UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0585

September Term, 2012

RUDOLPH McNEIL

v.

STATE OF MARYLAND

Krauser, C.J.,
Meredith,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Krauser, C. J.

Filed: February 9, 2015

In 1993, Rudolph McNeil, appellant, was convicted, in the Circuit Court for Baltimore City, of two counts of first-degree murder for, together with an accomplice, shooting and killing two individuals. More than eighteen years later, in 2012, he filed a petition for a writ of actual innocence. That petition was denied by the Baltimore City circuit court without a hearing. In his petition, McNeil asserted that the State had failed to disclose evidence casting doubt on the identification of him as one of the two shooters. Because we conclude that McNeil's petition was based on evidence that he had obtained in time to file a motion for a new trial, we hold that his petition failed to state a claim for a writ of actual innocence and affirm the circuit court's decision.

BACKGROUND

On May 26, 1993, McNeil and another individual shot and killed Gibson Charles and Devon Williams. The State, at trial, introduced evidence that two eyewitnesses, Soumayah Rolls and Melinda King, had identified McNeil as one of the two shooters. McNeil was convicted by a jury on January 18, 1994, of two counts of first-degree murder and two counts of use of a handgun during the commission of a crime of violence and was sentenced too. His convictions were affirmed on appeal. *McNeill v. State*, No. 0303, Sept. Term, 1994 (filed Nov. 28, 1994).

After filing several unsuccessful petitions for post-conviction relief, McNeil filed a petition for writ of actual innocence on April 5, 2012, more than eighteen years after his murder convictions. The petition asserted that McNeil was entitled to a hearing and new trial on the basis of newly discovered evidence. The newly discovered evidence were police

reports and notes detailing photo array identifications of McNeil made by George Hicks, a witness to the shooting. In one photo array, conducted in the hours immediately after the shooting, Hicks positively identified the other shooter. In a second photo array, Hicks identified another man, Michael West, as someone resembling "the twin brother of the second suspect," exclaiming at that time, "That's him."

Most of this information was disclosed to McNeil before his trial. McNeil, however, alleged in his petition that he was not apprised at that time of Hick's "That's him" exclamation and that police reports and notes referring to this exclamation were never disclosed to him by the State, and that he only discovered these materials by making a Maryland Public Information Act request after his trial. McNeil claimed that Hicks's exclamation sheds doubt on the other identifications made of McNeil as one of the shooters and that had he had access to this evidence at trial, the result of the proceedings would have been different.

The circuit court denied the petition without a hearing, finding that the petition failed "to state a claim or assert grounds for which relief may be granted pursuant to Md. Ann. Code Criminal § 8-301(a)." McNeil filed a timely appeal from the court's decision.

DISCUSSION

McNeil contends that the circuit court erred in denying his petition for writ of actual innocence without a hearing. We disagree.

Our review of the decision of the circuit court "to dismiss a petition for writ of actual innocence without a hearing . . . is *de novo*." *Hawes v. State*, 216 Md. App. 105, 133 (2014); *see also Keyes v. State*, 215 Md. App. 660, 669-70 (2014) (describing a review of the "legal sufficiency of the petition" for writ of actual innocence as *de novo*). In conducting that review, we examine "the claims and allegations set forth in the petition and decide[] whether, on the face of the petition, they satisfy the pleading requirements" of the governing statute. *Hawes*, 216 Md. App. at 133.

A petition for writ of actual innocence is a statutory mechanism by which a petitioner can challenge his or her criminal convictions on the basis of newly discovered evidence. *See* Md. Code (2002, 2008 Repl. Vol., 2010 Supp.), § 8-301 of the Criminal Procedure Article ("CP"). The statutory language of CP § 8-301 specifies what the circuit court must consider in deciding whether to hold a hearing on a petition or dismiss the petition without a hearing. Preliminarily, the petition must:

> (1) be in writing;
> (2) state in detail the grounds on which the petition is based;
> (3) describe the newly discovered evidence;
> (4) contain or be accompanied by a request for hearing if a hearing is sought; and
> (5) distinguish the newly discovered evidence claimed in the petition from any claims made in prior petitions.

