

Appendix CC A

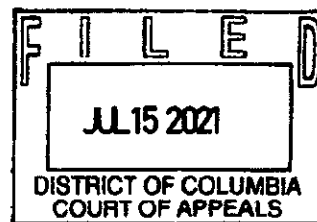
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 19-CO-1027

CALVIN TINSLEY, APPELLANT,

v.

UNITED STATES, APPELLEE.



Appeals from the Superior Court of the
District of Columbia
(CF1-29182-07)

(Hon. Gerald I. Fisher, Motions & Trial Judge)

(Submitted October 26, 2020)

Decided July 15, 2021)

Before BLACKBURNE-RIGSBY, *Chief Judge*, and GLICKMAN and THOMPSON,
Associate Judges.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: On September 1, 2010, following a jury trial, appellant Calvin Tinsley was convicted of one count of first-degree murder while armed, in violation of D.C. Code §§ 22-2101, 22-4502 (2012 Repl.); one count of possession of a firearm during a crime of violence, in violation of D.C. Code § 22-4504(b) (2012 Repl.); one count of carrying a pistol without a license, in violation of D.C. Code § 22-4504(a) (2012 Repl.); and one count of unlawful possession of a firearm, in violation of D.C. Code § 22-4503(a)(1) (2012 Repl.). On January 28, 2011, the trial court sentenced appellant to a total of 432 months of incarceration. On February 11, 2014, this court affirmed appellant's convictions on direct appeal. *See Washington v. United States*, Mem. Op. & J., No. 11-CF-90, (Feb. 11, 2014).¹

On October 30, 2015, appellant filed a motion to vacate his convictions under the Innocence Protection Act ("IPA"), D.C. Code § 22-4135 (2012 Repl.). On

¹ Appellant's co-defendant, Edward Washington, was convicted of one count of first-degree murder while armed and one count of soliciting murder, in violation of D.C. Code § 22-2104.02(a).

November 1, 2019, following a hearing, the trial court denied appellant's IPA motion. That same day, appellant timely filed a notice of appeal. We affirm.

I. Trial Proceedings

The testimony and evidence at trial was as follows: In October 2005, Edward Washington and the decedent, Malcolm Heath, allegedly propagated a fraudulent scheme in Maryland, which involved, among other things, the theft of personal identifying information of professional football player Orlando Brown. *Washington*, Mem. Op. & J., at 2. On November 8, 2006, Heath signed a plea deal in which he agreed to testify against Washington in exchange for a five-year sentence with all but one year suspended. On September 8, 2007, two days before Washington's fraud trial, Heath was shot and killed in the 1200 block of Mt. Olivet Road, Northeast, Washington, D.C. Appellant and Washington were subsequently charged with Heath's murder.

The government's theory at trial was that appellant killed Heath at Washington's request. The night before and the morning of the murder, Washington made several calls to appellant, interspersed with calls to M&T Bank. The government alleged that Washington and appellant had stayed in contact after Heath's murder. When executing a search warrant in appellant's jail cell in January 2008, police officers found a piece of paper under appellant's bunk with contact information for Washington written on it. They also recovered a photocopy of a \$134 money order sent to appellant by Washington's wife.

A witness, Emmer Simpson, who was in the area at the time of the shooting, heard a gunshot, turned to look, and saw an altercation between appellant and Heath. After the shooting, appellant ran south on Mt. Olivet Road. Simpson never identified anyone as the shooter, but other witnesses who were in the area at the time of the gunshots saw appellant running from the scene.

Venus Neely, a friend of Heath's who had been intimate with him the night before the shooting, was coming out of a nearby convenience store when she heard the gunshots. She was on her way to visit Heath again the morning of the shooting, but turned around and headed down a nearby alley when she heard the gunshots.

As Neely walked through the alley, appellant ran from behind her, passed her, and then briefly stopped and bent over to catch his breath. When appellant passed within a few feet of Neely, she got a good look at him and noticed that he had "odd" or "crooked" eyes. Appellant also had a gun in one hand and was trying to hold his

pants up with his other hand. Surveillance video from a nearby store was introduced at trial. Neely identified herself on the video and pointed out a person who ran past her.

