UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1588

September Term, 2012

MARCUS WILLIAM TUNSTALL

v.

STATE OF MARYLAND

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

JJ.

Opinion by Krauser, C. J.

Filed: February 11, 2015

Convicted of three counts of first-degree murder and three counts of use of a handgun in the commission of a crime of violence, Marcus William Tunstall appeals the denial by the Circuit Court for Prince George's County of his petition for writ of actual innocence without a hearing. Discerning no error in the decision to deny Tunstall's petition without a hearing, we affirm.

BACKGROUND

Tunstall and two co-defendants, George A. Thorne and Gordon M. Prailow, were charged with fatally shooting three people in 1990. The co-defendants were tried separately. On June 17, 1991, Tunstall was convicted of three counts of first-degree murder, three counts of use of a handgun in the commission of a crime of violence, and other related offenses. He was sentenced to life imprisonment without the possibility of parole and the convictions were affirmed by this Court on June 5, 1992.

Over the next eighteen years, Tunstall repeatedly challenged his convictions by filing, among other things, a petition for post-conviction relief and several motions to reopen his post-conviction proceeding. None of Tunstall's attempts to alter his conviction or obtain a new trial were successful.

On June 14, 2010, Tunstall filed a petition for writ of actual innocence, raising five claims of newly discovered exculpatory evidence. The circuit court denied Tunstall's petition without a hearing. Tunstall filed a timely appeal from that decision.

DISCUSSION

I.

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

Our review of a circuit court decision "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*). 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 creation that permits post-conviction challenges to criminal convictions based on newly discovered evidence. *See* Md. Code (2002, 2008 Repl. Vol., 2010 Supp.), § 8-301 of the Criminal Procedure Art. ("CP"). The statute delineates mandatory elements for a petition to merit consideration by the circuit court, including that 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.

CP § 8-301(b). The first four requirements are met by Tunstall's petition: he presented a written petition of his claims of newly discovered evidence, detailed why this evidence warranted relief, and requested a hearing. *Id.* Because this petition was the first that Tunstall filed, there are no prior claims of newly discovered evidence from which to distinguish the claims of the present petition, and thus CP § 8-301(b)(5) is inapplicable. *See also Douglas*, 423 Md. at 185.

Even if Tunstall's petition met the requirements described in CP § 8-301(b), the circuit court still possesses authority to dismiss the petition without a hearing if it "fails 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*, 423 Md. at 179-80 (quoting CP § 8-301(a)).

If Tunstall's petition did not assert the "requisite grounds" for relief described by CP § 8-301(e)(2), the court did not err in dismissing it. In addressing this proposition, we examine the allegations of "newly discovered evidence" raised in Tunstall's petition.

The first allegation of "newly discovered evidence" in Tunstall's petition for writ actual innocence was a comment made by the judge who presided over Tunstall's trial. The judge, during the sentencing of one of Tunstall's co-defendants, purportedly characterized the "trigger man" in the triple homicide (purportedly Tunstall) as a "sociopath." Tunstall

claimed that this reference demonstrated bias on the part of the trial judge. A second claim of "newly discovered evidence" alleged an agreement between co-defendant Thorne and the State for Thorne to submit testimony against Tunstall in exchange for a reduction of his own sentences, which Tunstall was never informed about before or during his trial. In support of this claim, Tunstall cited the allegedly perjured testimony Thorne gave in denying the existence of an agreement with the State, post-trial communications between Thorne's mother and the trial judge, and the 1995 reduction in co-defendant Thorne's sentences. A third allegation of "newly discovered evidence" stemmed from a comment the trial judge made after opening arguments regarding the alleged agreement between the State and co-defendant Thorne. A fourth claim of "newly discovered evidence" related to purportedly false testimony by one of the interrogating officers as to whether he threatened Tunstall with the death penalty during interrogation.[1] Tunstall asserted that facts identified in the opinion of *Green v. State*, 91 Md. App. 790 (1992), demonstrated that the interrogating officer in question used the technique of threatening minors with the death penalty during interrogations. The final claim of "newly discovered evidence" raised by Tunstall questions the reasonable doubt instructions submitted to the jury in his trial.

[1] As Tunstall was a minor at the time of the interrogation, it would have been improper to advise him "that he may be subject to the death penalty." *Green v. State*, 91 Md. App. 790, 798 (1992).

