Circuit Court for Baltimore City
Case No. 190302030, 32, 34

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2555

September Term, 2016

TIMOTHY HATCHETT

v.

STATE OF MARYLAND

Woodward, C.J.,
Eyler, Deborah S.,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 8, 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 1991, a jury in the Circuit Court for Baltimore City convicted appellant, Timothy Earl Hatchett, and his co-defendant, Phillip Alvin Jones, Jr., of attempted first-degree murder, use of a handgun in the commission of a crime of violence, and related offenses. Both were sentenced to life imprisonment for the attempted murder, and to a consecutive twenty-year term for the handgun offense. This Court affirmed the judgments. *Timothy Earl Hatchett and Phillip Alvin Jones, Jr. v. State of Maryland*, No. 820, September Term, 1991 (filed March 20, 1992).

In 2016, Hatchett filed a petition for writ of actual innocence in which he alleged that he had obtained "newly discovered evidence" that Joseph Kopera, the firearms expert who testified at his trial, "was an imposter who lied relentlessly and openly about his credentials to the jury" and that Mr. Kopera had "manufactured his testimony to bolster the State's case in chief," specifically the testimony of the State's eye-witness, Ginger Forrister. The circuit court dismissed his petition, without a hearing. Hatchett appeals that decision. For the reasons to be discussed, we affirm.

BACKGROUND

The Trial

As noted in our opinion affirming Hatchett's convictions, Ms. Forrister, an eye-witness to the crime, testified that Hatchett and Jones "walked up to the victim, Gerald Brown, and started 'shooting him.'" *Slip Op.* at 2.[1] Ms. Forrister identified Hatchett and

[1] The complete trial transcripts are not in the Record before us. In his petition for writ of actual innocence filed in the circuit court, Hatchett included excerpts from Ms. Forrister's trial testimony indicating that she testified that both Hatchett and Jones had (continued)

Brown, "stating that she had known them from the neighborhood." *Id.* "The victim testified that he did not see who shot him, but that he felt as if he had been shot 'from both sides.'" *Id.*

Joseph Kopera testified for the State as an expert in "firearms identification." He testified that he had examined "11 [spent] cartridge cases, six bullet specimens, and one metal fragment" that the police had recovered from the shooting scene. No weapon was recovered. His testimony included the following:

> [PROSECUTOR]: Now, sir, how did you go about making a comparison of these particular items that you had?
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> KOPERA: First I conducted an examination of the 11 spent cartridge cases that were turned in to me . . . . These 11 cartridge cases were both physically and microscopically examined and found, first of all, to be 11 9 mm Lugar type cartridge casings that had been fired. All 11 cartridge casings bore the head stamp or were manufactured by the Winchester Western Corporation.
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> **Cross comparison examinations under the microscope revealed to me that these 11 cartridges were fired in and ejected from the same weapon**.
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> The next examination pertained to the bullet specimens.
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> Out of the six bullet specimens, to break it down, there were only three because of the condition – there were only three that I was able to ascertain were fired definitely from a 9 mm weapon.

(continued)
guns in their hands and "they both shot" at the victim. When asked how many shots she "heard fired," Ms. Forrister replied: "It was over 10 shots."

(Emphasis added).

Kopera's cross-examination included the following:

> [DEFENSE COUNSEL]: Now in this, based upon the evidence that was submitted to you **you can't determine how many guns were used in this incident, can you?**
>
> KOPERA: **No.** Eleven cartridge cases were fired from one weapon, and of the three bullets which I could ascertain were 9 mm, only one of those bullets was good enough to compare to a gun.
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> ***
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> [DEFENSE COUNSEL]: Right. Now, you did, though, examine all 11 cartridges - -
>
> KOPERA: Cartridge casings.
>
> [DEFENSE COUNSEL]: Cartridge casings. You did examine 11 cartridge cases that were recovered from the scene. Is that correct?
>
> KOPERA: According to what I have here, 11 spent cartridge cases recovered from the street at crime scene under property 135692.
>
> [DEFENSE COUNSEL]: Okay. **And you found, based upon your scientific examination, that every one, all 11 of those cartridges, were fired from the exact same weapon.**
>
> KOPERA: Cartridge casings, **yes,** sir.
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> [DEFENSE COUNSEL]: And of the six bullets that you got, or partial bullets that you got, all six of those were 9 mm.
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> KOPERA: No, sir. Three of the six were classified as bullet fragments, which I could not distinguish as being 9 mm or any other caliber. I said that they were jackets of large caliber. However, the other three were found to be of a 9 mm caliber.
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[DEFENSE COUNSEL]: Based on everything you know in this case, **is there anything to indicate to you that there was anything more than one weapon used in this case?**

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KOPERA: **There is nothing to suggest either way in this particular case.**

[DEFENSE COUNSEL]: **Well, the 11 cartridges certainly suggest one weapon, don't they?**

KOPERA: **On the cartridge casings, yes, sir. But from the bullet evidence, I cannot ascertain strictly whether one gun or maybe several guns**. – six different guns, based on that evidence.

