UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1478

September Term, 2015

ALVIN J. THOMPSON

v.

STATE OF MARYLAND

Graeff,
Friedman,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: January 30, 2017

Defendant Alvin Thompson filed a petition for writ of actual innocence based on newly discovered evidence that State Trooper John Appleby, the State's principal witness who testified to the details of a traffic stop of Thompson's vehicle, had engaged in a pattern and practice of illegal conduct that pre-dated the traffic stop. At Thompson's trial, the jury considered the testimony of Trooper Appleby against the word of Thompson and his co-defendant Anthony Johnson, who were on trial for attempted murder, drug trafficking, and drug possession. On the basis of Trooper Appleby's testimony, Thompson was convicted and sentenced to fifty-five years of incarceration. The newly discovered evidence, however, unknown to the jury during Thompson's trial, paints a clear picture of Trooper Appleby as a thief and a liar, bolsters Thompson and Johnson's version of the events, and leaves us with little other evidence about the events of the traffic stop, who was the aggressor in the fight that ensued, and thus, as to Thompson's guilt.

The circuit court denied Thompson's petition for writ of actual innocence, finding that Trooper Appleby's malfeasance was neither newly discovered nor likely to change the outcome of the trial. We find both of these conclusions to be in error. *First*, the pattern and practice of Trooper Appleby's illegal conduct that pre-dated the traffic stop in this case was newly discovered evidence that could not have been discovered at the time of Thompson's trial. *Second*, this newly discovered evidence creates a substantial or significant possibility that the result of the trial may have been different if the jury had been aware of these facts. *Third*, after having answered both of these questions in Thompson's favor, we must determine whether Thompson alleges that he is actually, factually innocent

of the crimes charged—meaning, whether he alleges that he did not commit the crimes. We hold that Thompson alleges that he is actually, factually innocent of the attempted murder conviction, but not that he is actually, factually innocent of the drug trafficking and drug possession convictions. Therefore, for the reasons we explain below, we reverse in part, grant Thompson's petition for writ of actual innocence on his attempted murder conviction, and remand the matter to the circuit court for further proceedings.

BACKGROUND

We divide the long history of this case into three parts. *First*, we will describe the traffic stop of Thompson's vehicle on I-95. *Second*, we will describe the discovery of the pattern and practice of illegal conduct by, and subsequent prosecution of, Trooper Appleby. *Third*, we will discuss Thompson's post-trial efforts including, his direct appeal, his post-conviction petition, and then, the matter currently before us, his petition for writ of actual innocence and the decision on that petition below. After setting forth the history of the case, we will then proceed to our analysis of Thompson's claims, including the relief to which he is entitled.

I. The I-95 Traffic Stop

Our unreported opinion, concerning Thompson's direct appeal, told the story of the traffic stop:

> On the afternoon of October 28, 1992, Trooper First Class John Appleby of the Maryland State Police, a member of the Special Traffic Interdiction Force, was parked in an unmarked police car on the median two miles south of the Havre de Grace exit

on I-95, observing southbound traffic. When Appleby saw appellants' pick-up truck, he thought it was traveling faster than the other traffic. He pulled off the median and paced the pick-up truck for approximately one mile. Using his speedometer, Appleby estimated that the truck was traveling at 67 miles per hour. Consequently, Appleby, who was in full uniform, stopped and approached the truck.

According to Appleby, [Anthony] Johnson, who was the driver, produced his driver's license and the registration for the truck, which Johnson said belonged to his father. [Alvin] Thompson, the passenger, began to rummage through the glove box. Appleby directed Johnson to the police car to wait while Appleby verified the license. As Johnson walked back to the police cruiser, Thompson continued to rummage through the glove box and throw papers on the floor. Appleby observed that Thompson appeared nervous and was sweating despite the fact that it was not a hot day. When Appleby asked Thompson what he was doing, Thompson indicated he was looking for the registration. Appleby asked Thompson where appellants had been, and Thompson said that they were coming from New York where they had delivered a pit bull dog.

Appleby returned to his vehicle and asked Johnson why Thompson was nervous and why they were in a hurry to get home. Johnson, in a rude manner, asked whether Appleby was "going to give [him] a ticket or what?" Appleby advised that he was going to run a license check and "that being rude would not help him in my decision to write him a warning or a ticket."

While waiting for the information on Johnson's license, Appleby asked Johnson where appellants had been. Johnson stated that he and Thompson had been to the Salisbury Perdue Chicken Factory. In response to Appleby's further questions, Johnson said they did not take a dog with them, that they left Baltimore around 4:00 a.m. that morning, and that they had not been to New York. After Appleby told Johnson that Thompson had said they went to New York to deliver a pit bull, Johnson changed his story.

Appleby further testified that during his conversation with Johnson, Appleby became increasingly suspicious of Thompson as he continued to bend down and look back at them. Upon receiving confirmation that Johnson's license was valid, Appleby completed a Consent to Search form and read it to Johnson. According to Appleby, Johnson said, "Go ahead and search, I don't care," and signed the consent form knowingly and voluntarily. Appleby also said that about four or five minutes elapsed from the time of the stop until the time Johnson consented to the search.

Thereafter, Appleby began to search the car. Inside the air filter, Appleby recovered an aluminum foil package containing a large plastic baggie filled with white powder, later determined to be over 104 grams of ninety percent pure heroin, with a street value of approximately $400,000.

* * *

The defense version of events conflicted in many material respects with the evidence offered by the State. Johnson testified that he bred pit bulls and, on the day in question, he delivered a pit bull to a person in Riverdale New York. Thompson, driving his step-father's truck, picked up Johnson and the dog at Johnson's home around 4:00 a.m. Johnson drove the truck to New York, dropped off Thompson and the dog, refueled the truck, picked up Thompson about forty-five minutes later (at around 8:30 a.m.) and returned to Maryland.

Appellants were heading South on I-95 when they were stopped by Appleby. Johnson testified that prior to being stopped, his "fuzz buster" radar-detector reacted, so he monitored his speed at 53 miles per hour. He watched Appleby pace the truck on each side prior to signaling appellants to pull over. Johnson gave Appleby his driver's license and insurance papers, but said he did not give the registration because he did not have it. Johnson told Appleby the truck belonged to Thompson's step-father, and that the police possessed the registration because the truck had been stolen in August and was wrecked in an accident. Instead, Johnson gave Appleby a proof-of-insurance card.

Johnson asked Appleby the reason for the stop; Appleby did not answer, but instead told Johnson to get out of the truck. Johnson told him they had been to New York to deliver a dog. As Johnson stepped out of the truck, Appleby patted him around his waist, then directed him to the front of the police car. Thereafter, Appleby leaned into the driver's side of the truck and spoke with Thompson.

After three or four minutes, Appleby returned to the police car and called in Johnson's license. While waiting for the information on the license, Appleby volunteered that he was going to Crisfield over the weekend to fish and asked Johnson if he was familiar with the Eastern Shore. Johnson replied that he used to work at Perdue in Salisbury, but Johnson denied that he told Appleby that appellants had gone to Salisbury that day.

Johnson further testified that, after his license was verified, Appleby said that Thompson had contradicted Johnson with respect to where they had been. Johnson denied changing his account of the day's travels. When Appleby then asked to search the vehicle, Johnson asked Appleby why he wanted to search the truck. He also told Appleby that he could not authorize the search because Thompson was "the man in charge." After Appleby again spoke with Thompson, he told Johnson he was getting conflicting stories. Appleby said, "[Y]our buddy is scared to death … I am going to have to call a canine unit and get a warrant to search this truck because something is not right here, and I advise you to sign this before you get yourself into more trouble." Johnson testified that Appleby then handed him the consent form and, without knowing what it was, he signed it.

According to Johnson, Appleby never told him why they had been pulled over. Johnson denied knowledge of the heroin Appleby found in the air filter.

