

Circuit Court for Baltimore City
Case Nos.:105217037,38,39,41

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 728

September Term, 2018

TYRONE GROSS

v.

STATE OF MARYLAND

Berger,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: June 10, 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.

Tyrone Gross appeals the decision of the Circuit Court for Baltimore City denying his petition for writ of actual innocence. Because we agree with the circuit court's ruling that Mr. Gross is not entitled to the writ, we affirm.

Mr. Gross and his co-defendant, Timothy Brockington, were charged with various offenses stemming from the late-night July 4, 2005 carjacking, kidnapping, and robbery of Antwan Boykin, an off-duty Baltimore City police officer. The incident began at a gas station where Mr. Boykin, dressed in plain clothes, had stopped to obtain fuel. While pumping gasoline, Mr. Boykin was approached by a man with a gun and ordered into the gunman's vehicle, where another man sat in the driver's seat. A third assailant then ordered Mr. Boykin's female passenger from Mr. Boykin's car and took possession of it. The other two assailants, with Mr. Boykin in the front passenger's seat, then left the gas station, with the gunman seated directly behind Mr. Boykin. Mr. Boykin's baseball cap was yanked over his eyes to impair his vision, and was later replaced with a bandanna.

The incident ended shortly after the assailants parked the car, exited the vehicle, and walked Mr. Boykin through an alley with the vehicle's driver in front of him and the gunman to his rear. When the assailants attempted to get Mr. Boykin to enter a vacant house from its rear yard, Mr. Boykin, fearing his execution, pulled his service weapon from his "bellyband holster" and shot the assailant in front of him, who screamed and ran into the house. Mr. Boykin then turned around and fired at the assailant behind him.

After emptying his gun in an exchange of gun fire with the assailant in the rear yard, Mr. Boykin fled the scene to seek help and returned shortly thereafter with uniformed police officers. Mr. Gross was found lying on the sidewalk in front of the vacant house

with a gunshot wound to his back side and Mr. Brockington was found lying in the rear yard of the vacant house with gunshot wounds. At trial, Mr. Boykin identified Mr. Gross as the assailant at the gas station holding the gun. Other evidence presented at trial, however, indicated that Mr. Brockington was the assailant with the gun – including the undisputed fact that Mr. Brockington was the assailant found in the rear yard. The jury convicted both defendants of robbery, conspiracy to kidnap, kidnapping, and carjacking and acquitted both of various firearm offenses. Mr. Gross appealed, and this Court affirmed the judgments. *Gross v. State*, No. 847, September Term, 2012 (filed October 18, 2013).

The shooting incident left Mr. Brockington paralyzed from the waist down. He later sued Mr. Boykin and the Baltimore City Police Department in the United States District Court for the District of Maryland alleging that Mr. Boykin had employed excessive force in the encounter. In a January 30, 2014 deposition taken in that case, Mr. Boykin admitted that he mistakenly identified Mr. Gross at trial as the assailant with the gun. (There was no evidence that both assailants had guns.)

In September 2016, after discovering Mr. Boykin’s deposition, Mr. Gross filed a petition for writ of actual innocence in the circuit court in which he asserted that this “newly discovered evidence” created a substantial or significant possibility that the result of his trial may have been different. Specifically, he claimed that his conviction “was based solely upon Boykin’s misidentification at trial” and noted that he had “consistently maintained his innocence.”

The circuit court held a hearing on the petition and denied it. In a thorough and well-reasoned written ruling and order, the court concluded that (1) Mr. Boykin’s deposition was not “newly discovered” because it could have been discovered in time to move for a new trial; (2) the deposition did not create a substantial or significant possibility of a different result at trial; and (3) the deposition did not support Mr. Gross’s claim of innocence.

After reviewing the record before us, including the transcripts from the 2007 trial, for the reasons set forth in its ruling and order, we agree with the circuit court that Mr. Boykin’s subsequent admission of his mistaken identity of Mr. Gross as the assailant that held the gun does not create a substantial or significant possibility that the trial would have had a different outcome. As the circuit court noted, whether Mr. Gross or Mr. Brockington held the gun was an issue raised at trial and “[t]he inconsistency between Boykin’s trial testimony that [Mr. Gross] had the gun, and the remainder of the State’s evidence was exploited by defense counsel to attack Boykin’s credibility during cross-examination” and during the defense’s closing arguments. Moreover, both defendants were acquitted of all firearm offenses.

We also agree with the circuit court that the deposition does not support Mr. Gross’s claim of actual innocence. The circuit court correctly concluded that, “the mere fact that [Mr. Gross’s] co-defendant, rather than [Mr. Gross], had a firearm while both [men] acted in concert to carjack a vehicle, and rob and kidnap the victim does not remotely

speak to [Mr. Gross’s] innocence” as the “law would make no distinction between an accomplice and the principal offender in this case.”¹

Accordingly, we hold that the circuit court did not err in denying Mr. Gross’s petition for writ of actual innocence.

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

¹ Given our conclusion, we need not address whether the deposition was “newly discovered evidence.”