

Circuit Court for Baltimore County
Case No: 03-K-06-000303

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 796

September Term, 2020

KEVIN STEWART

v.

STATE OF MARYLAND

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

JJ.

PER CURIAM

Filed: July 12, 2021

*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 2006, a jury in the Circuit Court for Baltimore County convicted Kevin Stewart, appellant, of robbery with a dangerous weapon, felony theft, 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 Mr. Stewart to a total term of 40 years' imprisonment. On direct appeal, this Court affirmed the judgments. *Stewart v. State*, No. 2097, September Term, 2006 (filed August 8, 2008).

The convictions stemmed from an armed robbery of a McDonald's restaurant by two men. In 2020, Mr. Stewart, representing himself, filed a petition for writ of actual innocence based on the "newly discovered evidence" that a video recording of the robbery within the McDonald's had been "destroyed." The circuit court concluded that Mr. Stewart was not entitled to relief because he had "failed to present any newly discovered evidence." Accordingly, the court dismissed the petition, without a hearing. For the reasons to be discussed, we shall affirm the judgment.

BACKGROUND

On November 29, 2005 at approximately 2:57PM the Baltimore County police responded to a call involving an armed robbery at the McDonald's on Security Boulevard. The police were informed that two men, one wearing a black hooded sweatshirt ("hoodie") and the other wearing a gold hoodie, aviator sunglasses, and holding a silver colored revolver, entered the establishment and ushered the seven McDonald's employees and its sole customer at the time into the restaurant's walk-in freezer. The men left the premises with approximately \$1,200, which was taken from the safe and the cash registers and

placed into a Dunkin Donuts box. The initial officers to arrive secured the scene and took statements from the witnesses.

At approximately 4:00PM, Detective William Vaselaros, from the Baltimore County Police Department's robbery unit, arrived on the scene. Det. Vaselaros testified that the McDonald's was "equipped with a digital surveillance system" and that he was able to view video footage of "the robbery as it occurred." He testified that the video depicted two men, one "wearing a gold colored hooded sweatshirt type jacket, and the other was wearing a black hooded style jacket." The suspect wearing the "gold jacket" was wearing glasses. The testimony continued:

[PROSECUTOR]: Now, did the video actually show the robbery or just show them inside the restaurant?

DET. VASELAROS: It showed them inside. It showed them separate somewhat. One gathered employees. Took them to the back area. One confronted what we learned to be the manager and dealt specifically with that person.

[PROSECUTOR]: Okay. Now, I take it from the video that you weren't able to see their faces?

DET. VASELAROS: No.

[PROSECUTOR]: Okay. So you wouldn't be able to identify the people from the video?

DET. VASELAROS: No.

[PROSECUTOR]: Now, with that information, did you attempt to get a CD of the video?

DET. VASELAROS: Yes. The owner responded and informed us that he could burn a copy of the footage onto a disk which we would be able to take.

[PROSECUTOR]: And did that, in fact, happen?

DET. VASELAROS: At the time we believed, yes.

[PROSECUTOR]: Was it brought over to the State's Attorney's Office or packaged to be used for trial?

DET. VASELAROS: It was given to Detective Ford and Martin.

[PROSECUTOR]: Okay. Do you know what happened to the video?

DET. VASELAROS: No, I don't.

[PROSECUTOR]: Do you know if there was any trouble with being able to open the video? Open the CD?

DET. VASELAROS: No, I don't.

[PROSECUTOR]: So you weren't involved. It was Detective Martin and Ford who took over at that point.

DET. VASELAROS: Yes.

After he completed his investigation at the McDonald's, Detective Vaselaros testified that he walked to the AMF Bowling Alley located near the McDonald's and watched surveillance video that that business had depicting exterior shots of both the bowling alley and the McDonald's at the time of the robbery. The State then played the video for the jury, which Det. Vaselaros narrated. Among other things, the video captured a burgundy Nissan Maxima—later identified as a vehicle belonging to Mr. Stewart—come onto the bowling alley's parking lot. Two men, one wearing a gold hooded jacket and the other wearing a dark hooded jacket, exited the vehicle and walked toward the McDonald's. About 40 minutes later, the video captures the same two men returning to the vehicle and leaving the area. According to Det. Vaselaros, the men depicted on the McDonald's video were wearing the same clothes as the men depicted in the AMF bowling alley's video.

A couple of hours after the robbery, Mr. Stewart was stopped driving a Nissan Maxima. A Dunkin Donuts box, a gold-colored hoodie, and aviator style sunglasses were recovered from the vehicle and \$431 in cash (171 one-dollar bills, 44 five-dollar bills, and 14 ten-dollar bills) from Mr. Stewart's person. In an interview with the police, in which he changed his story several times, Mr. Stewart admitted that the vehicle was his and ultimately told the police that he had driven to the AMF bowling alley parking lot that day. He asserted, however, that he had remained in the car while a hack he had picked up got out of the vehicle for a short time. He claimed that the hack had the Dunkin Donuts box with him when he re-entered the vehicle. He admitted that the gold hoodie recovered from his vehicle belonged to him.

At trial, the McDonald's customer present when the robbery occurred testified about the incident and identified Mr. Stewart as the man wearing the gold hoodie and wielding a gun. A McDonald's employee also testified that one assailant wore a gold hoodie and the other a black hoodie, but she could not identify either one.

The defense's case was that Mr. Stewart was not in the area at the time of the robbery and that he was not the assailant wearing the gold hoodie. He testified that he had rented his vehicle to Reginald Fenwick that day in exchange for money to support a drug habit. He denied that the gold hoodie recovered from the car was his, and he asserted that it must have belonged to Mr. Fenwick or "Major," a man who had been with Mr. Fenwick. He denied that he had told the police that he had been at the AMF bowling alley parking lot the day of the robbery.