* * *

Thompson's testimony of the events of October 28, 1992[,] largely echoed Johnson's version. In addition, Thompson said that after Appleby directed Johnson to go back to the police

car, Appleby checked the ignition to make sure the car was not stolen. Thereafter, while Appleby checked on Johnson's license, Thompson began picking up the papers from the glove box he had thrown on the floor. Appleby returned a few minutes later and asked for consent to search the truck, but Thompson refused. Appleby took Thompson's driver's license and left. Appleby returned three to five minutes later, "snatched" open the door, and started searching the truck. Appleby directed Thompson to get out at the truck and frisked him, then continued his search of the vehicle.

* * *

According to Appleby, after Johnson signed the consent form, Appleby directed both appellants to sit on the guard rail, ten to fifteen feet apart. As Appleby started back to his police vehicle, Thompson began walking down the median and Appleby ordered him to sit down again. When Appleby again proceeded to his vehicle, both appellants got off the guard rail, and Appleby ordered them to lie down on the ground. Johnson obeyed but Thompson went halfway down and, with an angry expression, stood up.

Appleby said he grabbed Thompson's arm. Then, Thompson threw his other arm around Appleby and bear hugged Appleby face-to-face, pinning Appleby's arms to his side. From behind, Johnson tugged on Appleby's gun belt and appellants forced Appleby to the ground. Thompson held down Appleby's head and shoulders as Johnson continued to tug at Appleby's gun belt. Appleby attempted to hold the gun in its holster but Johnson freed the gun and held it to the back of Appleby's neck. Appleby managed to stick his thumb in the trigger guard to prevent it from being fired and pleaded with appellants to just leave. He felt Johnson applying pressure to the trigger.

Eventually, Appleby heard someone say "be cool and lie down." Johnson let go of the gun and it fell to the ground. Appleby picked up the gun, threw it to the side, looked up, and saw two off-duty law enforcement officers with their weapons drawn. Appleby rolled away from appellants and retrieved his gun. He then returned to his vehicle and called for back-up,

while the officers secured appellants and then searched the truck.

Daniel Link testified at trial on behalf of the State. He claimed that he was driving southbound on I-95 in the left lane when he noticed a police vehicle and a truck on the side of the road. As he approached, he "saw a Trooper with two men, one was kneeling on the ground and the other one was sort of running away from him." The Trooper, identified at trial as Appleby, was reaching for the individual who was moving away, and as Appleby grabbed for him, the individual turned and swung his left fist at Appleby. In his rearview mirror, Link saw that the individual who had been on the ground "was up in a half-bent position trying to grab the Trooper around his waist." Link proceeded to the next cross-over and returned to the scene.

Link testified that, as he returned, he noticed an unmarked police vehicle arrive approximately fifteen seconds before he did. The unmarked car had been approximately one half mile behind Link as he first came upon the scene. Link claimed that when he exited his car, he saw the two suspects lying face down on the ground with Appleby standing next to them. The two off-duty officers were standing in front of the suspects with their weapons drawn. Link did not recall whether Appleby's weapon was drawn on the suspects but it was not in Appleby's holster.

Appellants' version of events conflicted with the evidence presented by the State. According to Thompson, Appleby had ordered Johnson out of the police car and started to search the outside of the truck. Appleby then ordered Thompson out of the truck and searched the inside of the truck. Thompson stood with Johnson. When Appleby withdrew from the truck, he said to Thompson, "Damn it, where did I tell you to stay," and Appleby ordered both men to the ground. Thompson did as ordered but Johnson stopped in a kneeling position and asked Appleby why they had to go to the ground. Appleby "booted" Johnson in the side and said "what did I tell you to do[?]" Although Johnson went down to the ground, Thompson got up on one knee and asked Appleby why he was treating them like this. Johnson testified that "the trooper grabs [Thompson] by

> his neck and shoulder area and pushes him back toward the ground, and says, God damn it, what did I tell you to do." Thompson responded that he was trying to do as directed. Appleby then "backs up a few feet, and he grabs his gun, and said, God damn it, nigger, do what I tell you to do or I will blow your fucking brains out." Johnson testified that it was at this point that he grabbed Appleby's wrist and waist and took him to the ground to keep Appleby from hurting Thompson and himself. Thompson told Johnson to release Appleby and asked Appleby if he was okay. Appleby said he was okay, told Johnson to release him and lie on the ground, and they both complied.
>
> According to Johnson, he first saw the off-duty officers when he was lying on the ground and Appleby was standing with his gun in his holster. Appleby ran over to the officers and told them that Johnson and Thompson attempted to take his gun. Johnson testified that he was never in possession of Appleby's gun, he did not attempt to hurt Appleby, and he did not know about the heroin found in the truck. Thompson's testimony corroborated Johnson's.
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> Appellants called Wayne Jirsa, a private investigator who formerly had been a Maryland State Police Sergeant. Jirsa testified that he interviewed Link in January 1993, and that Link's trial testimony contradicted Link's original account of the events. Moreover, Link's original version was consistent with appellants' trial testimony.

Alvin Thompson and Anthony Johnson v. State of Maryland, No. 967, Sept. Term 1994 (filed unreported June 23, 1995) (emphasis added).[1]

Absent from this recitation of the facts is a description of the trial testimony of the two off-duty Howard County law enforcement officers who happened upon the scene.

[1] Reliance on our prior unreported opinion is permitted by Rule 1-104 because the citation is not for its precedential value. Rule 1-104(b).

Although the officers testified for the State and, at the time, their testimony appeared to support Trooper Appleby's story, the officers arrived on the scene in the middle of the fray and could not testify as to who was the aggressor.

Officer Bruce Lohr of the Howard County Police Department testified that on October 28, 1992, he was returning from a police seminar in Delaware with Sergeant Rod Stem of the Howard County Sheriff's Office, and was five miles north of the Edgewood exit on I-95, when he noticed "some type of altercation going on in the median." As they got closer, he asked Sergeant Stem to pull over because he noticed that "a State Trooper was on the ground and there was a struggle going on." As they pulled up, he observed Trooper Appleby on the ground "laying on his right side and with two African American males on top of him." He stated that one of the suspects was "situated around the head, shoulder area of the Trooper" and the other one was "down towards his legs and it was a constant struggle as we pulled up." After they pulled over, Officer Lohr got out of the car and yelled, "the police," at which point all three of the people involved in the struggle looked at him. Officer Lohr stated that he took control of the first suspect who had the Trooper around the head and shoulder and who immediately went to the ground, while Sergeant Stem took control of the second suspect who was around the Trooper's leg area.

Sergeant Stem testified that, when they arrived at the scene of the ongoing struggle, he observed that one of the suspects was holding Trooper Appleby from the back and the other had his hands around the Trooper's head. He stated that they were moving around

and wrestling. He drew his gun and yelled, "Sheriff's Office" as he got out of the car. He approached the three men quickly with his gun drawn and noticed that the first suspect dropped to the ground immediately. He then approached the second suspect and put his gun to the back of his head and said, "I got the gun on your head, let go." At that point, the second suspect let go. As he was getting the second suspect to put his hands behind his back, Sergeant Stem saw Trooper Appleby get up and put his gun in his holster.

Before trial, the circuit court conducted a suppression hearing on the drugs found as a result of the search of the vehicle. Thompson argued that the traffic stop, the subsequent questioning, and the search of the vehicle by Trooper Appleby violated the Fourth Amendment, and as a result, the drugs found should be suppressed. Thompson, Johnson, and Trooper Appleby were the only witnesses that testified at the suppression hearing to the nature and events of the traffic stop. After the hearing, the circuit court denied Thompson's motion to suppress, and ruled that the drugs would be admissible at trial.

