Circuit Court for Baltimore City
Case Nos.: 197125005, 07

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 478 & 781

September Term, 2021

JOHN WESLEY LEE, JR.

v.

STATE OF MARYLAND

Kehoe,
Zic,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: January 25, 2022

John Wesley Lee, Jr., appellant, filed a petition for writ of actual innocence in the Circuit Court for Baltimore City. The court dismissed the petition after finding that Mr. Lee had failed to assert grounds upon which relief may be granted. For the reasons to be discussed, we shall affirm the judgment.[1]

BACKGROUND

While an inmate at a Maryland correctional facility, Mr. Lee was charged with murder and other offenses after a fellow inmate was stabbed to death in the prison's weight room. On January 16, 1998, at the conclusion of his trial in the Circuit Court for Baltimore City, a jury found Mr. Lee guilty of murder, wearing and carrying a deadly weapon, and wearing and carrying a deadly weapon with the intent to injure, and acquitted him of conspiracy to commit murder. The circuit court sentenced him to life imprisonment for murder, to run consecutive to the sentences he was then serving. (The remaining offenses merged with murder for sentencing purposes.) This Court affirmed the judgments. *John W. Lee v. State of Maryland*, No. 774, September Term, 1998 (filed April 27, 1999).

In March of 2021, Mr. Lee, representing himself, filed a petition for writ of actual innocence based on DNA testing results which he had received from the Forensics Science Division of the Maryland State Police in 2011 pursuant to a Maryland Public Information

[1] By order dated April 28, 2021 and entered on the docket on May 5, 2021, the circuit court dismissed Mr. Lee's petition for writ of actual innocence, from which Mr. Lee noted an appeal docketed in this Court as No. 478, September Term, 2021. On July 9, 2021, the court entered a second order dismissing Mr. Lee's "Petition for Writ of Actual Innocence Amended Amendment" filed on or about May 3, 2021 "for the reasons set forth" in its previous order, from which Mr. Lee noted an appeal docketed in this Court as No. 781, September Term, 2021. Because the two appeals are based on essentially the same petition and orders of dismissal, this Court, on its own initiative, consolidated the appeals.

Act request. He claimed that "[t]his DNA evidence is DNA testing results from clothing and tennis shoes taken from" him during the 1993 murder investigation and that the results were "negative." The circuit court then ordered Mr. Lee to amend his petition to include "a specific *factual* statement setting forth *in detail*" why the DNA testing results supported his claim that he was actually innocent of the murder. (Emphasis in the original.) In his amended petition, Mr. Lee asserted that, "the basis" for his claim was that "not just one pair of [his] tennis shoes were taken but all of his tennis shoes were taken." He asserted that, given that "all" of his "footwear" was taken, the DNA testing "results seemed to have exonerated" him. Finally, he claimed that the DNA testing results created a substantial or significant possibility that the outcome of the trial may have been different "where the Trial Judge John N. Prevas suggested how one of the State's witness could testify. *See* Trial Transcript 1-12-98, page 115 lines 13, 14, & 15 and 17, 18, 19, & 20."

The circuit court found that, despite its order to do so, Mr. Lee failed to set out "the *basis* for" his claims, "specifically how such alleged newly discovered evidence would have created the possibility of a different result" at his trial. The court further found that, even construing his petition liberally, Mr. Lee had failed to assert grounds upon which relief could be granted and accordingly dismissed the petition.

DISCUSSION

The Writ of Actual Innocence

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:
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> (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) (footnote omitted); *see also* Rule 4-332(d)(6).

"Evidence" in the context of an actual innocence petition means "testimony or an item or thing that is capable of being elicited or introduced and moved into the court record,

so as to be put before the trier of fact at trial." *Hawes v. State*, 216 Md. App. 105, 134 (2014). 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.'" *Faulkner v. State*, 468 Md. 418, 459-60 (2020) (quoting *Smallwood*, 451 Md. at 323).

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.

