Circuit Court for Baltimore City
Case No. 18916403

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2042

September Term, 2018

STEVEN G. CARVER

v.

STATE OF MARYLAND

Shaw,
Nazarian,
Harrell (Senior Judge, Specially Assigned)

JJ.

Opinion by Shaw, J.

Filed: March 31, 2022

Appellant Steven Carver filed a petition for writ of actual innocence in the Circuit Court for Baltimore City and following a hearing, the court denied relief. Carver has appealed to this Court, and presents two questions for our review:

1. Did the circuit court abuse its discretion in denying Appellant's petition for writ of actual innocence?

    a. Did the circuit court abuse its discretion in finding that documents relating to a third-party perpetrator did not speak to Appellant's innocence or create a substantial possibility of a different result?

    b. Did the circuit court abuse its discretion in finding that outstanding but unserved arrest warrants for a crucial State's witness were not newly discovered and did not create a substantial possibility of a different result?

    c. Did the circuit court abuse its discretion in finding that evidence of Joseph Kopera's false credentials and testimony was not newly discovered and did not create a substantial possibility of a different result?

2. Did the circuit court err and/or abuse its discretion in failing to serve a body attachment issued for an important witness and failing to grant a postponement so the witness's presence could be secured?

For the following reasons, we affirm.

BACKGROUND

On November 16, 1989, a jury in the Circuit Court for Baltimore City convicted Steven Carver ("Carver" or "appellant") of first-degree murder, use of a handgun in a crime of violence, and wearing or carrying a handgun. He was sentenced to life without parole for first-degree murder and a consecutive 20-year term for the handgun offense. This Court affirmed the convictions in *Carver v. State*, Sept. 1990, unreported (Md. Ct. Spec. App. Jan. 13, 1992).

In 1997, Carver filed a *pro se* petition for post-conviction relief, then retained private counsel, who subsequently withdrew the petition. In 2008, Carver, represented by

another attorney, re-filed his petition for post-conviction relief, which was denied in 2010. Carver then filed an application for leave to appeal which was denied. Also, in 2010, Carver filed a *pro se* petition for federal habeas relief in U.S. District Court, which was deemed time-barred in 2013. That same year, Carver filed a motion to correct an illegal sentence, which was denied in 2015.

In 2012, Carver filed a *pro se* petition for writ of actual innocence which was denied without a hearing. On appeal, this Court vacated the denial and ordered a hearing be held. Carver represented himself at the hearings on December 1, 2015 and March 9, 2016. He filed an amended petition on December 9, 2015. In September 2016, a public defender, on Carver's behalf, filed an amended petition. Following hearings on May 10 and August 31 of 2017, Carver's petition was denied. He noted this appeal.

STATEMENT OF FACTS

On March 14, 1989, around 4:30 pm, John Green ("Green") was shot and killed in the 4000 block of Old York Road near the intersection of Cator Avenue. Carver and Joe Hodge ("Hodge") were both accused of killing Green and were tried jointly and convicted of first-degree murder. During trial, the State called three eyewitnesses, several law-enforcement officers, a medical examiner, and firearms expert. Its first eyewitness was Carmelita McIntosh ("McIntosh"), who testified that shortly before the incident, she was driving down Cator Avenue and as she proceeded to turn onto Old York Road, she saw three men and slowed down to avoid hitting them. She stated she thought the three men were "just talking playing . . ." but she then saw the man in the center lean to his right and she heard a pop. The man in the center was "falling" towards her car, so she swerved and

drove around him. A child crossed in front of her and she moved her car to avoid hitting the child as well. Through her rearview mirror, she saw the man to the right of the man in the center "go to his head with a gun" and heard a pop. She stopped, began to exit her car and "heard him say, bust him, yo, and the other guy started shooting." As "he" was shooting, "[h]e was moving around fighting." The "other person," who "maneuver[ed] around the body," also had a gun. She heard "four or five" "sounds" while the gun was "pointed at the victim." The shooting "was ending" when she was able to get out of her car. She heard a total of "five or six" "pops" but was uncertain because she was distracted, and "wanted to get away."

