Circuit Court for Baltimore City
Case No. 18619105

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 462

September Term, 2017

MARK DEMINDS

v.

STATE OF MARYLAND

Arthur,
Fader,
Thieme, Raymond G.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: July 11, 2018

Mark DeMinds, appellant, appeals from the denial of his petition for writ of actual innocence, in which he sought to overturn his 1987 convictions for first-degree murder and related handgun offenses. The newly discovered evidence asserted by DeMinds was the belated revelation that the State's ballistics expert, Joseph Kopera, had testified falsely at his trial. DeMinds raises a single question, which we have rephrased[1]:

> Did the circuit court err or abuse its discretion in denying Appellant's petition for writ of actual innocence?

Perceiving no abuse of discretion, we affirm.

BACKGROUND

On May 21, 1986, Keith Gaddy was fatally shot in the 600 block of East Biddle Street in Baltimore City. On July 10, 1986, a grand jury, sitting in the Circuit Court for Baltimore City, returned an indictment, charging DeMinds with first-degree murder and other offenses arising out of Gaddy's death.[2] In January 1987, a one-week jury trial was held on those charges.

At that trial, the State presented testimony from two witnesses who claimed that, in the week before the fatal shooting, DeMinds had expressed a specific intent to harm Gaddy. One of those witnesses, Cynthia Spease, Gaddy's girlfriend, testified that DeMinds had asked her, a few days before the shooting, whether she "would . . . be mad with him" if he

[1] DeMinds phrased the question: "Did the circuit court err by denying Appellant's petition for writ of actual innocence?" As we shall explain henceforth, a bifurcated standard of review applies, depending upon whether we are examining the circuit court's application of the correct legal standard or its ultimate decision on the merits.

[2] The indictment is not included in the record we have been provided for purposes of this appeal.

shot or hurt Gaddy. She further testified that, approximately ninety minutes before the shooting, DeMinds had come to her home, looking for Gaddy, but that she had informed him that she did not know where he was. At that time, she had observed that DeMinds had a handgun in his waistband. Another witness, Vanessa Pead, Spease's sister, testified that DeMinds had said that he was "going to hurt Keith about his money."

Two people witnessed the shooting. Kim Spease, Cynthia Spease's niece, testified that, at approximately 11:25 p.m. that night, she had been walking in the 600 block of East Biddle Street when she observed DeMinds and Gaddy arguing with each other. According to her, DeMinds had told Gaddy that he "want[ed] his money" and that Gaddy had told DeMinds to stay out of "his dip," that is, the area around his waistband. Ms. Spease gave conflicting testimony as to what then took place; on direct examination, she stated that she had observed DeMinds reach into his waistband and draw a handgun, but on cross-examination, she contradicted herself, stating that she had not actually observed a weapon. In any event, Ms. Spease further testified that she had then seen Gaddy move away from DeMinds and that she had heard gunshots. At the moment she had heard the gunshots, she stated that DeMinds and Gaddy had not been "very close to each other" and that Gaddy had been "across the street" from DeMinds.

Hosie Hopkins was the other witness to the shooting. He had given a statement to police several weeks after the murder but renounced that statement on the witness stand. His statement was then introduced as a prior inconsistent statement. In that statement, Hopkins told police that, on the night of the murder, he had been walking in the 600 block of East Biddle Street when he observed DeMinds and Gaddy arguing with each other.

According to the statement, a struggle had ensued, and he had seen Gaddy break free and attempt to flee. Then, according to the statement, DeMinds had responded by pointing a gun at Gaddy (and thus, at Hopkins). Hopkins told police that he had ducked at the sight of the drawn weapon and had then heard "three or four or five shots," at least one of which had struck Gaddy. In addition, Hopkins identified DeMinds in a photographic array "as the individual he [had seen] with the gun in his hand in the alley just prior to the shooting" of Gaddy.

The State introduced the autopsy report of Gaddy's death. According to that report, the manner of death was homicide, and Gaddy died from a single gunshot wound to the base of his neck; the "trajectory" of the projectile that struck him was "frontward, upward and right to left," or, in other words, Gaddy had been shot from behind.

