Circuit Court for Howard County
Case No. 13-K-01-040288

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2640

September Term, 2016

BENJAMIN DAVIS, III

v.

STATE OF MARYLAND

Woodward, C.J.,
Eyler, Deborah S.,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 9, 2018

In 2001, a jury in the Circuit Court for Howard County convicted Benjamin Davis, III, appellant, of eight offenses, including attempted second-degree murder and the use of a handgun in a crime of violence. The court subsequently sentenced him to ten years in prison for attempted murder and a consecutive five years for the handgun offense. We affirmed appellant's convictions and sentence in an unreported opinion. *See Davis v. State*, No. 2262, Sept. Term 2001 (filed Apr. 3, 2003). We recite the factual background from that opinion for contextual purposes:

> Before going out to a bar on the evening of February 9, 2001, [appellant], Aamir Benton, Craig Mott, and several other people were gathered at Stephanie Christian's house. Christian's mother came home before everyone left and "kicked everybody out of the house." Benton asked Mott if he would give Benton and [appellant] a ride to Benton's grandmother's house, a few blocks away from Christian's house. [Appellant], Benton, Mott, Nick Hebron, Nick Scarborough, and Greg Scarborough left together in Mott's girlfriend's car.
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> After leaving Christian's house, the car arrived at the intersection of Jones Road and Mary Lane in the Jessup area of Howard County, an intersection near Benton's grandmother's driveway. According to testimony from Mott, [appellant], Benton and he were involved in the drug trade. Benton told Mott to get out of the car so Benton could "holler at [him] real quick." Mott, [appellant], and Benton all got out and stood at the back of the car near the trunk. Benton was supposedly upset with Mott for not sending him commissary money while Benton was in jail. Benton had apparently helped Mott enter the narcotics trade and believed that Mott, out of respect, should have helped him during his incarceration. At some point, Mott alleged that Benton told [appellant] to "heat this n[*****] up."
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> At that instruction, [appellant] reached for a gun he had concealed in his waistband. As [appellant] went for his gun, Mott fled into the woods around the intersection. Mott heard at least one shot fired behind him. Mott reached a house, where Jason Benjamin let him in and allowed him to call 911. Both Mott and Benjamin saw Mott's girlfriend's car drive off toward Guilford Road and heard

> another shot. Officers arrived shortly after the second shot and found two .45 caliber shell casings on Mary Lane, but did not locate [appellant] or Benton at that time. Howard County Police later found Mott's girlfriend's car by using "Lowjack."

Id. at slip op. 1-2.

Following his unsuccessful appeal, appellant filed numerous post-conviction actions, none of which were successful. Relative to this appeal, on December 12, 2016, appellant filed a petition for a writ of actual innocence, claiming that Mott had recanted his trial testimony, and this constituted newly discovered evidence that called into question his convictions. Attached to the petition was an affidavit by Mott in which he claimed that he was pressured by the prosecutor to testify that appellant shot at him. Still, Mott states that he "knew that either Aamir Benton or [appellant] were involved[.]" The circuit court dismissed the petition without a hearing, determining that the issues raised by the affidavits were not newly discovered evidence because the information contained therein was known at trial.[1]

Appellant contends that in ruling on his petition, the circuit court did not have the benefit of a recent Court of Appeals decision, *State v. Ebb*, 452 Md. 634 (2017), which he believes stands for the proposition that when a victim recants his or her testimony, that is "newly discovered evidence" sufficient to warrant a hearing on a petition for a writ of actual innocence. Accordingly, he maintains that, because Mott recanted his trial testimony

[1] Appellant also attached a statement from Hebron, who stated that he had heard Mott say he knew appellant was innocent. In his brief, however, appellant focuses exclusively on Mott's statement.

in his purported affidavit, the court should have held a hearing on his petition. We disagree and affirm.

We review a circuit court's decision as to the sufficiency of a petition for a writ of actual innocence *de novo*. *See Smallwood v. State*, 451 Md. 290, 308-09 (2017). The Court of Appeals has held that in order to prevail on a petition for a writ of actual innocence, the petitioner must demonstrate "actual innocence," meaning that "a defendant is not guilty of a crime or offense in fact. In other words, 'actual innocence' means the defendant did not commit the crime or offense for which he or she was convicted." *Id.* at 313. Stated another way, "'[a]ctual innocence means factual innocence, not mere legal insufficiency.'" *Yonga v. State*, 221 Md. App. 45, 57 (2015) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)), *aff'd*, 446 Md. 183 (2016).

The statement appellant attached to his petition is not a recantation of Mott's trial testimony. Overlooking the fact that appellant has attacked Mott's statements and credibility from the date of his trial to the present, which has been litigated in prior post-conviction proceedings, the statement is not actually evidence of appellant's innocence of the crimes charged. At no point in the statement does Mott say that appellant did not fire the gun or did not assist Benton in firing the gun. Rather, Mott states, "I knew that either Aamir Benton or [appellant] were involved[.]" Accordingly, we find no error in the court's dismissal of appellant's petition because nothing in Mott's statement points to appellant's factual innocence.

Moreover, the facts of *Ebb* are sufficiently distinguishable from the present case. In that case, twenty years after trial for felony murder, a testifying witness alleged that he had

"lied" at trial. 452 Md. at 638. The circuit court denied Ebb's petition, concluding that other eyewitnesses identified Ebb as the shooter. *Id.* at 640-41. The Court of Appeals determined that Ebb had adequately pled the requirements of a writ of actual innocence pursuant to Maryland Code (2001, 2008 Repl. Vol., 2016 Suppl.), Criminal Procedure Article ("Crim. Pro."), § 8-301. *Ebb*, 452 Md. at 646-47. The Court concluded that Ebb should be given a hearing at which the recanting witness could clarify the statements he lied about at trial. *Id.* at 656-57. Here, Mott does not say that he lied at trial. Rather, he states that he was pressured by the prosecutor and police, but he still names appellant as involved in the crime. As such, the circuit court would not have benefitted from *Ebb* because it is not applicable to appellant's case.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.