, there were two pieces of newly discovered evidence that he obtained in response to a request he had made in October 2020 to the Prince George's County Police Department under the Maryland Public Information Act.

One of those items of purported newly discovered evidence, attached to Appellant's petition and designated "Exhibit D," is a note made by a Sergeant Buffington of the Prince George's County Police on July 23, 2003 (the day after the shooting). In that note, Sergeant

[6] Appellant's claim was not the same as the one he raises in the instant appeal. In his postconviction petition, Appellant asserted that he had been "convicted on very scant, circumstantial evidence" and that he intended "to produce a witness" at the postconviction hearing who had "personal knowledge that [Appellant] was not involved in the robbery or murder." It appears that Appellant abandoned this claim, as it was not mentioned either in the postconviction court's memorandum opinion or in Appellant's ensuing application for leave to appeal.

Buffington describes a telephone call he received from an attorney, David Geier, who was representing Howard University Hospital in a discrimination lawsuit that had been brought by a discharged employee, Sunitha Thumula. According to Geier, Dr. Gay and "about 17 other" doctors from the hospital were witnesses in that lawsuit. Geier further informed Sergeant Buffington that Ms. Thumula "made a threat against" one of the doctors, while "at the same time," her husband, Sadeed Thumula, "made threatening gestures."[7] The doctor who heard the threat, Dr. Thomas Gaitor, "filed an incident report" with the United States Marshal's Office, and the trial judge was notified of the threats. That litigation concluded "in favor of the University." A contemporaneous handwritten incident report ("CSO Incident Report") prepared by the United States Marshal's Service clarified that, according to Dr. Gaitor, the threat had been directed at him.

The second piece of purported newly discovered evidence, "Exhibit E," is a Crime Solvers Tip Sheet, dated July 23, 2003, describing a report given by an anonymous female caller who stated that Dr. Gay "was supposedly a key witness" in the Howard University Hospital lawsuit, in which the amount in controversy was $10 million. The caller further stated that Dr. Gay "did not testify in a manner that would assist the plaintiff." Thus, according to the anonymous caller, the plaintiff was "angry and may be responsible or involved in" Dr. Gay's murder.

[7] Sergeant Buffington's note further indicated that Mr. Thumula, although not a party to the case, "was very active in the case and was openly angry and aggressive against the witnesses who testified."

The gravamen of Appellant's claim is that these purportedly newly discovered documents point to the possibility of another suspect in Dr. Gay's murder and that the State's failure to disclose them during his trial violated its obligations under *Brady v. Maryland*, 373 Md. 83 (1963), and its progeny. According to Appellant, "Mrs. and Mr. Thumula … had the motive, ability, and opportunity to commit" the crime. Considered in combination with Appellant's assertion, not presented to the jury at his trial, that he had found Dr. Gay's wallet at Capital Plaza, as well as the absence of direct evidence of his presence at the crime scene, Appellant asserts that the purported newly discovered evidence is substantial enough to entitle him to a new trial.

Initially, Appellant's petition was sent to a judge who was not assigned to the case. On May 11, 2022, she issued an order denying the petition without a hearing but subsequently rescinded her order and issued an amended order, setting the matter for a hearing. The circuit court thereafter vacated the amended order and forwarded the petition to the assigned judge.

After the scheduling glitch was cleaned up, while Appellant's petition was pending before the circuit court, the State filed a reply, pointing out that Appellant "admitted at trial that he had used Dr. Gay's credit card — with initial purchases made approximately 45 minutes following the robbery." The State further averred that Appellant's story, denying that he had obtained the card during the robbery and that, instead, he had found it earlier and that "the timing was mere coincidence[,]" was so "implausible" that the jury properly

rejected it.[8] Moreover, the State asserted that the disputed documents had been provided in discovery and, therefore, the evidence was not newly discovered. In support of that assertion, the State attached as exhibits copies of the same documents that Appellant maintained were newly discovered. The State pointed to circumstantial evidence in its copies of the documents (specifically, handwritten numbering as well as correspondence about discovery) that it claimed supported the prosecutor's contention that she had provided the documents in discovery. The State further pointed out that Appellant previously had requested and received the same documents in a 2011 MPIA request.

