Amicus Curiarum

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Attorney Grievance Commission of Maryland v. Landon Maurice White, Misc. Docket AG No. 7, September Term 2021, filed August 12, 2022. Opinion by Eaves, J.

https://mdcourts.gov/data/opinions/coa/2022/7a21ag.pdf

ATTORNEY DISCIPLINE – SANCTION – DISBARMENT

Facts:

The Attorney Grievance Commission of Maryland (Petitioner), acting through Bar Counsel, filed a Petition for Disciplinary and Remedial Action with the Court of Appeals, alleging that Landon Maurice White ("Respondent") violated Maryland Attorney's Rules of Professional Conduct ("MARPC") 19-301.1 (Competence), 19-301.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 19-301.3 (Diligence), 19-301.4 (Communication), 19-301.5 (Fees), 19-301.8 (Conflict of Interest; Current Clients; Specific Rules), 19-301.15 (Safekeeping of Property), 19-301.16 (Declining or Terminating Representation), 19- 303.1 (Meritorious Claims and Contentions), 19-303.3 (Candor Toward the Tribunal), 19-303.4 (Fairness to Opposing Party and Attorney), 19-308.1 (Bar Admissions and Disciplinary Matters), and 19-308.4 (Misconduct); and Maryland Rules 19-407 (Attorney Trust Account Record-Keeping), and 19-410 (Prohibited Transactions). These allegations stemmed from the failure to provide adequate representation to several clients; the charging of improper fees; the making of knowingly false statements to the circuit court, the Court of Special Appeals, and Petitioner; and general mismanagement of an attorney trust account.

The hearing judge found that Respondent violated all the above-cited Rules except for Rule 19-303.4, as Petitioner withdrew that charge. According to the hearing judge, Respondent provided incompetent representation by failing to act on his clients' behalf, safekeep their property, and issue refunds once requested; communicate with and inform clients; appear for trial; advancing settlement proceeds to a client; and filing frivolous motions and pleadings. Respondent lacked candor towards the circuit court, Court of Special Appeals, and Petitioner when he knowingly made false statements in various motions and pleadings, as well as responses to complaints filed with Petitioner. Finally, Respondent mismanaged his client funds by failing to secure prior

approval before depositing client funds into accounts other than his attorney trust account and maintain client ledgers and other necessary records; comingling personal funds with client funds; making cash withdrawals from his attorney trust account; and authorizing personal transactions from his attorney trust account.

The hearing judge found as mitigating factors Respondent's lack of a prior disciplinary record, inexperience in the practice of law, and his character and reputation among his community. As aggravating factors, the hearing judge cited conduct that fell into three recognized categories: multiple MARPC infractions, Respondent's failure to acknowledge the wrongful nature of his misconduct, and the likelihood that he would repeat his misconduct.

Held: Disbarred

Based on an independent review of the record, the Court affirmed the hearing judge's legal conclusions that Respondent violated MARPC 19-301.1 (Competence), 19-301.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 19-301.3 (Diligence), 19-301.4 (Communication), 19-301.5 (Fees), 19-301.8 (Conflict of Interest; Current Clients; Specific Rules), 19-301.15 (Safekeeping of Property), 19-301.16 (Declining or Terminating Representation), 19- 303.1 (Meritorious Claims and Contentions), 19-303.3 (Candor Toward the Tribunal), 19-308.1 (Bar Admissions and Disciplinary Matters), and 19-308.4 (Misconduct); and Maryland Rules 19-407 (Attorney Trust Account Record-Keeping), and 19-410 (Prohibited Transactions).

The Court overruled Respondent's first exception that Petitioner could not prove its case-and-chief by relying on facts deemed admitted by Respondent when he failed to respond to Petitioner's request for admission of facts and genuineness of documents. Md. Rule 2-424(a)–(b); *Att'y Grievance Comm'n v. McCarthy*, 473 Md. 462, 469 (2021). The Court overruled Respondent's second exception, as it simply was a misreading of the hearing judge's Findings of Fact and Conclusions of Law. The Court declined to address Respondent's third exception—an alleged violation of his constitutional right to due process—because he failed to plead that exception with any sort of specificity. *Barbee v. Warden of Md. Penitentiary,* 220 Md. 647, 650 (1959). The Court also sustained the findings of all aggravating and mitigating factors by the hearing judge.

