Circuit Court for Baltimore City
Case No.:191155005-012

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1623

September Term, 2016

AHMED RUCKER

v.

STATE OF MARYLAND

Woodward, C.J.,
Friedman,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: October 2, 2018

In 1991, a jury in the Circuit Court for Baltimore City convicted appellant, Ahmed R. Rucker, and his co-defendant, Joseph Dorsey, of first-degree murder, use of a handgun in the commission of a crime of violence, breaking and entering, theft, and related offenses. Rucker was sentenced to life imprisonment and to a consecutive term of twenty-four years. This Court affirmed the judgments. *Ahmed R. Rucker and Joseph Dorsey v. State,* No. 218, September Term, 1992 (filed November 19, 1992).

In 2015, Rucker filed a petition for writ of actual innocence (his second such petition), in which he alleged that a recently discovered "chain of custody report" placed in doubt the trial testimony of the firearms examiner, Joseph Kopera, that four projectiles removed from the victim's body were fired from a handgun belonging to Rucker. After concluding that the document was not "newly discovered evidence," the circuit court dismissed the petition. Rucker appeals that decision, contending that the court improperly dismissed his petition without a hearing. For the reasons to be discussed, we affirm.

Background [1]

Keith Barlow was found dead on March 13, 1991. He had been shot multiple times with a .22 caliber handgun. Four spent projectiles were recovered from his body.

Shortly after the murder, Dorsey and Rucker picked up Dorsey's girlfriend in Barlow's vehicle. They then drove to where Rucker's vehicle was parked, whereupon Rucker and Dorsey took things from the trunk of Barlow's car and placed them in Rucker's

[1] The trial transcripts are not in the record before us. The facts set forth herein are taken primarily from this Court's 1992 unreported opinion affirming the convictions. Some facts, however, were gleaned from other documents in the record.

car. (At trial, Dorsey admitted that he had been in possession of Barlow's car after the murder, as testified to by several witnesses.)

"Some days after the murder," Rucker visited Dorsey and, in the presence of Dorsey's girlfriend, Rucker informed Dorsey that a newspaper article had reported that Barlow's body had been found. *Rucker and Dorsey v. State,* No. 218, September Term, *supra,* slip op. at 5. "Dorsey then blamed Rucker for not having been more adept in covering their tracks." *Id.* On direct appeal, this Court concluded "that Rucker's nonresponse to the blame being heaped upon him qualifie[d] as a tacit admission of his involvement with Dorsey in the murder." *Id.*

After the murder, the police wanted to question Rucker, but he could not be located. On May 3, 1991, however, Rucker came to the attention of the police after he himself was shot. In an application for a warrant, the police related that Rucker was shot multiple times in an alley on May 3rd, yet managed to make it to his vehicle and drive himself to a house on Lanvale Street. Upon arriving there, Rucker gave the occupant a .22 caliber handgun and narcotics and told the occupant to hide the items in the basement and then call an ambulance. When the police recovered the gun, a ballistics examination showed that Rucker's handgun had fired the projectiles recovered from Barlow's body.[2]

[2] The State, in its brief filed in the appeal presently before us, states that the evidence at trial also established that Rucker "possessed a pawn ticket for goods taken from Barlow's apartment. The goods had been pawned by Rucker's aunt." Because we do not have the trial transcripts, we cannot confirm that statement, but in his reply brief Rucker made no effort to dispute it. We also note that our 1992 opinion mentioned that Rucker argued on direct appeal that the suppression court erred in failing to suppress "a pawn ticket and a newspaper clipping, that were found in Rucker's automobile when the police searched it (continued)

After this Court affirmed the convictions, Rucker, in 1993, filed a petition for post-conviction relief. Among other things, Rucker asserted that his trial counsel was ineffective because he had "failed to capitalize on the discrepancy between the date of the application for issuance of the arrest warrant, i.e. May 4, 1991, and the date of the formal ballistics examination and report, i.e. on May 8, 1991." Specifically, he maintained that the May 4th application and affidavit for the warrant "recited that the ballistics examination had disclosed that bullets removed from the victim had been fired from a gun recovered from the defendant, while at trial the evidence showed that the ballistics examination had occurred on May 8, four days after the application for the warrant." The post-conviction court rejected the claim, summarizing its reasons as follows:

> At the post-conviction hearing Detective Robert Patton testified that he had been the primary homicide detective assigned to defendant's case and that during the night of May 3, early morning of May 4, 1991, the ballistics expert had been called from his home to the crime laboratory to make a comparison of the bullets removed from the victim's body and one fired from a gun recovered from a house on Lanvale Street where information disclosed defendant had abandoned it. This preliminary examination disclosed that the bullets had been fired from the same gun and it was on this oral advisement that he prepared and executed the affidavit in support of the application for charges and arrest warrant. Detective Patton testified that there was no written report from the ballistics expert and that the only written record of the preliminary examination is contained in the "twenty-four hour report" for the period May 3-4, 1991, which is maintained in his case folder. Detective Patton had testified to essentially the same effect at the hearing on the motion to suppress just prior to trial.
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> Detective Patton was a highly credible witness and his testimony with respect to the preliminary ballistics examination given at the post-conviction hearing was totally consistent with that given at the pretrial

pursuant to a warrant." *Rucker and Dorsey v. State*, No. 218, Sept. Term, 1992 (filed November 19, 1992), slip op. at 3.

