Circuit Court for Baltimore City
Case No. 199305044-47

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1619

September Term, 2016

MAYNARD SNEAD

v.

STATE OF MARYLAND

Graeff,
Arthur,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: September 25, 2017

On May 24, 2000, a jury in the Circuit Court for Baltimore City convicted Maynard Snead, appellant, of three counts of reckless endangerment, three counts of use of a handgun in the commission of a crime of violence, three counts of wearing, carrying or transporting a handgun, and possession of a regulated firearm by a felon. The court sentenced appellant to an aggregate of 35 years.

On March 27, 2014, after appellant's efforts to reverse his convictions by appeal and post-conviction relief were unsuccessful, appellant filed a Petition for Writ of Actual Innocence, arguing that he uncovered a number of database reports, which he described as "Lotus Notes," and a hand-drawn map of the crime scene that he alleged constituted newly discovered evidence. On August 8, 2016, the circuit court denied appellant's petition.[1]

On appeal, appellant presents two questions for this Court's review, which we have rephrased, as follows:

1. Did the circuit court err in denying appellant's Petition for Writ of Actual Innocence?

2. Did the circuit court err in striking a witness declaration on the basis of hearsay and in denying appellant's motion to continue the writ of actual innocence hearing to produce the witness?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

[1] As will be discussed in more detail, *infra*, the circuit court initially denied appellant's petition without a hearing, and this Court reversed. On remand, appellant retained counsel and supplemented his petition. After a hearing on the merits, the circuit court again denied the petition on the ground that the evidence that appellant produced was not newly discovered.

FACTUAL AND PROCEDURAL BACKGROUND

I.

The Shooting

On the morning of December 22, 1998, Timothy Thornton was waiting near a bus stop in Baltimore City. Appellant, who Mr. Thornton had seen previously, was present at the bus stop. At one point, Mr. Thornton "heard a pop," Mr. Thornton's cousin, Donnell Smith, ran by him, and Mr. Thornton saw appellant pointing a gun at him. At that point, appellant was wearing a bandana "around his neck part of his face," but Mr. Thornton testified that he could see appellant's face clearly. Appellant then shot Mr. Thornton three times. Mr. Thornton was hit in the stomach, "hip area," and ear.

Mr. Smith similarly testified that, on the morning of the shooting, he was standing on the corner with Mr. Thornton and a man named Leroy. Appellant and two others were "joking around with each other" several feet away. Appellant did not have anything on his face at that point.

Mr. Smith overheard one of appellant's companions say: "I bet you ten dollars you won't do him." Appellant's companions then began walking down Fayette Street. Mr. Smith described what happened next, as follows:

> [Appellant] stood on the corner. And then we looked at each other in the eyes and then he kept looking and looking down the street . . . and then he kept creeping up. . . . [Appellant] kept creeping up, creeping up and I had my . . . back up against the wall, against the Blue [N]ight Inn.

Appellant then pulled up a dark colored bandana around his face, which covered the part of his face below his nose. As appellant got closer, Mr. Smith noticed the "handle" of a

gun sticking out of the "side of [appellant's] pocket." When Mr. Smith saw the gun, he ran, nudging Mr. Thornton as he went by "because he was right next to [him]." As Mr. Smith ran down the street, he heard six to eight gunshots.[2] After running some distance, Mr. Smith sat down, and Mr. Thornton collapsed nearby. At that point, Mr. Smith realized he had been shot in his left foot.

During the incident, a third victim, Latasha Davis, was struck by two bullets. Although Ms. Davis did not testify at trial, Ms. Davis' mother, Angela Hopewell, testified that, on the morning of the shooting, Ms. Davis went to the bus stop to catch the bus to school.[3] "A couple of minutes later," Ms. Davis returned and began "banging on the door screaming and hollering that she had gotten shot." When Ms. Hopewell opened the door, she observed gunshot wounds on her daughter's arm and foot. Ms. Hopewell then called the police.

II.

Subsequent Events

The police recovered eight shell casings from the crime scene. A firearms expert subsequently examined the casings and concluded that they were all fired from the same 9mm caliber gun.

[2] Mr. Smith testified that he did not actually see anyone shooting because he ran away before the shooting began. He noted, however, that he knew that appellant "had a gun in his pocket and he pulled it out."

[3] Latasha Davis did not testify at trial because, at the time, she was experiencing "difficulties with her pregnancy," and she was "on bed rest."

Shortly after the shooting, Officer Alvin McCoy and Detective Raymond Hunter, both members of the Baltimore City Police Department, attempted to interview Mr. Smith. Mr. Smith, however, was uncooperative because he was "trying to get [his] life together" and was concerned about retaliation. Mr. Smith was "extremely vague" and "very elusive" when talking with Officer McCoy, stating only that "two to three subjects had approached him in the 2400 block of East Fayette Street at which point one of them produced an unknown handgun and started to shoot at him, . . . and his cousin." After talking with his uncle and father, however, Mr. Smith decided to cooperate more fully.

