

Circuit Court for Baltimore City
Case No. 109036005

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 721

September Term, 2018

KEDAR ANDERSON

v.

STATE OF MARYLAND

Nazarian,
Wells,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: August 7, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2011, Kedar Anderson, appellant, was convicted of first-degree murder, conspiracy to commit first-degree murder, kidnapping, conspiracy to commit kidnapping, use of a handgun in a crime of violence, and participating in a criminal gang, following a jury trial in the Circuit Court for Baltimore City. This Court affirmed his convictions on direct appeal. *See Anderson v. State*, No. 2778, Sept. Term 2011 (filed October 8, 2013). In 2018, Mr. Anderson filed a petition for writ of actual innocence, which the trial court denied without a hearing. He now raises a single issue on appeal: whether the court erred in denying his petition without a hearing. Because the evidence that Mr. Anderson maintains was newly discovered could have been discovered in time to move for a new trial under Maryland Rule 4-331, we shall affirm.

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). “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).

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).

In his petition for writ of actual innocence, Mr. Anderson contended that the newly discovered evidence in his case was the fact that the Baltimore City Police Department Trial Board had found Detective Joshua Ellsworth, the lead detective in his case, guilty of conduct unbecoming of an officer and disrespecting a superior officer based on an incident that had occurred in an unrelated case prior to Mr. Anderson’s trial. He further asserted that, because Detective Ellsworth’s personnel file was exempt from the Maryland Public Information Act, he did not discover the existence of the disciplinary charges until this Court issued its opinion in *Baltimore Police Dept. v. Ellsworth*, 211 Md. App. 198 (2013).¹

As an initial matter, even if the evidence identified in Mr. Anderson’s petition would have been admissible to impeach Detective Ellsworth’s credibility, we are not persuaded that it would have created a substantial or significant possibility that the result at the trial might have been different. Therefore, the court properly denied Mr. Anderson’s petition for that reason alone.

Moreover, Maryland Rule 4-331(c)(1) provides that a motion for a new trial based on newly discovered evidence may be filed within one year after the later of the date the court imposed the sentence or the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment. Here, Mr. Anderson was sentenced in February 2012 and the mandate from this Court was received by the circuit

¹ The Court of Appeals subsequently affirmed the judgment of this Court in *Ellsworth v. Baltimore Police Dept.*, 438 Md. 69 (2014).

court on November 7, 2013. Therefore, he had until November 7, 2014, or one year from the date the court received the mandate, to file a motion for a new trial.

However, as Mr. Anderson acknowledged in his petition for writ of actual innocence, the disciplinary charges against Detective Ellsworth were made public on March 25, 2013, when we issued our opinion in *Ellsworth*. Consequently, the existence of those charges was discoverable with due diligence as of that date. *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 the deadline for Mr. Anderson to file a motion for a new trial under Rule 4-331 did not expire until more than one year later, that evidence could have been discovered in time to file such a motion and does not constitute newly discovered evidence for the purposes of a petition for writ of actual innocence. Consequently, the court did not err in denying his petition for writ of actual innocence without a hearing.

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