Thompson was convicted by a jury sitting in the Circuit Court for Harford County of attempted second degree murder, drug trafficking, and possession with intent to distribute drugs.[2] The circuit court sentenced Thompson to thirty years imprisonment for

[2] Thompson's verdict sheet also included counts for attempted voluntary manslaughter and common law battery (as his indictment pre-dated the 1996 codification of the crime of battery). The verdict sheet instructed the jury, however, that if they reached a guilty verdict on the attempted second degree murder count, they were not to consider the attempted voluntary manslaughter and battery counts. *See State v. Prue*, 414 Md. 531, 548 (2010) (stating that one method of constructing a verdict sheet is for the circuit court to instruct the jury "that it need not consider one count if it found the defendant guilty on

attempted murder, a consecutive term of twenty-five years imprisonment for drug trafficking, and a concurrent twenty-year term of imprisonment for possession with intent to distribute drugs, for a total term of imprisonment of fifty-five years.[3]

II. Trooper John Appleby

In 1996, due to citizen complaints about Trooper Appleby, law enforcement set up a sting operation involving police officers posing as drug dealers. Trooper Appleby pulled over those police officers on I-95, confiscated $60,000 from the undercover officers, but did not arrest them. He then kept $9,000 of that money for himself and turned over the remaining $51,000 to the Maryland State Police. After he was caught and confronted with his wrongdoing, he confessed to having engaged in a pattern and practice of underreporting the amount of money that he confiscated from motorists. He later pleaded guilty and was sentenced to 18 months in prison. The following statement of facts supported Trooper Appleby's guilty plea:

> Sometime prior to the date of September 18, 1996, members of the Maryland State Police received several complaints from different sources that [Trooper][4] John Appleby, a member of

another count") (internal quotations omitted). Therefore, because the jury found Thompson guilty on the attempted second degree murder count, it did not consider these other two counts.

[3] Importantly, on the sentencing worksheet, the circuit court listed "tried to kill Trooper" as one of its reasons for imposing a particularly long sentence for Thompson's drug trafficking and drug possession convictions.

[4] The transcript reflects Trooper Appleby's then-current rank as a corporal in the Maryland State Police. For consistency with other parts of this Opinion, however, we have changed all references to "Trooper."

the Maryland State Police assigned to the JFK Memorial Barracks had made traffic stops of persons believed to be suspected drug or contraband couriers. During those stops, [Trooper] Appleby had obtained consent to search the suspects vehicles. During several of the searches, [Trooper] Appleby located and seized U.S. currency suspected to be drug proceeds. Following the seizure, it was … alleged that [Trooper] Appleby would steal a portion of U.S. currency he had seized, and would only report or turn in the remaining portion of seized suspected drug proceeds.

On the date of September 18, 1996, members of the Maryland State Police Bureau of Criminal and Drug Enforcement, who would be called to testify in this case if we were to proceed to trial, recorded serial numbers of U.S. currency in the amount of [$60,000], and placed the money in a wrapped, and duct-taped container in a secreted location in the trunk of an undercover vehicle. The vehicle was operated by two undercover police officers from another jurisdiction, and driven into the flow of traffic on Interstate 95, an area of enforcement for [Trooper] Appleby.

On that date surveillance of [Trooper] Appleby and the undercover vehicle and occupants was established by members of the Maryland State Police. Sometime around 10:10 a.m., [Trooper] Appleby effected a traffic stop of the undercover vehicle on the Southbound side of Interstate 95 in Harford County. After interviewing the undercover police officers, who were not known to [Trooper] Appleby, [Trooper] Appleby obtained … consent to search the vehicle. As a result of the search, [Trooper] Appleby seized the package of money which he located in the trunk area of the vehicle. The undercover officers were released and not charged with any criminal offenses.

[Trooper] Appleby maintained custody of the package of money seized from the trunk. He moved his marked patrol unit to the JFK Barracks located in Cecil County, Maryland. After counting the U.S. currency seized from the undercover vehicle, [Trooper] Appleby signed and submitted a property record to the Maryland State Police, kept in the normal course of

> business. The property record indicated that the amount of money seized was $51,000 in various denominations of U.S. currency.
>
> Members of the Maryland State Police Bureau of Criminal and Drug Enforcement obtained a search warrant for the patrol vehicle driven from the traffic stop to the JFK Barracks by [Trooper] Appleby. Investigators assigned to this case confronted [Trooper] Appleby about the money seized. After the investigators advised [Trooper] Appleby of his rights pursuant to Miranda, which he signed a waiver of on the form provided, [Trooper] Appleby gave a free and voluntary statement admitting to stealing the additional [$9,000]. He also advised the investigators that the money was on the front seat of his patrol vehicle parked at the JFK Barracks. Investigators executed the search and seizure warrant on the vehicle and located the [$9,000] under several citation books on the front seat. The serial numbers of the money seized from the patrol vehicle matched the serial numbers of the missing [$9,000] from the original [$60,000] placed in the undercover vehicle. Additionally, [Trooper] Appleby stated that this was not the first time he had stolen money from monies seized from suspected drugs couriers. [Trooper] Appleby advised the investigators that he had a gambling problem. And he stated he needed to help family members with financial difficulties. [Trooper] Appleby told the investigator he had other money stolen from suspected drug couriers located at his home.
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> At all times during these events members of Maryland State Police maintained constant surveillance on the vehicle operated by undercover officers containing the [$60,000], as well as on [Trooper] Appleby and the patrol vehicle he operated, as described above. An additional search and seizure warrant executed on the residence of [Trooper] Appleby revealed U.S. currency in the amount of [$10,590].

Additionally, on September 18, 1995—the day that Trooper Appleby was arrested for theft in the sting operation—the investigating officers interviewed Trooper Appleby. In the interview, Trooper Appleby answered questions regarding the traffic stop that was the

subject of the sting operation, as well as questions regarding other traffic stops that he had previously conducted in which he had also stolen confiscated money. The following conversation, alleged to be about Trooper Appleby's confrontation with Thompson and Johnson, took place during the course of that interview:

> **[Investigating Officer]:** Is there anything else you would like to add to your statement?
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> **[Trooper Appleby]:** I didn't, I never thought I would be susceptible to any I guess you would say bad habits … **I could have quit when that guy tried to kill me that time but I did not want to**.

III. Thompson's Post-Trial Efforts

A. Thompson's Direct Appeal

Thompson and Johnson took a direct appeal from their convictions to this Court and alleged that the circuit court erred in various ways. None of the contentions raised on direct appeal concerned Trooper Appleby or had any significant bearing on the allegations raised in Thompson's petition for writ of actual innocence that is the subject of this appeal. The convictions were, however, affirmed in all respects. *Alvin Thompson and Anthony Johnson v. State*, No. 967, Sept. Term, 1994 (filed unreported June 23, 1995).

B. Thompson's Post-Conviction Petition

On February 23, 2005, Thompson, by counsel, filed a petition for post-conviction relief alleging: (1) ineffective assistance of counsel, and (2) that Thompson's right to due process of law was violated when Thompson "was convicted on the testimony of a State Trooper who, it turned out, was engaged at the time of [Thompson's] arrest in a pattern of

stealing money from citizens he believed to be drug dealers during traffic stops along I-95, and who pleaded guilty to such conduct in 1997." In support of the second claim, Thompson offered into evidence documents associated with Trooper Appleby's arrest and conviction, including a copy of the indictment, an intake summary containing a psychological evaluation, Trooper Appleby's statement to investigators following his arrest, and transcript portions of Trooper Appleby's guilty plea, quoted above.

In addition to this documentary evidence, Thompson called two witnesses, Tyrone Arrington and James Fullard, each of whom had been stopped on I-95 by Trooper Appleby before his stop of Thompson and Johnson on October 28, 1992. Arrington and Fullard testified to a similar chain of events: they were stopped by Trooper Appleby, detained by him, and after Trooper Appleby searched the vehicle, he confiscated a sum of money but did not report or turn in the full amount confiscated.[5] Additionally, Fullard testified that after he declined to give consent to a search, Trooper Appleby bullied him into giving consent—threatening to hold him until a K-9 dog could be brought. Fullard also provided

[5] Arrington testified that Trooper Appleby confiscated a total of $5,900 from his vehicle during the traffic stop. The forfeiture order in the case, however, totaled only $4,427. Thus, Arrington testified that Trooper Appleby had stolen $1,473 of the total amount of money confiscated from him. Similarly, Fullard testified that Trooper Appleby confiscated a total of $14,000 from his vehicle during his traffic stop. The property report that Trooper Appleby submitted, however, showed that he had confiscated only $11,454. Thus, Fullard testified that Trooper Appleby had stolen $2,546 of the total amount of money confiscated from him.

data that demonstrated that Trooper Appleby routinely engaged in racial profiling and racially-charged behavior during his traffic stops and subsequent vehicle searches.