[DEFENSE COUNSEL]: There's certainly nothing in the physical evidence, nothing your examination, that affirmatively points to a second weapon, is there?

KOPERA: Nothing in the physical evidence as far as the cartridge casings. Cartridge casings which I examined, just the cartridge casings. And I'm getting at that you cannot compare or not say that bullet - - you cannot compare bullets or bullet fragments to cartridge casings. **There's no physical examination saying that these bullets came from these cartridge casings**.

However, on the first half we have all 11 cartridge casings that were fired from one gun. We have six bullet fragments that could have been fired from six guns. But because of the condition of those fragments or those bullets, not being able to be compared to each other, I cannot negate the fact that they were fired from one gun or six guns.

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[DEFENSE COUNSEL]: So, rifling characteristics of at least three of the bullets are identical.

KOPERA: That is correct. Well, they are what we call general class characteristics, identical. I cannot say, however, counsel, that those three bullets were fired from the same weapon.

> [DEFENSE COUNSEL]: Why can't you?
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> KOPERA: Because two of the bullets were in such a condition that microscopically they could not be compared to each other.
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> ***
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> [DEFENSE COUNSEL]: **And there's nothing that affirmatively points to a second weapon, is there?**
>
> KOPERA: **Just as there is nothing affirmatively that would point to a one-weapon situation.**

(Emphasis added.)

Petition for Writ of Actual Innocence

As is well known, a March 9, 2007 newspaper article revealed that Mr. Kopera, who had worked as a firearms examiner for decades and had testified in hundreds of criminal trials in Maryland as a firearm expert for the State, had falsely testified in those trials regarding his academic credentials. Shortly thereafter, the disgraced Mr. Kopera took his own life.

As noted, in 2016, Hatchett filed a petition for writ of actual innocence pursuant to Md. Code (2008 Repl. Vol., 2016 Supp.) Criminal Procedure Article, § 8-301 and Md. Rule 4-332. Section 8-301 of the Criminal Procedure Article allows certain convicted persons to petition for a writ of actual innocence based on "newly discovered evidence." The statute provides, in pertinent part, that:

> (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
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> (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.
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> (g) A petitioner in a proceeding under this section has the burden of proof.

"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) (citing *Hawes v. State*, 216 Md. App. 105, 134-136 (2014)). 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) (the petition for a writ of actual innocence must allege that it "is based on newly discovered evidence which, with due diligence, could not have been discovered in time to move for a new trial pursuant to Rule 4-331.")

As grounds for his petition, Hatchett asserted that Mr. Kopera "was an imposter who lied relentlessly and openly about his credentials to the jury" and that Mr. Kopera had "manufactured his testimony to bolster the State's case in chief," specifically Ms. Forrister's testimony that she witnessed Hatchett and his co-defendant approach the victim and fire shots at him. While acknowledging that Mr. Kopera testified that the recovered spent cartridge cases were all fired from the same weapon, he maintained, in essence, that Mr. Kopera's testimony regarding the recovered bullets and bullet fragments "suggested" that two guns were used in the crime. Given that Mr. Kopera had

testified falsely regarding his academic credentials, Hatchett baldly asserted that he, Hatchett, "could only assume that Mr. Kopera falsified and fraudulently testified [about his ballistics examination and findings] in order to impress upon the [ ] jury the untrue accusation from the State, that petitioner conspired and participated in the attempted murder" of the victim.[2]

Circuit Court Ruling

The circuit court dismissed Hatchett's petition, without a hearing. The court's order included the following findings and conclusions:

> FOUND that Joseph Kopera testified at Petitioner's trial that the eleven cartridge casings found at the crime scene were all shot from the same firearm and, further, that he could not determine whether the six bullet fragments recovered from the scene were either shot from the same firearm as the cartridge casings or were shot from one or more different firearms, [ ]; and it is further
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> FOUND that, assuming the evidence regarding Kopera's qualifications is newly discovered, "Kopera's testimony was not critical to the case," *McGhie v. State*, 224 Md. App. 286, 305 (2015), *aff'd* 449 Md. 494 (2016), as he failed to tie the Petitioner to any firearm evidence and failed to establish whether more than one firearm was used in the incident; and it is further
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> ***
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> FOUND that, "assuming the facts in the light most favorable to the Petitioner and accepting all reasonable inferences that can be drawn from the Petition," and "constru[ing] liberally filings by *pro se* inmates, *Douglas v. State*, 423 Md. 156, 180, 182 (2011), the Petitioner has failed to set forth how the alleged newly discovered evidence "creates a substantial or

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[2] In an amendment to his petition, Hatchett also asserted that Ms. Forrister had perjured herself before the grand jury and at trial. The circuit court found no merit to that claim, and Hatchett did not pursue it on appeal.

