UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1545

September Term, 2015

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LEVON STOKES

v.

STATE OF MARYLAND

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Krauser, C.J.,
Berger,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Thieme, J.

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Filed: October 18, 2016

This appeal flows from the denial of a petition for writ of actual innocence that Levon Stokes, appellant, filed in the Circuit Court for Baltimore City. In 1993, appellant was found guilty by a jury of the first degree murder of Angelo Garrison, Sr., the manslaughter of Angelo Garrision, Jr., and two counts of use of a handgun in the commission of a crime of violence. The court sentenced appellant to life imprisonment without the possibility of parole, plus 30 years' imprisonment to be served consecutively. Upon direct appeal of those convictions, we affirmed the judgment of the circuit court in an unreported *per curiam* opinion. *See Levon Stokes v. State of Maryland*, No. 1318, Sept. Term 1994 (filed unreported May 22, 1995). Appellant subsequently mounted several unsuccessful attacks on his convictions and sentences.

In June 2014, appellant, through counsel, 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 that there was newly discovered evidence that, he claimed, would have created a substantial or significant possibility that the result of his 1993 trial would have been different had he known of its existence in time. Appellant's alleged newly discovered evidence related to various documents he claimed to have received from the Baltimore City Police pursuant to Maryland Public Information Act (MPIA) requests.

On July 20, 2015, after holding a hearing on appellant's petition, the circuit court denied the petition. Appellant noted a timely pro se appeal and presents two questions[1] for our review:

> I. Was the circuit court clearly erroneous in finding that appellant had not proved that the evidence was newly discovered?
>
> II. Did the circuit court abuse its discretion in finding that the evidence did not create a significant or substantial possibility of a different result?

Finding neither error nor abuse of discretion, we answer both questions in the negative and affirm the judgment of the circuit court.

## BACKGROUND

We quote our description of the facts of the offense from our prior unreported opinion in which we affirmed appellant's convictions on direct appeal:

> At approximately 8:30 p.m., on 8 April 1993, Baltimore City Police responded to the 200 block of Park Avenue. Upon arriving, Angelo Garrison, Sr. was found lying in the gutter with multiple gunshot wounds. The police also discovered that Mr. Garrison's three-year-old son, Angelo Jr., had been shot. A paramedic carried the youngster into Angelo's Hair

[1]In the "Issue Presented" section of appellant's brief in this Court, appellant presented one question for our review, but presented two arguments in the body of his brief. Appellant's single question presented was "[w]hether the trial court erred by denying [appellant's petition] on the basis of the "implausible" memory of trial counsel?" In addition, appellant provides no detailed argument and cites to no authority in support of either of his contentions. We could, under Md. Rule 8-504 and the cases interpreting it, decline to entertain appellant's appeal on those bases alone. We have, however, elected to indulge appellant, and have re-phrased his question presented to more accurately reflect what he attempts to actually argue in his brief. Moreover, we have reviewed the record well beyond the information provided in his brief before this Court in arriving at our decision to affirm the judgment of the circuit court.

Design at 234 Park Avenue. Mr. Garrison died of the multiple gunshot wounds and Angelo Jr. died from a single shot to the head.

On the evening in question, John Turpin was standing at the corner of Saratoga and Howard Streets waiting for a bus. At trial, Mr. Turpin testified that he heard from four to six gunshots come from the direction of Park Avenue. He looked east on Saratoga Street towards Park Avenue and saw a "tall black man, dark, with a black sweatshirt and pants, with an orange design on the front of the shirt" run past him and into an alley, holding in his hand an object which Mr. Turpin thought to be a gun. Mr. Turpin was unable to identify the man.

Donald King, a paramedic with the Baltimore City Fire Department, was on Park Avenue and Saratoga Street on the evening of the shootings. He attempted to call home, but the pay phones were all in use. At trial, Mr. King recalled that the pay phone closest to Saratoga Street was being used by a black male, approximately six feet tall and dressed in a dark sweat suit. While still in the area, Mr. King heard gunshots, responded to the scene, and saw the male he had seen using the pay phone run into an alley. Mr. King carried Angelo Jr. into Angelo's Hair Design and attended to the child.