Neely then saw Sheila Williams, a woman she knew from the neighborhood, and the two exchanged glances. Appellant began to run again, and Williams yelled at Neely to follow appellant because appellant was the shooter. Appellant resumed running, turned right at the end of the alley, and ran out of Neely's sight. Neely testified that she was unwilling to follow appellant out of fear of what he might do to her.²

At about the same time, Freddy Goins approached the end of the alley on foot. Goins was looking to buy heroin in the area when he heard gunshots. As he stopped near the alley, Goins saw appellant running towards him with one hand in his pocket and another hand holding up his pants. Goins also saw Neely and Williams running after appellant; Williams pointed at appellant and said, "He's the one." Goins then saw appellant turn the corner and get into a 2007 Chrysler two-door sports car.³

Appellant's IPA Motion

On October 30, 2015, appellant filed his IPA motion. The motion alleged that Washington, at some point after trial, confessed to his attorney that he shot and killed Heath. On June 25, 2018, appellant filed a supplement to his IPA motion based on a recent letter that Washington mailed to the D.C. Superior Court. In the letter, Washington wrote that a man named Derek Walcott confessed to murdering Heath. On August 10, 2018, the trial court heard evidence on the motion to vacate. Washington and his trial attorney, Todd Baldwin, Esquire, testified.

² The defense impeached Neely with her prior record, her plea agreement with the government, her failure to mention the shooter's "crooked or odd eyes" to the police, and her description of the shooter as a man of medium complexion.

³ The defense impeached Goins by highlighting an inconsistency in his description of the shooter at trial as compared with prior descriptions to the police—at trial, he said the shooter had a lazy eye, while in his statements to law enforcement, he described the man's clothing but did not mention a lazy eye.

Attorney Baldwin's Testimony

Attorney Baldwin, a long-time practicing criminal attorney who began taking court-appointed cases in D.C. Superior Court in 1993, represented Washington in connection with the case involving Heath's murder. At some point, Attorney Baldwin visited Washington at the D.C. Jail. He believed the visit was some time after Washington was sentenced, but could not say for sure. Attorney Baldwin talked to Washington about the surveillance video shown at trial, specifically discussing how the person in the video did not appear to be appellant, but instead appeared to be a taller man with darker skin. Baldwin recalled being stunned when Washington replied, "that's because it's me," explaining that he shot Heath.

Baldwin described Washington's demeanor during this conversation as "[b]lunt," "revealing," and "direct." He believed Washington was telling the truth, but had no corroboration for his belief. Baldwin was shocked because he had always thought someone else had done the shooting. At trial, the defense theory had been that there was insufficient evidence to prove Washington solicited the murder.

Washington's Testimony

Washington testified that Attorney Baldwin represented him in the case involving Heath's murder. He said Baldwin may have visited him in jail after sentencing, but he did not remember. Washington denied telling Baldwin he shot Heath, denied conspiring with appellant to kill Heath, denied soliciting appellant to kill Heath, and denied that appellant killed Heath.

Washington said that on September 8, 2007, the day after Heath's murder, Washington's friend Walcott confessed to Washington in person that Walcott had shot and killed Heath, and that Walcott told Washington the shooting involved a dispute over money and a bicycle. According to Washington, there were no witnesses to their conversation.

Washington first publicly made the claim that Walcott confessed to Heath's murder in a letter mailed to the trial court in May 2018. Washington said he never reported Walcott's confession to Attorney Baldwin because "that would have been snitching." He also testified that he was no longer in touch with Walcott, did not know how to contact Walcott, and did not know where Walcott lived at the time of Heath's murder.

Trial Court's Decision

On November 1, 2019, the trial court denied appellant's IPA motion in an oral ruling, finding "that Mr. Washington's testimony about [Walcott's confession] would be palpably incredible and completely lacking in any indicia of trustworthiness." The court first summarized the procedural and factual history of the case. Within that summary was a witness-by-witness description of the eyewitness-identification evidence. The trial court provided an in-depth description of both the testimony and impeachment of each witness.

The court noted that Neely was a friend of Heath and that she had spent the night before his murder having sexual relations with him. It also highlighted the ways in which Neely and Goins were both impeached, while further characterizing Williams's testimony as "somewhat disjointed"⁴ and noting that she could not identify the shooter.

The court also described the other evidence linking appellant to Heath's murder, including the phone calls between appellant and Washington. The court made note of the fact that appellant was present and looked upset at Washington's trial date, and that Washington's wife gave the money order to appellant. Finally, the court also described the "less than clear" surveillance video shown at trial, which showed "a heavy-set Black male wearing black or dark cargo shorts and a white T-shirt walking toward Mr. Heath's shop, and then later running from the scene."

The trial court then summarized the evidence gleaned from the evidentiary hearing, including the fact that appellant had tried but failed to enhance the surveillance video post-trial, and the testimony of Attorney Baldwin and Washington.

