

Circuit Court for Baltimore City
Case No. 199113054

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 3437

September Term, 2018

OMAR WILKERSON

v.

STATE OF MARYLAND

Kehoe,
Arthur,
Wells,

JJ.

Opinion by Kehoe, J.

Filed: February 21, 2020

*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. *See* Md. Rule 1-104.

Omar Wilkerson was convicted of the murder of Shaborn Shabazz Allah in 2000. The prosecution's theory was that Allah was murdered with a handgun found in a car in which Wilkerson had been riding shortly before his arrest for an unrelated crime. The handgun belonged to a confederate in the latter crime, Antoine Lucas. The State asserted that Wilkerson murdered Allah, using Lucas's handgun. The defense conceded that Lucas's firearm was used to murder Allah, but maintained that it was Lucas, and not Wilkerson, who pulled the trigger.

At trial, the prosecution used comparative bullet-lead analysis (CBLA), a forensic investigation technique that has since been discredited, as one means of establishing a connection between the firearm and Allah's murder. In 2017, Wilkerson filed a petition for a writ of actual innocence, contending that he would not have been convicted if the CBLA evidence had not been presented to the jury. His petition was denied after a hearing in the Circuit Court for Baltimore City, the Honorable Charles J. Peters, presiding. On appeal, Wilkerson presents one issue:

Did the circuit court abuse its discretion in denying Wilkerson's petition for a writ of actual innocence?

We will affirm the judgment of the circuit court.

Background

On May 15, 2000, a jury found Wilkerson guilty of first-degree murder, use of a handgun in the commission of a felony or crime of violence, and unlawfully carrying a handgun. Wilkerson was sentenced to life imprisonment for first-degree murder, and a

consecutive sentence of twenty years' imprisonment for use of a handgun in the commission of a felony; the remaining handgun count was merged for sentencing purposes. Wilkerson appealed his conviction, and this Court affirmed. *Wilkerson v. State*, 139 Md. App. 557, cert. denied 366 Md. 249 (2001). A subsequent petition for post-conviction relief was denied by the Circuit Court for Baltimore City in 2003. Later, Wilkerson filed a motion to correct an illegal sentence, which was also denied. See *Wilkerson v. State*, 2016 WL 856979 (Md. Ct. Spec. App. 2016).

The pertinent facts of Wilkerson's case were related in detail in this Court's opinion in his direct appeal. *Wilkerson*, 139 Md. App. 561–68. We refer the reader to that opinion for the factual background of this case. We will provide further facts as needed in our analysis.

Wilkerson's Petition for a Writ of Actual Innocence

On November 28, 2017, Wilkerson filed a petition for writ of actual innocence pursuant to Maryland Code (2001, 2018 Repl. Vol.), Criminal Procedure ("Crim Pro."), § 8-301(a) in the circuit court. The petition maintained that Wilkerson was innocent and asserted that Wilkerson should be granted a new trial based on newly discovered evidence that would have created a substantial or significant possibility of a different result at trial. The alleged newly discovered evidence took the form of scientific studies, published in the early 2000s, debunking CBLAs, in conjunction with the FBI's discontinued use of CBLAs in 2005 for that reason. For legal support, Wilkerson cited three Maryland cases concerning

the use of CBLAs: *Clemons v. State*, 392 Md. 339 (2006);¹ *Kulbicki v. State*, 440 Md. 33 (2014); and *Ward v. State*, 221 Md. App. 146 (2015). We will discuss the latter two decisions later in this opinion.

A hearing on the petition was held on September 12, 2018. The arguments made by the parties at the hearing mirror those made on appeal, and we will discuss them in more detail in our analysis below.

On January 25, 2019, the court issued its ruling and order. The court first found that the post-trial scientific studies debunking CBLAs were newly discovered evidence in Wilkerson’s case pursuant to *Ward*, 221 Md. App. at 149. Further, the court found that the newly discovered evidence applied to Wilkerson’s case because the FBI did not renounce the use of CBLAs until 2005, while the mandate in Wilkerson’s direct appeal issued in 2001.

