UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1125

September Term, 2010

JOSEPH EMMANUEL DORSEY

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Moylan, Charles E.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: June 3, 2016

In 1991, appellant, Joseph Emmanuel Dorsey, was convicted by a jury sitting in the Circuit Court for Baltimore City of first-degree murder, attempted robbery with a deadly or dangerous weapon, use of a handgun in the commission of a felony or crime of violence, theft over $300.00, and theft under $300.00. The court sentenced appellant to life imprisonment plus a consecutive 35-year term. Upon direct appeal of those convictions, we affirmed the judgment of the circuit court in an unreported *per curiam* opinion. *Ahmed R. Rucker & Joseph Dorsey v. State of Maryland*, No. 218, Sept. Term 1992 (filed November 19, 1992). Appellant subsequently mounted several unsuccessful attacks on his convictions and sentences.

In May 2010, appellant, acting *pro se*, filed a petition for a writ of actual innocence pursuant to the provisions of Md. Code (2001, 2008 Repl. Vol., 2015 Supp.), § 8-301 of the Criminal Procedure Article ("CP"), and Md. Rule 4-332, alleging newly discovered evidence that he claimed, had he known the existence of in time for his 1991 trial, would have created a substantial or significant possibility that the result would have been different. Appellant's newly discovered evidence relates to testimony of the disgraced firearms examiner, Joseph Kopera,[1] who testified as an expert for the State, and who has been the subject of a number of opinions of this Court and the Court of Appeals.

[1] Joseph Kopera was a leading firearm expert witness for the State and testified in hundreds of criminal trials in Maryland. In 2007, it was discovered that Kopera had testified falsely, in all of those trials, regarding his credentials and educational background. Shortly after his transgressions became publicly known, Kopera took his life.

On June 16, 2010, the circuit court issued an order dismissing appellant's petition for a writ of actual innocence without a hearing. Appellant noted a timely *pro se* appeal and presents one question for our review:

> Did the circuit court err in denying the petition for a writ of actual innocence without a hearing?

Finding no error, we affirm.

BACKGROUND

Appellant and his co-defendant were jointly tried for the March 13, 1991, murder of Keith Barlow in Barlow's apartment. The victim died after he had been shot twice in the back, once in the chest, and once in the shoulder. The victim's front door had been forced open and the apartment had been ransacked. The responding officers noticed that there were no keys to the apartment found in the apartment, that the victim's jacket pocket had been turned inside out, and that the red Mustang registered to the victim could not be found.

Appellant's girlfriend at the time of the shooting, Tia Mann, testified that on March 13, 1991, she was at appellant's home when appellant and his co-defendant, Ahmed Rucker, arrived in a red Mustang. The three of them then drove to Rucker's car, an Isuzu, where appellant and Rucker transferred various items from the trunk of the Mustang to the Isuzu. Mann said that she was being "nosy" while Rucker and appellant were doing that, and she looked in the glove compartment of the Mustang and found the victim's driver's license. Sometime later, appellant told Mann that he had shot and killed

the victim during a botched robbery and taken his car. Mann also overheard several conversations wherein appellant discussed the shooting with others.

Mann and appellant drove the Mustang for the next several days, and Mann said that every time appellant finished driving the car, he "wipe[d] it down." Eventually, the Mustang was towed away and appellant threw its keys on the roof of a house across the street from his house**.** Because appellant believed the police were looking for him in connection with the killing, he and Mann spent the next several days together staying with friends. They also visited various friends, acquaintances, and family members during this time and appellant discussed the killing with some of them.

The police became interested in Rucker after an ambulance was called for him because he had been shot. After being shot, Rucker went to the home of Lea Smith and gave Smith a handgun and some drugs for her to hide. She then called for an ambulance which arrived shortly thereafter. Unfortunately for Rucker, the police responded too. Smith gave the gun and drugs to the police and told them how she came to possess them.

The firearm Smith gave the police was later tested by the State's expert witness in firearms, Joseph Kopera. Kopera testified that the projectiles that were removed from the victim were fired from that gun. When asked by the circuit court whether he could ". . . say for certain and for sure that this gun fired this bullet without any hesitation[,]" Kopera responded, "Yes, Your Honor."

When the police searched Rucker's Isuzu, they recovered a pawn ticket for the victim's television and a newspaper article about the victim's killing. After speaking

with Mann, the police searched the roof of the building across the street from appellant's house and found the keys to the Mustang.