Detective Hunter testified that, when he interviewed Mr. Smith on the day of the shooting, Mr. Smith initially "wasn't very cooperative." Mr. Smith subsequently became more cooperative and ultimately provided a taped statement to Detective Hunter explaining "what exactly happened" that day. Mr. Thornton described the shooter as a light-skinned, black male, who was approximately "five seven," 160 pounds, and "had dredded like hair."[4] The shooter was wearing "a green army like jacket, some jeans, and some [Timberland brand] brown work boots."

On January 4, 1999, Detective John Gipe, a member of the Baltimore City Police Department, along with members of the "Marshal's Task Force," executed a search and seizure warrant on appellant's residence in east Baltimore in connection with an unrelated

[4] Mr. Thornton clarified at trial that when he described the shooter's hair as "dredded," he was trying to describe a "bushy" hairstyle similar to the one that appellant had at trial. On cross-examination, Mr. Thornton denied that he told Detective Hunter that the shooter had a heavy build.

murder investigation. When the police entered the residence, appellant was detained in a bathroom on the second floor. The police then searched a bedroom in the front part of the basement, in which they recovered a loaded Hi-Point 9mm semi-automatic pistol from under the mattress, documents containing appellant's name and address in a "cubby hole shelf" across from the bed, a box containing ammunition from the same shelf, and an empty ammunition box that had been placed in a trash can.[5]

Detective Hunter spoke to Mr. Thornton approximately ten times in the months that followed his initial interview. On one occasion, Mr. Thornton told Detective Hunter that his niece said that the "word around the neighborhood" was that appellant and Ricky Evans were the perpetrators. Mr. Thornton subsequently identified appellant as the shooter in a photo array.

Approximately six months after identifying appellant in the photo array, Mr. Thornton encountered appellant and two others on the 2400 block of Fayette Street. Mr. Thornton asked appellant why he shot him, and appellant replied: "It wasn't meant for you." Appellant did not say whom he intended to shoot, and Mr. Thornton just walked away. Both Mr. Thornton and Detective Hunter testified that Mr. Thornton never called Detective Hunter to tell him about the encounter.

[5] Detective John Gipe also executed a search warrant on the residence of a man named Ricky Evans. The police recovered five 9mm shell casings from the backyard of that residence, which were later matched to the Hi-Point 9mm semi-automatic pistol that was recovered from appellant's bedroom.

III.

Discovery

On February 25, 2000, after a hearing regarding defense counsel's subpoena for police records, the circuit court, *inter alia*, ordered:

> 1. That, prior to March 2, 2000, all evidence to be used at trial in the above-captioned matter shall be retrieved from the Evidence Control Unit for viewing . . . by counsel for [appellant] . . . .
>
> * * *
>
> 3. That all other non-exculpatory descriptions of the suspect by the witness Timothy Thornton, including, but not limited to notes with respect to identification of the perpetrator of the offense which is the subject of this action and any oral communication from Thornton to Detective Ray Hunter, Detective Corey Hunter and Officer Alvin McCoy of the Baltimore City Police Department, shall be provided to [appellant] at the moment of the litigation of the motion to suppress the identification procedure by which Timothy Thornton identified [appellant].

Shortly thereafter, defense counsel, Ms. Z., met with the prosecutor, Mr. G., to go through the State's file. As will be discussed in more detail, *infra*, Ms. Z. "flipped through" the State's file, and Mr. G. read various witness statements to her while she took notes.

At the May 17, 2000, motions hearing, Ms. Z. renewed her motion to compel the State to disclose "the taped statement" that Mr. Smith provided to Detective Hunter, which she claimed had "been hurriedly read" to her by Mr. G. When asked by the court why the defense would not be entitled to such evidence, Mr. G. indicated that it was his policy not to turn over such a statement until after a jury is selected. The court then ordered Mr. G. to give Ms. Z. the statement.

Ms. Z. then asked for "a taped statement from Latasha Davis," if there was one. Mr. G. noted that there was a tape, and Ms. Z. knew it, because he "read them to her. She knows the contents. She's taken notes." The court stated: "Whatever you've told her . . . now give it to her so we can . . . move on with the merits."

IV.