II.

We dispose of one of Tunstall's claims of newly discovered evidence by applying the "law of the case," a principle of "appellate procedure" that limits retrial of issues already decided by an appellate court. *Scott v. State*, 379 Md. 170, 183 (2004). "[O]nce an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case." *Id.* This principle applies to "'[d]ecisions rendered by a prior appellate panel . . . ' at the same appellate level as well, unless the previous decision is incorrect because it is out of keeping with controlling principles announced by a higher court and following the decision would result in manifest injustice." *Id.* at 184 (quoting *Hawes v. Liberty Homes*, 100 Md. App. 222, 231 (1994)). As applied to the present case, Tunstall cannot claim evidence as "newly discovered" under CP § 8-301 when an appellate court has already spoken against the petitioner's desired interpretation of that same evidence in a prior proceeding. *See Gravely v. State*, 164 Md. App. 76, 91 (2005) (barring appellant from using "the same alleged 'newly discovered evidence' previously presented to the trial court" in a subsequent motion).

In 2007, Tunstall appealed from the circuit court's denial of his motion to correct an illegal sentence and for a new sentence based upon mistake and irregularity. *Tunstall v. State*, No. 2888, Sept. Term 2005 (Oct. 31, 2007). In that appeal, he made several claims related to an agreement between co-defendant Thorne and the State. Those claims included an assertion of a concealed *ex parte* communication and deal between the trial judge and

Thorne regarding a reduction in Thorne's sentence in exchange for his testimony. Tunstall cited a letter from Thorne's mother to the circuit court alluding to an agreement between Thorne and the State, a responding letter from the circuit court, and the transcript of Thorne's resentencing hearing. After reviewing Tunstall's arguments, this Court held that Tunstall was "patently incorrect in his assertion that there was evidence of an *ex parte* communication between the court and Thorne." We also noted that the "court stated that it had no knowledge of a deal between Thorne and the prosecutor" at Tunstall's trial, and we did not identify any "indication to the contrary in later proceedings."

Under the guise of a claim of newly discovered evidence, Tunstall alleged again in his petition for writ of actual innocence that Thorne had testified falsely as to whether he had made a deal with the State in exchange for his testimony. Tunstall cited the same evidence (the letter from Thorne's mother to the circuit court, the judge's reply, and the reduction in Thorne's sentence) for the same conclusion that we rejected in our 2007 decision. In the absence of some demonstration of "manifest injustice" (that Tunstall has not made), the law of the case binds our decision regarding whether the evidence submitted by Tunstall indicates the existence of a deal between Thorne and the State. *Scott*, 379 Md. at 183.

III.

An implicit precondition of newly discovered evidence claimed under CP § 8-301 is that the alleged newly discovered evidence must qualify as evidence. As stated by this Court in *Hawes*, "[t]he word 'evidence' as used in [CP § 8-301] necessarily means testimony or an

item or thing that is capable of being elicited or introduced and moved into the court record, so as to be put before the trier of fact at trial." 216 Md. App. at 134. Two of Tunstall's alleged pieces of "newly discovered evidence" do not amount to "evidence."

Tunstall's claims in his petition about the reasonable doubt jury instruction and the comments made by the trial judge after opening statements do not fit the definition of "evidence" put forth in *Hawes*. In *Hawes*, we focused on the "nonsensical" concept of a defendant attempting to admit at trial "newly discovered evidence" of post-trial testimony asserting errors with jury instructions given at trial. If the defendant in *Hawes* had realized that the jury instructions were erroneous during the trial, "he would have objected to it, not testified to it." *Id.* at 134-35. It is similarly nonsensical to consider how Tunstall could present these two pieces of "newly discovered evidence" to the jury. If Tunstall had realized problems existed with the trial judge's comments after the opening statements or the reasonable doubt instruction, he would have objected to these things at trial, not presented them as evidence. *Id.* at 134-35. Under *Hawes*, these two claims of "so-called evidence" are not "evidence at all" and cannot be considered newly discovered evidence under CP § 8-301. *Id.* at 135.

IV.

If a claim of newly discovered evidence meets the implicit definition of "evidence" contemplated by *Hawes*, we can look to whether the claim satisfies the requirements of CP § 8-301(a). Under CP § 8-301(a), a claim of newly discovered evidence is valid if it:

> (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.

