UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 551

SEPTEMBER TERM, 2015

RONNELL COLE

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Kenney, James A., III
(Retired Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: January 13, 2016

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

This is an appeal from an order denying a petition for writ of actual innocence filed by Ronnell Cole, in the Circuit Court for Baltimore County. In 2004, a jury in that county convicted Cole of attempted first degree murder, first degree assault, and use of a handgun in the commission of a crime of violence. He was sentenced to life in prison for attempted first degree murder and twenty years consecutive for use of a handgun. (The assault conviction was merged for sentencing.) The judgments were affirmed by this Court on direct appeal. A petition for post-conviction relief was denied by the circuit court, and this Court denied an application for leave to appeal.

In 2014, Cole filed a petition for writ of actual innocence or, in the alternative, to reopen post-conviction proceedings. After an evidentiary hearing, the circuit court declined to grant a writ of actual innocence but reopened the post-conviction case.[1] Cole noted this appeal as to the petition for writ of actual innocence ruling.[2] He presents one question for review, which we have rephrased: Did the circuit court abuse its discretion in denying his petition for writ of actual innocence? For the following reasons, we shall affirm the order of the circuit court.

FACTS AND PROCEEDINGS

The 2004 Trial

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[1] The post-conviction case is pending in the circuit court.

[2] "[T]he denial of a petition for writ of actual innocence is a final judgment" and therefore is an immediately appealable order. *Douglas v. State*, 423 Md. 156, 171 (2011).

Cole's convictions stem from the shooting of Timothy Williams on September 13, 2003, in Baltimore County. That evening, at around 8:00 p.m., Williams and his friend, Sean Russell, both 17 year old high school students, drove to a house on Wild Cherry Road in Milford Mill to go to a party.

At trial, Williams testified that he parked his car and he and Russell walked to the side of the house and into the back yard. At the same time, Cole (who neither of them knew) was leaving the party on a bicycle. Cole ran into Williams and Williams grabbed the bicycle's handlebars to stop him. Cole dismounted his bicycle and threatened to fight Williams. Williams and Russell walked away and went inside the house to the party.

Williams and Russell left the party briefly and then returned. As they approached the house, they saw a crowd of people outside. They heard that there was about to be a fight and then heard, much to their surprise, that they were expected to be in the fight. They decided to leave. When they turned to walk back to Williams's car, Williams was confronted by Renard Graves, who Williams knew from school. Cole was standing behind Graves.

Williams exchanged words with Graves and Graves swung at him but missed. At that point, Williams was hit on the back of the neck by something, and he fell on his back. He looked up and saw Graves, Cole, and a man with dreadlocks (later identified as Tyrell Carter) standing over him. Graves kicked him. Cole lifted his shirt up and pulled a gun out of his waistband, pointing it at him. Williams tried to get up, but before he could, Cole fired the gun multiple times. Not realizing that he had been shot, Williams

stood up and started to run to his car, but collapsed on the ground. He was transported to the University of Maryland Shock Trauma Unit, where he was found to have sustained two gunshot wounds in his chest and two in his abdomen. He underwent numerous surgeries to reconstruct his liver and bile duct. He remained in the hospital for three months.

Williams testified that he was certain that Cole was the person who shot him because Cole had lifted his shirt and pulled the gun out and he had seen Cole holding the gun immediately before the shots were fired. Before trial, Williams identified Cole from a photo array. He also made an in-court identification of him.

Russell also testified. He stated that he and Williams were approaching the house on their return trip to the party but decided to leave because they "felt something was getting ready to happen." Suddenly a group of people started running after them. Russell saw Cole hit Williams. Russell hit a person with dreadlocks (Carter) who was standing next to Cole. Russell then was hit in the back of his head with something metal. About 15 to 20 people were fighting. Russell saw Williams on the ground with Cole and two other men standing over him. He ran toward Williams, and heard gunshots. When the shots were fired, Cole was standing over Williams, and the other two men were standing by Cole. Russell got to Williams, not realizing he had been shot, and they started to run to the car. When Williams collapsed, Russell pulled up his shirt and saw bullet wounds. He immediately called the police. He gave the responding police officer a physical

description of Cole. He later described Cole to Detective Amy Page, with the Baltimore County Police Department ("BCPD"), who became the investigating officer on the case.

