UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2176

September Term, 2012

ANTONIO JACKSON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Kehoe,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 11, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

On February 10, 1993, in Baltimore City, Wilson Staples and Andre Ford were shot. Staples died of his wounds. Ford recovered. Antonio Jackson, the appellant, was arrested and charged with crimes arising out of the shootings. At a jury trial in the Circuit Court for Baltimore City the primary witness against Jackson was Sion Ford, a relative of Andre Ford. He identified "Bay-Boy" -- Jackson's street name -- as the shooter. The defense was one of mistaken identity. Jackson testified that he was not in the area of the shooting when it took place.

A jury convicted Jackson of first-degree murder, attempted second-degree murder, and related crimes. He was sentenced by the court to life in prison plus 35 years.

The present appeal challenges an order by the Circuit Court for Baltimore City dismissing without a hearing Jackson's second petition for writ of actual innocence. For the reasons to follow, we shall vacate the order and remand the case to that court for further proceedings.

First Petition for Writ of Actual Innocence

In his first petition, filed in February 2010, Jackson alleged that in 2007, through a Maryland Public Information Act ("MPIA") request, he obtained the entire file of the Baltimore City Police Department ("BPD") in his case. In it he found police notes of an interview of a witness to the shootings, and a police report summarizing that interview. The documents had been redacted so as not to reveal the name of the witness. It was later clarified to Jackson that the witness was a man named Frederick Goodman. The documents state that Goodman described seeing a man in a multicolored jacket shooting another man

and then running away. A multicolored jacket later was recovered from the laundry room at Jackson's residence.

Jackson alleged that these documents were newly discovered evidence that he had no knowledge of until 2007; they had not been provided to his trial counsel in response to his discovery request (which had been for any material or information tending to negate his guilt of the offenses charged or to reduce the punishment for those offenses); and there was a reasonable probability that the information in the notes would have produced a different outcome at trial. The circuit court dismissed the petition for writ of actual innocence, without a hearing.

Jackson noted an appeal, in which he advanced two arguments. First, he complained that the court's order dismissing his petition without a hearing was ineffective because the court did so for the stated reason of "fail[ure] to state a claim or assert grounds" for which relief could be granted, when at the time of the ruling that statutory language had been repealed and replaced with "fail[ure] to assert grounds." Second, Jackson complained that the circuit court abused its discretion by denying his petition (and a subsequently filed motion to alter or amend judgment) without holding a hearing.

On April 21, 2015, this Court filed an unreported opinion affirming the order denying the petition for writ of actual innocence.[1] We rejected both of Jackson's arguments. We

[1] The present appeal was stayed pending the outcome of the appeal regarding the first petition for writ of actual innocence. The stay was lifted after our opinion in that case was filed.

observed that Jackson was correct that the language of Md. Code (2001, 2008 Repl. Vol., 2010 Supp.), section 8-301(e)(2) of the Criminal Procedure Article ("CP") had been amended, and the precise language used by the court in its order tracked the repealed language, not the new language. We found the argument to be purely semantic, however, because there is no essential difference between failing to state a claim or assert grounds, and failing to assert grounds. We explained that the ultimate test, under *Douglas v. State*, 423 Md. 156, 185 (2011), is whether "the allegations, if proven, could not entitle a petitioner to relief." We found nothing to suggest that the court did not apply the proper standard.

In discussing Jackson's second argument, we noted that his petition met the basic requirements of CP section 8-301(b): that it be in writing, state in detail the grounds on which it is based, describe the newly discovered evidence, include a request for hearing if a hearing is being requested, and distinguish the newly discovered evidence claimed in the petition from any claims made in prior petitions. (At that time, the last requirement did not apply because there had been no prior filed petition.)

We explained that when these requirements are satisfied, the court nevertheless may dismiss the petition without a hearing if the petition does not assert grounds on which relief may be granted. *See* CP § 8-301(e)(2). To assert grounds on which relief may be granted, the petition must "'claim[] that there is newly discovered evidence that: (1) creates a substantial or significant possibility that the result may have been different . . . ; and (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.'" *Douglas*, 423 Md. at 179-80 (omission in original) (emphasis omitted) (quoting CP § 8-

301(a)). With respect to whether the evidence is newly discovered, the petition must allege facts to show that the evidence could not have been discovered by due diligence. To satisfy the due diligence standard, the petitioner must have acted "'reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him.'" *State v. Seward*, 220 Md. App. 1, 24 (2014), *cert. granted*, 441 Md. 666 (2015) (quoting *Argyrou v. State*, 349 Md. 587, 605 (1998)). Due diligence not only concerns the timing of when the evidence actually was discovered but also when it "should or could . . . have been discovered." *Argyrou*, 349 Md. at 602.

