Circuit Court for Baltimore City
Case No: 18736203

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3227

September Term, 2018

ANTHONY JOHNSON

v.

STATE OF MARYLAND

Graeff,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 4, 2020

Nearly 30 years after he was convicted of first-degree murder and handgun offenses, Anthony Johnson, the appellant, filed a petition for writ of actual innocence in the Circuit Court for Baltimore City based on (1) a 1998 letter from a State's witness recanting his trial testimony that the murder victim did not have a weapon on him at the time of the incident and (2) the public revelation that the firearms examiner who had testified at trial had falsified his credentials. Following a hearing, the circuit court denied relief after concluding that Johnson's "newly discovered evidence" could have been discovered in time to move for a new trial. But in any event, the court also found that (1) the authenticity of the 1998 letter was highly suspect and its contents untrustworthy and (2) the evidence that the firearm examiner had falsified his credentials would not have created a substantial or significant possibility that the result of his 1988 trial may have been different. Johnson appeals. Because the circuit court did not abuse its discretion in denying the petition for writ of actual innocence, we shall affirm.

BACKGROUND

Trial

At Johnson's 1988 trial, Jeffrey Briscoe and Shawn Weaver both testified that they were walking down the street in mid-afternoon on December 2, 1987 with Kevin Jones (who was accompanied by the two-year old niece of Jones's girlfriend) when they encountered Johnson. Both testified that Johnson and Jones began arguing and, as Jones bent down to tend to the child, Johnson reached into a bag he was carrying and shot Jones. Briscoe and Weaver both testified that Jones did not have a weapon. The police officer who arrived on the scene recovered a baseball hat with "blood and brain matter inside of

the hat," as well as a spent cartridge casing from the ground next to Jones. The officer did not find a weapon and a weapon was never recovered.

Jones died from a gunshot wound to the back of the head. The medical examiner testified that there was "no evidence of close range firing on the skin," but there was "evidence that the bullet passed through something else before it went into Mr. Jones's head." He testified that the hole in the hat recovered at the scene "corresponds to the location of the gunshot wound on the deceased when the hat is worn in the usual fashion," that is, "over the top of the head with the bill in front."

Joseph Kopera, a firearms examiner with the Baltimore Police Department, testified that he examined the spent cartridge case that was recovered at the shooting scene and the bullet recovered from Jones's head and concluded that the victim was shot with a .38 caliber bullet which could have been fired from "a variety of semi-automatic pistols." In addition, Mr. Kopera examined the baseball hat "to determine distance designation, meaning how far the gun was away from this object when the gun was fired." Based on his examination and testing, he concluded that the "distance between the gun and hat was within contact to one inch" and, therefore, his opinion was that the gun was "fired at a very close range" – "either contact or one inch."

The jury found Johnson guilty of first-degree murder, use of a handgun in the commission of a crime of violence, and unlawfully wearing, carrying, and transporting a handgun about his person. The court sentenced Mr. Johnson to life in prison for the murder offense and to a consecutive term of 20 years' for the use of a handgun in the commission of a crime of violence. Upon appeal, Johnson argued, among other things, that the evidence

was insufficient to support the jury's verdict of first-degree murder. A panel of this Court found the evidence was sufficient and affirmed the judgments. *Johnson v. State*, No. 1518, Sept. Term, 1988 (Md. App. May 18, 1989).

Petition for Writ of Actual Innocence

Johnson filed a petition for writ of actual innocence in 2017. His "newly discovered evidence" included a letter he had purportedly received from Shawn Weaver in 1998 recanting his trial testimony that the victim was not in possession of a weapon at the time of the incident. The letter recounted that Weaver observed Jones pull a gun from his waistband before Johnson pulled his gun from the bag and that when Johnson's gun "hit" Jones "it went off"; that Briscoe then picked up Jones's gun and took it and the two-year old child home; and that the police had told him to keep his story consistent with Brisoce's and say that Johnson had pulled his gun on Jones and shot him in the head.

Johnson also relied on the 2007 public revelation that the firearms examiner, Joseph Kopera, had falsified his credentials. He admitted that Kopera's testimony was not the "crux of his case," but asserted it played "a critical role in the State's inflated theory that he executed, slaughtered, and assassinated the victim based on Kopera's analysis that the shooting was close ranged of about 1 inch," noting that the prosecutor "went to great lengths to characterize the killing as an execution."

