UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1746

September Term, 2015

BRYANT JONES

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Woodward,
Nazarian,

JJ.

Opinion by Woodward, J.

Filed: October 19, 2016

This appeal flows from the denial of a petition for writ of actual innocence that Bryant Jones, appellant, filed in the Circuit Court for Baltimore City. In 1994, appellant was found guilty of attempted second degree murder, robbery with a deadly or dangerous weapon, conspiracy to commit robbery with a deadly or dangerous weapon, and use of a handgun in the commission of a crime of violence. The court sentenced appellant to a total of 70 years' imprisonment. Upon direct appeal of those convictions, we affirmed the judgments of the circuit court in an unreported *per curiam* opinion, *Bryant Jones v. State of Maryland*, No. 148, Sept. Term 1995 (filed November 15, 1995).

On July 27, 2015, acting *pro se*, appellant filed a petition for a writ of actual innocence (and two supplemental petitions on August 4 and 18, 2015, respectively) pursuant to the provisions of Md. Code (2001, 2008 Repl. Vol., 2015 Cum. 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 1994 trial would have been different had he known of its existence in time.

On August 25, 2015, the circuit court issued an Order denying appellant's petition without a hearing. Appellant filed a timely *pro se* appeal from the circuit court's decision and presents three questions [1] for our review, which we have condensed into one:

[1] Appellant phrased the questions presented as follows:

1. Did the lower court err in denying the Petition without a hearing?

(continued…)

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

Finding no error, we answer that question in the negative and affirm the judgment of the circuit court.

BACKGROUND

We quote the facts from our unreported opinion in *Bryant v. State*, No. 148, Sept. Term, 1995 (filed Nov. 15, 1995), slip op. at 1-2:

> On November 8, 1993, Bryant Jones, Elijah Porter, and Gregory Garnes were driving in a white BMW around the Walbrook Junction area in Baltimore City. As they passed a Crown gas station on Gwynns Falls Parkway, they noticed an older gentleman, Charles Harris, using a pay phone in a somewhat secluded area. Jones asked Porter, the driver, to turn the car around, stating that "[h]e thought the old man had some money." Porter turned the car around and stopped it in an alley next to the gas station leaving the engine running. Jones and Garnes exited the vehicle.
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> Jones approached Harris, pulled out a gun, pointed it directly at Harris's chest, and said "give it up." Garnes circled behind Harris and searched his pockets for valuables. In addition to money, Garnes discovered a badge, indicating that Harris was a Federal Protective Services agent. Garnes screamed out, "Five-O, kill him." Noticing that Jones had moved the gun up to the area of his heart, Harris knocked Jones's arm in an attempt to dislodge the gun. Harris was successful in disarming Jones, but, when he knocked the gun away from his chest, it discharged and a bullet struck him in the stomach area. Observing that Harris and Jones were struggling for the dislodged gun, Garnes fired a shot into the air. In the confusion, Harris was able to extricate himself from the struggle and attempted

(…continued)

> 2. Did the lower court err when concluding, without a hearing, that no conflict of interest existed?
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> 3. Did the lower court err in holding the "bloody rag" and the identity of Detective John Barrick were not newly discovered evidence?

> to get away. Several more shots were fired and Harris was struck twice more — once in the arm and once in the foot.
>
> During the struggle for Jones's gun, a bullet struck Jones's leg. After they both fired shots at the fleeing Harris, Garnes rushed back to the waiting car, and Jones followed limping. Two witnesses who heard the shots testified that they noticed two men, one of whom was limping, get into a white BMW. The police, who were called and responded to the scene of the altercation, chased the vehicle. Porter was able to elude the police, and the assailants later deserted the car. When police eventually located the vehicle on a side street, a search of it revealed a wash cloth soaked with blood.

