	*	IN THE
	*	SUPREME COURT
JOHN WESLEY LEE, JR.	*	OF MARYLAND
	*	Petition Docket No. 14
v.	*	September Term, 2023
STATE OF MARYLAND	*	(No. 1147, Sept. Term, 2022 Appellate Court of Maryland)
	*	(Nos. 197125005 & 197125007
	*	Circuit Court for Baltimore City)

ORDER

Upon consideration of the petition for a writ of certiorari to the Appellate Court of Maryland, it is this 30th day of May 2023, by the Supreme Court of Maryland,

ORDERED that the petition for writ of certiorari is DENIED as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Matthew J. Fader
Chief Justice

Circuit Court for Baltimore City
Case No.: 197125005, 07

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1147

September Term, 2022

JOHN WESLEY LEE, JR.

v.

STATE OF MARYLAND

Wells, C.J.,
Shaw,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 24, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2022, John Wesley Lee, Jr., appellant, filed a petition for writ of actual innocence in the Circuit Court for Baltimore City (his second such petition), which the court dismissed for failure to assert grounds on which relief may be granted. In its Order, the court noted that Mr. Lee's petition was based on DNA testing on three pairs of tennis shoes and that the court had "already addressed and dismissed this same claim" in its 2021 order dismissing Mr. Lee's first petition for writ of actual innocence. Mr. Lee appeals the decision. For the reasons to be discussed, we shall affirm the judgment.

BACKGROUND[1]

While serving time at a Maryland correctional facility, Mr. Lee was charged with murder and other offenses after a fellow inmate was stabbed to death in the prison's weight room. Following a trial in 1998, a jury found Mr. Lee guilty of murder, wearing and carrying a deadly weapon, and wearing and carrying a deadly weapon with the intent to injure, and acquitted him of conspiracy to commit murder. The court sentenced him to life imprisonment for murder, to run consecutive to the sentences he was then serving, and merged the remaining convictions for sentencing purposes. This Court affirmed the judgments. *Lee v. State*, No. 774, September Term, 1998 (filed April 27, 1999).

2021 Petition for Writ of Actual Innocence

In 2021, Mr. Lee, representing himself, filed a petition for writ of actual innocence based on DNA testing results which he had received from the Forensics Science Division of the Maryland State Police in 2011 pursuant to a Maryland Public Information Act

[1] Much of the background facts are taken from this Court's unreported opinion in *Lee v. State*, Nos. 478 & 781, Sept. Term, 2021 (filed January 25, 2022).

request. He claimed that "[t]his DNA evidence is DNA testing results from clothing and tennis shoes taken from" him during the 1993 murder investigation and that the results were "negative." The circuit court then ordered Mr. Lee to amend his petition to include "a specific *factual* statement setting forth *in detail*" why the DNA testing results supported his claim that he was actually innocent of the murder. (Emphasis in the original.) In his amended petition, Mr. Lee asserted that "the basis" for his claim was that "not just one pair of [his] tennis shoes were taken but all of his tennis shoes were taken." Given that "all" of his "footwear" was taken, Mr. Lee stated that the DNA testing "results seemed to have exonerated" him.[2] He did not elaborate on why he believed the absence of the victim's DNA on his shoes was indicative of his innocence.

The circuit court found that, despite its order to do so, Mr. Lee failed to set out "the *basis* for" his claims, "specifically how such alleged newly discovered evidence would have created the possibility of a different result" at his trial. The court further found that, even construing his petition liberally, Mr. Lee had failed to assert grounds upon which relief could be granted, justifying dismissal of the petition. This Court affirmed the judgment. *Lee v. State*, Nos. 478 & 781, September Term, 2021 (filed January 25, 2022) ("*Lee 1*").