When asked about the "person [she] saw going to the head of that person in the street with the gun," she said there were two males, one lighter-skinned, one darker-skinned, both with "very vague" attire. The lighter male went to the head, the darker male maneuvered around the body. The "lightest one" said "[b]ust him, yo." As she exited her vehicle, the two men ran past her, turning right. She asked someone to call the police and "checked for [the victim's] pulse." She stayed at the scene and spoke to the police when they arrived. She was later shown a photo array, and she "did not make a positive identification" of appellant.

The State's next eyewitness was Hodges Epps ("Epps"), who testified that during this timeframe, he was in a laundromat on Old York Road and Rosehill Terrace and decided to go to a store across the street. He testified that when he left the laundromat, he heard a gunshot. ". . . I seen the defendants walking up the street with [Green]. One of the defendants pulled out a gun and shot him." He stated that he saw Green, Carver, and

"another defendant" before the gunshot. After the first gunshot, he saw "Carver shooting [Green]" in the lower part of his body, and then "[a]nother person came behind [Green] and shot him in his head" while he was on the ground. He also testified that when he first heard the gunshot, Green was already "on the ground." Later, Epps testified that he saw Green with three people before he heard the first shot – Carver, Arlin Doles ("Doles"), and "another person." Epps named Doles and said he had never seen him before, but on cross-examination, he testified that Doles was a high school classmate. Epps also stated that he "grew up" with Green, saw him often, and after the shooting, he went to Green's body and put his coat on top of him. Epps said that he knew Carver for about six to twelve months prior to the shooting and he would see Carver "once a week sometimes." At the time of the murder, he stated that he did not know Carver's last name. He later was told Carver's full name by his "niece's father." Epps identified Carver from a photo array as "the one that shot [Green]." He testified that he could not recall any details relating to the other shooter, including physical build or clothing.

The final eyewitness was Doles, who knew Green from high school.[1] The night before the murder, Green introduced Doles to Carver and they spent about 45 minutes together. The three went to a restaurant, and Doles overheard Carver reconcile with Green. The next day just before 4:30 pm, Doles ran into Green at Old York Road and Dumbarton Avenue. They spoke and walked north on Old York Road toward Cator Avenue. Doles went behind a store to relieve himself, and when he rejoined Green, Carver was there. The

[1] Karen Williams was another eyewitness, but she was not called to testify. She could not identify Carver in an array.

three kept talking as they walked up the street and Doles "veered off into the street." Doles noticed someone coming up from behind "through my peripheral vision. . . ." "So I turned around and as I'm turning around, I seen a man approaching."

Doles testified that man was Hodge:

> . . . I looked him full in the face . . . and that's when he looked at me. Then he turned away. His eyes turned away towards in the direction of where [Green] was standing. He asked what time it was. . . . But before I could say anything, [Green] . . . said 4:30 and as I was still watching at my watch, I heard the first shot.

Doles ran north on Old York Road, hearing four more shots. He jumped a fence, turned around, and "Green was still standing and [Carver] was directly in front of him." Carver "just stood there" with his right hand in his pocket. Green "grabbed [Carver's] left arm," Carver "jerked his arm around away from him," and Green fell to the ground. Hodge stepped between Green's legs and shot him in the back of the head. Doles stated that he was about fifteen feet away. Hodge and Carver then ran in the same direction, with Hodge behind Carver. Doles never saw Carver with a gun. After viewing a photo array, Doles identified Carver as a person that he saw at the scene. He later identified Hodge, in a photo array, as the person he saw shoot Green.

Several law-enforcement officials also testified. Officer Clyde Day ("Officer Day") was one of the first officers to arrive at the scene and testified that he found Green lying in the street, with Epps and Doles standing over him. Detective Richard James ("Detective James") compiled the photo arrays that were shown to the witnesses and included a photograph of Carver and Hodge. Detective James testified that two of the witnesses

identified Carver. And the day after the shooting, Doles pointed to a photo of Hodge and said "that's him."

Detective James testified he "had no reason to" investigate any other suspects besides Carver and Hodge because he had a "positive identification." He acknowledged that Green had been shot previously. Officer Day had also testified observing Green wearing a bulletproof vest several months prior to being shot in March. Detective James testified that he had information about an additional person, Ralph Washington, but he did not make meaningful efforts to locate him because "I had a positive identification that night."