Then, the court concluded that there was no substantial or significant possibility of a different result at Wilkerson’s trial if the CBLA evidence had been excluded. The court recognized that “had the jury in this case been aware of the later scientific studies, the jury would have discounted the CBLA testimony in its entirety.” (Internal quotation marks omitted.) However, even “with that [CBLA] testimony out of the equation,” the court

¹ In *Clemons v. State*, 392 Md. 339, 372 (2006), the Court of Appeals, after reviewing a number of scientific studies challenging the reliability of CBLAs, concluded that “CBLA does not satisfy the requirement under the *Frye-Reed* test for the admissibility of scientific expert testimony because several fundamental assumptions underlying the process are not generally accepted by the scientific community.”

found that there was substantial evidence presented at trial to support the jury's verdict. The circuit court's analysis focused primarily upon the evidence concerning three factors: the eyewitness evidence linking Wilkerson to Allah's murder on March 5, the ballistics evidence linking the handgun found in Jolley's car on March 13 to Allah's murder, and Wilkerson's exculpatory evidence.

As to the first, the circuit court noted that Linmark Pearson, who testified at trial as an eyewitness to Allah's murder, identified Wilkerson as the shooter from a photographic array and was "one hundred percent certain" that Wilkerson shot and killed Allah. The court observed that, on cross-examination, Pearson was impeached with a 1992 conviction for failure to disclose a material fact in applying for unemployment insurance benefits, but that "no evidence was ever produced to show any reason why this witness would come to court, and under oath, frame [Wilkerson] as a murderer."

The circuit court analyzed the ballistics evidence at some length. Mark Takacs, the prosecution's ballistics expert, testified that he had examined three bullets recovered from the murder scene, including one from Allah's body. Takacs testified that all of these bullets "had the same general rifling characteristics," that is "four lands, four grooves with a righthand twist," which were imprinted on the bullets as they were shot from a firearm. He told the jury that these rifling characteristics were "very rare," so rare in fact that the FBI database did not contain a firearm with these characteristics. The court noted that Takacs testified that only "very rare" firearms were not listed on the FBI's database. Takacs also

examined the handgun found in Jolley's car. That weapon had the same rifling characteristics as the firearm used in Allah's murder. The circuit court continued:

Although Takacs did not have sufficient evidence to conclude that the three recovered bullets were shot from the recovered firearm, he did opine that these same rifling characteristics for both the bullets and the firearm were "unique" and "rare."

Ultimately, Takacs concluded that a very unique firearm fired the bullets which killed the victim and the same type of very unique firearm was recovered in the car in which [Wilkerson] was riding eight days later. Although [Wilkerson]'s trial counsel objected generally to these conclusions, he asked no questions on cross examination.

Finally, the circuit court discounted the probative weight of the evidence presented by Wilkerson:

The defense evidence presented in [Wilkerson]'s trial provides very little support for [Wilkerson]'s claim [that he was actually innocent]. The defense presented the testimony of Kevin Blackmon, a convicted murderer and robber, who stated that he was incarcerated with Antoine Lucas and [that] Lucas told Blackmon "plenty times" that Lucas, and not [Wilkerson], murdered [Allah]. This testimony was actually consistent with the CBLA evidence that the firearm at Lucas' feet on March 13th was the murder weapon. The defense also called two alibi witnesses, Sederick Vander-Bey and Albert Clark, who testified that [Wilkerson] was very near the scene of the murder but not involved in the murder. The Court would note that these two witnesses were seriously challenged on cross-examination. Regardless, their testimony was hardly compelling since it, at best, showed that [Wilkerson] just happened to be at the scene at the time of the murder. The same could be said for [Wilkerson]'s own trial testimony in which he confirmed that he was very nearby at the time of the murder, and also present in the car with the murder weapon eight days later. (Citations to the trial transcript omitted.)

From all of this, the circuit court concluded:

In its case, the State produced an eyewitness who in broad daylight identified [Wilkerson] as the murderer with one hundred percent certainty. Although

the defense did introduce a 1992 conviction for “failure to disclose material fact in applying for unemployment insurance benefits,” to impeach the eyewitness, no evidence was ever produced to show any reason why this witness would come to court and, under oath, frame [Wilkerson] as a murderer. The admissible ballistics evidence was equally damning. The State’s ballistics evidence established that the firearm used in the murder was very rare and unique, and merely eight days later, the police recovered this very same type of rare and unique firearm in the car from which [Wilkerson] fled. Somehow, the eyewitness identified [Wilkerson] as the murderer who, unbeknownst to the eyewitness, used a unique type of firearm, and [Wilkerson] just happened to have been found in a car with this same type of handgun eight days after the murder. The probability of such a coincidence is astronomical.

