UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0835

September Term, 2015

LAMONT EUGENE COLBERT

V.

STATE OF MARYLAND

Kehoe,
Leahy,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: September 26, 2016

In February 1992, a jury convicted Lamont Eugene Colbert ("Appellant," "Colbert") of first-degree murder and carrying a weapon openly with an intent to injure in the Circuit Court for Prince George's County. On April 16, 1992, he was sentenced to life imprisonment for the first-degree murder conviction and to a concurrent one-year term of imprisonment for the weapons offense.

On November 5, 2014, acting *pro se*, Appellant filed a petition for a writ of actual innocence pursuant to the provisions of Maryland Code (2001, 2008 Repl. Vol., 2013 Supp.), Criminal Procedure Article ("CP"), § 8-301, and Maryland Rule 4-332, alleging newly discovered evidence that he claimed created a substantial or significant possibility that the result of his trial may have been different. On May 26, 2015, the circuit court denied Appellant's petition without a hearing. On June 12, 2015, Appellant filed a timely *pro se* appeal from the circuit court's decision. He presents one question for our review, which we have re-phrased[1]: Did the circuit court err in denying appellant's petition for a writ of actual innocence without a hearing?

We agree with the circuit court's findings that the petition does not sufficiently plead grounds for relief under the statute, and our review of the record does not cause us to conclude the court erred in determining that the evidence is not newly discovered. We find no error and affirm the judgment of the circuit court.

[1] Appellant phrased the question as follows:

> Did the Court below erroneously deny appellant [sic] Petition for Writ of Actual Innocence - Newly Discovered Evidence without a hearing in violation of Maryland Rule 4-332(7), in accordance with Code, Criminal Procedure Article, §8-301, and in light of the Douglas decision?

BACKGROUND

We repeat the facts of the offense as they were presented in our unreported *per curiam* opinion on direct appeal affirming Appellant's convictions in 1992:

> As we review briefly the legal sufficiency of the State's case, it is necessary to keep the players straight in our minds by lining up the proper names of the key parties with the nicknames by which they were known to each other and to the witnesses in the case. The murder victim, Wendell Jenkins, was known to one and all simply as "Odell." The appellant Colbert was known as "Bom Bom." The appellant [Lecount] Williams[2] was simply "China."
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> The testimony of Forrest Montgomery alone was enough to surmount the legal sufficiency hurdle. He was standing near the corner of Emo Street and Drum Street shortly after midnight on January 1, 1991, when he saw Odell get out of a car. Colbert walked to Odell and started talking to him. He suddenly hit him, "drove him down to the ground, and started kicking him." At that point, China came out of a nearby house with a knife. Montgomery saw them both "start stabbing the boy." Montgomery stated that it was China who wielded the knife.
>
> The autopsy revealed that Odell died from five stab wounds in the back. There was cocaine in his system at the time of death.
>
> Another key witness was John Sykes, who had known both [Appellant] and China "since elementary school." On the night of the crime, he saw both Colbert and China "tussling with a gentleman." He also heard China demanding of the victim "something about where is it at . . . where's the money?" Sykes observed the stabbing. "First Colbert had the knife and China snatched it out of his hand and said give me that. He took the knife and started stabbing the victim in the back." It was clear from Sykes' testimony that whenever one of the appellants was wielding the knife, the other was holding the victim.

Colbert v. State, No. 647, September Term 1992, slip op. at 1-2 (filed December 17, 1992). Notably, the record at trial included an autopsy report of the victim entered into evidence as State's Exhibit #1.

[2] Appellant had a codefendant, Lecount Williams, who was also convicted of first-degree murder and carrying a weapon openly with intent to injure. *Colbert v. State*, No. 647, September Term 1992, slip op. at 1 (filed December 17, 1992).

