UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1381

September Term, 2014

OMAR JOHNSON

v.

STATE OF MARYLAND

Hotten,
Leahy,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: June 8, 2015

On June 25, 1993, Omar Johnson, appellant, was convicted in the Circuit Court for Baltimore City of first-degree murder, use of a handgun in the commission of a crime of violence and wearing, carrying, or transporting a handgun.[1] On November 14, 2013, he filed a petition for writ of actual innocence. After a hearing, the court denied appellant's petition. He appeals from the court order denying his petition and presents the following question for our review:

> "Whether the Circuit Court erred in ruling that the testimony of Anthony Brown that Mr. Brown alone committed the crimes and that [appellant] did not commit the crimes of which he was convicted did not constitute newly discovered evidence that created a substantial possibility that the result of the trial would have been different?"

We find no error and shall affirm.

I.

On June 25, 1993, in the Circuit Court for Baltimore City, a jury convicted appellant, and his co-defendant, Anthony Brown, of first-degree murder and use of a handgun in the commission of a crime of violence.[2] The court sentenced both defendants to a term of incarceration of life imprisonment for the murder charge and a concurrent term of incarceration of twenty years for the handgun charge. On direct appeal, in an unreported

[1]Appellant was tried and convicted jointly with his co-defendant, Anthony Brown.

[2]The jury also convicted appellant of wearing, carrying, or transporting a handgun.

opinion, this Court affirmed the judgments of conviction. *Brown and Johnson v. State of Maryland*, No. 1529, September Term, 1993 (filed: Aug. 9, 1994).

The following facts were presented at trial. Appellant was involved in the distribution of drugs with Cynthia Dingle and Anthony Brown. On the day of the incident, James McCray, the victim, and a woman approached Dingle to buy drugs. Dingle sold Mr. McCray the drugs, but soon realized that Mr. McCray did not pay her in full. She took the drugs back and returned Mr. McCray's money.

Approximately one hour later, Mr. McCray and the woman returned. He again purchased drugs from Dingle and did not pay her the full amount that she had requested. Dingle refused to accept the drugs, fearing that Mr. McCray would switch the vials, and she demanded payment in full. After another woman standing nearby suspected Mr. McCray of switching the vials of drugs, he started to run away. Several men, including appellant, ran after Mr. McCray. Dingle then heard four or five gunshots. Mr. McCray was shot four times and died from the injuries he suffered from the gunshot wounds. An autopsy revealed that three bullets were recovered from the victim's body.[3] A ballistics report stated that two of the three bullets recovered from Mr. McCray's body came from the same gun, but that it could not be determined whether the third bullet also came from the same gun.

[3]One of the four bullets fired at Mr. McCray had both an entrance wound and an exit wound.

Judith Jackson testified[4] that appellant and Brown kept guns in her house. She stated that, on the day of the shooting, appellant came into her house, got the guns and ran down the street and shot Mr. McCray. As to Brown, Ms. Jackson testified as follows:

> "He shot the boy. He shot at the boy, and like I said before, the rest of them, they just following [appellant]. They don't be trying to hurt nobody or nothing. They just be shooting because [appellant] tell them to shoot."

As indicated, the jury convicted appellant and Brown of all the charges and the court imposed sentence. This Court affirmed. *Brown and Johnson v. State of Maryland*, No. 1529, September Term, 1993 (filed: Aug. 9, 1994). Subsequently, appellant and Brown filed separate petitions for post-conviction relief. In Brown's case, the court granted a new trial. On remand, Brown pled guilty to second-degree murder and the court sentenced him to time served. The court denied appellant's petition for post-conviction relief.

In December 2009, appellant filed his first petition for writ of actual innocence. He alleged that the jury instructions at his trial were defective and that the State committed a *Brady*[5] violation. The court denied the petition.

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[4] Appellant argues that Ms. Jackson's testimony should be discredited because, on the day of the shooting, she was under the influence of a controlled dangerous substance and that her testimony at trial related to a wholly distinct criminal incident. Appellant concedes, however, that he did not move to strike Ms. Jackson's testimony and thus, the jury properly considered it.

[5] In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."

On November 14, 2013, appellant filed a second petition for writ of actual innocence, the subject of this appeal. Appellant argued "newly discovered evidence" in the form of an affidavit from Brown, who had since been released from incarceration pursuant to his guilty plea, alleging that appellant was not involved in Mr. McCray's shooting. Appellant also asserted that a statement made by the prosecutor during Brown's guilty plea hearing that all three bullets recovered from Mr. McCray's body were from the same gun, constituted newly discovered evidence that created a substantial or significant possibility that the result at trial would have been different.

