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July 30, 2025
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Respondent, Plaintiff Below

v.) No. 23-595 (Fayette County CC-10-2015-F-59)

Robert I. Brown Jr.,
Petitioner, Defendant Below

MEMORANDUM DECISION

Petitioner Robert I. Brown Jr. appeals the Circuit Court of Fayette County's September 25, 2024, order denying the petitioner's motion to vacate his guilty plea.[1] On appeal, the petitioner raises several assignments of error pertaining to alleged newly discovered evidence. Upon our review, finding no substantial question of law and no prejudicial error, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court's order is appropriate. *See* W. Va. R. App. P. 21(c).

On November 13, 2014, the petitioner shot and killed Jamaal Calhoun inside the petitioner's home. During subsequent questioning by law enforcement officers, the petitioner confessed that he had shot Mr. Calhoun, but claimed it was done in self-defense. However, the evidence demonstrated that the petitioner shot Mr. Calhoun eleven times with two different pistols and, after observing that Mr. Calhoun was still moving, he retrieved a shotgun and fired the gun into the back of Mr. Calhoun's head. *See State v. Brown*, No. 18-0339, 2020 WL 6051305, at *1 (W. Va. Oct. 13, 2020) (memorandum decision). Thereafter, the petitioner was indicted for second-degree murder. On the morning of trial, the petitioner accepted an *Alford*/*Kennedy*[2] plea, wherein he pled guilty to the second-degree murder charge. *Id.* at *2. On March 31, 2017, the circuit court sentenced the petitioner to forty years of incarceration. The petitioner subsequently appealed his sentence, which was affirmed by this Court. *Id.* at *3.

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[1] The petitioner is self-represented. The State of West Virginia is represented by Attorney General John B. McCuskey and Deputy Attorney General Andrea Nease Proper. Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel.

[2] *See* Syl. Pt. 1, *Kennedy v. Frazier*, 178 W. Va. 10, 357 S.E.2d 43 (1987) ("An accused may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, if he intelligently concludes that his interests require a guilty plea and the record supports the conclusion that a jury could convict him."); *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (same).

On July 24, 2023, the petitioner filed a self-represented motion to vacate and/or set aside his plea based on newly discovered evidence. Specifically, the petitioner claimed that he had retained a private investigator (P.I.) who had discovered new evidence in the form of documents, which allegedly supported the petitioner's self-defense claim. The petitioner argued that had this information been available to him prior to the entry of his plea agreement, he would have insisted on going to trial. The motion did not explain what the documents were or how they supported the petitioner's self-defense claim. However, the P.I.'s report was attached to the motion. In the report, the P.I. indicated that he had interviewed two individuals, Mustafa Smith and Michael Wallace. According to the P.I., Mr. Smith opined that the victim, Mr. Calhoun, was a violent individual who was allegedly involved in several murders in Ohio. Mr. Smith also reported a personal experience in which he had felt threatened by Mr. Calhoun's behavior. Mr. Wallace reported that on one occasion, he was in a vehicle with Mr. Calhoun when he overheard a phone call between Mr. Calhoun and an unknown male. The male informed Mr. Calhoun that the petitioner was asking too many questions about the death of a man named Frankie Borders and, in response, Mr. Calhoun stated that he would "take care" of the petitioner. Mr. Wallace also detailed an occasion in which he had observed Mr. Calhoun obtain a black pistol. The circuit court directed the State to respond to the petitioner's motion, and the petitioner filed a reply to the State's response.

The circuit court denied the petitioner's motion by order entered on September 25, 2023, finding that the petitioner failed to establish he was entitled to vacate or set aside his plea based on newly discovered evidence pursuant to this Court's decision in *State v. Frazier*, 162 W. Va. 935, 253 S.E.2d 534 (1979).[3] Specifically, the circuit court found that based on the motion, it was unknown when the petitioner learned that Mr. Smith and Mr. Wallace might have information relevant to his case and whether that evidence was discovered before or after the petitioner entered his plea. The court also noted that the evidence from the P.I. report was not new or material but merely cumulative evidence.[4] Lastly, the court found that this evidence would not have produced

[3] The sole Syllabus Point of *State v. Frazier*, 162 W. Va. at 935, 253 S.E.2d at 534-535, provides:

> "A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side." Syllabus Point 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894).