Appellant subsequently mounted numerous attacks on his convictions in the ensuing years.[3] The genesis of this current petition for a writ of actual innocence appears to be a letter sent from Appellant to the Clerk of the Circuit Court for Prince George's County (the "Clerk"), in which he requested a copy of the autopsy report that was admitted into evidence during his murder trial. This letter was filed on November 16, 2011. Appellant apparently received no response to this letter, whereupon he filed two identical Maryland Public Information Act complaints with the Clerk on December 8, 2011 and January 26, 2012. On April 23, 2012, a chambers judge of the Circuit Court for Prince George's County sent a letter asking that someone from the Clerk's office search its records to see whether the office had a "a copy of an autopsy report that was admitted into evidence . . . at [Colbert's] murder trial held on February 10 and 11, 1992." By July 16, 2012, Appellant apparently had received a copy of an autopsy report because he filed another letter with the Clerk acknowledging receipt of a report. In this letter, however, Appellant claimed that the Clerk had sent him a different autopsy report—one admitted into evidence in a May 3, 1996 postconviction hearing, not the one admitted into evidence at his 1992 trial. Outside of this unsubstantiated letter, there is no independent suggestion in the record that more than one autopsy report was generated as a result of the murder of Jenkins.

On November 5, 2014, Appellant filed a *pro se* petition for a writ of actual innocence, claiming that he had unearthed newly discovered evidence that he alleged created a substantial possibility of a different result of his trial. In the petition, Appellant

[3] We will address Appellant's attacks on his conviction that are not directly related to the present action as they become relevant to our analysis.

asserted "that his newly discovered evidence is based on the scientific testing, experiments, and comparisons conducted by the official expert forensic pathologist, and the exculpatory conclusions reached by the official forensic pathologist consulted by the prosecution." He also claimed that the "undisclosed exculpatory evidence . . . discredited the perjurious grand jury testimonies of the state witness Mr. John Sykes[.]" Moreover, Appellant contended that "the scientific testing, experiments, and comparisons conducted by the official expert forensic pathologist, and the exculpatory conclusions reached by the official expert forensic pathologist consulted by the prosecution clearly exonerated the petitioner of first degree murder in this case in chief." Appellant also claimed that:

> The prosecution's theory was that the decease[d] was being held down by [Appellant] on his knees with both of his hands behind him with [Appellant's] knee sort of like in the decease[d]'s back holding both of his hands behind him, while the co-defendant is stabbing the decease[d] in the back during the incident. The prosecution knew that after investigating the scientific testing, experiments and comparisons conducted by the official expert forensic pathologist, and the exculpatory conclusions reached by the official expert forensic pathologist consulted by the prosecution that the state witness Mr. John Sykes grand jury testimonies was perjury. . . . This is why from a legal perspective first degree murder was never proven through the testimony of the official expert forensic pathologist. The prosecution do not have any official expert forensic pathologist testimony or forensic evidence to establish that the decease[d] was being held down by [Appellant] on his knees with both of his hands behind him with [Appellant]'s knee sort of like in the decease[d]'s back holding both hands behind him while the codefendant is stabbing the decease[d] in the back during this incident.

Although, as noted above, the trial record included an autopsy report, appellant's petition did not clarify whether the "newly discovered evidence . . . based on the scientific testing, experiments, and comparisons conducted by the official expert forensic pathologist, and

the exculpatory conclusions reached by the official forensic pathologist consulted by the prosecution" was different from the previously admitted autopsy report.

On May 26, 2015, the circuit court denied his petition for a writ of actual innocence, without a hearing, stating the following:

> The Court finds that Defendant Colbert's Petition fails to (1) sufficiently describe the newly discovered evidence, (2) provide a basis to support that the evidence is in fact newly discovered, (3) state how Defendant found this evidence, and (4) create a substantial or significant possibility that the case would have had a different outcome.

Appellant timely appealed to this Court.