Kopera, the since-discredited firearms expert, testified that, based upon his examination of Gaddy's clothing, the fatal shot had been fired from a distance of at least three feet. He further testified that Gaddy had suffered a second gunshot wound, not noted in the autopsy, and that the projectile causing that wound had entered in the front of Gaddy's right leg and exited in the back.[3] Kopera was unable to opine about toolmark identification because the murder weapon was never recovered. *DeMinds v. State*, No. 323, Sept. Term, 1987, slip op. at 1 (filed Nov. 8, 1987).

DeMinds fled the scene after the murder and was not captured by police until three weeks later. At his trial, DeMinds claimed that he had shot Gaddy in self-defense. When

[3] The court in the actual innocence proceeding observed that, ironically, this testimony was exculpatory.

he was apprehended, DeMinds gave two statements to the police, both of which were admitted into evidence at his trial.

In one of his statements, DeMinds claimed that he had been visiting a friend, Tyrone Speaks. While he and Speaks were standing in a parking lot, conversing, Gaddy approached and "[got] real loud" and "threaten[ed]" him. Speaks had purportedly given DeMinds "a gun for protection." When Gaddy "was getting loud," DeMinds claimed that he "walked away through the alley" but that Gaddy followed him, "pulled a weapon," and announced a "stick up" while attempting to "grab" DeMinds's left arm. As the two men "struggle[ed]," DeMinds claimed that he reached into his pocket and "grabbed [his] gun" with his right hand. At the same time, Gaddy grabbed DeMinds's right hand and tried to "overpower" him, causing the weapon to discharge and wounding Gaddy. Gaddy fled across Biddle Street, crouched over, and fell. DeMinds claimed that he threw his gun into "a real big yard in the alley," went downtown, "and walked around for awhile thinking about whether [Gaddy] was dead or not."

In his other statement, DeMinds claimed that he and Gaddy had been "in the alley." As he was standing with his back to Gaddy, Gaddy purportedly "said stick up and put a gun in [DeMinds's] side." At first, claimed DeMinds, Gaddy "didn't have" the gun "pulled back" but then cocked it to "let [DeMinds] know he wasn't playing." DeMinds "just pulled [his gun], pulled the hammer back." Gaddy tried to "grab" him, and DeMinds "reached around him and, boom, it went off." Gaddy "ran, crouched over and fell." According to DeMinds, "[i]t just happened out of fear" because he had been "getting threats, people

calling and saying he [Gaddy] was gonna get my mother. People was saying he was gonna get me, plus he had a weapon."

Upon the conclusion of that trial, on January 30, 1987, DeMinds was convicted of first-degree murder, use of a handgun in the commission of a crime of violence, and wearing, carrying, or transporting a handgun. One month later, on March 2, 1987, the circuit court sentenced DeMinds to life imprisonment for the murder and to a concurrent term of twenty years for use of a handgun; the conviction for wearing, carrying, or transporting a handgun was merged for sentencing purposes. DeMinds thereafter noted an appeal, raising several allegations of error,[4] none which are relevant to the instant appeal. This Court affirmed the judgments in an unreported opinion. *DeMinds v. State*, No. 323, Sept. Term, 1987.

In 2010, DeMinds filed a postconviction petition, raising four claims: (1) that trial counsel had been ineffective in failing to investigate Kopera's educational background; (2) that the prosecution had engaged in misconduct by presenting Kopera's perjured testimony; (3) that trial counsel had been ineffective in failing to call an expert witness to counter the State's expert testimony; and (4) that he had been denied due process because of the State's

[4] In his direct appeal, DeMinds raised three allegations of error: (1) that the trial court had erred in refusing to allow inquiry into the likelihood that any gun carried by Gaddy would have been taken from the scene of the crime; (2) that the trial court had erred in refusing DeMinds's request for a jury instruction that he was entitled to the benefit of any inference in his favor that could reasonably be drawn from a given set of facts; and (3) that the trial court had erred in denying his motion for mistrial. *DeMinds v. State*, No. 323, Sept. Term, 1987, slip op. at 1 (filed Nov. 3, 1987).

presentation of false testimony. In 2011, DeMinds's postconviction petition was denied, and, the following year, his ensuing application for leave to appeal was denied.