Trial

Appellant's four-day trial began on May 18, 2000. The State presented the evidence and testimony discussed, *supra*. In addition, Mr. Thornton testified that he had "[n]o doubt in [his] mind" that appellant was the man who shot him. On cross-examination, Ms. Z. questioned Mr. Thornton about whether, after his initial description of the shooter, he had provided more information about the identity of the shooter to the police:

> [COUNSEL:] Now, after the shooting Detective Hunter got in touch with you right away, didn't he? Detective Hunter called you after the shooting?
>
> [MR. THORNTON:] Yes, after I came from the hospital.
>
> * * *
>
> [COUNSEL:] And you never gave Detective Hunter anymore details about the person who shot you, did you? You never filled out this identification with anymore details, did you?
>
> [MR. THORNTON:] No.
>
> [COUNSEL:] You never gave him any additional information and he called you approximately nine times after that shooting, isn't that right? Nine times you talked with Detective Hunter after the shooting before he brought over the pictures in April?
>
> [MR. THORNTON:] Yes.
>
> * * *

> [COUNSEL:] And in the months following the shooting you were around the area of the 2400 block of East Fayette, weren't you, off and on?
>
> [MR. THORNTON:] Yes.
>
> [COUNSEL:] And you never called Detective Hunter to say, oh, I just saw the guy who shot me, he was walking down the street, did you?
>
> [MR. THORNTON:] No.
>
> [COUNSEL:] You never told Detective Hunter you had any contact or saw him or hey he's over at the corner of such and such, come over, you can arrest him there, you never called him, did you?
>
> [MR. THORNTON:] No, because I think he was probably apprehended and out on bail or something.

Ms. Z. similarly questioned Detective Hunter about whether Mr. Thornton had ever provided additional details about the shooter:

> [COUNSEL:] [A]fter you spoke to Timothy Thornton on December 31st . . . you said you and he had rather frequent phone conversation[s], but he never called to give you anymore details about the way this person looked, did he?
>
> [DET. HUNTER:] No, ma'am, he just insisted that if he saw the individual, because he saw him in the neighborhood before. He know the individual from the neighborhood. That was it.
>
> [COUNSEL:] Okay. And he never called to say, oh, I did see him in the neighborhood, I saw him, he was over there on the corner of such and such, I just spotted the guy who shot me, he never called to say that, did he?
>
> [DET. HUNTER:] He never informed me of that, no, ma'am.

Karin Sullivan, the State's firearms expert, testified that she tested the Hi-Point pistol recovered from appellant's bedroom and determined that it was operable. Ms. Sullivan also determined that the eight shell casings recovered from the crime scene were fired from that pistol.

V.

Direct Appeal

Appellant appealed his convictions to this Court, raising three claims of error. *Snead v. State*, No. 680, Sept. Term, 2000, slip op. at 1 (filed May 7, 2001). First, he argued that the trial court erred in refusing to permit defense counsel "to elicit from [Mr.] Thornton the fact that he was arrested on drug dealing charges a week before he was scheduled to testify in this case." *Id.* at 3. Second, he argued that trial court erred in ruling that the rules of discovery did not require the State to disclose appellant's statement to Mr. Thornton that the shooting "wasn't meant for [him]." *Id.* at 1, 8. Finally, he argued that "he could not have been convicted of use of a handgun in the commission of crimes of violence against [Ms.] Davis and [Mr.] Smith because the jury acquitted him of the underlying crimes of violence." *Id.* at 8-9. This Court rejected appellant's claims and affirmed his convictions.

VI.

Petition for Post-Conviction Relief

In 2009, appellant, an unrepresented litigant, filed a Petition for Post Conviction Relief, raising three claims for relief: (1) ineffective assistance of counsel; (2) prosecutorial misconduct; and (3) court error. With respect to his "prosecutorial misconduct" claim, appellant argued that discovery provided in an unrelated case revealed documents that were "extremely exculpatory and could have been used to impeach the State's main witness[es], Timothy Thornton and Detective Raymond Hunter." Appellant asserted that these

documents reflected that Mr. Thornton told Detective Hunter "that the person [who] shot him was at a certain bar at a certain time [during which appellant] was incarcerated."

These documents included a series of database reports, which appellant described as "Lotus Notes," that were authored and signed by Detective Hunter. Each document was entitled "CIB - VC SHOOTING DATABASE . . . Progress Report," and they referenced the December 22, 1998, shooting incident. Although there were multiple documents, the documents to which appellant primarily referred stated as follows:

> On 25 Feb 99 @ 1930 hrs, this detective spoke with the victim Timothy Thornton. Same advised this detective that he saw the person who shot him at the corner of Collington and Jefferson Street wearing a black sweat suit. Same also provided this detective with the street name O.G. for the suspect. Same also advised this detective that his niece is working on getting the real name of the suspect. Same also advised this detective that he spoke with another victim in this case Donnell Smith. Same advised this detective that he would come in for another interview.[6]
>
> On 27 Feb 99 @ 1930 hrs. this detective spoke with Timothy Thornton. Same stated that he spoke with Leroy Milton and same stated that the individual that shot him was arrested at [a] bar located at E. Northern Parkway and Loch Raven called Uncle Harry's. On 26 Feb 99 between the possible hrs. of 2300 and 2400.