The medical examiner, Dr. Margarita Correll, was also a witness and testified that Green had sustained six gunshot wounds, all inflicted from behind: two in the back of his head, one in his back, one in his upper right buttock, and two in his left buttock. She opined that Green could have remained standing or could have moved after receiving the wounds to his back and buttocks.

Joseph Kopera ("Kopera") testified as a ballistics and firearms examination expert. He examined the six bullets and one metal fragment recovered from Green's body and testified that all six bullets were .38 caliber and four of them were too mutilated to perform a microscopic comparison. When asked whether he could offer an expert opinion as to the number of guns used to fire the bullets, Kopera said "there could be 1, 2, 3, possibly a total of five different guns because you have four bullets that are noncomparable. You have two bullets that are good from one gun."

Carver's defense theory was that the person who shot Green in January ultimately murdered him months later. Prior to trial, he filed several motions to compel discovery, requesting information that would show that someone else committed the murder. In response, the State released the January police report of Green's shooting, which noted that Bryant McArthur ("McArthur") threatened to kill Green, that Green was seen shortly afterwards wearing a bullet-proof vest, and he was subsequently arrested for carrying a handgun, presumably for protection against McArthur. In May 1989, the State was granted a protective order, allowing it to withhold the names and addresses of all civilian witnesses in the case. The order stayed in place until the day before trial and defense counsel was barred from sharing the information with Carver.

During trial, defense counsel attempted to put forth his theory through the witnesses. For example, on cross-examination, he asked Officer Day, who investigated the January shooting, whether Green had described the assailant. The State's objection, explaining that there was no evidence that the same person was involved in both shootings, was sustained. The trial judge later raised the same issue *sua sponte* and barred any inquiry into the January shooting as "hearsay and totally irrelevant." He stated that "if you can show, someone other than your defendant . . . shot that person on . . . January 14, and he also shot that person on March 14, you have something that's highly relevant."

The defense attorney also sought the admission of Carver's medical records from January 1989 to show that he was hospitalized at the time Green was initially shot. The court ruled that it had no bearing on whether he shot Green in March and thus was not relevant. At the conclusion of jury deliberations, Carver was convicted.

Prior to trial, Carver's defense attorney had received information that in September 1988, McArthur shot and killed Damon Barrett ("Barrett") and that Green and Kenneth Alston ("Alston") witnessed it. He also received information that in October 1988, McArthur and Terry Green[2] killed Alston, and that Green had been identified as a witness in McArthur's upcoming criminal trial for the murder of Barrett. Defense counsel testified at the actual innocence hearing in May 2017 that, prior to trial, he did not have access to information regarding specific threats McArthur made against Green. He also stated that he did not know, prior to trial, that in March 1989, Darnell Armstead ("Armstead"), an associate of McArthur's, attempted to solicit Denise Brewer ("Brewer") to assist in murdering Green. She refused and told police that several weeks after Green's murder, Armstead attempted to kill her. Police reports confirmed that she provided information that "Darryl" or "Darnell" had assaulted her.

Carver's counsel located "Darnell" and discovered his last name was Armstead. Armstead had never moved from the home where he was residing in 1989, when the trial was held. Counsel conducted a telephone interview and subpoenaed him to appear at the innocence hearing. However, he did not appear. Counsel proffered that Armstead would testify that there was a rivalry between groups from Old York Road and McCabe Avenue in 1989, he and McArthur were friends, McArthur shot Barrett "by mistake," and that Green was "killed for being a witness." The court issued a body attachment for Armstead on July 5, 2017. Unbeknownst to the court, he died July 4, 2017.

[2] To avoid confusion, Terry Green will be referred to as "Terry" in this opinion.

There was also a police report of an interview with Melvin Jackson ("Jackson") in 1989. The State had not disclosed that Jackson, a friend of McArthur's, told police that he and McArthur were in jail the first week of March 1989, and McArthur told him that he was going to pay Carver's bail to take care of Green. Jackson stated he was told that the other shooter of Green would be Hodge. Jackson was not called as a witness at Carver's trial.