The trial court first addressed appellant's IPA claim regarding Walcott, who reportedly confessed to Washington that he shot Heath. The court found that Washington's testimony would be untrustworthy because (1) Washington never told his attorney about Walcott; (2) there was no rational reason Walcott would confess to Washington; and (3) "there's no evidence providing any corroborating

⁴ Williams admitted that she was drinking alcohol at that time in the morning, attempting to get drunk. She was never able to provide a detailed description of the man to the police, but told them he "wasn't a white man." She also told the police that the man had a medium complexion, but at trial testified that she was too far away from the man to be certain of his complexion.

circumstances to the making of the statement or suggesting anything about Mr. Walcott's involvement in the events." The court therefore denied the part of appellant's IPA motion based on the claim that Walcott confessed to committing the murder.

The court then turned to appellant's remaining claim that Washington confessed to committing the murder by himself. The court found that Washington's confession to Attorney Baldwin was newly discovered evidence because it was not known or available to appellant until after trial.

The court then found that the evidence of Washington's confession did not make it more likely than not that appellant was actually innocent of Heath's murder. The court noted that "[t]hree of the four witnesses . . . described the shooter on the day of the shooting as being heavy-set"; that Neely and Goins "described the person at trial as having a lazy or wandering eye, although neither provided that detail in their descriptions to the police"; that Goins "described the individual, at that time, as being light skinned"; and that Neely and Goins both identified appellant as the shooter after the murder. The court found the descriptions to match appellant, since he was heavy set and light skinned, and had a lazy eye. In contrast, the court found the descriptions did not match Washington because Washington was not heavy set, looked "fairly muscular" and "much slimmer" than appellant, did not have a lazy eye, and is medium or dark in complexion.

The court also recognized that the other evidence linking appellant and Washington, including their "multiple efforts to communicate the evening before and the morning of the murder," contributed to the strength of the evidence against appellant. As a result, the court could not "conclude that Mr. Washington's statement to Attorney Baldwin establishes that it's more likely than not that [appellant] is innocent, and, therefore, he [wa]s not entitled to a new trial."

II. Discussion

On appeal, appellant argues that the trial court abused its discretion in two respects. First, appellant alleges that the trial court misapplied the standards contained in the IPA by "failing to consider the numerous weaknesses in the government's case against [appellant] in light of the evidence as a whole." (citing *Caston v. United States*, 146 A.3d 1082, 1100 (D.C. 2016)). Second, appellant argues that the trial court abused its discretion by evaluating the strength of the evidence introduced at trial without acknowledging its weaknesses. However,

because the trial court did evaluate the weaknesses in the government's case, we are not persuaded by either argument.

Standard of Review and Applicable Legal Principles

Under the IPA, a defendant may challenge a conviction "on grounds of actual innocence based on new evidence." D.C. Code § 22-4135(a). The trial court "may consider any relevant evidence," but must consider, among other things, "[t]he new evidence," "[h]ow the new evidence demonstrates actual innocence," "[w]hy the new evidence is or is not cumulative or impeaching," and "[i]f the conviction resulted from a trial, and if the movant asserted a theory of defense inconsistent with the current claim of innocence, the specific reason the movant asserted an inconsistent theory at trial." D.C. Code § 22-4135(g)(1). If the court "concludes that it is more likely than not the movant is actually innocent of the crime, the court shall grant a new trial." D.C. Code § 22-4135(g)(2). If the court "concludes by clear and convincing evidence that the movant is actually innocent of the crime, the court shall vacate the conviction and dismiss the relevant count with prejudice." D.C. Code § 22-4135(g)(3).

"We review the denial of a motion to vacate under the IPA for abuse of discretion, giving great deference to the trial court's role as the trier of fact on the ultimate issue of actual innocence under the IPA." *Williams v. United States*, 187 A.3d 559, 562 (D.C. 2018) (internal citations and footnote omitted). "Thus, we apply the clearly erroneous standard of review to the trial judge's rejection of alleged newly discovered evidence offered to prove 'actual innocence.'" *Id.* at 562-63 (quoting *Caston*, 146 A.3d at 1090) (cleaned up). "As such, the scope of . . . review is narrow on the question of whether that new evidence establishes appellant's actual innocence." *Id.* at 563 (internal alterations and quotation marks omitted). "However, 'whether the court applied the correct legal standard in ruling on an IPA motion is a question of law that [is] consider[ed] *de novo*.'" *Id.* (quoting *Mitchell v. United States*, 80 A.3d 962, 971 (D.C. 2013)) (internal alterations omitted).