DISCUSSION

Appellant contends that his petition satisfied the pleading requirements of CP § 8-301. Appellant supports this argument by arguing that: (1) his petition identified an allegedly exculpatory autopsy report as "newly-discovered" evidence; (2) the court enlarged the requirements of CP § 8-301; (3) that his petition explained how he discovered the evidence; and (4) that his petition created a substantial or significant possibility that, with the evidence, his case would have a different result. As a result, Appellant maintains that, according to the Court of Appeals' holding in *Douglas v. State*, 423 Md. 156 (2011), he was entitled to nothing less than a hearing on the petition.

The State responds by arguing that the circuit court "correctly ruled that [Appellant's] petition failed with respect to a number of [CP § 8-301's] requirements" because the petition "broadly claimed that the State knowingly suppressed 'the scientific testing, experiments, and comparisons'" allegedly conducted by the forensic pathologist "but [] did not describe what sort of testing, experiments and comparisons were performed

or why the material was significant." The State further avers that the circuit court "correctly found that the petition failed to provide a basis to support that the evidence is in fact newly discovered because there was no indication as to why the alleged evidence could not have been discovered in time to move for a new trial under Rule 4-331." Finally, the State maintains that "the petition did not state how the evidence created a substantial or significant possibility that the result of his trial would have been different."

The denial of a petition for writ of actual innocence is an immediately appealable order, regardless of whether the trial court held a hearing before denying the petition. *Douglas*, 423 Md. at 165. Where, as here, a petition for a writ of actual innocence is denied without a hearing on the basis that the pleading was insufficient to warrant a hearing, the standard of review is *de novo*. *State v. Hunt*, 443 Md. 238, 247 (2015) (citations omitted).

I.

Description of Petition's Grounds

CP § 8-301 provides, in pertinent part:

> (a) *Grounds.* — 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:
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> (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.
>
> (b) *Requirements.* — A petition filed under this section shall:
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> (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.

* * *

(e) *Hearing*. — (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.**
(f) *Ruling*. — (1) In ruling on a petition filed under this section, the court may set aside the verdict, resentence, grant a new trial, or correct the sentence, as the court considers appropriate.
(2) The court shall state the reasons for its ruling on the record.
(g) *Burden of proof*. — A petitioner in a proceeding under this section has the burden of proof.

(Emphasis added).

Thus, CP § 8-301 (e)(1) states that, "[e]xcept as provided in paragraph (2) of this subsection," a circuit court "shall" hold a hearing on an actual innocence petition if it "satisfies the requirements of subsection (b) of this section and a hearing was requested." Paragraph (2) authorizes the circuit court to dismiss an actual innocence petition without a hearing if it finds "that the petition fails to assert grounds on which relief may be granted."

Similarly, Maryland Rule 8-332(j) states that, "[e]xcept as provided in subsection (i)(1) of this Rule, the court shall hold a hearing on the petition if the petition substantially complies with the requirements of section (d) of this Rule and a hearing was requested." In turn, subsection (i) provides that, "[u]pon consideration of the petition and the State's response, the court may (A) dismiss the petition if it finds as a matter of law that the petition

fails to comply substantially with the requirements of section (d) of this Rule or otherwise fails to assert grounds on which relief may be granted[.]"

The Court of Appeals has explained that CP § 8-301(e)(2) "requires that a petition 'assert' grounds for relief; it does not require the petitioner to satisfy the burden of proving those grounds in the papers submitted." *Douglas*, 423 Md. at 179. "Grounds" on which relief may be granted are set forth in subsection (a): a claim of "newly discovered evidence" that both "creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined" and "could not have been discovered in time to move for a new trial under Maryland Rule 4-331." CP § 8-301(a). The Court of Appeals stated the following in *Douglas*:

> The pleading requirement mandates that the trial court determine whether the allegations could afford a petitioner relief, if those allegations would be proven at a hearing, assuming the facts in the light most favorable to the petitioner and accepting all reasonable inferences that can be drawn from the petition. That is, when determining whether to dismiss a petition for writ of actual innocence without a hearing pursuant to C.P. § 8–301(e)(2), provided the petition comports with the procedural requirements under C.P. § 8–301(b), the trial court must consider whether the allegations, if proven, consist of newly discovered evidence that "could not have been discovered in time to move for a new trial under Maryland Rule 4–331" and whether that evidence "creates a substantial or significant possibility that the result [of the trial] may have been different." C.P. § 8–301(a).

