

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0446

September Term, 2014

LYE HUAT ONG

v.

STATE OF MARYLAND

Zarnoch,
Leahy,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: May 4, 2015

*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.

In 1998, Lye Huat Ong, appellant, pleaded guilty, in the Circuit Court for Howard County, to two counts of child abuse and one count of sexual offense in the second degree and was thereafter sentenced to concurrent terms of imprisonment.¹ His application for leave to appeal from that guilty plea was denied. Ong thereafter unsuccessfully sought relief under the Maryland Uniform Post-conviction Procedure Act.

He ultimately filed a petition for writ of actual innocence, challenging his convictions on various grounds, among which were an alleged lack of evidence to show that he had committed any of the charged offenses, as well as allegations that his trial counsel, the prosecution, and two judges had acted improperly and effectively coerced him into acceding to a plea agreement against his wishes. Invoking Criminal Procedure Article (“CP”), § 8-301(e)(1),² Ong requested a hearing.

¹The circuit court imposed three concurrent sentences: fifteen years’ imprisonment for child abuse (fondling), with all but five years suspended; twenty years’ imprisonment for second-degree sexual offense (cunnilingus), with all but fifteen years suspended; and fifteen years’ imprisonment for child abuse (nude videotaping), with all but five years suspended. A five-year term of supervised probation was also imposed, effective upon his release.

²Maryland Code (2001, 2008 Repl. Vol., 2013 Supp.), Criminal Procedure Article (“CP”), § 8-301 provides in part:

(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.

Seven days after the State filed a written response opposing Ong’s petition, the circuit court dismissed his petition without a hearing because, according to the court’s written order of dismissal, that petition failed to cite any newly discovered evidence and therefore failed to comply with the pleading requirements of the actual innocence statute. Ong subsequently filed a motion for reconsideration, which the circuit court denied.

He now appeals from the circuit court’s order of dismissal, claiming that the circuit court’s prompt action in dismissing the petition, just seven days after the State filed its response, left him without an opportunity to file a reply memorandum to the State’s response, and that he was thereby denied due process. Ong further asserts that the circuit court “rush[ed] to judgment” in dismissing his pro se petition before he had an opportunity to amend it so as to render it compliant with the pleading requirements of the actual innocence statute, CP § 8-301, as well as Maryland Rule 4-332.³ Perceiving neither error nor abuse of discretion, we shall affirm.

³The issues, as stated in Ong’s appellate brief, are:

1. Did the Appellant have the fundamental right to reply to the State’s Response as a matter of due process common in every State and Federal appeal[] (direct appeal and habeas corpus) before an administrative judge abruptly denied the Petition without a hearing that is transparent and fair to all parties?
2. Was the Order to deny Appellant’s Petition a rush to judgment due to the handwritten pro se Petition that may be inarticulate but could be amended and corrected by a Reply brief, preferably by a court appointed legal counsel?

DISCUSSION

I.

Ong asserts that he had a due process right to file a reply memorandum to the State’s response to his actual innocence petition, a right which was violated, he claims, because the court’s prompt dismissal of his petition, just seven days after the State had filed its response, effectively deprived him of any opportunity to reply. He cites no specific authority for that assertion beyond a somewhat amorphous invocation of due process.

Both the actual innocence statute, CP § 8-301, as well as its implementing rule, Maryland Rule 4-332, provide for the State’s response to a petition. *See* CP § 8-301(c)(2) (providing that the State “may” file a response) and Md. Rule 4-332(f) (providing that the State “shall” file a response). Neither, however, expressly provides for a petitioner’s opportunity to file a reply. *See* CP § 8-301(e)(2) (permitting a court to dismiss an actual innocence petition without a hearing (and regardless of whether a petitioner has replied to the State’s response) if the petition “fails to assert grounds on which relief may be granted”) and Md. Rule 4-332(i)(1) (permitting, “[u]pon consideration of the petition and the State’s response,” dismissal of an actual innocence petition if it either fails to satisfy pleading requirements or fails to assert grounds on which relief may be granted).

It is thus clear that the circuit court’s dismissal of Ong’s petition, before he had an opportunity to file a reply to the State’s response, did not violate either the statute or the rule, so long as the petition failed to “assert grounds on which relief may be granted,” an issue we shall address in Parts II and III of this opinion. In other words, Ong’s claim of a due process violation is, in effect, an attack on the constitutionality of the actual innocence statute itself, as well as Rule 4-332.

It is true that, in certain parts of the Maryland Rules, express provision is made for an appellant’s opportunity to reply. Such a provision appears perhaps most prominently in Rule 8-502(a)(3), which recognizes that, in an appeal to either the Court of Special Appeals or the Court of Appeals, the appellant has an opportunity to file a reply brief. That such a provision is not required by due process, however, should be clear from the fact that no reply provision appears in the rules governing a number of other analogous proceedings. *See, e.g.*, Md. Rule 7-113(d) (provisions governing appeals heard on the record from District Court to circuit court—no opportunity for appellant to file reply); Md. Rule 4-404 (post-conviction proceedings—State must file response to petition but no opportunity for petitioner to file reply); Md. Rules 4-706, 4-707 (post-conviction DNA proceedings—State must file response to petition but no opportunity for petitioner to file reply); Md. Rule 15-1204 (coram nobis proceedings—State must file response to petition but no opportunity for petitioner to file reply). *See also Mayor and City Council of Baltimore v. State*, 281 Md. 217, 238-40 (1977)

(rejecting due process challenge to accelerated trial schedule where “nothing in the record . . . even suggests that any of the facts or principles of law involved were not adequately developed for the court’s consideration).

