UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0843

September Term, 2012

TAVON BLACKMON

v.

STATE OF MARYLAND

Krauser, C.J.,
Meredith,
Thieme, Raymond G., Jr.,
(Retired, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: July 8, 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.

After the Circuit Court for Baltimore City denied, without a hearing, Tavon Blackmon's petition for writ of actual innocence, and thereafter his motion for reconsideration of that order, Blackmon noted this appeal, claiming that the circuit court erred by not holding a hearing before ruling. We disagree and shall affirm.

BACKGROUND

Following a four-day jury trial in May 2001, Blackmon 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. He was subsequently sentenced to life imprisonment for murder and to a term of ten years' imprisonment for the use of a handgun offense, to run consecutively to his sentence of life imprisonment. Blackmon appealed, claiming that the evidence was insufficient to support his convictions. In an unreported opinion, this Court held that the issue was not preserved for appellate review, but even if it was, we would have concluded that the evidence was sufficient. *See Tavon R. Blackmon v. State of Maryland*, No. 1233, September Term, 2001 (filed June 12, 2002).

Several years later, Blackmon filed a petition for post-conviction relief which, after a hearing, the Baltimore City circuit court denied. Blackmon then filed an application for leave to appeal that decision, which this Court denied. *Tavon R. Blackmon v. State of Maryland*, No. 903, September Term, 2005 (filed December 23, 2005).

In 2012, Blackmon filed a *pro se* petition for writ of actual innocence pursuant to Section 8-301 of the Criminal Procedure Article of the Md. Code, the denial of which, by

the circuit court, is the subject of this appeal.[1] In his petition, Blackmon did not identify any evidence that could have been presented at trial and which might have produced a different verdict. Rather, he claimed that there were defects in the jury's announcement of its verdicts and that his trial counsel provided ineffective assistance by failing to object to the jury's announcement of its verdicts.

Specifically, he asserted that the jury's verdicts were not unanimous because, when the jurors were asked if they had agreed upon a verdict, the foreperson responded "yes," but the remaining jurors were silent. Then when the jury was polled, the clerk began the polling process with juror number two and skipped the foreperson who had just announced the verdicts; when juror number nine was polled, the transcript reflects that the response was "inaudible." Blackmon insisted that, although the jury hearkened to its verdicts, the hearkening did not "cure" the alleged defects. Moreover, "the discovery" of trial counsel's failure to object to the jury's announcement of the verdicts constitutes, he maintained, "newly discovered evidence . . . because it could not have been discovered by [him] without the trial transcript" in time to move for a new trial. He then concluded his petition with a request for a hearing on the issues he had raised.

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[1] On March 28, 2012, about the same time that Blackmon filed his petition for writ of actual innocence, he also filed a motion to correct an illegal sentence, pursuant to Maryland Rule 4-345(a), in which he raised essentially the same claims he raised in his actual innocence petition. It is not clear from the record before us whether Blackmon's motion to correct an illegal sentence has been ruled on.

In an order dated April 13, 2012, the circuit court, after "finding that the Petition fails to state a claim or assert grounds for which relief may be granted" under the actual innocence statute, denied, without a hearing, Blackmon's petition. Blackmon then filed a motion for reconsideration, which the circuit court denied on May 15, 2012. Blackmon then appealed both orders.

DISCUSSION

A petition for writ of actual innocence may be filed by a person who has been convicted of a crime and who thereafter claims that there is "newly discovered evidence" that "creates a substantial or significant possibility that the result may have been different" *and* the evidence "could not have been discovered in time to move for a new trial under Maryland Rule 4-331." Crim. Proc., § 8-301(a). The statute requires that the petition: "(1) be in writing; (2) state in detail the grounds on which the petition is based; (3) describe the newly discovered evidence; (4) contain or be accompanied by a request for hearing if a hearing is sought; and (5) distinguish the newly discovered evidence claimed in the petition from any claims made in prior petitions." Crim. Proc., § 8-301(b). And, as the Court of Appeals recently observed, Maryland Rule 4-332 further "particularizes" and "elaborates on the contents of petitions for writ of actual innocence." *Hunt & Hardy v. State*, __ Md. __, Nos. 72 and 73, September Term 2014, slip op. at 10 (filed June 18, 2015). Thus, in addition to the information noted above, Rule 4-332 provides that the petition must also state:

> (6) that the request for relief is based on newly discovered evidence which, with due diligence, could not have been discovered in time to move for a new trial pursuant to Rule 4-331;
>
> (7) a description of the newly discovered evidence, how and when it was discovered, why it could not have been discovered earlier, and, if the issue of whether the evidence could have been discovered in time to move for a new trial pursuant to Rule 4-331 was raised or decided in any earlier appeal or post-judgment proceeding, the identity of the appeal or proceeding and the decision on that issue;
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> * * *
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> (9) that the conviction sought to be vacated is based on an offense that the petitioner did not commit.

Md. Rule 4-332(d).

Although the court "shall hold a hearing" on the petition "if the petition satisfies" the pleading requirements and the petitioner requests a hearing, a 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." Crim. Proc., § 8-301(e); Rule 4-332(i).

As noted, the circuit court found that Blackmon's petition failed "to state a claim or assert grounds for which relief may be granted" and accordingly, denied the petition without a hearing. Consequently, the question of whether the circuit court erred in ruling on the petition without a hearing, as Blackmon contends, turns on whether the circuit court correctly concluded that Blackmon was not entitled to relief.

Upon a *de novo* review of that question,[2] we conclude that Blackmon failed to state a claim for which relief could be granted because he did not identify any "evidence" that, if proven, would have created "a substantial or significant possibility that the result [of his trial] may have been different." Rather, his grounds for relief were based solely on his allegations that the jury's verdicts were not unanimous and his trial counsel was ineffective for failing to object to the manner in which the jury delivered the verdicts. While those allegations may be a proper subject of a petition for post-conviction relief, or a motion to correct an illegal sentence,[3] they do not constitute "evidence," much less the type of exculpatory evidence necessary to satisfy the pleading requirements for a writ of actual innocence.

As the Court of Appeals observed in *Douglas v. State*, 423 Md. 156, 180 (2011), "if a petition asserts procedural errors committed by the trial court, that is not 'newly discovered evidence,'" a point upon which we elaborated in *Hawes v. State*:

> It goes without saying that something that is not "evidence" cannot be 'newly discovered evidence.' The word 'evidence' as used in Rule 4-331(c) necessarily means testimony or an item or thing that is capable of being

[2] "[T]he standard of review when appellate courts consider the legal sufficiency of a petition for writ of actual innocence is *de novo*." *Hunt & Hardy v. State,* ___ Md. ___, Nos. 72 and 73, September Term, 2014, slip op. at 9 (filed June 18, 2015).

[3] If a jury's verdict was defective for lack of unanimity, the conviction would be a nullity, *Caldwell v. State*, 164 Md. App. 612, 635 (2012), and hence, the legality of the sentence imposed for the conviction could be challenged in a motion to correct an illegal sentence pursuant to Rule 4-345(a). *Chaney v. State*, 397 Md. 460, 466 (2007) (a sentence is illegal for purposes of Rule 4-345(a) where there was no conviction).

> elicited or introduced and moved into the court record, so as to be put before the trier of fact at trial.

216 Md. App. 105, 134 (2014).

Blackmon identified no evidence that could have been presented to the jury during his trial. Accordingly, the circuit court did not err in concluding that Blackmon had failed to state a claim or assert grounds for which relief may be granted under the actual innocence statute, and thus it did not err in denying his petition without a hearing.

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