

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2344

SEPTEMBER TERM, 2014

TRACEY HAWES

v.

STATE OF MARYLAND

Eyler, Deborah, S.,
Kehoe,
Bair, Gary E.
(Specially Assigned),

JJ.

Opinion by Bair, Gary E., J.

Filed: February 9, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Tracey Hawes, the Appellant, was denied a writ of actual innocence following a hearing on October 14, 2014, in the Circuit Court for Baltimore City. Before this Court, Appellant presents one question for review:

1. Whether the circuit court erred in denying Appellant's petition for writ of actual innocence, where the State withheld a police report containing a statement questioning the credibility of the prosecution's chief witness?

For the reasons that follow, we shall affirm the ruling of the circuit court denying Appellant's petition for writ of actual innocence.

FACTS AND PROCEEDINGS

Appellant's jury trial took place on February 17, 1994, in the Circuit Court for Baltimore City (Bothe, J., presiding), at which he was convicted of first degree murder, use of a handgun in the commission of a crime of violence, and wearing, carrying, or transporting a handgun. On March 31, 1994, Appellant received a life sentence. Appellant filed an appeal, arguing plain error in the jury instruction defining premeditation, and insufficiency of the evidence. On January 27, 1995, the judgment was affirmed in an unreported decision. *Hawes v. State*, No. 675, Sept. Term 1994.

Following that ruling, Appellant filed his first Petition for Post Conviction Relief on March 28, 1997. A hearing was held on February 13, 1998 (Angeletti, J.), and Appellant's petition was denied. At that hearing, Appellant argued that the State failed to disclose a police report indicating that an officer did not believe the version of events given by the State's sole eyewitness. The first Post Conviction Court, however, held that the evidence was not required to be disclosed as it was the opinion of a police officer.

Appellant further argued that the reasonable doubt instruction provided to the jury was clearly erroneous, that his trial counsel was ineffective in failing to object to the instruction, and that the State knowingly introduced perjured testimony, but those claims were also rejected. Following this ruling, Appellant filed an Application for Leave to Appeal, which was denied by this Court on July 7, 1998.

Appellant filed his second Petition for Post Conviction Relief on July 23, 2003, which was dismissed on November 14, 2003. He subsequently filed a Motion to Re-open the Post Conviction proceedings on July 27, 2005, which was also denied. In that motion, Appellant alleged that his post-conviction attorney was ineffective for failing to raise the issue of the defective intent instruction, and that his appellate attorney was ineffective for failing to raise the issue on appeal. Appellant filed an Application for Leave to Appeal, which was denied on May 23, 2006.

Following that denial, Appellant filed a second Motion to Reopen the Post Conviction proceedings on April 3, 2007, in which he argued once again that his trial and appellate counsel were ineffective for not objecting to the intent instruction and failing to raise the issue of the State's alleged discovery violation. That motion was denied on December 28, 2007, by the Honorable Charles J. Bernstein, who held that these issues were previously addressed in the first Post Conviction Petition and/or the first Motion to Re-open.

On February 27, 2009, Appellant filed a Petition for Habeas Corpus Relief, which was denied on June 25, 2009, by the Honorable Judge Barry G. Williams. Appellant

alleged that the denial of his second Motion to Reopen was erroneous, that he was convicted based on defective reasonable doubt and intent instructions, and that the court erred in failing to find ineffective assistance of counsel. The habeas corpus court denied his petition, holding that Appellant failed to allege facts and circumstances to support relief, and that the other issues had been fully and finally litigated. Following this ruling, Appellant filed an Application for Leave to Appeal, which was denied on June 28, 2010.

On May 29, 2009, Appellant filed a Motion for New Trial, alleging that trial counsel's failure to object to the intent instruction and failure to request an alibi instruction constituted ineffective assistance of counsel. Appellant also alleged that the State's sole eyewitness, Wendy Washington, was not credible. This motion was denied after a hearing on September 21, 2012, before the Honorable Yvette M. Bryant.

Appellant filed his first Petition for Writ of Actual Innocence on September 28, 2010, which was denied without a hearing on February 15, 2011, by the Honorable M. Brooke Murdock. In a reported opinion, this Court affirmed the judgment of the circuit court on March 31, 2014, holding that Appellant failed to state a claim for writ of actual innocence under Md. Crim. Pro. Art. § 8-301(a) as a matter of law. *Hawes v. State*, 216 Md. App. 105 (2014).