> significant possibility that the result may have been different, as that standard has been judicially determined"[.]

For these reasons, the court concluded that Hatchett's petition "fail[ed] to assert grounds on which relief may be granted," and accordingly dismissed it.

DISCUSSION

In this appeal, Hatchett asserts that the circuit court erred in dismissing his petition without a hearing. The court, however, "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[.]")). "Generally, the standard of review when appellate courts consider the legal sufficiency of a petition for writ of actual innocence is *de novo*." *Smallwood v. State,* 451 Md. 290, 308 (2017).

As grounds for his petition, Hatchett asserted that Mr. Kopera "was an imposter who lied relentlessly and openly about his credentials to the jury" and that Mr. Kopera had "manufactured his testimony to bolster the State's case in chief," specifically Ms. Forrister's testimony that she witnessed Hatchett and his co-defendant approach the victim and fire shots at him. Hatchett, however, failed to support his claim that Mr. Kopera had "manufactured his testimony to bolster the State's case" with any evidence.

On appeal, Hatchett argues that Mr. Kopera's "perjured testimony did not stop at his credentials/educational background," but "carried over and he lied on the merits of the

bullet fragments." He maintains that, despite his testimony to the contrary, Mr. Kopera "should have been able to compare [the bullet or bullet fragments] to each other," but instead "fabricated / sandbagged his testimony to further support the State's theory of two guns being used." To support that claim, Hatchett included an affidavit, in the appendix to his reply brief filed in this Court, of a forensic firearms and ballistics expert *filed in an unrelated case* involving *an unrelated defendant* challenging Mr. Kopera's testimony about bullet comparisons in that unrelated case. It appears that this affidavit, prepared in 2008, was not submitted to the circuit court. But in any event, the affidavit is based on Mr. Kopera's testimony in a different case involving his examination of six bullets, whereas here Mr. Kopera's testimony was based on his examination of three bullets (only one of which "was good enough to compare to a gun") and fragments from three other bullets. In short, we fail to perceive the relevance of the affidavit to Hatchett's case. Hatchett's assertion that, because Mr. Kopera lied about his academic credentials, he must have also lied about the bullet comparisons in his case, is nothing more than mere speculation.

At trial, Mr. Kopera clearly and repeatedly testified that, in his opinion, the eleven spent cartridge cases were fired from the same weapon. When asked whether there was "anything to indicate . . . that there was anything more than one weapon used in this case," Mr. Kopera replied: "There is nothing to suggest either way in this particular case." While unequivocally stating that the cartridge casings were all fired from the same weapon, he testified that there was "no physical examination saying that [the recovered bullets and bullet fragments] came from these cartridge casings." In short, his opinion

was that the "11 cartridge casings [ ] were fired from one gun," but due to their condition, the six bullets or bullet fragments that were recovered could not be adequately compared and, therefore, he could not say "affirmatively" that the bullets or the bullet fragments were or were not fired from the same weapon as the spent cartridge casings. In other words, Mr. Kopera could not rule out *the possibility* that more than one weapon was used in this crime. Clearly then, Mr. Kopera's testimony did not "bolster" the testimony of Ms. Forrister. In fact, if anything, his testimony tended to support the defense's theory that only a single weapon was used to shoot the victim. Again, Ms. Forrister testified that she heard "over 10 shots" fired; Mr. Kopera testified that the eleven spent cartridge casings were fired from the same gun.

Even if we assume that the bullets and bullet fragments recovered in this case could have been compared and would have shown that they were fired from the same gun that fired the spent cartridge casings, such a finding would not, without more, exculpate Hatchett or create a substantial or significant possibility that the result of the trial may have been different. Ms. Forrister testified that she saw both Hatchet and his co-defendant, with guns in their hands, walk up to and shoot at the victim. And the victim testified that he felt as if he had been shot "from both sides." Thus, had the jury known that Kopera had lied about his academic credentials and, therefore, would have discounted his testimony in its entirety, the jury still had the evidence presented by Ms. Forrister and the victim. Notably, Mr. Kopera's testimony did not link any weapon (none were recovered), spent cartridge casing, bullet, or bullet fragment to Hatchett.

For the aforementioned reasons, we hold that the circuit court did not err in concluding that the Hatchett had failed to assert grounds upon which relief could be granted and, thus, the court did not err in dismissing his petition without a hearing.

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