Circuit Court for Baltimore City
Case No. 109036005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 707

September Term, 2019

KEDAR ANDERSON

v.

STATE OF MARYLAND

Beachley,
Ripken,
Salmon James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: March 19, 2021

*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 December 2011, a jury sitting in the Circuit Court for Baltimore City convicted appellant, Kedar Anderson, of first-degree murder, kidnapping, conspiracy to commit murder, conspiracy to kidnap, use of a handgun in the commission of a crime of violence, and participation in a criminal gang. On February 23, 2012, the court sentenced appellant to a term of life plus thirty years. This court affirmed the judgments in an unreported opinion. *Anderson v. State*, No. 2778, Sept. Term, 2011 (filed Oct. 8, 2013), *cert. denied*, 436 Md. 501 (2014). This Court also affirmed the denial of appellant's petition for actual innocence. *Anderson v. State*, No. 721, Sept. Term, 2018 (filed Aug. 7, 2019) (per curiam), *cert. denied*, 466 Md. 312 (2019).

On March 29, 2019, appellant filed a "Motion to Vacate Conviction Under the Court's Revisory Power of Md. Rule 2-535." The circuit court summarily denied that motion without a hearing on April 2, 2019. Appellant timely appealed from that denial and presents the following question for our review, which we have slightly rephrased:

> Did the circuit court err or abuse its discretion in denying appellant's motion to vacate his conviction on the basis of fraud, mistake or irregularity?

The State argues that the motion was not timely. Although we construe appellant's motion as timely because the facts alleged constitute an irregularity for purposes of his motion for a new trial, we conclude that appellant's motion failed to establish any prejudice resulting from the irregularity. We shall therefore affirm the denial of his motion.

BACKGROUND

As we noted in *Anderson v. State*, No. 2778, Sept. Term, 2011 (filed Oct. 8, 2013), this case concerns the gang-related kidnapping and murder of Kenneth Jones in Baltimore

City on June 8, 2008. Having exhausted his avenues of direct appeal and petition for actual innocence, in March 2019, appellant filed a "Motion to Vacate Conviction Under the Court's Revisory Power of Md. Rule 2-535." In his motion, appellant explained that Judge Devy Patterson Russell was the judge responsible for issuing the search warrant related to property known as 4044 Elmora Avenue in Baltimore City, and that as a result of that warrant, police recovered an audio CD which was used against him at his murder trial. Appellant alleged that Judge Russell was "found guilty for not properly processing search warrants in a timely manner," and "there is no proof that the warrant itself was valid[.]" The circuit court denied appellant's motion without a hearing. We shall provide additional facts as necessary.

DISCUSSION

There are two issues in this case. The first is whether appellant's motion in the circuit court was timely. The second issue is whether the court erred in denying appellant's motion. As we shall explain, although we conclude that appellant's motion was timely, we discern no error in the court's denial of his motion.

I. THE MOTION FOR NEW TRIAL WAS TIMELY

The parties dispute whether appellant's motion in the circuit court was timely, as he filed it approximately seven years after receiving his sentence. Appellant argues that his motion was timely under Rule 2-535(b), which allows a party to challenge a judgment "at any time" in cases of "fraud, mistake, or irregularity." The State responds that Rule 2-535(b) is inapplicable and construes appellant's motion as a Rule 4-345 motion challenging

his sentence. The State therefore argues that the motion was not timely under Rule 4-345(b) and (e) because a motion to correct an *illegal sentence* must be raised within five years of the imposition of that sentence.

