

Circuit Court for Baltimore City
Case No. 105223045

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 677

September Term, 2018

REGINALD ALLEN MCKEEVER

v.

STATE OF MARYLAND

Friedman,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: April 2, 2019

*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.

In 2006, Reginald McKeever, appellant, was convicted of attempted first-degree murder, first-degree assault, second-degree assault, use of a handgun in the commission of a crime of violence, and carrying a handgun, following a jury trial in the Circuit Court for Baltimore City. Those convictions were based on his having shot an off-duty police officer during an attempted robbery. At trial, Mr. McKeever claimed he could not have shot the officer because previous injuries to his left and right hand, that he received after having been shot by a shotgun, made it impossible for him to hold or operate a firearm.

In 2018, Mr. McKeever filed a petition for writ of actual innocence and, in support thereof, attached his 2001 medical records from Johns Hopkins Bayview Center, which detailed the nature and treatment of his injuries after he was shot. In claiming that the medical records constituted newly discovered evidence, Mr. McKeever claimed that he, his defense counsel, and his mother had tried to obtain the records prior to his trial but that they had been informed by Johns Hopkins that they did not exist. He further asserted that his post-conviction counsel had eventually obtained them in 2010 after discovering that he had been admitted for treatment as a “John Doe” rather than under his real name. The circuit court denied the petition for writ of actual innocence without a hearing, finding that the medical records were not newly discovered evidence because they could have been discovered with due diligence. Mr. McKeever now raises a single issue on appeal: whether the court erred in denying his petition for writ of actual innocence without a hearing. Because Mr. McKeever’s medical records are not newly discovered evidence, we affirm.

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 be granted.” Md.

Code Ann., Crim. Proc. § 8-301(e)(2). And “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). In short, the existence of newly discovered evidence is a “threshold question.” *Argyrou v. State*, 349 Md. 587, 604 (1998). “To 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. *Id.* at 600-01; *see also* Rule 4-332(d)(6). In analyzing whether newly discovered evidence could have been found using due diligence, the test is “whether the evidence was, in fact, discoverable and not whether the appellant or appellant’s counsel was at fault in not discovering it.” *Jackson v. State*, 164 Md. App. 679, 690 (2005).

Mr. McKeever, by his own admission, was aware of the existence of the medical records at the time of trial. And the fact that he was unable to locate them does not mean that they could not have been obtained with due diligence, as demonstrated by the fact that his post-conviction counsel was able to obtain them several years later. We therefore agree with the trial court that the medical records did not qualify as newly discovered evidence for actual innocence purposes. *See Argyrou*, 349 Md. at 600 n. 9 (explaining that “[e]xculpatory evidence known . . . prior to the expiration of the time for a new trial, though

unavailable, in fact, is not newly discovered evidence”).¹ Consequently, the court did not err in denying Mr. McKeever’s petition for writ of actual innocence without a hearing.

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

¹ We also note that Mr. McKeever testified about his injuries at trial. And although his medical records document the existence of those injuries, they do not address the functionality of his hands following the injuries or whether the injuries would have rendered him incapable of shooting a firearm. Thus, even if the medical records were newly discovered evidence, they did not create a substantial or significant possibility that the result at his trial may have been different.