Analysis

Mr. Lee's petition was based largely on a report from the Maryland State Police Crime Laboratory Division dated January 14, 1994 which set forth the results of the "examination/analysis" of various items including shoes, baseball cap, sweatpants, shorts, short sleeve shorts, boxer shorts, and a short sleeve shirt that were identified as "Suspects'." This particular report, however, did not identify the "Suspects" by name. Mr. Lee and Alexander Byrd, cellmates, were both charged and tried in this case.[2] The report noted that

[2] Mr. Lee and Mr. Byrd were tried jointly. The jury acquitted Mr. Byrd of all charges.

the shoes and items of clothing were "tested for the presence of blood with negative results." Nothing in this report indicates when the items were collected. Another report Mr. Lee had attached to his petition did state that items were collected from the "suspect" on August 14, 1993 (the date of the murder) including "shoes" and "clothing," but that document identified the "suspect" as Paul Aytch.[3] Another document does name Mr. Lee and Mr. Byrd in the suspect line of the form and indicates that "1 pr black Nike tennis shoes size 9 ½ inserted into dingy white socks" was submitted for examination, but it does not specify if the shoes and socks belonged to Mr. Lee or to Mr. Byrd.

But in any event, even if we assume that the clothing and/or shoes that were tested belonged to Mr. Lee, the fact that they were not found to have blood on them does not, standing alone, constitute a threshold showing that Mr. Lee did not commit the crime. The evidence at trial included the testimony of a prison guard that, immediately after a call went out for a stretcher because an inmate had collapsed, he observed an inmate (who he later identified as Mr. Lee) walking at a "brisk pace" to the building's "wing" (versus outside to the "yard") with his "hands so far down his pants it appeared . . . he was hiding something." The evidence also included a statement from an inmate given to the investigators that he had observed Mr. Lee standing by a sink and washing blood off of his hands and "acting weird," and Mr. Lee gave him two knives, one of which was later recovered from the inmate's cell. Another inmate told investigators he had observed Mr. Lee enter the weight

[3] Based on the record before us, Mr. Aytch was also an inmate at the time of the incident. He and several other inmates were either in the vicinity of the weight room where the murder took place or on the handball court where the victim staggered to and collapsed. Mr. Aytch and several others were detained in that area pending the securing of the scene.

room and stand over the victim, who was doing bench pulls, and repeatedly stab him. Mr. Lee's palm print was also recovered from the "chair seat top" of the exercise equipment the victim was using when he was attacked.

Although the record before us does not indicate precisely when Mr. Lee and Mr. Byrd were determined to be suspects, it does not appear that it was immediately after the murder but perhaps a day or two later. Moreover, neither Mr. Lee nor Mr. Byrd were detained at the crime scene when it was initially secured.

We also find no merit to Mr. Lee's claim that the DNA testing results created a substantial or significant possibility that the outcome of the trial may have been different "where the Trial Judge John N. Prevas suggested how one of the State's witness could testify. *See* Trial Transcript 1-12-98, page 115 lines 13, 14, & 15 and 17, 18, 19, & 20." Having reviewed the transcript, we discern that the State witness Mr. Lee is referring to was Roy Hicks-Bey, an inmate who had provided the investigators with a statement implicating Mr. Lee in the murder but who at trial was a reluctant and hostile witness. The transcript excerpts Mr. Lee relies on is a discussion between the judge, the prosecutor, and Mr. Hicks-Bey's attorney regarding the witness's refusal to testify and the court's admonishment that it would hold him in contempt of court if he refused to testify the next day. The discussion included the judge's comments that Mr. Hicks-Bey would be required to testify even if he says "I don't remember. He can tell [the prosecutor] pretty much anything that he wants, and he can answer whatever questions he wants on cross, from Defense Counsel, but he will not refuse to testify." We agree with the State on appeal, that

this does not constitute "newly discovered evidence" for actual innocence purposes. Moreover, we disagree with Mr. Lee's characterization of the court's discussion.

In sum, we find no error in the circuit court's dismissal of Mr. Lee's petition for a writ of actual innocence.

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