Circuit Court for Baltimore City
Case No. 196304002

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2326

September Term, 2016

TONY FORD

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: September 13, 2018

In this appeal, we consider the challenge by appellant, Tony Ford, to the denial of his petition for a writ of actual innocence by the Circuit Court for Baltimore City.[1]

On retrial following a mistrial, Ford was convicted by a jury of first degree murder and use of a handgun in the commission of a felony, and was sentenced to life in prison for the murder conviction and a concurrent 20-year term for the handgun conviction.[2] He availed himself of various post-conviction avenues seeking relief, including an application for review of sentence by a three-judge panel; direct appeal to this court, which affirmed in an unreported opinion, *Ford v. State*, No. 1614, Sept. Term, 1997 (filed June 5, 1998); a petition for post-conviction relief; and leave to appeal to this Court. Each of his efforts was unsuccessful.

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[1] Petitions for writs of actual innocence are governed by Maryland Code (2001, 2008 Repl. Vol., 2016 Supp.), Criminal Procedure Article (CP), § 8-301. For claims of newly discovered evidence, the statute provides, in relevant part:

> (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, 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.

CP § 8-301(a).

[2] Ford was also convicted of wearing, carrying and transporting a handgun, but for sentencing purposes, the conviction was merged.

On September 3, 2015, Ford filed a petition for writ of actual innocence, alleging the he had obtained new evidence that prosecutors in his jury trial withheld an exculpatory statement that incriminated another person for the murder of which he was convicted.[3] Following a hearing, the circuit court denied relief.

In his petition for writ of actual innocence, Ford contended that the State failed to disclose the statement of one Perry Nelson, who had allegedly informed police that the victim, Darius Langley, had come to him and told him who would be responsible if "something should happen" to him. Nelson's statement implicated a person other than Ford. The circuit court held a hearing on the writ, which consisted of the testimony of Ford's trial counsel and Ford, of whom just one substantive question was asked.[4]

Standard of Review

We review the denial of the petition for writ of actual innocence, after a hearing, under an abuse of discretion standard. *Smallwood v. State*, 451 Md. 290, 308-09 (2017) (citing *State v. Hunt*, 443 Md. 238, 247–48 (2015)); *Smith v. State*, 233 Md. App. 372, 411 (2017) (quoting *Smallwood*, 451 Md. at 308-09). "Under that standard, this Court 'will not disturb the circuit court's ruling, unless it is well removed from any center mark

[3] Ford's assertions that the prosecution withheld potentially exculpatory evidence from his trial counsel is not at issue in this appeal. In his Petition for Writ of Actual Innocence, Ford noted that, parallel to this proceeding, he has filed a Petition to Reopen Postconviction Proceedings based on the alleged *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] violations.

[4] Ford was asked by his counsel if he was, in any way, involved in the homicide of Langley, to which Ford replied "No, ma'am."

imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.'" *Patterson v.* State, 229 Md. App. 630, 639 (2016) (quoting *McGhie v. State*, 224 Md. App. 286, 298 (2015)). We accept the circuit court's factual findings unless clearly erroneous. *Smith*, 233 Md. App. at 412 (citing *Yonga v. State*, 221 Md. App. 45, 95 (2015)).

In order "to prevail on a petition for writ of [actual] innocence, the petitioner must produce evidence that is newly discovered, i.e., evidence that was not known to petitioner at trial." *Smith*, 233 Md. App. at 410 (citing *Hawes v. State*, 216 Md. App. 105, 134–36 (2014)). "Pursuant to CP § 8-301(a), the newly discovered evidence must satisfy two requirements: (1) it must be such that it 'could not have been discovered in time to move for a new trial under Maryland Rule 4-331'; and (2) it must create 'a substantial or significant possibility that the result may have been different.'" *Id.* (quoting CP § 8–301(a)). However, as this Court acknowledged in *Smith*, the Court of Appeals has also determined that there is a third requirement to prevail on a claim based on newly discovered evidence – that it "'speaks to' the petitioner's actual innocence[.]" *Id*. at 411. *Accord Smallwood*, 451 Md. at 323 (concluding that CP § 8–301 "requires a petitioner to allege he or she is 'actually innocent,' meaning he or she did not commit the crime, to petition for relief under the statute").

Newly Discovered Evidence

Ford bears the burden of showing that he has satisfied each of the requirements under CP § 8–301,[5] as well as a sufficient allegation that he is actually innocent of the murder of Darius Langley. *See Smallwood*, 451 Md. at 323.

Ford contends that the State withheld the statement made by Perry Nelson to one of the police detectives, wherein Nelson told the police that Langley was his good friend and that Langley had told him that if anything were to happen to him, "to get Kinard"[6] because he (Langley) had "robbed [Kinard's] boys."

The State asserts that the statement had been disclosed and so was Nelson's name and address as a potential witness. To the contrary, Ford now asserts that the statement was discovered in police department files by his current appellate counsel and was not disclosed during pre-trial discovery.

[5] CP § 8-301(g), provides that, in order to prevail on a petition for actual innocence, "[a] petitioner in a proceeding under this section has the burden of proof."

[6] In both briefs, the parties vary the spelling of the references to "Kinard" between, "Kinard," "Kinnard," and "Kennard." The references in the trial transcripts, and consistent with one of the ways Ford refers to the name in his brief, is to an individual named Kennard Grady.

