Circuit Court for Baltimore City
Case No.: 100144020

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 953

September Term, 2018

CHALMERS EFRAM SMITH

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Salmon, James P.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Salmon, J.

Filed: June 3, 2019

On January 15, 2000, Darryl Butler, Sr. ("Butler") was murdered. Appellant, Chalmers Efram Smith ("Smith"), was arrested for that murder approximately four and one-half months later. On February 23, 2001, after a trial by jury in the Circuit Court for Baltimore City, Smith was convicted of first degree pre-meditated murder of Butler, use of a handgun in the commission of a violent crime or felony, and wearing, carrying, or transporting a handgun. The trial judge sentenced Smith to life imprisonment for the first degree murder conviction and 20 years for the handgun crime, both sentences to be served consecutively. Smith filed a timely appeal from his convictions, but this Court, in an unreported decision filed on January 23, 2002, affirmed his convictions. Smith did not ask the Court of Appeals to issue a writ of certiorari. Thereafter, in an effort to overturn his convictions, Smith filed several petitions for post-conviction relief and a motion for new trial. Ultimately, however, these filings proved unsuccessful.

Over twelve years after his convictions were affirmed by this Court, Smith, on November 12, 2015, filed a petition for writ of actual innocence in the Circuit Court for Baltimore City. In his petition, Smith alleged that he had demanded from the Baltimore City Police Department that it produce certain documents pursuant to the Maryland Public Information Act (MPIA). He asserted that by use of the MPIA he had uncovered three witness statements that had not been previously turned over to him prior to his trial. One of the witness statements that he obtained through the MPIA was from one Jamie Sipio ("Sipio") and a second statement was from Derrick McDonald ("McDonald"). Those two witness statements, if authentic, were from eye witnesses who, purportedly, told the police

that someone other than Smith killed Butler. In response to Smith's petition, the State contended that the statements by Sipio and McDonald were fabricated by Smith inasmuch as they did not come from the files of the Baltimore City Police Department. In other words, the State contended that the reason the statements were not turned over to Smith in discovery prior to trial, was that those documents did not exist prior to trial.

A third statement that Smith relied upon in his petition was a transcribed statement from one David Parker. In that transcribed statement, David Parker said that on the date of the murder he saw the murder victim, Butler, get into a white cab driven by a short, stocky, Middle Eastern man, about 45 years old, who Parker called "V" because he could not pronounce "V's" last name. Later, on the afternoon of the murder, according to Parker's statement, a girl named "Bo Yolanda," "comes down the street crying all upset and talking about . . . [the fact] that Darryl had just got killed." Next, according to David Parker's statement, "when everyone got to asking [Yolanda] who did it, she says Veloccio did it." In his statement, Parker made clear that "Veloccio" and "V" were the same person.

In regard to the transcribed statement of David Parker, the State did not deny its authenticity and was unable to determine whether that statement had been turned over to Smith prior to trial. In any event, according to the State, Smith was not prejudiced by that failure to produce because David Parker's name and address were given to Smith's counsel prior to Smith's jury trial and therefore, with due diligence, David Parker could have been interviewed by defense counsel prior to Smith's trial.

A hearing on appellant's petition for writ of actual innocence was conducted on October 20, 2016, the Honorable Charles J. Peters presiding. At the hearing, McDonald testified on behalf of appellant. In his testimony, he acknowledged that he was then serving a sentence of 110 years in prison, the sentence having commenced in 2007. He further acknowledged that he was currently incarcerated at the North Branch Correctional Institution in Cumberland, Maryland, where Smith was also incarcerated. Nevertheless, according to McDonald, prior to the hearing, he had never spoken to Smith or, to his knowledge, ever seen him. McDonald further testified: (1) that he was an eyewitness to Butler's murder; (2) on the date of the murder he gave a statement to the police that the police transcribed; (3) that in his statement to the police, he said he saw a short, stocky man with a foreign accent, get out of a white cab and shoot the victim, then saw that man get into his cab and drive away; and (4) that after giving the statement, he talked to no one else about what he had seen until August 10, 2015, when he talked to an investigator employed by Smith.