At the conclusion of the post-conviction hearing, the post-conviction court denied Thompson's ineffective assistance of counsel claims from the bench, but reserved judgment on the allegation dealing with Trooper Appleby and invited supplemental briefing from the parties on that issue. The post-conviction court said the following about the allegations regarding Trooper Appleby:

> As to the *Thompson* matter, I again mention to counsel as I did in chambers that regardless of the decision that's made on this case, it does go against the grain that a State Trooper was a probable unreliable witness due to circumstances in his life that resulted in his conviction on a serious matter.
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> * * *
>
> Now, as to the more troublesome ground, that is Trooper Appleby's testimony, there is no question that Trooper Appleby was a key witness in this case as to the drugs and as to the attempted murder. There is also no question that in [1996], he was convicted of the theft in connection with stealing money from people he would stop on I-95. … And per the testimony of Mr. Fullard and Mr. Arrington, he was apparently stealing money as far back as 1989 and 1992 in the months that preceded the arrests in this case, and I accept that testimony that he falsely reported the amount of money that was taken from those folks.
>
> There is also evidence that Trooper Appleby lied about his consent searches over periods of time. You hate to see a State actor, State agent, becoming a bad apple, but that's apparently what happened in Trooper Appleby's case. I do find as a fact, however, that the State's Attorney's Office was not aware of the problem with Trooper Appleby at the time that this case was tried before the Court. So I find with respect to Trooper Appleby that it's likely, (A) that there was a pattern of theft

> from the defendant at the time of Thompson's arrest; (B) it is likely … that he had a pattern of misrepresenting evidence concerning State consent searches; and (C) that it's likely that he committed perjury in this case, although I'm not sure of the extent of it.

After the parties offered supplemental briefing on the issue, the post-conviction court issued an Order denying relief, which stated in pertinent part:

> Mr. Thompson's Post-Conviction Petition was the subject of [an] Evidentiary Hearing on January 17, 2006. At the conclusion of the proceedings, the Court issued an oral decision (later transcribed) which fully addressed all issues except one dealing with Trooper Appleby.
>
> The Court reiterates that it is likely that Trooper Appleby misrepresented facts at the trial, but the Court is not able to fully specify the extent. In other words, he may have misrepresented a few facts or many facts. Further his misrepresentations may have been significant to the verdict or may have been inconsequential to the verdict.
>
> The Court continues to find that in Maryland perjured testimony may be a ground for post-conviction relief only where its use is known to the State's attorney. As previously found, the State did not know of the problems with Trooper Appleby's testimony at the time of trial in 1992. Accordingly, the Petition for Post-Conviction Relief must be denied with regard to the perjury issue.

Thus, the post-conviction court found that although Trooper Appleby's testimony was perjurious, the State did not know at the time that it was. As a result, the post-conviction court correctly denied relief. *See Gray v. State*, 388 Md. 366, 385 (2005) ("The allegation that perjured testimony was offered at trial, absent a showing that the State knowingly used perjured testimony, is not a ground for post[-]conviction relief.") (Internal quotations and

citations omitted). Thompson thereafter sought leave to appeal that decision, which this Court declined to grant. *Alvin Thompson v. State*, No. 2890, Sept. Term, 2005 (filed unreported June 22, 2006).

C. Thompson's Writ of Actual Innocence

On December 22, 2014, Thompson, now acting as a self-represented litigant, filed the present petition for writ of actual innocence. In this petition, he alleged that information concerning Trooper Appleby's criminal conviction and pattern of wrongdoing was newly discovered evidence that created a significant or substantial possibility of a different result at trial within the meaning of the actual innocence statute. Md. Code Ann., Crim. Proc. Article ("CP") § 8-301. His petition for writ of actual innocence drew heavily from the evidence introduced in the litigation of his prior, unsuccessful petition for post-conviction relief.

Specifically, Thompson alleged in his petition that Trooper Appleby engaged in a pattern of wrongdoing before, during, and after the traffic stop of Thompson and Johnson. For reasons that will become clear, the critical allegations for our purposes are those that Trooper Appleby's misconduct pre-dated his traffic stop of Thompson and Johnson. As to that, Thompson alleged that: (1) the post-conviction court found that Trooper Appleby's misconduct was a well-established practice for him *before* his stop of Thompson and Johnson; (2) Trooper Appleby stole money from motorists during traffic stops *before* his

stop of Thompson and Johnson, as evidenced by the testimony of Fullard and Arrington;[6] and (3) Trooper Appleby's statement to investigating officers upon being caught stealing money suggested that he engaged in bad behavior *before* his encounter with Thompson and Johnson.

After holding a hearing, the actual innocence court denied Thompson's petition for writ of actual innocence from the bench stating in pertinent part:

> I am going to deny … your request for a Writ of Actual Innocence. In denying the Writ of Actual Innocence, you said that Trooper Appleby's perjury conviction that was brought out at your first post-conviction hearing created a circumstance of new evidence, that had you been aware of that at the time of your trial, that could have been used and perhaps you would not have been convicted. Well, in order for you to prevail on that, you would have to show that it was evidence that you could not have discovered at the time of trial. **The reason you couldn't discover it is because it didn't exist then. There may have been some indication based on Trooper Appleby's conviction that he had been dishonest and that he had committed other acts of misconduct which ultimately led to his conviction, but all of that came up after your trial. If you had known about that, at best it could have been used to impeach Trooper Appleby's testimony at**

[6] Thompson, in his petition, also cites two other cases in which Trooper Appleby's conduct during traffic stops was challenged. *See Whack v. State*, 94 Md. App. 107, 119 (1992) (alleging that Trooper Appleby improperly induced a motorist that he pulled over during a traffic stop to participate in a recorded telephone call that implicated the defendant in a scheme to possess and distribute drugs); *Powell v. Appleby*, 941 F. Supp. 52, 53-54 (D. Md. 1996) (denying summary judgment for Trooper Appleby and finding triable issues of fact as to whether Trooper Appleby conducted an improper inventory search of a car that he stopped by "damaging door panels, removing the panel near the air conditioner, and punching holes in the back of seats."). Although we can, and will, take judicial notice of these cases, *see* Rule 5-201, neither of these cases conclusively establishes that Trooper Appleby committed the facts as alleged.

> **your trial, but it wasn't the only evidence that the State presented as to your guilt at your trial.** There was the evidence of the other law enforcement officers as well. So based on all of that, just one trooper's impeached testimony would not have been sufficient to overturn your conviction or to show there is a likelihood you would not have been convicted in this case.
>
> In this case, Judge Baldwin already ruled that it's likely that Trooper Appleby may have lied in your trial, but it wasn't sufficient even then, and the Court of Special Appeals even denied your appeal on that basis that it could even have been used to overturn your conviction. So asking this Court to give you another bite at the apple about all of the things that Judge Baldwin knew then, all of the things that everybody suspected at that time, does not constitute newly discovered evidence in this case. It could be used for impeachment, but it certainly would not upset the quantum of evidence that was used to find you guilty of these crimes.[7]

[7] The comments of the actual innocence court could be interpreted to mean that, because Thompson had already litigated Trooper Appleby's misconduct in his petition for post-conviction relief, Thompson was precluded from litigating it in connection with his petition for writ of actual innocence. That is not the case. The Court of Appeals has made clear that the requirement in CP § 8-301(b)(5), to "distinguish the newly discovered evidence claimed in the petition from any claims made in prior petitions" applies only to prior petitions for writ of actual innocence, and not to other prior collateral proceedings, including petitions for post-conviction relief. *See Douglas v. State*, 423 Md. 156, 184-85 (2011). As in *Douglas*, because this is Thompson's first petition for actual innocence under CP § 8-301, he has no claims that he must distinguish. *See id*. at 185. Therefore, Thompson is not precluded from litigating issues regarding Trooper Appleby's misconduct in this petition. To the extent that the actual innocence court relied on this misunderstanding of the legal landscape, it also constitutes an abuse of discretion. *See Martin v. State*, 218 Md. App. 1, 30 n.31 (2014) (internal quotations and citation omitted) (explaining that an exercise of discretion based upon legal error is necessarily an abuse of discretion).