423 Md. at 180. Moreover, under Maryland Rule 4-332(d)(9), a petition for a writ of actual innocence "shall state . . . that the conviction sought to be vacated is based on an offense that the petitioner did not commit[.]"

Appellant attempts to rely principally on the Court of Appeals' holding in *Douglas v. State*. *Douglas* consisted of two consolidated appeals, from two petitioners, Douglas

and Curtis, in which the circuit court had dismissed both of the petitioners' petitions for writs of actual innocence without holding a hearing on either petition. 423 Md. at 163-64. In the first case, Douglas's petition "was in writing; stated in detail the grounds on which the petition was based; described the claimed newly discovered evidence; and distinguished the claimed newly discovered evidence from any claim made in prior petitions for writ of actual innocence." *Hawes v. State*, 216 Md. App. 105, 131 (2014) (citing *Douglas*, 423 Md. at 166-67) (describing petition in *Douglas*). Douglas's petition alleged that three police witnesses had perjured themselves in his case and that two of these police witnesses had been exposed as perjurers. *Douglas*, 432 Md. at 166-67. Douglas supported his allegations of actual innocence with "a newspaper article from 2007 (17 years after his conviction) reporting that '[q]uestions regarding [that particular officer's] credentials were raised several weeks ago by state public defenders working with the Innocence Project' after the public defenders noted inconsistencies in transcripts of proceedings in which the officer has testified about his credentials." *Hawes*, 216 Md. App. at 131 (alteration in *Hawes*) (quoting *Douglas*, 432 Md. at 185) (describing petition in *Douglas*). The Court of Appeals concluded that, because he included several "*detailed* allegations of error committed by the trial judge in addition to several items of evidence that were discovered years after Douglas's trial and sentencing[,]" Douglas sufficiently stated the grounds on which his petition was based, thereby satisfying Maryland Rule 8-301(b)(2). *Douglas*, 423 Md. at 183 (emphasis added).

In contrast, the Court of Appeals, in *Douglas*, affirmed the denial of a petition for writ of actual innocence without a hearing in Curtis's case—the second of the two

consolidated appeals. *Id*. at 186-87. In that case, the defendant identified an affidavit from his grandmother indicating that she never mentioned the name "Airy" or "Eri" to police as newly-discovered evidence, as a police witness had claimed she did at trial.[4] *Id.* at 168-70. Curtis asserted in his petition that he was previously unable to obtain this new evidence because of his grandmother's poor health and his own incarceration. *Id*. at 169. However, the Court noted that evidence that is "known but unavailable does not constitute 'newly discovered evidence[.]'" *Id*. at 187.

In a more recent case, the Court of Appeals found that two petitioners sufficiently stated grounds to require that a circuit court hold hearings on their petitions for writs of actual innocence. *State v. Hunt*, 443 Md. 238 (2015). The first petitioner, Hunt, noted the Maryland State Police's revelation that a police ballistics expert that the police had relied upon in his trial had "'lied under oath about his academic credentials for years, and probably falsified evidence as well.'" *Id*. at 243 (quoting Hunt's petition for a writ of actual innocence). Hunt further alleged that the ballistics expert's testimony "was the State's 'only evidence' against him and 'the lynch [sic] pin in the State's case." *Id*. at 244 (quoting Hunt's petition for a writ of actual innocence). Hunt also reproduced "portions of the trial transcript where [the expert] discussed a bullet specimen recovered from [the victim]'s body, a semiautomatic pistol, and [the expert]'s process of 'match[ing] the two.'" *Id*. (some alteration in original) (quoting Hunt's petition for a writ of actual innocence).