If we were to accept Ong’s assertion, we would have to conclude not only that the actual innocence statute and its implementing rule violate due process, but that the rules governing post-conviction proceedings, post-conviction DNA proceedings, coram nobis proceedings, and appeals from the District Court also violate due process. Simply to state the proposition is to illustrate its absurdity. (For one thing, we would have to imagine that the Court of Appeals, through its Rules Committee, deliberately adopted at least five different rules schemes that were in violation of due process.) There was no due process violation in this case.

II.

There are at least two reasons the circuit court properly dismissed Ong’s petition for writ of actual innocence without a hearing. We address those reasons in the following two sections.

As the State points out, the convictions Ong is challenging, by means of his actual innocence petition, were based on a guilty plea. In *Yonga v. State*, 221 Md. App. 45 (2015), *cert. granted*, ___ Md. ___ (Apr. 17, 2015), we held that a person whose conviction is entered on a guilty plea is categorically barred from subsequently challenging such a conviction by

means of an actual innocence petition. *Id.* at 64. That holding alone requires that we affirm the circuit court’s order dismissing Ong’s petition.

III.

The court below did not have the guidance of *Yonga* at the time it rendered its decision dismissing Ong’s petition. Instead, it relied upon CP § 8-301 (the actual innocence statute), Maryland Rule 4-332 (the rule implementing that statute), and *Douglas v. State*, 423 Md. 156 (2011) (the leading decision of the Court of Appeals construing the pleading requirements of the actual innocence statute), in determining that Ong’s petition was subject to dismissal without a hearing for failure to comply with the pleading requirements of both statute and rule, as it did not raise a claim based upon newly discovered evidence. We perceive no error in that determination.

The circuit court aptly summarized the contents of Ong’s petition:

The Petition, filed pro se, is twenty-two pages long. It is divided into the following sections: Facts of [the] Case, Argument[s], and Proof of Innocence. The section titled “Facts of [the] Case” is a short, concise rendition of the events in the case.

The section titled “Arguments” is approximately two pages long. In the section the Petitioner asserts allegations that his trial attorney was incompetent, that his trial attorney conspired with the State, and that the State (inclusive of both the prosecutor and police) behaved impermissibly. There exists in the section titled “Argument[s]” no description of newly discovered evidence . . .

The third section, “Proof of Innocence,” spans pages four through the end of the Petition. In this section Petitioner asserts allegations that [his] trial attorney was incompetent, that his trial attorney conspired with the prosecutor, that the State (again referring to both the prosecutor and the police) behaved impermissibly, that the judge rejecting his guilty plea acted impermissibly in referring the case to the second judge, that the second judge who accepted his guilty plea acted in bad faith and conspired with the prosecutor, that his plea of guilty was involuntary, that a second attorney he retained to undo the guilty plea was incompetent, that the prosecutor never produced the actual evidence and presented it to the second judge (the guilty plea having been conducted pursuant to a statement of facts), and as it relates to a later prosecution in Anne Arundel County various allegations of misconduct on the part of his attorney, the prosecutor and others. Additionally, attached to the Petition and incorporated into this section is the Petitioner’s “Affidavit” in which he confirms in general statements those assertions made in the [P]etition itself. There exists in the section titled “Proof of Innocence” no description of newly discovered evidence . . .

Putting aside the lack of merit of these claims, they are, in any event, not cognizable in a petition for writ of actual innocence. To see why, we look to the actual innocence statute. CP § 8-301(a) states the grounds upon which a claim of actual innocence may proceed. It provides:

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.

(Emphasis added.)

But if a petition for writ of actual innocence “fails to assert grounds on which relief may be granted,” the circuit court may dismiss the petition without a hearing. *Id.* § (e)(2).

In *Hawes v. State*, 216 Md. App. 105 (2014), we interpreted these statutory provisions in reviewing a circuit court’s dismissal of an actual innocence petition without a hearing. There, we said that, under the plain language of CP § 8-301(a), an actual innocence petition is predicated upon a claim of “newly discovered evidence.” Consequently, since “[i]t goes without saying that something that is not ‘evidence’ cannot be ‘newly discovered evidence,’” *id.* at 134, it follows that claims that are not founded upon evidence, such as, in that case, alleged errors in jury instructions, are not cognizable in an actual innocence proceeding. *Id.* at 135 (observing that “allegations in [Hawes’s] petition about the jury instructions are not allegations of newly discovered evidence within the meaning of 8-301(a)”).

That is obviously the case here as well. Ong’s claims, even if they were true, are not grounded upon evidence; rather, they are, as the circuit court characterized them, “those that are ordinarily presented as part of a petition seeking post-conviction relief[.]”

As none of Ong’s claims are based on evidence, his petition did not state grounds for relief, as required under CP § 8-301(a), and the circuit court properly dismissed Ong’s petition without a hearing, as it was authorized to do under CP § 8-301(e)(2). Moreover, since Ong’s rambling 22-page petition asserted no newly discovered evidence whatsoever, there was no possibility that it could be cured through amendment, and the circuit court thus did not “rush to judgment” or otherwise abuse its discretion in foreclosing any opportunity to amend the petition to render it compliant with the pleading requirements in CP § 8-301(b) and Rule 4-332(d).

**ORDER OF THE CIRCUIT COURT
FOR HOWARD COUNTY
DISMISSING APPELLANT’S
PETITION AFFIRMED. COSTS
ASSESSED TO APPELLANT.**