Circuit Court for Baltimore City
Case No.: 106116048

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0292

September Term, 2022

LARRY DAVIS

v.

STATE OF MARYLAND

Wells, C.J.,
Zic,
Eyler, James R.,
(Senior Judge, Specially Assigned),
JJ.

PER CURIAM

Filed: October 5, 2022

Following a 2010 trial in the Circuit Court for Baltimore City, a jury found Larry Davis, appellant, guilty of attempted first-degree murder, second-degree assault, and knowing possession of incendiary material with the intent to create a destructive device. Thereafter, the court sentenced him to life imprisonment for attempted first-degree murder.

In 2021, appellant, acting *pro se*, filed a petition for a writ of actual innocence based on newly discovered evidence[1] which the court ultimately denied on March 28, 2022, in a written memorandum opinion and order. Appellant, again acting *pro se*, noted an appeal from that denial. In it, he claims that the circuit court erred in denying his petition. We disagree and shall affirm.

BACKGROUND

The evidence adduced at trial showed that[2], appellant was convicted of attempted murder and other crimes for trying to kill his former girlfriend, Sarah Burke, by attaching

[1] Section 8-301 of the Criminal Procedure Article ("CP") and Maryland Rule 4-331 govern petitions for a writ of actual innocence. CP Section 8-301(a) states that persons convicted of a crime in circuit court may file such a petition if there is "newly discovered evidence" that: (1) "creates a substantial or significant possibility that the result may have been different"; and (2) "could not have been discovered in time to move for a new trial under Maryland Rule 4-331." "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) (footnote omitted).

[2] Nowhere in the papers filed in the circuit court, or in the briefs filed in this Court, does appellant explain the nature of his convictions or the evidence adduced at his trial. Nonetheless, in our analysis of his claims, we have, in our discretion, elected to delve into the record of this case. In doing so, we have relied on, and taken notice of, among other documents, earlier unreported opinions of this Court stemming from this criminal case, primarily *Davis v. Stat*e, No. 407, Sept. Term 2010 (filed May 9, 2012), and *Davis v. State*, No. 157, Sept. Term, 2014 (filed May 21, 2015) to aid in our understanding of the relevant factual background.

an incendiary device to the underside of her car.[3]

In February 2006, Burke and appellant, who had been romantically involved, had a contentious break-up. On April 11, 2006, after Burke left work temporarily to put some items in the trunk of her car, she saw appellant lying on the ground behind it, looking as if he was "doing some work" under the vehicle. Fearing for her life, Burke screamed and ran away. Appellant, who appeared to be carrying duct tape and other items, gave chase, yelling, "I'm gonna kill you, bitch." After appellant caught up to her, he grabbed her, but she was able to break free. Burke told a person who had emerged from her work in response to her scream to call the police, which he apparently did.

Appellant ran into a nearby wooded area where the police arrested him a short while later. He had duct tape in his possession. Moreover, in the nearby woods, the police found a duffle bag containing wire cutters, sulfuric acid in a bag, fuel cells with attached wires, a large rubber band, and a receipt bearing the name of his company and his signature.

One of the police officers who responded to the scene inspected Burke's car and discovered that a yellow propane cylinder of the kind commonly found at home improvement stores had been attached to its exhaust pipe with duct tape and copper wire. A police officer from the bomb squad who removed the device testified that, had Burke

[3] Appellant was tried twice for these offenses. After the conclusion of his first trial, which occurred in May of 2007, we reversed his convictions on direct appeal and remanded the case for a new trial. *Davis v. State*, No. 991, Sept. Term, 2007 (filed April 23, 2009). Appellant was thereafter re-tried and re-convicted. He took an appeal to this Court, and we affirmed his convictions in an unreported opinion. *Davis v. Stat*e, No. 407, Sept. Term 2010 (filed May 9, 2012).

driven the car with the propane cylinder attached, the heat from the car would have caused a "large incendiary explosion" of the propane gas and possibly an ignition of the car's gas tank that would have injured her and others in the immediate area. The propane cylinder, along with photographs of it attached to Burke's car, were admitted into evidence at trial.

As noted earlier, in 2021, appellant filed in the circuit court a petition for a writ of actual innocence based on newly discovered evidence.[4] Appellant alleged that he had newly discovered evidence in the form of "Property Intake Sheets" numbered AC06020727, 730, and 731. Of specific importance to appellant's petition is the document ending in 727 which purports to show that a propane cylinder was placed into the Baltimore City Police Department's Evidence Control Unit by Officer Lisa Hardy on April 12, 2006. Appellant claims that he received these documents for the first time sometime in 2020 or 2021.

As far as can be discerned, appellant argues that, if he had the allegedly newly discovered Property Intake Sheets in time for his second trial, he could have demonstrated that the propane cylinder introduced into evidence at his trial was not the propane cylinder that the police removed from Burke's car and that the police had lied about it in order to secure his conviction. According to appellant, the Property Intake Sheet contradicted the trial testimony of the police officers who handled the evidence and therefore, according to appellant, showed that no propane cylinder had, in fact, ever been submitted to the

[4] We have liberally construed appellant's *pro se* papers. *See Simms v. Shearin*, 221 Md. App. 460, 480 (2015) (noting that we generally liberally construe papers filed by *pro se* litigants).

Evidence Control Unit. From that standpoint, appellant concludes, without any analysis, that the outcome of his trial would have been different had the true facts (*i.e.* that the propane cylinder used at trial was a different propane cylinder than the one removed from Burke's car) been known in time for trial.

