Circuit Court for Prince George's County
Case No: CT041661X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 798

September Term, 2020

EDWARD BELL

v.

STATE OF MARYLAND

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

JJ.

PER CURIAM

Filed: July 30, 2021

In 2004, a jury in the Circuit Court for Prince George's County found Edward Bell, appellant, guilty of first-degree murder, attempted first-degree murder, and two counts of use of a handgun in the commission of a crime of violence. The court sentenced him to two consecutively run terms of life without parole for the murder and attempted murder and to additional time for the handgun offenses. Upon direct appeal, this Court remanded the case to the circuit court to correct the docket entry regarding the sentence imposed for attempted first-degree murder and otherwise affirmed the judgment. *Bell v. State*, No. 2765, September Term, 2004 (filed August 3, 2006).

In 2019, Mr. Bell, representing himself, filed a petition for writ of actual innocence. His "newly discovered evidence" consisted of a ballistics report dated April 9, 2004 which he claimed had not been provided to the defense in discovery prior to his October 2004 trial. By opinion and order dated August 21, 2020 and entered on the docket on August 26, 2020, the circuit court denied the petition without a hearing. On September 11, 2020, Mr. Bell filed a pleading he captioned "Motion to Alter or Amend a Judgment or in the Alternative Motion for New Trial," which the circuit court treated as a motion for reconsideration of its decision denying his request for a writ of actual innocence. By order dated September 21, 2020 and entered on September 24, 2020, the court denied the motion for reconsideration. On October 9, 2020, Mr. Bell filed a notice of appeal "from denial of [the] [H]onorable Dorothy M. Engel dated September 21, 2020." As noted, the September 21st decision was the court's denial of Mr. Bell's motion for reconsideration.

The State first asserts that Mr. Bell's notice of appeal was untimely because it was filed more than 30 days after the court's August 26, 2020 decision denying the petition for

actual innocence relief and urges this Court to "affirm (or dismiss the appeal) for that reason alone." The State also maintains that Mr. Bell's "claim can be rejected on its face."

We need not decide whether Mr. Bell's notice of appeal was timely as to the August 26th decision because his notice of appeal explicitly stated that he was appealing from the September 21st ruling. He did not appeal from the August 26th judgment. Accordingly, the only issue before us is whether the court abused its discretion in denying the motion for reconsideration. *See Sydnor v. Hathaway*, 228 Md. App. 691, 708 (2016). For the reasons to be discussed, we shall affirm the judgment.

BACKGROUND

Trial

The following facts are taken from this Court's opinion following Mr. Bell's direct appeal.

> On March 14, 2005 [sic][1], three men entered the 51 Club, a liquor store located in Temple Hills, Prince George's County, just outside of the Southeast, D.C. line. Shortly thereafter, Phillip Beverly, Vioncia Buckson, and Taninia Johnson entered the store together. A man approached Buckson, and, as Buckson testified, "popped" her suspenders. Beverly and the man then exchanged words; Beverly apparently told the man not to touch Buckson. Buckson testified that the conversation was merely talking "back and forth," rather than argument. Johnson testified that she was standing two feet away from the man, next to Buckson, during this conversation.
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> Buckson testified that her back was to the man, but at one point she turned around to tell Beverly "don't even worry about it." When she did so, she saw the hood of the man's jacket "fling over" onto his head. Immediately, he pulled a handgun out of his pocket and opened fire on Beverly and Buckson. Johnson ran out of the store. After firing a few shots, the shooter ran from the store as well. Buckson yelled to Johnson to get the

[1] The incident occurred on March 14, 2004, not 2005. Trial took place over several days in October 2004.

> tag number of the shooter's car. The gunman, however, reentered the store and continued shooting at Beverly, who was lying wounded on the ground, and Buckson, who was assisting Beverly. After firing a few more shots, the gunman left the store. Beverly was fatally shot, and Buckson escaped with a gunshot wound to the leg.
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> At trial, the State's case included the testimony of Buckson and Johnson. Each eyewitness was able to identify Bell in court as the shooter. Buckson also testified that she was able to pick Bell out of a six-photograph array shown to her by the P.G. County Police Department ten days after the shooting.
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> Detective Mark Alexander, the lead detective in the case, was the only other witness for the State. Relevant to his investigation was a "grainy" surveillance video that was recorded by the store's security system. The video was shown to the jury during Johnson's testimony[.]

Bell v. State, No. 2765, September Term, 2004, *slip op*. at 1-3.

In addition to the surveillance video, the State introduced photographs of the store where the crime was committed, the photo array shown to Ms. Buckson, the autopsy report, and a stipulation regarding the condition of the victim's body at the time of the autopsy. Mr. Bell rested without putting on any evidence. In opening and closing statements, defense counsel asserted that the issue in the case centered on the identity of the shooter and noted that "no gun" was recovered and no physical evidence "ever linked Mr. Bell to this crime scene," such as fingerprints or clothing (including a "distinctive jacket, a puffy coat") matching the clothing worn by the shooter in the video.

Petition for Writ of Actual Innocence

Mr. Bell's petition centered upon his receipt, in 2018, of a ballistics report dated April 9, 2004—prepared approximately a month after the incident and more than six months prior to trial. He claimed that the report, which he had obtained from the Prince

George's County Police Department pursuant to a Maryland Public Information Act request, had not been provided to the defense prior to trial. He maintained that the report supported his position that Ms. Johnson had testified falsely at trial "on the core merits" because "the ballistics didn't match." He also claimed that the State committed a *Brady*[2] violation by withholding the report prior to trial.

