FILED
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. 23-663 (Cabell County 98-F-40)

Michael E. Brown,
Petitioner, Defendant below

MEMORANDUM DECISION

Petitioner Michael E. Brown appeals the October 13, 2023, order of the Circuit Court of Cabell County that denied the petitioner's "Petition for Declaration of Lost Documents" and motion for a new trial.[1] 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 decision is appropriate. *See* W. Va. R. App. P. 21(c).

The petitioner was convicted on two counts of first-degree murder in March 1999. *See State v. Brown*, 210 W. Va. 14, 552 S.E.2d 390 (2001). His conviction was subsequently affirmed on appeal, *see id.*, and his repeated attempts at seeking habeas corpus relief have been unsuccessful. *See Coleman v. Brown*, 229 W. Va. 227, 728 S.E.2d 111 (2012); *Brown v. Coleman*, No. 14-0134, 2014 WL 6607517 (W. Va. Nov. 21, 2014) (memorandum decision); *Brown v. Ames*, No. 21-0084, 2022 WL 1693755 (W. Va. May 26, 2022) (memorandum decision); *Brown v. Straughn*, No. 22-899, 2024 WL 313787 (W. Va. Jan. 25, 2024) (memorandum decision).

On August 9, 2023, the petitioner filed a "Petition for Declaration of Lost Documents" using Cabell County Civil Action No. 06-C-39 and the case style of "*Michael E. Brown v. Cabell County Circuit Clerk.*" The petitioner sought a declaration from the circuit court that certain "court records and documents of scientific psychiatric reports, and evidence exhibits of Mr. Matt Fortner in Case No: 06-C-39" are lost and not available. Mr. Fortner was a witness for the State at the petitioner's trial, and the case number the petitioner referenced was the number assigned to Mr. Fortner's circuit court habeas action. The petitioner filed a motion to compel a decision on his petition seeking a declaration of lost documents on October 11, 2023. On October 13, 2023, the petitioner filed a motion for a new trial under Rule 33 of the West Virginia Rules of Criminal Procedure. The petitioner argued that this motion was based on newly discovered evidence, and

[1] The petitioner is self-represented. The respondent appears 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.

that the State violated *Giglio v. United States,* 405 U.S. 150 (1972)[2] and his due process rights by presenting knowingly false and perjured testimony. More specifically, the petitioner alleged that two of the State's "star" witnesses, Matt Fortner and Michael Mount, gave conflicting testimony as to whether a third person, Joey France, had accompanied the petitioner and Mr. Fortner when they committed the murders. The petitioner argued that this conflicting testimony was "clearly false and perjured testimony" that the State never corrected, and he attached excerpts from Mr. Fortner's and Mr. Mount's trial testimony as exhibits to his motion.

The circuit court entered an omnibus order on October 18, 2023, which denied the petition for declaration of lost documents and motion to compel a decision on the petition as moot, finding that the petition and motion erroneously identified a case number associated with a case filed by Mr. Fortner, and the petitioner had no pending action against the circuit clerk in which his petition or motion could be filed. The court commented that the petitioner could, if he wished, institute a new cause of action against the circuit clerk. Additionally, the circuit court denied the petitioner's Rule 33 motion for a new trial, which was filed twenty-five years after his jury conviction, finding that the motion was untimely, and that the petitioner presented no credible evidence that the court had been deceived at trial. It is from this order that the petitioner now appeals.

The petitioner raises two assignments of error on appeal. First, the petitioner asserts that the circuit court abused its discretion by denying his petition seeking a declaration of lost documents "under the premise" that the petitioner "had no lawful right to file an action against the Cabell County Circuit Clerk," and "because he had no action pending against the circuit clerk."

> In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition 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.

Syl. Pt. 2, *Walker v. West Virginia Ethics Comm'n,* 201 W. Va. 108, 492 S.E.2d 167 (1997).

The circuit court highlighted that the civil case number the petitioner identified on his petition and motion, No. 06-C-39, is associated with a case styled "*Matthew Fortner v. William Haines, Acting Warden.*" Furthermore, the petitioner had no pending case against the circuit clerk; therefore, the style he used, "*Michael E. Brown v. Cabell County Circuit Clerk,*" was incorrect. Because the petitioner is not a party to civil action No. 06-C-39, and because he had no pending case against the circuit clerk's office, the court correctly found the petition and motion were moot.

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[2] In *Giglio,* the State's key witness, Robert Taliento, testified that he received no promises that he would avoid prosecution if he testified against the petitioner at trial. However, the petitioner subsequently discovered evidence that showed Mr. Taliento had indeed received a deal to avoid prosecution if he agreed to testify against the petitioner, and the State failed to disclose this information at trial. The petitioner presented this newly discovered evidence with his motion for a new trial. The *Giglio* Court held that the State's failure to disclose this evidence warranted a new trial, as Mr. Taliento's deal to avoid prosecution affected his credibility, and "the jury was entitled to know of it." 405 U.S. at 155.