Also testifying at the October 20, 2016 hearing was Detective Vernon Parker, who had been a homicide detective for twenty-one years. He testified that he was one of the detectives that had investigated the murder of Butler. Detective Parker told the court that, to his knowledge, Derrick McDonald was never interviewed in connection with the Butler murder. He further stated that he had never seen the transcribed statement of McDonald that Smith attached to his petition. Detective Parker stressed that if McDonald had given a statement concerning the murder, he would have been given a copy of it as well as any

handwritten statement by the witness. But, according to Detective Parker, in the course of the investigation, he never saw or received either a transcribed or written statement from McDonald.

In support of his recollection that he had never seen a copy of the transcript of McDonald's statement, he pointed out that although the transcribed statement had what appeared to be his (Detective Parker's) signature in the upper right hand corner on the first page, he "would never have signed [such] a document because we don't transcribe our own interviews." Instead, such statements are sent to a secretarial pool and the secretary who typed up the statement would have information at the bottom of the transcript showing who transcribed the interview. No such information appears on the McDonald transcript. Moreover, according to Detective Parker's testimony, the purported statement by McDonald did not have a preamble, or opening statement, "that all the detectives use" to identify themselves as well as who else was in the room when the statement was taken. The purported transcript of the statement from McDonald did not have any of these "identifiers." Moreover, if the usual procedure was followed, each question and answer in the transcript would have had the name of the detective asking the question and the name of the person responding. The transcript of McDonald's statement did not indicate who was in the room, who was asking the question, nor did the transcript identify the person who was giving the answer.

Detective Vernon Parker said on cross-examination that, to his knowledge, the format used in the purported transcript of the interview of McDonald was one that is never

used by the Baltimore City Police Department. At the conclusion of the October 20, 2016 hearing, Judge Peters took the matter under advisement. On October 24, 2016, Judge Peters signed a written order in which he denied the petition for writ of actual innocence. The order read, in pertinent part, as follows:

> **FOUND** that pursuant to MD. CODE ANN., CRIM. PROC. ("CP") § 8-301(g), the Petitioner has the burden of proof in this case and in order to prevail, the Petitioner has to show "that there is newly discovered evidence that (1) 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," CP § 8-301(a); and it is further
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> **FOUND** that the Petitioner alleges that there are two documents – a report containing a transcribed interview of Derrick McDonald *(Petitioner's/Defendant's Exhibit Nos. 1B and 2B*) and a handwritten note regarding an interview of "Jamie Sipio" (*Petitioner's/Defendant's Exhibit No. 1C*) – allegedly generated by the police during the investigation of the Petitioner that are newly discovered because the Petitioner was only able to obtain these documents after his trial pursuant to a request filed under the Maryland Public Information Act ("MPIA"), MD. CODE ANN., STATE GOV'T. §§ 10-601, *et al.;* and it is further
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> **FOUND** that such documents are not newly discovered evidence as the Petitioner has failed to show that such documents even existed at the time of the Petitioner's trial; and it is further
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> **FOUND** that the Petitioner also alleges that another document – a report containing a transcribed interview of David Parker[1] (*Petitioner's/Defendant's Exhibit No. 5)* – is newly discovered evidence; and it is further
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> **FOUND** that, assuming that the document was never produced by the State, the document is nonetheless not newly discovered evidence since the State indisputably produced the name of David Parker in pretrial discovery

[1] The transcript of the statement from David Parker, insofar as the format was concerned, matched the format that Detective Vernon Parker testified was used by Baltimore City Police Department.

> as well as information that "[a]ccording to a witness, just after the shooting, Yolanda Wade said 'V' shot [the victim]," *Petitioner's/Defendant's Exhibit No. 7*, at 3, and utilizing such information, Petitioner's counsel, exercising due diligence, could have discovered any information contained in David Parker's transcribed interview (*Petitioner's/Defendant's Exhibit No. 5*); and, therefore, it is
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> **ORDERED** that the "Petition for Writ of Actual Innocence" is **DENIED**.

(Footnotes omitted.)

