

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2754

September Term, 2013

KEITH A. WOOD

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: April 22, 2015

On June 27, 1992, James Wallace was shot and killed. In November of 1995, Keith A. Wood, the appellant, was charged in a four-count indictment in the Circuit Court for Prince George's County with "murder," use of a handgun in the commission of a felony, assault, and unlawfully carrying a handgun on his person, all arising out of the shooting death of Wallace.

Wood was tried before a jury in May of 1996. The jury acquitted him of murder in the first degree but convicted him of murder in the second degree. It also convicted him of each of the handgun counts.¹ The court sentenced Wood to 30 years' imprisonment for second-degree murder and a consecutive term of 20 years' imprisonment for use of a handgun in the commission of a felony. It merged for sentencing the conviction for unlawfully carrying a handgun into that for unlawful use.

Wood unsuccessfully challenged his convictions on direct appeal and through post-conviction proceedings. *Wood v. State*, No. 1042, September Term, 1996 (filed April 4, 1997) (affirming judgments of conviction); *State v. Wood*, No. 22, September Term, 2000 (filed May 29, 2002) (reversing the circuit court's grant of post-conviction relief and reinstating judgments of conviction).

On December 3, 2013, Wood filed a *pro se* petition for writ of actual innocence.² In

¹At the close of the State's case, the circuit court granted Wood's motion for judgment of acquittal on the assault charge.

²Although Wood's pleading is captioned "PETITION FOR A WRIT OF ACTUAL INNOCENCE/or a MOTION - TO CORRECT AN ILLEGAL SENTENCE/or alternatively a PETITION - TO REOPEN PETITIONER'S CLOSED POST CONVICTION (continued...)

it, he claimed that Count One of the indictment only charged him with murder in the first degree because it alleged that he had acted with premeditation, and that he was not charged with murder in the second degree. Therefore, he argued, his conviction for second-degree murder was, in effect, the product of a mid-trial constructive amendment to the indictment made without his consent, and was unlawful. Pursuant to CP section 8-301(e)(1), Wood requested a hearing on his petition.

By order entered on December 19, 2013, the circuit court dismissed Wood's petition without a hearing. He noted a timely appeal.

DISCUSSION

I.

The State has moved to dismiss the appeal because Wood failed to provide any transcripts of the proceedings below, in violation of Rules 8-411 and 8-413(a)(2).³ While we would otherwise be inclined to grant the motion, because the record is adequate to resolve

²(...continued)

PROCEEDING," it invokes the actual innocence statute, Md. Code (2001, 2008 Repl. Vol., 2010 Supp.), section 8-301 of the Criminal Procedure Article ("CP"), as the sole cause of action. Accordingly, the circuit court construed Wood's pleading as a petition for writ of actual innocence, as do we. *See State v. Matthews*, 415 Md. 286, 297 (2010) (stating that, in construing a pleading, "courts must ordinarily look beyond labels . . . and make determinations based on . . . substance" (quoting *In re: Nicole B.*, 410 Md. 33, 65 (2009)) (internal quotation marks omitted).

³Rule 8-413(a)(2) mandates that the "record on appeal shall include . . . the transcript required by Rule 8-411" Rule 8-602(a)(6) permits an appellate court to dismiss an appeal if "the contents of the record do not comply with Rule 8-413"

Wood's appeal, we shall exercise our discretion to deny it. Md. Rule 8-602(a).

II.

As he did below, Wood contends on appeal that he was indicted only for first-degree murder and therefore, by including a charge of second-degree murder in the verdict sheet submitted to the jury, the trial court constructively amended the indictment without his consent. Consequently, his conviction of second-degree murder is illegal.

Putting aside for the moment the lack of merit to this claim, it is, in any event, not cognizable in a petition for writ of actual innocence. CP section 8-301(a) sets forth the grounds upon which a claim of actual innocence may proceed. It provides:

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.

(Emphasis added.)

In *Hawes v. State*, 216 Md. App. 105 (2014), we held that, under the plain language of CP section 8-301(a), an actual innocence petition must be predicated upon a claim of “newly discovered evidence.” Because “[i]t goes without saying that something that is not ‘evidence’ cannot be ‘newly discovered evidence,’” *id.* at 134, it follows that claims that are

not founded upon newly discovered evidence are not cognizable in an actual innocence proceeding. *Id.* at 135 (observing that “allegations in [Hawes’s] petition about the jury instructions are not allegations of newly discovered evidence within the meaning of 8-301(a)”).

Clearly, that is the case here as well. Wood’s claim is not founded upon evidence and therefore is not founded upon newly discovered evidence. Rather, it is a claim that the trial court erred in permitting a constructive amendment to the indictment, resulting in a conviction on an uncharged offense. Although such a claim may be raised in a motion to correct illegal sentence, *see Johnson v. State*, 427 Md. 356, 366-71 (2012), it is not based upon evidence at all, let alone newly discovered evidence, and thus may not be raised in a petition for writ of actual innocence.⁴

⁴Even if Wood’s pleading could be construed as a motion to correct illegal sentence under Rule 4-345(a), he would not have been entitled to relief. Woods was charged under a short form indictment, pursuant to Md. Code (1957, 1971 Repl. Vol.), Article 27, section 616, now codified, without substantive change, at Md. Code (2002, 2012 Repl. Vol.), section 2-208 of the Criminal Law Article. Count One (“Murder”) alleged that Wood “feloniously, wilfully and of his deliberately premeditated malice aforethought, did kill and murder” Wallace. Wood’s conviction for second-degree murder was under Count One of the indictment.

An accused charged with murder by means of the statutory short form indictment may be convicted of first-degree murder, second-degree murder, or manslaughter, even though the language used spells out first-degree murder. *State v. Ward*, 284 Md. 189, 200 (1978). *See also Blackwell v. State*, 278 Md. 466, 476 (1976) (holding that in first-degree murder indictments filed under former Article 27, section 616, second-degree murder and manslaughter are lesser included offenses); *McMillan v. State*, 181 Md. App. 298, 351 (2008) (statutory short form indictment for murder gave circuit court jurisdiction to try the defendant for murder of any variety).

(continued...)

CP section 8-301(e)(2) provides that a circuit court may dismiss a petition for writ of actual innocence without a hearing if “the petition fails to assert grounds on which relief may be granted.” For the reasons just discussed, Wood’s petition did not state grounds on which relief could be granted, as required by CP section 8-301(a). The circuit court properly dismissed the petition without a hearing.

**MOTION TO DISMISS APPEAL DENIED.
ORDER OF THE CIRCUIT COURT FOR
PRINCE GEORGE’S COUNTY AFFIRMED.
COSTS ASSESSED TO THE APPELLANT.**

⁴(...continued)

Accordingly, the charge of second-degree murder properly was submitted to the jury for determination, and Wood’s conviction and sentence for that crime were not illegal.