Carver presented evidence, during the actual innocence hearings in 2017, that he was not associated with McArthur, that he lived in a rival neighborhood, and that he was close to Alston. He had other evidence and a number of witnesses who also provided other information, such as the overall McArthur conspiracy, the role of Brewer, the police investigation, etc. The judge ultimately denied his petition for a writ of actual innocence.

DISCUSSION

Standard of Review

When reviewing actions taken by a circuit court following a hearing on a petition for writ of actual innocence, the review is limited to whether the trial court abused its discretion. *Faulkner v. State*, 468 Md. 418, 460 (2020) (citation omitted). *See also Jackson v. State*, 164 Md. App. 679, 712-13 (2005) ("Both evaluating the credibility of the [newly discovered] evidence, in the first place, and then weighing the significance of the evidence, in the second place, remain within the broad discretion of the trial judge[,]" thus the "ultimate review" by the appellate court of whether newly discovered evidence merits a new trial is "clearly under the abuse of discretion standard.") (citations omitted). Under this standard, the appellate court "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." *Smith v. State*, 233 Md. App. 372, 411 (2017) (citation and quotation marks omitted). Factual findings made by the circuit court are given deference by the appellate court, unless they are clearly erroneous. *Id.* at 412 (citation omitted).

I. The circuit court did not abuse its discretion in denying Carver's petition for a writ of actual innocence.

Under Md. Code Ann., Crim. Proc. § 8-301, a convicted defendant may file a petition for writ of actual innocence if they claim that "there is newly discovered evidence that" "creates a substantial or significant possibility that the result may have been different" and "could not have been discovered in time to move for a new trial under Maryland Rule 4-331." "The substantial or significant possibility standard falls between 'probable,' which is less demanding than 'beyond a reasonable doubt,' and 'might,' which is less stringent than 'probable.'" *Faulkner*, 468 Md. at 460 (citation omitted). Maryland case law also added another requirement for newly discovered evidence – such evidence must "support[] a claim that the petitioner is innocent of the crime of which he or she was convicted." *Smith*, 233 Md. App. at 410 (citations omitted).

A. Third-party perpetrator

Carver argues that newly discovered evidence of a third-party perpetrator, McArthur, speaks to his actual innocence and creates a substantial or significant possibility of a different result, citing *Faulkner*. Carver contends that while he was present during Green's murder, he did not commit the murder, and the new evidence speaks to his

innocence because other people, mainly McArthur, were trying to kill Green. He argues the evidence creates a substantial possibility of a different trial result because of the inconsistencies in the testimonies of Epps, Doles, and McIntosh and the materiality of the evidence relating to McArthur.

The State argues the court did not abuse its discretion. The State contends that Carver's defense counsel knew, before trial, about the murders of Barrett and Alston, McArthur and Terry's association with Alston's murder, the threats McArthur made toward Green, the neighborhood rivalry, and the details of Green's January shooting. The State asserts Carver's attorney was not precluded, at trial, from asking the witnesses about McArthur's connection to Green. The State argues further that some of the newly discovered evidence could have been detrimental to Carver's defense because it would have pointed to a conspiracy between McArthur and Carver.

The circuit court found that while the undisclosed documents regarding McArthur's attempts to kill Green were newly discovered evidence, the evidence "neither creates a significant possibility of a different result in the Petitioner's trial nor speaks to Petitioner's actual innocence." The court concluded that the evidence presented at trial was "very substantial," and "the fact that other persons wanted the victim dead, and were soliciting others, including Denise Brewer, to help kill the victim, does not in any way eliminate the Petitioner as the person who actually did the killing." The court noted the strength of the evidence against Carver as follows:

> The State presented three eyewitnesses who did not know each other. Absolutely no reason was offered why any of these

> witnesses would have lied about, inculpated or "framed" the defendant. These three witnesses remained at the scene and cooperated with the police while the Petitioner fled. All of the eyewitnesses, as well as Petitioner's own trial counsel, agreed that the Petitioner was present at the scene and fled after the shooting. All three witnesses confirmed the events surrounding the victim's death, including that the Petitioner and the other shooter fled from the scene together in the same path. The killing occurred in broad daylight on a clear, sunny day. The witnesses had unobstructed views a short distance away from the killing. . . . The remaining evidence . . . confirmed the eyewitnesses' testimony.

