Circuit Court for Baltimore City
Case No: 207094012

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3432

September Term, 2018

MARK HANDY

v.

STATE OF MARYLAND

Kehoe,
Gould,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: January 2, 2020

By order dated January 16, 2019, the Circuit Court for Baltimore City denied a petition for writ of actual innocence filed by the appellant, Mark Gregory Handy. He appeals that ruling and maintains that the circuit court erred in denying the petition without first holding a hearing. Because the "newly discovered evidence" upon which the appellant based his petition was available to the defense at trial and, moreover, was not exculpatory, the circuit court did not err in denying relief without a hearing. Accordingly, we shall affirm the judgment.

BACKGROUND

A. Trial

Following a trial in February 2008, a jury convicted the appellant of attempted first-degree murder and related offenses based on an October 3, 2006 incident in which Rodney Bell was stabbed multiple times in his abdomen. The weapon, described at trial as a knife, was never recovered.

At the time of the incident, Mr. Bell was living with his girlfriend, Tyra Brown, whom he had met in June of that year. The appellant and Ms. Brown had met some years previous to the incident and at the time were in a dispute regarding a cell phone bill. As a result of the stabbing, Mr. Bell spent over a month in the hospital and required multiple surgeries to repair the wounds. Mr. Bell and Ms. Brown became engaged in January 2007 and married that March.

The appellant did not testify at trial, but his defense was that Ms. Brown had stabbed Mr. Bell with a machete that she kept in their bedroom. In fact, the defense elicited evidence that in April 2007 the police were called to the Bell/Brown home and observed

Ms. Brown with a machete in her hand threatening to kill Mr. Bell. Ms. Brown denied stabbing Mr. Bell on October 6, 2006 and testified that the appellant had done it. Mr. Bell also testified that it was the appellant who had stabbed him.

The court sentenced appellant to a total term of life imprisonment. On appeal, this Court held that the convictions for attempted second-degree and second-degree assault should have merged into the convictions for attempted first-degree murder and first-degree assault, respectively, but otherwise affirmed the judgments. *Handy v. State*, No. 456, September Term, 2008 (filed April 14, 2010).

B. Post-Conviction

In 2012, the appellant filed a petition for post-conviction relief in which he alleged, among other things, that his trial counsel had rendered ineffective assistance of counsel for failing to present evidence or argument to support his "identity defense," that is, that Ms. Brown had stabbed Mr. Bell. In support of that argument, he produced an October 23, 2007 University of Maryland Medical System "report" by Thorsten Fleiter, M.D. noting an examination of Mr. Bell on that date, which stated: "Machete injury last year with multiple surgeries." He also produced a December 27, 2006 "outpatient psychotherapy progress note," authored by Nia Sipp, M.D. and an affidavit from Dr. Sipp who had treated Mr. Bell on that date. The note read as follows:

> Pt [Patient] is a 45 year old AAM [African American Male] with PMHx [Past Medical History] of multiple stab wounds to abdomen, arm, resulting in complicated surgery & recovery. Pt [Patient] stabbed by GF [girlfriend] ex fiancé, who remains free. Pt [Patient] attending session with GF [girlfriend] of 6 months who also has PTSD [Post Traumatic Stress Disorder] symptoms of anger, irritability, isolation, fear, nightmares, recurrent thought and guilt.

> Pt [Patient] feels he is improving and is excited about pending surgery to close his abdomen in upcoming week. Positive Homicidal Ideation without plan - - Pt [Patient] angry towards person who stabbed him.

This note was handwritten on December 27, 2006 and in Dr. Sipp's subsequent affidavit she stated that she had written the note and provided a typewritten version, adding the information in the brackets. The appellant interpreted this note as stating that Mr. Bell had told Dr. Sipp that Ms. Brown, his "girlfriend, ex fiancé," was the person who had stabbed him.

