Circuit Court for Baltimore City
Case No. 104338030

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2412

September Term, 2017

MARVIN DORSEY

v.

STATE OF MARYLAND

Fader, C.J.,
Leahy,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: December 28, 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.

Marvin Dorsey appeals the denial, by the Circuit Court for Baltimore City, of his second petition for a writ of actual innocence. He argues that the court erred in denying his petition without holding a hearing. We affirm because we agree with the circuit court that Mr. Dorsey's petition failed to state grounds for which relief could be granted and, therefore, a hearing was not required.

BACKGROUND

In 2006, a jury convicted Mr. Dorsey of first-degree murder, use of a handgun in the commission of a crime of violence, and carrying a handgun. The court sentenced him to life imprisonment for murder and to a consecutive term of twenty years for the use of a handgun offense. (Carrying a handgun merged for sentencing purposes.) On appeal, we affirmed the judgments. *Marvin Lamont Dorsey v. State*, No. 455, September Term, 2006 (October 10, 2007), *cert. denied*, 403 Md. 305 (2008). The circuit court denied Mr. Dorsey's subsequent petition for post-conviction relief, and we denied his application for leave to appeal that decision. *Marvin Lamont Dorsey v. State*, No. 1672, September Term, 2010 (filed April 12, 2012).

As we noted in our opinion in Mr. Dorsey's direct appeal, the victim in this case, Raymond Savoy, was shot and killed at approximately 4:00 p.m. on October 27, 2004, while walking down the street. *Slip op.* at 1. "No gun was recovered and no witnesses were interviewed by police at the scene." *Id.* "Before trial, several witnesses came forward. Two witnesses identified [Mr. Dorsey] as the shooter and one witness placed [Mr. Dorsey] near the crime scene at the time of the shooting. According to witnesses, [Mr. Dorsey] came at the victim from across the street, pulled out a gun and said, 'psst[, p]stt' as he fired

the gun and then walked away." *Id.* The lead detective testified at trial that, two months before Mr. Savoy's murder, Mr. Dorsey's brother had been shot and wounded and Mr. Savoy "and his 'associates' were there when" the shooting occurred. *Id.* at 2. The State theorized that Mr. Dorsey had "shot the victim in retaliation for his brother's shooting." *Id.*[1]

Petition I

In 2011, Mr. Dorsey, proceeding as a self-represented litigant, filed a petition for writ of actual innocence ("Petition I") in which he sought a new trial based on a document he obtained several years after his trial from the Baltimore City Police Department pursuant to a public information act request. Specifically, he relied upon an internal Police Department memorandum dated November 28, 2004, containing a redacted summary of interview statements the police obtained during their investigation of Mr. Savoy's murder. The memo included the following:

> 3) [name redacted]
> M/B/39 yrs, DOB [redacted]
> [street address redacted]
> Balto. Md [zip code redacted]
>
> On 27 October 2004, Detective Bradley interviewed this witness at the homicide section and stated he works [redacted]. The witness was in the area of Perkins Homes looking for an individual who jumped bail when he heard gunshots. One person he seen [sic] leaving the area as he entered into a black Escalade with chrome wheels with Maryland tag number [redacted]. Behind the steering wheel was another black male waiting, NFD.

[1] The trial transcripts are not in the record before us.

> The individual getting inside the vehicle was holding his right hand inside the right pocket of the hoody, and described him as being a: M/B 20's 6'1 230-250 lbs, beard & mustache, medium complexion[.] Wearing a baseball cap & gray hoody.

In Petition I, Mr. Dorsey stated that, "Petitioner can only assume that trial counsel was aware of the 'redacted witness statement' that Petitioner ultimately received on June 3, 2009 from the BCPD in reference to the MPIA." He further asserted that his defense counsel's failure to "investigate and call redacted witness at trial constituted deficient and incompetent performance because it would have put counsel in a better position to find the real 'culprit' of the homicide[.]" But he also suggested that the State had not provided the memo to the defense during trial and hence committed a *Brady* violation by failing to "turn over exculpatory evidence which could have exonerated" him. In conclusion, he maintained that the "redacted witness statement" "shed light on the real suspects description and vehicle," which did not match his physical description, thus justifying a new trial.

By order dated July 22, 2011, the circuit court denied relief, finding that Mr. Dorsey's "Petition fails to state a claim or assert grounds for which relief may be granted[.]" Mr. Dorsey did not appeal that decision.

Petition II

Six years later, Mr. Dorsey filed a second petition for a writ of actual innocence based on the same Police Department memorandum he relied upon in Petition I, but this time without the identifying information redacted. He asserted that it was "newly

discovered evidence" because it had been withheld by the State and the unredacted version had only been discovered in 2017 pursuant to a second public information act request.