[4] The identity of "Airy" or "Eri" was disputed at trial. *Douglas*, 423 Md. at 168-69 and n.7.

The second petitioner, Hardy, made similar allegations about the expert's testimony and included a "press release from the Department of Maryland State Police . . . announcing concerns over [the expert's] scholastic credentials, a copy of [a] 2007 Article, and an Affidavit of [an Assistant Public Defender] recount[ing] her discovery of [the expert's] misrepresentations." *Id*. at 246. Focusing on the detailed allegations and supporting evidence submitted by both petitioners, the Court of Appeals found that they both sufficiently stated the grounds on which their petitions were based, in satisfaction of Maryland Rule 8-301(b)(2). *Id*. at 252-53.

These cases make clear that, in order to meet CP § 8-301(b)(2)'s requirement that the petition "state in detail the grounds on which [it] is based[,]" the petitioner must include a sufficiently detailed allegation of grounds such that, when "assuming the facts in the light most favorable to the petitioner and accepting all reasonable inferences that can be drawn from the petition," the petition asserts grounds upon which relief can be granted. *Douglas*, 423 Md. at 187; *see also Hawes v. State*, 216 Md. App, 105, 120, 133 (2014) (finding that a defendant's petition for writ of actual innocence satisfied the requirements of section 8-301(b) when he included three exhibits together with his written petition, a detailed description of the grounds on which the petition was based, described the newly discovered evidence, and requested a hearing).

In this case, Appellant asserted in his petition, generally, that the State "suppressed scientific testing, experiments and comparisons, conducted by the official expert forensic pathologist consulted by the prosecution. Where the prosecution knew and participated in the uses [sic] of the undisclosed exculpatory evidence that discredited the perjuries [sic]

grand jury testimonies of the state witness." However, the 33-page petition lacks any detailed allegation and fails to provide any evidence from which the circuit court could assume facts from which relief could be granted. In no reported Maryland case has an appellate court reversed a circuit court for the denial of an actual innocence petition without a hearing when the petition provided so little in the way of details. Therefore, we discern no error by the circuit court as the petition does not comport with CP § 8-301(b)(2)'s requirement that the petition must "state in detail the grounds on which the petition is based[.]" Accordingly, we hold that the circuit court correctly dismissed the petition without a hearing.

II.

Newly Discovered Evidence

Even if we assume that the petition did comport with CP § 8-301(b)(2)'s detailed grounds requirement, Maryland Rule 4-332(d)(6) still requires that the "request for relief [be] 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[.]" The last possible time to file a motion for a new trial based on newly discovered evidence under Maryland Rule 4-331 is "within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief[.]"[5]

[5] Subsections (2) and (3) of Maryland Rule 4-331(c) permit a defendant to file a motion for a new trial at any time if a death sentence has been imposed or when "the motion is based on DNA identification testing not subject to the procedures of Code, Criminal Procedure Article, § 8-201 or other generally accepted scientific techniques (continued…)

To qualify as "newly discovered," evidence must not have been discovered, or been discoverable by the exercise of due diligence. *Argyrou v. State*, 349 Md. 587, 600-01 (1998). In addressing what constitutes "newly-discovered" evidence in the context of a motion for a new trial pursuant to Maryland Rule 4-331, we have said:

> Unless and until there is found to be "newly discovered evidence which could not have been discovered by due diligence," one does not weigh its significance. It is only when this definitional predicate has been established that the provisions of Rule 4-331(c) even become involved. Without this definitional predicate, the relief provided by subsection (c) is not available, no matter how compelling the cry of outraged justice may be.

Love v. State, 95 Md. App. 420, 432 (1993).

