

Circuit Court for Anne Arundel County
Case No. 02-K-04-001948

UNREPORTED*
IN THE APPELLATE COURT
OF MARYLAND**

No. 1264

September Term, 2022

ANN SWANSON PENNY HOARD

v.

STATE OF MARYLAND

Kehoe,
Reed,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: August 14, 2023

* An unreported opinion of either Court may be cited only (i) when relevant under the doctrine of the law of the case, res judicata, or collateral estoppel, (ii) in a criminal action or related proceeding involving the same defendant, 3)(iii) 10 in a disciplinary action involving the same respondent Md. Rule 1-104(a)(2)(b).

** 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.

Appellant Ann Swanson Penny Hoard was convicted in the Circuit Court for Anne Arundel County for attempted first-degree murder, first and second-degree assault, and a weapons charge. She has submitted several unsuccessful post-conviction motions. She presents the following questions for our review.

1. Did the Circuit Court properly deny Ms. Hoard's petition for a writ of error coram nobis?
2. Did the Circuit Court properly deny Ms. Hoard's motion for a new trial?
3. Did the Circuit Court properly deny Ms. Hoard's motion to reopen post-conviction proceedings?

We shall affirm.

I.

This criminal case has a lengthy and complex procedural history. Appellant appealed to this Court in 2005 and this Court affirmed her conviction. *Hoard v. State*, No. 1398, Sept. Term, 2005 (App. Ct. Md. Aug. 21, 2006) (unreported). In December 2006, the Supreme Court of Maryland denied her petition for certiorari. *Hoard v. State*, 396 Md. 10 (2006). In December 2010, appellant filed a petition for post-conviction relief in the Circuit Court for Anne Arundel County. Appellant's petition was denied in June 2011. In May 2012, appellant moved for a new trial pursuant to Maryland Rule 4-331. This motion was denied in June 2012. On November 3, 2020, appellant filed a motion to reopen her post-conviction proceedings. On January 4, 2021, the State filed a motion to dismiss, on the grounds that appellant was neither under a sentence of imprisonment or parole or probation, pursuant to the post-conviction statute. The circuit court granted the State's

motion on January 7, 2021. Appellant filed this petition for a writ of error coram nobis, asserting a *Brady v. Maryland*, 373 U.S. 83 (1963), violation she alleges occurred in her trial. After a hearing, the circuit court denied appellant's petition. This timely appeal followed.

II.

Appellant, Ann Swanson Penny Hoard was indicted by the Grand Jury for Anne Arundel County. Appellant was indicted on six counts: attempted first-degree murder, attempted second-degree murder, first-degree assault, second-degree assault, reckless endangerment, and carrying weapon openly with intent to injure. Following a bench trial, the court found appellant guilty of attempted first-degree murder, first and second-degree assault, and the weapons charge. Appellant was sentenced to a term of incarceration of 25 years, all but 15 years suspended, 5 years probation.

III.

On March 29, 2004, appellant's ex-husband Donald Hoard came to her home to pick up their son. As he entered the home, appellant struck Mr. Hoard in the buttock with a syringe. Mr. Hoard grabbed the syringe and left the home to call 911. Worried about his son, Mr. Hoard reentered the home where appellant attacked him with another syringe. When police and paramedics arrived at the home, Mr. Hoard had visible injuries. He weighed 230 pounds and he was a heavy smoker with hypertension. He had puncture

wounds and half dollar sized red welts around the marks on his buttocks and thigh. His clothing was stained with blood from the puncture wound. His blood pressure was exceedingly high, and he was struggling to breathe. Police recovered the first syringe from Mr. Hoard's truck and the second from appellant's bathroom. The first syringe contained drops of succinylcholine chloride, which the trial court described as "a deadly substance." The police also found unused syringes in appellant's closet. Mr. Hoard stated that at times appellant forgot to empty her pockets before leaving work and unintentionally brought syringes home.

During the trial, Mr. Hoard testified that he worked as a Release Information Coordinator in Health Information Management at Providence Hospital. He testified that he had no relationship to the medical aspects of the hospital and no access to drugs or needles to take home. Mr. Hoard testified also that he held an associate degree in general studies, and that after the divorce, the court awarded him full custody of the parties' minor child.

