UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1791

September Term, 2014

RICHARD WAYNE BOGER, SR.

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: January 15, 2016

In August 1986, a jury sitting in the Circuit Court for Prince George's County convicted Richard Wayne Boger, Sr., appellant, of murder in the first degree of his girlfriend, Clara Dolores Barnett, and use of a handgun in the commission of a felony. He was sentenced to a term of life imprisonment for first-degree murder and a concurrent term of fifteen years' imprisonment for use of a handgun. Those convictions were affirmed by this Court on appeal. *Boger v. State*, No. 1441, Sept. Term, 1986 (filed May 25, 1987) (per curiam).

Several years later, Boger sought post-conviction relief, but his petition was denied, as was his ensuing application for leave to appeal from that denial. Then, in 2012, Boger filed, in the Circuit Court for Prince George's County, a petition for writ of actual innocence contending that he was "both actually and jurisdictionally innocent" of the crimes for which he had been convicted. The following year, while his actual innocence petition was still pending in the circuit court, Boger filed, in that same court, a motion to correct an illegal sentence contending that he was entitled to an additional day of credit for pre-trial incarceration. The circuit court, in a single order, dismissed the actual innocence petition and denied the motion to correct an illegal sentence. Boger noted this timely appeal, raising two questions for our review, which we have rephrased:[1]

[1]The questions, as presented in Boger's brief, are:

> I. Whether the Lower Court Erred (a) when it Misconstrued the "New Position" Issue Asserted (Now Being Advanced by the Metropolitan Police Department) and Casting it as a "Mishandling of Evidence Claim" (by that Same Department)

(continued...)

> I. Whether the circuit court, having misconstrued Boger's actual innocence claim, erred in dismissing his petition without a hearing; and
>
> II. Whether the circuit court miscalculated the number of days of credit owed to Boger for his pre-trial incarceration and, thus, erred in denying his motion to correct an illegal sentence.

Finding no error in the decisions of the circuit court, we shall affirm.

BACKGROUND

To provide context for the instant appeal, we quote from the unreported decision of this Court in Boger's direct appeal:

> The State produced evidence that on February 12, 1986, at approximately 6:00 p.m., [Boger] checked into the Howard Johnson Motel on Route 1 in Laurel, Maryland. He asked the desk clerk for a room on the ground floor because he had somebody in the car that could not move around too well. [Boger] rented Room 101 for one night. The next day, February 13, [Boger] requested another night's rental of the room but asked that he be given no maid service for the room. At 10:30 a.m. [Boger] took a Laurel Cab Company taxi ride to Southeast

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[1](...continued)

> and (b) Appellant was Improperly Denied His Hearing ON THAT ASSERTED ISSUE Which was Fully Supported by: the Petition; Reply to Opposition; Supplement; Exhibit "A"; plus, Especially the TRIAL TRANSCRIPT?
>
> II. Whether the Lower Court Erred (a) when it Concluded that a Miscalculation of Pre-Trial Credits Benefitted the Appellant, when it Failed to Correct it, and (b) His Sentence was Rendered ILLEGAL once that INCORRECT TALLY of "218" Days was Awarded Instead of "219" Days. When the Court Failed to Correct that "ILLEGAL TALLY" it Effectively Sustained that "ILLEGAL SENTENCE"?

Washington, D.C. near 7th Street. Eventually, [Boger] made his way to the office of Richard Ringell, a lawyer at 301 I Street, N.W., Washington, D.C. At 11:00 a.m., Mr. Ringell telephoned the D.C. [Metropolitan] Police Department [hereafter "MPD"], alerting them that a dead person could be found in Room 101 of the Howard Johnson Motel in Laurel and that [Boger] was in his office and might be a suspect in the case.

The police found Ms. Barnett's body on one of the beds, covered with a bedspread. [Boger's] car was parked in front of Room 101. The window on the driver's side was broken and glass was found on the inside of the vehicle. There was blood on the passenger seat and console. No glass was found outside the vehicle; however, a shoe print was found in a bloodstain outside the vehicle on the passenger side. In addition, a .25 caliber bullet was found underneath the car. The firearm and ballistics expert testified that the bullet found under the car and the .25 caliber bullet removed from Ms. Barnett's head were fired from the same gun. Also, he testified that few firearms available in the United States could fire such bullets but one which could is a .25 caliber pistol manufactured by Raven. On file with the Maryland State Police was a .25 caliber Raven [semi-]automatic pistol which had been registered by [Boger]. Despite a search by police academy recruits, no weapon was found inside or outside the motel. A small black holster and two .25 caliber bullet casings without projectiles were found within [Boger's] car.