In one of the footnotes contained in the court's order, Judge Peters explained why he did not believe either Mr. McDonald's or appellant's testimony:

> The Petitioner and the State both produced copies of the MPIA responses from the State's Attorney's Office and the Baltimore City Police Department. The Petitioner's responses contained the two reports [*i.e.*, the statements of McDonald and Sipio] and the State's responses did not. The Petitioner claims that the responses that he received in fact contained these documents and the State claims that no such documents were ever produced. Detective Vernon Parker, the lead investigator in the Petitioner's criminal case, testified at the hearing that he had never seen such documents and further, that such documents did not conform to police procedures for the preparation of reports. The [c]ourt finds Detective Parker's testimony to be credible. Both the Petitioner and Derrick McDonald testified at the hearing. Based on the [c]ourt's observation of their demeanor and manner of testifying, the [c]ourt finds both the Petitioner and McDonald completely incredible. McDonald had an almost encyclopedic recollection of the events despite not having spoken to anyone about the events for fifteen years. Further, both the Petitioner and McDonald testified that neither had ever spoken to one [an]other before the time of the hearing despite being housed in the same state correctional facility for the past eight years.

Smith appealed the denial of the petition for writ of actual innocence, but this Court dismissed the appeal in an order, because Smith had not filed the transcript of the circuit court hearing. *Smith v. State*, No. 16-2080 (Md. Ct. Spec. App., June 15, 2017). The Court

of Appeals of Maryland declined to grant Smith's petition for certiorari. *Smith v. State*, 456 Md. 71 (Sept. 22, 2017).

About five weeks after this Court dismissed Smith's first appeal, Smith filed, on July 23, 2017, a second petition for writ of actual innocence.

In that second petition, Smith makes the following allegation:

> On March 2, 2017, the Baltimore City Police Department respond[ed] to the [MPIA request by the] Petitioner. In this response was, two statement's [sic] from a Mr. Wayne Campbell and one information sheet with all identifying information redacted. Also included was one transcribed statement from a Mr. James Capers and an information sheet with all identifying information redacted. These statements are [n]ewly discovered evidence and ha[ve] not been raised in any prior proceedings.
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> At the hearing previously held, the State called Detective Vernon Parker to testify. Mr. Parker testified that one of the document[s] being argued, he had never seen before and it do[es] not conform to police procedures for the preparation of reports. [T]he Honorable Judge Charles J. Peters denied Petitioner['s w]rit stating that the Petitioner failed to show that such documents even existed at the time of trial. And lead [D]etective Vernon Parker testified that he ha[d] never seen such document's [sic] and further that such documents "did not conform to police procedures for the preparation of reports." The [c]ourt [found] [D]etective Parker's testimony to be credible.

Smith did not attach to his second petition the statement allegedly made by Wayne Campbell or the information sheet concerning Campbell but he did attach the statement made by James Capers to the Baltimore City police on the day of the murder.[2]

[2] Smith's allegation in his second petition that the Capers and Campbell statements constituted "newly discovered evidence" was, at least arguably, contradicted by a letter, dated March 2, 2017, from the Baltimore City Police Department, that forwarded to Smith the statements of James Capers and Wayne Campbell. According to the letter, which Smith attached to his petition, those statements had been previously sent to Smith in 2009, which was eight years before he filed his second petition for writ of actual innocence.

The statement from Mr. Capers indicated that he had no knowledge as to who murdered Darryl Butler. Nevertheless, in his second petition, Smith contends that the transcribed statement of Mr. Capers was relevant because it contradicted Detective Parker's testimony (given at the hearing regarding the first petition for writ of actual innocence) that, to Detective Parker's knowledge, the witness statement format used in the purported McDonald interview was never used by the Baltimore City Police Department. Yet the format of the interview of Mr. Capers was the same as the format used in the McDonald interview.

By written order dated May 8, 2018, Judge Peters denied Smith's second petition for writ of actual innocence. Judge Peter's May 8, 2018 order reads, in material part, as follows:

> **FOUND** that the Petitioner alleges that the newly discovered evidence are (1) a statement from James Capers (misspelled "Capser") dated January 15, 2000, and an Information Sheet for James Capers, *Petition* at Exhibit No. 14; and (2) "two statements from a Wayne Campbell and one information sheet," *Petition* at 11; and it is further
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> **FOUND** that the Petitioner fails to allege how the Capers documents would have created a substantial possibility that the result of his trial would have been different because he only alleges that such documents would somehow show that Detective Vernon Parker "committed perjury at the hearing of *October 20, 2016*," *Petition* at 13 (emphasis supplied), over fifteen (15) years *after* Petitioner's original trial; and it is further
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> **FOUND** that since the Petitioner fails to attach the Campbell documents or even to summarize the contents of such documents, the Petitioner fails to demonstrate how such documents would have created a substantial possibility of a different result at Petitioner's trial; and it is further
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> **FOUND** that, "assuming the facts in the light most favorable to the Petitioner and accepting all reasonable inferences that can be drawn from the

