

Circuit Court for Montgomery County
Case No.: 131537C

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 239

September Term, 2022

GRAHAM SCHIFF

v.

STATE OF MARYLAND

Graeff,
Zic,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 6, 2022

*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 2017, a jury in the Circuit Court for Montgomery County found Graham Schiff, appellant, guilty of stalking and harassment. He did not appeal. In March 2021, Schiff filed a motion seeking to “vacate illegal convictions and sentences[,]” which the court denied. This Court affirmed the judgment. *Schiff v. State*, No. 887, September Term, 2021 (filed January 27, 2022). In December 2021, after his sentence was completed, Schiff filed a petition for writ of actual innocence, which the circuit court denied. He appeals that decision. For the reasons to be discussed, we shall affirm the judgment.

BACKGROUND

Trial

Schiff was charged with stalking, harassment, and attempted fourth-degree burglary. At trial, the following evidence was elicited.

The stalking and harassment victim (“M”) was the mother of a former high school acquaintance of Schiff. Schiff was infatuated with M’s daughter and sent the daughter messages which both she and M found disturbing. The attention was unwanted and unreciprocated. Although the daughter moved out of state, the communication from Schiff continued.

The nature of the communication Schiff directed at the daughter was so troubling that M contacted Schiff’s parents and ultimately had an attorney send a letter to Schiff directing him to cease all contact with M’s daughter. In response to the attorney’s letter, Schiff sent what M described as “obsessive letters” to the lawyer, “[m]aybe three letters a

day.”¹ On several occasions, Schiff also left gifts and letters for the daughter outside of M’s residence, despite the request to cease contact. M also related that Schiff began texting her. After receiving “bizarre text messages” on or about January 31, 2017, M contacted Schiff’s mother who told her to call the police, which M did.

Officer Melissa Weber responded to the call and met with M in her apartment. As M spoke with Officer Weber, they noticed a jingling of the doorknob of the door leading to the apartment. It appeared to them that someone was attempting to open the door, but the door was locked. After confirming with M that she was not expecting anyone, Officer Weber opened the door and encountered Schiff, who was “on the staircase.” Schiff informed the officer he was looking for a friend. The officer confirmed Schiff’s identity and called for back-up. Schiff was arrested. At trial, Schiff admitted that he knew that M lived in that apartment.

Officer Shawn Barr conducted a search of a bag in Schiff’s possession when he was arrested. He found a notebook in the bag. The notebook included some letters Schiff had addressed to M. The letters were removed from the notebook and submitted into evidence at trial, without objection.

Schiff, who represented himself at trial, testified in his own defense. On cross-examination, he acknowledged that “numerous e-mails” were sent from his e-mail account to M’s daughter and the attorney after the attorney had sent the cease-and-desist letter.

¹ Based on the record before us, which does not include the exhibits submitted at trial, it appears that at least some of the communication Schiff sent to the attorney was via email.

Although recognizing that some people might view the language in some of his communications as “sexual or otherwise crude and inappropriate,”² he denied any “intent” to stalk or harass M (or M’s daughter) and he denied any attempt to break into M’s residence. He also emphasized on direct examination that two of the letters addressed specifically to M that were entered into evidence were torn out of his notebook, which was in his possession when he was arrested. He did not recall writing them and speculated that he “could have been inebriated when [he] wrote them.” He maintained, however, that the letters from the notebook retrieved by the police upon his arrest “were not intended to be delivered.”

In his cross-examination of M, Schiff asked about her “original country of origin.” M responded that she born in the Czech Republic. Schiff then asked, “Do you consider yourself Czech, Slovakian or a mixture of both?” M replied, “I am a Czech citizen.” Schiff followed up with, “So you consider yourself Czech?” M answered, “Yes.”

The jury acquitted Schiff of attempted fourth-degree burglary and convicted him of stalking and harassment. As noted, he did not appeal.

² One message included the following: “You’re an arrogant, little manipulative mouthy Czech bitch and if you don’t learn to be a good girl for me, I swear to [name omitted] I will hold you down and choke you until you learn to submit to me.” Another stated: “But I vowed that I’d jump off the one lane bridge if I didn’t have you back at the end of September. I won’t actually do that because I’m not that dramatic, but why the fuck isn’t that tight little Czech butt up in my face yet?” Another example: “[Name omitted] get your tight ass over here, or I will come to Michigan and pull your pants down and spank you in front of your entire restaurant and all of its retarded hick employees until you learn to submit to me. And then I’ll paralyze your boyfriend and make him watch us fuck all over your dirty sheets because you’re mine and you best start getting with the program here.”

Petition for Writ of Actual Innocence

In his *pro se* petition for writ of actual innocence, Schiff asserted he is actually innocent of both stalking and harassment. As for stalking, he relied on the notebook recovered from his bag upon his arrest which contained the two letters addressed to M which the State submitted at trial. He claimed that the notebook was “newly discovered evidence.” Although he described the notebook—which was ultimately returned to him sometime after trial—as “the most compelling piece of exculpatory evidence in this case[,]” he did not explain why that it is so. His argument appeared to be that, because the letters that were found in that notebook were not delivered to M, those letters could not have caused her emotional distress. He maintained that “[i]f the jury had properly understood that key evidence in this case was never seen or given to the victim, it is more than likely they would have acquitted” him.

As a “secondary issue concerning [his] actual innocence of stalking,” Schiff asserted that M gave “false testimony.” Specifically, he stated: “Schiff asserted on the record that said victim was a native of the country of Slovakia, and may have some connection to organized crime within that nation-state. Schiff attempted to establish this fact on cross-examination, where [M] claimed she was a Czech citizen (but not a Czech native) then claimed she was born in the Czech Republic.” He then asserted that M “lied under oath” about her birthplace, which he maintained “was an issue material to [his] defense.”