Applying a *de novo* standard of review to the court's ruling, *see Keyes v. State*, 215 Md. App. 660, 669-70, *cert. denied*, 438 Md. 144 (2014), we held that Jackson's petition did not assert a claim for which relief may be granted. Frederick Goodman had been named as a witness in the prosecution's witness list, before trial, and therefore his identity and his role as a witness were known to Jackson before the trial even took place, and were not newly discovered evidence. On that basis, we affirmed the circuit court's judgment.

Second Petition for Writ of Actual Innocence

On October 10, 2012, while Jackson's appeal of the dismissal of his first petition for writ of actual innocence was pending in this Court, he filed a second petition for writ of actual innocence. That petition also was dismissed without a hearing. The instant appeal is from the order dismissing that petition.

Jackson alleged in his petition that on July 9, 2012, in response to a written MPIA request he made to the Baltimore City State's Attorneys Office ("SAO") on February 12,

2012, the SAO sent him the file in his case.[2] The file includes two documents that Jackson alleges are newly discovered evidence that he did not know about until he received the SAO's file.

The first document is a two-page form "Information Sheet" of the "Police Department Baltimore, Maryland," parts of which are handwritten. The first entry, under "Name," is "Charles Roulac." Other entries are made that give Roulac's age, education level, his wife's name, and the name of the closest relative with whom he does not live. His address and place of employment are redacted.

The second page is all handwritten, in the same handwriting as on the first page and appearing to have been written by a police officer. (There is a signature on the bottom of the first page, but it is cut off.) The entries are as follows:

W was Garrison & Liberty Hghts

W saw 2 B/M arguing
heard 4 gun shots

W Saw a B/M run from the scene but it wasn't one of the 2 who were arguing

W Waited for Police

W states person who did shooting was locked up.

Jackson alleges that he received this statement in the documents produced to him by the BPD, but it did not have a name on it and he could not tell who it was about. The

[2]The file included "150 paper documents." Because he had to pay to have copies made, Jackson reduced his request to 112 documents.

allegation is confusing, but seems to be that the first page of the document was not included in the police file, and only was included in the SAO's file; therefore, Jackson did not learn the identity of the witness ("W") referenced on the second page until he received the SAO's file, which included both pages.

The second document is a single lined page torn out of a spiral notebook, with handwritten entries on it, as follows:

Liberty Video
4700 Liberty Hgts
Vic: Wilson Leon Staples, Jr.
M/B [redacted information]
abdomen wound
Medic #8
Medic #22
Sinai Hospital

Lying supine in the
Street next to Red Cavalier
1990, XSA-318

Clothes are on the trunk
Lid
4413 - Williams

Along the left margin of the same page of paper, in the same handwriting, is written: "'Little puppy' DiD it."

Jackson alleges that the SAO knew there was another suspect in the murder -- "Little puppy"; that the State did not produce this document or any information suggesting that there was another suspect; and that he first learned about the document and its contents when he received the SAO's file in July of 2012. He does not include any allegation identifying

"Little puppy" or stating that he is not "Little puppy." However, a police memorandum and excerpts from a 2005 post-conviction hearing, both attached to Jackson's petition, make clear that his street name was "Bay-Boy."

In his petition, Jackson avers that these two documents are newly discovered evidence that he could not have discovered within time to move for a new trial; that the State had an obligation to turn these documents over in discovery, but did not; that he acted with due diligence; and that the contents of the documents raise a significant or substantial possibility that the outcome of his trial would have been different. Jackson discusses his first petition, explaining that it was based on the Frederick Goodman witness statement. For reasons that are not clear, he also includes that statement as a basis for his request for relief. His petition includes a request for a hearing.

The State did not file an opposition to Jackson's petition. On November 20, 2012, the court entered an order dismissing the petition, without a hearing, for failure "to state a claim or assert grounds for which relief may be granted pursuant to" CP section 8-301(a).

Jackson filed a timely notice of appeal. He asks whether the court's order was ineffective because the judge quoted an outdated standard in dismissing the petition, and whether the court abused its discretion in dismissing the petition without a hearing.

