Circuit Court for Prince George's County
Case No: CT891288B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 748

September Term, 2020

WAYNE ARTHUR JORDAN

v.

STATE OF MARYLAND

Wells,
Gould,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: July 9, 2021

In 1989, a jury in the Circuit Court for Prince George's County found Wayne Arthur Jordan, appellant, guilty of felony murder, armed robbery, robbery, use of a handgun in the commission of a felony, and use of a handgun in the commission of a crime of violence. The court sentenced him to life imprisonment for felony murder, a consecutively run term of 20 years (all but seven years suspended) for armed robbery, and to 10 years for the use of a handgun in the commission of a felony, to run concurrently with the life sentence. On direct appeal, this Court held that Mr. Jordan's sentence for armed robbery should have merged into his sentence for felony murder, and otherwise affirmed the judgment. *Jordan v. State*, No. 68, September Term, 1990 (filed on November 21, 1990).

Thirty years later, Mr. Jordan filed a petition for writ of actual innocence, which was based on his discovery of an "arrest report" which contained a mark ("XX") on the form report next to "HBD" in the box related to "Defendant's Condition." "HBD" apparently is short for "Had Been Drinking" and appeared in a continuum of choices: "□ SOBER □ HBD □ INFL □ INTOX □ UNCOOP □ NORMAL." Mr. Jordan maintained that the arrest report was newly discovered evidence and that it supported his claim that his confession to Corporal Thomas Jensen of the Prince George's County Police Department had been coerced because Cpl. Jensen had testified at a suppression hearing and at trial that he (Jordan) had not been drinking when he gave the inculpatory statement. The circuit court denied the petition, without a hearing, after determining that Mr. Jordan was not entitled to relief.

For the reasons to be discussed, we shall affirm the judgment.

DISCUSSION

Relevant Background

On August 30, 1985, Donald Mitchell was shot and killed in Prince George's County. On or about April 28, 1989, Mr. Jordan was arrested, pursuant to a warrant, and charged with first-degree murder and related offenses. Mr. Jordan was arrested in Montgomery County sometime after midnight and initially "presented and processed" at a police station in Montgomery County. He was then transported to a Prince George's County police station (Criminal Investigations Division) and arrived there about 3:35AM. Following an interview with Cpl. Jensen, which began about 4:00AM, Mr. Jordan penned an inculpatory statement admitting that he shot the victim.[1] He was presented to the Court Commissioner at 5:20AM.

Mr. Jordan later moved to suppress his statement, claiming that his confession was involuntary and asserting that he had not been "promptly presented" to the Court Commissioner. At a suppression hearing held on November 22, 1989, Cpl. Jensen testified that, prior to Mr. Jordan making the inculpatory statement, he had informed him of the charges against him, advised him of his *Miranda* rights, and told him that his sister had also been arrested and charged in the case. When testifying about the *Miranda* rights advisement, the State elicited the following:

[1] The written statement itself is not in the record before us. At trial, the statement was admitted into evidence. When asked to read the statement to the jury, witness Cpl. Jensen stated: "'On August 30, 1985, I, Wayne Jordan, did shoot and kill Mr. Mitchell. I shot him various times in the abdomen. My mother and sister were in no way involved. To my knowledge it was a robbery. I was subsequently back and forth to Baltimore. Most likely, I was at that time in Baltimore, Maryland.'"

[PROSECUTOR]: Now, while you were going over this waiver of rights form, how did Mr. Jordan appear to you at that time physically?

JENSEN: Physically, nervous.

Cpl. Jensen testified that after Mr. Jordan had provided the written inculpatory statement, he indicated that he "wasn't answering any more questions." Cpl. Jensen testified that he then "went about my procedure as far as finishing up the paperwork, and arranging for [Mr. Jordan] to be processed."

On cross-examination, defense counsel elicited the following:

[DEFENSE COUNSEL]: Did the defendant appear to have been drinking to you, when you were close to him?

JENSEN: He didn't appear to me.

[DEFENSE COUNSEL]: You didn't smell alcohol, or he didn't act in anyway as though he had been drinking alcoholic beverages?

JENSEN: No, sir.

***

[DEFENSE COUNSEL]: Your object [sic] in having him brought to C.I.D. [Criminal Investigations Division] was to see if you could obtain a statement from him; is that correct?

JENSEN: And process him, yes.

[DEFENSE COUNSEL]: But you attempted to obtain the statement from him before you began any of the standard processing?

JENSEN: Yes.

[DEFENSE COUNSEL]: By processing, we mean fingerprinting, photographing, and *filling out an arrest sheet of paper*?

JENSEN: Yes, sir.