Actual Innocence Hearing

A hearing was held on December 6, 2018. Johnson testified that he had received the Weaver letter in the mail on March 17, 1998, while he was housed at the Maryland House of Correction Annex in Jessup. The return address on the envelope included

Weaver's name and inmate number and the same address as that used to address the letter to Johnson. (Despite the similarity in the addresses, Johnson claimed that he and Weaver were in different "facilities" at the time.) Johnson attempted to authenticate the letter by claiming to have received other correspondence from Weaver before this one (which he had not kept) and, therefore, recognized the hand-writing as belonging to Weaver. He also maintained that the signature on the letter was the same as Weaver's signature on the 1987 statement he had given to the police when interviewed about this incident and a copy of that police statement was introduced. At the time of the hearing, Weaver was deceased – Johnson recalling that he had died in 2009 or 2010.

Johnson called Miren McCoy, for the purpose of corroborating the contents of the Weaver letter, who testified that he was present at the scene when the shooting occurred. He related that, when Jones and Johnson encountered one another in the street "they was fussing" and "I seen this guy [Jones] going into his waistband, and I seen [Johnson] like going into a bag." He kept walking but then "heard a gunshot." He turned around "and I seen first Anthony Johnson kept saying I didn't mean it, I didn't mean it. And he threw the gun on the ground and it went off." He testified that "Jeffrey Briscoe picked the gun up and ran up the street."

In rebuttal, the State introduced McCoy's police statement and a transcript of McCoy's grand jury testimony. The police statement, given one week after the shooting, reflects that McCoy told the detectives that he had encountered Briscoe, Weaver, and "the boy that got killed" as he was walking away from a "food bus." As he continued on his way, the statement reflects that he told the police: "I heard a shot. I turned around and saw

[Briscoe] kneeling down beside the guy who got shot and [Weaver] standing by him. I saw the guy who got shot move a little bit. I grabbed the little girl's hand and stood there with her. Somebody from her family came and took her." When asked if he had seen "who shot the boy," McCoy answered: "No not really."

The day after giving the police statement, McCoy testified before the grand jury that he had seen Johnson on the street with "a Diplomat bag in his hand." He observed Johnson and Jones when they encountered one another and "they start fussin." He initially told them to stop, but then walked toward his house because he did not want to get involved. His grand jury testimony continued:

> And as I was walking down the street, I heard a shot. And I turned back around and looked and then I seen . . . [Jones], he was standing there like this (indicating). And I seen [Johnson], he had the bag in this hand, had a gun in this hand. He was running . . . runnin' by the apartments. And I seen the boy [Jones] just fall. He just fell straight on his face and, you know, the boy [Weaver] was standing overtop of him and the boy [Briscoe] was kneeling down at him. You know, that's just what I seen.

As the State pointed out at the actual innocence hearing, neither McCoy's police statement nor his grand jury testimony indicate that he had observed the victim with a gun.

Circuit Court Ruling

In a written ruling and order dated December 11, 2018, the circuit court denied Johnson's petition for writ of actual innocence. As to the Weaver letter, the circuit court first concluded that it was not "newly discovered" evidence because Johnson had "failed to explain either when he first learned of the alleged recantation, or why Weaver could not

have been interviewed prior to May 20, 1989 [in time to move for a new trial], in order to discover the alleged recantation."

But even if it could be deemed newly discovered evidence, the circuit court "strongly question[ed]" the authenticity of the Weaver letter. The court was "skeptical" of Johnson's uncorroborated testimony that the handwriting was that of the now deceased Weaver and found "little similarity" between the signature on the letter and Weaver's signature on his police statement. The circuit court was "even more troubled by the reliability of the contents of the letter itself," noting that "'post-trial recantation of witnesses are looked on with the utmost suspicion.'" (Quoting *Yonga v. State*, 221 Md. App. 45, 91 (2015) (further quotation omitted)). In short, the circuit court found that "the statement is completely unreliable and of no probative value."

The circuit court also rejected Johnson's claim that Kopera's false credentials constituted newly discovered evidence, finding that the falsification could have been discovered with an "exercise of due diligence" in time to move for a new trial. Nonetheless, the circuit court concluded that if the jury in Johnson's trial had been aware of Kopera's false credentials, "there would not have been a substantial or significant possibility of a different result." That is because the circuit court found that "Kopera's testimony added nothing of significance to the State's case." The court explained:

> Kopera opined that the cartridge recovered at the scene and the spent bullet recovered from the victim's body were both .380 caliber ammunition shot by a handgun. There was no dispute that a handgun was used in the shooting. Further, no gun was ever recovered, so no comparison to any firearm was ever done. Consequently, this opinion was uncontroversial. Kopera also concluded, after an examination of the gunshot residue on

> the victim's hat, that the victim was shot at close range. Again, there appeared to be little controversy about this issue at trial.