At the post-conviction hearing, Ms. M., an Assistant State's Attorney for the Baltimore City State's Attorney's Office, testified that she prosecuted appellant and Mr. Evans in cases unrelated to the case at issue here. She learned that the gun that appellant allegedly used in her homicide case also had been used in a number of other

[6] Appellant's counsel stated at oral argument that, although there were other notations, appellant was relying primarily on these notes in support of his Petition for Writ of Actual Innocence. Thus, we will not set forth the substance of the other notes.

shootings, including the one on December 22, 1998, at issue here. Accordingly, Ms. M. obtained Mr. G's file for the December 22 shooting, with the intention of using those documents as "other crimes evidence." She could not remember what specific documents she disclosed to the defense in her cases, but she recalled that she disclosed "information with respect to the shooting of Timothy Thornton, Donnell Smith, and . . . Latasha Davis," including "Lotus Notes." Although she did not have "affirmative evidence that suggested that [Mr. G.] specifically turned over the Lotus Notes" to Ms. Z, "the Lotus Notes that [she] turned over" in her homicide case came from Mr. G.

Ms. Z. testified that she had difficulty obtaining discovery from the State prior to appellant's trial. She did recall a meeting where Mr. G. "brought a bunch of documents, and I went through them. I think I was there about an hour, as I recall."

Ms. Z. testified that she had "never seen" the "Lotus Notes" before trial. She could "firmly state" that because the information was so exculpatory, i.e., it "completely negate[d] the identification by . . . Mr. Thornton, of [appellant], which he made at trial," and if she had that information, there would not have been a trial.[7]

Mr. G. testified that he met with Ms. Z. so "she could go through [his] entire file and all the documents and review the evidence to include the statements that had been given by witnesses in the case." Other than Mr. G.'s personal notes, Ms. Z. "was allowed

[7] Ms. Z. testified that the "information saying that the eye witness was identifying someone as the shooter and that someone was arrested on a day when Mr. Snead was in jail" could have been useful, both in "negotiations" and as "devastating impeachment evidence."

to view everything in [Mr. G.'s] file." Mr. G. stated that he knew that Ms. Z. "reviewed everything" in his file, "every single paper," "includ[ing] Lotus Notes."

On cross-examination, Mr. G. stated that he did not "think [he] held anything back," and he was confident that he "sat down and went through everything, complete open file with counsel." In response to post-conviction counsel's question whether Mr. G. had a "firm memory about showing a single Lotus note to Ms. [Z]," Mr. G. responded: "I have a firm memory of showing my entire file. So I can't honestly say which documents I showed her. If it was in my file, she saw it." He conceded, however, that there was "no affirmative evidence in [his] filed that [he] turned over Lotus Notes to defense counsel."

On June 28, 2012, the circuit court denied appellant's petition for post-conviction relief.[8] In addressing appellant's claim with respect to the "Lotus Notes," the court found that the State did not suppress the notes in violation of *Brady*,[9] stating as follows:

> Most of [the] State's file, as well as the defense's file has been lost or destroyed and the court's file does not have the supplemental disclosure filed by the State on March 8, 2000. However, the State trial counsel testified that the State had an open file disclosure that contained the Lotus Note[s] in dispute, and that it was reviewed by [appellant's] trial counsel. Moreover, the record reflects and both trial counselors recalled a discovery hearing . . . , which led to a meeting between the parties so that [appellant's] trial counsel could review the State's files. Testimony at the post conviction hearing indicated that [appellant's] trial counsel inspected the State's files and took notes for approximately an hour. Additionally, there is a record of a subpoena for police files by [appellant's] trial counsel. While [appellant's] trial counsel testified that discovery proved difficult in this case, the State's

[8] Appellant subsequently filed an application for leave to appeal from the circuit court's denial of his petition for post-conviction relief, which this Court denied.

[9] *Brady v. Maryland*, 373 U.S. 83 (1963).

> testimony at the post conviction hearing also indicated that all the documents in the State's file for [appellant's] case were included in the later trial. The record as a whole indicates that [appellant's] trial counsel at least possessed constructive knowledge of the Lotus Notes, and therefore there was no suppression by the State and no *Brady* violation.[10]

VII.

Petition for Writ of Actual Innocence

On March 27, 2014, appellant, an unrepresented litigant at the time, filed a Petition for Writ of Actual Innocence. In his petition, appellant argued that "Lotus Notes," which he discovered through Ms. Martin "long after [his] case was adjudicated," in addition to a hand-drawn map, constituted newly discovered evidence that would have changed the outcome of his trial. With respect to the notes, appellant claimed that he "had never seen these notes before, and his earlier . . . counsel (Ms. [Z.]) testified she had never seen them at the post conviction hearing."