Monica McNutt was a beautician at Angelo's Hair Design, and testified that Mr. Garrison owned the shop. She and Angelo Garrison lived together and had two children, Angelo Jr. and Montez, who was nine months old at the time of the shooting.

On the evening of the shooting, Ms. McNutt was working at Angelo's Hair Design. At approximately 6:00 p.m., she telephoned Mr. Garrison and asked him to pick up their children from her grandmother's home. Mr. Garrison picked up the children, returned to the shop and parked the car. Ms. McNutt went out to assist Mr. Garrison with the children and noticed a man at a nearby pay phone whom she later identified as appellant. According to Ms. McNutt, she noticed appellant because he was staring at her. Ms. McNutt went to the car, saw that Mr. Garrison was using the car phone, and played with Angelo Jr. When Mr. Garrison finished using the phone, he got out of the car, and greeted Ms. McNutt. Ms. McNutt testified that she was about to ask Mr. Garrison why appellant "was staring at [them] so hard" when appellant pulled out a gun and began shooting.

Ms. McNutt identified appellant in court, after having identified him from a photo array two days after the shooting. The police obtained appellant's finger prints from a pay phone near the scene of the shooting.

> Kimberly Henderson and Denise Thompson were on Park Avenue at the time of the shooting. Hearing three or four gunshots, they headed in that direction. Ms. Henderson testified that she observed a dark-skinned black male, approximately six feet tall, and dressed in dark clothing run past them, and Ms. Thompson testified that the man bumped into her. Ms. Thompson described him as a medium complected black male, of average height, medium build, and wearing dark clothing. The women identified appellant in court. Both said they had identified appellant in a photo array.
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> Subsequent to the shooting, appellant was apprehended in New York City. On 3 May 1993, Detectives Marvin Sydnor and Ron Grady drove to New York, took custody of appellant, returned him to Baltimore, and advised him of his Miranda rights. While Detective Sydnor was interviewing him, appellant gave an exculpatory statement which was recorded on audio tape.
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> At trial, the defense presented Sherri Conner as a witness. Ms. Conner testified that appellant was a friend of her boyfriend and that she had known appellant less than a year. In April 1993, appellant and Ms. Conner's boyfriend lived in the same apartment building. On the evening of the shooting, Ms. Conner first went shopping, then went to her boyfriend's apartment. According to Ms. Conner, upon arriving at the apartment building, appellant helped her carry groceries to her boyfriend's apartment, and remained there until approximately 10:30 p.m.
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> In the statement he gave Detective Sydnor, appellant described his activities on the day of the shooting. Appellant said he had purchased various items at several stores near the scene of the shooting, that he spent the evening at home, and helped Ms. Conner with groceries….The audio tape was played for the jury and a transcript of the tape was introduced into evidence. The State then presented several witnesses to show the falsity of the statement.

*Levon Stokes v. State of Maryland*, No. 1318, Sept. Term 1994 (filed unreported May 22, 1995) at 1-6.

**The Petition for a Writ of Actual Innocence**

As mentioned earlier, in 2014, appellant, filed a petition for a writ of actual innocence attacking his 1993 convictions. In that petition he alleged as newly discovered evidence a variety of documents obtained from the Baltimore City Police Department. The circuit court described the evidence as follows:

> A. Report dated April 9, 1993, in which there is a summary of an interview with Damon Jackson. Jackson stated that an individual known as "Dixie" "supposedly paid someone to kill [Angelo Garrison, Sr.]."
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> B. Report dated April 9, 1993, in which there is a summary of an interview with Detective Harris from the Baltimore County Police Department. Detective Harris stated that Aaron Dennison had been accused by Angelo Garrison, Sr. of breaking into the victim's house and stealing $8,000. Dennison was arrested for this crime and was "very upset" with Garrison. Harris also stated that Garrison's girlfriend's brother, Anthony McNutt, was in the "drug business" with the [sic] Garrison.
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> C. Report dated April 14, 1993, Note dated April 22, 1993, and undated handwritten Note which reference statements from Division of Correction officials that they had sources of information that in 1992, inmates "Ty" and "Reggie" had been offered $3,000 to kill Garrison and, further "Ty" had made telephone calls in which he took responsibility for Garrison's death.
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> D. Report dated April 9, 1993, in which there is a summary of an interview with DEA Agent Glenn Gaasche. Agent Gaasche stated that Garrison was a member of a drug organization whose members were being prosecuted in federal court. He further stated that the federal defendants felt that Garrison was going to testify against them. He also stated that the [sic] Garrison's girlfriend, Monique McNutt, was "well aware" of Garrison's drug activities "and was involved in same."
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> E. Report dated April 9, 1993, in which there is a summary of an interview with Warren Brown, an attorney. Mr. Brown stated that someone had stolen $60,000 worth of cocaine from Garrison's

home. Brown had represented Aaron Dennison who was charged with the theft. Garrison and Dennison had reached a settlement of their issues. A "Colombian" had "fronted" the stolen cocaine to Garrison and Garrison had settled the problem of the stolen cocaine with the "Colombian."

F. Handwritten, undated Note which sets out that a witness, either Anthony Burton or Harold Williams, at "6-6:30 heard shooting Saw shooter white tennis Drk clothing 6-6'2 slim 35 - younger."

On the subject of the prejudice suffered by not receiving the foregoing materials in advance of trial, in his petition, appellant claimed, *inter alia*, that the foregoing information would have been helpful to the defense because it "not only contains alternate suspects and motives to the crime for which Petitioner was on trial, it also contains impeachment evidence for the identifying witness, Monica McNutt." Moreover, he claimed generally that the failure of the State to disclose the information hampered his pre-trial investigative endeavors, and affected his cross-examination of witnesses. On appeal, as part of his brief argument on the subject, he claims without specificity that the evidence "could have been used at trial to come up with numerous theories, including but not limited to a conspiracy theory against appellant."

After holding a hearing on appellant's petition, the circuit court denied the petition by order signed on July 20, 2015. The circuit court ruled that appellant had not proved, as it was his burden to do, that the evidence was, in fact, newly discovered within the meaning of CP § 8-301 and Md. Rules 4-331 & 4-332. In addition, the circuit court ruled that appellant did not prove that the newly discovered evidence created a significant or substantial possibility of a different result at trial.

Additional facts will be addressed as they become relevant to the discussion.

## DISCUSSION

The denial of a petition for writ of actual innocence is an immediately appealable order. *Douglas v. State*, 423 Md. 156, 165 (2011). Where, as here, the circuit court holds a hearing on a petition for a writ of actual innocence, we review the circuit court's ruling for abuse of discretion, *Jackson v. State*, 216 Md. App. 347, 363*, cert. denied,* 438 Md. 740 (2014), *Keyes v. State*, 215 Md. App. 660, 669-70, *cert. denied*, 438 Md. 144 (2014), bearing in mind that an exercise of discretion based upon legal error is "necessarily" an abuse of discretion. *Martin v. State*, 218 Md. App. 1, 30 n.31 (2014) (quoting *Bass v. State*, 206 Md. App. 1, 11 (2012)); *accord McGhie v. State*, ___ Md. ____, (2016), No. 78, SEPT. TERM, 2015, 2016 WL 4470907, at *8 (Md. Aug. 24, 2016). When applying the abuse of discretion standard "we will not disturb the circuit court's ruling, unless it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Jackson*, 216 Md. App. at 363 (internal citation and quotation omitted).

The actual innocence statute 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.

Md. Code Criminal Proc. § 8-301.

Under the statute, an actual innocence claim rests on two elements: first, that there is "newly discovered evidence" that "could not have been discovered in time to move for a new trial under Maryland Rule 4-331," CP § 8-301(a)(2); and, second, that this newly discovered evidence "creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined." CP § 8-301(a)(1).