In our opinion affirming the judgment in *Lee 1*, we concluded that "the fact that [the tennis shoes] were not found to have blood on them does not, standing alone, constitute a

[2] He also claimed that the DNA testing results created a substantial or significant possibility that the outcome of the trial may have been different "where the Trial Judge John N. Prevas suggested how one of the State's witness could testify. *See* Trial Transcript 1-12-98, page 115 lines 13, 14, & 15 and 17, 18, 19, & 20."

threshold showing that Mr. Lee did not commit the crime." *Lee 1*, slip op. at 5. We then summarized the trial evidence:

> The evidence at trial included the testimony of a prison guard that, immediately after a call went out for a stretcher because an inmate had collapsed, he observed an inmate (who he later identified as Mr. Lee) walking at a "brisk pace" to the building's "wing" (versus outside to the "yard") with his "hands so far down his pants it appeared . . . he was hiding something." The evidence also included a statement from an inmate given to the investigators that he had observed Mr. Lee standing by a sink and washing blood off of his hands and "acting weird," and Mr. Lee gave him two knives, one of which was later recovered from the inmate's cell. Another inmate told investigators he had observed Mr. Lee enter the weight room and stand over the victim, who was doing bench pulls, and repeatedly stab him. Mr. Lee's palm print was also recovered from the "chair seat top" of the exercise equipment the victim was using when he was attacked.

Lee 1, slip op. at 5.[3]

Accordingly, we held that the circuit court did not err in dismissing Mr. Lee's 2021 petition for writ of actual innocence. *Id.*, slip op. at 7.

2022 Petition for Writ of Actual Innocence

In August 2022, Mr. Lee filed another petition for writ of actual innocence, again as a self-represented litigant. As best we can discern from the petition, Mr. Lee made the following allegations or arguments: (1) the DNA testing results on his footwear were "favorable" to him and "exonerated [him] from 1993 through 1997 until the prosecutor in [his] case of August 1985 . . . took issue with the exoneration of Lee with respect to the DNA testing results," which led to his indictment for the 1993 murder of his fellow inmate, "and thus the DNA testing results vanished until many years later"; (2) the court erred in

[3] We also found no merit to Mr. Lee's claim that the trial judge had "suggested how one of the State's witness could testify." *Lee 1*, slip op. at 6-7.

failing to hold a hearing on his first petition for writ of actual innocence; (3) the filing of a petition for writ of actual innocence "provides a gateway for the adjudication of any defaulted constitutional claim"; (4) the "fingerprint" recovered from the weight-room "could have been made at a time other than at the time of the crime"; (5) the trial judge improperly suggested how a State's witness could testify; (6) the statement a witness gave to investigators identifying Mr. Lee as the individual who stabbed the victim was not provided in discovery (although it was introduced at trial) and the witness's viewing of a polaroid photograph "tainted the viewing of any photo array"; (7) trial counsel provided ineffective assistance for various reasons; and (8) the trial court committed "plain error" in its jury instructions, including its instruction on reasonable doubt.

In an Order filed on August 16, 2022, the circuit court dismissed the petition for failing to assert grounds on which relief may be granted. In doing so, the court noted that it appeared that "the newly discovered evidence" Mr. Lee relies upon "is the analysis of DNA supposedly collected from 'three (3) pair of tennis shoes[.]'" The court found that it had "already addressed and dismissed this same claim" when considering Mr. Lee's first petition for writ of actual innocence. The court further found that none of Mr. Lee's remaining allegations "relate to newly discovered evidence[.]"

DISCUSSION

The Writ of Actual Innocence

Certain convicted persons may file a petition for a writ of actual innocence based on "newly discovered evidence." *See* Md. Code Ann., Crim. Proc. § 8-301; Md. Rule 4-332(d)(6). "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:
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> (1) (i) if the conviction resulted from a trial, creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined; [and]
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> ***
>
> (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.
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> ***
>
> (g) A petitioner in a proceeding under this section has the burden of proof.

Crim. Proc. § 8-301.

"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) (footnote omitted); *see also* Rule 4-332(d)(6).