In 2013, DeMinds filed a *pro se* petition for writ of actual innocence, which he thereafter withdrew without prejudice. Finally, in 2015, DeMinds filed a second *pro se* petition for writ of actual innocence, raising a single claim: that Kopera's perjured testimony was newly discovered evidence tending to prove that he was actually innocent of the 1987 murder. In 2016, DeMinds, with the assistance of counsel, filed an amended petition.

Following a hearing, the circuit court denied DeMinds's amended petition. *DeMinds v. State*, No. 18619105 (Cir. Ct. Balt. City Mar. 27, 2017). Although the court found that the evidence asserted in DeMinds's amended petition was newly discovered, *id.* at 2, it ultimately determined that, given the "substantial" untainted evidence the State had adduced at DeMinds's trial, he could not show a "substantial or significant possibility that the result" of his trial would have been different. *Id.* at 6, 8. DeMinds then noted this timely appeal.

DISCUSSION

Governing Legal Principles

A petition for writ of actual innocence, under Maryland Code (2001, 2008 Repl. Vol., 2017 Supp.), Criminal Procedure Article ("CP"), § 8-301, provides a convicted person "an opportunity to seek a new trial based on newly discovered evidence that speaks to his or her actual innocence[.]" *Douglas v. State*, 423 Md. 156, 176 (2011). Section 8-301 provides that opportunity "by establishing the functional equivalent of a motion for

new trial on the ground of newly-discovered evidence, but without the strict time limits imposed by Maryland Rule 4-331(c)." *Patterson v. State*, 229 Md. App. 630, 637 (2016) (citing *Douglas*, 423 Md. at 176).

The scope of a claim that may be brought under CP § 8-301 is, however, narrower than that under Rule 4-331(c). Unlike a motion for new trial on the ground of newly discovered evidence under Rule 4-331(c), a petition for writ of actual innocence under CP § 8-301 must rest upon an assertion, either express or implied, that the "petitioner did not commit" the offense(s) of which he was convicted. *McGhie v. State*, 449 Md. 494, 509 n.6 (2016) (quoting Md. Rule 4-332(d)(9)).[5]

The elements of a claim under CP § 8-301 are that there is newly discovered evidence that "could not have been discovered in time to move for a new trial under Maryland Rule 4-331" and that "creates a substantial or significant possibility that the result may have been different." CP § 8-301(a). The petitioner bears the burden of proof. CP § 8-301(g); Md. Rule 4-332(k). "That burden stands in stark contrast to an appellant's burden in a direct appeal from a criminal conviction." *Patterson*, 229 Md. App. at 638. "If an appellant establishes error in a direct appeal from a criminal conviction, the burden shifts to the State to show that the error in no way influenced the verdict," but in a

[5] An assertion of factual innocence is still required under the recently enacted amendment to the actual innocence statute, which, under limited circumstances, permits those convicted under guilty pleas to seek relief under CP § 8-301. *See* 2018 Md. Laws, ch. 602, at 3134-35 (providing that a person convicted upon a guilty plea, Alford plea, or plea of nolo contendere may file a petition for writ of actual innocence if the person claims that there is newly discovered evidence that establishes by clear and convincing evidence his actual innocence of the offense) (effective October 1, 2018).

proceeding under section 8-301, "the petitioner must show that there [is] a substantial possibility that a different result would have occurred in the trial, whether jury or bench, as a result of the newly discovered evidence." *Id.* at 638-39 (citations and quotations omitted).

The standard of review depends upon the precise question before us. We review without deference a claim that the circuit court applied an incorrect legal standard in evaluating an actual innocence petition. *Ward v. State*, 221 Md. App. 146, 156-57 (2015), *cert. granted*, 446 Md. 218, *cert. dismissed*, 446 Md. 704 (2016); *accord McGhie*, 449 Md. at 510. We review for abuse of discretion the circuit court's denial on the merits of an actual innocence petition, provided that, as here, a hearing was held on the petition. *State v. Hunt*, 443 Md. 238, 247-48 (2015); *Ward*, 221 Md. App. at 156.