Inside Room 101 the police found blood on the bed and at the doorway of the room. Ms. Barnett's fingerprints were not found in the room. The room exhibited no signs of a struggle. Ms. Barnett's jeans, panties and pantyhose were found folded and piled behind a chair; however, no female shoes were found in the room. The Medical Examiner testified that sperm was present in the victim's vagina. Detective White testified that, in her opinion, Barnett's body had been moved to the motel from another location, either inside or outside the State of Maryland.

At 3:00 p.m. on February 13th two Prince George's County policemen went to Attorney Ringell's office and [Boger]

> voluntarily went with them to the Homicide Section of the [MPD]. [Boger] was then photographed, identified in a photographic lineup and told he would be charged with murder in Prince George's County.

Boger v. State, slip op. at 2-4.

Because the precise location of the events surrounding Ms. Barnett's death (as noted by the police detective) was uncertain, Boger's trial counsel requested a jury instruction that the State bore the burden of proving beyond a reasonable doubt that the murder occurred in Prince George's County. *Id.* at 4-5. In upholding the trial court's refusal to give that instruction, this Court observed that, if the proposed jury instruction had "been based on jurisdictional grounds, i.e., that the State has the burden of proving beyond a reasonable doubt that the offense was committed in the State of Maryland, then the trial court would have been required to give the instruction" but, because the proposed instruction "was cast solely in terms of venue," which must be raised by preliminary motion or else it is waived, *see* Md. Rule 4-252(a)(1) (1986),[2] it was "properly refused." *Boger v. State*, slip op. at 4-5. This Court further concluded that, had a jurisdictional instruction been given, "there was sufficient evidence for the jury to have found that [Boger] committed the offense in Maryland, beyond a reasonable doubt," because the "situs of the commission of a crime may be established by circumstantial evidence." *Id.* at 5 (quoting *McDonald v. State*, 61 Md.

[2]The current subsection of the rule is identical to the version in effect at the time of Boger's trial.

App. 461, 468 (1985)).[3] Boger's petition for writ of certiorari was denied. *Boger v. State*, 311 Md. 20 (1987).

Boger subsequently filed a post-conviction petition, alleging ineffective assistance of trial counsel for failure to request the proper jurisdictional jury instruction. The post-conviction court denied that petition, relying upon the trial court's belief that, given Boger's election not to testify in his own defense, the lack of territorial jurisdiction was supported by nothing more than a "bald allegation," and consequently, a territorial jurisdiction instruction was not required. After referring to this Court's determination that the evidence was sufficient to support a finding of territorial jurisdiction beyond a reasonable doubt, the post-conviction court indicated that the burden to establish a reasonable probability of a different result, in the absence of trial counsel's unprofessional errors, had not been met. In the Court's view, the decision not to testify was a matter of trial tactics to which Boger acquiesced. Boger's ensuing application for leave to appeal was denied.

In 2012, Boger filed, a petition for writ of actual innocence, contending that, in light of purportedly "newly discovered evidence," he was "both actually and jurisdictionally innocent" of the crimes for which he had been convicted and requested a hearing. The following year, while his petition was still pending in the circuit court, he also filed a motion

[3]The evidentiary sufficiency analysis, although not applicable to a *preserved* instructional error, is important in the post-conviction context, where the defendant bears the burden of proving that, but for the error at issue, there was a reasonable probability that the result would have been different. *See*, *e.g.*, *Bowers v. State*, 320 Md. 416, 425-27 (1990).

to correct an illegal sentence, alleging that the circuit court had erred in calculating the number of days of credit for pre-trial incarceration to which he was entitled. Upon the circuit court's dismissal of his petition and the denial of his motion, Boger noted this appeal.

Additional facts will be included where pertinent to the discussion of the issues.

DISCUSSION[4]

I.

