UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0813

September Term, 2015

LEON LITTLE, JR.

v.

STATE OF MARYLAND

Berger,
Reed,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: March 15, 2016

The entitlement to represent oneself in a legal proceeding is a fundamental constitutional right. The exercise of that right by a non-lawyer, however, is frequently fraught with unimaginable difficulty. In this pro se appeal, the appellant, Leon Little, Jr., after exhausting all other avenues of post-conviction relief, has turned to the newest modality of post-conviction review – a petition for a Writ of Actual Innocence pursuant to Maryland Code, Criminal Law Article, § 8-301. From the appellant's opening paragraph, however, it becomes discouragingly clear that he does not appreciate what a Writ of Actual Innocence is or, more particularly, what a Writ of Actual Innocence is not.

An Unpromising Procedural Past

For one seeking to establish actual factual innocence, the appellant's court history is an unpromising procedural predicate on which to build. On March 25, 1993, he was convicted by a Prince George's County jury, presided over by Judge Richard Sothoran, of two separate counts of first-degree murder, as well as of two counts of using a handgun in the commission of a crime of violence. Judge Sothoran sentenced him to two consecutive terms of life imprisonment without the possibility of parole.

The appellant appealed those convictions to this Court, challenging only the legal sufficiency of the evidence to support the conviction. In an unpublished opinion in Little v. State, No. 0882, September Term 1993, this Court on April 12, 1994, affirmed the convictions. On September 30, 1994, the Court of Appeals denied the appellant's petition for a writ of certiorari.

It was 18 years later that the appellant filed a Petition for Post-Conviction Relief. Following a full hearing, that petition was denied by Judge Cathy H. Serrette in a thorough 14-page Opinion and Order on February 12, 2013. On February 24, 2014, this Court denied the appellant's application for leave to appeal. On March 24, 2014, the appellant filed a pro se Motion to Reopen the Post-Conviction Petition case. That motion was denied by Judge Michael P. Whalen on May 29, 2014.

The Present Case

Having presumably exhausted all other avenues of post-conviction relief, the appellant on June 9, 2014, 21 years after his original convictions, filed a pro se petition for a Writ of Actual Innocence. That petition was dismissed by Judge Leo Green, Jr., on August 26, 2014. In his Memorandum and Order of Court, Judge Green concluded:

> "The court may dismiss a petition if the court finds that the petition fails to assert grounds on which relief may be granted. Md. Code Ann., Crim. Proc. §8-301(e)(2). In this matter, the court so finds and will dismiss the petition."

The present appeal is from that dismissal.

The Contentions

This appeal is concerned exclusively with the Writ of Actual Innocence. Each of the appellant's four contentions is accordingly addressed to the Writ of Actual Innocence.

1. "Did the lower court abuse its discretion by denying appellant's Writ of Actual Innocence in regard to a *Brady* violation[?];

2. "Did the lower court abuse its discretion by denying appellant's Writ of Actual Innocence in regard to a defective reasonable doubt instruction[?];

3. "Did the lower court abuse its discretion by denying appellant's Writ of Actual Innocence in regard to a defective imperfect self-defense instruction[?];

4. "Did the lower court abuse its discretion by denying appella[nt]'s Writ of Actual Innocence in regard to trial counsel failing to object to prejudicial comments[?]"

It is an interesting collection of charges. The appellant alleges that the failure of the State to turn over certain materials in violation of Brady v. United States compromised his defense at the trial of March 26, 1993. His second and third challenges are to allegedly defective jury instructions – on reasonable doubt and on imperfect self-defense – given by Judge Sothoran to the jury on March 26, 1993. The appellant's fourth and final challenge is to the adequacy of defense counsel for failing to object to "prejudicial comments" (although he does not tell us what these prejudicial comments were or when they were made).

We could point out that each of these alleged flaws in the trial of March 26, 1993, was fully known to the appellant as of that trial date 23 years ago and could readily have been raised by the appellant in his initial appeal to this Court. It appears that he is attempting to take a second appeal from his 1993 convictions. On the issue of a Writ of Actual Innocence, however, all of this belated anguish over the trial merits simply does not matter.

We could also point out, as Judge Green did in his Memorandum and Order of August 26, 2014, that each of these challenges were actually raised in the appellant's Petition

for Post-Conviction Relief in 2013 but were rejected by Judge Surrette. It appears that the appellant is appealing to us from Judge Surrette's decision of February 12, 2013, notwithstanding our denial of the appellant's application for leave to appeal that decision on February 24, 2014. On the issue of a Writ of Actual Innocence, however, all of this belated anguish over the dismissal of his Petition for Post-Conviction relief simply does not matter.

The Writ of Actual Innocence

What then does matter? Without meaning to be callous but only well-focused, the Writ of Actual Innocence is not at all concerned with the merits of the appellant's 1993 trial. It is not concerned in the least with whether the appellant received due process of law. It is not concerned with whether the jury instructions were accurate or flagrantly prejudicial. It is not concerned with whether the assistance of counsel was adequate or woefully deficient.

Actual innocence is something entirely different. The Supreme Court described actual innocence in Bousley v. United States, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L.Ed.2d 828 (1998):

"'[A]ctual innocence' means factual innocence, not mere legal insufficiency."

One hundred percent of the appellant's argument attempts to show that he should have been found not guilty. Even if, arguendo, that were true, however, it would not show that he was actually innocent. In Yonga v. State, 221 Md. App. 45, 49, 108 A.3d 448 (2015), aff'd Yonga v. State, No. 30, Sept. Term 2015 (Filed January 27, 2016), this Court focused on the difference.

> "Non-proof of guilt is by no means proof of innocence. There is a critical, albeit widely neglected, distinction in the criminal law between the status of being procedurally not guilty and the far rarer status of being factually innocent."

(Emphasis supplied).

Our Yonga opinion, 221 Md. App. at 57, went on to explain:

> "For a new trial generally under Rule 4-331(c)(1), it is enough that the newly discovered evidence expose procedural flaws in the trial that denied the petitioner due process of law. That would be enough to grant a new trial generally. That would not be enough, however, to grant a Writ of Actual Innocence."

(Emphasis supplied).

To show due process violations, as the appellant attempts to do here, is by no means to show actual innocence.

> "To have one's convictions reversed because of a non-Mirandized confession or an unreasonable search and seizure does not thereby make one actually innocent. Most defendants who suffer such violations are, indeed, not actually innocent."

221 Md. App. at 57. (Emphasis supplied).

The bottom line in this case is that not one of the appellant's contentions even speaks to the issue of his actual innocence.

It is perhaps a case of carrying coals to Newcastle, therefore, to point out an additional but equally fatal flaw. The Writ of Actual Innocence, as applied through Maryland Rule of Procedure 4-332, is a highly particularized variety of a motion for a new

trial based on newly discovered evidence. All of the requirements applicable to such a motion generally also apply to the Writ of Actual Innocence.

The appellant does not even pretend to establish that anything he argues is newly discovered evidence. None of it is newly discovered. It has been fully known by the appellant for 23 years. This is obviously not a case for the Writ of Actual Innocence.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY THE APPELLANT.