The circuit court initially dismissed appellant's petition without a hearing. This Court vacated the circuit court's order and remanded the case for further proceedings. *Snead v. State*, 224 Md. App. 99, 105-06 (2015).

[10] The circuit court also found that the "allegedly suppressed evidence does not appear to be exculpatory nor would it have successfully impeached Detective Hunter or Timothy Thornton's testimony," and it was "unlikely that the Lotus Notes would reasonably have led to a different result because they do not tend to clear [appellant] of guilt and are ineffective for the purpose of impeaching witnesses."

On remand, appellant, now represented, filed a supplemental petition, which he subsequently amended. He argued that the "Lotus Notes"[11] were newly discovered evidence that could not have been discovered in time to move for a new trial, and they created a substantial or significant possibility of a different result. He asserted that Ms. Z. "made repeated reasonable good faith efforts to locate any and all exculpatory material, including material tending towards the impeachment of government witnesses." Appellant stated that he and "his counsel had no reason to believe that the Database Entries existed, and thus no reason to continue to pursue them after trial." Appellant further argued that the "post-conviction court's determination that the State's actions did not support a finding of a *Brady* violation is neither binding on, nor relevant to, [the innocence court's] due diligence determination." Citing *State v. Seward*, 220 Md. App. 1, 18 (2014), *rev'd on other grounds*, 446 Md. 171 (2016), appellant asserted that an innocence court "is not bound by the findings of fact made or the conclusions of law set forth by a post-conviction court as the 'law of the case.'"

In its response, the State argued that appellant was collaterally estopped from claiming that the "Lotus Notes" were newly discovered evidence, based on the finding of the post-conviction court that the defense had constructive knowledge of the "Lotus Notes." The State asserted that the post-conviction court's finding was an implicit finding

[11] In his amended supplemental petition, appellant referred to the notes as "database entries." As indicated, there were multiple notes, but counsel for appellant stated at oral argument on appeal that they were focusing on the February 25, 1999, note as well as a February 27, 1999, note.

"that the evidence existed in the State's file at the time of the original trial," and therefore, appellant should not be afforded a "'do-over' for arguments that failed in post-conviction proceedings." Finally, the State contended that none of the evidence that appellant claimed was newly discovered created a substantial possibility of a different result.

VIII.

Actual Innocence Hearing

At the innocence hearing, Ms. Z. testified that, with respect to the discovery process, Mr. G. was "[n]ot cooperative and not forthcoming with anything that he didn't absolutely have to give." She testified that she filed a Motion to Compel Discovery because Mr. G. would not schedule an "open file meeting," and the court "ordered that Mr. [G.] provide the entire file, give me everything that was required." She and Mr. G. then met in his office for approximately one hour. She testified:

> He came with the file, which as I recall was voluminous. I would say it was approximately a foot high. He placed it on the table and we met. During the meeting I spoke with Mr. [G.]. Of course I was really needing to get witness statements . . . -- there were three victims in this case and there were statements and -- sought. I asked him for those, he would not give them to me, but he read them to me during our meeting. He read them to me and I took notes. That was the best I could get out of that. So that took a lot of the time for the one-hour meeting. After we finished reading the statements and I'm taking notes, I flipped through the file, you know, just looking at the file and that was what I did.

Appellant's innocence counsel then asked Ms. Z. if she "ever ask[ed] for more time to look at "the State's file, to which Ms. Z. replied: "[N]o. I mean, you know, . . . that was it, he had complied barely as he was required to do. And he was clear that was the end of it, end of the thing, that was all he was going to do." She did note that the first day of trial

she renewed her motion for discovery with respect to getting "a hard copy of the witness statements," and the court ordered Mr. G. to provide those.

In response to the question whether she had seen the "Lotus Notes" before appellant's trial, Ms. Z. testified: "Absolutely not. . . . I never saw any of these documents prior to our trial."[12] She testified that, if she had seen the "Lotus Notes," her defense strategy would have been different, and she likely would have filed a motion to dismiss based on the information contained in some of the notes.

On cross-examination, Ms. Z. acknowledged that Mr. G. did not say her review was limited to one hour, but "he said 'Let's just -- you know, I don't why we're here,' and was just complaining about it. But anyway, it -- he was very eager to not take too much time." She stated that Mr. G. would not copy the witness statements for her, but "he had them and he was reading them to me at the meeting." On the first day of trial, he still refused to give her the witness reports, and the court said: "Give them to her." The cross-examination continued as follows:

> [STATE:] And you said at some point during that meeting you said he flipped through the file?
>
> [MS. Z.:] [A]fter the witness statement thing I had time, you know, and I sort of flipped through this big file. And I'm looking through. He said, "Go ahead, look at the file." And I looked through the file. You know, I don't know, I didn't find anything.
>
> [STATE:] What do you mean you didn't find anything?
>
> [MS. Z.:] I mean, I don't know, nothing jumped out at me.

