

Circuit Court for Baltimore City
Case Nos. 101192028, 101192031, 101192034, and 102114023

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2078

September Term, 2016

ERIC POOLE

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: February 26, 2018

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

In 2002, a jury, in the Circuit Court for Baltimore City, convicted Eric Poole, appellant, of aiding and abetting first-degree murder, felony murder, aiding and abetting second-degree murder, kidnapping, robbery with a deadly weapon, robbery, first-degree assault, use of a handgun in the commission of a crime of violence, carrying a concealed weapon, and carrying a weapon openly. Poole was sentenced to a total term of life imprisonment plus fifty years.

In 2016, Poole filed a Petition for Writ of Actual Innocence based on a claim of newly discovered evidence. The circuit court ultimately dismissed Poole's petition without a hearing. In this appeal, Poole presents several questions for our review, which we have rephrased and consolidated into a single question¹:

Did the circuit err in dismissing Poole's Petition for Writ of Actual Innocence without a hearing?

For reasons to follow, we answer the above question in the negative and affirm the judgment of the circuit court.

¹ Poole phrased the questions as:

1. Did the Circuit Court err in not granting a hearing to Pro-se petitioner, to overcome Md. Rule 4-332(k) Burden of proof, by not allowing the Pro-se petitioner to explain the newly discovered evidence that showed the conviction was based on withheld evidence that proves the offense was one the petitioner did not commit?
2. Did the Circuit Court err in not allowing Pro-se petitioner the "relief valve" in Md. Rule 4-332(i)(1)(B)?
3. Did the Appellant's case warrant change of venue from the 8th Judicial Circuit Court for Baltimore City over concerns of impartiality?

BACKGROUND

Eric Poole, appellant, was arrested and charged in connection with the shooting death of Brian Johnson that occurred on June 10, 2001 (hereinafter the “Johnson murder”). At Poole’s trial, Antoine Lester testified that, on the night of the Johnson murder, he and five other individuals, including Poole, were involved in a robbery scheme. Lester stated that, at the time, he and one of the perpetrators, Gregory Veale, were in one vehicle, a Toyota Corolla, while Poole and the other perpetrators, Charles Hamm, Leon Wilkerson, and Carl Harrison, were in another vehicle, a gray Jeep Cherokee. Lester also stated that “everyone” had a gun.

According to Lester, at some point during the night, Poole, who was driving the Jeep Cherokee, telephoned Lester and told Lester to meet him at a local gas station “where there were drug dealers to rob.” Lester then drove the Toyota Corolla to the gas station, where he observed Harrison and Hamm get out of Poole’s vehicle, grab an individual, later identified as Brian Johnson, and put him in the back of the Cherokee. Poole then drove off, and Lester followed. A witness who was present at the gas station later reported the abduction to the police at approximately 10:06 p.m. that same night.

Lester testified that, during the ensuing drive, he attempted to contact, via his cellular phone, both Poole and Harrison, each of whom had his own cellular phone, and that he made contact with Harrison on Harrison’s phone. Lester also testified that, during one of those conversations, he could hear Johnson screaming. According to Lester, Poole eventually drove to a local park, where he stopped the vehicle, forced Johnson out of the car, and made him kneel on the ground. Lester then heard two gunshots.

Veale and Wilkerson also testified. Veale stated that he and the other perpetrators convened at his house around nine or ten o'clock on the night of the Johnson murder and that they all went to a gas station "to get some weed." Veale claimed that, while at the gas station, he witnessed Harrison and Hamm put Johnson in the back of the Cherokee. According to Veale, Poole then drove the Cherokee away, and he and Lester followed in their vehicle.

Wilkerson testified that, after abducting Johnson from the gas station and driving away, Harrison and Hamm began arguing about whether to let Johnson go. Wilkerson also testified that, when the group eventually stopped at the park where Johnson was killed, Harrison and Poole both got out of the Cherokee. According to both Wilkerson and Veale, after Johnson was removed from the Cherokee, someone fired two gunshots. Wilkerson testified that, after the gunshots were fired, Poole and Harrison got back in the Cherokee, and Poole told Harrison, "See what you made me do?" Poole was ultimately convicted and incarcerated.

Years later, Poole filed a Petition for Writ of Actual Innocence based on newly discovered evidence. In his petition, Poole claimed that, on September 12, 2011, he received a police report that had not been disclosed by the State at any time prior to or during his trial. According to Poole's petition, the police report contained a statement by "a victim who takes the petitioner away from the scene of the shoot-out minute's [sic] before the kidnapping and murder of Brian Johnson." In support, Poole included, in his petition, several exhibits that he claimed had not been disclosed by the State and constituted "newly discovered evidence."