The circuit court, without holding a hearing, issued a memorandum opinion and order denying Appellant's petition. The court denied Appellant's petition for two independent reasons: it determined that the evidence Appellant claimed to be newly discovered had been disclosed by the State in discovery and, moreover, could have been discovered before trial through the exercise of due diligence and therefore, did not qualify as newly discovered; and furthermore, the court concluded that, even assuming that the

[8] As we noted previously, although Appellant provided this alibi to police when he was interrogated following his arrest, he did not assert that defense at trial. He relied, instead upon the absence of direct evidence establishing his presence at the crime scene, the allegedly greater culpability of Kargbo, and the purported unreliability of the State's principal witness, Usman Taiwo. In his actual innocence petition, however, Appellant once again resurrected the claim that he found Dr. Gay's wallet at Capital Plaza. Although the Supreme Court of Maryland has held that a reviewing court must consider evidence "that was available to the defense but not offered at trial, and/or offered but excluded, where the available evidence was made relevant and admissible by the newly discovered evidence," *Carver v. State*, 482 Md. 469, 478 (2022), we must agree with the State that Appellant's assertion that he found Dr. Gay's wallet at Capital Plaza (and by inference just happened, coincidentally, to use his credit card forty-five minutes after the shooting) is so wildly implausible that no reasonable juror would have taken it seriously.

evidence was newly discovered and assuming its truth, there was no substantial or significant possibility that it would have altered the outcome of the trial.

Regarding the latter ground for denying the petition, the court explained that the CSO Incident Report related a threat that had been made against Dr. Gaitor, not Dr. Gay, and therefore, there was no reasonable probability that the outcome of Appellant's trial would have been different if the incident report had been disclosed to the jury. As for the Crime Solvers Tip Sheet, the court quoted the tip sheet, which stated that Dr. Gay "did not testify in a manner that would assist the plaintiff" and that "the plaintiff is angry and may be responsible or involved in" the crime, but the court opined that the tip sheet was neither inculpatory nor exculpatory as to Appellant.

Appellant then noted this timely appeal.

DISCUSSION

Parties' Contentions

Appellant contends, as he did before the circuit court, that the State committed a *Brady* violation by failing to disclose Exhibits D and E, the CSO Incident Report and the Crime Solvers Tip Sheet. This purported newly discovered evidence, according to Appellant, points to the possibility that the Thumulas, not he, shot Dr. Gay. Given what he claims was the otherwise thin evidence of his guilt presented at trial, Appellant maintains that, had the State honored its obligation to provide the newly discovered evidence at trial, there is a substantial or significant possibility of a different outcome, thereby entitling him to a new trial or at least a hearing on his claim.

The State counters that the circuit court correctly denied Appellant's petition because, "[a]s the exhibits attached to the State's reply indicated," the purported newly discovered evidence had been provided in discovery and therefore was not, in fact, newly discovered. In addition, the State counters that the purported newly discovered evidence "did not speak to [Appellant's] innocence because it did not show that he did not commit the crime." Finally, the State counters that the purported newly discovered evidence "did not create a substantial or significant possibility that the result may have been different."

Standard of Review

A circuit court may deny an actual innocence petition without a hearing if it "fails to assert grounds on which relief may be granted." Md. Code (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), § 8-301(e)(2). When a circuit court denies a petition for writ of actual innocence without a hearing, we review its decision without deference. *Hunt v. State*, 474 Md. 89, 102 (2021).

Governing Legal Principles

A convicted person who claims that he was wrongly convicted may file "at any time" a petition for writ of actual innocence under CP § 8-301(a). The statute and its enabling rule, Maryland Rule 4-332, set forth several requirements that such a petition must satisfy. The most important for our purposes is that the petitioner must show that there is "newly discovered evidence" that "creates a substantial or significant possibility that the result [of his trial] may have been different" and "could not have been discovered in time

to move for a new trial under Maryland Rule 4-331."[9] CP § 8-301(a)(1)(i), (2); Md. Rule 4-332(d)(6)-(8).

