

Circuit Court for Anne Arundel County
Case Nos. C-02-CR-17-000406, 07

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 490

September Term, 2019

STACEY ERIC WILBURN, JR.

v.

STATE OF MARYLAND

Berger,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: July 10, 2020

*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.

Stacey Eric Wilburn, Jr., appellant, was convicted in separate jury trials, in the Circuit Court for Anne Arundel County, of two counts of armed robbery and other related offenses.¹ In December 2018, Mr. Wilburn filed a petition for writ of actual innocence, which the circuit court dismissed without a hearing. He raises three issues on appeal, which reduce to two: (1) whether the circuit court erred in dismissing his petition without a hearing, and (2) whether the court erred in allowing the State to file an untimely response to his petition.² For the reasons that follow, we shall affirm.

Certain convicted persons may file a petition for writ of actual innocence “based on newly discovered evidence.” *See* Md. Code Ann., Crim. Proc. § 8-301; Md. Rule 4-332. “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). “[T]o 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). The burden of proof on a writ for actual innocence is on petitioner. Crim. Pro. § 8-301(g); Md. Rule 4-332(k). A court “may dismiss a petition [for writ of actual innocence] without a hearing if the court finds that the petition fails to assert grounds on which relief may

¹ He appealed one of those armed robbery convictions and we affirmed. *Wilburn v. State*, No. 2136, Sept. Term 2018 (filed Dec. 30, 2019) *cert. denied* March 27, 2020.

² Mr. Wilburn filed a motion for reconsideration, which the court denied after he had filed his notice of appeal. The State contends this is an appeal only from the denial of appellant’s motion for reconsideration. However, Mr. Wilburn’s notice of appeal was filed within 30 days of the entry of the order denying his petition. Therefore, that order is properly before this Court on appeal.

be granted.” Crim. Proc. § 8-301(e)(2). *See also* Rule 4-332(i)(1). “The standard of review is *de novo* when appellate courts consider the legal sufficiency of a petition for writ of actual innocence that was denied without a hearing.” *State v. Ebb*, 452 Md. 634, 643 (2017).

In his petition for writ of actual innocence, which he amended and supplemented on several occasions, Mr. Wilburn asserted that the prosecutors had conspired to suppress exculpatory evidence in his case, specifically “Historical Precision Location Information” from his cell phone, which had been subpoenaed from AT&T by Howard County detectives in a related robbery case.³ That data showed the approximate location of his cell phone relative to certain cell phone towers on the date of the incident. Although he did not include an affidavit from an expert witness, Mr. Wilburn asserted that his analysis of the cell phone data cast doubt on whether he could have committed the robberies at the times and places alleged by the State.⁴

Mr. Wilburn acknowledged, however, that the State provided the relevant cell phone data to his defense counsel on August 7, 2017, approximately two months before his first trial and five months before his second trial. That concession is also supported by the record, which demonstrates that, after receiving the data, defense counsel requested at least two continuances

³ That robbery was committed in Howard County on the same day as the robberies in Anne Arundel County. Mr. Wilburn pleaded guilty to that armed robbery and other offenses, pursuant to an *Alford* plea, in January 2018. His application for leave to appeal was denied. He also filed a petition for writ of actual innocence in that case, raising similar claims to those he raised in the instant case. That petition for writ of actual innocence was also denied and we affirmed. *See Wilburn v. State*, No. 474, Sept. Term 2019 (filed Feb. 20, 2020).

⁴ We note that, during an interview with the police, Mr. Wilburn confessed to committing one of the robberies. Although the jury found otherwise, he maintains that the confession was coerced.

to examine the data and procure an expert witness, one of which was granted by the circuit court. Moreover, in his “Analysis of Cell Data Suppression,” which he filed as a supplement to his petition, Mr. Wilburn indicated that the Howard County detectives had informed him in January 2017 that they intended to obtain and review his cell phone data. Yet, Mr. Wilburn offered no explanation as to why, if he believed the data might be exculpatory, he did not subpoena it himself before trial. *See Jackson v. State*, 164 Md. App. 679, 690 (2005) (explaining that the test for whether newly discovered evidence could have been found using due diligence is “whether the evidence was, in fact, discoverable and not whether the appellant or appellant’s counsel was at fault in not discovering it”).

In arguing that the cell phone data was newly discovered evidence, Mr. Wilburn contends that he was unable to introduce it at trial because the prosecutor did not disclose it in a timely manner, which he asserts was a *Brady* violation, and because the judge erroneously refused to grant his second motion to continue the first trial so that he could retain an expert.⁵ However, those claims could have been raised on direct appeal and are not the proper subject of a petition for writ of actual innocence. Moreover, even if true, it does not alter the fact that the cell phone data was in Mr. Wilburn’s possession prior to both of his trials and, therefore, it cannot be considered “newly discovered” evidence for the purposes of Rule 4-331. Consequently, Mr. Wilburn’s petition failed to “assert grounds on which relief may be granted” and the circuit court did not err in dismissing it without a hearing.

⁵ The court granted his first motion to continue the case on August 24, 2017.

Mr. Wilburn also asserts the court erred in allowing the State to file an untimely response to his petition. Here, the State filed a response after the petition had been denied. However, Mr. Wilburn has not indicated how he was prejudiced by that fact. It was ultimately Mr. Wilburn's burden to sufficiently allege the existence of newly discovered, exculpatory evidence. And because he failed to do so, the court was required to dismiss the petition, regardless of whether and when the State filed its response.

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