The Court held that Respondent's mismanagement of client funds and infliction of harm to his clients warranted the Court's customary sanction of disbarment for such action. *Att'y Grievance Comm'n v. Karambelas*, 473 Md. 134, 177 (2021). "To safeguard the public from future harm and to protect its perception of the legal community at large," the Court "concluded that disbarment was the appropriate sanction for Respondent's flagrant and persistent MARPC violations."

Brandon Gambrill, et al. v. Board of Education of Dorchester County, et al., No. 34, September Term 2021, filed August 26, 2022. Opinion by Booth, J.

https://mdcourts.gov/data/opinions/coa/2022/34a21.pdf

FEDERAL PREEMPTION – CIVIL ACTIONS FILED AGAINST SCHOOL EMPLOYEES FOR NEGLIGENT ACTS OR OMISSIONS – INDEMNIFICATION BY SCHOOL BOARD FOR MONEY DAMAGES

NEGLIGENT SUPERVISION CLAIMS AGAINST SCHOOL EMPLOYEES – NOT PRECLUDED BY THE EDUCATIONAL MALPRACTICE DOCTRINE

SUMMARY JUDGMENT – MATERIAL DISPUTES OF FACT

Facts:

The Paul D. Coverdell Teacher Protection Act of 2001, 20 U.S.C. § 7941 et seq. (2015) (the "Coverdell Act" or "Act") is a federal law that provides teachers with protection from liability for harm caused by a negligent act or omission that occurs within the teacher's scope of employment. Under Maryland law, Maryland Code, Courts and Judicial Proceedings Article ("CJ") § 5-518, negligence claims may be brought against a school board employee, provided that the school board is joined as a party and indemnifies the employee for any personal liability or money judgment entered against the employee.

In this case, the Court of Appeals was asked to determine whether the Coverdell Act preempts the Maryland statute, CJ § 5-518. This federal preemption question arose in the context of a negligence action filed by the Gambrills, and their minor daughter, S., against teachers and administrators at Mace's Lane Middle School in Dorchester County, for injuries that S. suffered at the hands of her fellow students. During the 2016–2017 school year, the Gambrills alleged that their daughter, S., was involved in a series of violent and troubling peer conflicts between adolescents at the middle school, which involved a range of incidents from emotionally abusive name-calling and teasing to physical fights, which resulted in S. receiving concussions on two occasions.

The Gambrills filed a negligence action against the Dorchester County Board of Education (the "Board"), as well as teachers and administrators who were employed by the Board. The Gambrills alleged, among other things, that the defendants failed to supervise the students, which resulted in S. being bullied and physically assaulted. The individual defendants and the Board filed a motion for summary judgment which was granted by the circuit court and affirmed by the Court of Special Appeals.

Both lower courts held that the federal Coverdell Act preempts the state statute, CJ § 5-518, and precluded the Gambrills from pursuing their negligence actions against the individual employees.

The Court of Special Appeals determined that the Coverdell Act provided teachers with "immunity from suit," and therefore, provided more protection than CJ § 5-518, which requires that the school board be joined as a party, and indemnify the teacher if a judgment is entered against the teacher on a negligence claim. With respect to the Gambrills' negligence claim against the Board, the lower courts held that the claim fell within the "educational malpractice doctrine," which bars claims regarding the quality of education provided by an educational institution. In addition, the circuit court also determined that, even if the Gambrills' negligence claim was not barred by the Coverdell Act and the educational malpractice doctrine, the defendants were nonetheless entitled to summary judgment because no reasonable jury could conclude that the defendants were negligent in supervising S. and the other students.

The Gambrills filed a petition for a writ of *certiorari*, which the Court of Appeals granted to consider the following:

> 1. Does the federal Coverdell Act preempt Maryland law and apply to preclude any liability on the part of either school personnel or boards of education in connection with the negligence of teachers and school administrators?
>
> 2. Did the Gambrills' negligence claim against the school personnel and the school board fall within the education malpractice doctrine, which precludes claims arising from educational decision-marking or academic placement, which this Court recognized in *Hunter v. Board of Education of Montgomery County*, 292 Md. 481 (2018)?
>
> 3. Was the circuit court's decision to grant summary judgment, including the court's stated reasons, legally correct?

