UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1427

September Term, 2015

JEFFREY D. EBB, SR.

v.

STATE OF MARYLAND

Meredith,
Leahy,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: May 25, 2016

This appeal flows from the denial of a petition for writ of actual innocence that Jeffrey D. Ebb, Sr., appellant, filed in the Circuit Court for Montgomery County. In 1994, appellant was convicted by a jury sitting in the Circuit Court for Montgomery County of two counts of first degree murder and lesser related crimes. The court sentenced appellant to life imprisonment without the possibility of parole plus a concurrent 80 years of imprisonment. Upon direct appeal of those convictions, we affirmed the judgment of the circuit court in an unreported *per curiam* opinion. *See Jeffrey D. Ebb, Sr. v. State of Maryland*, No. 1809, Sept. Term 1994 (filed unreported July 20, 1994). After granting appellant's petition for a writ of certiorari, the Court of Appeals also affirmed the convictions. *Ebb v. State*, 341 Md. 578, 581 (1996).[1]

On May 7, 2015, appellant filed a petition for a writ of actual innocence pursuant to the provisions of Maryland Code (2001, 2008 Repl. Vol., 2014 Supp.), Criminal Procedure Article ("CP"), § 8-301, and Maryland Rule 4-332, alleging that there was newly discovered evidence that, he claimed, would have created a substantial or significant possibility that the result of his 1994 trial would have been different had he known of its existence in time.[2] The

[1] Fourteen years later, in *Calloway v. State*, 414 Md. 616, 638 (2010), the Court of Appeals announced that it was overruling *Ebb* with respect to its holding regarding cross-examination of a witness for the prosecution (*not* the witness who has allegedly now recanted). "[T]he judge allowed Ebb to cross-examine House-Bowman about his pending charges because he had some subjective expectation of leniency." *Ebb*, 341 Md. at 590.

[2] Appellant previously filed a petition for a writ of actual innocence on grounds unrelated to the instant matter, the denial of which we affirmed on appeal. *See Jeffrey D. Ebb, Sr. v. State of Maryland*, No. 1342, Sept. Term 2012 (filed unreported, June 16, 2014).

purported evidence that appellant claims to be newly discovered relates to the fact that a witness who testified for the State at trial — namely, Jerome House-Bowman — has signed a statement claiming, *inter alia*, that he "lied, in court, at the trial of Jeffrey [Ebb], to save [his] niece (Stephanie Stevenson) from prosecution and conviction."

Without conducting a hearing, the circuit court issued an order denying appellant's petition for a writ of actual innocence. By order entered August 26, 2015, the circuit court denied a motion for reconsideration. Appellant, acting *pro se*, noted an appeal, and presents one question for our review, which we have rephrased: Did the circuit court err in denying the petition for a writ of actual innocence without a hearing?[3] We answer that question in the affirmative, and we will remand the case to the circuit court for further proceedings.

BACKGROUND

For background, we will quote our description of the facts of the offense from our prior unreported opinion in which we affirmed the denial of a previous petition for a writ of actual innocence:

> On the afternoon of November 28, 1992, a gunman entered Brodie's Barbershop in Catonsville, Maryland, with the intent of robbing it. Eight customers were present when the gunman entered. In the course of the attempted robbery that followed, the gunman killed two persons and wounded another.

[3] The question was framed as follows in appellant's brief: "Whether the lower court's denial of Appellant's Petition for writ of actual innocence, without a hearing, was an abuse of discretion, when Appellants' petition satisfied the required pleading standards established Maryland Criminal Code and Procedure § 8-301?"

* * *

> At Ebb's trial, the State proved his criminal agency by introducing the testimony of several witnesses including that of Stephanie Stevenson. Ms. Stevenson testified that she participated in the attempted robbery with Ebb and that Ebb shot all three of the victims. **Her testimony, in turn, was corroborated by the testimony of [Stephanie Stevenson's uncle,] Jerome House–Bowman, who testified that sometime during the month of December 1992, Ebb told him, in confidence, that he was involved in the "Barbershop murder." Ebb also told House-Bowman that: "It first started out as a robbery. It was supposed to be a robbery and somehow it got fouled up and he had to shoot two people." Ebb further confided to House-Bowman that he had known where the money was kept in the barbershop and that was why he decided to rob it. He also described, in detail, how he escaped from the barbershop after he killed the victims.**
>
> The State also introduced into evidence a Browning semi-automatic 9mm pistol. Todd Timmons testified that he bought that weapon from Ebb sometime in the month of November 1992. In addition, the State called Joseph Kopera, a firearms and ballistics expert employed by the Maryland State Police Crime Laboratory, who testified that all of the spent cartridge casings and all of the spent bullets recovered from the bodies of the victims were fired from the Browning semi-automatic 9mm pistol that was introduced into evidence.