(Emphasis added). Thompson, again acting as a self-represented litigant, noted an appeal to this Court,[8] and presents one question for our review, which we have rephrased: Did the actual innocence court abuse its discretion in denying the petition for writ of actual innocence? We hold that it did, and, therefore, remand the case for further proceedings.

DISCUSSION

The General Assembly created the Writ of Actual Innocence in 2009, and it is now codified in CP § 8-301. *Smallwood v. State*, ___ Md. ___, ___, No. 22, September Term, 2016, Slip Op. at *18 (filed January 23, 2017). Prior to its adoption, there was no recourse for a wrongfully convicted defendant who discovered new exculpatory evidence. *Id.* at *26.

The actual innocence statute provides in pertinent part:

> **Claims of newly discovered evidence**
>
> (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,

[8] In the circuit court, Thompson filed a pleading entitled "Petition for a Writ of Actual Innocence & Motion to Reopen a Closed Post-Conviction & Request for Hearing & Supporting Memorandum of Law." The motion to reopen a closed post-conviction portion of the pleading, filed pursuant to CP § 7-101 *et seq.*, sought relief for various allegations of ineffective assistance of counsel. Thompson's only appellate remedy for the denial of the motion to reopen a closed post-conviction was to file an application for leave to appeal to this Court, pursuant to CP § 7-109, which he did not do. Instead, he filed a notice of appeal.

We have discretion in determining whether to require strict compliance with the rules governing applications for leave to appeal. *Grandison v. State*, 425 Md. 34, 52 (2012). Thompson's notice of appeal did not include the requisite "concise statement of the reasons why the judgment should be reversed or modified" or "specify the errors allegedly committed by the lower court," as required by Rule 8-204(b)(3). As a result, we decline to treat it as an application for leave to appeal from the denial of his motion to reopen his post-conviction proceeding, and we therefore dismiss that portion of his appeal.

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.

Petition requirements

(b) A petition filed under this section shall:

(1) be in writing;

(2) state in detail the grounds on which the petition is based;

(3) describe the newly discovered evidence;

(4) contain or be accompanied by a request for hearing if a hearing is sought; and

(5) distinguish the newly discovered evidence claimed in the petition from any claims made in prior petitions.

* * *

Power of court to set aside verdict, resentence, grant a new trial, or correct sentence

(f) (1) In ruling on a petition filed under this section, the court may set aside the verdict, resentence, grant a new trial, or correct the sentence, as the court considers appropriate.

(2) The court shall state the reasons for its ruling on the record.

Burden of proof

(g) A petitioner in a proceeding under this section has the burden of proof.

CP § 8-301.

We review the circuit court's denial of a petition for writ of actual innocence for abuse of discretion. *See Keyes v. State*, 215 Md. App. 660, 669 (2014). When applying the abuse of discretion standard we will not disturb the circuit court's ruling, "unless it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Jackson v. State*, 216 Md. App. 347, 363-64 (2014) (internal citation and quotation omitted).

Under the statute, an actual innocence claim rests on two elements: (1) that there is "newly discovered evidence" that "could not have been discovered in time to move for a new trial under Maryland Rule 4-331"; and (2) that this newly discovered evidence "creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined." CP § 8-301(a). The Court of Appeal's recent opinion in *Smallwood v. State*, makes clear that there is a third requirement—that the petitioner must allege that he or she is actually, factually innocent of the crimes charged—meaning, that he or she did not commit the crimes. ___ Md. at ___, Slip Op. at *34. We will discuss each requirement in turn.

I. Newly Discovered Evidence

To satisfy the newly discovered evidence prong of the actual innocence analysis, a petitioner needs to prove two things: (1) that he became aware of "newly discovered evidence," that (2) "could not have been discovered in time to move for a new trial under Maryland Rule 4-331." CP § 8-301(a)(2).

A. Newly Discovered

First, we hold that the actual innocence court abused its discretion by finding that Thompson had not produced "newly discovered evidence." As the actual innocence court stated: "There may have been some indication based on Trooper Appleby's conviction that he had been dishonest and that he had committed other acts of misconduct which ultimately led to his conviction, but all of that came up *after your trial*." (Emphasis added).[9] That finding—that Trooper Appleby's misconduct happened only after Thompson's trial and, thus, was not newly discovered—was wrong, and was wrong for four separate reasons: (1) that conclusion was inconsistent with the finding of the post-conviction court on which it relied; (2) that conclusion was inconsistent with the testimony of Arrington and Fullard, whose testimony the post-conviction court (which heard it) specifically credited; (3) that conclusion was inconsistent with Trooper Appleby's admission to the investigating officers; and (4) that conclusion defies common sense.

As described above, the post-conviction court made a specific finding that Trooper Appleby's malfeasance was not an isolated event, but a continuing pattern and practice. For our present purposes, however, the critical portion of that finding was that Trooper

[9] The actual innocence court was correct that Trooper Appleby's theft conviction could not qualify as newly discovered evidence because "it could have no effect on [Thompson's] trial. *See Keyes*, 215 Md. App. at 671. As explained below, however, the actual innocence court's finding that Trooper Appleby's misconduct happened only after Thompson's trial—and, thus, was not newly discovered—was incorrect and constituted an abuse of discretion.

Appleby's misconduct was a well-established practice for him *before* his stop of Thompson and Johnson. The post-conviction court found: "(A) there was a pattern of theft [by Trooper Appleby] at the time of Thompson's arrest; (B) it is likely … that [Trooper Appleby] had a pattern of misrepresenting evidence concerning State consent searches; and (C) it's likely that [Trooper Appleby] committed perjury in this case." Thus, the actual innocence court's finding that that evidence only arose later is at odds with the post-conviction court's findings. Ordinarily, an actual innocence court would not be bound by the findings of the prior post-conviction court. Here, however, the actual innocence court declined to hear testimony and instead relied exclusively on its review of the evidence from the post-conviction court. In such a circumstance, we think it is incumbent on the actual innocence court to understand correctly the findings of the post-conviction court.

The post-conviction court also specifically credited Arrington and Fullard's testimony that Trooper Appleby had mistreated them in precisely the same way he was alleged to have mistreated Thompson and Johnson, *before* he encountered Thompson and Johnson. Specifically, the post-conviction court found that Trooper Appleby was engaged in the same type of behavior in 1989, with Arrington, and in early 1992, with Fullard—traffic stops that resulted in Trooper Appleby stealing money that he had confiscated, and in Fullard's case, bullying Fullard into consenting to a search of the vehicle. This evidence too is at odds with the actual innocence court's finding that "all [of the evidence] came up" after Thompson's trial. And, as we explained above, because the actual innocence court

declined to hear testimony and instead adopted the evidentiary conclusions of the post-conviction court, the actual innocence court must understand correctly the findings of the post-conviction court.

We also think that a fair reading of the transcript of Trooper Appleby's interview upon being caught stealing money demonstrates that his pattern of bad behavior pre-dated his encounter with Thompson and Johnson. As reported above, on September 18, 1995—the day that Trooper Appleby was arrested for theft as a result of the sting operation—the investigating officers interviewed Trooper Appleby. In the interview, Trooper Appleby answered questions regarding the traffic stop that was the subject of the sting operation, as well as questions regarding other stops that he had previously conducted in which he had also stolen from confiscated money. The following conversation took place during the course of the interview:

> **[Investigating Officer]:** Is there anything else you would like to add to your statement?
>
> **[Trooper Appleby]:** I didn't, I never thought I would be susceptible to any I guess you would say bad habits … **I could have quit when that guy tried to kill me that time but I did not want to**.