One of those exhibits was an incident report from the Baltimore Police Department, which was authored around the time of the Johnson murder and indicated that, at approximately 9:30 p.m. on the night of the murder, an individual, Arnold Paige, had been shot by an unidentified individual driving “a gold colored Jeep Cherokee” (hereinafter the “Paige shooting”). A second exhibit, which was a “Progress Report” regarding the Paige shooting, indicated that the shooting occurred at Clifton and Elsinore Avenue in Baltimore and that the shooter was “a black male approximately 22 years of age wearing a black dew rag over his face with no further description.” That same exhibit also included: another Progress Report, which indicated that several individuals, including Poole, had been seen exiting a silver Jeep Cherokee and robbing some people on Elsinore Avenue in Baltimore and that, during the robbery, one of the victims, later identified as Paige, fired his own weapon at the robbers, who returned fire, striking Paige in the process; a statement by a witness to the Paige shooting that identified the person who shot Paige as a “black male in his mid-twenties, 5’10” to 6’00”, 160 lbs., medium brown complexion, regular haircut and wearing a black shirt;” and, a document showing that Paige ultimately identified someone other than Poole as the person who shot him.

In his petition, Poole also alleged that the evidence showed that the Paige shooting occurred at approximately 9:30 p.m. and that a witness had reported the Johnson kidnapping at approximately 10:04 p.m. Poole maintained that that information differed from “physical evidence” adduced at trial regarding his cell phone use and that, because “Lester had an AT&T cellphone and petitioner’s cellphone was Nextel, there is no

technological way these different mobile devices can have the ability to be utilized as ‘walkie talkies’” (hereinafter the “cell phone evidence”).

Poole claimed that the aforementioned evidence, in particular the incident reports detailing the Paige shooting, was in the hands of the State prior to trial and that the State failed to disclose the information to the defense. Poole further claimed that he only discovered the evidence after filing a request for information pursuant to the Maryland Public Information Act years after his conviction. Poole averred that, had he known about the information during trial, he could have used it to refute Lester’s testimony.

The circuit court ultimately denied Poole’s petition without a hearing and issued the following order:

Upon consideration of the Petitioner’s “Petition for Writ of Actual Innocence/Newly Discovered Evidence,” and no Response having been filed by the State, it is this 18th day of October 2016,

FOUND that, as required by Rule 4-332(d)(9) and *McGhie v. State*, 449 Md. 494 (2016) (McDonald, J., Concurring Opinion), the Petitioner failed to state that “the conviction sought to be vacated is based on an offense that the petitioner did not commit”; and, therefore, it is

ORDERED that, pursuant to Md. Code Ann., Crim. Proc. § 8-301(e)(2), the “Petition for Writ of Actual Innocence/Newly Discovered Evidence” shall be DISMISSED as it fails to assert grounds on which relief may be granted.

STANDARD OF REVIEW

“The standard of review is *de novo* when appellate courts consider the legal sufficiency of a petition for writ of actual innocence that was denied without a hearing.” *State v. Ebb*, 452 Md. 634, 643 (2017). “The appellate court reviews the claims and allegations set forth in the petition and decides whether, on the face of the petition, they

satisfy the [statutory pleading requirements].” *Hawes v. State*, 216 Md. App. 105, 133 (2014). Additionally, we determine whether the allegations in a petition “could afford [the petitioner] relief, if the allegations can be proven at the hearing, and we assume the facts in the light most favorable to [the petitioner], accepting all reasonable inferences that can be drawn from his petition.” *Ebb*, 452 Md. at 656.

DISCUSSION

Poole argues that the circuit court erred in denying his petition without a hearing.² Poole avers that the police reports concerning the Paige shooting and the cell phone evidence was “newly discovered” and that it created a substantial possibility that the result of his trial may have been different. Poole maintains, therefore, that he was entitled to a hearing on his petition. Poole also maintains that the trial court erred in not allowing him leave to amend his petition to correct any deficiencies.

Section 8-301 of the Criminal Procedure Article of the Maryland Code provides that certain individuals convicted of a crime in circuit court may file a petition for writ of actual innocence based on “newly discovered evidence.” Md. Code, Crim. Proc. § 8-301(a). Generally, a court is required to hold a hearing on such a petition if a hearing is requested and if the petition satisfies certain enumerated pleading requirements.³ Md. Code, Crim.

² Poole also asserts that his petition should be transferred to a new venue because of “concerns regarding the partiality of the former prosecutor’s [sic] that are now Circuit Court judges in the 8th Judicial Circuit Court for Baltimore City.” That claim was not, however, raised in Poole’s petition for writ of actual innocence and is not, therefore, preserved for our review. Md. Rule 8-131(a).

³ The pleading requirements set forth in § 8-301 are not applicable in the instant case. Md. Code, Crim. Proc. § 8-301(b).

