Circuit Court for Howard County
Case No. 13-K-17-057659

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 474

September Term, 2019

STACEY ERIC WILBURN

v.

STATE OF MARYLAND

Berger,
Friedman,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: March 4, 2020

Stacey Eric Wilburn, Jr., appellant, pleaded guilty in the Circuit Court for Howard County to armed robbery, robbery, first-degree assault, attempted theft, and use of a handgun in the commission of a felony. This Court denied his application for leave to appeal. In December 2018, Mr. Wilburn filed a petition for writ of actual innocence, which the circuit court denied without a hearing. He raises four issues on appeal which we re-order and rephrase for clarity: (1) whether the court erred in denying his petition without a hearing; (2) whether the court erred in not allowing him an opportunity to amend his petition; (3) whether the motions judge erred in not recusing himself; and (4) whether the court erred in allowing the State to file an untimely response to his petition. For the reasons that follow, we shall affirm.

Mr. Wilburn first contends that the court erred in dismissing his petition for writ of actual innocence without a hearing. A court "may dismiss a petition [for writ of actual innocence] without a hearing if the court finds that the petition fails to assert grounds on which relief may be granted." Md. Code Ann., Crim. Proc. § 8-301(e)(2); *see also Douglas v. State*, 423 Md. 156, 185 (2011). To prevail on a petition for a writ of actual innocence, the petitioner has the burden of establishing 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 and that the new evidence creates a substantial or significant possibility that the result at his trial may have been different. *See Hawes v. State*, 216 Md. App. 105, 133 (2014). "Generally, the standard of review when appellate courts consider the legal sufficiency of a petition for writ of actual innocence is *de novo*. *Smallwood v. State*, 451 Md. 290, 308 (2017).

In his petition for writ of actual innocence, Mr. Wilburn contended that the newly discovered evidence in his case was his cell phone records, which showed the location of his phone on the dates of the charged offenses. However, the record indicates, and Mr. Wilburn concedes, that the cell phone records were provided to his defense counsel prior to his pleading guilty in his case. Thus, they do not constitute newly discovered evidence for the purposes of a petition for writ of actual innocence.

Mr. Wilburn nevertheless asserts that the cell phone records should be considered newly discovered evidence because he recently learned that prosecutors in Anne Arundel County and Howard County had conspired to keep that evidence suppressed for over six months. However, even if we assume that his claim of prosecutorial misconduct is true, it does not change the fact that he had the records in his possession before he pleaded guilty in this case. We also note that Mr. Wilburn claims to have uncovered this alleged conspiracy after reviewing the transcripts in his case. However, the transcripts that Mr. Wilburn references are from hearings that he attended. Thus, the alleged conspiracy could have been discovered with due diligence prior to entering his guilty plea as the transcripts merely recorded what had occurred during those hearings. *See Jackson v. State*, 164 Md. App. 679, 690 (2005) (explaining that the test for whether newly discovered evidence could have been found using due diligence is "whether the evidence was, in fact, discoverable and not whether the appellant or appellant's counsel was at fault in not discovering it"). Because Mr. Wilburn's petition failed to allege the existence of newly discovered evidence, the circuit court did not err in dismissing the petition without a hearing.

Mr. Wilburn also claims that the circuit court erred in not allowing him to amend his petition for writ of actual innocence pursuant to Maryland Rule 4-332(h). However, in his brief, Mr. Wilburn does not identify what amendment he is referring to or indicate why the court erred in disallowing it. Consequently, this issue is not properly before us. *See Diallo v. State*, 413 Md. 678, 692-93 (2010) (noting that arguments that are "not presented with particularity will not be considered on appeal" (citation omitted)).[1]

Next, Mr. Wilburn asserts that the judge who denied his petition should have recused himself because he was also the judge who accepted Mr. Wilburn's guilty plea. Specifically, Mr. Wilburn notes that he had filed an application for leave to appeal and a motion to correct illegal sentence in this case, alleging that the judge had "illegally brokered" his plea deal and that having the same judge "review [his petition] would be asking him to review and overturn his own ruling." However, this issue is not preserved for appellate review as Mr. Wilburn never filed a motion to recuse in the circuit court. *See Traverso v. State*, 83 Md. App. 389, 926 (1990) (finding that issue of whether the trial judge should have recused himself was not preserved where the appellant never asked for recusal). Moreover, even if preserved, there is nothing in the record before us that indicates the judge could not be fair and impartial in ruling on Mr. Wilburn's petition.

[1] It appears that Mr. Wilburn may be referring to either his March 25, 2019, reply to the State's response to his petition or to his April 9, 2019, pleading titled "Supplement New Evidence for Petition for Writ of Actual Innocence." In any event, even if Mr. Wilburn's petition had been amended to include the allegations contained in both of those pleadings, neither pleading identified any newly discovered evidence and dismissal would still have been required.

Finally, Mr. Wilburn contends that the court erred in allowing the State to file an untimely response to his petition. However, even if the State's response to the petition was untimely, Mr. Wilburn has not indicated how he was prejudiced as a result. *See Harris v. David S. Harris, P.A.*, 310 Md. 310, 319 (1987) ("[A]ppellate courts of this State will not reverse a lower court's judgment for harmless error: the complaining party must show *prejudice* as well as *error*." (italics in original)). Nor do we perceive any prejudice because, even if the court had stricken the State's response, it does not change the fact that Mr. Wilburn's petition did not identify any newly discovered evidence.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.