Circuit Court for Harford County
Case No. 12-K-09-001620

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1961

September Term, 2021

KYVELLE JAMAAS MARTIN

v.

STATE OF MARYLAND

Reed,
Shaw,
Albright

JJ.

Opinion by Shaw, J.

Filed: November 1, 2022

Appellant, Kyvelle Jamaas Martin, appeals an order from the Circuit Court for Harford County denying a Petition for Writ of Actual Innocence without a hearing. Appellant presents two questions for our review that have been consolidated and rephrased for clarity:[1]

1. Did the circuit court err in finding Earl Cobb's affidavit recanting his testimony is not newly discovered evidence and does not create a substantial possibility of a different outcome?
2. Did the circuit court err in concluding that Kyvelle Martin could have obtained Earl Cobb's affidavit in time to request a new trial?

BACKGROUND

On July 12, 2006, Kevin Rowlette was shot and killed outside his girlfriend's home on Brookside Drive in Edgewood, Maryland. Appellant was, subsequently, indicted in the Circuit Court for Harford County on fifteen counts relating to the incident, including the first-degree murder of Mr. Rowlette. During a jury trial held in April 2010, the State called several witnesses, including: Earl Cobb and Sekena Baldwin, who witnessed the shooting, Bryanna Sanderson, who spoke to Appellant after the shooting, and Eddie Johnson, Appellant's stepfather.

[1] Appellant's questions verbatim were:
1. Is the circuit court's holding that Earl Cobb's affidavit recanting his testimony is not newly discovered evidence erroneous?
2. Does Mr. Martin and Mr. Cobb's incarceration defeat the circuit court's opinion that Mr. Martin could have obtained the affidavit in time to request a new trial?
3. Is the circuit court's holding that the newly discovered evidence does not create a substantial possibility of a different outcome incorrect?

The eyewitnesses testified that, prior to the shooting, Appellant, also known as "Turtle", drove to the residence on Brookside Drive with several other individuals. When Appellant arrived, Mr. Rowlette briefly went inside and upon his return, Mr. Rowlette and Appellant began arguing. According to Mr. Cobb, Mr. Rowlette accused Appellant of robbing him. Mr. Cobb stated that Mr. Rowlette was the aggressor and started to pull his gun out first, but Appellant was able to "draw quicker." Others differed in their testimony as to whether Mr. Rowlette drew or attempted to draw a weapon from his pants immediately before he was shot. Mr. Cobb also testified that he spoke with Appellant prior to the shooting and asked him about the alleged robberies. Appellant denied any involvement. A handgun and two magazines were found near Mr. Rowlette's body; however, the murder weapon was never recovered.

On April 22, 2010, a jury convicted Appellant of second-degree murder, use of a handgun in the commission of second-degree murder, wearing, carrying, or transporting a handgun, and illegal possession of a firearm. He was found not guilty of first-degree murder, use of a handgun in the commission of first-degree murder, manslaughter, use of a handgun in the commission of manslaughter, first-degree assault, use of a handgun in the commission of first-degree assault, and second-degree assault. On September 13, 2010, Appellant was sentenced to sixty years' incarceration: thirty years for second-degree murder, twenty years consecutive for use of a handgun in the commission of a crime of violence, three years concurrent for wearing or carrying a handgun, five years concurrent for illegal possession of a regulated firearm, and ten years consecutive for an unrelated violation of probation. Appellant timely appealed.

On December 14, 2011, this Court issued an unreported opinion, *Kyvelle Jamaas Martin v. State*, CSA-REG-1730-2010 (Dec. 14, 2011), holding that Appellant's three-year sentence for wearing, carrying, or transporting a handgun should be merged into his twenty-year sentence for use of a handgun in a crime of violence. We, otherwise, affirmed his convictions. His petition for a writ of certiorari was denied on April 23, 2012. Appellant later sought and was granted post-conviction relief that allowed him the right to file a belated motion for modification of sentence. His motion was denied on May 1, 2020. On September 23, 2020, the circuit court denied his *pro se* motion to reopen his post-conviction proceedings. On February 8, 2021, this Court denied Appellant's *pro se* application for leave to appeal from the denial of his motion to reopen post-conviction proceedings.

On November 22, 2021, Appellant, with counsel, filed a Petition for Writ of Actual Innocence with Request for a Hearing and a Second Motion to Reopen Post-Conviction Proceedings. Appellant's Second Motion to Reopen Post-Conviction Proceedings was denied by the court on February 2, 2022. In Appellant's Petition for Writ of Actual Innocence, he asserted that the State's witness, Earl Cobb, provided an affidavit on May 12, 2021, which included newly discovered evidence of Appellant's innocence that could not have been discovered in time to request a new trial. The affidavit stated:

> I, Earl Cobb, being of full age, sound and competent mind, so states the following:
>
> I HEREBY AFFIRM that the following statement contained herein is true and correct as best as I can remember. I would first like to take the opportunity to apologize for what I've caused. I will never forget what I witnessed the day of the

shooting of my good friend, Diggs. I was in so much pain that I was willing to do anything to make sure that somebody paid for what happened. Even lie.