> suppression hearing. I have no doubt as to the accuracy of his testimony and find as a fact that the preliminary comparison took place before the execution and submission of the affidavit in support of the application for the charges and arrest warrant and that the examination disclosed that the projectiles removed from the body of the victim came from the gun attributed to [Rucker].

Memorandum and Order of the Circuit Court for Baltimore City dated April 18, 1994 (case nos. 191155005-12) at pp. 3-6.

The post-conviction court also rejected Rucker's contention that his trial counsel was ineffective for failing to pursue a pre-trial motion to sever his trial from that of his co-defendant. The post-conviction court noted that Rucker's "trial lawyer testified [at the post-conviction hearing] that when the prosecutor informed him that [Rucker's] inculpatory statement would not be offered at a joint trial he determined it was in his client's best interest to acquiesce in a joint trial." *Id.* at p. 7. The inculpatory statement was a hand-written question and answer statement (signed by Rucker) of an interview between Rucker and Detective Robert Patton on May 4, 1991, in which Rucker denied that he had murdered Barlow; admitted that he was at Barlow's house when the murder occurred; claimed that Dorsey had shot Barlow; admitted that he gave Dorsey the gun that was used to shoot Barlow; and stated that he retrieved the gun from Dorsey after the murder.

The post-conviction court denied relief, and this Court denied Rucker's application for leave to appeal that decision. *Rucker v. State*, No. 59, September Term, 1994 (filed September 8, 1994). This Court also twice denied Rucker's application for leave to appeal the post-conviction court's denial of motions to re-open his petition for post-conviction

relief. *See Rucker v. State*, No. 203, September Term, 1998 (filed February 18, 1999) and *Rucker v. State,* No. 2271, September Term, 2007 (filed March 9, 2010).

Petitions for Writ of Actual Innocence

First Petition

Rucker filed his first petition for writ of actual innocence in 2012. He based this petition on the "newly discovered evidence" that Joseph Kopera, the firearms examiner who testified at his trial, had fabricated details related to his educational background.[3] In response to this petition, the State requested that the projectiles removed from Barlow's body be re-examined. Rucker asserts that, "firearms examiner, Christopher Faber, testified that his conclusions as to the caliber, weight, etc. of the projectiles, essentially mirrored those of Joseph Kopera," but maintains that Mr. Faber "did not perform any comparative examination between the projectiles and the suspect weapon."[4] (It is not clear from the record before us whether, in 2012, the "suspect weapon" used in the 1991 murder was still in the State's possession.) Following a hearing, the circuit court denied the petition. The court found that Kopera's false academic credentials was not newly discovered evidence and, moreover, "[i]n light of this body of strong circumstantial evidence," the court could

[3] As is well known, a March 9, 2007 newspaper article revealed that Mr. Kopera, who had worked as a firearms examiner for decades and had testified in hundreds of criminal trials in Maryland as a firearm expert for the State, had falsely testified in those trials regarding his academic credentials. Shortly after the news broke, Mr. Kopera took his own life.

[4] The transcript from the hearing on the first petition for writ of actual innocence is not in the record before us and the accuracy of Rucker's statement cannot be confirmed. The State, however, does not dispute it.

not "conclude that [Rucker's] evidence of the ballistics expert's perjury about his credentials creates a substantial or significant possibility that a jury would not have convicted [him] at his 1991 trial."

Second Petition

In the process of the ballistics re-examination undertaken as a result of the first petition, a Baltimore Police Department document – which Rucker refers to as a "chain of custody report" – came to light. The pre-printed form, with a "date of request" of March 14, 1991, included the following handwritten notation: "Request Firearms Identification of four (4) spent projectiles submitted to ECS under property #." Various other dates were stamped or handwritten on the form. Rucker relied on this form as "newly discovered evidence" to support his second petition for writ of actual innocence, which he filed in 2015. Rucker maintained that the document, which he claimed was intentionally "suppressed" in discovery, "clearly showed that the evidence wasn't signed out for re-testing (projectiles) as testified to by Joseph Kopera." Specifically, he asserted that the document illustrates that the projectiles were examined by Mr. Kopera on March 18, 1991 and signed back into Evidence Control on March 19, 1991, and they remained in a sealed container from that date onward. Hence, Rucker alleged that this document establishes that Mr. Kopera "did not perform any additional examination after the initial one." Given that the suspect weapon was not recovered until May 4, 1991, Rucker's position was that, contrary to his trial testimony, Mr. Kopera could not have linked the suspect weapon to the projectiles recovered from the murder victim.