The circuit court found that the "firearms examination results are not newly discovered evidence" and that Mr. Bell had failed to demonstrate that the results could not have been discovered in an exercise of due diligence. Moreover, the court found that the "report could not have inculpated nor exculpated" him and, therefore, it was not "material evidence" and hence, the State did not violate its obligations under *Brady*. The court further found that Mr. Bell had failed to "provide any evidence to support the allegation that Johnson and Buckson committed perjury on direct testimony and/or on cross-examination[,]" noting that both witnesses were "effectively cross-examined" by defense counsel. Accordingly, the court denied the petition and did so without a hearing.

In his motion for reconsideration, Mr. Bell challenged generally the court's finding that the ballistics report could have been discovered pre-trial. He also asserted that, if the report had been produced in discovery, "it would have showed the jury that the State's witnesses testified falsely on the core of merits of the case" and the "outcome would have been different because the ballistic report would have showed the jury that the bullets did

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

not match and most importantly [the trial judge] would have acquitted" him. The court summarily denied the motion for reconsideration. Mr. Bell appealed that ruling.

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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> ***
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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, as noted, we are reviewing the court's denial of Mr. Bell's motion for reconsideration of its decision denying his petition for writ of actual innocence, something we review for abuse of discretion, but obviously in the context of its ruling denying his petition.

"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, 460 (2020) (quoting *Smallwood*, 451 Md. at 323).

We hold that the court did not abuse its discretion in denying Mr. Bell's motion for reconsideration because the court had given due consideration to Mr. Bell's claims in its decision denying the petition and it did not err in concluding that his petition was legally insufficient. The motion for reconsideration did not provide any information that should have changed the court's ruling.

The report, prepared by a firearm and tool mark examiner with the Prince George's County Police Department and directed to the attention of Detective Alexander—the lead investigator in the case who testified at trial—stated that the following items were examined:

Items TMP 4 & 5	two (2) fired bullets
Items KA1, 2, and 4-8	seven (7) fired cartridge cases
Items KA3, 9A, 9B, 10A, 11A, 12	six (6) fired bullets/fragments

The report then provided the "RESULTS OF EXAMINATION" and stated:

> Items KA3, TMP4 and TMP5 are three (3) fired full copper jacket design bullets that were identified as having been fired from the same barrel. Items KA11A and KA12 are two (2) fired full copper jack design bullets. Items KA9A and KA10A are two (2) copper bullet jack fragments. Although consistent they lack sufficient matching individual marks to identify them as having been fired from the same barrel as items KA3, TMP4, and TMP5. All of the above items are caliber .40 S&W and have been fired from a barrel rifled with six (6) grooves right twist. The following firearms that may produce similar rifling impressions include but is not limited to semiautomatic pistols marketed under the brand names of: Astra, Heckler and Koch, Hi-Point, Ruger, and Taurus. Item KA9B is a small copper jacket bullet fragment which lacks any individual marks for microscopic comparison.

> Items KA1, KA2 and KA4 thru KA8 are seven (7) fired cartridge cases caliber .40 S&W, Winchester brand, which were all identified as having been fired in one firearm. They are compatible with the above fired bullets and listed firearm brands. A representative sample was entered in the FEU computer imaging system with no association(s) made at this time. This entry will remain on file and be compared with any newly recovered firearm test fires or other evidence cartridge cases submitted.

In his petition, Mr. Bell seized on the statement in the report regarding two of the five "fired full copper jacket design bullets" that had been recovered, namely, that KA11 and KA12. The report indicated that, "[a]lthough consistent they lack sufficient matching individual marks to identify them as having been fired from the same barrel as" the other three bullets (KA3, TMP4, and TMP5). He then seemed to use that information to challenge the veracity of Ms. Johnson's testimony that after the assailant fired the initial shots, he left the store but then returned and fired again. He maintained that the report's finding that KA11 and KA12, in his words, "did not match" the other three recovered bullets constituted "exculpatory and mitigating" evidence.

We disagree. First, the record before us indicates that the gun used in the crime was not recovered and, therefore, the firearm examiner could not compare the recovered bullets to a particular weapon, much less the weapon from which they were fired. Hence, as the circuit court concluded, the report was of limited value. Second, the report concluded that two of the five full fired bullets that were recovered were "consistent" with the other three but "they lack[ed] sufficient matching individual marks to identify them as having been fired from the same barrel[.]" In other words, the examiner could not state that all five of the recovered full fired bullets were fired from the same weapon, but on the other hand he did not conclude that they were fired from separate weapons.

But even if the five recovered bullets had been fired from two different firearms, that fact alone does not speak to Mr. Bell's actual innocence or discredit the testimony of the eyewitnesses. Ms. Johnson testified that after the initial shots were fired, the shooter left the store but ultimately reentered and fired again. The incident was captured on the store's surveillance video, which the defense used to bolster its position that the shooter was not Mr. Bell because the individual in the video appeared heavier than Mr. Bell, looked younger than Mr. Bell, and had a "different shaped nose" than Mr. Bell. The defense, however, did not challenge the State's evidence that the shooter who left the store and the person who reentered and fired again were the same individual—evidence that was testified to by the eyewitnesses and captured on the surveillance video that was shown to the jury.

We also agree with the circuit court that the ballistics report is something that the defense could have discovered pretrial or in time to move for a new trial. The report was dated April 9, 2004—more than six months before trial. Given that there was no dispute that multiple shots were fired in the store, it is reasonable to conclude that the defense knew or should have known that bullets and/or cartridge casings may have been recovered and perhaps examined.

In sum, we hold that the circuit court did not abuse its discretion in denying Mr. Bell's motion for reconsideration of its denial of his petition for writ of actual innocence because Mr. Bell's petition did not meet the threshold requirements for actual innocence relief and nothing in the motion for reconsideration would have changed that fact.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.