

Circuit Court for Baltimore City
Case Nos. 115195018-19

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 810

September Term, 2021

DAVON TEMPLE

v.

STATE OF MARYLAND

Arthur,
Tang,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: August 4, 2022

*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.

Davon Temple, appellant, contends that the Circuit Court for Baltimore City abused its discretion in denying his motion to correct illegal sentence and petition for writ of actual innocence. For the reasons that follow, we shall affirm the judgments of the circuit court.

We recount some of the pertinent facts from our previous opinion in Mr. Temple’s case:

At 11:51 p.m. on the evening of May 22, [2015,] Baltimore City Officer Christopher Smith responded to the 1900 block of Wilhelm Street following the report of a shooting. He found James McCoy lying on the sidewalk outside 1912 Wilhelm Street and Justin Knox inside that house. McCoy had been shot in the back of his head, was unresponsive, and despite some effort on the scene to save him, died from the wound. Knox also had been shot, in the face. He was taken to the Shock Trauma unit and recovered from his wound but said that he did not see the shooter. Approximately four minutes after Officer Smith’s arrival, Officer Tucker Fries, who also was responding to that shooting, was flagged down at the corner of Pratt and Payson Street – about two blocks away – where an individual, later identified as [Mr. Temple], was lying on the ground bleeding from the neck. There was no immediate association between the two events.

Two days later, in response to a tip from someone who identified himself only as “Marvin,” the police searched the back yard of 1930 McHenry Street and recovered a handgun under a dog crate. Marvin told the police that the gun was related to the shooting on Wilhelm Street and that he had placed the crate over the gun. Six casings from fired bullets were removed from the gun. No fingerprints were recovered from the gun, but a single-source DNA profile obtained from a swab of blood on the gun matched [Mr. Temple’s] DNA. The State’s expert in firearm and tool mark identification testified that the bullet recovered by the Medical Examiner from McCoy’s head was fired from that gun. That focused attention on [Mr. Temple] as the murderer. The State’s theory was that the wound to [Mr. Temple’s] neck was essentially self-inflicted – caused by one of the bullets he fired at McCoy ricocheting and hitting him in the neck.

Temple v. State, No. 2730, September Term, 2016 (filed January 5, 2018), slip op. at 1-2.

Following trial, Mr. Temple was convicted by a jury of second degree murder, use of a firearm in the commission of a crime of violence, and two counts of wearing, carrying,

or transporting a deadly weapon. *Id.* at 1. The court imposed a term of imprisonment of thirty years for the second degree murder, a consecutive term of imprisonment of twenty years for the use of a firearm in the commission of a crime of violence, and a concurrent term of imprisonment of three years for one of the counts of wearing, carrying, or transporting a deadly weapon. The court merged the remaining count of wearing, carrying, or transporting a deadly weapon.

On April 30, 2021, Mr. Temple filed the motion to correct illegal sentence.¹ On May 25, 2021, Mr. Temple filed the petition for writ of actual innocence. Mr. Temple attached to the petition documentation indicating that on August 30, 2018, a bullet fragment was removed from the left side of his neck, and contended that “a test of the bullet . . . will produce exculpatory evidence, and prove that the bullet . . . was not fired out of the murder weapon.” On June 23, 2021, the court denied the motion to correct illegal sentence. On July 9, 2021, the court denied the petition for writ of actual innocence on the ground that Mr. Temple “was in possession of the bullet as of August 2018[,] which was within the time to file a motion for new trial under Rule 4-331(c),”² and hence, “the bullet is not newly discovered evidence under” Md. Code (2001, 2018 Repl. Vol., 2020 Supp.), § 8-301(a)(2)

¹The motion is not in the record.

²Rule 4-331(c) states: “The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule . . . on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment[.]”

of the Criminal Procedure Article (“CP”).³ On August 4, 2021, Mr. Temple filed a notice in which he specifically appealed from the denial of the motion to correct illegal sentence.

Mr. Temple first contends that the court abused its discretion in denying the petition for writ of actual innocence, because “the bullet was never tested and still in [Mr. Temple’s] neck during his trial.” But, Mr. Temple made clear in his notice of appeal that he appealed from only the denial of his motion to correct illegal sentence, not the denial of the petition for writ of actual innocence. Even if the denial of the petition for writ of actual innocence was before us, we note that Mr. Temple did not state in the petition that the convictions sought to be vacated are based on offenses that he did not commit, in violation of Rule 4-332(d)(9) (a petition for writ of actual innocence “shall state . . . that the conviction sought to be vacated is based on an offense that the petitioner did not commit”). *See also State v. Ebb*, 452 Md. 634, 655 (2017) (a petition for writ of actual innocence “must allege which convictions [the petitioner] is ‘actually innocent’ of, meaning which offenses he alleges he ‘did not commit’” (citation omitted)); *Smallwood v. State*, 451 Md. 290, 320 (2017) (“[o]nly defendants who can allege that they are ‘actually innocent,’ meaning they did not

³CP § 8-301(a) states:

Grounds. – 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:

* * *

(2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.

commit the crimes for which they are convicted, may bring a petition for” writ of actual innocence); *State v. Hunt & Hardy*, 443 Md. 238, 255 (2015) (a petition for writ of actual innocence “must assert that the contested conviction is based on an offense that the petitioner did not commit” (internal citation and quotations omitted)). Hence, the court did not abuse its discretion in denying the petition for writ of actual innocence.

Mr. Temple next contends that the court abused its discretion in denying the motion to correct illegal sentence, because the sentences for second degree murder and use of a firearm in the commission of a crime of violence “should have merged as a matter of law.” We note that Mr. Temple was required to file a notice of appeal from the denial of the motion “within 30 days after entry of the judgment,” Rule 8-202(a), but failed to do so. In any event, the sentences are not illegal. We have noted that “the crime of using a handgun in the commission of a crime of violence contains an element – the use of a handgun – which is not a required element of . . . murder,” and the offense of murder “require[s] obvious elements not required for [a] handgun conviction[.]” *Godwin v. State*, 41 Md. App. 233, 235 (1979). A conviction of use of a handgun in the commission of a crime of violence is not a “lesser included offense[] for purposes of mandatory merger” with a conviction of second degree murder, *id.* (citations omitted), and hence, the court did not abuse its discretion in denying the motion to correct illegal sentence.

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