UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2027

September Term, 2013

DONTE GREGG

v.

STATE OF MARYLAND

Krauser, C.J.,
Meredith,
Arthur,

JJ.

Opinion by Krauser, C.J.

Filed: May 6, 2015

On April 4, 2003, Donte Gregg, appellant, was convicted by a jury, in the Circuit Court for Baltimore City, of first-degree murder, conspiracy to commit murder, and related handgun offenses. In 2007, Gregg filed a petition for post-conviction relief, in which he claimed that his counsel had rendered ineffective assistance by failing to note an appeal from the circuit court's denial of his petition seeking DNA testing, under section 8-201 of the Criminal Procedure Article ("CP"),[1] of "epithelial cells" found on the murder weapon. The circuit court granted Gregg post-conviction relief in the form of a belated appeal from the denial of his petition for DNA testing, and the Court of Appeals subsequently ordered that DNA testing be performed on those epithelial cells. Results of that testing were, however, "inconclusive."

In 2013, Gregg filed a second petition for post-conviction relief, alleging, for the first time, ineffective assistance of both trial and appellate counsel. The circuit court denied this second petition, holding that, because Gregg had previously filed a petition for post-conviction relief, his second petition was "procedurally barred" by section 7-103 of the Uniform Postconviction Procedure Act[2] ("UPPA"), which states that "a person may file only one petition for relief" for each trial or sentence. Gregg thereafter filed an application for leave to appeal, presenting the issue of whether, in his words, "the filing of a petition for post-conviction relief seeking a belated appeal from the improper denial of a petition for DNA testing preclude[s] petitioner from filing a petition for post-conviction

[1] Md. Code Crim. Proc. § 8-201 (2001, 2008 Repl. Vol., 2014 Supp.). All citations to the Maryland Code are to the Criminal Procedure Article unless otherwise noted.

[2] Md. Code Crim. Proc. § 7-103 (2001, 2008 Repl. Vol., 2014 Supp.).

relief from the trial proceedings." Having granted that application and considered this issue, we conclude that it does and affirm.

I.

Gregg was accused, in 2002, of fatally shooting Phillip Adams.[3] The only eyewitness to the murder testified, at trial, that he saw a man hold a gun to Adams's head, fire a single shot, and climbed into the passenger seat of a nearby van, which was then driven away. He further stated that he had never seen Gregg before trial and that the man whom he had observed shoot Adams did not match Gregg's physical appearance.

When police stopped the van shortly after the shooting, in the vicinity of the crime scene, two individuals got out of the vehicle, one of whom was Gregg. Upon searching the van, the police found Adams's blood splattered on the van's back bumper and back door, a .45 caliber shell on the passenger seat, and a .45 caliber handgun, which was established, by ballistics testing, to have been the murder weapon. Although "swabbing" of the handgun revealed the presence of "epithelial cells" on the trigger of the handgun, neither the State nor the defense obtained, nor even requested, a DNA analysis of those cells before or during Gregg's trial.

Gregg's defense, at trial, was that, on the night in question, he had been the driver of the van, not the passenger, and that the passenger in the van, a man by the name of Andre Robinson, had murdered Adams.[4] Unpersuaded by that defense, the jury found Gregg

[3] In setting forth the facts of the shooting, we have relied on the factual summary of that event as set out by the Court of Appeals in *Gregg v. State*, 409 Md. 698 (2009).

[4] Robinson was subpoenaed to testify but did not appear in court.

guilty of first-degree murder, conspiracy to commit murder, use of a handgun in the commission of a crime of violence, and wearing and carrying a handgun. He was thereafter sentenced to two life terms of imprisonment, to be served concurrently, for the murder and conspiracy charges, and to a term of twenty years' imprisonment, to be served concurrently with his other two sentences, for the use-of-a-handgun charge, which was merged with his conviction for wearing and carrying a handgun. This Court later affirmed Gregg's convictions in an unreported opinion, *Gregg v. State*, No. 564, Sept. Term 2003 (filed Oct. 25, 2004), and the Court of Appeals subsequently denied his petition for writ of certiorari, *Gregg v. State*, 384 Md. 581 (2005).

In November of 2005, ten months after his petition for writ of certiorari had been denied, Gregg filed, in the Baltimore City circuit court, a petition for "release of evidence for forensic testing," pursuant to section 8-201 of the Criminal Procedure Article.[5] Specifically, he sought DNA testing of the epithelial cells recovered from the trigger of the handgun used in the shooting, asserting that such testing "could reveal that the DNA profile generated was that of Andre Robinson," the man Gregg claimed had been the shooter.