Appellant testified in his own defense and admitted that he was in the victim's apartment when gunshots were fired but denied knowing anything about it. Appellant explained that earlier on the evening of the shooting, the victim approached appellant on the corner where appellant was selling drugs, expressed interest in buying drugs, but had left his money back in his apartment. The two then went to the victim's apartment together and began to consume alcohol and cocaine. After the victim made unwanted sexual advances toward appellant, appellant decided to leave, but said he was too drunk to walk home so he called a friend to come get him. Initially, appellant refused to identify this friend, but after the circuit court ordered him to reveal the identity of the friend or be held in contempt, appellant identified the friend as his co-defendant, Rucker.

After Rucker entered the apartment, appellant, who was watching television, heard gunshots and saw Rucker leave. Appellant said that he took the victim's car keys after the shooting because his "first impression was to get away." Appellant and Rucker then left in the victim's car with Rucker driving. Appellant said he did not know what happened to Rucker's car. On cross-examination, appellant recalled that before the shooting he had obtained permission from the victim to borrow his car. When asked "[b]ut now that you knew [the victim] was shot you figured [the victim] would not need the car?" appellant responded, "Yes ma'am."

Appellant said he never saw a gun, never saw the victim after the shooting, and that while he did not remove any of the victim's belongings (other than his keys), Rucker

did. Appellant explained that all of the witnesses who testified that he admitted to the shooting were mistaken or lying. According to appellant, what he actually told all of them was that the police were looking for him in connection with the shooting and not that he shot anyone.

The Petition for a Writ of Actual Innocence

In 2010, appellant, acting *pro se*, filed a petition for a writ of actual innocence attacking his 1991 convictions. In that petition, he raised two instances of newly discovered evidence that he claims create a substantial or significant possibility of a different result at trial. Both instances of newly discovered evidence relate to the testimony of the State's firearm expert, Kopera. One of the claims deals with the highly-publicized revelation that Kopera had lied about his qualifications in a large number of trials.

Appellant's other claim of newly discovered evidence is particular to the circumstances of appellant's case. On direct examination, Kopera testified that he concluded that the firearm recovered by the police in Lea Smith's apartment was the same firearm from which the projectiles removed from the victim had been fired. He came to that conclusion by microscopically comparing the projectiles from the victim with projectiles he fired from the firearm.

On cross-examination, appellant's counsel questioned Kopera about the availability of photographs of the projectiles taken with the microscope used to compare them. Kopera explained that he took photographs of the projectiles but he did not have them with him, in part, because he was no longer an employee of the Baltimore City

Police Department as he had been when he performed the analysis in this case,[2] and in part, because it was not standard procedure to bring such photographs to trial. He testified that such photographs were available to be produced from the negatives.

Appellant claims that Kopera lied about having photographed the projectiles. Appellant's basis for that claim comes from a response, dated February 28, 2009, that appellant received from the Baltimore City Police to a Maryland Public Information Act request he had made seeking the photographs. In that response, the police department told appellant: "According to the Crime Lab no files from 1991 exist. The Crime Lab was not taking photos of ballistics examination at that time so no photos exist. I have enclosed a copy of the archived offense report with lab sheets included."

DISCUSSION

The Court of Appeals, in both *Douglas v. State*, 423 Md. 156 (2011), and *State v. Hunt*, 443 Md. 238 (2015), held that a person convicted of a crime and eligible to file a petition for writ of actual innocence, under CP § 8-301, "is entitled to a hearing on the merits of" such a petition, provided that it "sufficiently pleads grounds for relief under the statute, includes a request for a hearing, and complies with the filing requirements of [CP] § 8-301(b)." *Douglas,* 423 Md. at 165. Contending that his petition satisfies all of these requirements, appellant complains that the circuit court erred in denying his petition without a hearing. We reject that contention, because, as we explain, the petition does not sufficiently plead grounds for relief under the statute.

[2] At the time of trial in the instant case, Kopera was employed by the Maryland State Police.

CP § 8-301 provides:

Claims of newly discovered evidence.
(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.

Petition requirements
(b) A petition filed under this section shall:
(1) be in writing;
(2) state in detail the grounds on which the petition is based;
(3) describe the newly discovered evidence;
(4) contain or be accompanied by a request for hearing if a hearing is sought; and
(5) distinguish the newly discovered evidence claimed in the petition from any claims made in prior petitions.

Notice of filing petition
(c)(1) A petitioner shall notify the State in writing of the filing of a petition under this section.
(2) The State may file a response to the petition within 90 days after receipt of the notice required under this subsection or within the period of time that the court orders.

Notice to victim or victim's representative
(d)(1) Before a hearing is held on a petition filed under this section, the victim or victim's representative shall be notified of the hearing as provided under § 11-104 or § 11-503 of this article.
(2) A victim or victim's representative has the right to attend a hearing on a petition filed under this section as provided under § 11-102 of this article.