> Petition," and "construe[ing] liberally filings by *pro se* inmates," *Douglas v. State*, 423 Md. 156, 180, 182 (2011), the Petitioner fails to assert grounds on which relief may be granted; and, therefore, it is
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> **ORDERED** that, pursuant to CP § 8-301(e)(2) and Rule 4-332(i)(1), the Petition for Writ of Actual Innocence is **DENIED**.

(Footnotes omitted.)

Smith filed a timely appeal from the denial of the second petition for writ of actual innocence in which he raises one question that is phrased as follows:

> Did the circuit court err and abuse its discretion in denying the appellant's petition for writ of actual innocence – newly discovered evidence – without a hearing?

DISCUSSION

Appellant was given a hearing as to his first petition for writ of actual innocence, but a hearing was denied as to his second petition. Therefore, the question presented, as phrased by appellant, appears to concern only the denial of the second petition for writ of actual innocence. Nevertheless, one of the arguments set forth in appellant's brief concerns the denial of his first petition for writ of actual innocence. Smith argues:

> The Circuit Court abused its discretion first, in denying Appellant's first Petition for Writ of Actual Innocence, when clearly the Appellant satisfied all requirements under CP 8-301, and produced newly discovered evidence (the withheld statements) that could not have been discovered in time to move for a new trial under Maryland Rule 4-331, and proved how, if this evidence had been disclosed, there is a substantial and significant possibility that the results of the trial may have been different, as that standard has been judicially determined. The State produced no evidence other than the testimony of Detective Parker.

As the State points out in its brief, appellant's contention that the circuit court abused its discretion in denying his first petition for writ of actual innocence, overlooked

the fact that Judge Peters made a demeanor based conclusion that both Smith and McDonald's testimony was "completely incredible." Perhaps more important, any claim that the circuit court was wrong in denying the first petition is barred by the res judicata doctrine. As mentioned previously, this Court dismissed the appellant's appeal from the denial of appellant's first petition in 2017 and the Court of Appeals denied Smith's request for the issuance of a writ of certiorari. Thus, that judgment was final. The res judicata doctrine is applicable if the following three elements are proven:

> (1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; (2) that the claim presented in the current action [as set forth in appellant's brief] is identical to the one determined in the prior adjudication; and (3) that there was a final judgment on the merits.

Davis v. Wicomico County Bureau, 447 Md. 302, 306 (2016) (setting forth elements of res judicata). Here, all three elements were proven. The doctrine of res judicata prohibits any claim that the denial of the first writ of actual innocence was erroneous.[3]

In regard to the denial of the second petition for writ of actual innocence, appellant contends that the circuit court erred by not granting him a hearing, despite his request for one. In regard to the denial of a hearing, appellant argues:

> The Court of Appeals has held that a person convicted of a crime and eligible to file a Petition for Writ of Actual Innocence under Maryland Annotated Code, Criminal Procedure Section 8-301, "is entitled to a hearing on the merits of" such a petition, provided that the petitioner "sufficiently pleads grounds for relief under the statute, included a request for a hearing, and complies with the filing requirement of CP 8-301(b)." *Douglas v. State,*

[3] During oral argument before this panel, counsel for appellant admitted that the doctrine of res judicata barred any claim that Judge Peter's erred in denying appellant's first petition.

> 423 Md. 156 at 165 (2011); *State v. Hunt & Hardy*, 443 Md. 238 at 251 (2015). The trial cou[r]t is obligated to view the facts asserted in the light most favorable to the petitioner, and is required to hold a hearing "if the allegations could afford petitioner relief, [assuming] these allegations would be proven at a hearing. *See Hunt*, supra, at 251, quoting *Douglas*, 423 Md. at 180. Appellant satisfied all statutory requirements under CP 8-301(a) and (b)(1-5). Thus, a hearing is required to be held. Even an untimely and procedurally compliant motion for new trial on the basis of newly discovered evidence cannot be denied without a hearing. *State v. Matthews*, 415 Md. 286 (2010).