As for the harassment conviction, in essence, Schiff challenged M’s trial testimony that M had asked Schiff’s mother to have him cease contact and the mother told her she did. Schiff maintained that there “is no proof this ever happened” and “had the jury

properly seen and understood that [M] was not a credible witness based on her perjury about being born in a country that did not exist at her birth, there exists a substantial or significant possibility . . . that the result of the trial may have been different[.]” He asserted that it was only after the trial concluded that he “learned about the history of Czechoslovakia and was able to view [M’s] marriage certificate indicating her country of birth as Czechoslovakia.” He claimed that this information was newly discovered evidence and if he had had access to it during trial “he could have demonstrated to the jury that [M’s] testimony was not credible, as she tried to obscure her organized crime connections.”³

The State opposed the petition, pointing out that the notebook was known to Schiff before trial and, therefore, could not be deemed newly discovered evidence. The court denied relief “for failure to comply with § 8-301(a)(1)-(2)” of the actual innocence statute.

DISCUSSION

Certain convicted persons may file a petition for a writ of actual innocence based on “newly discovered evidence.” *See* Md. Code Ann., Crim. Proc. § 8-301; Md. Rule 4-332(d)(6). “Actual innocence” means that “the defendant did not commit the crime or offense for which he or she was convicted.” *Smallwood v. State*, 451 Md. 290, 313 (2017).

In pertinent part, the statute provides:

- (a) 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:

³ There is no evidence or indication whatsoever that M had any connections to organized crime.

(1) (i) if the conviction resulted from a trial, 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.

(g) A petitioner in a proceeding under this section has the burden of proof.

Crim. Proc. § 8-301.

“Thus, to prevail on a petition for writ of innocence, the petitioner must produce evidence that is newly discovered, i.e., evidence that was not known to petitioner at trial.” *Smith v. State*, 233 Md. App. 372, 410 (2017). Moreover, “[t]o qualify as ‘newly discovered,’ evidence must not have been discovered, or been discoverable by the exercise of due diligence,” in time to move for a new trial. *Argyrou v. State*, 349 Md. 587, 600-01 (1998); *see also* Md. Rule 4-332(d)(6).

A court may dismiss a petition for actual innocence without a hearing “if the court concludes that the allegations, if proven, could not entitle a petitioner to relief.” *State v. Hunt*, 443 Md. 238, 252 (2015) (quotation marks and citation omitted). *See also* Crim. Proc. § 8-301(e)(2). “[T]he standard of review when appellate courts consider the legal sufficiency of a petition for writ of actual innocence is *de novo*.” *Smallwood*, 451 Md. at 308.

Here, Schiff did not produce any exculpatory evidence or any evidence whatsoever which even hints at the possibility that he could be actually innocent of the crimes. *See Faulkner v. State*, 468 Md. 418, 459-60 (2020) (The requirement that newly discovered evidence “speaks to” the petitioner’s actual innocence “ensures that relief under [the

statute] is limited to a petitioner who makes a threshold showing that he or she may be actually innocent, ‘meaning he or she did not commit the crime.’” (quoting *Smallwood*, 451 Md. at 323)).

The notebook does not qualify as newly discovered evidence because the notebook, even though not in his actual possession at the time of trial, was known to Schiff before and during trial and admittedly contained his own writings. Moreover, he points to nothing in the notebook that speaks to his actual innocence. And it was clear from the trial testimony that the letters from the notebook that were submitted into evidence were recovered from the notebook in Schiff’s possession when he was arrested. In other words, the State did not claim that the letters were ever delivered to M. In short, Schiff is attempting to attack the sufficiency of the evidence to support the convictions, an issue he could have raised on direct appeal. Schiff did not appeal and a petition for actual innocence is not a substitute for an appeal.

In his brief in this Court, Schiff also claims that the “stalking law is unconstitutional” because it infringes on the freedom of speech protected by the First Amendment. He makes the same argument with respect to the harassment statute. A petition for writ of actual innocence, however, is not the proper vehicle for attacking the constitutionality of the stalking and harassment statutes and, accordingly, we shall not address the issue.⁴

⁴ This Court rejected a similar claim which Schiff raised in *Schiff v. State*, 254 Md. App. 509, *cert. denied*, 479 Md. 81 (2022). In that case, Schiff was convicted of stalking and harassing the female prosecutor who had tried this case. On direct appeal, we rejected

(continued)

Finally, we are not persuaded that M’s birthplace is relevant to Schiff’s convictions. There is not a shred of evidence to support Schiff’s claim that M falsified her testimony to secure convictions against him. There is not a shred of evidence that M is somehow connected to any organized crime or nefarious organization as Schiff implies. Moreover, in addition to M’s testimony, the State submitted copies of emails, letters, text messages, and gifts that Schiff had sent to M’s daughter, M, and/or the attorney requesting he cease contact. Schiff did not object to the introduction of this evidence nor dispute that the gifts and communications had come from him.⁵

In sum, we hold that the circuit court did not err in denying Schiff’s petition for writ of actual innocence because he was not entitled to the relief.

**JUDGMENT OF THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY AFFIRMED. COSTS TO
BE PAID BY APPELLANT.**

his claim that the evidence was insufficient to sustain the convictions and rejected his claim that the communications which formed the basis of the stalking and harassment convictions were protected by the First Amendment. Thus, we affirmed the judgments.

⁵ Although Schiff testified that he did “not recall” drafting or sending some of the communications, he admitted that the emails had come from his email account and the handwritten letters reflected his handwriting.