Circuit Court for Baltimore City
Case No: 104281054

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 605

September Term, 2020

CARL EMERSON-BEY

v.

STATE OF MARYLAND

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

JJ.

PER CURIAM

Filed: July 30, 2021

In 2005, Carl Emerson-Bey, appellant, was convicted of the first-degree murder of his wife and related weapon offenses by a jury in the Circuit Court for Baltimore City and was sentenced to life imprisonment, plus a consecutive 20 years. Jennie Emerson-Bey, Mr. Emerson-Bey's estranged wife at the time, was shot multiple times by someone in her house when she returned home after work about midnight on August 30, 2004. Mr. Emerson-Bey had lived in the home with Ms. Emerson-Bey until the previous July, when they separated due to his infidelity. Although the home had a security alarm and was activated when Ms. Emerson-Bey had left for work, the alarm did not sound when Ms. Emerson-Bey entered the home after work. There was no indication that Ms. Emerson-Bey had deactivated the alarm when she entered the premises and there was no evidence of a break-in.

In 2018, the United States District Court for the District of Maryland granted Mr. Emerson-Bey's petition for a writ of habeas corpus and remanded the case for a new trial. After discharging his counsel, Mr. Emerson-Bey represented himself in a bench trial held in October 2018. The circuit court found him guilty of first-degree murder and use of a firearm in the commission of a felony or crime of violence and sentenced him to life imprisonment, plus a consecutive 20 years. On direct appeal, among other things, Mr. Emerson-Bey argued that the evidence was insufficient to support the convictions. This Court disagreed and affirmed the judgments. *Emerson-Bey v. State*, No. 130, September Term, 2019 (filed November 16, 2020), *cert. denied*, 2021WL1255022 (March 1, 2021).

On June 11, 2020, while his direct appeal was pending in this Court, Mr. Emerson-Bey filed a pleading he captioned "Writ of Actual Innocence/Discovery Violation" based

on the transcript from a June 20, 2018 pre-trial hearing. The transcript reflects that, at the outset of the hearing, Mr. Emerson-Bey was still in lock-up. Before he entered the courtroom, the State informed the court that it had "just found out a disclosure about one of our officers and we've advised [defense] counsel about it verbally, we've tried to have the materials forwarded to her," but she had not received it yet. Defense counsel stated that "[i]t's actually fact-sustained for either false statement or lying" related to a police officer, Michael Valair, who had been detailed to the Crime Lab and had been "involved with some of the processing" of the crime scene in 2004, including the lifting of Mr. Emerson-Bey's "handprint in the house[.]" The State also related that when searching for the "print card" it was discovered that there was a "second file that had to be located and that second file has several pieces of discovery that we were not able to recreate." The State, therefore, informed the court that it needed a court order to retrieve or photocopy those items that were in the circuit court clerk's possession. Shortly after this discussion, the proceeding recessed while they waited for Mr. Emerson-Bey to be brought to the courtroom. When the proceeding resumed, Mr. Emerson-Bey requested permission to discharge his counsel. After a discussion about that request, the court allowed the discharge and Mr. Emerson-Bey made known his intent to proceed *pro se*. The court then directed that all documents provided or to be provided in discovery be turned over to Mr. Emerson-Bey.

In his post-trial "Writ of Actual Innocence/Discovery Violation" pleading, Mr. Emerson-Bey—representing himself—asserted that he had received the June 20, 2018 transcript in August 2019 (about 10 months after his re-trial) and learned for the first time

about the "Lift Print Card and other evidence missing" from the original trial. He alleged a *Brady* violation, that is, "suppression of material evidence and favorable pertinent information withheld from defense"; a discovery violation, that is, "failure to disclose favorable information to the defense" as instructed by the court at the June 20, 2018 hearing; and a "Confrontation Clause and Due Process Violation – denied right to effective cross-examination and denied right to a fair trial."