We summarily resolve this issue. The first sentence in appellant's motion filed in the circuit court unequivocally requests *a new trial*: "Now comes [appellant], proceeding pro-se, moves pursuant to Md. Rule 2-535(b) Fraud, Mistake, Irregularity (Revisory Power of the Court), prays that this Honorable Court set aside their verdict and **grant a new trial in this matter** . . . ." (Emphasis added). For criminal cases, Maryland Rule 4-331 governs requests for a new trial when invoking the court's revisory power. Relevant here, Rule 4-331(b)(1)(B) provides, in relevant part:

> (1) The court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial:
>
> . . .
>
> (B) in the circuit courts, on motion filed within 90 days after its imposition of sentence. *Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity.*

(Emphasis added). Accordingly, we construe appellant's purported motion under Rule 2-535(b) to be a motion for a new trial based on fraud, mistake, or irregularity pursuant to Rule 4-331(b)(1)(B). Under this lens, we have no difficulty concluding that Judge Russell's handling of search warrant materials as described in *Matter of Russell*, 464 Md. 390, 419-21 (2019), constituted an irregularity, thereby allowing appellant to seek a new trial despite the fact that seven years had elapsed between his sentencing and the filing of

his motion for new trial.[1] *See generally Dir. of Fin. of Balt. City v. Harris*, 90 Md. App. 506, 514-15 (1992) (construing as an irregularity under Rule 2-535 clerk's refusal to accept a filing due to deficient service on the opposing party); *Estime v. King*, 196 Md. App. 296, 308-09 (2010) (construing as an irregularity under Rule 2-535 clerk's failure to send court order to tax sale purchaser's new address).[2] Judge Russell's failure to timely file executed warrants with the clerk of court clearly constitutes an irregularity for purposes of Rule 4-331(b)(1)(B). Because there is no time limit for alleging an irregularity under Rule 4-331(b)(1)(B), appellant's motion in the circuit court was timely.[3]

II. THE COURT DID NOT ERR OR ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR NEW TRIAL

In a motion for a new trial, "the burden of persuading the trial judge that such a remedy is called for is on the defendant, as the moving party." *Jackson v. State*, 164 Md.

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[1] For purposes of this appeal, we will assume that Judge Russell handled appellant's search warrant and related documents in the same manner as described in *Matter of Russell*.

[2] Although the cases cited above construe "irregularity" as it appears in Rule 2-535—a civil rule—this Court has expressly adopted the interpretation of the term in the criminal milieu. *Minger v. State*, 157 Md. App. 157, 172 (2004) ("We can think of no reason why the words should be interpreted differently in construing the same phrase in the context of Rule 4-331(b).").

[3] We are unable to explain why, in its brief, the State construed appellant's motion as one challenging the legality of his *sentence* under Rule 4-345. Generally, "A motion to correct an illegal sentence ordinarily can be granted only where there is some illegality in the sentence itself or where no sentence should have been imposed." *Carter v. State*, 461 Md. 295, 337 (2018) (quoting *Evans v. State*, 382 Md. 248, 278-79 (2004)). Not only did appellant's motion specifically request a new trial, but it never mentioned any illegality in the sentence. Indeed, the word "sentence" only appears once in appellant's entire opening brief—when he requests that this court order the circuit court to vacate his sentence.

App. 679, 686 (2005). We conclude that appellant failed to meet this burden because he failed to allege that the irregularity here—Judge Russell's failure to timely file search warrants and related materials—created any prejudicial error related to his trial. We explain.

In his supplemental brief, appellant alleges that, "The warrant in the instant case was not verified by either the affiant or the judge, nor was it sworn and dated, nor was the return ever transmitted to the clerk for filing, nor was it introduced into evidence at [his] trial." We initially note that appellant's allegations that the warrant was never "verified by either the affiant or the judge, nor was it sworn and dated" is contradicted by materials appellant himself appended to his opening brief. In the appendix to appellant's opening brief, he provides a copy of the search warrant purportedly signed by Judge Russell on January 15, 2009. The appendix also contains an application for the search warrant, purportedly signed by the affiant, Detective Joshua Ellsworth, and signed and dated January 15, 2009, by Judge Russell. We presume the authenticity of these documents, as appellant himself supplied them. Thus, it appears that Judge Russell signed a search warrant after receiving a law enforcement officer's supporting affidavit, and the police executed the search warrant for the property in question, 4044 Elmora Avenue.