My very first interview with the police, I told the officer what happened, the officer stated that it sounded like the shooter might have a self defense claim. The officer further stated that I might want to reconsider my statement. I refused to go to the police station, because I didn't want to tell the police that it was self defense.

Later on that evening, after being force [sic] to go to the police station, I was interviewed by a Detective, prior to the interview, the Detective spoke about a person named "Turtle", the Detective ask me if I had heard things about turtle. I told the Detective that I didn't know anybody named turtle. The Detective then said that he killed my homeboy, that turtle had just came home from prison, robbing people, assaulting people, even shooting people. The Detective then told me that if I didn't play ball turtle would walk. He ask me if I had wanted justice for my friend.

I can't recall everything that the Detective told me about turtle, but I clearly remember that I was to repeat what I've been told, that turtle was committing crimes in the county. I recall that I did hear about some of the stuff the Detective was saying, but I really had no personal knowledge whether turtle committed the crimes or not. I was then told that turtle was in fact Kyvelle Martin. I now realize that I shouldn't have lied. In Court I attempted to tell the truth, but it was too late. I am very sorry for my misleading testimony. I recall that during my interview with the Detective, he kept telling me that I was very lucky not to be charged with evidence tampering and other crimes. Upon speaking to the States Attorney I told them that it was self defense and that the Detective made me say bad things about Mr. Martin. I recall the States Attorney telling me that we would clear that up, but that when I testify he would need me to say that Diggs lived on Brookside Drive. I assume that since Diggs be over his girl house it would be no problem. This just bothers me, Diggs live across town, so why would the State want me to lie about where he lives? in any event, I really want to correct the record, and tell the truth about what happened. I am very sorry for my actions and my lying. I was in a dark

> place after Diggs died, but I can't continue to let a wrong committed by me go unchecked.
>
> I, Earl Cobb, do solemnly swear that this affidavit is true and an accurate account of the facts contained herein based on the very best of my memory, knowledge, and belief.

On February 3, 2022, the circuit court issued a Memorandum Opinion and Order denying the Petition without a hearing. The court held that the evidence Appellant claimed was newly discovered either was known at trial or could have been discovered with due diligence within the applicable time frame to move for a new trial. The court also held that the alleged newly discovered evidence did not create a substantial possibility that the result would have been different. Appellant timely noted this appeal.

DISCUSSION

Standard of Review

"[T]he denial of a petition for writ of actual innocence is an immediately appealable order, regardless of whether the trial court held a hearing before denying the petition." *Douglas v. State*, 423 Md. 156, 165 (2011). Generally, the standard of review when appellate courts consider the legal sufficiency of a petition for writ of actual innocence that the court denied without a hearing is *de novo*. *State v. Ebb*, 452 Md. 634, 643 (2017). The standard of review for a circuit court's decision to deny a petition for writ of actual innocence after a hearing is limited to whether the lower court abused its discretion. *Smith v. State*, 233 Md. App. 372, 411 (2017).

I. The circuit court did not err in finding Earl Cobb's affidavit recanting his testimony is not newly discovered evidence and does not create a substantial possibility of a different outcome.

Petitions for writs of actual innocence are governed by § 8-301 of the Criminal Procedure Article and Md. Rule 4-331. Section 8-301 states:

> (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; or
>
> (ii) if the conviction resulted from a guilty plea, an Alford plea, or a plea of nolo contendere, establishes by clear and convincing evidence the petitioner's actual innocence of the offense or offenses that are the subject of the petitioner's motion; and
>
> (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.
>
> * * *
>
> (e)(1) Except as provided in paragraph (2) of this subsection, the court shall hold a hearing on a petition filed under this section if the petition satisfies the requirements of subsection (b) of this section and a hearing was requested.
> (2) The court may dismiss a petition without a hearing if the court finds that the petition fails to assert grounds on which relief may be granted.

Md. Crim Proc. Code § 8-301 (2021).

Appellant argues that Mr. Cobb's affidavit newly revealed that Mr. Rowlette did not actually live in the house associated with the shooting. He asserts, as a result, there was a substantial possibility that the disclosure of that information would have resulted in a different verdict. He contends that his trial counsel was not aware of this fact, as demonstrated by his failure to correct the State's argument that Appellant "hunt[ed] down

a person who has accused him of a crime and sho[t] him dead on the front lawn of his own home after he had a duty to retreat." Appellant also maintains that the information could not have been discovered in time to move for a new trial.