The court further cited *Jones v. State*, 310 Md. 569, 586-87 (1987), *rev'd on other grounds*, 486 U.S. 1050 (1988), where the Court of Appeals held "[t]he mere possibility that there may have been an additional principal to the crime, who might have paid [the defendant] to kill [the victim], is hardly exculpatory as to [the defendant]."

We agree and find *Faulkner* also instructive. Petitioners there argued that if certain newly discovered evidence had been provided there was a substantial or significant possibility that their juries would have reached different outcomes. *Faulkner*, 468 Md. at 427. The evidence included information about a potential alternate perpetrator and a secret witness agreement between the State Police and a key State's witness. *Id.* The trial court concluded that the newly discovered evidence did not prove the petitioners' innocence and denied the petitions. *Id.* at 454.

We reversed in *Smith*, noting that "although CP § 8–301 applies only to newly discovered evidence that 'speaks to' actual innocence, the petitioner need not definitively prove his or her innocence to warrant relief under the statute," and that, "[t]o the extent the evidence was offered to show that someone other than [petitioners] committed the crime,

it was evidence that supports a claim of actual innocence." 233 Md. App. at 413-14. We held that the new evidence did "speak to" petitioners' innocence, *id.* at 414-15, and we remanded to consider whether there was a substantial or significant possibility of a different outcome. *Id.* at 4333. On remand, the circuit court again denied the petitions. *Faulkner*, 468 Md. at 459.

We affirmed the circuit court's second denial of the petitions. *Id.* However, the Court of Appeals reversed, holding that the circuit court erred. *Id.* at 427. The Court found, "the question the court was required to decide was not whether the newly discovered evidence proves [the alternative perpetrators were] guilty beyond a reasonable doubt, but rather whether such evidence, combined with the evidence the juries did hear, creates a substantial or significant possibility that the juries would not have found [petitioners] guilty beyond a reasonable doubt." *Id.* at 466.

In accordance, the actual innocence court, here, after evaluating the evidence presented, specifically held that the newly discovered evidence does not "create[] a significant possibility of a different result in the Petitioner's trial." The judge found that the information contained in the police reports offered by appellant, did constitute new evidence, however, that evidence simply elaborated on information previously known about McArthur's attempts to hire someone to kill Green. In fact, Carver's trial attorney testified, that at the time of trial, he was well aware of the threats made by McArthur against the victim. The court noted in its opinion that "the State filed a 'Motion for Protective Order' before Petitioner's trial in which the State laid out a series of violent acts by McArthur and his associates and also stated specifically '[t]hat Bryant McArthur while in

Baltimore City Jail informed another inmate that he knew John Green was to testify against him and the [sic] he had someone to take care of John Green.'"

Carver argues the court misunderstood the governing standard and the significance of the newly discovered evidence. However, this argument is not supported by the record. Unlike the court in *Faulkner*, that included the reasonable doubt instruction as part of its ruling, 468 Md. at 458, the court, here, considered only whether the newly discovered evidence creates a substantial possibility of a different result at trial. On this record, we hold the hearing court's ruling was not an abuse of discretion.

B. Unserved Arrest Warrants

Prior to trial, the State disclosed that eyewitness Hodges Epps had several criminal convictions, but the State did not disclose that he had outstanding warrants. There were two open warrants for Epps's arrest; one was for a violation of probation and the other was for failure to pay a fine and cost. Carver argues the prosecutor was obligated to disclose the existence of the unserved warrants and he was entitled to assume that the prosecutor would fulfill his obligation. According to Carver, because there was an unnecessary protective order, preparation involving checking court records could not be completed. Epps was the only witness who identified him as a shooter and questioning him about the warrant would have been an opportunity to effectively impeach him. Carver also contends that it is reasonable to infer that Epps knew about the warrants because they were for violations of probation and that he received leniency for his testimony.[3]

[3] We disagree with these assertions as there is no basis in the record for such inferences.

The State counters that the warrants were not newly discovered and do not create a substantial possibility of a different result at trial. According to them, defense counsel had the ability to check local court records and even if the protective order prevented him from finding the open warrants before trial, it did not preclude him from searching for them in the year after the trial.