Hearing
(e)(1) Except as provided in paragraph (2) of this subsection, the court shall hold a hearing on a petition filed under this section if the petition satisfies the requirements of subsection (b) of this section and a hearing was requested.

> (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.
>
> *Power of court to set aside verdict, resentence, grant a new trial, or correct sentence*
> (f)(1) In ruling on a petition filed under this section, the court may set aside the verdict, resentence, grant a new trial, or correct the sentence, as the court considers appropriate.
> (2) The court shall state the reasons for its ruling on the record.
>
> *Burden of proof*
> (g) A petitioner in a proceeding under this section has the burden of proof.

Subsection (e)(1) states that, "[e]xcept as provided in paragraph (2) of this subsection," a circuit court "shall" hold a hearing on an actual innocence petition if it "satisfies the requirements of subsection (b) of this section and a hearing was requested." Paragraph (2) authorizes the circuit court to dismiss an actual innocence petition without a hearing if it finds "that the petition fails to assert grounds on which relief may be granted." "Grounds" on which relief may be granted are set forth in subsection (a): a claim of "newly discovered evidence" that both "creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined" and "could not have been discovered in time to move for a new trial under Maryland Rule 4-331."[3]

Here, appellant has substantially complied with the form requirements of CP § 8-301(b). The petition is in writing; it states in detail the grounds on which it is based;

[3] Md. Rule 4-332(d)(9) contains the requirement that a petition for writ of actual innocence "shall state . . . that the conviction sought to be vacated is based on an offense that the petitioner did not commit." The Rule became effective on October 1, 2011. The Rule is not applicable to this case because appellant filed his petition before that effective date. *Douglas*, 423 Md. at 182 n.14.

it describes in detail the purported newly discovered evidence and attaches that evidence as exhibits to the petition; it contains a request for a hearing; and, as it is appellant's first such petition under CP § 8-301, the requirement, under CP § 8-301(b)(5), that it "distinguish the newly discovered evidence claimed in the petition from any claims made in prior petitions," is not applicable. *See Douglas*, 423 Md. at 184-85, n.16 (interpreting "prior petitions," under CP § 8-301(b)(5), as including only petitions brought under the statute and not including post-conviction petitions).

Thus, the question before us is whether the petition sufficiently pleads grounds for relief under the statute. In other words, under CP § 8-301(a)(1)-(2), the question becomes whether appellant's petition present "newly discovered evidence" that both "creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined" and "could not have been discovered in time to move for a new trial under Maryland Rule 4-331." Only if these questions are answered in favor of appellant is a hearing required.

The denial of a petition for writ of actual innocence is an immediately appealable order, regardless of whether the trial court held a hearing before denying the petition. *Douglas*, 423 Md. at 165. Where, as here, a petition for a writ of actual innocence is denied without a hearing on the basis that the pleading was insufficient to warrant a hearing, the standard of review is *de novo*. *Hunt*, 443 Md. at 247. If a petition for a writ of actual innocence is denied after a hearing, however, the decision will be reviewed for abuse of discretion. *Id*. at 247-48.

The Kopera Cases

As indicated earlier, this Court and the Court of Appeals have issued a number of decisions dealing with the fallout from the revelation that Kopera lied about his credentials in numerous criminal trials.

In *Douglas*, 423 Md. at 166-67, Douglas filed a petition for a writ of actual innocence based on the newly discovered evidence that Kopera had lied about his qualifications. The Court of Appeals found that the petition satisfied the procedural requirements of CP § 8-301 and, applying a *de novo* standard of review, held that the trial court therefore erred in denying the petition without a hearing. *Id*. at 188. The Court emphasized "that, although Douglas has satisfied the pleading requirement to assert grounds for relief, it does not follow automatically that he can prove his claim." *Douglas*, 423 Md. at 186.

Next, this Court decided *Kulbicki v. State*, 207 Md. App. 412 (2012), *rev'd on other grounds*, 440 Md. 33 (2013), *cert. granted, judgment rev'd*, 136 S. Ct. 2, *and aff'd*, 445 Md. 451 (2015). Kulbicki filed a petition for post-conviction relief alleging that his right to due process of law was violated when Kopera lied about his qualifications during his trial. *Id*. at 428. We first found that Kulbicki had waived his allegation within the meaning of the relevant post-conviction statutes, but held in the alternative that the fact that Kopera lied was not material in any event. *Id*. at 444. We agreed with the post-conviction court's finding "that 'there simply is no likelihood that the jury's determination would have been influenced by the fact that Mr. Kopera did not have the academic credentials he claimed'" and noted that "ballistics is a field for which no

college degree is offered, and the expertise for the field is usually based on experience, which Kopera had in copious amounts." *Id*. at 447.