Appellant filed his second Petition for Writ of Actual Innocence on April 21, 2014. This Petition was heard on October 14, 2014, before the Honorable Charles J. Peters. Judge Peters filed a ten-page Ruling and Order on December 5, 2014, denying the

Petition. Appellant appealed this decision on December 17, 2014, which brought the present matter before the Court.

Although the facts of this case were fully summarized in our prior reported opinion, *see Hawes*, 216 Md. App. at 110-13, we briefly recount them here. On July 21, 1993, at approximately 3:00 p.m., Ricky Lee Cunningham (victim) was walking with Wendy Washington along Freemont Street in Baltimore City when Cunningham was shot twice in the back and killed. Following the shooting, Washington was taken to police headquarters where she told officers she was unable to identify the shooter. She did, however, provide a description that he was a taller black male with a medium build wearing maroon shorts, a white shirt, and tennis shoes without socks. While being questioned, Washington was observed trying to conceal a hypodermic needle in her purse. Upon further investigation, a variety of paraphernalia was discovered and Washington was arrested on drug charges.

Roughly one month later, Washington returned to police headquarters and was shown a photographic array that included Appellant's photograph. At that time, Washington affirmatively identified Appellant as the shooter. Washington later testified at trial that she did not identify Appellant on the day of the shooting because she was "scared." Washington also admitted that she and the victim had used heroin and cocaine approximately two to three hours prior to the shooting. Describing the event, she testified that she heard two gunshots, and looked behind over her right shoulder. When she did not see anyone, she looked to her left, where the victim had fallen to the ground clutching his

back. It was at that time that Washington saw a man running down the street carrying a silver gun.

Family members of the victim testified that Appellant made statements indicating that he killed the victim after mistaking him for his brother Gwynn Cunningham. However, Appellant's sister claimed that Appellant denied killing the victim and that the shooter was actually trying to kill Appellant. Appellant maintained that he was watching television at the time of the murder with his friend Lance Gordon. He did, however, tell police that Gwynn Cunningham had robbed him of \$20, and on August 1, 1993, Appellant saw Gwynn and wanted to fight but Gwynn ran and called police. Appellant further claimed that an individual named "black Jessie" killed the victim.

In addition to Washington, an acquaintance of Appellant, Carl Willburn, also witnessed the shooting. At trial, Wilburn testified that had met Appellant two to three months prior to the event and that Appellant was not the shooter. Wilburn stated that he saw the shooter run down the street, fire three shots, and then run away. He described the shooter as a black male, approximately 5'6", wearing a T-shirt, shorts, and shoes without socks.

DISCUSSION

The standard for reviewing the denial of a Petition for Writ of Actual Innocence was recently stated by this Court: "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. In that regard, we will not disturb the circuit court's

ruling, unless it is ‘well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.’” *Jackson v. State*, 216 Md. App. 347, 363–64 (2014) (quoting *Moreland v. State*, 207 Md.App. 563, 569 (2012)). The Court of Appeals has further stated that discretion is abused only “where no reasonable person would take the view adopted by the trial court[.]” *Metheny v. State*, 359 Md. 576, 604 (2000).

Appellant argues that the circuit court erred in denying his second petition for writ of actual innocence, based on the discovery of a previously undisclosed police report, which questioned the credibility of the prosecution’s chief witness, Wendy Washington. The relevant section of that report, written by Detective Rick James on August 3, 1993, is as follows:

The witness states that when they were on the middle of the block, she ‘heard some shots’ and ‘turned to her right to see whether they were coming from.’ (note: this direction would be towards the row houses and away from the suspects location, which would be behind them and from the street.) She then turn to her left and, observes the victim grabbing his side and fall to the sidewalk. It is at this point she observes the suspect, gun in hand, running down Freemont (south) and right on Edmonson Avenue west. Ms. Washington’s recollection of the event is simply not credible. She describes only seeing the shooters’ back, saying he was wearing a white shirt, maroon shorts, tennis shoes with no socks...

Appellant argues that the circuit court erred in finding that the report was “cumulative and merely impeaching.” It is Appellant’s position that the report was not only newly discovered evidence, but that it created a substantial possibility of a different result at trial, as the jury could have determined that Washington’s testimony was not accurate.

The circuit court, however, rejected this argument, holding that the information contained in the report had already been addressed at trial. Nonetheless, it is Appellant’s position that Washington was not questioned regarding the inconsistencies of her story when compared to the physical evidence, and that this clash between the evidence and her testimony renders the report far more than “merely impeaching.” In support of this argument, Appellant cites *Jackson v. State*, 164 Md. App. 679 (2005), where this Court held that if newly discovered evidence demonstrated “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.” *Id.* at 697-98.