Proc. § 8-301(e)(1). One exception to that general rule is provided in § 8-301(e)(2), which states that a court “may dismiss a petition without a hearing if the court finds that the petition fails to assert grounds on which relief may be granted.” Whether a petitioner has asserted sufficient “grounds” to be entitled to a hearing is dependent upon whether the petitioner has claimed “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.” Md. Code, Crim. Proc. § 8-301(a). Maryland Rule 4-331 provides, in pertinent part, that a court may grant a new trial or other appropriate relief based on newly discovered evidence, provided that the evidence could not have been discovered by due diligence within ten days of the verdict. Md. Rule 4-331(c). “A petitioner in a proceeding under [section 8-301] has the burden of proof.” Md. Code, Crim. Proc. § 8-301(g).

In *Douglas v. State*, 423 Md. 156 (2011), the Court of Appeals discussed in detail the pleading requirements established by § 8-301 and, in particular, a petitioner’s burden in establishing those requirements in order to merit a hearing:

This standard does not require that a trial court take impossibilities as truths. For example, if a petition asserts, as “newly discovered,” evidence that was clearly known during trial, then the evidence cannot be “newly discovered,” and the trial court may dismiss the petition without a hearing. Similarly, if a petition asserts procedural errors committed by the trial court, that is not “newly discovered evidence.” If, however, the petition alleges newly discovered evidence that “could not have been discovered in time to move for a new trial under Maryland Rule 4-331,” and “which creates a substantial or significant possibility that the result may have been different,” then it would be error to dismiss the petition merely because the petition itself did not convince the trial court without a hearing.

Id. at 179-81.

Maryland Rule 4-332, which was adopted to provide guidance in the implementation of § 8-301, elucidates further the pleading requirements for petitions for writs of actual innocence and provides, in pertinent part, that petitions must include certain averments. Md. Rule 4-332(d)(1)-(13); *See also Smallwood v. State*, 451 Md. 290, 321 (2017) (noting that Rule 4-322 provides “procedural guidance on how to properly implement Crim. Proc. § 8-301[.]”). Pertinent here is the requirement set forth in section (d)(9) of the Rule, which states that a petition “shall state...that the conviction sought to be vacated is based on an offense that the petitioner did not commit[.]” Md. Rule 4-332(d)(9).

Like § 8-301, Rule 4-332 requires a hearing to be held if one is requested and if the petition meets the procedural requirements set forth in the Rule. Md. Rule 4-332(j). Also like § 8-301, Rule 4-332 expressly permits a court to dismiss a petition without a hearing if the court “finds as a matter of law that the petition...fails to assert grounds on which relief may be granted[.]” Md. Rule 4-332(i)(1). Unlike § 8-301, however, Rule 4-332 provides a “relief valve” in lieu of an outright dismissal:

Upon consideration of the petition and the State’s response, the court may (A) dismiss the petition if it finds as a matter of law that the petition fails to comply substantially with the requirements of section (d) of this Rule or otherwise fails to assert grounds on which relief may be granted **or (B) grant leave to amend the petition to correct the deficiency.**

Md. Rule 4-332(i)(1) (emphasis added). The Rule further states that amendments to a petition “shall be freely allowed in order to do substantial justice.” Md. Code 4-332(h).

The Court of Appeals has noted that, in light of the relief valve afforded by Rule 4-332, a circuit court is not required to dismiss a petition for failing to strictly comply with the Rule's more technical pleading requirements, including the requirement that a petition include an averment of innocence. *Ebb*, 452 Md. at 653-54. Instead, "the hearing court may grant the petitioner leave to amend his or her petition to correct the deficiency pursuant to Maryland Rule 4-332(i)(1)(B) and (h) if in so doing, it would do substantial justice." *Id.* The Court has made clear, however, that, in such cases, a finding of "substantial justice" is required before a petitioner is entitled to a hearing. *Id.* In other words, a petitioner that fails to include an averment of innocence, as required by Rule 4-332(d)(9), "is not entitled to a hearing unless the circuit court determines that amending his petition would do substantial justice." *Id.*

In short, both § 8-301 and Rule 4-332 permit a court to dismiss a petition without a hearing if the court finds that the petitioner has failed to assert grounds on which relief may be granted. In the alternative, a court may, pursuant to Rule 4-332, grant leave to amend a deficient petition if the court finds that allowing the amendment would do substantial justice.

In the present case, the circuit court found that Poole's petition failed to include an averment of innocence, as required by Rule 4-332(d)(9). The court did not permit Poole to amend his petition, nor did the court make any finding as to whether doing so would (or would not) do substantial justice. Instead, the court, pursuant to § 8-301(e)(2), dismissed Poole's petition because he failed to assert grounds on which relief may be granted.