[12] Appellant similarly testified at the innocence hearing that he had not seen the Lotus Notes or the map before his trial.

> [STATE:] About how long would you say you spent flipping through the file?
>
> [MS. Z.:] I couldn't tell you. Whatever time was left. I'm pushing through to try to see a one-foot tall file. I don't know.
>
> [STATE:] [W]ho signaled that the hour was at an end?
>
> [MS. Z.:] Mr. [G.].
>
> [STATE:] And do you remember what he said to you?
>
> [MS. Z.:] I don't recall. But he -- it was very clear . . . he was impatient. He was impatient. He was not happy to have to do it. . . . And so we ended the meeting after about an hour.
>
> [STATE:] Did you tell him you needed more follow up time to examine the file?
>
> * * *
>
> [MS. Z.:] I mean he complied. He said, "All right, here we go, here's the file." And so I'd had my -- he had complied minimally. And I wasn't going to go back to [the court] and complain I needed more time. No, I didn't complain, I let it go. . . .

The court subsequently questioned Ms. Z. about the State's file, and the following colloquy occurred:

> [THE COURT:] So you're telling me you met with the prosecutor, Mr. [G.]. And you're there and he's giving you an open file and he says he has a voluminous file and you said there [was] a stack of papers like a foot tall. And you're engaging him and you said it was about an hour. And you engaged him I guess in some conversation and he was disclosing orally some of the statements. So I guess can you tell me how you know that those statements weren't in that file?
>
> [MS. Z.]: Well, I mean he was reading from them.
>
> THE COURT: How do you know [the "Lotus Notes" and the map] weren't in that stack?
>
> [MS. Z.]: Oh, these, that these weren't.

THE COURT: Yeah.

[MS. Z.]: You know, I don't. I have no idea. Maybe they were in the file.

IX.

Circuit Court's Ruling

On August 8, 2016, the circuit court denied appellant's petition, finding that appellant "failed to meet his burden to show that the CIB-VC Shooting Database reports" could not have been discovered in time to move for a new trial. The court explained its ruling as follows:

> [Appellant] claims that he was not given copies of these reports until they were provided by his *post* trial counsel after June 6, 2002. However, even if the [c]ourt credits [appellant's] claim that this was the first time that *he* received these reports, [he] still has not met his burden regarding whether his trial counsel received, or should have discovered, these reports.
>
> [Appellant's] trial counsel, [Ms. Z.], testified at the hearing. Ms. [Z.] testified that she first saw these reports at [appellant's] post conviction hearing on April 28, 2010. However, she acknowledged that she could not remember exactly which of the reports were shown to her six years ago. Further, and most importantly, her testimony about what she received over *sixteen* years ago in pretrial discovery was completely lacking. When asked about discovery, she testified that she recalled that the State provided her with a large stack of documents which she "flipped through" during a meeting with the State. She could not say whether the reports in question were in the stack. She claimed that she was somehow hurried by the State during her review and therefore was prevented from thoroughly reviewing the discovery. Nonetheless, she never asked either for additional time to review the documents, or for court assistance to address any allegedly deficient discovery. Regardless, "[e]ven a good explanation for not having exercised due diligence is not the same thing as the actual exercise of that due diligence." *Love* [*v. State*], 95 Md. App. [420, 436 (1993)]. Neither party could present any record of what was actually sent or received in discovery over sixteen years ago and the [c]ourt finds that [appellant's] trial counsel simply had no idea what was sent or received in discovery. Consequently, based on the evidence and testimony presented at the hearing, the [c]ourt finds that [appellant] has failed to show either that the reports

were not produced in pretrial discovery or that with due diligence, counsel could not have discovered the reports. The Petition, therefore, is denied.

DISCUSSION

I.

Newly Discovered Evidence

Appellant contends that the circuit court "erred as a matter of law in finding that [his] trial counsel did not exercise due diligence in seeking discovery, and therefore that the Database Reports were not newly discovered." The State contends that the ruling denying the Petition for Writ of Actual Innocence should be affirmed on either of two grounds: (1) appellant was "collaterally estopped from arguing that the Lotus Notes contained in the prosecutor's file were 'newly discovered' evidence where the judge presiding over [appellant's] post-conviction petition found as a fact that the notes were in the prosecutor's file when it was reviewed by defense counsel"; or (2) the circuit court "acted within its discretion in determining that [Ms. Z.] did not exercise due diligence."