Analysis

The trial court did not abuse its discretion in denying appellant's motion. The trial court found that Washington's testimony about Walcott's confession was "palpably incredible." Specifically, the court noted that Washington never told his attorney about Walcott's confession; there appeared to be no reason that Walcott would confess the crime to Washington; and there was no corroboration. The court's credibility determination was supported by the record. *See Williams*, 187 A.3d at

564 (holding that factual findings derived from personal observations of the trial court are not reversible unless clearly erroneous). Thus, the trial court properly denied appellant's IPA claim that Walcott murdered Heath because it discredited all evidence supporting that theory. *See id.* at 563-64 (upholding denial of IPA claim where "there is no new evidence (claimed to demonstrate actual innocence) which has not been substantially discredited").

The court also acted within its discretion when determining that appellant had not, by a preponderance of the evidence, shown he was actually innocent of Heath's murder, even in light of Washington's alleged confession to Attorney Baldwin. The court considered the eyewitness testimony identifying appellant as the shooter who ran from the scene of Heath's murder. Both Neely and Goins identified appellant as the shooter at trial and in a photo array administered by the police during the investigation. The trial court found those identifications were corroborated because appellant, not Washington, matched the consistent description of the shooter given by most of the witnesses—that of a heavy-set, light-skinned man with a lazy eye.⁵

The trial court weighed Washington's confession against the evidence at trial and determined that Washington's confession—which was made after Washington's sentencing and later disavowed by Washington at the evidentiary hearing—lacked sufficient corroboration to outweigh the government's evidence. Thus, the court concluded that appellant failed to establish by preponderance of the evidence that he was actually innocent. The trial court did not clearly err in making this conclusion and therefore properly denied appellant's IPA motion.

Contrary to appellant's argument, the record demonstrates that the trial court specifically addressed the weaknesses in the government's case. The court considered that Simpson, the sole eyewitness to the shooting itself, could not identify the shooter. It noted that Neely was a friend of Heath's "who had spent the previous night having sexual relations with him," and that Neely was impeached with her prior criminal record, which included several sexual-solicitation convictions, and her plea agreement with the government. It further addressed that Neely failed to

⁵ The court also considered the circumstantial evidence against appellant, including that Washington made multiple phone calls to appellant, interspersed with calls to M&T Bank, the night before and morning of the murder; that appellant was present at the trial date of Washington's Maryland case and looked upset when the case was not dismissed after Heath failed to appear; and that, after appellant was arrested, police found in his jail cell a document with Washington's contact information and a money deposit made to him by Washington's wife.

mention the shooter's lazy eye in her interview with the police, and that she had described the shooter as having a "medium complexion," while appellant was light skinned and the other witnesses described the shooter as light skinned. The court also considered that Goins was an admitted heroin addict and did not mention that the shooter had a lazy eye in his interviews with the police. The court also took note that Williams's trial testimony was "somewhat disjointed," and that she could not identify the shooter.

Furthermore, appellant's reliance on *Caston* is misplaced. In that case, we faulted the trial court for (1) ruling that a witness's testimony was merely impeaching instead of exculpatory; (2) not addressing whether the inconsistencies between that witness's testimony and his affidavit were so significant that they impacted the witness's credibility; (3) allowing its evaluation of the defendant's credibility to affect its determination of the witness's credibility; and (4) failing "to at least consider the potential weaknesses in the government's case that [the defendant] cited in his IPA papers." 146 A.3d at 1094-1101.

Here, the trial court committed none of these errors. Instead, the trial court (1) found that Washington's confession would be exculpatory; (2) implicitly assumed that Washington's confession would be unimpeached when weighing it against the evidence in the case; (3) did not evaluate appellant's credibility, as appellant did not testify; and (4) considered the potential weaknesses in the government's case. Moreover, in *Caston*, we emphasized that the motions judge in that case "did not preside over appellant's trial," and therefore the judge's "assessment of the weight of the trial evidence [could] be no better than our own." 146 A.3d at 1099. Here, however, the same judge presided over both the trial and post-conviction proceedings. See *Williams*, 187 A.3d at 564 ("[A]n appellate court will not redetermine the credibility of a witness where, as here, the trial court had the opportunity to observe their demeanor and form a conclusion.") (quoting *Turner v. United States*, 116 A.3d 894, 927 n.94 (D.C. 2015), *aff'd*, 137 S. Ct. 1885 (2017)). The trial court did not misapply the IPA's standards in denying appellant's IPA motion.