The appellant claimed that these two medical records supported his "identity defense" and exculpated him; and he alleged prosecutorial misconduct based on the State's failure to provide these documents to the defense. In its Statement of Reasons and Order of the Court denying his petition for post-conviction relief, however, the post-conviction court stated: "At the hearing [ ] it became apparent that the records had in fact been disclosed to the defense and the defense failed to utilize them." *Statement of Reasons and Order of the Court*, dated August 19, 2013, p. 1, n 1.[1]

In then addressing whether defense counsel was ineffective for failing to use these records at trial, the post-conviction court summarized Dr. Sipp's testimony, given by telephone at a December 17, 2012 post-conviction hearing, "that although she had no independent recollection of the December 27, 2006 meeting [with Rodney Bell], she believed her notes indicate that Rodney's girlfriend, Tyra [Brown], was present at the session." *Id.* p. 11. (The post-conviction court noted that Mr. Bell had testified at an earlier

[1] There are no transcripts of the post-conviction hearings in the record before us.

post-conviction hearing that Ms. Brown "was at all of his therapy sessions." *Id.* p. 11, n. 4). The post-conviction court stated that "Dr. Sipp testified that her notes indicated that Rodney [Bell] was angry at the person who stabbed him, and that if the person who stabbed him was the person in the room, Dr. Sipp would have referred directly to the person in the room, rather than to 'GF ex fiancé' to describe the individual." *Id.* p. 11. In short, the post-conviction court was "not persuaded that the use of this note or of Dr. Sipp's testimony would have [had] a significant probability of altering the outcome of the trial." *Id.*

The post-conviction court also rejected the allegation that defense counsel's failure to utilize Dr. Fleiter's October 23, 2007 medical report referring to Mr. Bell's condition as a "machete injury" caused any prejudice to the appellant. *Id.* pp. 11-12. The post-conviction court noted that the jury at the appellant's trial was made "aware that Rodney [Bell] had previously identified the weapon he was stabbed with as a machete, and the jury was clearly aware that Tyra [Brown] had a machete that she kept in the home." *Id.* p. 12.[2]

C. Petition for Writ of Actual Innocence

In December 2018, the appellant filed his petition for writ of actual innocence and relied on Dr. Fleiter's October 23, 2007 medical report and Dr. Sipp's December 27, 2006 progress note as his "newly discovered evidence" supporting his claim of innocence. He asserted that these documents "were not disclosed to trial counsel" and "became available long after the trial." He claimed that the records "were only discovered by chance" when,

[2] Mr. Handy filed an application for leave to appeal the court's denial of his petition for post-conviction relief, which this Court denied.

in 2010, he received them in response to a request under the Maryland Public Information Act.

The circuit court found that the records "are not newly discovered evidence" as "the existence of such records was known to Petitioner's trial counsel prior to trial and therefore Petitioner's trial counsel, through the exercise of due diligence, could have obtained these records[.]" Accordingly, the court denied the petition, without a hearing.[3]

DISCUSSION

Certain convicted persons may file a petition for writ of actual innocence "based on newly discovered evidence." *See* Md. Code Ann., Crim. Proc. § 8-301; 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.

[3] The judge who ruled on the petition for a writ of actual innocence was not the same judge who ruled on the petition for post-conviction relief.

"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, 600-01 (1998); *see also* Rule 4-332(d)(6).

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 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 circuit court concluded that the medical records relied upon by the appellant were not newly discovered evidence. We agree. As noted above, in 2012, the post-conviction court considered the exact same documents and in its Statement of Reasons and Order of the Court noted that, at the post-conviction hearings, "it became apparent that the records had in fact been disclosed to the defense and the defense failed to utilize them." Hence, because these documents were known to the defense at trial, the appellant could not prevail on a petition for writ of actual innocence.

Moreover, we are not persuaded that the documents are in any way exculpatory. The appellant would like us to read Dr. Sipp's progress note as stating that Mr. Bell informed the doctor that he was stabbed by his "girlfriend, ex-fiancé," that is, Ms. Brown, rather than he was stabbed by his girlfriend's ex fiancé. His interpretation was not given

credence by Dr. Sipp at the 2012 post-conviction hearing, who testified – in the words of the post-conviction court – "that her notes indicated that Rodney [Bell] was angry at the person who stabbed him, and that if the person who stabbed him was the person in the room [his girlfriend of six months], Dr. Sipp would have referred directly to the person in the room, rather than to 'GF ex fiancé.'" Finally, we note that testimony at trial established that, when the progress note was written on December 27, 2006, Ms. Brown had been Mr. Bell's girlfriend of six months, they became engaged in January 2007 (after the December 27th session with Dr. Sipp), and they married in March 2007. In other words, on December 27th, Ms. Brown was not Mr. Bell's ex fiancé.

In sum, the circuit court did not err in denying the appellant's petition for writ of innocence without a hearing because his evidence was neither newly discovered nor exculpatory.

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