While we cannot rule out the possibility that Trooper Appleby was referring to another instance in which someone tried to kill him, we think that it is more likely than not that this statement referred to the altercation between he, Thompson, and Johnson less than three years earlier that resulted in Thompson being convicted, the prior year, of the attempted murder of Trooper Appleby. Thus, we read Trooper Appleby's statement as admitting to

illegal conduct during traffic stops, *before* "that guy tried to kill me that time"—meaning, *before* the altercation between he, Thompson, and Johnson.[10] This evidence, from Trooper Appleby's own lips, is also inconsistent with the actual innocence court's finding that it all happened later.

Finally, considering all of the evidence to the contrary, we think it defies reason and common sense to believe, as the actual innocence court apparently did, that Thompson and Johnson were the first travelers on I-95 that Trooper Appleby ever mistreated.

For each of these four reasons, individually, and more still because of their cumulative effect, we hold that the actual innocence court's determination that all of Trooper Appleby's misconduct occurred *after* Thompson's trial (and was thus not newly discovered), was wrong. By contrast, there is absolutely no evidence to suggest that Trooper Appleby's conduct only began *after* the traffic stop and trial. Therefore, the conclusion of the actual innocence court was so obviously wrong as to constitute an abuse of discretion.

B. Could Not Have Been Discovered in Time to Move for a New Trial

Second, because the actual innocence court found that Thompson's evidence was not considered to be "newly discovered," it did not address whether the evidence could

[10] Obviously, this evidence points both ways. It suggests that Trooper Appleby, even as he confessed to other crimes, was still insisting on Thompson's guilt. For our purposes, however, this evidence shows that Trooper Appleby admitted to illegal conduct during traffic stops *before* the altercation between he, Thompson, and Johnson.

have been discovered in time to move for a new trial under Rule 4-331. We hold that the newly discovered evidence could not have been discovered in time, and, therefore, that an actual innocence petition is the proper vehicle within which for Thompson to raise his claim.

According to Rule 4-331(c)(1), pertaining to a motion for new trial filed on the grounds of newly discovered evidence:

> The 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:
>
> > (1) on motion 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.

Id. Thompson appealed his conviction to this Court. This Court entered its mandate, affirming Thompson's convictions, on July 24, 1995. Thompson did not seek further appellate review of his convictions. Therefore, under Rule 4-331(c)(1), Thompson had until July 24, 1996, to file a motion for a new trial. As established above, Thompson's newly discovered evidence (the pattern and practice of Trooper Appleby's illegal conduct that pre-dated the traffic stop of Thompson and Johnson) could have been discovered no earlier than September 18, 1996—the date of the sting operation and Trooper Appleby's subsequent interview. Thus, Thompson could not have discovered the evidence in time to file a motion for a new trial pursuant to Rule 4-331.

Because the newly discovered evidence of the pattern and practice of Trooper Appleby's illegal conduct that pre-dated the traffic stop could not have been discovered in time to move for a new trial under Rule 4-331, we are compelled to conclude that the actual innocence court abused its discretion.

II. Substantial or Significant Possibility that the Result May Have Been Different

Under the second prong of the actual innocence analysis, Thompson needed to prove that the newly discovered evidence "creates a substantial or significant possibility that the result may have been different." Regarding the second prong, the actual innocence court stated:

> If you had known about that, at best it could have been used to impeach Trooper Appleby's testimony at your trial, but it wasn't the only evidence that the State presented as to your guilt at your trial. There was the evidence of the other law enforcement officers as well. So based on all of that, just one trooper's impeached testimony would not have been sufficient to overturn your conviction or to show there is a likelihood you would not have been convicted in this case.

We understand the actual innocence court to mean that the evidence did not create a substantial or significant possibility of a different result at trial because, "at best," it would only have impeached Trooper Appleby and that there was other evidence in the trial record of Thompson's guilt.

We disagree. The newly discovered evidence "creates a substantial or significant possibility that the result may have been different" by: (1) impeaching Trooper Appleby's testimony; (2) bolstering the credibility of Thompson and Johnson's version of the events;

and because (3) except for the testimony of the three principal participants (Trooper Appleby, Thompson, and Johnson), there was little other evidence about the traffic stop and the nature of the fight. Therefore, we hold that the actual innocence court abused its discretion in the second step of the actual innocence analysis as well.

The proper standard for reviewing the second step of the actual innocence analysis—whether the newly discovered evidence "creates a substantial or significant possibility that the result may have been different"—is set forth in *McGhie v. State*. 449 Md. 494 (2016). In *McGhie*, the petitioner, Robert McGhie, challenged his conviction under the actual innocence statute, and argued that newly discovered evidence that the State's ballistics expert, John Kopera, testified falsely about his academic credentials during the trial created a substantial or significant possibility of a different outcome at trial. *Id.* at 497. The *McGhie* Court first established that the "substantial or significant possibility standard [of CP § 8-301(a)(1)] falls between 'probable,' which is less demanding than 'beyond a reasonable doubt,' and 'might' which is less stringent than 'probable.'" *Id.* at 510 (internal quotations and citations omitted). The Court agreed with McGhie that the actual innocence statute requires a "retrospective approach"—one that looks back at the petitioner's trial to consider the impact that the newly discovered evidence would have had on the result of the trial. *Id.* at 510-11. The Court also agreed with McGhie that the reviewing court does not "simply … excise the falsehood," but "must decide whether, had the jurors been aware of the falsehood, there is a substantial or significant

possibility that the result of the trial may have been different." *Id.* at 511. The Court affirmed McGhie's conviction, however, because "given the weight of the evidence presented against him at trial, [McGhie] was unable to prove that [the expert's] lies create[d] a substantial or significant possibility that the result may have been different." *Id.* at 514. Employing the *McGhie* standard in this case, however, yields a different conclusion.

Using a retrospective approach to consider the impact that the newly discovered evidence would have had on the result of Thompson's trial, we hold that there is a substantial or significant possibility that the result of the trial may have been different if the jurors had been aware of the pattern and practice of Trooper Appleby's illegal conduct. Here, Trooper Appleby was the *only* witness offered by the State to testify to the particulars of the traffic stop and to the beginning of the scuffle with Thompson and Johnson. The jury considered the testimony of Trooper Appleby against the word of Thompson and Johnson, while they were on trial for attempted murder, drug trafficking, and drug possession. The newly discovered evidence, however, unknown to the jury during the trial, paints a clear picture of Trooper Appleby as both a thief and a liar—impeaching Trooper Appleby's testimony, bolstering Thompson and Johnson's version of the events, and leaving us with little other evidence about the events of the traffic stop and the nature of the fight.

First, the newly discovered evidence completely impeaches Trooper Appleby's testimony. Every point of Trooper Appleby's version of the events surrounding the traffic stop is absolutely impeached. At the suppression hearing and at trial, Trooper Appleby

maintained: (1) that he did not pull even with the truck while pacing it because he did not need to see who was in it; (2) that Johnson knowingly and voluntarily signed the consent form and knew exactly what it was before signing; (3) that he extended the stop because Thompson and Johnson's story didn't "add up" and they were acting suspicious; and (4) that he did not use racial slurs or violence against Thompson and Johnson. For example, during the suppression hearing, Trooper Appleby flatly denied stopping the vehicle on the basis of race. The following conversation occurred on cross-examination of Trooper Appleby by defense counsel:

> Q. You weren't able to pay any specific attention to the color of [the] person driving the car?
>
> A. No, I didn't.
>
> Q. You didn't know … when the truck passed whether that person was black or white?
>
> * * *
>
> A. It made no difference if they were black or white.
>
> Q. Pardon?
>
> A. Didn't make any difference whether they were black or white.