Jeffrey D. Ebb, Sr. v. State of Maryland, No. 1342, Sept. Term 2012 (filed unreported June 16, 2014) (emphasis added).

The Petition for a Writ of Actual Innocence

As mentioned earlier, on May 7, 2015, appellant, acting *pro se*, filed the present petition for a writ of actual innocence attacking his 1994 convictions. In the 2015 petition, he alleged that he has newly discovered evidence in the form of an affidavit signed by House-Bowman in January 2013 which asserts that House-Bowman lied when testifying for the State during appellant's trial. The affidavit included a notarized statement as follows:

> I lied, in court, at the trial of Jeffrey Edd [sic], to save my niece, (Stephanie Stevenson) from prosecution and conviction, facing her, I just did not tell the truth at the trial, I was trying to help my niece.

No further details were provided in the affidavit. And, although notarized, the statement did not include any oath.

By order docketed on July 17, 2015, the circuit court denied appellant's petition without conducting a hearing because, the court opined, appellant's newly discovered evidence was "merely impeaching evidence, and not material evidence." But the court also opined that the proffered new evidence did not create a "substantial possibility of a different outcome at trial" given the fact that "there was overwhelming evidence of [appellant's] guilt." The court explained:

> [T]he Defendant was linked to the crime by several other witnesses — including eye witnesses. Specifically, Defendant's accomplice, Stephanie Stevenson testified in detail about Defendant's involvement in the crime and Charles Dunlop, an eye witness, identified the Defendant from photographs. Kevin Johnson, another eye witness[], testified that he recognized the Defendant as the shooter in this case when he saw the Defendant's picture on the news and notified the police. More importantly, ballistics reports linked the murder weapon to the Defendant. Consequently, there was overwhelming evidence of Defendant's guilt in this case and thus Mr. House-Bowman's recantation of his testimony is merely impeaching evidence. For similar reasons, Mr. House-Bowman's recantation of his testimony under oath does not create a substantial possibility of a different outcome at trial — given the overwhelming evidence of Defendant's guilt.

On July 29, 2015, appellant filed an untimely motion for reconsideration of that denial, arguing that his newly discovered evidence that a key witness lied at his trial is not "merely impeaching." The circuit court denied the motion for reconsideration, explaining:

> MD. CODE CRIM. PROC. § 8-301 provides, in pertinent part that "newly discovered evidence" must create a "substantial or significant possibility that the result may have been different" had the evidence been discovered. In the present case, the overwhelming evidence, independent from Mr. House-Bowman's testimony, supports the Defendant's conviction. This evidence includes testimony of the Defendant's accomplice, two eye witnesses, and ballistic reports that linked the murder weapon to the Defendant. Therefore, **the Defendant's newly discovered evidence does not create a substantial possibility of a different outcome at trial given the overwhelming evidence independent from Mr. House-Bowman's recantation.**

(Emphasis added.) On August 13, 2015, appellant filed a timely notice of appeal to this Court.

DISCUSSION

The denial of a petition for writ of actual innocence is an immediately appealable order, regardless of whether the circuit court held a hearing before denying the petition. *Douglas v State*, 423 Md. 156, 165 (2011). Where, as here, a petition for a writ of actual innocence is denied without a hearing, the applicable standard of appellate review of the circuit court's determination that no hearing need be held is *de novo. State v. Hunt*, 443 Md. 238, 247 (2015).