**Newly Discovered Evidence**

As indicated above, the circuit court denied relief, in part, because that court was not persuaded that appellant had carried his burden to establish that the evidence that he had allegedly recently discovered was, in fact, "newly discovered evidence" as contemplated by CP §8-301. The circuit court found that appellant had not proved that the documents had not been provided in discovery and found the testimony of appellant's trial counsel that she had never seen the documents before appellant showed them to her in 2013 to be untrustworthy. The circuit court stated the following:

> Although the Petitioner may have been able to convince the Court about the date of receipt of the documents pursuant to the MPIA request, the Court is much more troubled by the issue of whether the Petitioner has proven that the defense did not receive the documents before trial in discovery. The trial of this case took place over twenty years prior to filing of the Petition. Consequently, discovery was provided over twenty years ago. The Petitioner did not produce any record of what discovery was actually provided by the State.[1]
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> Because of the age of the case, neither the State nor Petitioner's trial counsel could substantiate in any way what was produced by the State. The

only evidence produced by the Petitioner regarding what was produced in pretrial discovery was testimony by trial counsel that there was "a lot of material." Despite the fact that there is no record of what was produced prior to trial, and over twenty years had passed since any pretrial production, Petitioner's trial counsel testified that she had only seen these documents for the first time in August 2013.[2] Although the Court does not question the honesty of Petitioner's trial counsel, the Court finds such a recollection completely implausible.

In contrast to the certainty of the above recollection, trial counsel testified that she could not recall numerous significant details about the trial itself. She could not recall the substance of Petitioner's pretrial statement, nor could she recall whether she had received or reviewed parts of the pretrial statement of Monica McNutt, the State's principal witness. She further could not recall what was contained in the fingerprint report, possibly the most crucial piece of evidence in the trial, and whether she followed up with questions about the other persons named in [the] fingerprint report. Trial counsel also testified at the hearing that she recalled a particular defense theory at trial that there were two different possible shooters at the scene. No such theory was ever raised at trial. Trial counsel could not even recall whether she had recently received a copy of the State's response to the pending Petition. Consequently, the Court finds that the testimony of this one witness that she could recall not receiving documents among "a lot of material" provided over twenty years ago, is insufficient for the Petitioner to meet his burden of establishing the existence of newly discovered evidence.

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[1] Petitioner did testify that he had never seen the documents before receipt from the BCPD. However, he also testified that he had never reviewed with his counsel prior to trial what documents counsel had actually received.

[2] Trial counsel stated that she recalled seeing these documents for the first time during a meeting with Petitioner's present counsel in August 2013. However, Petitioner testified that he met with trial counsel in 2007 and showed her the documents at that time. Trial counsel did not remember any prior meeting with Petitioner to discuss these documents.

Md. Rule 4-332(d)(6) requires that the "request for relief [be] 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."[2] To qualify as "newly discovered," evidence must not have been discovered, or been discoverable by the exercise of due diligence. *Argyrou v. State*, 349 Md. 587 (1998). In addressing what constitutes "newly-discovered" evidence in the context of a motion for a new trial pursuant to Md. Rule 4-331, we have said:

> Unless and until there is found to be "newly discovered evidence which could not have been discovered by due diligence," one does not weigh its significance. It is only when this definitional predicate has been established that the provisions of Rule 4-331(c) even become involved. Without this definitional predicate, the relief provided by subsection (c) is not available, no matter how compelling the cry of outraged justice may be.

*Love v. State*, 95 Md. App. 420, 432 (1993).

[2] Maryland Rule 4-331 (c) provides as follows:

> *Newly Discovered Evidence*. The 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:
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> > (1) on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief; and
> >
> > (2) on motion filed at any time if the motion is based on DNA identification testing not subject to the procedures of Code, Criminal Procedure Article, § 8-201 or other generally accepted scientific techniques the results of which, if proved, would show that the defendant is innocent of the crime of which the defendant was convicted.