The circuit court denied appellant's petition for two reasons.[5] First, it found that the Property Intake Sheets were not, in fact, newly discovered within the meaning of the applicable laws, as appellant either was aware of them and/or their contents, or could have, with due diligence, been aware of them, in time to move for a new trial after his second trial.[6]

[5] On August 27, 2021, appellant filed the petition for a writ of actual innocence that is the subject of this appeal. On September 1, 2021, the circuit court dismissed that petition on the basis that appellant's allegedly newly discovered evidence did not meet the legal definition of newly discovered evidence. On September 17, 2021, appellant filed a motion for reconsideration of the order dismissing his petition, to which the State responded on November 24, 2021. Thereafter, appellant filed a supplemental petition. On March 21, 2022, the circuit court held a hearing on appellant's petition(s)/motion, and, on March 28, 2022, as noted earlier, it denied it/them. In this appeal, we address the common thread that permeates all of those papers, *i.e.*, appellant's assertion that the Property Intake Sheets constituted newly discovered evidence entitling appellant to have his convictions vacated.

[6] In finding that the Property Sheet did not constitute newly discovered evidence, the court referenced this Court's opinion in the previous appeal appellant took from the previous denial of a previous *pro se* motion for a new trial based on allegedly newly discovered evidence that he had filed. Just like the current appeal, that previous motion dealt with the chain of custody, and thus the provenance, of the yellow propane cylinder entered into evidence at Davis' trial. *Davis v. State*, No. 157, Sept. Term, 2014 (filed May 21, 2015).

In that prior motion for a new trial, appellant claimed that he had newly discovered a chain of custody report for the yellow propane cylinder (Inventory 06020727) demonstrating that the cylinder had been logged into the Baltimore City Police Evidence Control Unit. Appellant argued, similar to his current argument, that the report "'confirm[ed] with certainty' that the propane cylinder introduced into evidence at trial (continued)

Second, the circuit court found that there was no significant possibility of a different result at trial had appellant known of the Property Intake Report in time for trial. The circuit court found that, rather than support appellant's theory that the Property Intake Sheets proved that the propane cylinder admitted into evidence at trial was not the same one recovered at the scene, the Property Sheet corroborated that a yellow propane cylinder was recovered from Burke's vehicle and was submitted to the Evidence Control Unit. The court also noted that, at trial, the yellow propane cylinder was authenticated by three different witnesses as being the one that was removed from Burke's vehicle. The court concluded: "Consequently, the introduction of the Property Sheet at [appellant]'s trial would not have created any possibility, much less a substantial possibility, that the result in [appellant]'s trial would have been different."

DISCUSSION

"Generally, the standard of review when appellate courts consider the legal sufficiency of a petition for writ of actual innocence is *de novo*." *Smallwood v State*, 451 Md. 290, 308 (2017). "Courts reviewing actions taken by a circuit court after a hearing on a petition for writ of actual innocence limit their review, however, to whether the trial court

was not the same propane cylinder being held at the ECU under AC06020727" because the report did not show that the cylinder had been removed from the Evidence Control Unit. *Id*., slip op. at 3-4.

In that appeal, we determined that, based on the evidence presented to the circuit court, the circuit court did not err or abuse its discretion in denying appellant's motion for a new trial because "[t]he chain of custody report for the propane cylinder was not newly discovered evidence and the appellant did not exercise due diligence to obtain it before trial." *Id*., slip op. at 12.

abused its discretion." *Id.* at 308-09. *See also Jackson v. State,* 164 Md. App. 679, 712-13 (2005) ("Both evaluating the credibility of the [newly discovered] evidence, in the first place, and then weighing the significance of the evidence, in the second place, remain within the broad discretion of the trial judge[,]" thus the "ultimate review" by the appellate court of whether newly discovered evidence merits a new trial is "clearly under the abuse of discretion standard."), *cert. denied,* 390 Md. 501 (2006). Under this standard, the appellate court "will not disturb the circuit court's ruling, unless it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Smith v State*, 233 Md. App. 372, 411 (2017) (quotation marks and citation omitted). Factual findings made by the circuit court are given deference by the appellate court, unless they are clearly erroneous. *Yonga v. State,* 221 Md. App. 45, 95 (2015).

In our view, the circuit court did not err in concluding that appellant had failed to show that the Property Sheet amounted to newly discovered evidence within the meaning of CP § 8-301. It is obvious that appellant has tirelessly pursued, time and again, his theory that the chain of custody documents prove that the propane cylinder introduced at his trial was not the propane cylinder removed from Burke's vehicle. We are of the view that the chain of custody documents at issue in the present appeal show nothing except that the yellow propane canister was submitted to the Evidence Control Unit by certain police officers on April 12, 2006, making them analytically indistinct from the chain of custody documents at issue in *Davis v. State*, No. 157, Sept. Term, 2014 (filed May 21, 2015) where we determined that the documents did not amount to newly discovered evidence.

Of equal, if not greater, importance, however, is that, in our view, appellant has utterly failed to prove the Property Intake Sheet, even if deemed newly discovered, would have created a significant or substantial possibility of a different result at trial, had it been known to appellant in time for trial. As noted earlier, appellant failed to explain in his petition before the circuit court and in his briefs before this Court, anything about the facts of the case or the evidence adduced at trial (other than the yellow propane cylinder). As a result, he has not demonstrated how the Property Sheet would have created a significant or substantial possibility of a different result at trial. Our independent analysis reveals that the State presented strong evidence of appellant's guilt at trial. Based on the strength of the State's case, coupled with the weakness of the allegedly newly discovered evidence, we are of the view that there is no substantial possibility of a different result regardless of whether the actual propane cylinder removed from Burke's vehicle was admitted into evidence at appellant's trial or some other yellow propane cylinder was admitted.

We therefore find that the circuit court neither erred nor abused its discretion in denying appellant's petition for a writ of actual innocence. Consequently, we affirm the judgment of the circuit court.

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