In closing argument, defense counsel brought up the “missing” McDonald’s video, saying:

I want to know what happened to that video. It’s kind of left hanging, the video from McDonald’s. The owner burned the video and it didn’t come out. Is there a hard drive? Could you go back and reclaim it from the hard drive? Where is it stored? Is it a digital? Why don’t we have that video here? That seems to be a great, big glitch without an explanation.

There was a video of the robbery. We could either see the person talking to [the eye-witness customer] or not. We couldn’t maybe identify his face, but we could see [if] he was fat, thin, medium, whatever. We might be able to see a limp or no limp. We might be able to see really significant things, but it’s gone, and there’s no rational explanation for why it’s gone.

Do I think that somebody hid it in a police station and destroyed it? No, but it’s gone, and no one has told us why, and what’s more, no one went back. That’s what I find disturbing. I would have liked to hear somebody say, we found out that the CD that was burned was bad, and we went back and asked – I can’t remember his name – Mr. So and So that owns the McDonald’s – we asked him can he recover the images again?^[1]

Did that happen? I don’t think so because nobody said so. That’s important. We’re relying on Detective Vaselaros saying he couldn’t identify the faces. Okay? He couldn’t identify the faces. What about all of these other very, very important things? Body size? Movement? Who they’re talking to? They’re gone. They weren’t presented to us.

As noted, the jury found Mr. Stewart guilty of robbery with a dangerous weapon, felony theft, use of a handgun in the commission of a felony, and use of a handgun in the commission of a crime of violence. In a timely filed motion for a new trial, defense counsel

¹ Dwight Johnson, the franchise owner of the McDonald’s that was robbed, testified at trial. He was not asked by the State or the defense about the video surveillance system or the footage on the day of the robbery. Det. Vaselaros had testified that he believed that the store owner had given a CD of the footage to Detectives Ford and Martin. Although both Detectives Ford and Martin testified at trial, neither were questioned by the State or the defense about the CD.

asserted, in part, that Mr. Stewart “was denied a fair trial in that the State was unable to produce a known videotape of the robbery of McDonald’s on November 29, 2005 which was *somehow lost or destroyed*.” (Emphasis added.) The motion was denied.

Petition for Writ of Actual Innocence

In his petition for writ of actual innocence, Mr. Stewart relied upon responses to his Maryland Public Information Act (“MPIA”) requests to the Baltimore County Police Department seeking the McDonald’s video footage of the robbery. Baltimore County Assistant County Attorney Vickie Wash responded to the MPIA request. The first response, dated May 27, 2020, stated in pertinent part:

Apparently, there were two surveillance videos recovered as evidence. From what I can gather from the records that were provided, there is one video that depicts activity from inside the McDonalds and another video that depicts activity from the nearby AMF bowling alley.

Further, BCOPD [Baltimore County Police Department] has advised both Ms. Stewart [Mr. Stewart’s daughter] and myself that the video that depicts activity inside the McDonalds has been destroyed. I cannot confirm this or deny it.

The second response from Ms. Wash, dated July 2, 2020, stated in pertinent part:

Despite a diligent search, the Baltimore County Police Department was unable to locate the McDonalds video. Subsequently, Ms. Stewart requested a letter stating that the McDonalds video had been destroyed by the Baltimore County Police Department.

Despite the diligent search for the McDonalds video, the Baltimore County Police Department was unable to locate the McDonald’s video. Further, my review of the records did not reveal a record that indicates that the McDonalds video was destroyed. Accordingly, I am unable to provide a responsive record or a letter that confirms that the McDonald’s video was destroyed per your request.

Based on the MPIA responses, Mr. Stewart maintained that “[i]t has now been ‘discovered’ that the surveillance video that depicts activity inside the McDonald’s has been ‘destroyed’ without ever being viewed and used in ‘Court’ to convict” him.

The circuit court concluded that “[a]lleging the destruction of evidence without any evidence to support this assertion is not new evidence.” Because he had “failed to present any newly discovered evidence,” the court dismissed the petition without a hearing.

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.

(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 Mr. Stewart’s petition was dismissed without a hearing based on the court’s conclusion that the petition was legally insufficient, we utilize the *de novo* standard of review.

Mr. Stewart maintains that (1) the circuit court erred in dismissing his petition without a hearing; (2) he had no knowledge that the “videotape surveillance was destroyed” until he received the MPIA response in May 2020; and (3) had the videotape been available at trial, it could have been used to impeach Det. Vaseloras’s testimony regarding the “clothing” of the assailants.

The State responds that the circuit court did not err in dismissing the actual innocence petition because the allegation that the video footage was destroyed “was not ‘new’ because [defense counsel] mentioned the possibility at trial and raised it in a 2006 motion for a new trial.” The State, therefore, maintains that Mr. Stewart is not entitled to actual innocence relief under the statute. Moreover, the State asserts that the “absence of evidence is not ‘evidence’ within the contemplation of a petition for writ of actual innocence.” And even if the jurors had been informed that the video was “definitively ‘destroyed,’ rather than merely lost,” the State maintains that “there is no indication that this would have created a substantial or significant possibility that the result of the trial may have been different.” The State points out that the jury viewed the video footage from the AMF bowling alley showing the suspects before and after the robbery and that an eyewitness to the crime positively identified Mr. Stewart as the assailant wearing the gold hoodie. Finally, the State points out that the defense had the opportunity at trial to cross-examine Det. Vaselaras about the missing videotape.

We agree with the State. The circuit court did not err in denying Mr. Stewart’s petition without a hearing because it properly concluded that Mr. Stewart had failed to produce any “newly discovered evidence” within the meaning of the actual innocence statute.

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