The Court of Appeals, in both *Douglas* and *Hunt*, held that a person convicted of a crime and eligible to file a petition for writ of actual innocence, under CP § 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, includes a request for a hearing, and complies with the filing requirements of [CP] § 8–301(b)." *Douglas,* 423 Md. at 165; *accord*

Hunt, 443 Md. at 250-51. Although the petitioner must "assert" grounds for relief, the documents filed with the petition are not required to meet the petitioner's burden of *proving* the assertions. *Hunt*, 443 Md. at 251. Rather, the trial court is obligated to view the facts asserted in the light most favorable to the petitioner, *id.*, at 251, and is required to hold a hearing "'if the allegations could afford petitioner relief, [assuming] those allegations would be proven at a hearing.'" *Hunt, id.*, 251, quoting *Douglas*, 423 Md. at 180.

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:**
> **(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.
>
> *Petition requirements*
> (b) **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.
>
> *Notice of filing petition*
> (c) (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.

(Emphasis added.)

Appellant asserts that this case is one in which the circuit court was required to hold a hearing before ruling upon the merits of his petition. Subsection (e)(1) states that, "[e]xcept as provided in paragraph (2) of this subsection," a circuit court "shall hold a

hearing" on a petition if it "satisfies the requirements of subsection (b) of [CP § 8-301] and a hearing was requested." But subsection (e)(2) authorizes the circuit court to dismiss the petition without a hearing "if the court finds that the petition fails to assert grounds on which relief may be granted." The Court of Appeals explained in *Douglas,* 423 Md. at 180:

> [A] trial court may dismiss a petition without a hearing when one was requested, pursuant to C.P. § 8-301(e)(2), only when a petitioner fails to satisfy the pleading requirement. **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 that evidence "created a substantial or significant possibility that the result [of the trial] may have been different." C.P. § 8-301(a).**

(Emphasis added.)

Appellant contends that he satisfied the pleading requirements of CP § 8-301, and therefore, according to the holdings of *Douglas* and *Hunt*, he was entitled to a hearing on the petition.[4] As we are instructed to do by *Douglas*, 423 Md. at 182-83, we have construed the

[4] Maryland Rule 4-332(d)(9) contains a requirement that 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." Although, as the State points out, appellant's petition did not comply with this requirement, the circuit court did not deny his petition on that basis, and we note that, in the Brief of Appellant before this Court, appellant asserts that he "has (continued...)

petition liberally, and we conclude that the trial court erred in ruling on the petition without a hearing. Because we are required at this juncture to assume that petitioner could prove all facts alleged in the petition and consider all reasonable inferences that can be drawn from the petition in the light most favorable to the appellant, we conclude that appellant met the pleading requirement of alleging facts that theoretically could have resulted in a different result at trial.[5]

[4](...continued)
maintained his innocence as being wrongfully convicted."

[5] We recognize that the petition provides sparse detail regarding the grounds on which it is based. The sentence quoted above from House-Bowman's unsworn affidavit is the only description of the proffered newly discovered evidence, and there is no description of any substantive statement as to which House-Bowman now recants. The petition does not identify the facts as to which House-Bowman testified falsely, or assert what House-Bowman's testimony would be at a new trial. The State argues in its brief:

> The petition mentions, and attaches, an affidavit to the effect that one of the witnesses "lied at trial." But what the affiant claims to have lied about is never mentioned, nor does the affidavit state what he now claims the truth to be. Therefore, the pleading is deficient on its face in perhaps the most glaring way possible: it fails to set forth any material new evidence. This is not merely a technical lapse; absent "evidence," no relief can be granted. "The word 'evidence' as used in Rule 4-331(c) necessarily means testimony or an item or thing that is capable of being elicited or introduced and moved into the court record, so as to be put before the trier of fact at trial." *Hawes v. State*, 216 Md. App. 105, 134 (2014). Ebb failed to establish even a prima facie claim for relief because he did not describe any "evidence," as that term is used in § 8-301.

As explained above, however, in deciding whether a hearing is required, the court is obligated to consider all facts and inferences in a light most favorable to the petitioner.

Appellant has asserted that he could, if given the opportunity, prove that one of the prosecution's key witnesses lied at his trial. When we consider that development in a light most favorable to appellant — *i.e.*, without weighing it against the countervailing evidence — we cannot rule out the possibility that this alteration of the available evidence could have led to a different result at trial. We hasten to add, however, that we apply this standard of review only to the question of whether appellant was entitled to a hearing. This is not the standard that applies when the court rules on the merits of the petition.

