Circuit Court for Baltimore City
Case No. 107164029

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2559

September Term, 2016

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TRENDON WASHINGTON

v.

STATE OF MARYLAND

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Woodward, C.J.,
Kehoe,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

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PER CURIAM

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Filed: May 8, 2018

Trendon Washington, appellant, appeals from the denial of his petition for a writ of actual innocence ("petition") in the Circuit Court for Baltimore City. He contends that the circuit court applied an incorrect standard and improperly placed the burden on him to demonstrate due diligence in requesting DNA evidence from the State. Assuming *arguendo* that the court did apply an incorrect standard, we conclude that the court still properly denied his petition because the evidence he maintains was newly discovered is not evidence of his actual innocence. Accordingly, we affirm.

On January 21, 2009, a jury convicted appellant of conspiracy to murder. The court subsequently sentenced appellant to life in prison. We affirmed that conviction in an unreported opinion, *Washington v. State*, No. 461, Sept. Term 2009 (filed June 30, 2010), from which we recite the underlying facts of appellant's case for contextual purposes:

> Ricardo Paige, also known as "Pop" or "Poppy," was found dead in his home, at 502 East 43rd Street in Baltimore City on March 20, 2007. He had been shot six times. Two shell casings were recovered from the crime scene. A firearms examiner testified that the two shell casings were fired from the handgun seized from appellant [Washington] at the time of his arrest.
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> Jamel Fulton, who pled guilty on charges of conspiracy to murder Paige, testified against appellant. He related that he and appellant were drug dealers in the area of the 500 block of East 43rd Street. According to Fulton, appellant kept a stash house at 508 East 43rd Street. Fulton recalled that, two days before Paige was killed, appellant, a man named Kevin Armstead and Fulton left appellant's stash house to purchase vials, only to return to find that appellant's drugs had been stolen. Appellant believed that Paige was responsible for the theft and he accused Paige, who denied the accusation. That day, appellant allegedly told Fulton that he had to "do something" with Paige because he had stolen from him. Fulton told appellant that he should "do it in the dark" and "do it up." Two days later, according to Fulton, he

> asked appellant what happened to Paige and appellant said, "I took care of him," meaning that he had killed him.
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> Latonya Odom, Fulton's girlfriend, testified that she formerly lived at 500 East 43rd Street when Paige and his family lived at 502 East 43rd Street. In February 2007, Paige's family members moved away while he remained. She testified that, approximately two weeks before March 18, 2007, she observed police lights outside on the street and, the next day, she overheard a conversation between appellant, Fulton and Armstead, during which appellant blamed Paige for calling the police, causing their stash house to be raided. She testified that she overheard appellant say that he was "going to get" Paige.
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> Appellant's identical twin brother, Tremaine Washington[], was also called as a witness for the State, but he refused to answer most of the State's questions. Accordingly, the State called Detective James Lloyd, who testified that he interviewed Tremaine on May 16, 2007 and November 20, 2008. Thereafter, two tape recordings of the police interviews from those dates were entered into evidence, over appellant's objection. The tape recording of the May 16, 2007 interview contained statements from Tremaine indicating that appellant had told him that Paige had stolen from him and that he shot him multiple times. The tape of the November 20, 2008 interview revealed that appellant had admitted to Tremaine that he shot Paige with a .45 caliber weapon because he had stolen drugs from his stash house.

*Id.* at slip op. 1-3.

Relative to this appeal, on October 7, 2015, appellant filed a petition for a writ of actual innocence, contending that two categories of newly discovered evidence created a substantial possibility of a different result at trial.[1] Specifically, appellant maintains that the results of serological and DNA testing and two police reports constituted newly

[1] We note that appellant had previously filed a petition for post-conviction relief in August 2011, which was eventually denied, as well as a separate petition for post-conviction DNA testing, which was also denied. *See Washington v. State*, 450 Md. 319 (2016).

discovered evidence. Following a September 14, 2016 hearing, the circuit court determined that appellant had not exhibited due diligence in inquiring as to the results of DNA testing, rendering the results not newly discovered evidence. Additionally, the court concluded that the police reports were also not newly discovered evidence. [2]

Appellant contends that the circuit court applied an improper standard. Appellant maintains that the DNA test results were in the exclusive control of the State, and the circuit court's due diligence standard places a "limitless standard . . . that goes far beyond any justification courts have relied upon to excuse prosecutors for failing to provide the defense with facts or evidence that defendants or defense counsel could have obtained themselves." He argues that he adequately pled the requirements for a petition of a writ of actual innocence, pursuant to Maryland Code (2001, 2008 Repl. Vol., 2016 Suppl.), Criminal Procedure Article ("Crim. Pro."), § 8-301, and he urges this Court to remand to the circuit court for a hearing as to the materiality of the DNA evidence.[3] We review a circuit court's decision as to a petition for a writ of actual innocence for abuse of discretion. *See Smallwood v. State*, 451 Md. 290, 308-09 (2017).

[2] Appellant states that he is not contesting the circuit court's decision as to the police reports.

[3] Crim. Pro. § 8-301(a) provides that a person convicted of a crime may file a petition for a writ of actual innocence "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."

The Court of Appeals has held that in order to prevail on a petition for a writ of actual innocence, the petitioner must demonstrate "actual innocence," meaning that "a defendant is not guilty of a crime or offense in fact. In other words, 'actual innocence' means the defendant did not commit the crime or offense for which he or she was convicted." *Id.* at 313. Stated another way, "'[a]ctual innocence means factual innocence, not mere legal insufficiency.'" *Yonga v. State*, 221 Md. App. 45, 57 (2015) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)), *aff'd*, 446 Md. 183 (2016).

The DNA and serological test results, even if newly discovered, do not demonstrate actual innocence. The State tested swabs taken from a pink rubber ball found near Paige's body, the handle and blade of a knife, and also from underneath Paige's fingernails. Appellant contends that the results as to the ball and Paige's right fingernail clippings call into question his conviction because they show a DNA profile consistent with Paige and an unknown contributor. Appellant maintains that this is significant because his DNA was known and compared in the testing. Accordingly, appellant argues, someone else shot Paige.

The DNA and serological testing results do not point to appellant's actual innocence of the offense for which he was convicted. Appellant was not convicted of shooting Paige; rather, he was convicted of conspiracy to murder Paige. The DNA results, even if newly discovered, do not call into question his conviction for that offense, much less point to his

innocence of that crime. Accordingly, we do not discern an abuse of discretion in the court's denial of the petition.

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