Appellant did not testify at trial. The judge made several findings. The court found that Mr. Hoard had no reason to be contentious considering his attainment of full custody of the parties' minor child, and that appellant had a clear motive, *i.e.*, to attain custody of their child. He asserted that as a nurse, appellant had the requisite medical knowledge and access to the drugs to commit the assault. Moreover, the child was not there when Mr. Hoard came at the prearranged time to pick him up, indicative of a pre-meditated plan by appellant to attack Mr. Hoard. The judge inferred from the fact that the syringe contained

a lethal drug that appellant intended to murder Mr. Hoard to gain full custody of their son. Following her conviction, appellant's appeal to this court was denied. Her subsequent petition for certiorari to the Supreme Court of Maryland was also denied.

IV.

Appellant filed several motions for post-conviction relief. Relevant here is her 2021 petition for a writ of error coram nobis. In that petition, appellant asserted a *Brady* violation based on Mr. Hoard's transcripts. She asserted that appellant's sister found previously undiscovered transcripts in appellant's home. The transcripts showed that Mr. Hoard had momentarily studied respiratory therapy. Appellant contends that this undermined Mr. Hoard's argument that he lacked the technical wherewithal to possess and operate the syringe. Appellant argues that the State should have known that Mr. Hoard had studied respiratory studies. Appellant claims that this violation caused her to lose her nursing license. In November of 2021, at the coram nobis hearing, appellant asserted that Mr. Hoard's school grade transcripts showed that he had majored in respiratory therapy and not medical records as he had testified during the trial. The State argued that there could not be a *Brady* violation because it did not possess the transcripts, they were not material, and appellant had exclusive access to them.

Mr. Hoard testified at coram nobis hearing. He testified that although the transcripts were his, he had worked as a release of information coordinator, and had no access to prescription or pharmaceutical drugs. He testified that he only momentarily majored in

respiratory therapy before he switched to general studies. Additionally, he learned nothing about drugs or human anatomy in his respiratory theory class.

On September 7, 2022, the coram nobis court denied appellant's petition, holding that there was no *Brady* violation because appellant did not establish that the State suppressed Mr. Hoard's college transcripts. The judge concluded that the State was never in possession of the transcripts and that only the appellant had access to them. The court held that the transcripts were neither material nor favorable to the defense, concluding that there was no evidence that succinylcholine chloride, the drug found in the syringe, was discussed in any of Mr. Hoard's classes. This timely appeal followed.

V.

Appellant's first argument is that the circuit court denied her petition for writ of error coram nobis improperly. Appellant argues that Mr. Hoard withheld the substance of his education and that his educational records were accessible only with a court order. Appellant contends that the prosecution could have easily acquired Mr. Hoard's educational records.

Appellant's second argument is that the circuit court erred by denying her motion for a new trial in 2012. Appellant argues that this Court has the power to set aside the circuit court's 11-year-old judgment based upon the newly discovered evidence in this case. Appellant contends that the new evidence is material and warrants a new trial pursuant to the Maryland Uniform Postconviction Procedure Act Title 7.

Appellant's third argument is that the circuit court erred by dismissing her postconviction motion without a hearing. She argues that she filed her original postconviction proceeding within 10 years of her 2005 conviction. Appellant maintains that because she filed the petition while she was originally on parole, her later filing to reopen and reconsider the original denial was within the limitations set by the statute. Consequently, the circuit court abused its discretion in granting the State's Motion to Dismiss Postconviction.

The State's first argument is that the circuit court properly denied appellant's petition for a writ of error coram nobis, an extraordinary remedy. She has failed to satisfy any requirements to justify coram nobis relief. The State contends that appellant shows no evidence of constitutional violations in her conviction. Additionally, the State asserts that the circuit court was correct in finding that there was no prosecutorial suppression of Mr. Hoard's transcripts. The State maintains that *Brady* does not require a prosecution team to affirmatively *search* for information from locations not within its control or organizations that are not pertinent to the case. Additionally, the State asserts that there was no evidence that anyone on the prosecution team had or was aware of Mr. Hoard's transcripts. The State argues that appellant had exclusive access to the transcripts, located in a filing cabinet left in her home for years. Moreover, the State agrees with the circuit court that the transcripts were not favorable to the defense or material to the outcome of the case. There was no indication that the coursework addressed the drugs used in the attempted murder.