The circuit court also noted that, although the medical examiner was "unable to opine about the shooting distance," he did testify that a "'barrier' such as a hat 'would likely have prevented any deposition of gunshot residue on the skin surrounding the wound.'" Further, the court noted that the medical examiner did find "evidence of blood and gunshot residue on the victim's hat in a location that 'corresponds to the location of the gunshot wound' on the victim." Finally, the circuit court found that the "the State's case was strong" and that at trial Johnson had "failed to produce enough evidence to even generate a self-defense instruction."

DISCUSSION

A Writ of Actual Innocence

Certain convicted persons may file a petition for a writ of actual innocence "based on newly discovered evidence." *See* Md. Code Ann., Crim. Proc. § 8-301; Md. Rule 4-332. "Actual innocence" means that "the defendant did not commit the crime or offense for which he or she was convicted." *Smallwood v. State*, 451 Md. 290, 313 (2017).

In pertinent part, the statute provides:

> (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.

***

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

Crim. Proc. § 8-301.

"Thus, to prevail on a petition for writ of innocence, the petitioner must produce evidence that is newly discovered, i.e., evidence that was not known to petitioner at trial." *Smith v. State*, 233 Md. App. 372, 410 (2017). Moreover, "[t]o qualify as 'newly discovered,' evidence must not have been discovered, or been discoverable by the exercise of due diligence," in time to move for a new trial. *Argyrou v. State*, 349 Md. 587, 600-601 (1998); *see also* Rule 4-332(d)(6).

Standard of Review

"Generally, the standard of review when appellate courts consider the legal sufficiency of a petition for writ of actual innocence is *de novo.*" *Smallwood*, 451 Md. 308. "Courts reviewing actions taken by a circuit court after a hearing on a petition for writ of actual innocence limit their review, however, to whether the trial court abused its discretion." *Id.* at 308-09. *See also Jackson v. State*, 164 Md. App. 679, 712-13 (2005) ("Both evaluating the credibility of the [newly discovered] evidence, in the first place, and then weighing the significance of the evidence, in the second place, remain within the broad discretion of the trial judge[,]" thus the "ultimate review" by the appellate court of whether newly discovered evidence merits a new trial is "clearly under the abuse of discretion standard."), *cert. denied*, 390 Md. 501 (2006)). Under this standard, the appellate court "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." *Smith*, 233 Md. App. at 411-12 (quotation omitted). Factual findings made by the circuit court are given deference by the appellate court, unless they are clearly erroneous. *Yonga*, 221 Md. App. at 95.

Analysis

On appeal, Johnson asserts that the circuit court erred in discrediting the authenticity of Weaver's letter and in failing to recognize its probative value. In essence, he challenges the circuit court's failure to credit his testimony that the letter was genuine based on his claim that he was familiar with Weaver's handwriting from other correspondence he had received from Weaver. He also maintains that the letter was "self-authenticated . . . by the mere fact [that] the envelope has a post mark date stamped March 12, 1998 and Shawn Weaver's name and D.O.C. identification number affixed to the envelope as well." And he asserts that McCoy's testimony at the actual innocence hearing was consistent with Weaver's recantation in the 1998 letter and, therefore, the letter should be deemed trustworthy.

We are not persuaded that the circuit court abused its discretion in denying relief based on the Weaver letter. The court was far from convinced of its authenticity, finding that Weaver was now deceased; that Johnson did not retain previous letters he claimed Weaver had written to him "so that an independent comparison could be made"; and that the signatures on the letter and Weaver's 1987 police statement bore "little similarity." Having reviewed the record, we cannot say that those findings are clearly erroneous.

Johnson also maintains that Kopera's "perjurious testimony was newly discovered and would have affected the verdict." The circuit court, however, concluded that

"Kopera's testimony added nothing of significance to the State's case," finding from its review of the trial transcripts that, given the hole in the baseball hat, the medical examiner did not rule out the possibility of a close-range firing. We cannot say that the court's finding is clearly erroneous or that the court abused its discretion in denying relief based on Kopera's false credentials.

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