Furthermore, and contrary to what the petitioner contends, the court did not find that the petitioner had no right to file an action against the circuit clerk. Instead, the court specifically acknowledged that the petitioner could institute such a suit under a new action. Therefore, we conclude that the circuit court did not err by summarily denying the petition and motion.

The petitioner next argues that the circuit court abused its discretion by refusing to entertain his Rule 33 motion for a new trial as time barred, by failing to address his *Giglio* claim, and by failing to provide any findings of fact or conclusions of law in support of its ruling. In his motion for a new trial, the petitioner alleged that Mr. Fortner and Mr. Mount provided perjured and false testimony against him, and that their testimony was the sole evidence used to secure his conviction. Specifically, the petitioner alleges that Mr. Fortner testified that Joey France participated in the events that led to the petitioner's murder conviction, while Mr. Mount testified that Mr. France did not participate in the relevant events. The circuit court denied the petitioner's motion, finding that the jury verdict was entered twenty-five years ago, and "a motion for a new trial decades after a jury verdict has been entered is improper." The circuit court also noted that the petitioner presented no credible evidence that the State had deceived the court.

On appeal, the petitioner asserts that the Rule 33 motion for a new trial is not time-barred because the motion is based on new evidence of a *Giglio* violation that went uncorrected by the State at trial. In addressing this assignment of error, we note that a motion for a new trial is subject to a three-pronged 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.

Syl. Pt. 3, in part, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000). Rule 33 of the West Virginia Rules of Criminal Procedure provides in relevant part:

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. . . . A motion for a new trial based on the ground of newly discovered evidence may be made only after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within ten days after verdict or finding of guilty or within such further time as the court may fix during the ten-day period.

Since the verdict against the petitioner was entered twenty-five years ago, his Rule 33 motion for a new trial is timely only on grounds of newly discovered evidence. "Rule 33 requires that a motion for new trial, based on grounds other than newly discovered evidence, *be filed* 'within ten days after verdict or finding of guilty or within such further time as the court may fix during the ten-day period.'" *State v. Smith*, 226 W. Va. 487, 493, 702 S.E.2d 619, 625 (2010) (quoting W.V. R. Crim. P. 33). *See also State v. Wilson*, No. 20-0528, 2021 WL 3833722, at *4 (W. Va. Aug. 27, 2021) (memorandum decision) (finding no error in circuit court's denial of Rule 33

motion as time-barred where it did not assert newly discovered evidence and was filed more than eleven months after the petitioner's conviction).

To be newly discovered evidence, "[t]he evidence must appear to have been discovered since the trial," and it "must be new and material[.]" Syl. Pt. 1, in part, *State v. Crouch*, 191 W. Va. 272, 445 S.E.2d 213 (1994). The petitioner has not presented newly discovered evidence. Instead, he relies on testimony that was provided during his trial.[3] Although the petitioner attempts to characterize this testimony as a violation of *Giglio*, the transcript excerpts upon which he relies merely reflect conflicting testimony from two witnesses, which presents only a credibility issue for a jury to resolve. As this Court stated in the petitioner's direct appeal, "[a]n appellate court must . . . credit all . . . credibility assessments that the jury might have drawn in favor of the prosecution . . . . Credibility determinations are for a jury and not an appellate court." *Brown*, 210 W. Va. at 27, 552 S.E.2d at 403 (citing Syl. Pt. 3, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995)).

The petitioner also contends that the circuit court's refusal to render findings of fact and conclusions of law in the omnibus order was an abuse of discretion. However, we determine that the circuit court's findings are sufficient to support its conclusions that the petitioner's motion for a new trial was not timely and that the petitioner had not proven deception of the court. Even if the court's findings had been inadequate, the record supports affirming the court's ruling because the petitioner has presented no newly discovered evidence and likewise presented no evidence that the State deceived the trial court. *See* Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965) (holding that this Court may affirm on any legal ground apparent from the record, regardless of the reason given by lower court).

Lastly, we remind the petitioner that in his most recently decided appeal, this Court stated that the petitioner "has exhausted all avenues for review of his 1999 conviction, the attendant sentence, and his efforts to secure post-conviction relief" in West Virginia courts. *Brown*, 2024 WL 313787, at *2.

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

[3] We also note that the petitioner presented this exact argument regarding the conflicting testimony of Mr. Fortner and Mr. Mount in his direct appeal. *See Brown*, 210 W. Va. at 27, 552 S.E.2d at 403. As such, this evidence is not new or material.