UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0442

September Term, 2015

ALVIN JONES, JR., A/K/A PHILLIP JONES

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: April 25, 2016

In 1991, appellant, Alvin Jones, Jr. A/K/A Phillip Jones, was convicted by a jury sitting in the Circuit Court for Baltimore City of attempted first-degree murder, conspiracy to commit murder, handgun offenses and other related offenses. He was sentenced to two concurrent terms of life imprisonment plus 20 years consecutive. Upon direct appeal of those convictions, we affirmed the judgment of the circuit court in an unreported *per curiam* opinion. *Timothy Earl Hatchett & Phillip Alvin Jones, Jr. v. State of Maryland*, No. 820, Sept. Term 1991 (filed March 20, 1992). Appellant subsequently mounted numerous unsuccessful attacks on his convictions and sentences.[1]

In March 2015, appellant, acting *pro se*, filed a petition for a writ of actual innocence pursuant to the provisions of Md. Code (2001, 2008 Repl. Vol., 2015 Supp.), § 8-301 of the Criminal Procedure Article ("C.P."), and Md. Rule 4-332, alleging newly discovered evidence that, had he known the existence of in time for his 1991 trial, would have created a substantial or significant possibility that the result would have been different.

On April 1, 2015, the circuit court dismissed appellant's petition for a writ of actual innocence without a hearing. Appellant noted a timely *pro se* appeal and presents two

[1]Those attacks included a 1996 petition for post-conviction relief, a 1998 motion to reopen a closed post-conviction proceeding, a 2001 petition for a writ of error coram nobis, a 2005 petition for post-conviction relief, and a 2014 motion to correct an illegal sentence. In addition, appellant has unsuccessfully sought relief in federal court on several occasions.

questions which are reducible to one[2] for our review: Did the circuit court err in denying the petition for a writ of actual innocence without a hearing?

Finding no error, we affirm.

BACKGROUND

In August 1990, while standing in the street in Baltimore City, Gerald Brown was shot in the back multiple times by two assailants. Although the victim survived the attack, despite being shot 17 times, he was unable to identify his attackers. Ginger Forrester identified the assailants as appellant and his co-defendant, Timothy Earl Hatchett, both of whom she knew from the neighborhood.

In his petition for a writ of actual innocence, appellant claimed that he had recently discovered (1) that the State's only eyewitness, Ginger Forrester, had a criminal record at the

[2] Appellant phrased his questions, as follows:

1. Did the circuit court err by resolving the claims in Jones' petition for writ of actual innocence without affording him an evidentiary hearing?

   A. Is an order denying a petition for writ of actual innocence without a hearing an automatically appealable order?

   B. Did [the circuit court] erroneously deny Jones' petition for writ of actual innocence without a hearing in violation of 8-301 of the criminal procedure title of the Maryland Code?

2. Did the circuit court err in its finding that appellant's petition for writ of actual innocence failed to set out newly discovered evidence and assert grounds on which relief may be granted?

time of trial that was not provided to appellant by the State despite requests for such information during the discovery phase, and (2) that an alibi witness, Victor Brown, who did not testify at trial, had provided an affidavit asserting that appellant was with him at the time of the crime.

In dismissing appellant's petition for a writ of actual innocence without a hearing, the circuit court said, in pertinent part:

> **FOUND** that the Petitioner alleges that the "arrest record" of the State's witness, Ginger Forrester, was not provided to the Petitioner prior to trial and, therefore, is newly discovered evidence; and it is further
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> **FOUND** that the arrest record of the witness is not newly discovered evidence as such evidence could have been discovered prior to trial by trial counsel exercising due diligence; and it is further
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> **FOUND** that the Petitioner alleges that the statement of an alibi witness, Victor Brown, is newly discovered evidence, however, Petitioner also states that the identity of Brown was known to the Petitioner and his counsel prior to trial, and, therefore, such evidence cannot be newly discovered[.]

By footnote, the circuit court explained that there were three "newly-discovered" prior convictions of Ginger Forrester:

> One for battery which is not impeachable under Rule 5-609; *See State v. Duckett*, 306 Md. 503, 507 (1986) and *Tilghman v. State*, 117 Md. App. 542, 552 n.3 (1997); another conviction for possession of narcotics which is not impeachable under Rule 5-609; *See Morales v. State*, 325 Md. 330, 339 (1992); *Cason v. State*, 66 Md. App. 757, 773 (1986); *Lowery v. State*, 292 Md. 2 (1981); *Tilghman v. State*, 117 Md. App. 542, 552 n.3 (1997); and another conviction for misdemeanor theft which, although it is an impeachable offense under Rule 5-609, has very limited impeachment value, considering it is only a misdemeanor for which the witness was given a $25 fine and one year probation.

DISCUSSION

The Court of Appeals, in *Douglas v. State*, 423 Md. 156 (2011), held that a person convicted of a crime and eligible to file a petition for writ of actual innocence, under Criminal Procedure Article ("C.P."), § 8-301, "is entitled to a hearing on the merits of" such a petition, provided that it "sufficiently pleads grounds for relief under the statute, includes a request for a hearing, and complies with the filing requirements of C.P. § 8–301(b)." *Id.* at 165. Contending that his petition satisfies all of these requirements, appellant complains that the circuit court erred in denying his petition without a hearing. We reject that contention, because, as we explain, the petition does not sufficiently plead grounds for relief under the statute.