[4] While the petitioner claimed that the newly provided witness statements demonstrated that Mr. Calhoun was a violent person and was suspected to be connected to the murder of Mr.

a different result, such as a verdict of not guilty, had the case gone to trial. The court noted that the State would have produced evidence that the petitioner shot the victim eleven times with two different pistols while the victim remained seated on a couch, unarmed, and then retrieved a shotgun and fired it into the victim's head. As such, the court found that this alleged "new evidence" would not have justified the petitioner's actions and, moreover, would not have bolstered the petitioner's claim of self-defense because if the statements were truly "new" evidence, the petitioner could not claim to have been influenced by that information at the time he shot Mr. Calhoun in self-defense. It is from this order that the petitioner appeals.

The petitioner argues that his evidence is newly discovered and warrants setting aside his guilty plea pursuant to the *State v. Frazier* factors. He also argues that the circuit court erred in denying his motion without first holding a hearing and by making insufficient findings of fact and conclusions of law.[5]

When reviewing a circuit court's decision to deny a motion for new trial, we apply a two-pronged deferential standard of review.

> We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

State v. Jenner, 236 W. Va. 406, 413, 780 S.E.2d 762, 769 (2015) (citing Syl. Pt. 3, in part, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000)).

On appeal, the petitioner raises several assignments of error pertaining to the circuit court's denial of his motion to set aside his guilty plea due to newly discovered evidence. The petitioner's assignments of error state that the court erred in denying his motion based on his inability to satisfy the *Frazier* factors, but he also argues that the court erred in denying his motion without first holding a hearing. According to the petitioner, this motion constituted a "critical stage" of his

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Borders, this information was already known at the time of the petitioner's plea, as the State proffered at the petitioner's plea hearing that it would have submitted evidence that the petitioner believed that Mr. Calhoun had murdered Mr. Borders, and that Mr. Calhoun had made veiled threats against the petitioner and/or his family.

[5] We observe that Rule 32(e) of the West Virginia Rules of Criminal Procedure provides that if a request to withdraw a plea is made any time after sentencing, the "plea may be set aside only on direct appeal or by petition under W. Va. Code [§] 53-4A-1." The petitioner has already received a direct appeal, and the motion filed below was not presented in a petition for post-conviction habeas corpus pursuant to West Virginia Code § 53-4A-1. However, having ruled on the merits of petitioner's motion, we find that the circuit court effectively treated the motion as a petition for habeas relief, permitting our review of the merits of petitioner's request. *See State v. Donald S.B.*, 184 W. Va. 187, 399 S.E.2d 898 (1990) (affirming circuit court's treatment of identical motion as habeas petition and ruling on merits).

criminal proceedings, entitling him to the appointment of counsel and a hearing to allow him to fully develop the facts surrounding his newly discovered evidence. The petitioner also asserts that the circuit court's findings of fact were unsubstantiated given the lack of a hearing on the matter. Specifically, the petitioner claims that had the court held a hearing, the parties could have presented evidence to ascertain when the information known by Mr. Smith and Mr. Wallace was discovered by the petitioner and whether their statements had any probative value. Lastly, he claims that the court abused its discretion by making a factual determination that this newly discovered evidence would not have produced a different result had the plea been vacated and the case presented to a jury.