We now know, however, that: (1) Trooper Appleby had a pattern of racial profiling and targeting black motorists for enforcement activities; (2) he engaged in bullying to force individuals to consent to search; and (3) the type of racially-charged behavior described by Thompson and Johnson was common in Trooper Appleby's traffic stops. It would take no strain of the imagination to believe that race played a significant role in Trooper Appleby's

decision to stop Thompson's vehicle. And, Trooper Appleby was not a side figure in the case, he was the central complaining witness. We think that these facts suggest that the result of the trial may have been different had the jury been aware of Trooper Appleby's pattern and practice of illegal conduct that impeached his testimony.[11]

Second, while in other cases impeachment evidence just tends to tear down the witness, here the impeachment evidence does not just tear down Trooper Appleby, but at the same time also bolsters the credibility of Thompson and Johnson. An example of impeachment familiar to our actual innocence jurisprudence is the evidence, mentioned above, that MSP ballistics expert John Kopera repeatedly lied about his educational qualifications. *See, e.g.*, *McGhie*, 449 Md. at 505 (establishing that Kopera lied about his qualifications); *State v. Hunt*, 443 Md. 238, 240-41 (2015) (same); *Jackson v. State*, 216

[11] It is possible that the actual innocence court denigrated Thompson's evidence as "merely impeaching" Trooper Appleby's testimony because it was following the legal standard that it thought was then in force. Under that standard, this Court, in an effort to give substantive content to the substantial probability standard, distinguished between, on the one hand, evidence that was "merely impeaching" of a witness, which would not create a substantial possibility of a different outcome, and, on the other hand, evidence that could impeach the State's theory of the case, which would create a substantial probability of a different outcome. *See, e.g.*, *Jackson*, 216 Md. App. at 367. That impeaching/merely impeaching dichotomy, which the actual innocence court may have thought was the governing legal standard at the time of Thompson's actual innocence hearing, was not the law then, *see State v. Hunt*, 443 Md. 238, 264 n.26 (2015), and was emphatically rejected by the Court of Appeals in *McGhie*. *See* 449 Md. at 512. To the extent that the actual innocence court based its evaluation of whether there was a substantial probability of a different outcome on the impeaching/merely impeaching case law, it was erroneous and constitutes another ground for finding an abuse of discretion. *See Martin*, 218 Md. App. at 30 n.31 (internal quotations and citation omitted) (explaining that an exercise of discretion based upon legal error is necessarily an abuse of discretion).

Md. App. 347, 356-57 (2014) (same). This impeaching evidence, while powerful to impeach Kopera, did nothing to bolster other parts of McGhie's case. Here, by contrast, impeaching Trooper Appleby's credibility and testimony also has the reciprocal effect of bolstering the credibility of Thompson and Johnson. The story told to the jury by Thompson and Johnson is, in many ways, now significantly *consistent* with Trooper Appleby's confessed behavior.

Thompson and Johnson's version of the events surrounding the traffic stop now fit hand-in-glove with Trooper Appleby's confessed behavior. Specifically, Johnson testified that just prior to being stopped by Trooper Appleby, Johnson slowed down to 53 miles per hour because his radar-detector "react[ed]." Thompson and Johnson testified that Trooper Appleby pulled alongside the truck, observed its occupants and then "back[ed] off" before stopping the truck. In contrast, Trooper Appleby said that he became interested in the vehicle because it appeared to be traveling in excess of the posted speed limit and stopped the vehicle for that reason alone. In light of Trooper Appleby's confessed behavior of pre-textual traffic stops, Johnson's testimony is more believable and reasonable.

Johnson also testified that when Trooper Appleby first asked for permission to search the vehicle, Johnson told him to ask Thompson for permission because Thompson was "in charge" of the vehicle. According to Johnson, Trooper Appleby then threatened Johnson to consent to a search "before you get yourself into more trouble." When

considered in light of Trooper Appleby's confessed habit of bullying and procuring forced consent for searches, Johnson's version of events is much more credible.

Thompson and Johnson testified that Trooper Appleby cursed at them and used racially-charged language. They also testified that he kicked Johnson in the side, pulled his gun, and threatened, "God damn it, nigger, do what I tell you to do or I will blow your fucking brains out." Thompson and Johnson testified that they only touched Trooper Appleby in an attempt to keep him from firing his gun at them and that they were never in possession of his gun. In light of Trooper Appleby's established behavior of using violence at traffic stops in conjunction with bullying, and racially-charged, abusive language, Thompson and Johnson's version of events, rather than sounding outrageous, is now much more credible.

Third, under the second prong of the actual innocence analysis, the actual innocence court must consider the weight of the other evidence presented to the jury during the trial and conclude whether the verdict would have been different if the jury had known of the newly discovered evidence. *McGhie*, 449 Md. at 512-13. The Court of Appeals in *McGhie* concluded that the weight of the other evidence in that case was so strong that it prevented McGhie from proving that the expert's lies created a substantial or significant possibility that the result may have been different. Here, by contrast, there was no equivalent counterweight. Except for the testimony of the three principal participants—Trooper Appleby, Thompson, and Johnson—there was little other evidence as to the events of the

traffic stop and the nature of the fight. Daniel Link, Sergeant Stem, and Officer Lohr, whose testimony is described in detail above, *see supra* pgs. 7-10, arrived after the struggle was under way and, thus, their testimony was mostly corroborative of facts not in dispute. They could not, and did not, testify about the events that precipitated the fight. Link's testimony was already under suspicion given that much of what he claimed to have seen, he saw from the poor vantage point of his rearview mirror as he was driving away from the scene. Additionally, as quoted above, *see supra* pg. 8, other testimony established that Link's testimony was significantly impeached by prior statements that he gave to Thompson and Johnson's private investigator, and that Link's original version was consistent with Thompson and Johnson's trial testimony. As a result, the actual innocence court's finding that Trooper Appleby's testimony "wasn't the only evidence that the State presented as to [Thompson's] guilt at … trial" rests on an extremely slender reed.

The newly discovered evidence of the pattern and practice of Trooper Appleby's illegal conduct retrospectively impeaches the credibility of Trooper Appleby's testimony during trial, bolsters Thompson and Johnson's version of the events, and leaves us with little other evidence as to the events of the traffic stop and the nature of the fight. Therefore, we hold that there is a substantial or significant possibility that the result of the trial may have been different if the jury had been aware of these facts.

III. Actual, Factual Innocence

Finally, having resolved both of the statutory requirements in Thompson's favor, we must determine whether Thompson alleges that he is actually, factually innocent of the charges in this case—meaning, that he did not commit the crimes. *First*, we will briefly discuss this third, judicially-created element in the actual innocence calculus. *Second*, we will analyze the specifics of Thompson's petition in regard to his actual, factual innocence of: (1) the attempted murder conviction; and (2) the drug trafficking and drug possession convictions.

A. Actual, factual innocence as a third element

The Court of Appeals, in *Smallwood v. State*, recently set forth that in addition to the two statutory elements in CP § 8-301(a), there is a third requirement in the actual innocence determination—that a petitioner must allege he or she is actually, factually innocent and did not commit the crimes. ___ Md. at ___, Slip Op. at *34. Smallwood, who was convicted of murder, filed a petition for writ of actual innocence. *Id.* at *12. Smallwood based his petition on the "newly discovered evidence" that a psychiatrist who had testified as a defense expert at Smallwood's reverse waiver hearing[12] twenty-five years earlier, was now willing to testify that Smallwood was not criminally responsible for the murder. *Id.* at *8-12. The circuit court denied Smallwood's petition, and this Court affirmed. *Id.* at *14-

[12] "Reverse waiver" is the statutory procedure for transferring jurisdiction from circuit court to juvenile court. The decision is governed by CP § 4-202. *See Smallwood*, ___ Md. at ___, Slip Op. at *1.