Id.; *see also* CP § 8-301(e)(1).

McNeil's petition for writ of actual innocence fulfilled the basic requirements of CP § 8-301(b). His written petition "describe[d] the newly discovered evidence" of the police

materials recounting George Hicks's photo array identification. CP § 8-301(b)(1) & (3). The petition also "state[d] in detail the grounds on which [his] petition [was] based" by describing the State's failure to disclose the statements of emphasis made by Hicks in positively identifying another man as the shooter. CP § 8-301(b)(2). McNeil's petition concluded by requesting a hearing on the claims presented in the petition.[1] CP § 8-301(b)(4).

Nonetheless, the circuit court, may deny such a petition without a hearing if "the petition fail[ed] to assert grounds on which relief may be granted." CP § 8-301(e)(2). A petition has the "requisite grounds" if it "'claims that there is newly discovered evidence that: (1) creates a substantial or significant possibility that the result may have been different . . . ; and (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.'" *Douglas v. State*, 423 Md. 156, 179-80 (2011) (quoting CP § 8-301(a)). McNeil's petition did not meet the second prong of CP § 8-301(a).

Maryland Rule 4-331(c) establishes a window of time during which a convicted person may move for a new trial on the grounds of newly discovered evidence. The Rule provides:

> The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence [within ten days after the verdict]:

[1] As McNeil had not filed any other petitions for writ of actual innocence, there is no need for his present petition to "distinguish the newly discovered evidence claimed . . . from any claims made in prior petitions." CP § 8-301(b)(5). *See Hawes*, 216 Md. App. at 133.

> (1) on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief[.][2]

Id.; *see also Hawes*, 216 Md. App. at 136. As applied to the present case, McNeil's convictions were affirmed on appeal on November 28, 1994, and the mandate was issued to the circuit court on January 26, 1995.[3] McNeil could have moved for a new trial on the basis of newly discovered evidence under Rule 4-331 until January 26, 1996, one year after the circuit court received our mandate.

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[2] At the time McNeil committed and was convicted for his participation in the shooting, Rule 4-331(c) read as follows:

> The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence [within ten days after the verdict].
>
> (1) in the District Court, on motion filed within one year after its imposition of sentence if an appeal has not been perfected;
>
> (2) in the circuit courts, on motion filed within one year after its imposition of sentence or its receipt of a mandate issued by the Court of Appeals of the Courts of Special Appeals, whichever is later.

Id. For the purposes of the present appeal, there is no difference between this version and the modern version of Rule 4-331.

[3] This date is later than the date on which McNeil's sentences were imposed: February 28, 1994.

The statute requires that the newly discovered evidence asserted in a petition for writ of actual innocence "could not have been discovered in time to move for a new trial under Maryland Rule 4-331." CP § 8-301(a)(2). If the newly discovered evidence could have been discovered in time to move for a new trial under Rule 4-331, then "as a matter of law," the "petition does not state a claim for writ of actual innocence under 8-301(a)," and the circuit court was correct to deny the petition without a hearing. *Hawes*, 216 Md. App. at 137.

That is the situation here, as McNeil's petition for writ of actual innocence was based upon newly discovered evidence that he did, in fact, discover prior to the expiration of the period in which he had to file a motion for new trial under Rule 4-331(c). In his petition, McNeil argued that "[i]t was . . . not possible for petitioner to discover [the newly discovered] evidence in time to move for a new trial under Rule 4-331, because this information was provided to him after 1993," pursuant to his Maryland Public Information Act request. In his post-conviction hearing on March 31, 1997, however, McNeil conceded that he received the police materials documenting Hick's "That's him" photo array identification on or about September 26, 1995—several months before the date by which McNeil could have moved for a new trial under Rule 4-331(c). Because McNeil could have moved for a new trial under Rule 4-331, his petition for writ of actual innocence does not meet the governing statutory requirements, specifically CP § 8-301(a)(2). We hold, therefore,

that as a matter of law, McNeil's petition did not state a claim for writ of actual innocence under CP § 8-301(a), and that petition was properly denied.

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