Upon our review, we conclude that the circuit court did not abuse its discretion in finding that the petitioner failed to demonstrate his entitlement to a new trial under *Frazier*.[6] "[A]ll five elements must be satisfied," *Frazier*, at 941, 253 S.E.2d at 537 (citation omitted), and a new trial on the basis of newly discovered evidence "is very seldom granted and the circumstances must be unusual or special." Syl. Pt. 9, in part, *State v. Hamric*, 151 W. Va. 1, 151 S.E.2d 252 (1966). Furthermore, "we will not disturb the lower court's conclusions when there is factual support for such findings unless the lower court's conclusions are plainly wrong or against the weight of the evidence." *State v. Crouch*, 191 W. Va. 272, 276, 445 S.E.2d 213, 217 (1994).

As noted by the court, the petitioner failed to (1) state when he became aware that Mr. Smith and Mr. Wallace had pertinent information regarding Mr. Calhoun, (2) explain what diligence he exercised in ascertaining or securing the statements, (3) explain why he waited roughly seven years to hire a P.I. to investigate the matter, and (4) explain why he could not have discovered this evidence with due diligence before he pled guilty. While the petitioner claims that he could have presented evidence at a hearing to more fully develop these issues, *Frazier* clearly contemplates that a defendant must include with his motion an "affidavit [indicating] that [the] plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict." *Id*. at 935, 253 S.E.2d at 534-35, Syl. (citation omitted). Here, neither the petitioner's motion nor his affidavit provided any information addressing the timing of the petitioner's discovery or his diligence in securing this evidence. Accordingly, the petitioner has failed to establish that either the first or second factor under *Frazier* had been satisfied, and we find no abuse of discretion in the circuit court's denying the motion on this basis. Because "all five elements must be satisfied" to succeed in obtaining a new trial on the basis of newly discovered evidence, we need not address the remaining elements. *Id.* at 941, 253 S.E.2d at 537.

We likewise cannot find that the circuit court abused its discretion in deciding the petitioner's motion without holding a hearing, particularly when his motion and accompanying P.I. report clearly failed to satisfy the *Frazier* factors. *See State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 317 n.1, 465 S.E.2d 416, 419 n.1 (1995) (noting that a "circuit court has broad discretion in resolving a new trial matter, so, too, does it enjoy discretion whether to hold an evidentiary hearing on [a] motion [for new trial]"). Moreover, to the extent that the petitioner claims that the filing of his motion constituted a "critical stage" of his criminal proceedings, we note that he failed to cite to any authority to support such a proposition. As we have previously defined, "[a] critical

[6] *See supra*, note 3.

stage of a criminal proceeding is where the defendant's right to a fair trial will be affected." Syl. Pt. 2, *State v. Tiller*, 168 W. Va. 522, 285 S.E.2d 371 (1981). Here, the petitioner fails to explain how his motion to set aside his plea filed roughly seven years after his conviction constitutes a critical stage of his criminal proceedings such that his right to a fair trial would be affected. *See State v. Conley*, 168 W. Va. 694, 696-97, 285 S.E.2d 454, 456 (1981) (finding that a defendant's absence at a hearing on his post-trial "motion to reconsider [his] sentence could not have affected the fairness of his trial"). Accordingly, we conclude that the petitioner has failed to demonstrate that the court abused its discretion in deciding his motion without first holding a hearing or appointing counsel.

Regarding the petitioner's last assignment of error, he contends that the order denying the petitioner's motion to vacate his guilty plea is invalid, as it fails to include a "date of decree" and fails to include the circuit court's signature of endorsement. Under West Virginia Trial Court Rule 15A.25, "[o]rders issued by the court shall bear a typographic signature and an official e-filing court stamp, and shall be e-filed and served. . . . The date of the official e-filing court stamp shall constitute the date of entry of the order." A review of the record indicates that the circuit court's order was electronically signed and filed on September 25, 2023, at 11:55 A.M.; thus, it is fully compliant with Rule 15A.25 of the West Virginia Trial Court Rules. Accordingly, this assignment of error is without merit.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: July 30, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice Tim Armstead
Justice C. Haley Bunn
Justice Charles S. Trump IV