On September 18, 2003, Russell identified Cole from a photo array. On the photo array, Russell wrote, "This is the person who was on the bike when we first came to the party. He also was over top of [Williams] when the shots went off." Russell made an in-court identification of Cole as well.

Page testified that, on June 28, 2004, she received a telephone call from BCPD Detective Ken Shipley, who was investigating an unrelated burglary. A suspect in the burglary, Timothy Gilpin, claimed to have information about the shooting of Williams. Page interviewed Gilpin.

Gilpin testified as a State's witness at trial. He acknowledged a past conviction for robbery with a deadly weapon. He stated that, in May of 2004, he was incarcerated at the Baltimore County Detention Center ("BCDC") awaiting trial for burglary and for violation of probation ("VOP"). He shared a prison cell with Cole, who also was awaiting trial. The two talked about the charges against them. Cole told him he had been at a party and he was on his bicycle when he bumped into a boy. He and the boy exchanged words, and he left the party to get his gun. When he returned, he and his friends got into a fight with the boy. He then stood over the boy and shot him four times in the chest area. The boy got up and ran, but then fell down. Cole left. Cole further told Gilpin that after the shooting he had gone to his girlfriend Heather's house and had told her to hide the gun. He was arrested about a week later.

Gilpin testified that he called Shipley and told him he had information about Cole. On June 29, 2004, Shipley and Page interviewed him and he gave them a written statement.

On direct examination, the prosecutor asked Gilpin whether, when he spoke to Shipley and Page, he asked for anything in return for providing information about Cole. Gilpin answered no. He also stated that he did not ever ask the detectives (or anyone with the State) for help with the charges against him and he was not promised anything in return for the information or for his testimony. Gilpin was asked whether he ever had seen Cole's paperwork or documents related to the case. He said he had not.

On cross-examination, defense counsel elicited that Gilpin had had a trial scheduled for that day, but it and a hearing on a VOP had been postponed until after he testified. Gilpin reiterated that he had not discussed with the detectives getting any consideration for his testimony against Cole. On re-direct, Gilpin said he was not seeking any consideration from the State for his testimony and was just testifying against Cole because what Cole had told him "kind of made [him] sick." On re-cross, defense counsel brought out that the charge against Gilpin for which trial had been postponed was burglary.

Heather Jones, Cole's girlfriend at the time of the shooting, testified that she spoke to Cole the day after he was arrested. He told her that he had been concerned that the police would search his house, so he had placed the handgun beneath a tire on a car parked in her driveway. (The car belong to her cousin.) He also told her that his brother

would come by her house to get the handgun. Cole's brother came over to her house, retrieved the handgun, cleaned it with oil, and left. Jones described the handgun as a revolver. A firearms technician testified that bullets found at the scene of the crime were consistent with those from a revolver and there were no shell casings found, which was consistent with the weapon being a revolver.

In the defense case, Cole called two witnesses. Gregory Bushrod testified that he attended the party on the night in question and saw Cole and Williams arguing. He did not recall seeing Cole with a handgun. Brendan Toston testified that he had shared a cell with Gilpin at the BCDC and that Gilpin had mentioned that he had read through Cole's charging documents. Toston conceded that he disliked Gilpin because Gilpin had testified against him in an unrelated matter.

In closing argument, Janice Bledsoe, Esq., counsel for Cole, attempted to discredit Gilpin's testimony by arguing that Gilpin had lied when he testified that he never read Cole's charging documents; that the criminal proceedings against Gilpin had been postponed so he could testify against Cole; and that Gilpin expected leniency in exchange for his testimony. In particular, Bledsoe argued:

> Timothy Gilpin, what a coincidence that Mr. Gilpin's case which was scheduled for yesterday or the day before yesterday, was postponed . . . until after the conclusion of this case. It might be true the State is not giving him any consideration, but the defense is, and, if I was his defense attorney, the first thing I'd tell [the] judge in mitigation at his VOP . . . hearing, is that he has turned a new leaf judge. He deserves a second shot. Guess what he did? He provided testimony in a case, a very serious case here in Baltimore County.
>
> That's going to sway somebody. He knows what he was in for. He knows what he was getting. He knew because he has done that many times.