Held: Reversed.

The Court answered "no" to the above questions, reversed the judgment of the Court to Special Appeals and remanded the case to the circuit court for further proceedings.

The Court of Appeals held that the Coverdell Act does not preempt CJ § 5-518. Under the plain language of the Coverdell Act, the Act does not provide teachers with "immunity from suit." Rather, it provides teachers with liability protection for harm they cause through negligent acts or omissions within the scope of employment. Additionally, 20 U.S.C. § 7946(b)(2) establishes an express "exception" to the preemption provisions of the Act for a "state law that makes the school or governmental entity liable for the acts or omissions of its employees to the same extent as an employer is liable for the acts or omissions of its employees." The Court of Appeals held that the state statute, CJ § 5-518, fits squarely within the exception set forth under § 7946(b)(2) of the Coverdell Act and is therefore not preempted.

The Court of Appeals additionally held that the Gambrills' negligence claim does not fall within the educational malpractice doctrine, which is intended to cover cases when a court is asked to

evaluate the course of instruction or is called upon to review the soundness of the method of teaching that has been adopted by an educational institution. The Court of Appeals adopted the educational malpractice doctrine in *Hunter v. Board of Education of Montgomery County*, 292 Md. 481 (1982), where it declined to recognize a cause of action based upon academic decision-making or educational placement. The Court of Appeals held that here, the Gambrills' claims did not fall within the scope of the educational malpractice doctrine. Specifically, the Gambrills are not alleging claims based upon educational placement or academic decisions that were made concerning S.'s educational needs. Instead, the Gambrills allege that the school employees and their employer had a duty to use reasonable measures to protect S. while on school grounds, including supervising students and taking precautions to protect S.'s physical safety. The Court has not applied the educational malpractice doctrine to claims that were not based upon educational placement or pedagogical decisions and declined to expand the doctrine to cover negligence claims involving supervision as asserted by the Gambrills in this case.

Because of the outstanding material disputes of fact appearing in the record, the Court could not affirm the circuit court's entry of summary judgment. Therefore, the Court reversed the judgment of the Court of Special Appeals and remanded the case to the circuit court for further proceedings.

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Roger Johann Garcia v. State of Maryland, No. 62, September Term 2021, filed August 11, 2022. Opinion by Eaves, J.

https://mdcourts.gov/data/opinions/coa/2022/62a21.pdf

CRIMINAL LAW – ACCESSORYSHIP

Facts:

In 2016, Jose Ovilson Canales-Yanez arranged to sell marijuana to Shadi Najjar. Although, Canales-Yanez initially proposed the sale to Najjar, it was Canales-Yanez's wife who was present to complete the sale. During the transaction, however, Canales-Yanez's wife alleged Najjar assaulted her by running over her foot with his car. It was from that point forward that Canales-Yanez began formulating a plan to avenge his wife.

Part of Canales-Yanez plan required the recruitment of Petitioner, Roger Garcia. Garcia's role was to inconspicuously communicate with Najjar since they both attended the same high school. To fulfill his role, Garcia became friends with Najjar on Snapchat, a social mean app where users can share pictures, communicate via text, and see their friend's location. A few days after Garcia and Najjar became friends on Snapchat, Najjar posted a photo to the app advertising an extra graduation ticket he had for sale. Later that day, Garcia told Canales-Yanez and the other Co-Defendants about Najjar's Snapchat post.

Garcia responded to the post, and following an exchange via the app's texting function, Najjar agreed to meet with Garcia that night to sell the extra graduation ticket. Ultimately, during the arranged meet-up, Najjar and Artem Ziberov, a passenger in the vehicle, were shot and killed while waiting in Najjar's car for Garcia to purchase the ticket.