Maryland Code (2016 Supp.) § 8-301 of the Criminal Procedure Article ("CP"), allows certain convicted persons to petition for a writ of actual innocence based on newly discovered evidence. *See Smallwood v. State*, 451 Md. 290, 313-20 (2017) (setting forth the legislative history of CP § 8-301). CP § 8-301 states, in pertinent part, as follows:

> (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.
>
> * * *
>
> (g) A petitioner in a proceeding under this section has the burden of proof.

As this Court recently explained in *Smith v. State*, ___ Md. App. ___, Nos. 1069 & 1879, Sept. Term, 2016, slip op. at 38-39 (filed July 26, 2017):

> [A] petitioner asserting newly discovered evidence must satisfy three requirements to prevail in a petition for actual innocence. A petitioner must produce newly discovered evidence that: (1) "speaks to" the petitioner's actual innocence; (2) "could not have been discovered in time to move for a new trial under Md. Rule 4-331"; and (3) creates "a substantial or significant possibility that the result may have been different."
>
> When an appellate court reviews a circuit court's decision to deny a petition for writ of actual innocence, we limit our review "to whether the trial court abused its discretion." *Smallwood*, 451 Md. at 308-09. *Accord Patterson v. State*, 229 Md. App. 630, 639 (2016), *cert. denied*, 451 Md. 596 (2017). "Under that standard, this Court 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." *Patterson*, 229 Md. App. at 639 (citations and quotation marks omitted). A trial court must, however, "'exercise its discretion in accordance with correct legal standards.'" *Jackson v. Sollie*, 449 Md. 165, 196 (2016) (quoting *Alston v. Alston*, 331 Md. 496, 504 (1993)). With respect to the circuit court's factual findings, we accept these findings unless clearly erroneous. *Yonga*, 221 Md. App. at 95.

(footnote omitted).

The circuit court here denied the petition on the ground that appellant failed to prove the second requirement, i.e., whether the newly discovered evidence "could not have been

discovered in time to move for a new trial under Maryland Rule 4-331."[13] To satisfy this requirement, defense counsel must show that newly discovered evidence "could not, with due diligence, have been discovered in time to move for a new trial under Maryland Rule 4-331." *Hawes v. State*, 216 Md. App. 105, 136 (2014). *See also Argyrou v. State*, 349 Md. 587, 600-01 (1998) ("To qualify as 'newly discovered,' evidence must not have been discovered, or been discoverable[,] by the exercise of due diligence."); Md. Rule 4-332(d)(6) (A petition for a writ of actual innocence must allege that it is 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.").

As this Court explained in *Smith*, slip op. at 44-45, the

> requirement, that the evidence could not, with due diligence, have been discovered in time to move for a new trial, is "a threshold question." *Argyrou*, 349 Md. at 604. *Accord Jackson v. State*, 216 Md. App. 347, 364, *cert. denied*, 438 Md. 740 (2014). "[U]ntil there is a finding of newly discovered evidence that could not have been discovered by due diligence, no relief is available, 'no matter how compelling the cry of outraged justice may be.'" *Argyrou*, 349 Md. at 602 (quoting [*Love*, 95 Md. App. at 432]).

Appellant contends that the circuit court's finding, that the "Lotus Notes" were not newly discovered evidence that could not have been discovered with due diligence, was erroneous. Initially, he argues that the circuit court "misapplied the law regarding the

[13] A Rule 4-331 motion based on newly discovered evidence must be 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.' Rule 4-331(c)(1).

Smith v. State, ___ Md. App. ___, Nos. 1069 & 1879, Sept. Term, 2016, slip op. at 43-44 (filed July 26, 2017).

expectations of due diligence by trial counsel." He asserts that the court's "focus should have been on what counsel actually did, rather than what it believes, with the benefit of hindsight, she could have done." Appellant characterizes the court's ruling as failing to apply the due diligence standard, but instead, imposing a standard "requiring that: (1) counsel take every conceivable measure in seeking discovery; and (2) counsel not only **find all** exculpatory evidence, but also remember each and every piece of evidence reviewed no matter the passage of time." In any event, appellant argues that, even if the circuit court applied the proper test, the circuit court's ruling was an abuse of discretion.

The State contends that the circuit court "acted within its discretion in concluding that the notes were not newly discovered." It argues that the circuit court applied the correct due diligence standard but simply "reached an outcome that [appellant] does not like." It notes that Ms. Z. admitted that she had "no idea" whether the notes were in the file the State produced and conceded that "maybe" they were there. The State argues that, if the notes were there and Ms. Z. did not take the time to review the entire file, she failed to exercise due diligence, and it "does not matter what other, unrelated steps [Ms. Z.] took to secure discovery." We agree with the State.[14]

[14] The State contends that the doctrine of collateral estoppel bars appellant's claims because the issue whether the Lotus Notes were produced to defense counsel was previously litigated in post-conviction proceedings, and the circuit court found that the appellant's defense counsel had, at minimum, constructive knowledge of the Lotus Notes, and they were not suppressed by the State. We need not decide that issue in this case. The circuit court did not rely upon that doctrine in denying appellant's petition, and as discussed, *infra*, we conclude that the circuit court did not abuse its discretion in denying the petition on the merits, and therefore, we shall affirm the circuit court's ruling on that ground.