Our decision in *Jackson*, however, is inapposite, and the trial court did not abuse its discretion in denying Appellant’s Petition for Writ of Actual Innocence. Although Detective James did not testify at trial, Detective David Brown did, and his testimony covered all relevant information contained in Detective James’s report. Detective Brown not only testified that Washington appeared to be under the influence of drugs during their interview, but that he doubted the reliability of her statements. Furthermore, the evidence does not demonstrate that the “witness had actually testified falsely on the core merits of the case.” *Id.*

A Petition for Writ of Actual Innocence under Md. Crim. Pro. Art. § 8-301 may be granted only if the petitioner provides newly discovered evidence that gives rise to a reasonable probability of a different outcome at trial. Newly discovered evidence is

defined as “evidence that could not have been discovered in time to move for a new trial under Maryland Rule 4-331...[and] could not have been discovered by due diligence.” *Jackson*, 216 Md. App. at 364. Determining whether the evidence gives rise to a reasonable probability of a different outcome at trial involves a two-part inquiry. The court must assess whether the evidence is material to the result and, if material, determine the possible impact of the evidence had it been introduced at trial. *Id.* at 366-67.

Looking first to whether Detective James’s report could have been discovered in time to move for a new trial, we agree with the circuit court that it was not discovered until after the deadline under Maryland Rule 4-331. As noted by Judge Peters, Appellant did not receive the report in question until April 24, 1996, which was almost two months after the deadline for filing a motion for a new trial. Therefore, our analysis shifts to whether the report is material and “creates a substantial or significant possibility that the result may have been different.” Md. Crim. Pro. § 8-301.

Appellant argues that the report at issue contains two pieces of information that are material and demonstrate a “reasonable probability” of a different outcome at trial. First, the fact that Washington was under the influence of narcotics during the shooting, and second, that the police officer conducting the interview found Washington not to be a credible witness. However, both these issues were fully addressed at trial. Washington herself testified that on the day of the shooting she and the victim had used heroin and cocaine. Furthermore, the primary investigator, Detective Brown, testified that Washington “gave us information that I found, in my experience, not to be 100 percent

truthful.” The jury was well aware that Washington had used heroin and cocaine prior to the shooting, that she initially told police she was unable to identify the shooter, and that the investigating officer doubted her credibility. Given that this evidence was presented at trial, it is difficult to envision how additional testimony reiterating virtually the same facts would represent more than mere cumulative evidence or would have created a reasonable probability of a different outcome.

In an attempt to avoid this result, Appellant also argues that the newly discovered evidence must be considered in the context of other deficiencies in the case in order to truly evaluate whether it creates a substantial possibility of a different outcome at trial. Specifically, Appellant points to “defective jury instructions,” that this Court held did not constitute newly discovered evidence at Appellant’s previous appeal. Appellant maintains that the instructions on reasonable doubt, premeditation, and intent were critically flawed, and no alibi instruction was generated. Additionally, Appellant argues that the State violated Maryland Rule 4-263 when it failed to disclose the existence of the police report. Appellant maintains that had the report been disclosed, he would have called Detective James as a witness to ask about the inconsistencies between Washington’s account of events and the evidence known to Detective James.

These issues, however, were not properly before the trial court in the present case. A Petition for Writ of Actual Innocence is limited to addressing the effects of material, newly discovered evidence of actual innocence, and not an open opportunity for addressing broader complaints. We addressed this very issue in Appellant’s previous

appeal, finding: “Hawes’s claims, in his petition, about the intent instruction that was given to the jury and the alibi instruction that was not requested are not claims of newly discovered evidence because nothing he alleges about these instructions is evidence.” *Hawes*, 216 Md. App. at 134. Additionally, all of these claims related to jury instructions and production of the police report were previously addressed by two post-conviction courts, both of which rejected the arguments. Therefore, Appellant’s claims on these issues need not be further addressed.

Based on the above analysis, Appellant’s petition for Writ of Actual Innocence was properly denied. The report written by Detective James did not add any relevant information that was not already addressed at trial and, further, Appellant has failed to demonstrate that such evidence was material and would have created a reasonable probability of a different outcome at trial. The jury was well aware that the police not only doubted Washington’s initial account of the shooting, but that she was under the influence of narcotics, and initially stated she was unable to identify the shooter. Therefore, even if Detective James’s report was presented at trial, it is “merely cumulative” and would not have created a reasonable possibility of a different result. As such, the circuit court did not abuse its discretion in denying Appellant’s Petition for Writ of Actual Innocence.

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