After an investigation, the State charged Garcia in an indictment with eight offenses, including murder, conspiracy to commit murder, armed robbery, and use of a firearm in a felony or violent crime. At trial, after the close of evidence, the trial court instructed the jury on, among other things, first-degree premeditated murder, second-degree murder, and accomplice liability. The jury found Garcia guilty of two counts of second-degree murder, as well as the two-corresponding firearm use counts. The jury acquitted Garcia on all other charges.

Garcia appealed to the Court of Special Appeals, arguing that an accessory before the fact to second-degree intent to kill murder necessarily deliberates and premediates the murder, and thus cannot be guilty of second-degree murder. The Court of Special Appeals affirmed the trial court's judgment and rejected Garcia's theory.

Garcia petitioned the Court of Appeals for a writ of *certiorari*, which the Court granted. 477 Md. 382 (2022). In his writ, Garcia asked the Court to consider whether it is legally impossible to be convicted of second-degree intent to kill murder as an accessory before the fact. And

whether the conviction must be vacated if the jury considered a legal impossible theory of liability. For the reasons outlines below, the Court answered the first question in the negative, and therefore, did not address the second.

Held: Affirmed.

The Court of Appeals held the following: (1) an accessory before the fact's aid can be provided on the spur of the moment, thoughtlessly, or rashly, and thus without premeditation; (2) an accessory before the fact to second-degree murder is different and district from conspiracy to commit second-degree murder; and (3) *Sheppard* liability provides a legally cognizable basis upon which an accessory before the fact to an initial crime can be convicted as an accessory before the fact to an incidental crime.

First, the Court of Appeals reviewed the law as it relates to murder. To begin, the Court noted that pursuant to Maryland law murder is still a common law crime. Since murder is a common law crime, but divided into statutory degrees for purpose of punishment, the Court provided a lengthy historical analysis of common law murder's statutory segmentation.

Then, the Court noted the difference between first-degree murder and second-degree intent to kill murder, as the latter's lack of premeditation. The Court explained that the absence of premeditation in second-degree murder does not preclude the intent to kill. Instead, it reasoned that premeditation requires a showing that the intent to kill preceded the act of killing by an appreciable length of time.

Given that reasoning, the Court concluded that one can draw a reasonable inference that Garcia befriended Najjar on Snapchat in order to provide his Co-Defendant's with an inconspicuous way to communicate with Najjar and access to his whereabouts. Additionally, the Court suggested that it was reasonable to infer that Garcia alerted his Co-Defendant's to the Snapchat advertisement to give them a chance to meet, face-to-face, with Najjar. But, the Court opined, because premeditation is not an element of second-degree murder, the presence or absence of any alleged premeditation element is irrelevant.

Second, the Court of Appeals reviewed the law as it relates to accomplice liability. The Court, citing *Sheppard v. State*, defined an accomplice as one who "as a result of [their] status as a party to an offense, is criminally responsible for a crime committed by another." 312 Md. 118, 122 (1988). Thus, the Court held that *Sheppard* liability provides a basis upon which an accomplice can be "one who, as a result of their status as a party to an offense, is criminally responsible for planned and incidental crimes committed by another."

The Court opined that a reasonable inference can be drawn that Garcia, acting as an accessory before the fact, only intended to commit first-degree assault by scaring Najjar with some guns. However, because his Co-Defendant's, in furtherance of the first-degree assault, committed murder, Garcia can be found guilty of those murders under *Sheppard*.

Third, the Court reasoned that *State v. Mitchell* is inapplicable to Garcia's case. 363 Md. 130 (2001). In *Mitchell* the Court held that a defendant's prior planning in a conspiracy is equivalent to premeditation, and therefore a conspiracy to commit second-degree murder is legally impossible. *Id*. at 150. According to the Court, unlike a conspirator an accessory before the fact does not always act with a "prearranged concert of action." Likewise, the Court opined, it is possible for an actor to aid another in the commission of a crime without an agreement. Therefore, the Court held that *Mitchell* does not provide a logical conclusion to the idea that an accessory before the fact necessarily premeditates.

Accordingly, the Court reasoned, that when the jury acquitted Garcia of conspiracy to commit murder, the jury inherently found that Garcia's aid lacked premeditation. Thus, the jury properly found him guilty of second-degree murder.

