Circuit Court for Harford County
Case No. 12-K-06-2009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1350

September Term, 2016

CHARLES EUGENE BURNS

v.

STATE OF MARYLAND

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

JJ.

PER CURIAM

Filed: September 8, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Serving a life sentence for first-degree murder, Charles Eugene Burns, appellant, moved for a new trial on the basis of what he asserted was newly discovered evidence. The Circuit Court for Harford County denied the motion. On appeal, he asks three questions, which we have combined into one: Did the court err in denying the motion for a new trial? We answer this question in the negative and affirm.

BACKGROUND

Briefly recounted, appellant was convicted of the murder of Lillian Phelps, whose decomposing body was discovered in a rural area of Havre de Grace in June 2006. At trial, the State's theory of the case was that appellant strangled Phelps and then ran over her with his car. The police discovered Phelps's blood on the undercarriage of appellant's vehicle. Additionally, the medical examiner who performed Phelps's autopsy testified that the puncture wound to her skull matched a bolt under appellant's car and that there was evidence of strangulation. Furthermore, cell phone records put appellant at the place and time of Phelps's disappearance.

In searching the undercarriage of appellant's vehicle, the police also observed a piece of human tissue with five hairs hanging from a hexagonal bolt that was part of the right front stabilizer link. At a pre-trial suppression hearing, the State established that the only DNA testing that could be performed on the hairs was mitochondrial DNA analysis, which would take "several months." Appellant would not consent to a postponement of trial to allow for this testing. Accordingly, without the DNA test results, the State was permitted at trial to show the jury a picture of the hairs and argue that they were Phelps's because they were the same color as hers. Following trial, this Court affirmed appellant's

conviction and sentence in an unreported opinion. *See Burns v. State*, No. 1336, Sept. Term 2007 (filed Aug. 14, 2009).

The DNA test results of the hairs became available on April 29, 2011. Four of the five hairs were not Phelps's, and testing of the final hair was inconclusive. On May 4, 2011, appellant filed a motion for a new trial, arguing that the DNA test results were newly discovered evidence that cast doubt on his conviction. Following a hearing on June 3, 2016, the circuit court denied appellant's motion, and he noted this appeal.[1]

DISCUSSION

Rule 4-331(c) provides for the filing of a motion for a new trial on the basis 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 [which provides for the filing of a motion for a new trial within ten days of a verdict]."[2] Importantly, Rule 4-331(c)(1) states that the motion for a new trial must be "filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief[.]"

[1] Appellant also filed a petition for post-conviction relief and a petition for a writ of actual innocence, which have been stayed.

[2] We note that Rule 4-331 was amended twice between the filing of appellant's motion and the hearing. We cite the rule as it currently appears, because the amendments dealt with the abolishment of the death penalty in Maryland and have no effect on appellant's case.

We review a circuit court's determination as to a motion for a new trial for abuse of discretion. *See Willis v. Ford*, 211 Md. App. 708, 714 (2013). We have observed that trial judges have "'wide latitude in considering a motion for new trial[,]'" but that discretion "is not boundless, and abuse of that discretion occurs when it is exercised 'in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of law.'" *Mack v. State*, 166 Md. App. 670, 683-84 (2006) (internal citations omitted).

Appellant contends that the court erred in denying his motion because it was timely, was based on newly discovered evidence, and demonstrated a substantial possibility of a different result at trial. As to the timeliness of the motion, appellant argues that the circuit court failed to consider his motion under the timing requirements of Rule 4-331(c)(2), which permits the filing of a motion for a new trial "at any time" for certain DNA evidence. Responding to the circuit court's determination that the evidence was not newly discovered because he did not act with "due diligence" to obtain it, appellant contends that he constantly wrote his public defender to inquire as to the test results. Furthermore, he argues, as an inmate he did not have the freedom to leave the jail to obtain the results himself. Finally, appellant maintains that the DNA results would have led to a different outcome at trial because the DNA results would have restricted the State from introducing the picture of the hairs and from arguing that the hairs were Phelps's.

This Court has held that Rule 4-331(c) calls for "literal compliance." *Love v. State*, 95 Md. App. 420, 438 (1993). Indeed, the Court of Appeals has held that courts "'may not shorten or extend the time for filing . . . a motion for new trial.'" *Campbell v. State*, 373 Md. 637, 658 (2003) (quoting Rule 1-204(a)). Accordingly, we conclude that appellant's

motion was untimely pursuant to Rule 4-331(c)(1) because he failed to file it within a year of the mandate issued by this Court on direct appeal on September 14, 2009.

Furthermore, appellant's argument that his motion falls into Rule 4-331(c)(2)'s more lenient "at any time" language is unpersuasive. Rule 4-331(c)(2) permits the filing of a motion for new trial "at any time" if the motion is based on DNA evidence "the results of which, if proved, would show that the defendant is innocent of the crime of which the defendant was convicted." Appellant contends that, because the evidence would have produced a different result at trial, then Rule 4-331(c)(2) applies. He is wrong.

In order for Rule 4-331(c)(2) to apply, the evidence must demonstrate appellant's innocence, not merely call into question his guilt. Discussing the substantively similar writ of actual innocence, this Court observed: "'[A]ctual innocence means factual innocence, not mere legal insufficiency.'" *Yonga v. State*, 221 Md. App. 45, 57 (2015) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)), *aff'd*, 446 Md. 183 (2016). Stated another way, for Rule 4-331(c)(2) to apply, the movant must show that the DNA evidence demonstrates that he or she is actually innocent of the crime charged. *Id.* at 61-62. Here, appellant does not contend that the DNA results demonstrate his innocence; rather, he asserts that they call into question the result of his trial, which is insufficient.

Even if appellant's motion was timely, it suffers from other deficiencies. To justify a new trial, newly discovered evidence must be "both material and persuasive." *Mack*, 166 Md. App. at 685. That is, it must be "more than 'merely cumulative or impeaching[,]'" and also show "'a substantial or significant possibility that the verdict of the trier of fact would have been affected.'" *Id.* (internal citations omitted). The circuit court concluded

that the DNA results would have put the State in the same position as they were at trial – arguing that a hair found underneath the vehicle was Phelps's based on hair color. Furthermore, the court noted, there was additional other evidence of appellant's guilt, namely the presence of Phelps's blood underneath appellant's car, the testimony of the medical examiner concerning the puncture wound, and the cell phone records. Accordingly, we fail to perceive an abuse of the court's discretion and agree that the DNA results do not produce a significant possibility that the result at trial would have been affected.[3]

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

[3] We also agree with the circuit court that appellant failed to exercise due diligence in obtaining the DNA results. Although appellant may have written constantly to his lawyer, he did not request the DNA results until October 21, 2008, more than a year after his sentencing. Furthermore, we find this case similar to *Love v. State*, 95 Md. App. 420 (1993). In that case, Love was convicted of armed robbery and related offenses. 95 Md. App. at 423-24. Although two security officers observed Love taking clothes and arrested him, the State only called one at trial. *Id.* at 424. Because the non-testifying officer claimed that Love did not carry a knife, he asserted that this was newly discovered evidence that called his convictions for armed robbery and carrying a dangerous weapon into question. *Id.* We determined that the second officer's version of events was not newly discovered evidence because Love had ample opportunity to question her before trial and call her as a witness at trial. *Id.* at 434-35 (stating that "additional evidence that is not newly discovered is not the same as additional evidence that is newly discovered" (emphasis omitted)). In this case, we agree with the circuit court that appellant could have requested to postpone the trial and request that the hairs undergo DNA testing.