17. The Court of Appeals affirmed the denial of the petition as well because Smallwood's allegation that he was not criminally responsible for the murder did not meet the requirement that the petitioner allege his actual, factual innocence—that he did not commit the crimes. *Id.* at *34.

B. Thompson's Petition

Having determined that an actual innocence petition, in addition to fulfilling the two statutory prongs of CP § 8-301(a), must also allege that the petitioner is actually, factually innocent of the crimes, we now consider how to apply that requirement to Thompson's convictions for: (1) attempted murder; and (2) drug trafficking and drug possession. We hold that the requirement of actual, factual innocence operates differently in the two different categories.

1. Attempted Murder

As described above in detail, there is newly discovered evidence, not available in time for Thompson to file a motion for a new trial, that Trooper Appleby was the aggressor in the confrontation rather than Thompson. We have already held that this evidence creates a substantial likelihood of a different result, but we now also must determine whether the difference in aggressor status is relevant to Thompson's actual, factual innocence.

One of the defenses available to a defendant charged with attempted murder is that he or she acted in self-defense. In *State v. Marr*, the Court of Appeals noted that: "Maryland recognizes two varieties of self-defense—the traditional one, which we have sometimes

termed 'perfect' or 'complete' self-defense, and a lesser form, sometimes called 'imperfect' or 'partial' self-defense." 362 Md. 467, 472 (2001). According to the *Marr* Court, one of the elements of "perfect self-defense"—a complete defense to murder that, "if credited by the trier of fact, results in an acquittal"—is that the "accused claiming the right of self-defense must not have been the aggressor or provoked the conflict." *Id.* at 472-73 (citations omitted). By contrast, "imperfect self-defense"—when the subjective belief of the accused that "he [or] she is in apparent imminent danger of death or serious bodily harm, requiring the use of deadly force, is not an objectively reasonable belief"—takes away the element of malice required for a murder conviction and therefore reduces the offense to manslaughter. *Id.* at 473-74.

As to the attempted murder conviction, it is clear that Thompson's version of the events surrounding the traffic stop, if credited, would make him actually, factually innocent of the crime. The newly discovered evidence no longer paints Thompson as the aggressor in the confrontation; rather, the evidence shows that it is likely that Trooper Appleby was the aggressor and that Thompson acted in self-defense—that he did not commit attempted murder. As stressed by the trial court during its jury instructions, a finding by the jury of perfect self-defense, and even a finding of imperfect self-defense, would negate the possibility of a conviction for second degree murder. Thus, Thompson has alleged that he is, and if believed could be, actually, factually innocent of the attempted murder count.

2. Drug Trafficking and Drug Possession

The result is different when we consider the drug trafficking and drug possession convictions. Consistent with our discussion above, we have held that there is a substantial possibility that the outcome as to the drug crimes would have been different had the suppression court known of Trooper Appleby's pre-existing pattern of bad behavior. But that does not mean that Thompson was—or even has alleged that he was—*actually, factually innocent* of the crimes of drug trafficking and drug possession.

At his suppression hearing, Thompson argued that he did not freely consent to Trooper Appleby's search of the vehicle, that no other exception to the warrant requirement existed, and that, therefore, the search violated the Fourth Amendment. *See McCain v. State*, 194 Md. App. 252, 264 (2010) (citation omitted). From there, Thompson argued that the exclusionary rule, which punishes law enforcement for wrongful searches by excluding the fruits of those searches, should bar the introduction of the evidence of the drugs. *See Kelly v. State*, 436 Md. 406, 421 (2013) (citation omitted). The suppression court rejected the application of that theory. As things stand now, because Trooper Appleby was the State's only witness at the suppression hearing to testify to the traffic stop, and because the newly discovered evidence reveals both Trooper Appleby's pattern of perjury and his pattern of misrepresentation regarding consent searches, we have held above that there is a substantial likelihood that the suppression court would have suppressed the evidence of the drugs. Moreover, without the drugs, there is a substantial likelihood that the jury would

have acquitted Thompson of the drug trafficking and drug possession charges. But nowhere in Thompson's petition does he argue that he is actually, factually innocent of the drug trafficking and drug possession charges. Critically, the newly discovered evidence is not even relevant to this question: even if Trooper Appleby is a liar and a thief, Thompson still possessed the drugs, and, therefore, committed the crimes.

In this case, therefore, we hold that as to his drug trafficking and drug possession convictions, Thompson has not satisfied the third of the three requirements for the issuance of a writ of actual innocence. Although Thompson has identified newly discovered evidence that has a substantial possibility of changing the outcome of the suppression hearing, and, therefore, the outcome of his drug convictions, he has failed to satisfy the mandatory precondition that he allege that he did not commit the drug crimes. On the other hand, Thompson has satisfied all three requirements for issuance of the writ of actual innocence with respect to his attempted murder convictions. Therefore, we grant Thompson's petition for writ of actual innocence only in part—with respect to the attempted murder conviction.

IV. Remedy

After a petition for writ of actual innocence is granted, the actual innocence court determines the appropriate remedy pursuant to CP § 8-301(f), which may include "set[ting] aside the verdict, resentence[ing], grant[ing] a new trial, or correct[ing] the sentence, as the court considers appropriate." We note for the benefit of the actual innocence court that

because we granted Thompson's petition on the attempted murder conviction, the proper remedy is for the actual innocence court, in its discretion, to either set aside the verdict or grant a new trial on that count.[13] Additionally, although we did not grant Thompson's petition on the drug trafficking and drug possession convictions, we note that the circuit court, in sentencing Thompson on the drug charges, listed "tried to kill Trooper" on the sentencing worksheet as one of the factors that led it to impose a particularly long sentence.

[13] We must also discuss briefly the status on remand of the attempted voluntary manslaughter and battery charges against Thompson. As explained above, *supra* n.2, Thompson's verdict sheet also included counts for attempted voluntary manslaughter and common law battery. In accordance with the instructions on the verdict sheet, however, the jury did not consider the attempted voluntary manslaughter and battery counts because it found Thompson guilty of attempted second degree murder. When the absence of a verdict on a count is pursuant to the court's instructions on the verdict sheet, the absence of the verdict does not constitute an acquittal on that count. *State v. Prue*, 414 Md. 531, 547-48 (2010). "In a real sense," the attempted voluntary manslaughter and battery counts were "not submitted to the jury for its consideration." *State v. Moulden*, 292 Md. 666, 678-79 (1982). And, further trial proceedings on the attempted voluntary manslaughter and battery counts are not prohibited by the double jeopardy clause. *Id.* at 679-80. Therefore, the attempted voluntary manslaughter and battery counts are still conceivably in play.

On remand, the State's Attorney for Harford County must decide whether to initiate new proceedings against Thompson for attempted voluntary manslaughter and battery, because the Opinion is not controlling as to these counts. This is because the standard used in an actual innocence petition—that the newly discovered evidence creates substantial or significant possibility that the result of the trial may have been different, is distinct from the standard that is used to judge the viability of a prosecution and defense in a criminal trial—whether the finder of fact could still find the defendant guilty beyond a reasonable doubt. Thus, the State's Attorney must make its own determination as to whether to pursue further these counts. *But see Marr*, 362 Md. at 472-73 (stating that "perfect self-defense" is a complete defense to murder that, "if credited by the trier of fact, results in an acquittal"); *Marquardt v. State*, 164 Md. App. 95, 129, 139-40 (stating that self-defense is an available defense to a battery charge).

Therefore, as part of the relief for our grant of the petition on the attempted murder conviction, the proper remedy is for the actual innocence court, again operating in its discretion, to consider resentencing or otherwise correcting Thompson's sentence on the drug convictions.

In conclusion, we reverse the judgment of the actual innocence court in part, grant Thompson's petition for writ of actual innocence as to the attempted murder conviction, and remand to the actual innocence court for further proceedings consistent with this Opinion.

MOTION TO REOPEN A CLOSED POST-CONVICTION DENIED. JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY DENYING THE WRIT OF ACTUAL INNOCENCE REVERSED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY HARFORD COUNTY.