"Evidence" in the context of an actual innocence petition 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." *Hawes v. State*, 216 Md. App. 105, 134 (2014). The requirement that newly discovered evidence "speaks to" the petitioner's actual innocence "ensures that relief under [the statute] is limited to a petitioner who makes a threshold showing that he or she may be actually innocent, 'meaning he or she did not commit the crime.'" *Faulkner v. State*, 468 Md. 418, 459-60 (2020) (quoting *Smallwood*, 451 Md. at 323).

A court may dismiss a petition for actual innocence without a hearing "if the court concludes that the allegations, if proven, could not entitle a petitioner to relief." *State v. Hunt*, 443 Md. 238, 252 (2015) (quotation marks and citation omitted). *See also* Crim. Proc. § 8-301(e)(2). "[T]he standard of review when appellate courts consider the legal sufficiency of a petition for writ of actual innocence is *de novo*." *Smallwood*, 451 Md. at 308.

Contentions on Appeal

On appeal, Mr. Lee asserts that the circuit court "made an arbitrary and capricious decision" to dismiss his petition without first holding a hearing and without appointing counsel to represent him. He also maintains that "a showing of actual innocence is sufficient to serve as a procedural gateway for the adjudication of any otherwise defaulted

constitutional claim[,]" and he reiterates the allegations he made in his petition regarding ineffective assistance of trial counsel and a "tainted identification."

The State maintains that Mr. Lee's DNA claim is barred by the law of the case doctrine because his second petition for writ of actual innocence was based on the "same DNA evidence" as his first petition and in *Lee I* this Court determined that the evidence did not create a threshold showing that Mr. Lee did not commit the crime nor that it created a substantial or significant possibility that the trial results may have differed. But in any event, the State asserts that, even if the DNA results could be deemed "newly discovered," a lack of blood on Mr. Lee's footwear, standing alone, does not speak to his actual innocence and does not create a significant possibility that the outcome of his trial may have been different. As for the remaining allegations, the State asserts that "because none of those claims concern newly discovered evidence, they do not entitle Lee to the relief that he seeks using this procedural mechanism."

Analysis

We hold that the issue related to the DNA results of Mr. Lee's footwear is barred by the law of the case. That doctrine "bar[s] litigants from raising arguments on questions that have been previously decided or could have been decided in that case." *Dabbs v. Anne Arundel County*, 458 Md. 331, 345 n. 15 (2018). The doctrine "applies to both questions that were decided and questions that could have been raised and decided." *Holloway v. State*, 232 Md. App. 272, 282 (2017). Mr. Lee raised the DNA results related to his footwear in his first petition for writ of actual innocence and in *Lee 1* this Court determined that "the fact that [the tennis shoes] were not found to have blood on them does not,

standing alone, constitute a threshold showing that Mr. Lee did not commit the crime." *Lee 1*, slip op. at 5. In short, our decision in *Lee 1* on the DNA claim barred Mr. Lee's re-litigation of the issue in his second petition for writ of actual innocence. But even if the law of the case doctrine were not applicable here, and assuming the DNA results qualify as "newly discovered evidence," Mr. Lee—once again—failed to proffer how or why the absence of the victim's DNA on his footwear speaks to his actual innocence.

As to Mr. Lee's remaining allegations, we agree with the circuit court that they do not involve "newly discovered evidence" that speaks to his actual innocence and, therefore, we find no error in the circuit court's failure to address them. Consequently, the court did not err in failing to hold a hearing before ruling on his petition. *Hunt*, *supra*, 443 Md. at 252 (A court may dismiss a petition for writ of actual innocence without a hearing "if the court concludes that the allegations, if proven, could not entitle a petitioner to relief." (quotation marks and citation omitted). Finally, Mr. Lee cites no authority for his assertion that the circuit court should have appointed counsel to represent him and given that he raised no colorable claim entitling him to relief under the actual innocence statute, we find no error in the court's action.

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

Additional material from this filing is available in the Clerk's Office.