We further note that the search warrant and evidence recovered as a result of its execution were discussed at appellant's trial. Given the significance of the evidence recovered as a result of the search warrant, we presume that defense counsel had a copy of the search warrant, the supporting application and affidavit, and the inventory. No issue

was raised at trial concerning any deficiencies in those documents. Furthermore, appellant has not alleged that Detective Ellsworth violated Rule 4-601(e) by failing to provide him with "a copy of the search warrant and application," "a copy of the supporting affidavit," and "a copy of the inventory." *See* Rule 4-601(e)(2)(A)-(C). In short, appellant makes no allegation that the police, at the time they executed the warrant, failed to have in their possession a search warrant signed by an authorized judge (in this case, Judge Russell).

Finally, contrary to appellant's allegations, there is absolutely no evidence that Judge Russell destroyed appellant's search warrant materials.[4] We presume that appellant's allegation is derived from his misreading of *Matter of Russell*. There, the Court of Appeals explained Judge Russell's practice of placing search warrant materials in boxes kept in her office rather than filing them with the clerk as required by Rule 4-601. *Matter of Russell*, 464 Md. at 416. Ultimately, Administrative Judge Barbara Waxman found "135 warrants that should have been filed with the clerk's office." *Id.* at 416-17. The Court of Appeals described what Judge Waxman did after discovering the warrants in boxes:

> Judge Waxman explained that she sorted the documents in the boxes by year. Then she separated the warrants that had been executed and returned by a police officer – "the ones that should have been [processed]" with the clerk's office. In total, Judge Waxman identified and set aside "approximately 135" warrants dating from 2007-2015 that should have been "sent to the clerk's office" for filing.

[4] In footnote 3 of his supplemental brief, appellant states that he "requested a copy of Judge Russell's warrant in 2018 via a Maryland Public Information Act Request and in 2019 pursuant to a subpoena, and it was never provided to him, as it had been destroyed." We note that appellant has not indicated which agencies received, and responded to, his MPIA request. Nor do we see any official verification that the search warrant was destroyed and, if so, by whom. Irrespective of these shortcomings, there is no evidence that Judge Russell destroyed appellant's search warrant materials.

> Indeed, the warrants that Judge Waxman set aside were admitted into evidence at the disciplinary proceeding. Judge Waxman went through several of the exhibits, and she described their contents. Based on her testimony, the warrants had been executed; they were signed by an officer and detailed any inventory that was seized. As such, they "need[ed] to be filed with the" clerk. Md. Rule 4-601(g) (providing that executed warrants must be filed with the clerk of the court).

Id. at 418.

Thus, all of the search warrant materials for those 135 warrants were recovered and admitted into evidence at Judge Russell's disciplinary proceeding.[5] *Id.* Although Judge Russell told her law clerk in 2016 to "get rid of" the boxes, the law clerk apparently did not do so, *id.* at 417, because Judge Waxman delivered the boxes containing the warrants to Investigative Counsel for the Judicial Disabilities Commission on December 21, 2016. *Id.* at 405. In short, there is not a scintilla of evidence that Judge Russell destroyed any search warrant materials, let alone those related to appellant's case. We fail to see how Judge Russell's admittedly "irregular" handling and processing of her search warrants prejudiced appellant. In any event, appellant did not sufficiently allege how this

[5] The "Amended Findings of Fact, Conclusions of Law, Order and Recommendations" prepared by the Commission on Judicial Disabilities found six warrants purportedly signed by Judge Russell in January 2009. We note that appellant's search warrant was ostensibly issued on January 15, 2009, but there is no indication in the record whether his search warrant was one of the six recovered from Judge Russell's chambers. Additionally, appellant attached to his motion in the circuit court (and to his Reply Brief in this Court) an unsigned return/inventory for 4044 Elmora Avenue. Although there is no indication when and how that document was obtained, there is no evidence that this document was retrieved from Judge Russell's records.

irregularity required granting him a new trial. We therefore affirm the circuit court's denial of appellant's motion for new trial.[6]

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

[6] Citing *Campofreda v. State*, 15 Md. App. 693 (1972), appellant suggests that a conviction cannot be sustained where a search warrant is not introduced into evidence. *Campofreda* is inapposite and we expressly reject appellant's argument on this point.