***

> [DEFENSE COUNSEL]: The information concerning the defendant that you have on the top of this form 2998,[2] or background information about the defendant, did you obtain that information from him, or from some other source.
>
> JENSEN: From him.

(Emphasis added.)

Mr. Jordan testified at the suppression hearing about the night of his arrest, saying that he had "just left the club" and called his girlfriend about 12:20AM to say he was coming to her house. He testified that he was "just driving fast" and when he arrived at his girlfriend's apartment complex he was arrested; the time was "about ten minutes of 1:00 or quarter to 1:00." He testified that he was taken to the police precinct on Sligo Avenue in Montgomery County. When asked what happened there, Mr. Jordan stated: "I was processed. The guy – the arresting officer in Montgomery County asked me how many beers did I have to drink. I said a couple beers, and everything. And I sat there while I got processed." He was then transported to Prince George's County.

In arguing for the suppression of Mr. Jordan's inculpatory statement, among other things, defense counsel stated: "All the police had to do in this case, to secure whether or not this man was aware of where he stood, would have been to take him over there, fingerprint him, photograph him, *fill out their arrest sheet*, and take him to a Commissioner. They didn't do it, and they didn't do it on purpose." (Emphasis added.)

[2] Form 2998 appears to have been the form used when a victim, witness, or suspect makes a written statement. It is not the arrest form at issue in this case. Rather, it appears to be the form used by Mr. Jordan when penning the inculpatory statement. A copy of the completed form is not in the record before us.

The suppression court denied the motion. On direct appeal, this Court affirmed the judgment. *Jordan*, *supra*, No. 68, September Term, 1990, slip op. at 3-6.

At trial, Cpl. Jensen testified that his first contact with Mr. Jordan was at the police station at approximately 4:00AM. On direct examination, when discussing the *Miranda* rights advisement, the State elicited the following testimony:

> [PROSECUTOR]: Did [Mr. Jordan] seem to understand you when you were going through those rights?
>
> JENSEN: Yes.
>
> [PROSECUTOR]: Did he appear to be under the influence of any drugs or alcohol at that time?
>
> JENSEN: No.
>
> On cross-examination, defense counsel elicited the following:
>
> [DEFENSE COUNSEL]: And in addition to interrogating him, or interviewing him, it would have been necessary to also process him by way of taking pictures and fingerprints, *and filling out an arrest sheet*, and that sort of thing.
>
> JENSEN: Yes.
>
> ***
>
> [DEFENSE COUNSEL]: On the night when you interrogated Wayne Jordan, did he appear to have been drinking any alcoholic beverages, as far as you could tell?
>
> JENSEN: He didn't appear to me that he had been drinking.

(Emphasis added.)

Petition for Writ of Actual Innocence

In his petition for writ of actual innocence, filed nearly 30 years after his conviction, the self-represented Mr. Jordan sought to challenge the voluntariness of his inculpatory statement based on the suppression and trial testimony of Cpl. Jensen cited above, which he claimed was contradicted by the "newly discovered" arrest report Cpl. Jensen had completed. As noted, the arrest report included a mark next to the box "HBD" on the form, signifying the "Defendant's Condition" as "Had Been Drinking." Mr. Jordan claimed that "the arrest report speaks to the veracity of Jensen's testimony before the fact-finders, as well as his credibility." Because of the alleged discrepancy between the arrest report and his sworn testimony at the suppression hearing and trial, Mr. Jordan maintained that "none of [Cpl. Jensen's] testimony" regarding the voluntariness of the inculpatory statement "can be trusted."[3]

Mr. Jordan claimed that the State had "deliberately" withheld the arrest report and that he had obtained it in May 2018 when the "custodian of Prince George's police . . . inadvertently forwarded the report" to him.

[3] At the suppression hearing, Mr. Jordan had claimed that Cpl. Jensen did not advise him of his rights, denied his request for a lawyer, and refused to allow him to make a telephone call. He claimed that he made the inculpatory statement only after Cpl. Jensen had grabbed him and threatened to arrest his mother. Cpl. Jensen denied those allegations and the suppression court credited his testimony. The suppression court found Mr. Jordan's testimony "doesn't appear to be truthful[]" and that he gave "the impression of someone that is just trying to get out of this very serious crime that he's been charged with."

The circuit court concluded that Mr. Jordan "failed to meet his burden of proving that the arrest report qualifies as newly discovered evidence sufficient to warrant relief in this case." Accordingly, the court denied the petition, without a hearing.[4]

DISCUSSION

Certain convicted persons may file a petition for a writ of actual innocence "based on newly discovered evidence." *See* Md. Code Ann., Crim. Proc. § 8-301; Md. Rule 4-332. "Actual innocence" means that "the defendant did not commit the crime or offense for which he or she was convicted." *Smallwood v. State*, 451 Md. 290, 313 (2017).