Analysis

DeMinds contends that the circuit court misapplied the legal standard that governs review of an actual innocence claim based upon perjured testimony. He claims that the circuit court improperly "excised" the perjured testimony from the record and then sought to determine whether the jury, at DeMinds's trial, would have, nonetheless, returned the same verdict. Moreover, he claims, because the State's case against him "depended *entirely* on the ballistics evidence," then, upon proper application of the governing legal standard to his case, "any court would be constrained to grant" him a new trial. These claims are utterly without merit.

I. Whether the circuit court applied the correct legal standard

In *McGhie v. State*, 449 Md. 494, the Court of Appeals explicated the application of CP § 8-301 to a so-called Kopera claim, such as that presented here. In that case, the petitioner, McGhie, had been convicted of murder in the first degree and related offenses, arising from a failed armed robbery of a Silver Spring store in 1994, and was sentenced to life imprisonment and additional concurrent sentences on the related charges. *Id.* at 497. The principal witness against McGhie was Edward Borrero, who testified pursuant to a plea agreement with the State. *Id.* at 497-98 & n.2. Borrero admitted that he had been the shooter but testified that McGhie had participated in planning the robbery and had been one of two occupants of a getaway vehicle (from which McGhie's fingerprints had been recovered). *Id.* at 498-99, 502.

Kopera testified for the State at McGhie's trial. In addition to testifying falsely about his educational and technical credentials, Kopera opined that, "to a reasonable degree of scientific probability," the bullets and shell casings found at the crime scene had been fired from the same semiautomatic pistol as had been used in an unrelated prior shooting, which, according to three other witnesses, McGhie had committed. *Id.* at 503.

Years later, after it became widely known that Kopera had testified falsely, in McGhie's trial as well as many others, about his credentials, McGhie filed a petition for writ of actual innocence, contending that Kopera's perjured testimony had rendered his remaining testimony unreliable and that, "without [Kopera's] contested ballistics results and perjured testimony," there was a "substantial or significant possibility that the result [of his trial might] have been different." *Id.* at 505. The circuit court denied his petition,

we affirmed that denial in a reported opinion, *McGhie v. State*, 224 Md. App. 286 (2015), and McGhie petitioned the Court of Appeals for review.

The Court of Appeals began its analysis by determining that, in assessing the probable effect of newly discovered evidence, a reviewing court must look retrospectively to the actual trial that occurred. *McGhie*, 449 Md. at 510-11. Then, in elucidating how a reviewing court should look back to a petitioner's trial, in the specific context of a Kopera claim, the Court determined that a reviewing court should consider what the jury would have found had it been aware that the State's witness had perjured himself regarding his credentials and training. *Id.* at 512.

In so doing, the Court expressly rejected the State's "excision" theory, under which a reviewing court should merely "excise the false testimony and then determine from the remaining evidence whether there is a substantial or significant possibility that the result at trial may have been different." *Id.* at 511. In rejecting the State's "excision" theory, the Court of Appeals also expressly rejected the distinction "between 'impeaching' evidence, i.e., evidence that a witness lied about the merits of the case, and so-called 'merely impeaching' evidence, i.e., false testimony concerning the witness's credibility," observing that if a jury "is made aware that the expert lied about his qualifications, the jury might also reasonably find that other aspects of the expert's testimony are not reliable." *Id.* at 512 (citing *State v. Hunt*, 443 Md. 238, 263-64 (2015)). The Court drew the line, however, at the notion that a jury, "armed with the knowledge" that a State's witness had testified falsely about his credentials, "reasonably would have distrusted the credibility of the other witnesses the State presented to trial." *Id.* at 512 n.8.

In sum, a reviewing court, in assessing a Kopera claim, should disregard *all* of Kopera's testimony, not merely his false testimony regarding his qualifications, but it should include the remaining, untainted testimony of the other witnesses[6] and then assess whether there was a substantial or significant possibility that the result of the trial would have been different, in light of all the remaining evidence. In fact, that is precisely how the Court applied its newly minted test in *McGhie*. *Id.* at 512-14.