The circuit court denied the petition, without holding a hearing, by order dated August 4, 2016. In the order, the court described the document at issue:

> [T]he exact title of the report is obscured. Further, it contains numerous notations, initials and dates, the significance of which are not immediately apparent to the Court. Although the Petitioner claims that the report relates to the chain of custody of the projectiles, the report itself does not specifically list any projectiles. Such information would certainly be crucial if in fact the report memorialized the chain of custody for such projectiles. *The report appears more likely to be a document used to memorialize requests for forensic examination of evidence*, thus the following hand-written notation on the report: "Request Firearms Identification of four (4) spent projectiles submitted to ECS under property #."

(Emphasis added.)[5]

The court found that Rucker's trial counsel, "exercising due diligence in either the discovery rules or the subpoena power, should have uncovered all police documents," including the one at issue "related to the chain of custody of the State's ballistics evidence in order to contest the authenticity, and ultimate admissibility, of the ballistics evidence introduced by the State at Petitioner's trial." The court concluded that Rucker had "failed to present any 'newly discovered evidence'" and, accordingly, dismissed his petition for failure to assert grounds on which relief could be granted. Rucker appeals that decision.

[5] We note that the pre-printed form includes the following instruction for its completion: "Describe evidence items and types of examinations – list property numbers and specify exact sources of [obscured] evidence items below. For latent print examination list suspects and B.P.I. numbers below." The very bottom of the form is a section "For Laboratory Use Only." We agree with the circuit court's characterization of the document as a request for forensic examination of evidence, not a chain of custody report.

DISCUSSION

Certain convicted persons may file a petition for writ of actual innocence "based on newly discovered evidence." *See* Md. Code (2008 Repl. Vol., 2016 Supp.) Criminal Procedure Article, § 8-301 and 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 that:

> (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) 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.
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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, 600-601 (1998); *see also* Rule 4-332(d)(6). As this Court explained in *Smith, supra,* 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.

Rucker asserts that his petition satisfied the pleading requirements and, therefore, the circuit court erred in dismissing the petition without first holding a hearing. He continues to maintain that the "newly discovered chain of custody report now proves that *no comparative examination took place*."

The State points out that, when Rucker was tried in 1991 "the State engaged in what was known as 'open file' discovery, allowing defense counsel to personally inspect the prosecution's file prior to trial," and that "[t]here is no claim that the subject document in this case was not in the file." The State also notes that defense counsel would have been aware that the State would present firearm and toolmark testimony at trial and, in the exercise of due diligence, the document at issue could have been discovered in a timely manner. Moreover, the State maintains that the document is not a "chain of custody" log and "is in no way exculpatory and does not impeach Kopera's testimony in any meaningful way." The State, therefore, contends that the court did not err in dismissing the petition without a hearing.

A court "may dismiss a petition [for writ of actual innocence] without a hearing if the court finds that the petition fails to assert grounds on which relief may be granted." Crim. Proc., § 8-301(e)(2). *See also* Rule 4-332(i)(1) ("the court may [ ] dismiss the

petition if it finds as a matter of law that the petition fails to comply substantially with the requirements of section (d) of this Rule or otherwise fails to assert grounds on which relief may be granted[.]"). "Generally, the standard of review when appellate courts consider the legal sufficiency of a petition for writ of actual innocence is *de novo*." *Smallwood, supra,* 451 Md. at 308.

We agree that the document at issue is not a "chain of custody" log, but rather an initial request for forensic testing, prior to the recovery of the handgun, of the four spent projectiles that had been recovered. We also agree with the circuit court that the document was not "newly discovered evidence" because, with the exercise of due diligence, it could have been discovered pre-trial or in time to move for a new trial. Finally, we are not persuaded that the document "creates a substantial or significant possibility that the result [of the trial] may have been different." In 1994, the post-conviction court found as a fact that Rucker's handgun was compared to the recovered spent projectiles preliminary on May 4, 1991 and then again on May 8, 1991 – that is, after the suspect gun was recovered – something that was also testified to at the pre-trial suppression hearing. The document at issue is not at odds with that finding. Moreover, given the evidence produced at trial, coupled with the inculpatory statement Rucker gave to the police, we are not persuaded that Rucker would be entitled to a writ of actual innocence because, as noted, the Court of Appeals has defined "actual innocence" to mean that "the defendant did not commit the

crime or offense for which he was convicted." *Smallwood, supra*, 451 at 313. Accordingly, we hold that the court did not err in dismissing the petition without a hearing.

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