Circuit Court for Baltimore City
Case No. 194167041

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 254

September Term, 2018

DEVAUGHN CHARLES JOHNSON

v.

STATE OF MARYLAND

Fader, C.J.,
Leahy,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: September 3, 2019

The Circuit Court for Baltimore City found that Devaughn Charles Johnson did not present sufficient evidence to support his petition for writ of actual innocence. We agree with the circuit court and affirm its denial of Johnson's petition.

BACKGROUND

In 1995, Johnson was convicted of first-degree murder and related offenses, and was sentenced to life in prison plus twenty years. Johnson appealed to this Court, and we affirmed his conviction in an unreported opinion. *Devaughn Johnson a/k/a Dan A. Pettway v. State*, No. 969, Sept. Term 1996 (Apr. 4, 1997).[1]

In 2016, Johnson filed a petition for writ of actual innocence. At the hearing on the petition, Johnson offered three pieces of evidence he claims are newly discovered: (1) police reports that were allegedly withheld from Johnson during pre-trial discovery; (2) testimony from Hezekiah Allen that Allen lied at Johnson's trial; and (3) a confession by William Taylor that Taylor, not Johnson, committed the murder. Based largely on findings that Johnson and his witnesses were not credible, the actual-innocence court denied Johnson's petition.

DISCUSSION

To prevail on a petition for writ of actual innocence, the petitioner must produce evidence that is newly discovered and shows that the petitioner is, in fact, innocent of the

[1] This unreported opinion is cited pursuant to the exceptions for law of the case, MD. RULE 1-104(b)(1), and for criminal actions involving the same defendant, MD. RULE 1-104(b)(2).

crime for which he was convicted. *Smith v. State*, 233 Md. App. 372, 410 (2017). In addition, the newly discovered evidence must be found credible by the actual-innocence court. *Jackson v. State*, 164 Md. App. 679, 714 (2005) ("It is essentially the function of the trial judge to evaluate and assess the newly discovered evidence and where such evidence consists of testimonial evidence from a witness allegedly discovered after the trial has been concluded, it is for the trial judge to determine the materiality and the credibility of such testimony.").

We will only reverse the decision to deny a petition for writ of actual innocence if the court abused its discretion. *Smith*, 233 Md. App. at 411. We defer to the actual-innocence judge on credibility determinations unless they are clearly erroneous, and an actual-innocence judge finding a witness not credible is itself a sufficient "basis to find that the … evidence did not justify a grant of a petition for writ of actual innocence." *Id*. at 418 n.32.

As each piece of evidence presented by Johnson is either not new or was determined to not be credible, we affirm the denial of Johnson's petition for writ of actual innocence.

I. POLICE REPORTS

At his actual-innocence hearing, Johnson offered police reports which include descriptions of other suspects, alternative theories of the case, and notes from witness interviews. Johnson argues that these police reports are new evidence because, he testified, he did not see them before his trial. The actual-innocence court found, however, that the police reports do not constitute new evidence, and we agree.

Newly discovered evidence is evidence that "was not known to petitioner at trial." *Smith*, 233 Md. App. at 410. The only support Johnson produced for his argument that the police reports were newly discovered evidence was his "self-serving testimony that he had never seen the reports"—testimony that the actual-innocence judge found not credible. We must give deference to this finding unless it is clearly erroneous, and we do not find it to be so. *Id*. at 418 n.32; *Jackson*, 164 Md. App. at 714. Thus, we conclude that the court did not abuse its discretion in finding that the police reports were not newly discovered evidence.[2]

II. HEZEKIAH ALLEN'S TESTIMONY

Johnson next offered the testimony of Hezekiah Allen. At Johnson's trial, Allen's testimony was internally inconsistent, but at one point, Allen did say that Johnson was the shooter. At the actual-innocence hearing, Allen testified that Johnson was *not* the shooter. Allen told the actual-innocence court that he lied at Johnson's trial when he identified Johnson as the shooter because, in Allen's words, "the police … kept threatening me about charging me with the murder … [and the State] promised to get rid of my [probation] violation if I tell."

The actual-innocence court did not believe Allen's testimony, finding that "based on viewing Allen's manner of testifying and demeanor that he was not credible." This

[2] As a result of our resolution of this issue, we need not reach Johnson's second issue on appeal—his allegation that the actual-innocence court erred in preventing him from impeaching the testimony of Detective Robert Patton, who testified about the way in which he ordinarily handled police reports. *See Smith*, 233 Md. App. at 418 n.32 (noting that an actual-innocence judge finding a witness not credible is itself a sufficient "basis to find that the … evidence did not justify a grant of a petition for writ of actual innocence").

credibility determination is squarely within the province of a trial court and appellate courts defer to the credibility determinations unless clearly erroneous. *Smith*, 233 Md. App. at 418 n.32; *Jackson*, 164 Md. App. at 714. We see nothing erroneous about the actual-innocence court finding Allen's testimony not credible and, therefore, affirm.

III. WILLIAM TAYLOR'S CONFESSION

Finally, Johnson presented the confession of William Taylor that Taylor, not Johnson, committed the murder. After hearing Taylor's testimony and confession, however, the actual-innocence judge concluded that Taylor was not a credible witness. The judge based this conclusion on several factors. *First*, Johnson "and Taylor both testified that their *only* interaction [leading to the confession] consisted of two extremely short meetings ('20, 30 seconds') in 2009 while [Johnson] was handing out meals to other inmates." *Second*, "Taylor's testimony at the hearing and his recollection of the events about the shooting over twenty-five years earlier was … nothing short of astonishing." *Third*, Taylor is "presently serving a sentence well in excess of life. Consequently, taking responsibility for a murder committed twenty-five years ago hardly exposes Taylor to the possibility of additional punishment." *Fourth*, "despite Taylor's testimony regarding his alleged concern about doing the 'right thing,' Taylor never contacted the police about his involvement in the homicide."

A confession from someone other than the defendant could obviously be new evidence related to actual innocence. Here, however, the actual-innocence court did not believe Taylor's testimony, writing that "having observed the demeanor and manner of [Taylor] testifying … the Court finds [his] testimony incredible." Again, this credibility

determination is squarely within the province of a trial court and appellate courts defer to these credibility determinations unless clearly erroneous. *Smith*, 233 Md. App. at 418 n.32; *Jackson*, 164 Md. App. at 714. We see nothing erroneous about the actual-innocence court finding Taylor's testimony not credible and, therefore, affirm.

IV. CONCLUSION

As each piece of evidence presented by Johnson is either not new or was found not credible, we hold that the court did not abuse its discretion by denying Johnson's petition for writ of actual innocence.[3]

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

[3] Johnson also argues that the actual-innocence court erred by failing to consider the cumulative effect of the evidence. We reject this claim as well.