In sum, the Court of Appeals affirmed the decision of the Court of Special Appeals. The Court held that it is legally possible to be an accessory before the fact to second-degree intent to kill murder.

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Claudia Grier, et al. v. Timothy Heidenberg, No. 2523, September Term 2019, filed September 1, 2022. Opinion by Kehoe, J.

Arthur, J., concurs.

https://www.courts.state.md.us/data/opinions/cosa/2022/2523s19.pdf

NEGLIGENCE – PARENT-CHILD IMMUNITY – ABROGATION

Facts:

In July 2016, Michaelangelo Heidenberg, age twenty-one months old, drowned in a swimming pool at the home of his father, Timothy Heidenberg. Claudia Grier, Michaelangelo's mother, in her own name and as the personal representative of the deceased child's estate, filed a wrongful death and survival action against Mr. Heidenberg and his mother, Marguerite Heidenberg, in the Circuit Court for Howard County.

Ms. Grier asserted that Mr. Heidenberg had a duty to care for and protect Michaelangelo, and that he breached that duty by failing to take reasonable measures to prevent a young child from accessing the backyard pool and by failing to properly monitor and supervise Michaelangelo when he was at his residence. Mr. Heidenberg filed a Maryland Rule 2-502 motion for a determination by the court as to whether he was entitled to invoke Maryland's doctrine of parent-child immunity. After a complicated procedural history, the circuit court eventually granted judgment in Mr. Heidenberg's favor on that basis and certified its judgment as final for purposes of appellate review pursuant to Rule 2-602(b).

Held: Affirmed.

On appeal, Ms. Grier first argued that Maryland's doctrine of parent-child immunity should be abrogated in its entirety. She contended that the original policy justifications for parent-child immunity were, at best, dubious, and have been rendered irrelevant by the passage of time and changing societal values. The Court of Special Appeals noted that the Court of Appeals has declined to abrogate the doctrine in its entirety on repeated occasions, most recently in *Bushey v.*

Northern Assurance Co. of America, 362 Md. 626, 645 (2001). After reviewing the pertinent case law, the Court of Special Appeals concluded: "Assuming for purposes of analysis that the principle of *stare decisis* and our role as an intermediate appellate court would permit us to do so, Ms. Grier has not convinced us that societal mores, expectations, and values have changed sufficiently since 2001 for us to abrogate the doctrine of parent-child immunity in its entirety."

Ms. Grier also argued that the circuit court erred when it ruled that the doctrine of parent-child immunity barred her wrongful death claim. She asserted that the justifications for parent-child immunity are not relevant in cases where a child dies as a result of a parent's negligence. The Court of Special Appeals noted that the Court of Appeals had previously held in *Smith v. Gross* that parent-child immunity protects the tortfeasor parent when the death of the child is the result of negligence. 319 Md. 138, 148–49 (1990). The intermediate appellate court concluded that it could not distinguish *Smith v. Gross* from the case before it.

Finally, Ms. Grier contended that the *Smith* holding was abrogated by *Mummert v. Alizadeh*, 435 Md. 207, 230 (2013). The Court of Special Appeals held that Ms. Grier's reading of *Mummert* was incorrect. In *Mummert*, the Court of Appeals distinguished between a statute of limitations defense (which would not bar a claim by a decedent against a tortfeasor had the decedent survived) and defenses such as immunity and contributory negligence (which would bar such a claim). 435 Md. at 221. For the foregoing reasons, the Court affirmed the judgments of the circuit court.

In his concurring opinion, Judge Arthur stated that he disagreed with the majority's conclusion that "societal mores, expectations, and values" have not "changed sufficiently since 2001' for a court 'to abrogate the doctrine of parent-child immunity in its entirety.'" He concluded:

If it were my decision, which it is not in view of *stare decisis* and the limits on our power as an intermediate appellate court, I would abrogate the doctrine in order to permit a recovery in this case.

