

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 454

September Term, 2012

RONNELL COLE

v.

STATE OF MARYLAND

Krauser, C.J.,
Nazarian,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 28, 2016

*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 2005, following a jury trial in the Circuit Court for Baltimore City, Ronnell Cole, appellant, was convicted of second-degree murder, use of a handgun in the commission of a felony or crime of violence, and wearing, carrying, or transporting a handgun. The court sentenced Cole to thirty years' imprisonment for murder and to a consecutive term of twenty years' imprisonment for the handgun offense. He appealed and this Court affirmed the judgments. *Ronnell Cole v. State*, No. 1618, September Term, 2005 (filed April 11, 2007).

In 2012, Cole filed a petition for a writ of actual innocence claiming that, in 2010, he had obtained “newly discovered evidence” that substantiated his defense theory that someone else had committed the murder. This “newly discovered evidence” consisted of two documents: (1) a transcribed statement a witness to the murder had provided to the police, hours after the incident, in which the witness claimed that shortly before the murder he was robbed by two men, one armed, and that shortly thereafter he saw the armed man who had robbed him shoot the murder victim; and (2) a photo array from which the witness failed to identify Cole's photo as resembling either the robber or the shooter (the “negative photo array”).

The circuit court denied the petition after finding that Cole had failed to state a claim or assert grounds upon which relief could be granted under Section 8-301 of the Criminal Procedure Article of the Maryland Code (2008 Repl. Vol., 2010 Supp.) (the actual innocence statute). Cole appeals that decision. Because we conclude that the “newly discovered evidence” was not, in fact, newly discovered, we affirm.

In order to prevail on a petition for a writ of actual innocence, the petitioner must, among other things, establish “that there is newly discovered evidence that: (1) creates a substantial or significant possibility that the result [of the trial] 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 Md. Rule 4-331.” *See*, Crim. Proc., § 8-301. Rule 4-331(c) provides, in relevant part, that the court “may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial[.]” (Emphasis added.)

Cole’s claim that the robbery victim / murder witness’s statement to the police was newly discovered evidence is without merit because the substance of this evidence was made known at Cole’s trial. The lead investigator in the case, Detective Eric Sharp, testified there were four robberies in the vicinity of the murder just prior to the shooting. He related that the “four guys” that were robbed “were brought down to the homicide office” and questioned, which resulted in Antwon Saunders being developed as a suspect in the robberies. (Saunders was a friend of Cole’s, who later identified Cole as the person who shot the murder victim.) The detective also testified that “one of the witnesses . . . believed that the guy that robbed him was the same guy that did the homicide.” Although the detective did not identify the robbery victim / murder witness by name, he testified that one of the robbery victims believed that the person who robbed him was the same individual who committed the murder. As such, if Cole had acted with due diligence, he could have discovered the transcribed statement (and the identity of the robbery victim / murder witness who gave the statement) in time to move for a new trial under Rule 4-331.

As to the negative photo array -- the photo array in which the robbery victim / murder witness failed to identify Cole -- it appears this photo array was provided to defense counsel at trial. Defense counsel denied receiving it in discovery, but the trial transcript reveals that the photo array was seen by defense counsel at trial and was the subject of a discussion between the court and counsel.

In sum, because the “newly discovered evidence” Cole cites in support of his petition for a writ of actual innocence was not unknown to him at the time of his trial, the circuit court did not err in denying his petition for a writ of actual innocence.

In its brief, the State moved to dismiss the appeal because it claimed that Cole had “failed to provide this Court with the ruling of the circuit court” and to include the transcripts from his trial in the record for this appeal. The record, however, includes the circuit court’s order of denial and the clerk of the circuit court subsequently transmitted the trial transcripts, so the motion is denied.

**STATE’S MOTION TO DISMISS DENIED.
JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**