Circuit Court for Baltimore City
Case No: 109072036

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2882

September Term, 2018

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DEMETRY JENKINS

v.

STATE OF MARYLAND

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Arthur,
Gould,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

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PER CURIAM

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Filed: September 6, 2019

*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 2010, Demetry Jenkins pleaded guilty to first-degree murder and use of a handgun in the commission of a crime of violence and was sentenced to life imprisonment, all but 40 years suspended, to be followed by a five-year term of probation upon release. He did not seek leave to appeal.

In 2018, Mr. Jenkins filed a petition for writ of actual innocence. He did not dispute the fact that he had shot the victim, but he claimed that a recently obtained copy of the medical examiner's report supported his position that he had shot the victim in the front of the head. Specifically, he relied on the medical examiner's finding that the "wound track traveled from the decedent's front to back, left to right, and slightly downward."[1] In contrast, he pointed out that, in its proffer of facts in support of the plea, the prosecutor stated that Mr. Jenkins had shot the victim "once in the *back* of the head." (Emphasis added.)[2] He claimed that his assigned public defender had refused to share discovery

[1] The report summarized the medical examiner's opinion that the victim died from a "gunshot wound of head." The report noted that the bullet entered on the "left side of the head" and exited "the right occipital scalp." "Autopsy revealed a close range (soot and stippling) gunshot wound to the left side of the head[.]" The examiner also noted "[a]dditional injuries included abrasions of the face." The report described the location of the entrance wound as "3¼" below the top of the head and 6 ¾" left of the anterior midline." A drawing included in the report showed the "ENT" (entrance wound) on the left side of the head, to the rear of the left ear. The examiner concluded that the "manner of death" was a "homicide."

[2] In its proffer of facts the State related that the police responded to a "shooting call" and found the victim "laying on the sidewalk in front of the address, shot once in the head." Four witnesses would have testified to an argument between Mr. Jenkins and his girlfriend's daughter (Ryan Clark) about the victim (Ms. Clark's boyfriend) after the victim was discovered in Mr. Jenkins's home in the middle of the night. The witness(es) would have testified that Mr. Jenkins "pulled out a handgun, started waiving it around." The "argument continued" and as the victim "was on his way out the front door to get into the

(continued)

materials with him, including the medical examiner's report, and that he was unable to obtain the document in time to move for a new trial. He maintained that the medical examiner's report supported his position that he shot the victim in self-defense when the victim refused to leave his home and "advanced upon" him in a manner indicating an intent "to cause him harm" because the report confirmed that the victim was shot "from the front." Thus, he asserted that the murder charge should have been reduced to "a lesser degree, such as manslaughter, or at the most, second degree murder."

The circuit court concluded that Mr. Jenkins had failed to assert grounds on which relief may be granted and denied the petition for writ of actual innocence without a hearing. Mr. Jenkins appeals that decision. Because we agree that Mr. Jenkins is not entitled to relief, we affirm.

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." Md. Code Ann., Crim. Proc. § 8-301(e)(2). *See also* Rule 4-332(i)(1). "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).

taxi he had requested," Mr. Jenkins "said to Ms. Clark, you're going to respect me now" and then "shot [the victim] once in the back of the head." The witness(es) would have further testified that the victim "fell forward onto the sidewalk which is how the police found him." Finally, a physician who conducted the autopsy would have testified that the "cause of death was a gunshot wound to the head." The State then moved the autopsy report into evidence, without objection. The defense had no "additions or corrections" to the State's proffer and the trial court found that it supported a conviction for first-degree murder.

When filing a petition for writ of actual innocence, the petitioner must, among other things, state:

> 6.) that the request for relief 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;
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> 7.) a description of the newly discovered evidence, how and when it was discovered, why it could not have been discovered earlier . . . [;]
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> 8.) that the newly discovered evidence creates a substantial or significant possibility, as that standard has been judicially determined, that the result may have been different, and the basis for that statement;
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> 9.) that the conviction sought to be vacated is based on an offense that the petitioner did not commit.

Rule 4-322(d).

"To 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, 600-01 (1998); *see also* Rule 4-332(d)(6). As this Court explained in *Smith v. State,* 233 Md. App. 372, 416 (2017), 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.'" (quoting *Argyrou*, 349 Md. at 604). And "'until 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.'" *Id.* (quoting *Argyrou,* 349 Md. at 602 (further quotation omitted)).

Here, the medical examiner's report that Mr. Jenkins relies on was admitted into evidence at his plea hearing. Hence, it was not newly discovered evidence and for that

reason alone the court properly denied Mr. Jenkins's petition. Moreover, the report does not create a substantial or significant possibility that result of his case would have been different. The report supports the State's proffer that the victim was shot in the head and the death was a homicide. The fact that the medical examiner found that the victim was shot in the left side of the head (and not the back of the head) does not call into question Mr. Jenkins's plea to first-degree murder – a plea that the trial court found Mr. Jenkins had entered knowingly and voluntarily and found was supported by the State's proffer of facts, which relied not only on the proffered testimony of the physician who had conducted the autopsy (and his report), but also the testimony of eye-witnesses.

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