Boger contends that the circuit court "misconstrued" his actual innocence claim, which, he insists, was founded upon his allegation that the MPD had invoked a "new position," namely, that it had "no active involvement" in the investigation of his case.[5] He claims that this "new position" is directly contrary to that presented at his 1986 trial during his attorney's cross-examination of Detective Jan Richard Veeder, who stated that automobile glass had been collected at 1905 Constitution Ave., N.E., Washington, D.C., where the decedent had last been seen alive. Boger argues that the MPD was obviously involved in this case and presumably maintained possession of the evidence it collected until

[4]The State has moved to dismiss this appeal because Boger has failed to provide any transcripts of the proceedings below, in violation of Maryland Rules 8-411 and 8-413(a)(2). Maryland Rule 8-413(a)(2) mandates that the "record on appeal shall include . . . the transcript required by Rule 8-411[.]" Rule 8-602(a)(6) permits an appellate court to dismiss an appeal if "the contents of the record do not comply with Rule 8-413[.]" Because, as we shall explain in the following sections, the record is adequate to resolve Boger's claims, we shall exercise our discretion to deny the motion. Md. Rule 8-602(a). We further note that the State has helpfully provided pertinent parts of the record in an appendix to its brief.

[5]In construing Boger's actual innocence petition, which, as the State points out, is not the easiest task, we recognize that we must do so "liberally." *Douglas v. State*, 423 Md. 156, 182-83 (2011).

it decided it was no longer involved in the investigation. For reasons that are somewhat unclear from Boger's brief, MPD's "new position" calls into question the jurisdiction of the Circuit Court for Prince George's County over his underlying criminal case. In other words, the automobile glass that had been collected would support his claim that the crimes for which he was convicted occurred in the District of Columbia and not Maryland. On the other hand, clearly Boger and trial counsel were aware of the glass collected in the District of Columbia by the time of the trial.

He further contends that the circuit court erred in denying his actual innocence petition without a hearing because, he asserts, that petition complied with the pleading requirements of *Douglas v. State*, 423 Md. 156 (2011) (interpreting pleading requirements under actual innocence statute, Maryland Code (2001, 2008 Repl. Vol.), § 8-301 of the Criminal Procedure Article ("CP § 8-301").

According to his petition, Boger, from 2009 to 2011, sought from the MPD, under a FOIA[6] request, "all documents related to" his February 13, 1986 arrest, but the MPD "ignor[ed]" and "stonewall[ed]" his request for those documents. Boger ultimately did obtain a single document, a form "PD-163," dated February 24, 1986, which stated that he had surrendered to the MPD on February 13, 1986, that an arrest warrant naming him had been issued by the Prince George's County Police Department for a homicide that took place on that same date, and that he was thereafter interviewed by a Prince George's County Police

[6]Freedom of Information Act, 5 U.S.C. § 552 (2012).

detective. In a letter, issued in response to Boger's request for additional information, the MPD informed him that it "does not have any other information regarding you in our files" and that he should contact the Prince George's County Police Department "to assist you further as the incident occurred in Maryland and you were tried and convicted in Maryland."

According to Boger, the MPD's current position of "no active involvement" is belied by its investigation and erection of a crime scene, in 1986, at 19th St. and Constitution Ave., N.E., Washington, D.C., and the collection of broken glass discovered at the site. He contends that the broken glass, considered in combination with testimony at his trial that there was no broken glass found anywhere outside of his vehicle found in the parking lot of the Howard Johnson Motel in Laurel, would have established that the crimes for which he was convicted occurred in Washington, D.C.[7]

In regard to the actual shooting of the victim, Boger alleges that "the prosecution again tricked the jury." In support of that allegation is an attached letter from the Federal Bureau of Investigation, dated August 21, 1986, along with two hand-written notes, which describe the results of the forensic analysis of a cap that was discovered in Room 101 and

[7]We note that, to the extent Boger's actual innocence petition rests on a jurisdictional claim, it is problematic whether it states grounds for relief under the actual innocence statute. *See* Md. Rule 4-332(d)(9) (stating that petition under CP § 8-301 must assert that "the conviction sought to be vacated is based on an offense that the petitioner did not commit"); *Yonga v. State*, 221 Md. App. 45, 57 (2015) (observing that claim under CP § 8-301 requires showing of "factual innocence, not mere legal insufficiency") (citation and quotation omitted), *cert. granted*, 442 Md. 515 (2015). But that issue has not been raised and we need not address it in the instant case.

which, Boger claims, belonged to him. According to the letter, the holes in the cap were the result of one or more shots fired at very close range. According to Boger, the "significance of these results is that, taken together with the fact that [the victim] was shot both in the neck, ear, and back of head, combined with the shot(s) in [Boger's] cap, it is more consistent with [Boger's] argument that the weapon was only discharged accidentally during a violent struggle."