> That giving information is going to get him something. The State doesn't have to promise it, the defense is going to argue [for] it.

The jury convicted Cole on all counts. This Court affirmed the judgments in an unreported opinion filed on September 25, 2006.

The 2007 Post Conviction Petition

On April 2, 2007, Cole filed a petition for post conviction relief. On September 11, 2008, after a hearing, the court denied the petition. Cole filed an application for leave to appeal to this Court, which was denied on June 28, 2010.

The 2012 MPIA Request

In 2012, Cole submitted a request to the BCPD under the Maryland Public Information Act ("MPIA"), Md. Code (1984, 2009 Repl. Vol.) section 10-611, *et seq.* of the State Government Article ("SG"),[3] for documents pertaining to the charges against him in the Williams shooting case. In response, he received several documents from the criminal investigation unit, including a police report entitled "Confidential Report of Investigation" (the "Report"). The Report is dated July 2, 2004, and is signed by Page. It states, in pertinent part:

> On Monday June 28, 2004 Detective Ken Shipley . . . contacted Detective Page in reference to the above attempted murder investigation. Detective Shipley advised that Timothy Gilpin, who is currently incarcerated at the Baltimore County Detention Center, contacted him stating he had information about the above shooting.

[3] In 2014, the General Assembly recodified the MPIA under Md. Code (2014, 2015 Cum. Supp.) section 4-101, *et seq.* of the General Provisions Article ("GP"). The statute remains substantively the same.

> On June 29, 2004 Detective Page and Detective Shipley responded to the Baltimore County Detention Center and transported Gilpin to Baltimore County Police Headquarters. According to Detective Shipley, Gilpin did not ask for any consideration with regard to his sentence. ***He explained that he has had a drug addiction and asked for help getting into a long term rehabilitation clinic.***

(Emphasis added.) Cole maintains this was the first time he saw the Report.

The 2014 Petition for Writ of Actual Innocence or, in the Alternative, to Reopen Post-Conviction Proceedings

On May 14, 2014, Cole, filed a petition for writ of actual innocence or, in the alternative, to reopen post-conviction proceedings.[4] The petition for writ of actual innocence was based on the Report, which Cole alleged was newly discovered evidence. Cole argued that the Report showed that Gilpin had expected consideration, in the form of drug treatment, for his testimony. He maintained that neither he nor Bledsoe (nor Gary Schenker, Esq., who represented him before Bledsoe) were given the Report; that, had Bledsoe been aware of the Report, she would have cross-examined Gilpin about its contents and about any agreement between Gilpin and the State that he would receive consideration, in the form of drug treatment, in exchange for his testimony; and that that cross-examination would have substantially altered the outcome of his trial.

[4] On December 20, 2013, Cole, acting *pro se*, had filed a motion for new trial based on the Report. After counsel entered an appearance for him, the court directed that a supplemental motion for new trial be filed by May 14, 2014. Counsel filed the petition for writ of actual innocence or, in the alternative, to reopen post-conviction proceedings in lieu of filing a supplemental motion for new trial.

In support of his alternative request to reopen his post-conviction case, Cole alleged that the State had violated his due process rights by suborning perjury by knowingly allowing Gilpin to testify that he did not receive a benefit from his testimony, even though the State had agreed to assist him in getting into a drug rehabilitation program. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("[I]t is established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment."). He also alleged that Bledsoe's failure to identify and use the Report was ineffective assistance of counsel, in violation of his rights under the Sixth Amendment.

On March 31, 2015, the circuit court held an evidentiary hearing. Cole called three witnesses: Bledsoe, Page, and Shipley. The State called Judge Rachel Cogen, who had been the prosecutor in Cole's 2004 trial.