The court also observed that the defense embraced the notion that the firearm recovered from the March 13 incident was the murder weapon. The court found:

Faced with the State’s evidence, [Wilkerson’s] trial counsel conceded that the gun seized was indeed the murder weapon. However, this concession was not due to the CBLA evidence, but rather because this concession was consistent with [Wilkerson’s] strongest defense, namely, that Antoine Lucas, and not [Wilkerson], was the murderer. Considering that [Wilkerson’s] trial counsel was faced with the other admissible ballistics evidence, and the recovery of this 1940’s Belgian handgun at the feet of Antoine Lucas as well as the testimony that the handgun was owned by Lucas, and the alleged statements from Lucas that he committed the murder, [Wilkerson’s] counsel made the clear and reasonable strategic decision to embrace the ballistics evidence, including the CBLA evidence. Instead of hurting [Wilkerson’s] defense, the CBLA evidence actually bolstered the defense.

For these reasons, the circuit court concluded that Wilkerson did not meet his burden of demonstrating a substantial or significant possibility that the result of the trial might have been different had the CBLA evidence been excluded, and it denied Wilkerson’s petition. Wilkerson noted a timely appeal.

Analysis

1.

Section 8-301(a) of the Criminal Procedure Article provides in pertinent part:

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)(i) if the conviction resulted from a trial, creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined[.]

See also Md. Rule 4-332.²

Thus, in order to prevail on a petition for writ of actual innocence, the petitioner must first demonstrate that there is newly discovered evidence that could not have been discovered in time to move for a new trial under Maryland Rule 4-331. Second, the petitioner must demonstrate that the newly discovered evidence creates a substantial or significant possibility that the result of the trial might have been different. *McGhie v. State*,

² The rule states in pertinent part:

(a) This Rule applies to an action seeking a writ of actual innocence as provided by Code, Criminal Procedure Article, § 8-301.

* * *

(k) The petitioner has the burden of proof to establish a right to relief.

(l)(1) If the court finds that the petitioner is entitled to relief, it may set aside the verdict or judgment of conviction, grant a new trial, re-sentence the petitioner, or correct the sentence. (2) The court shall state the reasons for its ruling on the record.

449 Md. 494, 512 (2016). The burden of proof on a writ for actual innocence is on petitioner. Crim. Pro. § 8-301(g); Md. Rule 4-332(k). Additionally, the newly discovered evidence must support a petitioner’s claim that he or she “did not commit the underlying crime for which he or she was convicted.” *Smallwood v. State*, 451 Md. 290, 316 (2017).

Appellate courts review a circuit court’s decision to grant or deny a petition for actual innocence for abuse of discretion. *McGhie v. State*, 449 Md. at 509–10; *State v. Hunt*, 443 Md. 238, 257, 116 A.3d 477 (2015). A court can abuse its discretion by basing its decisions on factual findings that are clearly erroneous or by applying erroneous legal principles. Appellate courts review factual findings for clear error, *In re Adoption/Guardianship of Ta’Niya C.*, 417 Md. 90, 100 (2010), and exercise *de novo* review on circuit court’s conclusions of law. *Douglas v. State*, 423 Md. 156 (2011)). Finally, a court can abuse its discretion by reaching an unreasonable or unjust result even though it has correctly identified the applicable legal principles and applied those principles to factual findings that are not clearly erroneous. In this context, an appellate court will interfere with the circuit court’s ruling only when it is “well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *State v. Taylor*, 431 Md. 615, 630 (2013) (quoting *North v. North*, 102 Md. App. 1, 14 (1994)).

2.

Wilkerson challenges the motion court’s conclusion that he did not meet his burden of showing that the newly discovered evidence created a substantial or significant possibility that the result of the trial might have been different.

First, Wilkerson highlights the problems with CBLA evidence. He indicates that the science behind CBLAs has been debunked, as the Court of Appeals and this Court have recognized in *Kulbicki v. State*, 440 Md. 33 (2014),³ and in *Ward v. State*, 221 Md. App. 146 (2015).⁴ Specifically, Wilkerson argues that FBI Agent Kathleen Lundy’s expert testimony regarding CBLA evidence was unquestionably unreliable and unfairly prejudiced him, thereby creating a significant possibility that the result of his trial may have

³ In *Kulbicki*, the Court of Appeals overturned a defendant’s murder conviction on ineffective-assistance-of-counsel grounds, as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). 440 Md. at 56. The Court based its holding on defense counsel’s failure to challenge an expert witness’s testimony on a CBLA conducted on bullets found in the victim and unfired bullets found in the defendant’s home. *Id.* at 55–56. However, the United States Supreme Court summarily reversed the Court of Appeals, holding that counsel did not provide deficient performance by failing to challenge the expert witness’s testimony and report on cross-examination. *Maryland v. Kulbicki*, 136 S.Ct. 2, 4 (2015) (“Counsel did not perform deficiently by dedicating their time and focus to elements of the defense that did not involve poking methodological holes in a then-uncontroversial mode of ballistics analysis.”).