On August 7, 2014, after a hearing, the trial court issued a written "Ruling and Order" denying appellant's second petition for writ of actual innocence. The court noted that it "had the opportunity to observe Mr. Brown's demeanor and manner of testifying" and found that "he was incredible." The court considered the fact that Brown "waited twenty years after the trial, and almost six years after his guilty plea, to come forward with [his] testimony" and that he made no attempt to correct the statement of facts at his guilty plea hearing. The court also ruled that Brown's testimony did not constitute "newly discovered evidence" because appellant could have discovered it in time to move for a new trial. As to the prosecutor's statement at the plea hearing, the court ruled that the statement was not evidence, no less newly discovered evidence, and that even if the statement was evidence, it would not have substantially affected the verdict because appellant could be held criminally responsible as

an accomplice. Accordingly, the trial court denied appellant's petition for writ of actual innocence.

This timely appeal followed.

II.

Before this Court, appellant argues that the trial court erred by denying his petition for writ of actual innocence. He argues that Brown's testimony stating that appellant was not involved in the shooting was newly discovered evidence that created a substantial possibility that the result of the trial would have been different. Specifically, appellant contends that the trial court abused its discretion by finding that Brown lacked credibility and that Brown's testimony had no probative value. He argues also that Brown's statement constitutes newly discovered evidence because it was unavailable in time to move for a new trial and appellant could not have known that Brown was involved in the shooting until his guilty plea in 2008. Next, appellant contends that the court erred in ruling that the State's proffer at Brown's plea hearing that all of the bullets that killed the victim came from the same gun, did not constitute newly discovered evidence. He posits that a transcript of the guilty plea hearing demonstrating the prosecutor's proffer constitutes "evidence" and that the proffer is material because it establishes that only one of the men was responsible for Mr. McCray's death. Finally, appellant argues that the court erred by not considering the totality of the evidence

presented against him to determine if the alleged newly discovered evidence warrants a new trial.

The State maintains that the trial court denied properly appellant's petition for writ of actual innocence. The State contends that because the trial court did not find Brown to be a credible witness, our inquiry ends. The State asserts that Brown's testimony that appellant was not involved in the shooting does not constitute newly discovered evidence because appellant could have obtained such evidence in time to move for a new trial through the exercise of due diligence. Additionally, the State argues that the prosecutor's proffer at Brown's guilty plea did not constitute evidence, no less newly discovered evidence, and that even if it was evidence, the statement is irrelevant because whether or not the bullets came from the same gun, both appellant and Brown could have been convicted under a theory of accomplice liability. The State's final contention is that appellant's argument that the totality of the evidence requires a new trial is neither preserved nor an appropriate argument in a petition for writ of actual innocence.

III.

We address appellant's contention before this Court: whether the trial court erred in denying his petition for writ of actual innocence. Because appellant failed to establish newly discovered evidence that creates a substantial possibility that the result of the trial would have been different, we hold that the court denied the petition properly. Moreover, even if

the evidence was newly discovery, the trial judge heard the witness and made a credibility determination. The court flat out disbelieved the witness. That credibility determination was within the purview of the trial court, and we will not disturb it. As the State argues—end of story. Appellant loses.

Appellant filed a petition for writ of actual innocence in the Circuit Court for Baltimore City pursuant to Maryland Code (2001, Repl. Vol. 2008) § 8-301(a) of the Criminal Procedure Article.[6] Section 8-301(a) states as follows:

> "(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) 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."

The decision to grant or deny a request for a new trial based on newly discovered evidence pursuant to § 8-301, is "committed to the hearing court's sound discretion." *Douglas v. State*, 423 Md. 156, 188 (2011). We will not disturb the trial court's ruling on a petition for writ of actual innocence unless it is "well removed from any center mark imagined . . . and

[6]Unless otherwise indicated, all subsequent statutory references herein shall be to the Criminal Procedure Article.

beyond the fringe of what [is deemed] minimally acceptable." *Jackson v. State*, 216 Md. App. 347, 363-64, *cert. denied*, 438 Md. 740 (2014).

To prevail under § 8-301, the petitioner has the burden of proof to establish newly discovered evidence, which "must not have been discovered, *or have been discoverable by the exercise of due diligence*" in time to move for a new trial under Rule 4-331. *Campbell v. State*, 373 Md. 637, 668-69 (2003) (emphasis added). This is a "threshold question and until there is a finding of newly discovered evidence that could not have been discovered by due diligence, no relief is available." *Jackson*, 216 Md. App. at 364.