When a circuit court judge denied Gregg's petition, he signed an order reflecting that denial on March 31, 2006, which was docketed on April 17, 2006. But no notice of that denial was sent to Gregg's DNA-evidence counsel, who first learned of the denial of Gregg's petition a month later, on May 2, 2006, when, using a case-tracking computer

[5] Two years earlier, in September of 2003, Gregg filed, under section 8-201, a "Petition for DNA Testing—Post Conviction Review." This petition was never ruled on, and, in 2005, Greg asked the circuit court to dismiss his petition without prejudice, a request the court granted.

system, she was checking on the status of the petition. She immediately noted an appeal from the denial of the petition for DNA testing, which this Court dismissed as untimely.

In February of 2007, Gregg filed a petition for post-conviction relief under the Uniform Postconviction Procedure Act[6] ("UPPA"), requesting the right to file a belated appeal from the circuit court's denial of his petition for DNA testing. Gregg alleged that his DNA-evidence counsel had rendered ineffective assistance, first, by not being "aware in a timely manner" that Gregg's petition for DNA testing had been denied and, second, by failing to note a timely appeal from the court's denial of that petition. But, notably, Gregg did not raise any other allegations of error in this post-conviction petition. Indeed, missing from that petition were claims that either his trial or appellate counsel had rendered ineffective assistance.[7]

After holding a hearing on Gregg's petition for post-conviction relief, the circuit court granted Gregg the right to file a belated appeal from the denial of his petition for DNA testing. That appeal, in accordance with section 8-201(k)(6) of the Criminal

[6] Md. Code Crim. Proc. §§ 7-101-301 (2001, 2008 Repl. Vol., 2014 Supp.).

[7] Gregg contends that, when he filed his first post-conviction petition in 2007, he could not have alleged ineffective assistance of appellate counsel, as that "could not be known until the appeal was completed" and that his direct appeal was ongoing when he sought DNA testing. This claim, however, is inaccurate. We affirmed Gregg's convictions in 2004, and the Court of Appeals denied his petition for writ of certiorari in January of 2005. Gregg's petition for DNA testing was filed nine months later, in November of 2005, and was denied in 2006, over a year after his direct appeals had concluded. His post-conviction petition, then, was filed three years after this Court affirmed his convictions and two years after the Court of Appeals denied his petition for writ of certiorari. In short, at the time Gregg filed his post-conviction petition seeking to appeal the circuit court's denial of his petition for DNA testing, his direct appeal had, in fact, concluded.

Procedure Article, was heard by the Court of Appeals, which held, in *Gregg v. State*, 409 Md. 698 (2008), that Gregg was entitled to the DNA testing he was seeking and remanded the case to the circuit court for it "to enter an order directing that the epithelial cells collected from the trigger area of the murder weapon be tested in accordance with the dictates of [section] 8-201." 409 Md. at 721. DNA testing was subsequently conducted on those cells but the results of that testing were "inconclusive."

Four years later, in May of 2013, Gregg once again filed a petition for post-conviction relief. But, this time, he sought the vacation of his convictions and a new trial. Characterizing that petition as his "first petition for post-conviction relief from the jury trial resulting in his convictions," Gregg claimed, for the first time, that he had been denied his right to a public trial, that his trial counsel had rendered ineffective assistance by failing to make certain objections,[8] and that his appellate counsel had rendered ineffective assistance by not raising, on appeal, the errors committed by trial counsel.

The State responded by moving to dismiss Gregg's petition on the grounds that he had, in 2007, previously filed a petition for post-conviction relief and had not raised, in that petition, any of the issues he now sought to raise before the court. Because section 7-103 of the UPPA limits petitioners to one petition for post-conviction relief, the State asserted that Gregg's second petition was procedurally barred. Gregg responded to the State's motion by filing a new petition for post-conviction relief "or in the alternative, to re-open

[8] Specifically, Gregg alleged that his trial counsel had failed to object to the following: a series of "were they lying" questions asked by the State, the State having Gregg approach the jury to show a tattoo of teardrops on his face, and the State's failure to timely provide discovery.

post-conviction." He requested that, if the circuit court were to find that "the petition for post-conviction relief filed by Mr. Gregg on May 13, 2013 was, in actuality his second petition," that the court reopen his prior post-conviction petition.

The circuit court, at a hearing on Gregg's petition, heard argument as to whether the petition should be, under section 7-104 of the UPPA, reopened "in the interests of justice." Following that hearing, the court denied Gregg's petition for post-conviction relief on the grounds that it was "procedurally barred," and then, "pursuant to the court's willingness to construe" the petition as a motion to reopen, denied that motion as well.