Newly discovered evidence is evidence that could not have been discovered by due diligence within one year after trial. Md. Code Ann., Crim. Proc., § 8-301(a)(2); Md. Rule 4-331(c). Due diligence "does not require that defense counsel exhaust every lead or seek to discover a needle in a haystack." *Smith*, 233 Md. App. at 415 (citation omitted). Rather, it is acting "reasonably and in good faith . . . in light of the totality of the circumstances and the facts known" to the petitioner or counsel at the time. *Argyrou v. State*, 349 Md. 587, 605 (1998).

The actual innocence court found that the warrants were not newly discovered evidence because defense counsel was aware of Epps's prior convictions and could have investigated court records for additional information about him before the trial. The court held that even if this evidence was newly discovered, it would not have impacted the trial, and it was unclear whether Epps had knowledge of the warrants.

We observe, first, that, following trial, there was no obstacle to a search of court records to assess whether the witness had outstanding criminal charges or convictions. We agree with the hearing court that the existence of Epps' unserved warrants was not newly discovered evidence. Carver's trial counsel knew of Epps's criminal history and with due diligence, he could have checked local court records. As the court stated, "[c]onvictions

for simple possession of illegal drugs are not admissible for impeachment. . . . Further, any claim of a pending violation of probation would have, at best, been only merely impeaching." The court noted that material evidence must be more than "merely cumulative or impeaching," citing *Argyrou*, 349 Md. at 602 (citations omitted).

> Specifically, as for the conviction in Case No. 48823022, the records show that, as of 2017, the warrant had not yet been served. . . . As for the conviction in Case No. 48826419, the records show that the warrant was never served and was finally quashed in 2005, over fifteen years after Epps testified.

We hold the circuit court did not abuse its discretion in determining that the unserved warrants were not newly discovered evidence and even if the evidence was new, it would not have created a significant possibility of a different result.

C. Kopera's False Credentialing

At trial, Joseph Kopera testified as the State's ballistics and firearms expert. He worked for the Baltimore City Police Department for twenty years and had testified more than 100 times per year in various courts. In 2007, it became publicly known that Kopera lied about his credentials, specifically, receiving degrees from the Rochester Institute of Technology and the University of Maryland, *Hunt v. State*, 474 Md. 89, 93 n.1 (2021), and about certification by the International Association of Identification and the Association of Firearms and Toolmark Examiners.

Carver argues the court abused its discretion in holding that Kopera's false credentials did not create a substantial possibility of a different trial result. According to Carver, we should assume the jury would have discredited his testimony in its entirety, and

if he had not testified, the State would have had no evidence as to whether the bullet came from one or more guns.

The State concedes that Kopera's fraud was newly discovered evidence, in accordance with *Hunt*, where the Court of Appeals held that in "all similarly situated cases tried prior to the 2007 discovery of Kopera's fraud, in the absence of particularized facts that would have put defense counsel on inquiry notice of Kopera's fraud, due diligence did not require defense counsel to unearth the unfortunate charade." *Hunt*, 474 Md. at 110. Nevertheless, the States argues that Kopera's falsified credentials do not create a substantial possibility of a different trial result as Kopera's testimony was inconclusive. Kopera did not opine as to the number of guns used to fire the six bullets recovered and he testified that four of the bullets were too mutilated for comparison purposes. Because Kopera's written report and testimony was inconclusive, his testimony was actually more consistent with Carver's theory of defense that there was only one gun.

The innocence court concluded that because Kopera's testimony "added little, if any, support to the State's case," "there is no significant possibility of a different result if the alleged newly discovered evidence had been known." We agree and hold the court did not abuse its discretion in determining that Kopera's testimony was inconclusive and did not create a substantial possibility of a different trial result.