In pertinent part, the statute provides:

> (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) if the conviction resulted from a trial, 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.
>
> ***

[4] In 2005, Mr. Jordan had filed a motion to reopen his post-conviction proceeding based on an allegation that the State had committed a *Brady* violation by failing to provide the defense the arrest report completed by the Montgomery County police following his arrest which indicated that when arrested he "had been drinking." (It does not appear that he made the same *Brady* violation claim with respect to the Prince George's County arrest report that is the subject of this appeal.) The circuit court denied the motion to reopen. In ruling on the petition for writ of actual innocence, the subject of the present appeal, the circuit court seems to have confused the two arrest reports.

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

Crim. Proc. § 8-301.

"Thus, to prevail on a petition for writ of innocence, the petitioner must produce evidence that is newly discovered, i.e., evidence that was not known to petitioner at trial." *Smith v. State*, 233 Md. App. 372, 410 (2017). Moreover, "[t]o qualify as 'newly discovered,' evidence must not have been discovered, or been discoverable by the exercise of due diligence," in time to move for a new trial. *Argyrou v. State*, 349 Md. 587, 600-01 (1998)(footnote omitted); *see also* Rule 4-332(d)(6). As this Court explained in *Smith*, 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 v. State*, 95 Md. App. 420, 432 (1993)).

233 Md. App. at 416.

A court may dismiss a petition for actual innocence without a hearing "if the court concludes that the allegations, if proven, could not entitle a petitioner to relief." *State v. Hunt*, 443 Md. 238, 252 (2015) (quotation marks and citation omitted). *See also* Crim. Proc. § 8-301(e)(2).

"Generally, the standard of review when appellate courts consider the legal sufficiency of a petition for writ of actual innocence is *de novo.*" *Smallwood*, 451 Md. at 308. "Courts reviewing actions taken by a circuit court after a hearing on a petition for writ of actual innocence limit their review, however, to whether the trial court abused its

discretion." *Id.* at 308-09. *See also Jackson v. State*, 164 Md. App. 679, 712-13 (2005). Here, because the court denied Mr. Jordan's petition without a hearing based on its conclusion that the petition was legally insufficient, we utilize the *de novo* standard of review.

We agree with the circuit court that Mr. Jordan failed to establish that he was entitled to relief. First, in an exercise of due diligence the arrest report certainly could have been discovered at or before trial and certainly in time to move for a new trial. At both the suppression hearing and at trial, in its cross-examination of Cpl. Jensen defense counsel mentioned that the completion of an "arrest sheet" was standard when "processing" an arrestee. In other words, Mr. Jordan was aware of the fact that an arrest report would have been generated and, therefore, could have obtained a copy of it.

Moreover, we are not persuaded that the arrest report discredits Cpl. Jensen's testimony. Mr. Jordan, who was arrested pursuant to an arrest warrant, testified at the suppression hearing that on the night he was arrested he had left a "club" and called his girlfriend about 12:20AM saying he was coming to pick her up. He testified that he drove himself to her residence and that he was arrested outside immediately upon his arrival at that location—at "about ten minutes of 1:00 or quarter to 1:00." While being processed at a Montgomery County police station, Mr. Jordan testified that he was asked "how many beers" he had consumed, and his answer was "a couple beers[.]" Montgomery County then transported him to Prince George's County's police station where he gave the inculpatory statement at approximately 4:00AM. The fact that Cpl. Jensen checked the box "HBD" on the arrest report he prepared, but later testified that Mr. Jordan did not "act as though he

had been drinking alcoholic beverages" or smelled of alcohol is not necessarily contradictory. The "HBD" designation, as the State points out, could have been based on Mr. Jordan's own self-reporting that he had consumed a few beers at the "club" hours earlier. And, notably, the box "INTOX" was left unmarked.

Finally, we are not persuaded that the arrest report speaks to Mr. Jordan's actual innocence or that it creates a substantial or significant possibility that the result of his trial may have been different. At trial, Mr. Jordan's sister testified that she was present when the crime was committed and that Mr. Jordan had shot the victim. The victim's brother, who was robbed by the gunman during the incident, testified that the victim and Mr. Jordan's sister were both present during the robbery and that he heard shots fired moments after he had fled the scene. The arrest report in no manner undermines the testimony of those two witnesses.

Accordingly, we hold that the circuit court did not err in denying Mr. Jordan's request for a writ of actual innocence.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.