Challenging those rulings, Gregg filed an application for leave to appeal to this Court, which we granted, asking the parties to address "whether the circuit court ruled correctly in denying the subject post-conviction petition on the ground that the post-conviction petition Mr. Gregg filed in [2007] requesting permission to file a belated appeal from the Circuit Court's denial of his petition for DNA testing, exhausted the one post-conviction petition he was allowed by [section] 7-103(a)."

II.

Gregg contends that the circuit court erred in finding that his petition for post-conviction relief was "procedurally barred" because he had previously filed a petition seeking post-conviction relief. He asserts that, because his first post-conviction petition sought a belated appeal from the denial of his petition, under section 8-201, for DNA testing, he had not yet filed a petition for post-conviction relief based on errors that occurred during his trial. He points out that proceedings brought under the UPPA are

"completely separate" from proceedings brought under section 8-201 of the Criminal Procedure Article.

As this appeal "concerns the interplay," as Gregg put it, between that section and the UPPA, we must determine whether they, in concert, allow a petitioner to file one petition for post-conviction relief alleging errors made with respect to a petition under section 8-201 and another such petition alleging errors made during his trial and appeal. This, of course, is a question of statutory interpretation, and our goal "is to discover the actual intent of the legislature in enacting the statute." *Price v. State*, 378 Md. 378, 387 (2003). Statutory interpretation "begins, and usually ends, with the statutory text itself, for the legislative intent of a statute primarily reveals itself through the statute's very words." *Id.* (internal citations omitted). If the statutory text "reveals ambiguity," that is, if there are "two or more reasonable alternative interpretations of the statute," then we must "resolve that ambiguity in light of the legislative intent, using all the resources and tools of statutory construction at our disposal." *Id.* On the other hand, "if the words of a statute clearly and unambiguously delineate the legislative intent, ours is an ephemeral enterprise. We need investigate no further but simply apply the statute as it reads." *Id.*

We begin with the UPPA, whose purpose was to "streamline into one simple statute all the remedies, beyond those that are incident to the usual procedures of trial and review," that are "available for challenging the validity of a sentence." *Douglas v. State*, 423 Md. 156, 175 (2011) (internal quotation marks and citation omitted). The UPPA authorizes any person who is "convicted in any court in the State" and who is imprisoned, on parole, or

on probation, to file a petition for post-conviction relief "in the circuit court for the county in which the conviction took place." CP §§ 7-101, -102(a).

Of particular relevance to the issue before us is section 7-103(a) of the UPPA, which provides that, "[f]or each trial or sentence, a person may file **only one petition** for relief under this title." (Emphasis added.) This section provides no qualifications or exemptions from the one-petition limit based on the reason the petition was filed.

We do note, however, that the UPPA allows a court to "reopen a postconviction proceeding that was previously concluded if the court determines that the action is in the interests of justice." CP § 7-104. Hence, a petitioner, who has filed his one petition for post-conviction relief, is not precluded from seeking to reopen that petition at a later date. But the reopening of a post-conviction petition is "for the purpose of providing a safeguard for the occasional meritorious case where the convicted person ha[s] already filed one postconviction petition." *Alston v. State*, 425 Md. 326, 335 (2012). It is not for the purpose of creating a "functional substitute" for a subsequent petition for post-conviction relief. *Gray v. State*, 388 Md. 366, 380 (2005).

Moreover, a reopened petition is subject to the "waiver" provision of the UPPA, which provides that an "allegation of error is waived when a petitioner could have made but intelligently and knowingly failed to make the allegation" in, among other things, a "prior" petition for post-conviction relief. CP § 7-106(b)(6). Thus, if a petitioner seeks to raise, in his petition to reopen, an allegation of error that could have been, but was not, raised in his petition for post-conviction relief, that allegation of error is presumptively waived. *E.g.*, *Grandison v. State*, 425 Md. 34, 61 (2012).

The other statute implicated in this appeal is section 8-201 of the Criminal Procedure Article, which is not part of the UPPA. Under section 8-201, "notwithstanding any other law governing postconviction relief," a person convicted of first-degree murder, second-degree murder, manslaughter, or rape or sexual offense in the first or second degree may file a petition for "DNA testing of scientific identification evidence that the State possesses."[9] CP § 8-201(b)(1). This statute was enacted "to provide a means for incarcerated persons to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing." *Gregg v. State*, 409 Md. 698, 718 (2009) (quoting *Arey v. State*, 400 Md. 491, 507 (2007)).