D. Cumulative Analysis

Carver argues the court erred in failing to conduct a cumulative analysis, and he is entitled to exoneration, or, at the very least, a new trial. He cites *Faulkner* for support, where the Court of Appeals stated, "in analyzing the materiality of multiple items of newly

discovered evidence for purposes of an actual innocence petition, a circuit court must conduct a cumulative analysis." 468 Md. at 464. "First, in some cases, no one distinct item of newly discovered evidence will suffice on its own to warrant relief, but cumulatively, such evidence will create a substantial or significant possibility of a different result." *Id.* "Second, even if one or more distinct pieces of newly discovered evidence independently justifies the granting of the writ, a cumulative analysis may affect the court's determination of the appropriate remedy." *Id.*

The Court, in *Faulkner*, observed that, "[a]lthough the circuit court's opinion does not contain a separate section that explicitly addresses cumulative effect, it is clear from the overall proceedings on remand that the court considered the newly discovered evidence collectively." *Id.* at 465. Here, the circuit court carefully examined Carver's claims regarding newly discovered evidence and found that the reports regarding McArthur's previous attempts to kill the victim were newly discovered. The court further evaluated this evidence and determined that the reports did not eliminate Carver as the murderer and that Kopera's testimony, even if newly discovered, was inconclusive. Essentially, the court found that the evidence was not material. The court, as discussed *supra*, noted that the evidence against Carver was very strong, including the eyewitnesses' testimony and Carver not disputing that he was present at the scene. In light of the court's thorough review of the evidence presented at trial and the newly discovered evidence, we hold the court properly evaluated whether there was a substantial possibility of a different result collectively and the court did not abuse its discretion.

II. The circuit court did not abuse its discretion in denying Carver's request for a continuance.

A continuance to secure a missing witness is appropriate where (1) there is a "reasonable expectation" of securing the witness "within some reasonable time"; (2) "the evidence was competent and material, and . . . the case could not be fairly tried without it"; and (3) "diligent and proper efforts" were made to secure the witness. *Wright v. State*, 70 Md. App. 616, 623 (1987). "[A] ruling on a postponement request will be overturned only if there was both an abuse of discretion and a showing of actual prejudice because of the ruling." *State v. Frazier*, 298 Md. 422, 452 (1984) (citations omitted). To show an abuse of discretion, "the party who requested the continuance must demonstrate" that all three of these conditions were met. *Cottman v. State*, 165 Md. App. 679, 688-89 (2005) (citation omitted), *vacated and dismissed on other grounds*, 395 Md. 729 (2006).

Brewer was subpoenaed and failed to appear at the May 10, 2017 hearing. Defense counsel had previously made contact with her and confirmed where she lived. A process server attempted to serve Brewer but was unsuccessful. A body attachment was issued on July 5, 2017, but Brewer failed to appear at the August 31, 2017 hearing. Counsel had requested that a sheriff serve the body attachment. On the day of the hearing, the court contacted the sheriff's office and was told that they had unsuccessfully tried, at least twice, to serve her. Counsel proffered that Brewer's "testimony would map onto her recollection of the events of March and April of 1989 in which she was threatened after she refused to kill, or participate[] in the killing of the victim in this case." The hearing proceeded, the

court noted the body attachment had not been served and later denied the request for a continuance because the body attachment had not been served.

Carver argues the court abused its discretion by denying his request because he had a "reasonable expectation of securing the evidence of the absent witness" within a reasonable amount of time, he had made diligent efforts and all he needed was for the sheriffs to serve Brewer at her home. He contends the proceeding could not be "fairly" conducted without Brewer's "competent and material" testimony because she was a crucial piece of the undisclosed evidence that showed a third-party conspiracy.

The State argues that Carver was not prejudiced by the absence of Brewer's testimony because defense counsel conceded Brewer's testimony was not essential, saying "I think her testimony would be illuminating for the Court but it's not necessary to succeed." A police report documenting her statement was considered by the court, as was defense counsel's proffer of a conversation between Brewer and Carver's prosecutor.

As we see it, the court did not abuse its discretion and its ruling did not prejudice Carver. The sheriff attempted to serve the body attachment on several occasions. Three months before the hearing, counsel had confirmed Brewer's address, and the body attachment was issued for her two months before the hearing. We found nothing in the record that establishes that the sheriff was less than diligent in its attempt to secure Brewer's presence at the August hearing. Further, her anticipated testimony was cumulative as defense counsel conceded that her testimony was "not necessary." In sum, despite diligent efforts to secure the witness' presence at the hearing and in light of

counsel's concession, the court did not abuse its discretion in denying the request for a continuance.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.