Finally, Mr. Hoard's testimony was accurate because he was asked only general questions and answered truthfully.

The State argues that both of appellant's arguments regarding her prior dismissed actions are time-barred. First, the State asserts that appellant's challenge of the circuit court's denial for a new trial pursuant to Rule 4-331(b) & (c), which governs motions for a new trial, is untimely and subject to dismissal pursuant to Rule 8-202(b)(2). The State contends that under Rule 8-202(a), an appeal must be noted within 30 days of the entry of judgment and appellant waited 10 years.

In the alternative, the State maintains that, on the merits, the appeal should be denied. The State asserts that appellant's original motion for a new trial, based on newly discovered evidence, was fatally delayed, because, under Rule 4-331(c), such a motion must be filed within one year of either the sentencing, or a final mandate from an appellate court considering an appeal. The State maintains appellant's deadline was September 2007; consequently, her 2012 motion was five years too late. The State also argues that appellant did not make a prima facie case for relief under the Rule. The State contends that after 90 days after sentencing, the circuit court can revise a judgment only in instances of fraud, mistake, or irregularity. Appellant's motion was based on the credibility of Mr. Hoard's testimony, not mistake, fraud, or irregularity.

The State argues that appellant's challenge to the State's successful Motion to Dismiss Postconviction Petition should not be addressed. The State asserts that an appellant must appeal the denial of a motion to reopen within 30 days of the court order.

Appellant is challenging a ruling that was issued in January 2021, but she did not file an application for leave to appeal until September 2022. Additionally, the State argues that the substance of her postconviction motion, the alleged *Brady*, claim is identical to the claim in her motion to reopen and her coram nobis petition. Because the circuit court had denied her coram nobis petition on these grounds, the State contends that the issue has been finally litigated for the purposes of postconviction relief. Consequently, the State asserts that the alleged *Brady* violation cannot be pursued as a postconviction claim.

III.

We address appellant’s first argument that the circuit court erred in denying her coram nobis petition. We review a denial of a coram nobis petition for an abuse of discretion. *State v. Rich*, 454 Md. 448, 461 (2017). We accept the circuit court’s factual findings unless they are clearly erroneous, and we review the legal determinations *de novo*. *Id.* Coram nobis “is an extraordinary remedy justified only under circumstances compelling such action to achieve justice.” *State v. Smith*, 443 Md. 572, 579 (2015) (internal quotations omitted). This relief is available only when other avenues are validly and reasonably foreclosed, and to address fundamental errors that expose the invalidity of a criminal conviction. *Id.* The Supreme Court of Maryland has outlined five requirements a petitioner or appellant must meet to gain coram nobis relief, noting as follows:

1. The grounds for challenging the criminal conviction must be of a constitutional, jurisdictional or fundamental character,
2. A presumption of regularity attaches to the criminal case, and the burden of proof is on the coram nobis petitioner,

3. The petitioner must be suffering or facing significant collateral consequences from the conviction,
4. Basic principles of waiver apply and where an issue has been finally litigated in a prior proceeding, and there are no intervening changes in the applicable law or controlling case law, the issue may not be relitigated in a coram nobis action,
5. One is not entitled to challenge a criminal conviction by a coram nobis proceeding if another statutory or common law remedy is then available.

Skok v. State, 361 Md. 52, 78-80 (2000).

Meeting these conditions alone, however, is not dispositive; a petitioner must present “circumstances compelling such action to achieve justice.” *Smith*, 480 Md at 548.