Although the actual innocence statute itself does not mention "due diligence," that standard is incorporated by reference through Rule 4-331. Rule 4-331(c) provides that a court "may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule," that is, within ten days after the verdict. Due diligence "'contemplates that the defendant act reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him or her.'" *Hunt*, 474 Md. at 108 (quoting *Argyrou v. State*, 349 Md. 587, 605 (1998)).[10]

As for whether newly discovered evidence creates a "substantial or significant possibility that the result may have been different," we "look back to the trial that occurred to determine whether the newly discovered evidence" rises to that level. *McGhie v. State*,

[9] Although the actual innocence statute does not expressly so require, the Supreme Court of Maryland has imposed, through Rule 4-332(d)(9), an additional requirement that an actual innocence petition must satisfy: "that the conviction sought to be vacated is based on an offense that the petitioner did not commit[.]"

[10] In *Smith v. State*, 233 Md. App. 372 (2017), we held that

> the due diligence requirement in CP § 8-301 does not encompass a requirement that a defendant file a MPIA request with the police, or other agency that reports to the prosecutor, seeking information that the State is required to disclose pursuant to *Brady* and Rule 4-263. As [A]ppellant notes, a criminal defendant should be able to rely upon the State to comply with its *Brady* and discovery obligations.

Id. at 422 (citations omitted).

449 Md. 494, 511 (2016). That analysis "requires a retrospective approach that considers the impact of the newly discovered evidence at the trial that occurred." *Id.* For a petitioner to prevail, he must show that "if the jury had had the benefit of the newly discovered evidence as well as the evidence that was introduced at the trial, there is a substantial or significant possibility that the result would have been different." *Faulkner v. State*, 468 Md. 418, 460 (2020) (citation and quotation omitted). We apply substantially the same standard and perform "substantially the same inquiry" as we do in "assessing whether *Brady* evidence is material." *Hunt*, 474 Md. at 114. Consequently, to dismiss an actual innocence petition without a hearing for failure to show a substantial or significant possibility that the result may have been different, a court must be able to conclude that, as a matter of law, the newly discovered evidence fails to meet this threshold.

Analysis

Newly Discovered

Without the benefit of a hearing, we do not think the circuit court could have completely foreclosed the possibility that the documents Appellant claims were newly discovered had not been, in fact, provided to the defense during discovery. To reach that conclusion would require credibility determinations that cannot be made on a cold record.[11] We therefore decline to affirm on that ground.

[11] The State in its opposition asserted that it had contacted Appellant's trial and postconviction counsel and that neither could "locate copies of the original trial file." Therefore, according to the State, Appellant cannot satisfy his burden to prove that the documents at issue had been suppressed. *Yearby v. State*, 414 Md. 708, 717 (2010). But without affidavits from Appellant's counsel (or their live testimony), the circuit court could (continued)

Substantial or Significant Possibility of a Different Result

To be entitled to a hearing on his petition, we would have to conclude that, assuming the truth of Appellant's allegations, there is a substantial or significant possibility that, had the purported newly discovered evidence been available to the defense at trial, the outcome would have been different. The purported newly discovered evidence in this case does not meet that threshold.

We note that, at Appellant's trial, he unsuccessfully raised a similar defense, claiming that a neighbor of Dr. Gay, a man nicknamed "Poet,"[12] may have been the culprit. The most significant hurdle Appellant faced with that defense, which applies equally to the claim at issue here, is that it utterly fails to account for Appellant's possession of Dr. Gay's credit card, just forty-five minutes after the shooting. Furthermore, Appellant's claim of an alternative shooter fails to account for his flight, with Kargbo, to Louisiana just days after the shooting (and almost immediately after Appellant and Kargbo discovered that police had searched Taiwo's home). Moreover, as the circuit court observed, the threats that Thumulas made apparently were directed at Dr. Gaitor, not Dr. Gay, greatly blunting their impact on this case. We hold that, even assuming that the reports at issue in this case had been suppressed by the State, there is no substantial or significant possibility that they

not have made this finding. Similarly, the State in its opposition asserted that it had contacted the prosecutor from Appellant's trial, who assured it that the handwritten markings on the State's exhibits "are in her handwriting, and that consistent with her letter she would have sent the documents" to Appellant's trial counsel. But the record does not contain a sworn statement from the prosecutor (or her live testimony) to that effect.

[12] Poet's actual name was Ollie Sampson.

would have made any difference in the outcome. Therefore, there was no *Brady* violation, and the circuit court properly denied Appellant petition without a hearing.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.

The correction notice(s) for this opinion(s) can be found here:

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