The statute provides:

> *Claims of newly discovered evidence*.
> (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:
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> (1) creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined; 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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> *Petition requirements*
> (b) A petition filed under this section shall:
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> (1) be in writing;
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> (2) state in detail the grounds on which the petition is based;
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> (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.

Notice of filing petition

(1) A petitioner shall notify the State in writing of the filing of a petition under this section.

(2) The State may file a response to the petition within 90 days after receipt of the notice required under this subsection or within the period of time that the court orders.

Notice to victim or victim's representative

(d) (1) Before a hearing is held on a petition filed under this section, the victim or victim's representative shall be notified of the hearing as provided under § 11-104 or § 11-503 of this article.

(2) A victim or victim's representative has the right to attend a hearing on a petition filed under this section as provided under § 11-102 of this article.

Hearing

(e) (1) Except as provided in paragraph (2) of this subsection, the court shall hold a hearing on a petition filed under this section if the petition satisfies the requirements of subsection (b) of this section and a hearing was requested.

(2) The court may dismiss a petition without a hearing if the court finds that the petition fails to assert grounds on which relief may be granted.

Power of court to set aside verdict, resentence, grant a new trial, or correct sentence

(f) (1) In ruling on a petition filed under this section, the court may set aside the verdict, resentence, grant a new trial, or correct the sentence, as the court considers appropriate.

(2) The court shall state the reasons for its ruling on the record.

Burden of proof

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

Md. Code Criminal Proc. § 8-301.

Subsection (e)(1) states that, "[e]xcept as provided in paragraph (2) of this subsection," a circuit court "shall" hold a hearing on an actual innocence petition if it "satisfies the requirements of subsection (b) of this section and a hearing was requested." Paragraph (2) authorizes the circuit court to dismiss an actual innocence petition without a hearing if it finds "that the petition fails to assert grounds on which relief may be granted." "Grounds" on which relief may be granted are set forth in subsection (a): a claim of "newly discovered evidence" that both "creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined" and "could not have been discovered in time to move for a new trial under Maryland Rule 4-331." Moreover, under Maryland 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."

Here, the form requirements of CP § 8-301(b) and Md. Rule 4-332 have been met – the petition is in writing; it states in detail the grounds on which it is based; it describes in detail the purported newly discovered evidence and attaches that evidence as exhibits to the petition; it contains a request for a hearing; appellant protests his innocence; and, as it is appellant's first such petition under CP § 8-301, the requirement, under CP § 8-301(b)(5), that it "distinguish the newly discovered evidence claimed in the petition from any claims made in prior petitions," is not applicable. *See Douglas*, 423 Md. at 184-85 & n.16

(interpreting "prior petitions," under CP § 8-301(b)(5), as including only petitions brought under the statute and not including post-conviction petitions).

Thus, the question before us is whether the petition sufficiently pleads grounds for relief under the statute. In other words, under CP § 8-301(a)(1)-(2) the question becomes does appellant's petition present "newly discovered evidence" that both "creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined" and "could not have been discovered in time to move for a new trial under Maryland Rule 4-331"? Only if these questions are answered in favor of appellant is a hearing required.

The denial of a petition for writ of actual innocence is an immediately appealable order, regardless of whether the trial court held a hearing before denying the petition. *Douglas*, 423 Md. at 165. When, as here, a petition for a writ of actual innocence is denied without a hearing on the basis that the pleading was insufficient to warrant a hearing, the standard of review is *de novo*. *State v. Hunt*, 443 Md. 238, 247 (2015).

We have construed the petition liberally, as instructed to do by the *Douglas* Court, 423 Md. at 182-83, and conclude that the purported "newly discovered evidence" asserted in appellant's petition (1) is not, in fact, "newly-discovered," and (2) with respect to the prior criminal convictions of Ginger Forrester, that even if "newly-discovered," does not create a substantial or significant possibility that the result may have been different.

I.

As previously explained, one of the two items of allegedly "newly-discovered" evidence set forth in the petition was the criminal record of the State's only eyewitness to identify appellant as the assailant, Ginger Forrester. Appellant alleges that his defense counsel repeatedly sought, but did not obtain, the witness' prior criminal record from the State during the discovery phase prior to trial. Appellant contends that he only came to possess the criminal record of Forrester in 2014 when his co-defendant, Timothy Hatchett, sent him a copy of the document. Appellant alleges in his petition that, because Forrester was the lone eyewitness, had the jury known of Forrester's prior "arrest history," the outcome of his trial may have been different.

In denying the petition for a writ of actual innocence, the circuit court said: "that the arrest record of the witness is not newly discovered evidence as such evidence could have been discovered prior to trial by trial counsel exercising due diligence." We agree. "[D]ue diligence" contemplates that the defendant act reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him or her. *Argyrou v. State*, 349 Md. 587, 605 (1998).