Mr. Dorsey based his claim of innocence on two witness statements in the memorandum: (1) William Mossman, whose redacted statement is set forth above, and (2) Troy Douglas. Unredacted, Mr. Mossman's statement provided his full name, noted that he "works at 'Four Aces Bail bond,'" and provided the tag number of the vehicle that he observed the black male enter after he had heard gun shots.[2] Mr. Dorsey attached a copy of his Petition I as an exhibit to Petition II. And he requested a hearing on the petition. The State did not file a response to Petition II (nor, it appears, to Petition I). The court denied relief, without a hearing, finding in pertinent part, "that the statement of William Mossman is not newly discovered as the Petitioner stated in a previous Petition for Writ of Actual Innocence attached to the present Petition as *Exhibit* 1, that 'Petitioner can only assume that trial counsel was aware of the 'redacted witness statement' [Mossman statement] prior to trial[.]" (Brackets [ ] in the original.) The court concluded that Petition II "fails to assert grounds on which relief may be granted[.]"

DISCUSSION

On appeal, Mr. Dorsey focuses solely on his claim that the William Mossman statement was "newly discovered evidence" and argues that the court erred in denying

[2] Troy Douglas's statement indicated that, about the time of the shooting, he was at Mr. Dorsey's mother's house playing a video game and he "never saw Marvin nor was he at the house when the shooting occurred on Caroline Street and did not have any information to provide to this homicide investigation." The court found this was not "newly discovered evidence." Mr. Dorsey does not challenge that finding in this appeal.

relief without holding a hearing on that claim. We hold that the court correctly determined that the Mr. Mossman statement was "not newly discovered evidence" and, as such, did not err in denying relief without a hearing.

Certain convicted persons may file a petition for writ of actual innocence "based on newly discovered evidence." *See* Md. Code Ann., Crim. Proc. § 8-30; Md. Rule 4-332. "Actual innocence" means that "the defendant did not commit the crime or offense for which he or she was convicted." *Smallwood v. State,* 451 Md. 290, 313 (2017).

In pertinent part, the statute provides:

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

Crim. Proc. § 8-301.

"Thus, to prevail on a petition for writ of innocence, the petitioner must produce evidence that is newly discovered, i.e., evidence that was not known to petitioner at trial." *Smith v. State,* 233 Md. App. 372, 410 (2017). Moreover, "[t]o qualify as 'newly discovered,' evidence must not have been discovered, or been discoverable by the exercise

of due diligence," in time to move for a new trial. *Argyrou v. State*, 349 Md. 587, 600-601 (1998); *see also* Rule 4-332(d)(6). As this Court explained in *Smith*, the

> requirement, that the evidence could not with due diligence, have been discovered in time to move for a new trial, is a "threshold question." *Argyrou*, 349 Md. at 604. *Accord Jackson v. State*, 216 Md. App. 347, 364, *cert. denied*, 438 Md. 740 (2014). "[U]ntil there is a finding of newly discovered evidence that could not have been discovered by due diligence, no relief is available, 'no matter how compelling the cry of outraged justice may be.'" *Argyrou*, 349 Md. at 602 (quoting *Love v. State*, 95 Md. App. 420, 432 (1993)).

233 Md. App. at 416.

A court "may dismiss a petition [for writ of actual innocence] without a hearing if the court finds that the petition fails to assert grounds on which relief may be granted." Crim. Proc. § 8-301(e)(2). *See also* Rule 4-332(i)(1) ("the court may [ ] 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[.]"). "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).

Here, the police memorandum is dated November 28, 2004 – about one month after the shooting and some 14 months prior to Mr. Dorsey's trial. Although Mr. Dorsey made the bald assertion that the State kept the memorandum from the defense, he also stated in Petition I, which he attached as an exhibit to Petition II, that he "could only assume that trial counsel was aware of the 'redacted witness statement' prior to trial[.]" But in any event, even if the State did not turn over the memorandum to the defense in pre-trial

discovery, it could have been discovered through the exercise of due diligence prior to trial or in time to move for a new trial and Mr. Dorsey did not allege in either Petition I or II that any such efforts had been undertaken during that time period.

Moreover, without more, we are not persuaded that Mr. Mossman's statement "creates a substantial or significant possibility that the result [of Mr. Dorsey's trial] may have been different." Mr. Mossman simply related that he had heard gun shots and saw an individual get into a waiting vehicle, while "holding his right hand inside the right pocket" of his hoody, and then leave the area. Although Mr. Dorsey would like us to believe that the person Mr. Mossman observed had shot the victim, Mr. Mossman did not claim to have witnessed the shooting, nor did he see a gun. As we noted in our opinion affirming his convictions on direct appeal, at trial the State established that Mr. Dorsey had a motive for the murder and "[t]wo witnesses identified [Mr. Dorsey] as the shooter and one witness placed [Mr. Dorsey] near the crime scene at the time of the shooting."

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