Further, when explaining the pleading requirements for a petition for a writ of actual innocence, the Court of Appeals noted in *Douglas* that the "standard does not require that a trial court take impossibilities as truths. For example, if a petition asserts, as 'newly discovered,' evidence that was clearly known during trial, then the evidence cannot be "newly discovered," and the trial court may dismiss the petition without a hearing." 423 Md. at 180.

From the record on appeal, it does not appear that Appellant attached a copy of his alleged newly discovered evidence—an autopsy report—to his petition. Moreover, his petition makes no mention of more than one autopsy report, and there is only one in the

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the results of which, if proved, would show that the defendant is innocent of the crime of which the defendant was convicted," but these subsections of the Rule "are not applicable" regarding the calculation of time allotted to move for a new trial based on newly discovered evidence. *See Hawes*, 216 Md. App. at 119 n.12.

record.[6] There are multiple copies of the same autopsy report in the record. It is clear from the record that Appellant was in possession of that autopsy report as of July 16, 2012 when he attached a copy of it to a letter he wrote to the Clerk of the circuit court. It also appears that the autopsy report contained in the record was, in fact, entered into evidence as State's Exhibit #1 at trial. Appellant's petition pleads nothing to the contrary. Thus, the record reveals that the autopsy report that was entered into evidence, the one attached to Appellant's letter to the Clerk, and the one complained about in the petition for a writ of actual innocence, are all one in the same.

[6] Appellant recounted, at length, the history of his prior attacks on his convictions and sentences in the petition for a writ of actual innocence appellant filed in the circuit court. That history spanned roughly 16 typewritten pages of his roughly 30-page petition. It appears from that history that Appellant has previously, and repeatedly, litigated allegations similar to what he presented in his petition for a writ of actual innocence (*i.e.*, alleged inconsistencies between the autopsy report and John Sykes's testimony). This lends further credence to our holding that he has not established that the autopsy report is newly-discovered evidence.

For instance, in his first postconviction, filed in 1994, one of the allegations was that his trial counsel "failed to solicit exculpatory evidence from the medical examiner." In that same petition, appellant advanced a mixed bag of at least six allegations of error directed toward his attorney's and the State's performance with regard to John Sykes's testimony. Those same allegations appear to have been thereafter unsuccessfully pursued in an application for leave to appeal in this Court, a habeas corpus petition in the United States District Court for the District of Maryland, and an appeal to the United States Court of Appeals for the Fourth Circuit.

On November 29, 1999, Appellant filed a motion to reopen a closed postconviction (and three supplements to it). In that motion, it appears that he once again litigated a variety of claims related to alleged inconsistencies between the medical examiner's report and John Sykes's testimony. He thereafter unsuccessfully sought leave to appeal the denial of that motion in this Court, which this Court denied on March 16, 2001.

On February 30, 2002, appellant filed a motion for modification of sentence wherein he once again litigated claims related to the medical examiner's report. That motion appears to have been treated as a motion to reopen his closed postconviction proceedings, and it was denied. This Court thereafter denied his application for leave to appeal.

In asking the circuit court to believe that the autopsy report was newly discovered and that the State concealed the report for decades, Appellant was asking the court to "take impossibilities as truths." *See id.* at 180. We decline to assume that there was a secret autopsy report—different from the autopsy report entered into evidence during Appellant's trial—entered into evidence during one of Appellant's postconviction hearings. Certainly, Appellant, the chambers judge who sent the April 23, 2011 letter to the Clerk, and the Clerk all were laboring under the impression that Appellant requested a copy of the autopsy report entered into evidence during Appellant's trial.

In order to be entitled to a hearing on his petition, Appellant was required to explain how the autopsy report constituted newly discovered evidence. *See* CP § 8-301(b)(3); Md. Rule 4-332(d)(7). If the allegedly newly discovered autopsy report was some report other than the one contained in the record and admitted into evidence at trial, Appellant had the duty to demonstrate this fact, which he did not do. Under these circumstances, the circuit court did not err in dismissing appellant's petition without a hearing.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.