In *Jackson v. State*, 216 Md. App. 347, 350, *cert. denied*, 438 Md. 740 (2014), Jackson filed a petition for a writ of actual innocence, which was denied after a hearing was held. We held that that circuit court did not abuse its discretion in finding (1) that trial counsel did not act with due diligence, *id*. at 366; (2) that the evidence that Kopera lied about his qualifications was not material, but rather, "merely impeaching," *id*. at 371; and (3) that there was no significant possibility of a different result at trial had Kopera not lied. *Id*. at 375.

Like *Douglas*, in *Hunt*, 443 Md. at 240-41, Hunt filed a petition for a writ of actual innocence based on the newly discovered evidence that Kopera had lied about his qualifications and the circuit court denied it without a hearing. After finding that the petition met the pleading standards established by CP § 8-301, the Court of Appeals, utilizing a *de novo* standard of review, reversed the circuit court's decision to dismiss the petition without a hearing. *Id*. at 264. In concluding that Hunt was entitled to a hearing on his Kopera based claim, the *Hunt* Court made the following observations:

> We offer no comment on the reasoning of the hearing judge or the Court of Special Appeals in *Jackson* of 2014 as that case is not before us. We note, however, that it would not be an abuse of discretion for a hearing judge to find that a defense attorney might fail, after nonetheless exercising due diligence before the revelations of 2007, to discover Kopera's alleged fraud. We note also that a hearing judge might conclude reasonably that the Court of Special Appeals's distinction between "impeaching" and "merely impeaching," in the context of [CP] § 8-301 petitions for writs of actual innocence, is overly rigid. When an expert is called to testify, it is conceivable that, based on the cumulative body of evidence presented at a

> given trial, falsity regarding the expert's credibility and qualifications might "create[ ] a substantial or significant possibility that the result may have been different." [CP] § 8-301(a)(1).

Id. at 263-64 (footnotes omitted). Thus, *Hunt* makes clear that *Jackson* and *Kulbicki* do not compel the conclusion that all Kopera-based petitions for a writ of actual innocence should be denied without a hearing.

McGhie v. State, 224 Md. App. 286, *cert. granted*, 445 Md. 487 (2015), also involved a petition for a writ of actual innocence based on a Kopera claim that was denied after a hearing. This Court held that "[b]ecause Mr. Kopera's testimony was not critical to the case, and there was other compelling evidence of appellant's guilt, the circuit court did not abuse its discretion in deciding that the newly discovered evidence did not create a 'substantial or significant possibility that the result may have been different.'" *Id*. at 305-06 (citing CP § 8-301). *McGhie* is currently pending in the Court of Appeals to answer the question of how to correctly measure whether, in a given case, a Kopera based claim creates a "substantial or significant possibility that the result may have been different." Do we "(a) simply excise the false testimony and then, based on the remaining evidence, determine whether the result would have been different, or (b) consider whether the result would have been different if it was revealed during the trial that [Mr.] Kopera's educational qualifications were exaggerated?" *Id*. at 295.

Against this legal landscape, we now turn to the Kopera-based claim in the instant case.

The Instant Case

There is one massive and fatal defect in appellant's Kopera claim which forces the conclusion that appellant is not entitled to a hearing on his petition for a writ of actual innocence. Kopera's testimony supported appellant's theory of defense. As a result, neither instance of newly discovered evidence he alleges could have had a negative impact on his defense.

Appellant testified that he was in the victim's apartment when his co-defendant, Rucker, arrived at his beckoning. Appellant said he then heard gunshots and left with Rucker in the victim's car. He initially refused to identify Rucker as the person who entered the apartment before the shots were fired but did so after being ordered. In addition, while he consistently denied seeing Rucker shoot the victim, in closing argument he directly and repeatedly accused Rucker of the killing.

Because Kopera's testimony linked the firearm Rucker left with Lea Smith to the shooting, it lent support to appellant's chosen defense – that Rucker shot the victim and appellant only became involved after the fact. Appellant cannot show that Kopera's falsehood contributed to the verdict because Kopera's testimony corroborated appellant's version of events. Had the jury learned that Kopera was not telling the truth under oath, it would have undermined the defense, not helped it.

Because Kopera's testimony was in line with appellant's defense, it makes no difference whether we were to "(a) simply excise the false testimony and then, based on the remaining evidence, determine whether the result would have been different, or (b) consider whether the result would have been different if it was revealed during the trial

that [Mr.] Kopera's educational qualifications were exaggerated." *McGhie,* 224 Md. App. at 295.

We need not await the Court of Appeals's decision in *McGhie* because under neither (a) nor (b) could appellant make the requisite showing that the newly discovered evidence created a substantial or significant possibility that the result may have been different.

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