The Petition for a Writ of Actual Innocence

As mentioned earlier, appellant, acting *pro se*, filed a petition for a writ of actual innocence and two supplemental petitions, which are the subject of this appeal. In the petition, appellant made three [2] arguments based on allegedly newly discovered evidence. First, he contended that his trial counsel labored under a conflict of interest by representing both appellant and Gregory Garnes (a co-defendant who testified against appellant pursuant to a plea agreement) during the pre-trial stage of the proceedings below. Second, he asserted that the State failed to (a) disclose the identity of Detective John Barrick, a State's witness, and (b) designate Detective Barrick as an expert witness. Third, he claimed that the State did not test the "bloody rag" found in the white BMW to confirm whether the blood on it was, in fact, appellant's blood.

By order signed on August 25, 2015, the circuit court denied appellant's petition without a hearing, stating in pertinent part:

[2] In the petition and its supplements, appellant raised a variety of other contentions; however, on appeal he only questions the circuit court's rulings regarding the three mentioned herein.

> **FOUND** that even if an alleged conflict of interest could be construed as newly discovered evidence, no such conflict existed as the Petitioner was represented by [another lawyer] and not [the allegedly conflicted lawyer]; and it is further
>
> **FOUND** that the . . . identity of Detective John Barrick and the "bloody rag" were not newly discovered evidence as, according to the allegations in the Petitioner's pleadings, all such evidence was known at trial; and therefore, it is
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> **ORDERED** that, pursuant to Rule 4-332(i)(1)(A) and Md. Code Ann. Crim. Proc. §8-301(e)(2), the "Petition for Writ of Actual Innocence," "Supplemental Petition for Writ of Actual Innocence," and Second Supplement to Petition for Writ of Actual Innocence," shall be **DENIED** as the Petitioner fails to assert any grounds on which relief may be granted.

(Emphasis in original).

DISCUSSION

"[T]he denial of a petition for writ of actual innocence is an immediately appealable order, regardless of whether the [circuit] court held a hearing before denying the petition." *Douglas v State*, 423 Md. 156, 165 (2011). Where, as here, a petition for a writ of actual innocence is denied without a hearing, the applicable standard of appellate review of the circuit court's determination that no hearing need be held is *de novo*. *State v. Hunt*, 443 Md. 238, 247 (2015).

The Court of Appeals, in both *Douglas* and *Hunt*, held that a person eligible to file a petition for writ of actual innocence, under CP § 8-301, "is entitled to a hearing on the merits of the petition, provided the petition 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; *Hunt*, 443 Md. at 250-51.

Although the petitioner must "assert" grounds for relief, the documents filed with the petition are not required to meet the petitioner's burden of proving those assertions. *Hunt*, 443 Md. at 251. Rather, the trial court is obligated to view the facts asserted "in the light most favorable to the petitioner[,]" *id.*, at 251, and is required to hold a hearing if the "'allegations could afford petitioner relief, [assuming] those allegations would be proven at a hearing[.]'" *Id.*, (quoting *Douglas*, 423 Md. at 180).

The statute CP, § 8-301 provides:

> (a) *Grounds.* – **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:**
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> **(1) creates a substantial or significant possibility that the result may have been different**, as that standard has been judicially determined; and
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> **(2) could not have been discovered in time to move for new trial under Maryland Rule 4-331.**
>
> (b) *Requirements.* – A petition filed under this section shall:
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> (1) be in writing;
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> (2) state in detail the grounds on which the petition is based;
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> (3) describe the newly discovered evidence;
>
> (4) contain or be accompanied by a request for hearing if a hearing is sought; and
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> (5) distinguish the newly discovered evidence claimed in the petition from any claims made in prior petitions.
>
> (c) *Notice and response to filing.* – (1) A petitioner shall notify the State in writing of the filing of a petition under this section.
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> (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.
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> (d) *Notice to victim or victim's representative.* – (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.

> (1) 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.
>
> (e) *Hearing.* – (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.**
>
> (f) *Ruling.* – (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.
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> (2) The court shall state the reasons for its ruling on the record.
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> (g) *Burden of proof.* – A petitioner in a proceeding under this section has the burden of proof.

(Emphasis added).

Appellant asserts that this case is one in which the circuit court was required to hold a hearing before ruling upon the merits of his petition. CP § 8-301(e)(1) states that, "[e]xcept as provided in paragraph (2) of this subsection, the 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." Subsection (b) requires that the petition "be in writing; state in detail the grounds on which the petition is based; describe the newly discovered evidence; contain or be accompanied by a request for hearing if a hearing is sought; and distinguish the newly discovered evidence claimed in the petition from any claims made in prior petitions."