⁴ In *Ward*, this Court held that, pursuant to Crim. Pro. § 8-301, reports debunking CBLAs was newly discovered evidence that created a substantial possibility that the result of the defendant’s trial may have been different. 221 Md. App. at 170. In overturning the defendant’s conviction, we looked to *Kulbicki* for guidance and reasoned that “[i]f mere cross-examination of [the expert witness] would have created a substantial possibility of a different outcome, it follows that total exclusion of [the expert witness’s] testimony . . . would also have created a possibility of a different outcome.” *Id.*

been different. Wilkerson highlights that the State, in its opening statements, told the jury that the FBI:

did a test on the bullet. They examined the lead contents of the bullets themselves and . . . it appears that one bullet in the gun that was recovered is an *absolute match* to one bullet that was found at the scene. Another bullet from the gun is an *absolute match* to a bullet found at the scene.” (emphasis Wilkerson’s)

Further, Wilkerson notes that Agent Lundy was not cross-examined by defense counsel.

Second, Wilkerson attacks the sufficiency of the State’s evidence against him. He contends that the CBLA evidence was the primary evidence utilized by the State to convict him. He asserts that there are deficiencies in the other evidence relied on by the State. For example, Mark Takacs, a firearms expert, could not state with absolute certainty that the bullets recovered from the murder scene were fired from the handgun seized on March 13. Two eyewitnesses to the murder chose Wilkerson from the same photographic array, but Wilkerson notes that one eyewitness was only “60 to 70 percent sure” that Wilkerson was the person she saw at the March 5 murder. In any event, Wilkerson asserts that the photographic array was biased because it did not include photographs of any other arrestees from the March 13 robbery. (It appears from the circuit court’s analysis that it did not believe that the second eyewitness’s testimony affected the jury’s verdict.)

Third, Wilkerson points to evidence demonstrating his innocence. Two witnesses, Sederick Vander-Bey and Albert Clark, testified for the defense that they saw Wilkerson at a location different from that of the murder scene at the time the murder occurred.

Further, Blackmon testified that Antoine Lucas repeatedly confided in him that he, and not Wilkerson, murdered Allah while the two were in lock-up. Thus, Wilkerson argues that the other evidence presented against him at trial was far from dispositive of a guilty verdict.

Finally, Wilkerson takes issue with the circuit court's reasoning for denying his petition. In finding that Wilkerson failed to meet his burden for the second prong of Crim. Pro. § 8-301, the court reasoned that "[Wilkerson's] counsel made the clear and reasonable strategic decision to embrace the ballistics evidence, including the CBLA evidence," despite other evidence that favored Wilkerson's case, including other admissible ballistics evidence, the recovery of the handgun at the feet of Lucas, and statements made by Lucas that he committed the murder.

Wilkerson asserts that this part of the court's reasoning was in error because it conflated the standard applicable to petitions for post-conviction relief based upon inadequate assistance of counsel with the standard for petitions for writs of actual innocence. Citing *Hawes v. State*, 216 Md. App. 105, 124–25 (2014), Wilkerson argues that trial strategy does not preclude relief in a petition for a writ of actual innocence as it does in a post-conviction matter. According to Wilkerson, the former is concerned with newly discovered evidence and its effect on trial, while in the latter, trial counsel's performance is reviewed.

In sum, Wilkerson suggests that, had the unreliable and prejudicial CBLA evidence been excluded, the jury could not have considered it, making it a significant possibility that the result of his trial may have been different.

3.

As to the first prong of Crim Pro. § 8-301(a), there is no dispute that the 2005 scientific studies debunking CBLAs are, in the context of Wilkerson’s original trial, newly discovered evidence. *See Ward v. State*, 221 Md. App. 146, 149 (2015). Therefore, the focus of our analysis is on the second prong of Crim Pro. § 8-301(a), *i.e.*, whether there was a substantial or significant possibility that Wilkerson’s trial would have a different result had the CBLA evidence been excluded. We conclude that Wilkerson has failed to meet his burden of demonstrating that the circuit court abused its discretion in denying his petition.