The State argues that the evidence, at trial, was clear that it was Mr. Rowlette's girlfriend's house, and Mr. Rowlette stayed there occasionally. In his opening statement, the prosecutor stated, "[t]he evidence will show that after the defendant started pointing at [Mr. Rowlette], Mr. Rowlette went into the house where he would stay. That was not his house, that was his girlfriend's house, but he would stay at 1859 [where his girlfriend lived and where the shooting took place]." Additionally, Appellant's stepfather, Eddie Johnson when asked, "[d]id your stepson Kevin Rowlette have access to your home while you were on vacation in July of 2006?" testified, "Yes, he did. Kevin lives there." Mr. Johnson testified further that Mr. Rowlette occasionally stayed with his girlfriend in Brookside. The State argues that it was immaterial whether it was Mr. Rowlette's house or his girlfriend's because the law of self-defense does not require actual ownership or legal residency.

The circuit court, in reviewing Mr. Cobb's affidavit, noted:

> Taking the Cobb affidavit at face value the Court notes that Cobb's concerns about where the victim lived were just as he had found. Because the victim was a guest of his girlfriend at the house where or about the shooting took place, the victim was in the legal status of owner from legal standpoint. *See Barton v. State*, 46 Md. App. 616 (1980); *Crawford v. State*, 231 Md. 354 (1963). Thus, just as Cobb surmised this was not a problem. All the parties knew these facts at the time of trial. The State, Defense or the Courts mentioning that the victim was on his property was harmless error. No newly discovered evidence was presented here.

Appellant argues that *Barton* and *Crawford* are not applicable here. We disagree as we find that both opinions are pertinent to the issues presented. In *Crawford*, the defendant was convicted of manslaughter in the Criminal Court of Baltimore after fatally shooting someone, claiming self-defense. *Crawford,* 231 Md. at 356. The victim was shot while trying to force his way into the defendant's house to beat and rob him. *Id.* In reversing the conviction, the Court of Appeals acknowledged the exception to the retreat requirement, known as the "castle" doctrine, stating, "a man faced with the danger of an attack upon his dwelling need not retreat from his home to escape the danger, but instead may stand his ground and, if necessary to repel the attack, may kill the attacker." *Id.* at 361.

In *Barton*, a shooting occurred after one of the owners of the house told Barton, a temporary household guest, to go upstairs and told the victim to leave. 46 Md. App. at 617. A few minutes later, Barton returned from upstairs, and the victim, who ignored the instruction to leave, charged at Barton with a knife, prompting Barton to shoot the victim in self-defense. *Id*. at 617. In reversing the conviction, this Court held that the trial court improperly denied a jury instruction request on the "castle" doctrine, finding that the court's view of the term "home" was too restrictive. We referenced *Gainer v. State*, where we stated, "[o]ne who . . . is not the head of the house but a member of the household, is within the ambit of the [castle] doctrine's protection. *Gainer v. State*, 40 Md. App. 382, 388 (1978). We further noted that the Restatement of Torts defines dwelling place as "any building or habitation, or part of it, in which the actor is at the time temporarily or permanently residing and which is in the exclusive possession of the actor, or of a

household of which he is a member." Restatement (Second) of Torts § 65 cmt. h (Am. L. Inst. 1965).

In the present case, the court did not err or in determining that the evidence regarding residency was not newly discovered evidence, it was not pertinent to a claim of self-defense and it would not have created a substantial possibility of a different result. The innocence court found, based on the record, that all parties were fully aware that Appellant did not reside at the home of his girlfriend and that testimony was presented during the trial regarding Appellant's status there. We hold the court's finding was fully supported by the record and was not erroneous. The residency evidence was presented to the jury for its factual determination and there was no substantial possibility of a different result. Further, we hold that the law on self-defense is clear, as enunciated in *Barton* and *Crawford*, that legal residency or proprietary interest is not a requirement. We agree with the trial judge that any "mention that the victim was on his own property" was harmless error.

Appellant next argues the court erred in denying his Petition because, in his May 2021 affidavit, Mr. Cobb expressly recanted his trial testimony regarding his knowledge of Appellant committing new robberies. He argues the affidavit constitutes newly discovered evidence. He asserts the jury's request to review the video-recorded interview where Mr. Cobb made certain accusations, including the one that Appellant robbed Mr. Rowlette, proves that the jury relied on Mr. Cobb's lies.