Here, critical to the issue whether the notes could have been discovered by due diligence is whether the notes were in the file provided by the State. This file was reviewed more than 17 years ago, it no longer exists, and no one has any specific recollection of what, precisely, was in the file. Critical to our resolution of the issue presented here, is who has the burden of proof regarding whether the notes were or were not in the file.

CP § 8-301(g) makes clear that it is the *petitioner* who bears the burden of proof in an actual innocence proceeding. Accordingly, appellant's contentions that (a) the "State has never alleged that the Database Reports were in the set of documents that it produced to trial counsel"; (b) the State admitted that "it had no affirmative evidence that it had fulfilled its duties under *Brady*"; and (c) that it is unreasonable to expect counsel to "remember each and every piece of evidence reviewed no matter the passage of time," are unavailing. At the stage where we are now, a petition for writ of actual innocence, after the resolution of appeals and post-conviction proceedings, it is the petitioner's burden, however difficult it may be, to prove that the State did *not* disclose the evidence that petitioner claims is newly discovered.

Here, appellant failed to meet that burden. Defense counsel testified that she had "no idea" what documents were in the State's open file disclosure, and she explicitly conceded that the documents that appellant now claims are newly discovered could have been in the materials that the State provided to her. And counsel did not argue at that time,

when she "flipped through" the State's file, that she needed more time to review those documents.[15]

Under these circumstances, the circuit court did not abuse its discretion in concluding that appellant failed to meet his burden of showing that the documents were not provided to Ms. Z., and therefore, that the evidence could not, with due diligence, have timely been discovered. Accordingly, the circuit court did not abuse its discretion in denying appellant's Petition for Writ of Actual Innocence.

II.

Kevin Cade

Appellant's second argument relates to his attempt to introduce into evidence a declaration signed by Kevin Cade, an acquaintance of appellant and Mr. Thornton.[16] He asserts that the court abused its discretion in (1) excluding the declaration and (2) denying

[15] Although Ms. Z. did subsequently ask the court for witness statements, she specifically requested that the State turn over hard copies of Mr. Smith's and Ms. Davis' recorded statements, and the court ordered the State to do so. She did not assert that she was not given an inadequate amount of time to review the State's file.

[16] This declaration stated, in pertinent part, as follows:

> 4. [Appellant's] attorneys have asked me whether I know the identity of an individual whose street name is "O.G."
>
> 5. O.G.'s full name is Travis Easley and he was a close friend of mine.
>
> 6. When [appellant's] lawyers asked me about O.G., I thought it was funny because Travis and [appellant] looked alike and were often confused for each other. We used to refer to them in the neighborhood as "brothers" because they looked so much alike.

his request to postpone the proceedings so he could summon Mr. Cade to testify at the hearing in person.

Appellant argues on appeal that the Cade declaration was offered "to support [appellant's] claim that there is a significant or substantial possibility that had the undisclosed police notes been available at trial, a different outcome would have resulted." Specifically, appellant contends that the February 25 "Lotus Note" demonstrates that, while he was incarcerated, the victim, Mr. Thornton, encountered a man on the street nicknamed "O.G." whom Mr. Thornton identified as the shooter, and this document would have aided his defense if he could have further investigated O.G. and potentially exculpated himself by pinning the shooting on that person. Appellant asserts that the additional information from Mr. Cade that O.G. was Mr. Easley, a man who looked like, and frequently was mistaken for, appellant, increased the significance of the "Lotus Note" evidence, and was relevant to whether there was a substantial possibility that the newly discovered February 25 "Lotus Note" would have affected the outcome of appellant's trial.

Appellant's argument is unavailing. The circuit court here concluded, and we concur, that appellant did not meet his burden of showing the second requirement to prevail in a petition for writ of actual innocence, i.e., demonstrating that the "Lotus Notes" were not discoverable through the exercise of due diligence in the applicable time period. Accordingly, the circuit court properly denied the petition, without the need to address the third requirement, i.e., whether the "Lotus Note" evidence created a substantial or significant possibility that the result of the trial may have been different. The Cade

declaration, therefore, was not relevant to the dispositive issue in the case, and even if the court erred in excluding it, any error was harmless and does not entitle appellant to relief. *See Fields v. State*, 395 Md. 758, 763-64 (2006) ("We need not determine whether the testimony . . . was inadmissible . . . because even if it was hearsay and not admissible, any error was harmless beyond a reasonable doubt.").

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