Although a petition, under section 8-201, may be filed "notwithstanding any other law governing postconviction relief," the UPPA and section 8-201 are not, as Gregg asserts, completely separate. To begin with, the language of section 8-201 expressly refers to the UPPA when outlining the relief a court may grant to a petitioner who obtains favorable DNA testing results. Specifically, the court may (1) open a post-conviction proceeding, under section 7-102 of the UPPA, if no post-conviction petition "has been previously initiated by the petitioner," or (2) reopen a prior post-conviction proceeding, under section 7-104 of the UPPA, if the petitioner has previously filed a petition for post-conviction relief, or (3) order a new trial if the court finds that "a substantial possibility

[9] A petitioner may also seek "a search by a law enforcement agency . . . for the purpose of identifying the source of physical evidence used for DNA testing" or may move for a new trial "on the grounds that the conviction was based on unreliable scientific identification evidence and a substantial possibility exists that the petitioner would not have been convicted without the evidence." CP § 8-201(b)(2)-(c).

exists that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial." CP § 8-201(2). What section 8-201 does not contain is any provision that would allow a petitioner to file a petition for post-conviction relief independent of the provisions of the UPPA.

The Court of Appeals had occasion, in *Arrington v. State*, 411 Md. 524 (2009), to consider the relationship between section 8-201 and the waiver provisions of UPPA and determined that section 8-201 "does not modify the important waiver provisions" of the UPPA. *Id.* at 548. Maryland's highest court explained that, while section 8-201 allows a court to reopen a post-conviction proceeding that was previously concluded, if the petitioner seeks DNA testing and obtains favorable results, this "reopening" does not permit a petitioner to assert, in a post-conviction petition reopened under section 8-201, "claims that could have been, but were not, raised in the original postconviction proceeding, other than claims based on the results of the postconviction DNA testing." *Id.* at 545. In other words, a petitioner, whose post-conviction petition is reopened under section 8-201, "has the right to assert the arguments" he made in his original post-conviction petition, "plus present the new DNA evidence." *Id.* at 548. But he does not have the right to raise issues that could have been, but were not, raised in his original petition. *Id.* at 547–48. This is so, said the Court, because, when the legislature enacted section 8-201, there was "no indication" that section 8-201 was "intended to modify the important waiver provisions" of the UPPA.[10] *Id.* at 548.

[10] Although section 8-201 does not modify the waiver provision of the UPPA, the Court of Appeals has explained that the waiver provision of the UPPA does not preclude a

Just as there was no indication that section 8-201 was intended to modify the UPPA's waiver provisions, there is no indication that section 8-201 was intended to modify the UPPA's one-petition limit, or even to provide any kind of post-conviction relief independent of the UPPA. Rather, section 8-201 permits a court, in the event that a petitioner receives favorable DNA test results, to either "open" a post-conviction proceeding, under the UPPA, if "no postconviction proceeding has previously been initiated by the petitioner" or to "reopen" a post-conviction proceeding the petitioner has "previously initiated" under the UPPA. In short, none of the post-conviction relief set forth in section 8-201 is independent of the provisions of the UPPA. Moreover, nothing in section 8-201 alters or limits the scope or applicability of section 7-103 of the UPPA, which limits a petitioner to one, and only one, petition for post-conviction relief. Equally important, nothing in the UPPA provides that the one-petition limit should be ignored based upon the reasons the petition for post-conviction relief was filed. In sum, Gregg's contention that a petitioner, who has already filed a post-conviction petition seeking relief from the denial of a petition for DNA testing under section 8-201, may file a second post-conviction petition seeking relief, for the first time, from errors purportedly made during his trial and appeal, is without statutory authority or any other support.

Although Gregg's first petition for post-conviction relief was based on the petition he filed under section 8-201, as it was the denial of his petition for DNA testing from which he sought the right to file a belated appeal, he nonetheless sought, and was granted, relief

petitioner from seeking DNA testing under section 8-201, even if the petitioner had failed to raise the issue of DNA testing before or at his trial. *Gregg*, 409 Md. at 713, 716.

under the provisions of the UPPA. When he filed, four years later, his second petition for post-conviction relief, he was also proceeding under the provisions of the UPPA. And, under the UPPA, Gregg was entitled to file "only one petition for relief." CP § 7-103(a). Having already filed his one petition for post-conviction relief, Gregg was not entitled to file a second, and therefore the circuit court did not err in denying that petition.

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