The copies of the Nelson statement, produced by both the State and Ford during the hearing, appear to be a typed transcript of the police interview between Perry Nelson and Detective Homer Pennington from the Homicide Unit of the Baltimore City Police Department, wherein the reference is to "Kinard." The transcript is uncertified and is not in a standard professional format.

For support, the State offered the hearing court a date-stamped copy of its supplemental discovery disclosures that contained Nelson's name and address.[7] Further, the State offered a computer-generated JIS docket report, which includes an entry that notes:

> COMM 020797 CCY STATE'S SUPPLEMENTAL DISCLOSURE FLD

Ford argues before this Court that the circuit court's findings that the State had in fact produced the February 7, 1997 record of the State's Supplemental Discovery Disclosures, and that trial counsel had received that document, were "clearly erroneous." For support of this position, Ford refers to the hearing transcript, wherein he posits that his trial counsel had "definitively state[d] that she had never heard the name Perry Nelson." The transcript does not support Ford's assertion that his trial counsel's testimony on that point was definitive. Counsel's testimony was:

> [DEFENSE]: Okay. Now did you have a copy of that when - - in the first trial or second trial?
>
> [TRIAL COUNSEL]: No. I have no recollection of this at all.
>
> [DEFENSE]: Did you know anything about Perry Nelson?

[7] While the certificate of service certifies that the State's supplemental disclosure was mailed to defense counsel on February 7, 1997, the court's date-stamp on the document reflects that it was received by the court on February 7, 1999. Part of Ford's argument that the disclosure was not made during pretrial discovery was based on his assertion that the filing was not until 1999, according to the date-stamp, two years after his trial. The record reflects no docket entries or filings at any time in 1999. Moreover, February 7, 1999 was a Sunday. The computer-generated docket report also reflects that the State's supplemental disclosure was filed on February 7, 1997.

> [TRIAL COUNSEL]: No. There is nothing from my recollection of reading the closing, there's nothing even talking about Mr. Nelson's statement.

On cross-examination, trial counsel stated that: "There's nothing to indicate that I heard of Perry Nelson. That I have anything that says Perry Nelson." Further, that:

> [STATE]: But you don't have your file anymore, correct?
>
> [TRIAL COUNSEL]: No.
>
> [STATE]: So you don't [sic] whether you received this document in February of 1997?
>
> [TRIAL COUNSEL]: I don't know for sure.

The circuit court ruled:

> The Court finds that the written statement taken from Perry Nelson is not "newly discovered" evidence. The Petitioner has failed to prove that the State did not produce the statement in pretrial discovery…. The only evidence produced by the Petitioner regarding what was produced in pretrial discovery was testimony by trial counsel…. Petitioner's trial counsel testified that she had only seen this statement for the first time in preparation for the hearing on the Petition. Although the Court does not question the honesty of Petitioner's trial counsel, the Court finds such a recollection completely implausible…. However, the State did produce the "State's Supplemental Disclosure" … sent to Petitioner's counsel on February 7, 1997, which listed "Perry Nelson" as a State's witness as well as Nelson's address. The Court finds that the testimony of this one witness that she could recall ***not*** receiving this single statement over eighteen years ago, is insufficient for the Petitioner to meet his burden of establishing the existence of newly discovered evidence….

(Emphasis and bold type-face in original) (footnote omitted).

In *Smith v. State*, Judge Graeff observed that in *Yonga v. State, supra,* Judge Moylan explained:

> the test that the newly discovered evidence "creates a substantial or significant possibility that the result may have been different" is "simply

> the weight or level of persuasion that the newly discovered evidence of actual innocence must possess in order to justify the issuance of the writ." Putting forth a "mere bald assertion of actual innocence or some highly speculative or unsupported claim of actual innocence is not enough to justify the granting of a writ. The claim must be substantial enough for the hearing judge to conclude that there may, indeed, be a plausible case of actual innocence."

Smith, 233 Md. App. at 411, n.30 (quoting *Yonga*, 221 Md. App. at 57-58, 62).

The issue before us is not whether the State disclosed the Nelson statement, or even whether the State knew of or possessed the statement; rather, it is whether the evidence of the existence of Nelson as a possible witness was not newly discovered, or discoverable, until after the time for filing a motion for new trial has passed.

The hearing court relied on (1) court records of the State's Supplemental Disclosure relating to Nelson and (2) trial counsel's equivocal testimony to reach its conclusion that the asserted late discovery of the statement was not newly discovered evidence.

The hearing court found trial counsel's testimony to be implausible as a result of her uncertainty and lack of recall about Nelson specifically, or the trial generally. Trial counsel stated that she did not recall, or had no independent recollection of the matter she was being questioned about. In its own inquiry on the subject, the circuit court elicited testimony from counsel, who conceded:

> THE COURT: Okay. So you don't have any independent - - do you have any - - do you have independent recollection of speaking about Mr. Nelson or speaking to Mr. Nelson?

> [TRIAL COUNSEL]: No. I mean, I - - at that stage I was new at doing murders, I don't - - I don't know. I really don't have any independent recollection of it.

On those grounds, we find neither clear error nor abuse of discretion in the hearing court's conclusions or rulings, noting as well that the court made credibility assessments, weighing the evidence of documented court records against the "implausible" testimony of trial counsel, which we shall not disturb on appeal.[8]

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

[8] Having concurred in the hearing court's ruling that what Ford asserts to be newly discovered evidence is not, in fact, newly discovered, we need not address the second prong of the CP § 8-301 elements.