Boger's argument fails for the simple reason that the form "PD-163," the only conceivably "newly discovered evidence" that he presents,[8] fails to suggest anything approaching a "substantial or significant possibility that the result" of his 1986 trial would have been different, as required by the actual innocence statute, CP § 8-301, had that form been available at trial. The form "PD-163" is not inconsistent with the State's position that Ms. Barnett was shot in Maryland, that there was essentially no evidence that the murder took place in the District of Columbia, and that the circumstantial evidence indicated that the murder took place in Maryland. To the extent Boger's actual innocence petition contends otherwise, it consists of only bald allegations. But, in determining whether a petition for actual innocence states grounds for relief and thereby qualifies for a hearing upon request a circuit court is "not required to consider a bald, unsupported factual allegation." *Keyes v.*

[8]The letter from the FBI, dated August 21, 1986, and accompanying notes, unless shown *prima facie* by Boger to have been withheld from him, do not qualify as "newly discovered evidence." Because Boger has made no such showing, we do not further address the letter or the notes.

State, 215 Md. App. 660, 674 (2014). In sum, Boger failed to state grounds for relief in his CP § 8-301 petition, and therefore the circuit court properly dismissed it without a hearing. *Id.* at 668-69 (concluding that dismissal without a hearing is proper if petition fails to state grounds for relief).

II.

Boger complains that the circuit court erred in denying his motion to correct an illegal sentence because it miscalculated the number of days of credit he was owed for pre-trial incarceration. As noted earlier, Boger was interrogated in Washington, D.C. by Prince George's County homicide detectives on February 13, 1986, and, according to this Court's opinion in his direct appeal, was "told [that] he would be charged with murder in Prince George's County." *Boger v. State*, slip op. at 4. According to the docket entries, on March 4, 1986, a bench warrant was issued, and on March 20, 1986, that warrant was served[9] and arraignment was held.[10]

[9]In his motion to correct an illegal sentence, Boger asserts that, on March 19, 1986, he "was taken into custody by the Prince George's County Sheriff's Department and transported to Maryland." In the absence, however, of any evidence supporting that assertion, we rely upon the date indicated in the docket entries, March 20, 1986, as the starting point for when Boger was in the custody of Maryland.

[10]In his motion to correct an illegal sentence, Boger asserts that "there is a companion petition pending which challenges the failure to credit time served in Washington's 'DC Jail' while awaiting transport to Prince George's County," a time period presumably running from February 13, 1986 until March 20, 1986, when the Maryland warrant was served. *See Wilson v. Simms*, 157 Md. App. 82, 96 (2004) (observing that "[a]ll of the subsections" of CP § 6-218, the statute providing for credit for time spent in custody, also "apply to time spent (continued...)

On October 24, 1986, Boger's sentencing hearing was held. After the circuit court announced that it would impose a sentence of life imprisonment for first-degree murder and a concurrent term of fifteen years' imprisonment for the handgun offense, the following colloquy took place;

> [DEFENSE COUNSEL]: Yes, Your Honor. Mr. Boger obviously gets credit for the time he served?
>
> THE COURT: Oh, yes.
>
> Can we compute that? Do we have a starting date?
>
> THE DEPUTY SHERIFF: 218 days.
>
> THE COURT: 218 days.

The hearing then concluded.

Boger complains that he should have received 219 days credit for time served in pre-trial incarceration in Maryland. As a preliminary matter, we consider whether Boger's claim is cognizable under Maryland Rule 4-345(a), which permits a sentencing court to "correct an illegal sentence at any time." Ordinarily, the calculation of the pre-trial incarceration credit is not part of the pronounced sentence and thus, not grist for the illegal sentence mill. *See Carlini v. State*, 215 Md. App. 415, 419 (2013). Such disputes are usually resolved by a motion to correct the commitment record under Maryland Rule 4-351. But,

[10](...continued)
in custody in other jurisdictions"). But, in this appeal, Boger does not seek credit for time spent in custody in Washington, D.C., and the issue is not before us.