In applying its test to the case before it, the *McGhie* Court made an offhand remark that is the source of disagreement between the parties to this appeal. The Court stated as follows:

> The hearing judge correctly addressed the petition, albeit as an alternative, by considering whether there was a substantial or significant possibility that, had the jury known of Kopera's lies about his academic credentials, the jury would have discounted his testimony in its entirety. **With that ballistics testimony out of the equation**, the judge considered the other evidence that was presented to the jury and concluded that he "cannot find that the verdict would have been different[.]"

Id. at 512-13 (emphasis added). But that was precisely in accord with the test the Court had just set out—under that test, a reviewing court should disregard Kopera's testimony in its entirety. *Id.* at 511 (noting that the "appropriate analysis" must account for "the

[6] Although a reviewing court should generally consider the testimony of the remaining State's witnesses in assessing a Kopera claim, *McGhie v. State*, 449 Md. 494, 512 n.8 (2016), it must exclude such testimony if its admissibility hinged upon Kopera's testimony. *Id.* at 514 (observing that the circuit court had "correctly eliminated" from its consideration lay witness testimony regarding an allegation that McGhie had "shot a gun in an unrelated incident" because "the jury would not have heard" that testimony "save for Kopera's testimony linking that gun to the crime at issue").

'substantial or significant possibility' that one or more of the jurors at [McGhie's] trial, had they known of Kopera's false testimony about his credentials, would have discredited his testimony in its entirety") (quoting CP § 8-301(a)(1)).

In the instant case, we note that the circuit court literally read out of the same playbook as *McGhie*:

> Following the directions of the Court of Appeals in *McGhie v. State*, 449 Md 494, 512 (2016), the Court will examine the Petitioner's trial and determine whether, "[w]ith that ballistics testimony out of the equation," there is a substantial or significant possibility that the result may have been different.

The court observed that the relevant ballistics testimony in this case was Kopera's "opinion that, based on his examination of the victim's clothing, the shot that killed the victim was fired from a distance of at least three feet from the victim." The court then rendered a detailed recitation of the remaining, untainted evidence, which it aptly termed "strong." Having taken Kopera's testimony "out of the equation," *McGhie*, 449 Md. at 512, and having then assessed the remaining untainted testimony, the circuit court concluded that DeMinds had failed to prove that, had the jury been aware of Kopera's false testimony concerning his qualifications and credentials and thereby disbelieved all his testimony, there was a "substantial or significant possibility that the result" of his trial "may have been different."

At no time did the circuit court improperly consider any of Kopera's testimony. Nor, for that matter, does DeMinds identify any other evidence that was tainted by Kopera's testimony but improperly considered by the circuit court in its analysis. We

conclude that the circuit court followed the correct legal standard, as articulated by the Court of Appeals in *McGhie*, and reject DeMinds's claim that it merely gave "lip service" to that standard.

II. Merits of the court's decision

In denying DeMinds's actual innocence petition, the circuit court undertook a detailed consideration of the remaining untainted evidence. That untainted evidence included the testimony of several witnesses confirming that multiple shots had been fired and that, at the moment the victim was shot, he "had separated from" DeMinds; a contemporaneous statement by one of those witnesses identifying DeMinds as the shooter; DeMinds's two somewhat contradictory post-arrest statements he had given to police; his flight from the murder scene, which supported an inference of consciousness of guilt; and the coroner's conclusion that the fatal gunshot wound had traveled on a "trajectory [that was] frontward, upward and right to left," which supported an inference that the victim had been shot from behind. The sheer weight of this evidence belies DeMinds's bald assertion that the "outcome of this case depended *entirely* on the [tainted] ballistics evidence."

Moreover, as noted previously, the decision on the merits of an actual innocence petition, where a hearing was held, is committed to the circuit court's discretion. *McGhie*, 449 Md. at 509; *Hunt*, 443 Md. at 247-48. Given the "strong" evidence against DeMinds, completely apart from Kopera's testimony, we could hardly say that the circuit court abused its discretion in concluding that DeMinds had failed to demonstrate a "substantial

or significant possibility that the result" of his trial "may have been different." CP § 8-301(a)(1).

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