In *Douglas, supra*, 423 Md. at 185, the Court of Appeals described the analysis the circuit court is obligated to undertake when a petition has satisfied the procedural pleading requirements of CP § 8-301:

> It remains for us to consider whether the court, nonetheless, could dismiss the petition without a hearing because [the petitioner] "fail[ed] to assert grounds on which relief may be granted," pursuant to C.P. § 8-301(e)(2). We discussed above that **C.P. § 8-301(e)(2) authorizes the trial court to dismiss a petition for writ of actual innocence without a hearing even though one was requested, if the court concludes that the allegations, if proven, could not entitle a petitioner to relief.**

(Emphasis added.)

As noted earlier, the circuit court initially explained that it denied appellant's petition in part because House-Bowman's recantation was "merely impeaching" evidence as that term was used in prior decisions of this Court. *See, e.g., Keyes v. State*, 215 Md. App. 660, 672-73, *cert. denied*, 438 Md. 144 (2014). To the extent that categorization of the witness's

recantation played a decisive role in the circuit court's dismissal of appellant's petition without a hearing, the court applied an erroneous standard.

If, in fact, a material witness has recanted testimony about facts that played a significant role in the case, that recantation could be evidence that is directly exculpatory and not "merely impeaching." In *Jackson v. State*, 164 Md. App. 679, 697-98 (2005), we said:

> The distinction between "impeaching" and "merely impeaching," albeit nuanced, is pivotally important. Newly discovered evidence that a State's witness had a number of convictions for crimes involving truth and veracity or had lied on a number of occasions about other matters might have a bearing on that witness's testimonial credibility, but would not have a direct bearing on the merits of the trial under review. Such evidence would constitute collateral impeachment and would, therefore, be "merely impeaching." If the newly discovered evidence was that the State's witness had been mistaken, or even deliberately false, about inconsequential details that did [not] go to the core question of guilt or innocence, such evidence would offer peripheral contradiction and would, therefore, be "merely impeaching." **If the newly discovered evidence, on the other hand, was that the State's witness had actually testified falsely on the core merits of the case under review, that evidence, albeit coincidentally impeaching, would be directly exculpatory evidence on the merits and could not, therefore, be dismissed as "merely impeaching."**

(Emphasis added.) *See also Ward v. State*, 221 Md. App. 146, 168-69 (2015) (new evidence discrediting CBLA testimony was not "merely impeaching"); *cert. granted*, 446 Md. 218 (2016).[6]

[6] We observed in *Snead v. State*, 224 Md. App. 99, 113 (2015), that the Court of Appeals has expressed "skepticism about the conceptual distinction" between "impeaching" evidence and "merely impeaching" evidence. In *Hunt*, the Court of Appeals observed in *dicta* "that a hearing judge might conclude reasonably that the . . . distinction between (continued...)

We said in *Snead v. State*, 224 Md. App. 99, 113 (2015): "[A]s long as a court could reasonably conclude that the newly-discovered evidence, if believed, could create a substantial or significant possibility of a different result, the court may not dismiss a petition" based upon a characterization of the new evidence as merely impeaching.

Accordingly, we vacate the circuit court's rulings on the petition for writ of actual innocence and remand the case for a hearing on the petition. To paraphrase the closing comments made by the Court of Appeals in *Hunt*, 443 Md. at 264:

> If the [appellant proves that House-Bowman recants material trial testimony and would not testify to incriminating facts to which he testified at the first trial] and also persuade[s] the trial judge that [appellant] could not have discovered [this evidence] in time to move for a new trial pursuant to Rule 4–331, the Circuit Court must [then] determine whether the new evidence regarding [House-Bowman] creates a substantial or significant possibility that the result of the trial may have been different. We suggest that the answer to that question depends in large part on the particular set of facts and comprehensive body of evidence introduced at trial in each case.

In closing, we add this caveat, as the Court of Appeals did in the closing sentence of the majority opinion in *Douglas, supra*, 423 Md. at 188: "We make no conclusions regarding the underlying merits of [appellant's] petition and we recognize that decisions on the merits of requests for new trials based on newly discovered evidence, whether filed

[6](...continued)
'impeaching' and 'merely impeaching,' in the context of § 8–301 petitions for writs of actual innocence, is overly rigid." *Hunt*, 443 Md. at 263–64.

pursuant to Rule 4–331 or the C.P. § 8–301, are committed to the hearing court's sound discretion."

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MONTGOMERY COUNTY.