Bledsoe testified on direct examination that for nine months after Cole was charged, he was represented by Schenker, an attorney with the Office of the Public Defender. She then took over as Cole's counsel, and Schenker provided her with his file on the case. After reviewing Cole's file, she met with Schenker and they discussed some aspects of the case. Bledsoe claimed she never received the Report and, had she received it, she "would have cross examined [Gilpin], or [she] would have at least attempted to cross examine [Gilpin] and if [she] had been denied the right to cross examine [Gilpin she] would have made sure the record was clear that [she] believe[d] he was getting a benefit . . . for his testimony."

On cross-examination, Bledsoe was questioned about supplemental answers furnished by the State in response to Cole's motion for discovery and inspection in the 2004 case. There were two such supplemental answers. They both were in the court file for the 2004 case. The first supplemental answer states:

> Additional witness/material that the State may intend to call to prove its case in chief or to rebut alibi testimony are as follows:
> a. Police Report dated 7/2/04 including statements of Kelly Bounds and Morgan Dickerson.
> b. The State intends to call as a witness the following:
> 1. Timothy Gilpin, Baltimore County Detention Center.

The Certificate of Service is dated July 23, 2004, and states that the supplemental answer was mailed to Schenker on that date. The second supplemental answer states:

> Additional witness/material that the State may intend to call to prove its case in chief or to rebut alibi testimony are as follows:
> a. Police Report dated 7/2/04 including written statement of Timothy Gilpin. . . .

Gilpin's written statement is two pages long. The Certificate of Service is dated July 27, 2004. Like the first supplemental answer, the second one was mailed to Schenker, who at those times still was representing Cole. The supplemental answers were introduced into evidence at the hearing on the petition for writ of actual innocence, as was the Report and Gilpin's statement.

As noted, on direct examination, Bledsoe testified that she did not have the Report when she was representing Cole. On cross-examination, after being shown the supplemental answers, she said she did not specifically recall having the Report. With respect to Gilpin's statement, which, according to the second supplemental answer, was

included with the Report, she conceded that she "would hope that [she] would have had [it] because when [she] looked at the transcript it appears that [she] cross examined [Gilpin] about some of the information in the statement."

Page testified that Gilpin had asked for help, in the form of drug treatment, but not specifically from her. Shipley confirmed that Gilpin had been a suspect in one of his investigations. He testified that Gilpin had "expressed . . . a desire" for drug treatment but had not specifically asked for assistance.

Cogen testified that it was her signature on the two supplemental discovery answers that were furnished to the defense in the 2004 case. The supplemental answers were sent to Schenker. Cogen stated that she believed the Report had been attached to both supplemental answers. She also stated that when the case against Cole went to trial Gilpin had two pending cases in the Circuit Court for Baltimore County: one for burglary and one for violation of probation. After testifying at Cole's trial, Gilpin pleaded guilty to the burglary and violation of probation charges and was sentenced. She was not the prosecutor in those cases.

Cole introduced the transcripts from these sentencing proceedings into evidence. The first transcript was for a guilty plea on the burglary charge, before Judge Bollinger (*State v. Gilpin*, Case No. 03-K-04-002300). The hearing took place on the morning of October 8, 2004. The following discussion took place:

> [COUNSEL FOR GILPIN]: The case (inaudible) sentencing because Mr. Gilpin was testifying for the State in another matter that was set for the same time, same date, as this case was set for. [The State] and I worked out

a recommendation, while the State wasn't giving any type of deal, they wouldn't make any affirmative --

[THE COURT]: Is he also due in front of [Judge Daniels?]

[COUNSEL FOR GILPIN]: It's a [VOP] for this case, [Judge] Daniels is sending him to Cenikor[[5]] if you allow his plane ticket. Mom is here, it's paid for. He's ready to roll to Cenikor Corps.

[THE COURT]: Do you want me to just order restitution and reduce it to judgment, give him a suspended sentence?

[COUNSEL FOR GILPIN]: Yeah.

[THE COURT]: All right.

[COUNSEL FOR GILPIN]: He's been in since May.

[THE COURT]: Hm?

[COUNSEL FOR GILPIN]: He's been in since May.

[THE COURT]: All right. I'll give him (inaudible) time served.

[THE STATE]: Okay.