The exercise of due diligence has both a "time component and a good faith component." *Campbell*, 373 Md. at 669. In the context of Rule 4-331, a motion for a new trial based on newly discovered evidence must be made within one year of the date the trial court received the mandate from the final direct appeal. Due diligence "contemplates that the defendant act reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him or her." *Argyrou v. State*, 349 Md. 587, 605 (1998). 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). Ultimately, the question of whether the evidence could have been found earlier is reserved to the sound discretion of the trial court. *See Love v. State*, 95 Md. App. 420, 435 (1993) (declining to hold that the trial court abused its discretion in finding an absence of due diligence).

In the case *sub judice*, the court found properly that Brown's testimony purporting to exculpate appellant did not constitute newly discovered evidence. This Court issued its mandate affirming the judgments against Brown and appellant on September 9, 1994, and the Court of Appeals denied certiorari on March 22, 1995. Because Brown had exhausted his appeals, his testimony was compellable as early as March 23, 1995, which, as the State notes, was within a year from when this Court issued its mandate. *See Archer v. State*, 383 Md. 329, 344 (2004) (noting that the witness's Fifth Amendment right was extinguished at the time he "was a compellable witness because no appeal or sentence was pending and the time for appeal and sentence review had expired"). As such, appellant, with the exercise of due diligence, could have obtained Brown's statement in time to move for a new trial, notwithstanding the fact that Brown had invoked his Fifth Amendment privilege against self-incrimination. *See* Rule 4-331(c) (noting that, to file a motion for a new trial on the ground of newly discovered evidence, the petitioner has a year after the imposition of sentence or the trial court's receipt of mandate issued by the Court of Appeals or the Court of Special Appeals, whichever is later). Rather, appellant took no action whatsoever to contact Brown until he pled guilty, was released from incarceration and thus, faced no further prosecution for Mr. McCray's murder. Because appellant failed to exercise any due diligence to obtain Brown's statement in time to move for a new trial, we hold that Brown's testimony does not constitute newly discovered evidence.

Assuming *arguendo* that Brown's testimony constituted newly discovered evidence, we would hold that the trial court's ruling that it did not find Brown to be a credible witness, all but ended the inquiry.

Appellant's petition for actual innocence rested on Brown's credibility and on the weight afforded to his testimony that appellant was not involved in the underlying offense. Assessing Brown's credibility and weighing his testimony was in "the unfettered domain" of the trial judge. *Yonga v. State*, 221 Md. App. 45, 95, *cert. granted*, _ Md. _ (2015). In *Jackson*, we stated as follows:

> "there is a threshold question of the trustworthiness of the newly discovered evidence and of the credibility of its source. It is clear that the judge called upon to decide the motion may assess trustworthiness and credibility for himself, even though the verdict in the case was rendered by a jury."

Jackson, 164 Md. App. at 694. We accept the trial judge's fact-finding "as historic reality unless it was clearly erroneous." *Yonga*, 221 Md. App. at 95. Judge Charles E. Moylan, Jr., writing for this Court, explained as follows:

> "Can a fact-finding judge who is unpersuaded by even uncontradicted testimony offered by the proponent of a proposition who bears the burden of proof ever be clearly erroneous? Although the cautious response may be, 'Never say never,' it is hard to imagine an exception to the 'never.'
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> It is easy to conjure up scenarios, of course, wherein a fact finder may be clearly erroneous when he or she is actually persuaded of something. It is a far, far different phenomenon when one is simply unpersuaded. To be unpersuaded, there is no burden of production that has to be satisfied. "

Id. at 96. Accordingly, if the trial judge does not believe the witness, on appeal, the witness's testimony is deemed to be a nullity. *See id*. at 95 (noting that once the trial judge ruled that she did not believe the witnesses, "it is as if those two witnesses had never been called or as if their testimony did not exist").

In the instant matter, the court's ruling that it did not find Brown to be credible essentially ended our inquiry. *See id*. at 97 (noting that when the court announced that it "did not believe a word of the testimony of either the victim or her mother, that testimony, for purposes of appellate review, ceased to exist"). The court considered several factors to arrive at its conclusion. The court "had the opportunity to observe Mr. Brown's demeanor and manner of testifying" and found him to be "incredible." Moreover, the court found relevant that Brown waited twenty years after trial and almost six years after his guilty plea and release from incarceration to exculpate appellant, despite the significance of his testimony alleging that appellant was not involved in the murder. *See Argyrou*, 349 Md. at 608 (noting that the focus is not only on the credibility of the person offering the exculpatory evidence, but also on "the credibility or trustworthiness of the evidence itself, as well as the motive, or other impeaching characteristics, of those offering it"); *United States v. Jasin*, 280 F.3d 355, 365 (3d. Cir. 2002) (noting that "[c]ourts generally consider exculpatory testimony offered by codefendants after they have been sentenced to be inherently suspect"); *United States v. Jacobs*, 475 F.2d 270, 286 n. 33 (2d Cir. 1973) (noting that "a court must exercise great caution in considering evidence to be 'newly discovered' when it existed all along and was