Boger contends that "[b]oth the trial transcript and commitment record indicate that . . . '218 days' were awarded" by the court and were part of the sentence itself.

Lawson v. State, 187 Md. App. 101 (2009), provides guidance to the question before us. In *Lawson*, we were asked to construe a claim of sentence illegality resulting from the correction of an error in a prisoner's commitment record. *Id.* at 102-03. Lawson, who was incarcerated for an unrelated crime, was found in possession of a cell phone and ultimately pleaded guilty to knowingly possessing contraband while in confinement. *Id.* He was sentenced to one year of incarceration, to be served consecutively "to the last sentence to expire of all his outstanding and unserved Maryland sentences." *Id.* at 103-04. After the circuit court pronounced sentence, the court clerk issued a commitment record, noting the sentence and also (erroneously) stating that Lawson would receive credit "for time served awaiting trial on the cell phone charge." *Id.* at 104. The State filed a motion to correct the commitment record, which the court granted, "and a new commitment record was issued without the credit for time served." *Id.* at 105. Lawson thereupon filed a motion to correct an illegal sentence, asserting that the issuance of the new commitment record rendered his sentence illegal. *Id.* After the circuit court denied Lawson's motion, he appealed. *Id.* at 103.

On appeal, Lawson argued, among other things, that the inclusion of the credit for time served, in the original commitment record, indicated that the circuit court had, under CP

§ 6-218(b)(3),[11] exercised its discretion to grant him that credit and that the subsequent grant of the State's motion to correct the commitment record resulted in an illegal increase of his sentence. *Id.* at 107-08. He further argued that, even if the circuit court's pronouncement of his sentence was erroneous, the court nonetheless erred in removing the credit because, under Rule 4-345(c), a "court may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding" but that, in his case, the correction was made after he had left the courtroom at the conclusion of his sentencing hearing. *Id.* at 109.

[11] CP § 6-218 provides in part:

> (b)(1) A defendant who is convicted and sentenced shall receive credit against and a reduction of the term of a definite or life sentence, or the minimum and maximum terms of an indeterminate sentence, for all time spent in the custody of a correctional facility . . . because of:
>
> (i) the charge for which the sentence is imposed; or
>
> (ii) the conduct on which the charge is based.
>
> (2) If a defendant is in custody because of a charge that results in a dismissal or acquittal, the time that would have been credited if a sentence had been imposed shall be credited against any sentence that is based on a charge for which a warrant or commitment was filed during that custody.
>
> (3) In a case other than a case described in paragraph (2) of this subsection, the sentencing court may apply credit against a sentence for time spent in custody for another charge or crime.

The *Lawson* Court affirmed, reasoning that, because "[t]here was no mention at the [sentencing] hearing of any credit for time served," the credit for time served "was not part of the sentence as pronounced by the court," and the subsequent removal of that credit from the commitment record did not constitute an illegal increase in sentence. *Id.* at 108. As to Lawson's invocation of Rule 4-345(c), we held that "Rule 4-345 applies only when the court intends to make changes to a pronounced sentence." Because the credit reflected in Lawson's original commitment record "never was part of the sentence pronounced" Rule 4-351, and not Rule 4-345, applied. *Id.* at 109-10.

Here, the circuit court announced a credit of 218 days for time served when it imposed the sentence. Assuming, for the purposes of this opinion, that the credit was part of the sentence pronounced and would be "substantively unlawful" if it did not comply with what is now CP § 6-218, the sentence could be corrected under Rule 4-345(a). *Chaney v. State*, 397 Md. 460, 466 (2007); *see Smith v. State*, 31 Md. App. 310, 317 (1976) (holding that sentence was illegal when court failed to apply credit mandated by statutory predecessor to CP § 6-218).

As to the dispute between 218 and 219 days, however, Boger's claim fails. Boger was incarcerated in Maryland pre-trial for 12 days in March (including March 20); 30 days in April; 31 days in May; 30 days in June; 31 days in July; 31 days in August; 30 days in September; and 23 days in October (not including October 24, as that is the day when the sentence was imposed), for a total of 218 days. There was no error in the calculation of

Maryland pre-trial incarceration time, and therefore, the circuit court correctly denied Boger's motion to correct an illegal sentence.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.