The second transcript was of Gilpin's guilty plea hearing on the violation of probation case (*State v. Gilpin*, Case Nos. 02-CR-0400 and 02-CR-0401). This hearing also took place on October 8, 2004, later that morning, before Judge Daniels. The following colloquy occurred:

[THE STATE]: [Gilpin] just finished in front of Judge Bollinger.

[5] Cenikor is a non-profit rehabilitation center with multiple locations in Texas and Louisiana. *See* Cenikor Foundation, *About Us*, cenikor.org (2015), available at http://www.cenikor.org/about-us.

THE COURT: And what happened in front of Judge Bollinger?

[COUNSEL FOR GILPIN]: He received a suspended sentence on condition that he report to Cenikor which was an effort to coordinate the efforts that we will try to put forth today based on a previous bench conference we had with this court.

* * *

Your Honor, if the Court please, this matter -- this matter, today's matter, if you will, for the violation of probation was previously before you at which time both the State and the defense approached the Court asking it to continue to today's date for a number of reasons, one of which you've heard about while we were waiting for the Defendant to come forward, and that is he had pending charges before this Court as it turns out to be Judge Bollinger today, but also because while he was incarcerated awaiting the [VOP] hearing, certain information or knowledge came to this Defendant and he was most helpful -- most emphasis on most helpful -- in assisting the State in other prosecutions of a very serious nature.

And in speaking to [the State] this morning, I understand he fully complied with his "agreement" with the State to the extent he was required to and produced live testimony in another proceeding as well as provided sufficient information to the State in other cases to make those cases go satisfactorily in the State's eyes.

With that in mind, ***the State indicated that they would assist him, if you will, before judge -- as it turns out Judge Bollinger -- and I believe the State would also advise you today as the judge who's obviously hearing these violations of probations what I just presented to the Court***.

* * *

[THE COURT]: And there would be no alternative for me but to put him in jail for the balance of his sentence no matter how cooperative he is with the State, no matter what good things he does. If he doesn't complete this program successfully for two and a half years, that's what's going to happen. [What is the] State's position?

[THE STATE]: ***Your Honor, as [counsel for Gilpin] stated, he did do everything he was supposed to, so I'll defer to the Court.***

> [THE COURT]: All right. I'm willing to take no further action against him with regard to this [VOP] except to add to the conditions of probation that he successfully complete the Cenikor Program.

(Emphasis added.)

At the conclusion of the evidentiary hearing, the court ruled from the bench. It first addressed the petition for writ of actual innocence, stating:

> [Cole's] claim in this case is that the newly discovered evidence is the perjured testimony of Mr. Gilpin who was a witness in the original trial, and although there is a dispute, I guess an, an issue as to whether or not that testimony was in fact perjury, assuming *arguendo* it is perjury, then the court finds that it, well let's put it this way, if the court finds it's perjury and that perjury is newly discovered evidence ***the court finds that that newly discovered evidence could have been discovered prior to the time limit for filing a motion for new trial under [Rule] 4-331***, which is one of the requirements for a claim of newly discovered evidence under sec, under subsection II.
>
> Just to repeat, the claim for newly discovered evidence has two requirements and they're in the . . . [c]onjunctive. Could not have been discovered in time to move for a new trial. Well it would have been discovered, could have been discovered prior to that. So it fails for that reason. And I believe that's the, that ends in terms of the writ of actual innocence.

(Emphasis added.)

The court then turned to Cole's motion to reopen his post-conviction case. The court pointed out that the Report documents that Gilpin asked for help with drug treatment and that the transcripts of the guilty plea hearings show that the courts allowed him to receive drug treatment. The court found that there

> was somewhat of an agreement, implicit, apparently not explicit but, certainly not explicit but so far as the court can discern at least an implicit agreement between Mr. Gilpin and the State . . . for a benefit to Mr. Gilpin . . . conferred on him in exchange for testimony favorable to the State in the

> upcoming prosecution [of Cole]. And that it was not disclosed to [Cole] through counsel.

The court found that that was a due process violation.