The State argues that nothing in the affidavit indicates the police told Mr. Cobb to say that Appellant had previously robbed Mr. Rowlette. In the affidavit, Mr. Cobb states,

"I recall that I did hear about some of the stuff the Detective was saying, but I really had no personal knowledge whether [T]urtle committed the crimes or not." At trial, Mr. Cobb testified that Mr. Rowlette told him that Appellant had robbed him, and he was angry about this, stating that "if he had seen him he was gonna kill him." According to the State, there were no contradicting statements in the affidavit, the affidavit is consistent with Mr. Cobb's trial testimony, and Mr. Cobb never claimed that he had personal knowledge of the crimes. Rather, Mr. Cobb "heard" from other people that Appellant had been committing robberies during that time frame.

The court observed and then held:

> The Cobb affidavit seems to advance that he learned of the Defendant's past acts of committing crimes in the county from the detective. However, Cobb's affidavit contains this phrase, "I recall that I did hear about some of the stuff the detective was saying, but I really had no personal knowledge whether Turtle (the Defendant) committed the crimes or not". This phrase completely undermines any notion that the State was the sole source of information for Cobb to learn that the Defendant had previously committed a crime against the victim. Cobb testified that the victim was his best friend. The Defendant now seemingly attempts to advance that Cobb and his best friend did not talk about what may have previously happened between the victim and the Defendant. Cobb states the obvious in his affidavit that he had no personal knowledge of whether the Defendant committed the crimes or not. He wasn't there. The affidavit does not undo Cobb's testimony that it was the victim who had made an accusation against the Defendant. Cobb testified at trial that when the Defendant came out of the car, Cobb had some interaction with the Defendant. This occurred while the victim went inside to ostensibly arm himself with a concealed weapon. Upon the victim coming back outside Cobb told the victim that the Defendant claimed that he was not involved in any crime against him. After Cobb relayed this to the victim, that was when the heated verbal exchange between the victim and the Defendant ensured [sic]. The Cobb affidavit presents no newly discovered evidence on the issue of Cobb's understanding that the victim had accused the Defendant of previously committing a crime against him. Cobb admitted in the affidavit he had heard some of this stuff before his conversation with the detective.

Based on this record, the court did not err. The affidavit simply does not constitute newly discovered evidence regarding self defense or evidence that Appellant was or was not engaged in prior robberies. Nor did the affidavit create a substantial or significant possibility that the result may have been different. We hold the court did not err in finding Earl Cobb's affidavit recanting his testimony was not newly discovered evidence.

II. The circuit court did not err in concluding that Kyvelle Martin could have obtained Earl Cobb's affidavit in time to request a new trial.

Under Maryland Rule 4-331, "[t]he court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule." Md. Rule 4-331 (2022).

Appellant argues he was unable to obtain an affidavit from Mr. Cobb because Mr. Cobb did not decide to provide his affidavit until May 12, 2021. Appellant further argues the court implied that he was obligated to contact Mr. Cobb while they were both incarcerated to procure an affidavit. Appellant contends it is likely Mr. Cobb would have denied his request to provide an affidavit or the correctional staff would have construed Appellant's communication with Mr. Cobb as harassment. Appellant points out that Mr. Cobb gave the affidavit to someone other than Appellant after being released from prison.

The State argues Mr. Cobb's incarceration works against Appellant's case. Since Mr. Cobb has been incarcerated, he has been available. The State further asserts that none of Appellant's arguments negate his obligation to act with due diligence. Moreover,

Appellant's speculation that had he directly asked Mr. Cobb for an affidavit he would have likely been refused, does not automatically render the information in Mr. Cobb's affidavit undiscoverable. The State points out that Appellant admitted he failed to even attempt to contact Mr. Cobb within the applicable time frame to move for a new trial.

In denying the petition, the court explained:

> The evidence that the Defendant advances through the Cobb affidavit was known or could have been discovered by due diligence prior to the expiration of time for filing motion for new trial. This type of evidence, known or discoverable prior to the expiration of time for filing motion for new trial even though unavailable, in fact, is not newly discovered evidence. *Douglas*, *supra* at 187. Secondarily, the facts advanced in the Cobb affidavit assumed as true, along with the reasonable inferences therein do not create substantial or significant possibility that the result of the proceedings would have been different. Since the evidence that was known but unavailable does not constitute newly discovered evidence and did not create substantial or significant possibility of altering the results of the proceeding, this Court denies the Petition for Writ of Actual Innocence without a hearing. *Id.*

We agree with the trial court that the statements in the affidavit do not constitute new evidence and did not create a substantial possibility of a different result. We also agree with the court that Mr. Cobb's statements at trial were an important part of Appellant's defense and the affidavit does "not undo or materially alter his prior testimony." Even if we were to assume the information in the affidavit could not have been discovered in time for filing a motion for a new trial, the affidavit simply does not contain any newly discovered evidence. In sum, the court did not err in denying the Petition for Writ of Actual Innocence.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.