MOTION TO DISMISS

In its brief, the State has moved to dismiss this appeal, arguing that Jackson's two petitions for writ of actual innocence are substantively identical, and therefore both are controlled by the appeal from the order dismissing the first petition for writ of actual

innocence. In his reply brief, Jackson counters that the petitions are not identical: his petition for writ of actual innocence in this appeal concerns witness Charles Roulac and information that there was another suspect, named "Little puppy," whereas his first petition for writ of actual innocence concerned witness Goodman.

We shall deny the State's motion to dismiss this appeal. The second petition for writ of actual innocence alleged as newly discovered evidence that one Charles Roulac was a witness to the shootings, and that there was another suspect in the shootings -- "Little puppy." It is true that there are references in the second petition suggesting that Jackson is including Goodman's being a witness to the crime in the newly discovered evidence on which that petition is based. The confusion may be that, as a *pro se* petitioner, Jackson was inartful in distinguishing, as he was required to do, his first petition from his second petition. We are confident that the second petition does not concern Goodman, as Jackson verifies in his reply brief.

DISCUSSION

I.

Jackson's contention about the language used by the circuit court in its order dismissing the petition has no merit for the exact same reason we discussed in our recently filed opinion affirming the dismissal of his first petition for writ of actual innocence. We have explained that reason above.

II.

Jackson contends the circuit court erred in dismissing his second petition for writ of actual innocence without a hearing because, contrary to the finding of the circuit court, he asserted grounds upon which relief may be granted. The State's brief is of no assistance; it merely adopts its brief in the appeal from the dismissal of the first petition for writ of actual innocence, apparently under the mistaken belief that the two petitions are identical. As explained, they are not.

Our standard of review is *de novo*. *Keyes*, 215 Md. App. at 669-70. To assert grounds on which relief may be granted, it was incumbent upon Jackson to allege facts to show that there was newly discovered evidence that he could not have or should not have discovered in time to file a motion for new trial; that he acted with due diligence to obtain that evidence, that is, reasonably and in good faith in light of the evidence and the facts known to him; and that the newly discovered evidence created a substantial or significant possibility that the result of his trial would have been different. CP § 8-301(a).[3] The question is not whether Jackson failed in any proof; it is whether he met the pleading requirements for a petition for writ of actual innocence. *Douglas*, 423 Md. at 180.

We conclude that Jackson's second petition for writ of actual innocence asserted grounds on which relief could be granted with regard to the document bearing the "Little puppy" reference, and therefore the circuit court erred in dismissing the petition without a hearing.

[3]The second petition for writ of actual innocence satisfied the basic requirements of CP section 8-301(b).

The spiral notebook paper bearing the "Little puppy" reference appears to be the handwritten notes of a police officer or medic who was present with victim Staples soon after the shooting, when he was lying in the street suffering from a gunshot wound. And the note written in the margin of the paper -- "'Little puppy' DiD it" -- appears to memorialize a statement that was made by Staples, informing the officer or medic of the identity of the shooter. Jackson's street name was "Bay-Boy," not "Little puppy." One reasonably can read this note to mean that Staples (who did not survive) identified a person other than Jackson as the person who shot him. This evidence was sufficient to create a substantial or significant possibility that the result of Jackson's trial would have been different.

The "Little puppy" paper was not disclosed by the State in response to discovery, including discovery that requested "any material or information which tends to negate the guilt of the Defendant as to the offense charged." There is nothing in the record as it now stands that shows that Jackson knew of the existence of this document at any time before it was disclosed to him by the SAO in July of 2012, in response to his MPIA request, or that he failed to exercise due diligence to discover its existence. Although the document seems to be one that the BPD would have had, it was not disclosed by the BPD in response to the MPIA request Jackson made to it.

Thus, with regard to the "Little puppy" paper, Jackson adequately pleaded the existence of newly discovered evidence that could not have been discovered in time to move for a new trial under Rule 4-331, and that created a substantial or significant possibility that the result of his trial would have been different.

Jackson's allegations regarding the Charles Roulac witness document does not meet the pleading requirements. Even if the witness statement could not have been discovered by Jackson with the exercise of due diligence in time to move for a new trial, the document itself does not contain possibly exculpatory information, and Jackson has not offered any reason why, if the document had been produced to him by the State in a timely fashion, there would have been a substantial or significant possibility that the outcome of his trial would have been different.

Accordingly, we shall reverse the order of the circuit court and remand the case to that court to hold a hearing on the second petition for writ of actual innocence, with respect to the "Little puppy" document.

ORDER VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.