

Circuit Court for Anne Arundel County
Case No.: 02-K-10-000265

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 1197

September Term, 2022

EARL DELMORE JOHNSON, JR.

v.

STATE OF MARYLAND

Berger,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: April 3, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

*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 2011, a jury in the Circuit Court for Anne Arundel County found appellant, Earl Delmore Johnson, Jr., guilty of robbery with a dangerous weapon, robbery, second-degree assault, and theft under \$10,000. The court sentenced him to 25 years without parole for the armed robbery and merged the remaining offenses for sentencing purposes. On direct appeal, among other things, Mr. Johnson argued that the evidence was insufficient to support the convictions and that the sentence to 25 years without parole was illegal. This Court held that the evidence was sufficient and affirmed the convictions. We vacated the sentence, however, and remanded for resentencing. *Johnson v. State*, No. 2680, September Term, 2010 (filed August 28, 2012). Upon remand, the court sentenced Mr. Johnson to 13 years' imprisonment.

In August 2022, Mr. Johnson, representing himself, filed two petitions for writ of actual innocence in which he, in essence, challenged the sufficiency of the evidence. For example, he maintained that the eyewitness (an employee of the 7-11 store that was robbed) and an investigative police officer both “testified falsely” at trial. He further claimed that “the still photo do not show me I am not the person who committed this crime[.]” He did not, however, cite any newly discovered evidence in support of his allegations and he did allege that the “still photo” was newly discovered.

The circuit court dismissed the petitions after finding that they “fail to comply substantially with the requirements of Md. Rule 4-332(d)” and that Mr. Johnson “fail[ed] to assert grounds upon which relief may be granted.” Mr. Johnson appeals that ruling. For the reasons to be discussed, we shall affirm the judgment.

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(d)(6). “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:

(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]

(2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.

(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).

“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, 459-60 (2020) (quoting *Smallwood*, 451 Md. at 323).

Rule 4-332(d) addresses the content of a petition for writ of actual innocence.

Among other things, a petition must include:

a description of the newly discovered evidence, how and when it was discovered, why it could not have been discovered earlier, and, if the issue of whether the evidence could have been discovered in time to move for a new trial pursuant to Rule 4-331 was raised or decided in any earlier appeal of post-judgment proceeding, the identity of the appeal or proceeding and the decision on that issue[.]

Rule 4-332(d)(7).

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 marks and citation 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. at 308.

Here, Mr. Johnson did not rely on any newly discovered evidence to support his allegations that the State’s witnesses lied at trial. Nor did he produce or cite any evidence which was not known to him at the time of trial to support his allegation that “the still photo” did not depict him or was somehow exculpatory. In fact, in its brief, the State points out that at a 2014 post-conviction proceeding it was established that still photos taken from the store’s surveillance video were turned over to trial counsel prior to trial and, therefore, the State maintains that the photo could not constitute newly discovered evidence in this case.

The record before us reflects that the post-conviction court rejected Mr. Johnson’s claim that trial counsel rendered ineffective assistance by failing to object to the introduction of still photos on lack of authentication grounds and because some of the still photos were not provided to trial counsel until the day before trial. The post-conviction court credited the testimony of the prosecutor that the “photos actually were authenticated” by the owner of the 7-11 that was robbed and that the only photos which were admitted into evidence were provided to trial counsel months prior to trial. *See* Statement of Reasons and Order of Court filed by the post-conviction court on April 30, 2014. Thus, we agree with the State that the still photo Mr. Johnson appears to rely upon in his petitions for writ of actual innocence cannot be deemed “newly discovered” evidence because it was known to him prior to, and certainly during, trial. Mr. Johnson does not claim otherwise.

In sum, because Mr. Johnson’s petitions failed to assert grounds upon which actual innocence relief could be granted, the circuit court did not err in dismissing them.

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