The court then turned to ineffective assistance of counsel. It found that the State filed two supplemental discovery answers, both indicating that the Report was attached, and therefore "it appears that [the Report] . . . [was] transmitted twice, at a minimum once, but possibly twice" to Schenker. "So there's really no issue that the State's Attorney fulfilled its obligation to turn the [Report] over." The court found that there was a question whether there was ineffective assistance of counsel by Schenker "of somehow not turning [the Report] over to" Bledsoe; or if the Report was turned over to Bledsoe, whether there was ineffective assistance of counsel on her part by "failing to utilize it."

On the bases of due process and ineffective assistance of counsel, the court found that there was sufficient evidence "to raise enough of a question in the court's mind that it is in the interest of justice" to grant the request to reopen the post-conviction proceeding.

We shall include additional facts as pertinent to the issues on appeal.

DISCUSSION

Cole contends the circuit court abused its discretion by denying his petition for writ of actual innocence because it erroneously found that the newly discovered evidence—that Gilpin's testimony was perjured—could have been discovered before the deadline in which to move for a new trial. He maintains that Bledsoe never received the Report and, therefore, had no reason to know it existed when the case went to trial in 2004; that Gilpin committed perjury when he testified that he did not expect any

consideration for his testimony, and that also could not have been known by Bledsoe at the time of trial; that the transcripts of the guilty plea hearings on the burglary charge and the VOP establish that Gilpin in fact expected to receive assistance in entering a drug treatment program in exchange for his testimony against Cole, and that there was an agreement between Gilpin and the State that he would receive that assistance; that, had defense counsel been aware of this, she would have impeached Gilpin with the agreement; and there was a substantial or significant possibility that, had this impeaching evidence been adduced at the 2004 trial, he would have been acquitted of all charges.

The State counters that the trial court did not find that Gilpin committed perjury or that the State knowingly presented perjured testimony. Even assuming *arguendo* that Gilpin perjured himself, the court did not err in finding that the evidence on which Cole relies "could have been discovered within the time frame set forth in Maryland Rule 4-331." In the alternative, the State argues that, if the court erred in finding that the evidence was not newly discovered, we still should affirm the denial of the petition for writ of actual innocence because it was not substantially or significantly likely that the evidence would have changed the outcome of Cole's trial.

"Courts reviewing actions taken by a circuit court after a hearing on a petition for writ of actual innocence limit their review . . . to whether the trial court abused its discretion." *State v. Hunt*, 443 Md. 238, 247–48 (2015); *McGhie v. State*, 224 Md. App. 286, 298 (2015) ("In addressing a circuit court's decision, after a hearing, to deny a petition for writ of actual innocence, we limit our review to whether the circuit court

abused its discretion."). "[A] ruling generally will not be deemed to be an abuse of discretion unless it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Jackson v. State*, 216 Md. App. 347, 363–64 (2014) (internal citations omitted).

Maryland Code (2001, 2008 Repl. Vol., 2015 Cum. Supp.) section 8-301 of the Criminal Procedure ("CP") Article states, in pertinent part:

> (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) 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.

See also Rule 4-332(d)(6)–(8). Under Rule 4-331(c), a court

> may grant a new trial . . . on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial [within ten days after a verdict]:
>
> . . . 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. . . .

Cole was sentenced on November 16, 2004. As noted, this Court filed its unreported opinion affirming the judgments of conviction on September 25, 2006. On October 25, 2006, our mandate issued, and on January 9, 2007, the circuit court received the mandate. Accordingly, the deadline by which to file a motion for new trial based on

newly discovered evidence, under Rule 4-331(c)(1), was January 9, 2008.[6] Cole bore the burden of proving that, with due diligence, he could not have found the newly discovered evidence by then. *See* CP § 8-301(g); Rule 4-332(k).

"[U]ntil there is a finding of newly discovered evidence that could not have been discovered by due diligence, no relief is available [under CP section 8-301], 'no matter how compelling the cry of outraged justice may be.'" *Jackson*, 216 Md. App. at 364 (quoting *Argyrou v. State*, 349 Md. 587, 602 (1998)). In the context of Rule 4-331(c), the Court of Appeals has explained:

> The question of whether evidence is newly discovered has two aspects, a temporal one, *i.e.*, when was the evidence discovered?, and a predictive one, *i.e.*, when should or could it have been discovered? It is to the latter that the requirement of "due diligence" has relevance.