Assuming for the sake of argument that the State violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) to disclose favorable evidence to the defense, any such failure did not relieve trial counsel of conducting a reasonable and prudent investigation into the State's only eyewitness, including her publicly available criminal record. "We previously

have explained that, under *Brady* and its progeny, the defense is not relieved of its "obligation to investigate the case and prepare for trial." *Yearby v. State*, 414 Md. 708, 723 (2010), quoting *Ware v. State*, 348 Md. 19, 39 (1997). Moreover, in *Yearby*, the Court of Appeals cited with approval a decision of the United States Court of Appeals for the Second Circuit for the proposition that "[d]ocuments that are part of public records are not deemed suppressed if defense counsel should know of them and fails to obtain them because of lack of diligence in his own investigation." *Yearby*, 414 Md. at 724, citing *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir.1995). *But see Wilson v. Beard*, 589 F.3d 651, 663 (3d Cir. 2009) (holding that the prosecution bears the burden of disclosing to the defense a prosecution witness's criminal record, whether or not an explicit request has been made by defense counsel.).

Even if the evidence of Forrester's prior convictions were deemed to be newly discovered, we are persuaded that appellant has not proved that there is a significant or substantial possibility of a different result at trial. We agree with the circuit court that, of the three convictions allegedly "newly-discovered" only one of them was admissible at trial, and it was only admissible for its marginal impeachment value that Forrester had previously been convicted of misdemeanor theft and was sentenced to one year probation and a $25 fine.

Given the strength of Forrester's identification based on the fact that she knew appellant for years before the crime occurred, it is unlikely that the jury would have disregarded that identification because of the revelation that she had earlier been convicted

and sentenced for misdemeanor theft. Moreover, appellant provided no argument or explanation to support his bald allegation that "[h]ad the jury who was the trier of facts, known of Ms. Forrester's arrest history, the outcome of appellant's trial may have been different." Because the evidence was not newly discovered and because appellant has not shown us how the marginal impeachment of Forrester would have had a significant or substantial possibility of a different result at trial, we agree with the circuit court's decision denying appellant relief without a hearing on this allegation.

II.

Next, appellant claims newly-discovered evidence in the form of an affidavit from an alibi witness, Victor Brown, who did not testify during appellant's trial. In the affidavit, Victor Brown attested:

> 1. THAT, Affiant, on the evening of August 22, 1990, received a phone call back from Phillip Alvin Jones, who Affiant sent a page to around 8:30 PM.
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> 2. THAT, Affiant, asked Jones, if he wanted to go along with him, down to the Arcade/Restaurant (Crazy John's), which used to be located on the corner of Baltimore and Howard Streets at the time. Jones, said that he wanted to go, and asked if Affiant would come pick him up from his girlfriend[']s house on Mulberry and Poppleton Streets.
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> 3. THAT, Affiant, agreed and picked Jones up from that location round or about 9:00 PM.
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> 4. THAT, Affiant, and Jones, arrived at the 'Crazy John's' round or about 9:10 PM., and remained there until after Midnight, which Affiant recalls, because this is the reason Affiant decided that it was time to get home.

In his petition for a writ of actual innocence, appellant explained that "[t]wenty-four years ago [appellant] told his lawyer, Mr. Randolph O. Gregory, Sr., that he was innocent and that he was with his friend, Mr. Victor Brown, when this crime occurred." He further explained that Victor Brown contacted appellant's attorney and the two spoke about the case.

C.P. § 8-301 (a) provides that a petition for a writ of actual innocence may be filed when there is a claim of "newly discovered evidence that ... could not have been discovered in time to move for a new trial under Maryland Rule 4-331."[3]

In dismissing the petition for a writ of actual innocence the circuit court arrived at the unsurprising conclusion that the alleged newly-discovered evidence was not newly-discovered at all because it was "known to the Petitioner and his counsel prior to trial." We agree with the circuit court. It is axiomatic that the evidence was not newly discovered under the meaning of C.P. § 8-301 because appellant admits that not only was he aware of the

[3] Md. Rule 4-331 (c) provides, in pertinent part, as follows:

> (c) *Newly Discovered Evidence*. 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: (1) 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 or a belated appeal permitted as post conviction relief.

existence of the alibi witness, but that he told his defense attorney about the evidence "twenty-four years ago."

Perhaps anticipating this analysis, appellant shifts tacks on appeal and claims that the newly discovered evidence is not the fact that Victor Brown is an alibi witness, but rather that the newly discovered evidence is the fact that Victor Brown contacted appellant's trial counsel and volunteered to be a witness in the case. Appellant raises a distinction without a difference. It matters not that appellant did not know that Victor Brown had contacted trial counsel. It makes the ultimate evidence – the fact that Victor Brown was an alibi witness – no more or less newly discovered. In addition, there is no meaningful argument (and appellant does not attempt to make one) that the fact that appellant just learned that Victor Brown spoke with trial counsel would have created any significant or substantial possibility of a different result at trial.

We affirm the decision of the circuit court to deny relief on this allegation without a hearing.

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