By order dated August 4, 2020, the court (Judge Charles Peters, presiding) dismissed the petition for failure to assert grounds on which relief may be granted. Judge Peters also found that Mr. Emerson-Bey's direct appeal was still pending "and, therefore, the time for the Petitioner to file a motion for new trial on the ground of newly discovered evidence under Rule 4-331 has not yet expired[.]"

On August 20, 2020, Mr. Emerson-Bey filed a similar pleading, this one captioned "Motion for New Trial/Discovery Violation" in which he requested a new trial "pursuant to Md. Rules 4-331 and 4-263." The grounds for relief were essentially the same as raised in the earlier "Writ of Actual Innocence/Discovery Violation." By order dated August 26, 2020, the court (Judge Yolanda Tanner, presiding) denied relief. The court noted that, after the bench trial but before sentencing, Mr. Emerson-Bey had filed a motion for a new trial, which was denied following a hearing. And the court found that the present motion for a new trial was untimely.

Mr. Emerson-Bey, still representing himself, filed separate notices of appeal from the two orders, which appear to have been treated as the same appeal. In his brief, Mr. Emerson-Bey maintains that Judge Peters erred in dismissing his petition for writ of actual

innocence and in doing so without a hearing. Because he does not address the August 26th ruling by Judge Tanner, we shall not consider it. For the reasons to be discussed, we shall affirm the August 4th judgment because we concur with Judge Peters that Mr. Emerson-Bey was not entitled to a writ of actual innocence.

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. "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]
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> ***
>
> (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.
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> ***
>
> (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). As this Court explained in *Smith*, the

> requirement, that the evidence could not with due diligence, have been discovered in time to move for a new trial, is a "threshold question." *Argyrou*, 349 Md. at 604. *Accord Jackson v. State*, 216 Md. App. 347, 364, *cert. denied*, 438 Md. 740 (2014). "[U]ntil there is a finding of newly discovered evidence that could not have been discovered by due diligence, no relief is available, 'no matter how compelling the cry of outraged justice may be.'" *Argyrou*, 349 Md. at 602 (quoting *Love v. State*, 95 Md. App. 420, 432 (1993)).

233 Md. App. at 416.

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 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. 308.

Here, Mr. Emerson-Bey's petition was not based on any "evidence" that speaks to his actual innocence. He focuses on the transcript from the June 20, 2018 hearing before he entered the courtroom wherein the State and defense counsel informed the court that a police officer who had assisted with the processing of the crime scene—and specifically the person who "found [Mr. Emerson-Bey's] handprint in the house"—had been "fact-

sustained for either false statement or lying." That disclosure, however, did not indicate that the officer's misconduct was related to this case. Moreover, the officer did not testify at Mr. Emerson-Bey's retrial and the court, in reviewing the evidence in support of its finding of guilt, never mentioned that Mr. Emerson-Bey's handprint had been recovered from the house—a dwelling where Mr. Emerson-Bey had resided with his wife until shortly before her murder.

In his petition, Mr. Emerson-Bey also focused on the prosecutor's statement to the court that, when searching for the handprint "lift card," the State discovered that the "original court file" did not "contain the evidence that was admitted at [the first] trial" and thereafter learned that a "second file ha[d] several pieces of discovery that [the State was] not able to recreate." The prosecutor further related that it wished to get "that stuff . . . back" or be permitted "to photocopy it" but was told by the clerk's office that to do so required a court order. Later in the proceeding, after Mr. Emerson-Bey had discharged his counsel, the court directed the State to ensure that Mr. Emerson-Bey was given "every document that he is entitled to[.]" From this, Mr. Emerson-Bey seems to assert that evidence favorable to him had been withheld by the State. He does not, however, point to anything whatsoever that speaks to his actual innocence. Moreover, any discovery or evidence presented in relation to the first trial would not meet the definition of "newly discovered" as it would have already been known to Mr. Emerson-Bey.

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, 460 (2020) (quoting *Smallwood*, 451 Md. at 323). In short, because nothing in his petition identified any "newly discovered evidence" that even suggests the possibility that Mr. Emerson-Bey did not commit the crime, the circuit court did not err in dismissing the petition without a hearing.

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