unavailable only because a co-defendant, since convicted, had availed himself of his privilege not to testify"). Also, Brown did not attempt to correct the statement of facts at his guilty plea hearing to reflect his allegation that appellant was not involved in the shooting. In light of the circumstances and the deference afforded to the trial court's credibility assessment, we hold that the court's finding was not clearly erroneous. *See Yonga*, 221 Md. App. at 96 (noting that a when a trial court is not persuaded by a witness's testimony, it is "virtually, albeit perhaps not totally, impossible to find reversible error in that regard").

We turn to appellant's allegation that a statement made by the prosecutor at Brown's guilty plea hearing that all three bullets that were removed from the victim were fired from the same gun, constituted newly discovered evidence. We hold that the prosecutor's statement did not constitute evidence, no less newly discovered evidence.

This Court has stated the obvious: "something that is not 'evidence' cannot be 'newly discovered evidence.'" *Hawes v. State*, 216 Md. App. 105, 134 (2014). In the context of Rule 4-331(c), "the word 'evidence' . . . necessarily 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." *Id*.

At Brown's plea hearing in 2008, the prosecutor stated that "it appears that all three bullets were fired by the same firearm." The court then received in evidence a ballistics report indicating that, at least, two of the bullets came from the same gun, but the markings on the third bullet were insufficient to make a conclusion as to whether it was fired from the

same gun. The trial court in the case at bar found that the prosecutor "misread the contents of the report" and that the misstatement did not constitute "newly discovered evidence." Whether or not the prosecutor misstated the evidence found in the ballistics report, his statement at the plea hearing did not constitute testimony or something that would be capable of being elicited or introduced and moved into the court record. In other words, the prosecutor's proffer at Brown's 2008 guilty plea hearing was not evidence, no less "newly discovered" evidence.

Even if the prosecutor's statement constituted evidence, it would not have created a substantial or significant possibility that the result of the trial may have been different. The evidence at trial demonstrated that appellant went to Ms. Jackson's house, picked up some guns, and that both he and Brown chased the victim, firing their weapons. Whether or not all of the bullets that struck the victim came from the same gun, appellant and Brown could be held criminally responsible for Mr. McCray's death. *See Diggs & Allen v. State*, 213 Md. App. 28, 90 (2013) (noting that "when two or more persons participate in a criminal offense, each is responsible for the commission of the offense and for any other criminal acts done in furtherance of the commission of the offense"). Accordingly, even if the prosecutor's statement constituted evidence, it would not have resulted in a different outcome at trial.

Finally, we reject appellant's argument that the court assessed improperly the alleged newly discovered evidence because it did not consider the totality of the evidence. Section 8-301 concerns "actual innocence" based on "newly discovered evidence" that creates a

substantial or significant possibility that the result at trial would be different. *Yonga*, 221 Md. App. at 57. In determining whether evidence warrants a new trial, the trial court should undertake a two-part-inquiry. *Jackson*, 216 Md. App. at 366. First, "the court should assess whether the evidence is material to the result." *Id*. If the evidence is found to be material, the court should determine the "impact the newly discovered evidence would have on the outcome of the trial." *Id*. This prong of the analysis involves an inquiry into the "weight of the evidence" *Id*. at 373.

As discussed *supra*, the alleged newly discovered evidence in the case at bar was Brown's testimony that appellant was not involved in the shooting and that the prosecutor at Brown's guilty plea hearing made a proffer that all three bullets recovered from the victim came from the same gun. The court considered the alleged newly discovered evidence and determined that it was neither material nor did it create a substantial or significant possibility that the result would have been different. Appellant appears to argue that the court erred by not considering the fact that Brown received post-conviction relief, but appellant did not, and that the evidence at trial consisted solely of Dingle's testimony who was under the influence of a controlled dangerous substance during the shooting and had received a benefit in exchange for her testimony. Even if appellant is correct in asserting that the court must consider the totality of the evidence, surely, the court was not required to consider the fact that Brown, but not appellant, received post-conviction relief, despite the similarities of their petitions. Moreover, as to Dingle's testimony, the trial court was not required on a petition

for writ of actual innocence to reassess the credibility of a trial witness whose testimony was not stricken and was otherwise corroborated. We hold that the trial court considered properly the alleged newly discovered evidence in denying appellant's petition for writ of actual innocence.

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