Appellate courts review a circuit court’s decision in a petition for a writ of actual innocence proceeding for abuse of discretion. As we have discussed, a court can abuse its discretion by applying the wrong legal standard, by relying on factual findings that are clearly erroneous, or, in absence of legal error or clearly erroneous fact-finding, by reaching a decision that is nonetheless patently unreasonable or unfair or is otherwise “well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *Taylor*, 431 Md. at 630.

Reduced to their essentials, Wilkerson’s appellate contentions boil down to two propositions: (1) the circuit court committed a legal error by conflating the standards for a petition for a writ of actual innocence with a post-conviction relief proceeding based upon inadequate representation of counsel, and (2) the court reached the wrong conclusions in

assessing the probative weight of the CBLA evidence and the strength of the rest of the prosecution’s case against him at his trial.

As to his first contention, we hold that the circuit court applied the correct legal standard. The court began its analysis by concluding that, had it been made aware of the evidence discrediting CBLA analysis, the jury would have “discounted the CBLA testimony in its entirety.” This is precisely the analytical template endorsed by the Court of Appeals in *McGhie*, 449 Md. at 511 (“The appropriate analysis is not simply to excise the falsehood, for such an approach . . . ignores the substantial or significant possibility that one or more of the jurors at Petitioner’s trial, had they known of Kopera’s false testimony about his credentials, would have discredited his testimony in its entirety.” (cleaned up)).

Wilkerson is correct that the circuit court also stated in its memorandum opinion that his trial counsel “made [a] clear and reasonable strategic decision to embrace the ballistics evidence, including the CBLA evidence.” However, his appellate contention—in effect, that the circuit court denied his petition simply because his trial counsel did not challenge the evidence linking him to the murder weapon as a matter of trial tactics—does not accurately reflect the court’s reasoning.

In making the statement, the circuit court was addressing an assertion in Wilkerson’s petition that “the introduction of the CBLA evidence unfairly prejudiced [Wilkerson] because the CBLA ultimately substantiated that the gun seized from the car on was the gun used in the murder.” In finding that this contention was unpersuasive, the circuit court

concluded that, with or without the CBLA evidence, there was a significant tactical advantage that accrued to Wilkerson by tying the handgun discovered in the car to the murder and Antoine Lewis to that handgun. In light of this, the circuit court reasoned, Wilkerson’s trial strategy would not have changed if there had been no CBLA evidence.⁵ The trial court did not misapply the *McGhie* standard merely because it addressed in passing an alternative argument presented by Wilkerson.

Turning to Wilkerson’s second contention, we agree with the circuit court that, even with the CBLA evidence excised in its entirety, the prosecution’s evidence linking the handgun recovered when Wilkerson was arrested to the handgun used to murder Allah was very strong. An eyewitness to the murder identified Wilkerson as the shooter with “one hundred percent” certainty. Wilkerson’s own testimony placed him in the immediate vicinity of the murder at the time that it occurred, as did the testimony of his alibi witnesses. To be sure, Wilkerson called Kevin Blackmon as a witness, and Blackmon testified that

⁵ In its memorandum opinion, the court stated:

[T]his concession was not due to the CBLA evidence, but rather because this concession was consistent with [Wilkerson’s] strongest defense, namely, that Antoine Lucas, and not [Wilkerson], was the murderer. Considering that the [Wilkerson’s] trial counsel was faced with the other admissible ballistics evidence, and the recovery of this 1940’s Belgian handgun at the feet of Antoine Lucas as well as the testimony that the handgun was owned by Lucas, and the alleged statements from Lucas that he committed the murder, [Wilkerson’s] counsel made the clear and reasonable strategic decision to embrace the ballistics evidence, including the CBLA evidence. Instead of hurting the [Wilkerson’s] defense, the CBLA evidence actually bolstered the defense. Consequently, the Court finds that [Wilkerson] has not met his burden”

Lucas had confessed to the murder. But the absence of the CBLA evidence would not have enhanced Blackmon’s credibility. And the guilty verdicts suggest that the jurors did not find Blackmon or any of the other defense witnesses to be credible.

We believe that the circuit court’s conclusion that Wilkerson failed to meet his burden of persuasion was the sort of judicial decision-making that was not “well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *Taylor*, 431 Md. at 630.

**THE JUDGMENT OF THE CIRCUIT
COURT FOR BALTIMORE CITY IS
AFFIRMED. APPELLANT TO PAY
COSTS.**