Criminal Procedure Article (2018 Replacement Vol.) § 8-301 reads, in material part, as follows:

> (a) *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:
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> (1)(i) 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; or
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> (ii) if the conviction resulted from a guilty plea, an Alford plea, or a plea of nolo contendere, establishes by clear and convincing evidence the petitioner's actual innocence of the offense or offense that are the subject of the petitioner's motion; and
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> (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.
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> (b) *Requirements*. – A petition filed under this section shall:
> (1) be in writing;
> (2) state in detail the grounds on which the petition is based;
> (3) describe the newly discovered evidence;
> (4) contain or be accompanied by a request for hearing if a hearing is sought; and
> (5) distinguish the newly discovered evidence claimed in the petition from any claims made in prior petitions.

(Emphasis added.)

In his brief, appellant cites nothing in the record to justify his contention that his second petition "satisfied all statutory requirements under CP [§] 8-301(a) and (b)(1-5)." More specifically, he fails to make any argument to support his contention that Judge Peters erred when he found that petitioner had failed to allege how the Capers document, had it been produced prior to appellant's 2001 trial, would have created a substantial possibility that the results of that 2001 trial would have been different.

The only argument that appellant makes in regard to the denial, without a hearing, of his second petition, is as follows:

> Appellant, exercising due diligence, after learning that two other witnesses who were not disclosed in discovery or the first MPIA request, filed another MPIA request specifically requesting any information on these two individuals, received new evidence that proved that Det. Vernon Parker committed perjury at the hearing held on October 20, 2016. Appellant then filed another (second) Petition for Writ of Actual Innocence pursuant to CP 8-301, which the [c]ircuit [c]ourt denied without a hearing, again abusing its discretion.
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> Satisfying all requirements of CP 8-301, Appellant should have been granted a hearing; in doing so, the Appellant would have been able to prove that Det. Parker committed perjury and had this evidence been disclosed before the first hearing, Appellant would have been granted a new trial.

Judge Peters did not err when he held that an allegation that a witness for the State committed perjury[4] in testimony given after the trial that resulted in Smith's conviction, is

[4] It is doubtful, in the extreme, that appellant alleges facts in his second petition to support the conclusion that Detective Parker committed perjury. To prove perjury, appellant would have to show that Detective Parker knowingly gave false testimony. After all, the detective was testifying as to the format used by Baltimore City police over sixteen

(continued . . .)

insufficient to meet the requirements of C.P. § 8-301. In other words, it is not sufficient to allege that if documents had been produced earlier, the results of an earlier hearing regarding a petition for writ of actual innocence would have been different. Petitioner, as Judge Peters pointed out, must plead facts that show that there is a significant or substantial possibility that the results of his jury trial would have been different. That was explained by Judge Barbera for the Court of Appeals in *Douglas v. State*, 423 Md. 156, 180 (2011), as follows:

> The pleading requirement mandates that the trial court determine whether the allegations could afford a petitioner relief, if those allegations would be proven at a hearing, assuming the facts in the light most favorable to the petitioner and accepting all reasonable inferences that can be drawn from the petition. That is, when determining whether to dismiss a petition for writ of actual innocence without a hearing pursuant to C.P. § 8-301(e)(2), provided the petition comports with the procedural requirements under C.P. § 8-301(b), the trial court must consider whether the allegations, if proven, consist of newly discovered evidence that "could not have been discovered in time to move for a new trial under Maryland Rule 4-331" and whether the evidence "creates a substantial or significant possibility that the result [of the trial] may have been different." C.P. § 8-301(a).

(Alterations in original.)

(. . . continued)

years earlier.

Additionally, it should be noted that no matter when Detective Parker gave the testimony at issue, the format of the transcribed statement by Mr. Capers would merely impeach Detective Parker as to a collateral matter which would not entitle appellant to a new trial under Md. Rule 4-331. *See Love v. State*, 95 Md. App. 420, 433 (1993).

Finally, appellant, in his second petition for writ of actual innocence, failed to demonstrate that the Campbell documents, which were not attached to the petition, would have created a substantial possibility of a different result at petitioner's 2001 criminal trial.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.