When explaining the pleading requirements for a petition for a writ of actual innocence, the Court of Appeals noted in *Douglas* that the "standard does not require that a trial court take impossibilities as truths. For example, if a petition 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." *Douglas*, 423 Md. at 180.

The circuit court, after hearing the testimony and reviewing the evidence appellant offered during the hearing, found as a fact that none of appellant's evidence was "newly discovered." We will not disturb factual findings unless the circuit court's findings are clearly erroneous. Because there is competent evidence to support the findings of the circuit court, its factual findings are not clearly erroneous. Md. Rule 8-131(c); *see Wagner v. State*, 445 Md. 404, 417 (2015). As a result, the circuit court did not abuse its discretion in denying appellant's petition on the basis that he did not prove that the documents he received from the Baltimore City Police pursuant to his MPIA request were "newly discovered".

**Significant Possibility of a Different Result**

Alternatively, the circuit court denied appellant's petition for a writ of actual innocence because it found that, even if the documents were newly discovered evidence, they created no significant possibility of a different result. The circuit court found that, based on testimony and evidence presented during the hearing on the petition, that trial counsel "indisputably had similar evidence at trial" yet did not choose to use it because

"evidence that others may have wanted to harm Garrison would not have exonerated the Petitioner as the shooter."

The circuit court then explained that "[m]ost important to the Court's finding is that the evidence against the [appellant] was overwhelming." The circuit court summarized the evidence against appellant in detail, pointing out that there were three reliable eyewitnesses (two of whom were completely independent) who identified appellant in photographic arrays and at trial and whose identifications were consistent with each other and corroborated multiple other ways. One of the witnesses who could not identify appellant, but corroborated the other identifications, saw a person matching the description of appellant using a pay phone before the shooting and running away after the shooting. Appellant's fingerprints were later found on that pay phone. Under the circumstances, the circuit court concluded that the "odds of three separate people independently identifying the same person whose fingerprints just happened to be found on a public payphone near the shooting are certainly astronomical."

The court next outlined the significant evidence of appellant's own actions demonstrating his guilt. Appellant fled to New York City within a day or two of learning that he was wanted for the shooting and only returned to Baltimore after he was arrested in New York. Next, appellant wrote a letter in which he requested that an acquaintance fabricate an alibi by telling appellant's trial counsel that appellant helped the alibi witness, "Shree," in the house with some bags at about 8:20 p.m. which was approximately ten minutes before the shooting. The circuit court commented that "[c]oincidentally, testimony by the Petitioner's trial alibi witness, Sherri Conner,

mirrored the fabricated story set out in [appellant's] letter" when she "testified that [appellant] 'helped me get the groceries out of the cab and carry them upstairs to the third floor.'"

The circuit court then discussed appellant's statement to the police in which "he tried to weave a completely implausible scenario." Appellant claimed that he just happened to be near the scene of the shooting earlier in the day even though he lived on the other side of Baltimore. He was allegedly there to purchase shoes from a store located nearby but the store had no record of such a sale.

According to the circuit court "[a]ppellant also said that he just happened to purchase a tape from a record store located nearby, but unfortunately, the store's owner testified that the store had never sold such a tape." Then the circuit court pointed out that "[f]inally, he stated that he just happened to use the same public pay phone as the shooter but some hours before, and somehow his multiple prints remained intact on the public pay phone hours later."

The circuit court then concluded:

> Petitioner's flight, fabrication of a defense, and false statement all firmly established the Petitioner's consciousness of guilt, bolstering the State's case and, ultimately, the credibility of its witnesses. Accordingly, having "considered the newly discovered evidence in the light of the evidence that was placed before the jury at the trial on the merits," *Yorke v. State*, 315 Md. 578, 589 (1989), the Court finds that the alleged newly discovered evidence did not "create a substantial or significant possibility that the result may have been different, as that standard has been judicially determined." CP § 8-301(a). For this reason, the Petition will be denied.

We discern neither error nor abuse of discretion and therefore affirm the judgment of the circuit court.

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