Id. These two statutory subsections impose requirements on the timeliness of claims and the materiality and persuasiveness of claims. We now turn to whether Tunstall's two remaining claims of newly discovered evidence meet the statutory requirements of CP §§ 8-301(a)(1) & (2).

A.

Another piece of newly discovered evidence asserted by Tunstall is rendered defective by its lack of timeliness under CP § 8-301(a)(2). This section of the petition for writ of actual innocence statute bars the use of any newly discovered evidence that could "have been discovered in time to move for a new trial under Maryland Rule 4-331." The timeline contemplated by Rule 4-331 required Tunstall to demonstrate that he could not have discovered the newly discovered evidence "through the exercise of due diligence prior to . . . one year after the later of sentencing or the issuance of a mandate issued by the appellate court." *Jackson v. State*, 216 Md. App. 347, 364-65 (2014). The mandate of Tunstall's appeal was issued by this Court on June 9, 1992: one year from this date was in June 1993. The opinion for *Green v. State*, 91 Md. App. 790 (1992), was reported in 1992. Because Tunstall could have discovered the newly discovered evidence contained within the facts

section of *Green* prior to the date on which he could have moved for a new trial under Rule 4-331, this claim does not meet the requirement of CP § 8-301(a)(2).

B.

Tunstall's last claim of newly discovered evidence stems from a purported pretrial characterization made by the trial judge of Tunstall as a "sociopath." At the sentencing hearing for co-defendant Thorne on December 17, 1990, the trial judge described an unnamed "trigger man" in the triple homicide as a "sociopath . . . with no [conscience] whatsoever." Six months later, that same trial judge presided over Tunstall's trial for charges arising from the same triple homicide. In his petition for writ of actual innocence, Tunstall stated that the trial judge's "sociopath" comment at Thorne's sentencing hearing indicated the judge's development of a preconceived notion of Tunstall as the "trigger man sociopath." Given this purported bias, the judge's failure to recuse himself prevented Tunstall from receiving a fair and impartial trial.

To warrant a new trial, Tunstall's claim of newly discovered evidence must be "persuasive, such that [it] may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected." *Jackson*, 216 Md. App. at 366-67 (quoting *Campbell v. State*, 373 Md. 637, 666-67) (internal quotation marks omitted); *see also* CP § 8-301(a). Evaluating the persuasiveness of newly discovered evidence under CP § 8-301(a) is achieved by determining the likelihood of the evidence, when viewed in the light most favorable to the

petitioner, *see Douglas*, 423 Md. at 180, of possibly altering the result of the trial. *See Jackson v. State*, 358 Md. 612, 626-27 (2000). Tunstall's assertion of bias on the part of the trial judge falls short of the threshold requirement.

To alter the trial outcome, Tunstall's claim of disqualifying bias on the part of the trial judge would need to rebut the presumption of judicial impartiality. *Boyd v. State*, 321 Md. 69, 80 (1990) (citing *United States v. Sidener*, 876 F.2d 1334, 1336 (7th Cir. 1989)). This presumption existed even when the judge gained information about a defendant by presiding over prior proceedings involving co-defendants; we presume that the trial judge "can and will separate that which may be considered from that which may not." *Id.* at 78, 81. To rebut the presumption of impartiality, Tunstall would need to claim evidence indicating that "there may have been some practical limitation on the ability of the judge to do that which he is ordinarily presumed competent to do." *Id.* at 85.

Tunstall has not met this burden. The single piece of evidence of the judge's alleged bias against Tunstall is the judge's characterization of an unnamed shooter in a triple homicide as a sociopath. The judge's comment did not indicate that he perceived Tunstall to be a sociopath; rather, it indicated that he perceived the actor who shot and killed three people to be a sociopath. Tunstall received a jury trial for the purpose of determining whether he was guilty beyond a reasonable doubt of participating in the triple homicide, and Tunstall has not indicated any portions of the trial record supporting his claim that the trial judge had predetermined that Tunstall was that perpetrating actor. In the absence of

additional supporting evidence, a single reference by the trial judge to the unnamed shooter as a "sociopath" is not sufficiently persuasive to demonstrate a substantial or significant possibility of a change in the trial outcome.

ORDER OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.