We hold that the circuit court did not err in dismissing Poole's petition. Before discussing the reasons for our holding, we first note that Poole presents a number of claims in his brief, many of which either were not raised in his petition for writ of actual innocence or have been embellished with additional facts and/or arguments. Because we are asked to determine whether Poole's petition met the pleading requirements to necessitate a hearing, we are concerned only with those claims as they appeared in Poole's petition.

Turning to our holding, we find that Poole's evidence was not newly discovered. "Newly discovered evidence" is such evidence that could not have been discovered by due diligence in time to move for a new trial within ten days after the verdict. Md. Code, Crim. Proc. § 8-301(a)(2); *See also* Md. Rule 4-331. In *Argyrou v. State*, 349 Md. 587 (1998), the Court of Appeals explained that "[t]he question of whether evidence is newly discovered has two aspects, a temporal one, *i.e.*, when was the evidence discovered?, and a predictive one, *i.e.*, when should or could it have been discovered? It is to the latter that the requirement of 'due diligence' has relevance." *Id.* at 602. The Court further explained that "'due diligence' contemplates that the defendant act reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to him or her." *Id.* at 605.

Regarding the information related to the Paige shooting, Poole's petition failed to establish that he acted reasonably and in good faith to obtain the evidence in light of the facts known to him at trial. At trial, Lester discussed the Paige shooting when the State asked him what happened upon his arrival at the gas station where Johnson was abducted:

[STATE]: All right. Did there come a time when you all ended up at Forest Park and Windsor Mill Road?

[WITNESS]: Yes.

[STATE]: And do you remember whether it was light or dark?

[WITNESS]: It was dark.

[STATE]: And what, if anything did you do there?

[WITNESS]: I, um, we – we ended up at Forest Park and Windsor Mill Road **after a robbery on Elsinore Street** –

[STATE]: Uh-huh.

[WITNESS]: - **With some guys that shot at us.**

From that testimony, a reasonable person in Poole’s position would or should have known that there had been a prior shooting on Elsinore Street. Had Poole then exercised due diligence in investigating that incident, he almost certainly would have discovered the police report related to that shooting, which was created around the time of the shooting and well before Poole’s trial. That the State may have failed to disclose the evidence prior to trial is irrelevant in determining whether Poole acted with due diligence in uncovering evidence related to an event he knew about (or should have known about) in time to move for a new trial under Rule 4-331. Because Poole failed to establish that he exercised due diligence in uncovering the evidence related to the Paige shooting, his petition failed to assert grounds on which relief could be granted as to that evidence.

Likewise, Poole failed to establish that the cell phone evidence was newly discovered. Accepting as true Poole’s claim that his cell phone and Lester’s cell phone did not have the requisite technology to communicate by way of a “walkie talkie” feature, that

“evidence” is not newly discovered because that claim could have been raised at trial. In other words, if evidence was presented at trial to show that Poole and Lester communicated by way of a “walkie talkie” feature on their respective phones, and if that technology was not possible at the time, then Poole should have exercised due diligence and made that argument then.

Assuming, *arguendo*, that Poole’s evidence was newly discovered, his petition would still lack grounds on which relief could be granted because there is little chance – much less a substantial or significant possibility – that the result may have been different had that evidence been admitted at trial. Regarding the Paige shooting, it is somewhat unclear from Poole’s petition whether he is arguing that the evidence is exculpatory because a witness places him at the scene of the Paige shooting (which would disrupt the State’s timeline of events) or because someone other than Poole was identified as having shot Paige. In either case, Poole’s argument would fail. If Poole had presented evidence that he was involved in the Paige shooting, said evidence would have corroborated Lester’s testimony, which established that the group had been involved in a shoot-out on Elsinore Avenue prior to going to the gas station and abducting Johnson. If, on the other hand, Poole presented evidence that someone other than he had shot Paige, that evidence would have been wholly irrelevant because the Paige shooting was not at issue during trial and no evidence was presented establishing that either man, Poole or Lester, had shot Paige. Thus, Poole’s claim that evidence of the Paige shooting would have somehow discredited Lester is without merit.

As for Poole's evidence that his and Lester's cell phones were incompatible in terms of a "walkie talkie" feature, that evidence was also irrelevant. Although Poole claims that the evidence would have refuted Detective Nevin's testimony that he and Lester communicated by way of a "walkie talkie" feature on their phones, the record reveals that Detective Nevin never made any such claim. The only testimony offered by Detective Nevin on that matter came when Poole's phone was introduced into evidence, at which time Detective Nevin informed the jury that Poole's phone was equipped with a feature that allowed him to speak with other phones through the push of a button, similar to a "walkie talkie." At no time did Detective Nevin state that Lester's phone was equipped with the same feature or that the two phones had communicated in such a manner.

In sum, Poole was not entitled to a hearing on his petition because he failed to assert grounds on which relief could be granted. For those reasons, permitting Poole to amend his petition to include a statement of innocence would not do substantial justice.

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