Argyrou, 349 Md. at 602. The *Argyrou* Court determined that "as used in Maryland Rule 4-331(c), "due 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." *Id.* at 605. "The test, of course, is whether the evidence was, in fact, discoverable and not whether the [defendant] or [defense] counsel was at fault in not discovering it." *Jackson v. State*, 164 Md. App. 679, 690 (2005).

[6] In his brief, Cole asserts that the operative date under Rule 4-331(c) is October 26, 2007, *i.e.* one year after this Court ***issued*** its mandate affirming the judgment of the circuit court. Rule 4-331(c)(1) clearly states that the one-year provision is calculated from when the circuit court ***receives*** the mandate from the final appellate court to review the case. The Court of Appeals did not review Cole's case. The docket entries show that the mandate from this Court was received by the circuit court on January 9, 2007.

As noted above, in his petition for writ of actual innocence, Cole specifically identified the Report as the "newly discovered evidence" he was claiming he could not have discovered in time to file a motion for new trial by the deadline in Rule 4-331(c), which in this case was January 9, 2008. During the evidentiary hearing, the "newly discovered evidence" Cole was basing his claim on morphed from the Report to Gilpin's allegedly perjured testimony. In other words, Cole argued that with due diligence he could not have discovered that Gilpin had given perjured testimony at trial by the deadline for filing a motion for new trial. Yet, if perjury by Gilpin (and we note there was no finding that Gilpin committed perjury) was the "new evidence," on the facts adduced by Cole, it *still* would be undiscovered. He claimed to have discovered the perjury as a consequence of receiving the Report for the first time in 2012. It was the Report, not the perjury, that, allegedly, was the "newly discovered evidence."

In fact, Cole's theory of prosecution was, and had to be, that neither of his lawyers in the 2004 trial were given the Report in discovery or in any of the proceedings surrounding the 2004 trial; that Cole first received the Report in 2012, in response to his MPIA request; that the Report revealed that Gilpin had asked for consideration in the form of drug treatment in his interview by Page and Shipley; and that, had his trial counsel been furnished the Report, one or both of them would have looked into whether the State had agreed to assist Gilpin by advocating in favor of drug treatment as an alternative sentence in his upcoming burglary and VOP cases and would have found that that was the case. Then, at trial, Bledsoe could have revealed testimony by Gilpin to the

contrary as untrue, impeaching him and undercutting whatever value his testimony might have. Only when Cole received the Report in response to his MPIA request did he (and his trial counsel) learn of its existence and that Gilpin had asked for assistance with drug treatment before he disclosed what he knew to the detectives.

Notwithstanding Bledsoe's initial testimony that she had not been given the Report, once she was shown the supplemental answers, she testified that she could not recall whether she received the Report. But, she conceded that she had seen Gilpin's statement, which was included as part of the Report. The court made an express finding that the Report was turned over by the State to Schenker, who was Cole's attorney at the time.

This finding established that the newly discovered evidence—the Report—was not newly discovered by virtue of Cole's MPIA request because it was in the possession of Cole's trial counsel before the 2004 trial. Trial counsel could have used the Report to impeach Gilpin and, as we have explained, cross-examined him so as to have revealed that he expected assistance from the State with drug treatment in exchange for his testimony. If cross-examination did not effectively reveal that, trial counsel was on notice of Gilpin's sentencing hearings, which took place a month after Gilpin's testimony in the 2004 trial, and easily could have attended the hearings or obtained transcripts and thereby learned of the implicit agreement in time to file a motion for new trial.

On the evidence adduced, neither the Report nor information that could have been ascertained with due diligence based on the contents of the Report, including the veracity

of Gilpin's testimony, was "newly discovered evidence." The circuit court did not abuse its discretion in denying Cole's petition for writ of actual innocence.

ORDER OF THE CIRCUIT COURT FOR BALTIMORE COUNTY DENYING PETITION FOR WRIT OF ACTUAL INNOCENCE AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.