Whether appellant suffered a constitutional infirmity in her conviction turns on the validity of her alleged *Brady* violation. Because it presents a constitutional issue, we review the allegation of a *Brady* violation *de novo*. *Canales-Yanez v. State*, 472 Md. 132, 156 (2021). “*Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny guarantee to a criminal defendant who stands trial the right to receive material exculpatory and impeachment evidence in the possession of the State.” *Byrd v. State*, 471 Md. 359, 372 (2020). A petitioner must meet three requirements to establish a due process violation under *Brady*: “1) that the prosecutor suppressed or withheld evidence that is 2) favorable to the defense – either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness – and 3) that the suppressed evidence is material.” *Ware v. State*, 348 Md. 19, 38 (1997).

To prove suppression, a petitioner needs to show that the either the prosecution or someone working with the prosecution had possession of the evidence and it was not

produced to the defense. *Diallo v. State*, 413 Md. 678, 705 (2010). “*Brady* offers a defendant no relief when the defendant knew or should have known facts permitting him or her to take advantage of the evidence in question or when a reasonable defendant would have found the evidence.” *Id* (quoting *Ware*, 348 Md. at 39). The United States Supreme Court’s standard for materiality is whether there is a reasonable probability that if the defense had the evidence, the case would have been decided differently. The Court defined ‘reasonable probability’ as “probability sufficient to undermine confidence in the outcome.” *United States v. Bagley*, 473 U.S. 667, 682 (1985). The Supreme Court of Maryland has added to the definition of materiality by adding six factors to consider:

- 1) The specificity of the defendant’s request for disclosure of materials,
- 2) The closeness of the case against the defendant and the cumulative weight of the other independent evidence of guilt,
- 3) The centrality of the particular witness to the State’s case,
- 4) The significance of the inducement to testify,
- 5) Whether and to what extent the witness’s credibility is already in question, and
- 6) The prosecutorial emphasis on the witness’s credibility in closing arguments.

Wilson v. State, 363 Md. 333, 352 (2001).

The circuit court did not err or abuse its discretion in finding that the State did not suppress evidence because appellant produced no evidence that the prosecution was in possession of the educational transcripts. Specifically, the transcripts were in appellant’s possession the entire time. In addition, appellant knew or should have known about the presence of the transcripts, which would bar her from *Brady* relief. *Yearby v. State*, 414 Md. 708, 724 (2010).

There is no evidence that the documents were either material or favorable to the defense. Both the United States Supreme Court and the Supreme Court of Maryland have held that for evidence to be material, there must be a reasonable probability that the undisclosed evidence would have undermined confidence in the outcome of the case. *Ware*, 348 Md. at 46; *United States v. Bagley*, 473 U.S. 667, 682 (1985). The crux of petitioner’s *Brady* allegation is that because Mr. Hoard’s transcripts showed that he temporarily majored in respiratory therapy, he must have had some familiarity with succinylcholine chloride. There is no indication, however, that this drug was covered in any of his courses. Moreover, Mr. Hoard studied respiratory therapy temporarily before switching to general medical records. Consequently, the circuit court did not abuse its discretion or err in denying appellant’s coram nobis petition.

We decline to address the merits of appellant’s challenge to the 2012 denial of her motion for a new trial pursuant to Rule 4-331(b)(c) and Rule 8-202(a). Under Rule 8-202(a), an appellant must file a notice of an appeal within 30 days after the entry of the order or judgment that is being appealed. Appellant’s motion was denied in 2012. Appellant then waited over 10 years before she decided to file her appeal. Consequently, her appeal is time barred. Rule 4-331(b) and (c) contain a procedural timing provision which would prohibit appellant’s challenge. Rule 4-331(c) allows an appellant to ask for a new trial based on newly discovered evidence if that challenge is made “within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment

or a belated appeal permitted as post-conviction relief.” The final mandate in the instant case was issued in 2007 from this Court. Consequently, appellant’s motion was time-barred by the plain language of the statute.

Similarly, we decline to address the merits of appellant’s challenge to the dismissal of the postconviction petition. A defendant has 30 days to apply for leave to appeal the denial of a motion to reopen. Appellant is attempting to appeal a decision that was issued in January 2021. She did not file for leave to appeal until September 2022. This appeal is time barred.

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