CP § 8-301(e)(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 "(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."[3] CP § 8-301. Moreover, under Md. Rule 4-332(d)(9), 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[.]"

On appeal, appellant contends that he satisfied the pleading requirements of CP § 8-301 and therefore, according to the holdings of *Douglas* and *Hunt*, he was entitled to nothing less than a hearing on the petition.

Here, we assume, without deciding, that the form requirements of CP § 8-301(b) and Md. Rule 4-332 were met. Thus the question before us is whether the petition sufficiently pleads grounds for relief under the statute. In other words, does appellant's petition present (1) "newly discovered evidence" that both "creates a substantial or

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

> (c) **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
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> (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.

significant possibility that the result may have been different" and "could not have been discovered in time to move for a new trial under Md. Rule 4-331", CP § 8-301(a)(1)-(2), and (2) state "that the conviction sought to be vacated is based on an offense that the petitioner did not commit", Rule 4-332(d)(9)?

We have construed the petition liberally, as instructed to do by the *Douglas* Court, 423 Md. at 182-83, and conclude that the purported "newly discovered evidence" asserted in appellant's petition is not, in fact, "newly-discovered".

As indicated earlier, appellant made three arguments in his petition based on allegedly newly-discovered evidence. First, appellant contended that his lawyer, Paul Hazelhurst, labored under a conflict of interest that entitles appellant to have his convictions vacated. Appellant claimed that, when Hazelhurst entered his appearance as appellant's attorney on March 31, 1994, Hazelhurst was already representing one of appellant's co-defendants, Gregory Garnes. Appellant attached a letter dated June 20, 1994, from Hazelhurst to another lawyer, Antonio Gioia, in which Hazelhurst informed Gioia that appellant's case had been assigned to Gioia, and that Gioia's appearance had already been entered on behalf of appellant. Gioia ultimately represented appellant at trial. Before this Court, appellant asserts that he was prejudiced by the conflict of interest, because, *inter alia*, during the period when the conflict allegedly existed, Hazelhurst filed pre-trial motions for Garnes, did not file such motions for appellant, and negotiated a guilty plea agreement for Garnes, which involved Garnes testifying against appellant at trial. Appellant makes no mention, nor did he do so below, of how any of the foregoing is "newly discovered."

Next, appellant contended that the State failed to (a) disclose the identity of Detective John Barrick, a State's witness, and (b) designate Detective Barrick as an expert witness. According to appellant, Detective Barrick testified that the wound on appellant's leg appeared to be a gunshot wound. Appellant baldly claimed that this was newly discovered evidence, but provided no explanation other than to allege that he learned, through a Maryland Public Information Act request, that a different police detective, Detective Robert Stanton, requested that appellant's leg be photographed, and that fact would have presumably contradicted Detective Barrick's testimony that he made the request.

Last, appellant contended that the State did not test the "bloody rag", which was recovered from the vehicle that appellant had been in with his co-defendants, to confirm that the blood was, in fact, appellant's blood. Here, again, appellant does not attempt to explain how or why this is newly discovered evidence; rather he asserts that the State purposefully did not test the rag, and thereby withheld exculpatory evidence. According to appellant's theory, the only rational inference to be drawn by the State's failure to test the rag is that the State knew that the blood was not his. Appellant also contends that his trial counsel was ineffective for not having the rag tested on appellant's behalf.

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[.]" "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, 600-01(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).

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.

None of appellant's claims involves newly discovered evidence. The conflict of interest, if any, was certainly known, or knowable, before trial. The fact that Detective Barrick was not identified as a State's witness and not identified as an expert witness was obviously known, or knowable, as soon as he testified. Likewise, the fact that the State did not test the bloody rag to confirm that it contained appellant's blood was known, or knowable, at trial.

In order to be entitled to a hearing on his petition appellant was required to explain how his allegations were based on newly discovered evidence. Under the circumstances

of the instant case, the circuit court did not err in denying appellant's petition without a hearing.

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