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State of Maryland v. Artiis Ricardo Williams, No. 802, September Term 2021, filed August 31, 2022. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2022/0802s21.pdf

CRIMINAL LAW – ASSAULT BY INMATE – "CONSECUTIVE SENTENCE" REQUIREMENT – PLAIN LANGUAGE

Facts:

Appellant, Artiis Ricardo Williams, struck another inmate with his fists while incarcerated at the Harford County Detention Center. At a plea and sentencing hearing, Mr. Williams pleaded guilty to second-degree assault on an inmate pursuant to Maryland Code (2002, 2021 Repl. Vol.), Criminal Law Article ("CR"), § 3-210. The statute provides, in relevant part:

> A sentence imposed under this section shall be consecutive to any sentence that the inmate was serving at the time of the crime or that had been imposed but was not yet being served at the time of sentencing.

CR § 3-210(b). Mr. Williams was sentenced to one year and one day imprisonment, "consecutive to the last sentence to expire of all outstanding and unserved sentences."

Months later, Mr. Williams filed a motion to correct an illegal sentence. He argued that his sentence was not permitted by law because it was imposed consecutive to two other consecutive sentences: a 25-year sentence that he was serving at the time he assaulted the other inmate; and a 12-year sentence for a separate crime which had been imposed after the assault took place but before he was ultimately sentenced for the assault conviction. At the conclusion of a hearing on July 8, 2021, the circuit court granted Mr. Williams's motion, finding that his plea was not knowing and voluntary because during the plea and sentencing hearing, he was advised that the sentence for his assault conviction would be imposed consecutive only to the 25-year sentence that he was serving at the time of the assault. The court then resentenced Mr. Williams to a term of one year and one day, consecutive only to the sentence that he was serving on the date he assaulted the other inmate. The State noted an appeal.

Held: Reversed and remanded.

The Court of Special Appeals held that CR § 3-210(b) requires that when an inmate is sentenced for an assault under CR § 3-210, the sentence imposed "shall" be consecutive to the last to expire of "any" sentence that the inmate was serving at the time of the assault as well as "any" sentence that had been imposed, but that the inmate was not yet serving, at the time of sentencing. The Maryland General Assembly's use of the word *shall* in CR § 3-210(b) confirms that the statute's requirements for imposing a consecutive sentence are mandatory. In ascertaining the meaning of

"or" as it appears in CR § 3-210(b), the Court considered not just the definition of the word, but also the context in which the word is used. Because the word "or" in CR § 3-210(b) is preceded by the declaration that a sentence imposed under CR § 3-210 "*shall* be consecutive to any sentence . . . .," the Court concluded that a sentence imposed under CR § 3-210 *must* be consecutive to every sentence described thereafter. To assign a disjunctive meaning to the word "or" in CR § 3-210(b) would undermine this intent, as it would, plainly, allow sentencing judges to impose sentences that were consecutive to *some*, but not *every*, eligible sentence. As Mr. Williams's modified sentence was consecutive only to his 25-year sentence, it is not permitted by CR § 3-210(b), and is, therefore, illegal.

The Court of Special Appeals then analyzed whether Mr. Williams' plea was knowing and voluntary. Because Mr. Williams was advised, incorrectly, that his sentence for assaulting another inmate would be imposed consecutive only to his 25-year sentence, the Court held that plea was not knowing and voluntary. The Court remanded the case to the circuit court to allow Mr. Williams the choice of: (1) leaving the guilty plea in place and accepting the State's original offer of one year and one day of incarceration, to be served consecutive to the last sentence to expire of all outstanding and unserved sentences; or (2) withdrawing his guilty plea, with the understanding that the State is free to try him on all four of the original charges, or to negotiate another plea agreement.

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Stanley Charles Butler, Jr. v. State of Maryland, No. 1037, September Term 2021, filed August 31, 2022. Opinion by Wells, C.J.

https://mdcourts.gov/data/opinions/cosa/2022/1037s21.pdf

CRIMINAL LAW – FIFTH AMENDMENT – SUPPRESSION – DEFENDANT'S BURDEN – DISARMING A LAW ENFORCEMENT OFFICER – SUFFICIENCY OF THE EVIDENCE – MERGER – SECOND-DEGREE ASSAULT AND RESISTING ARREST

Facts:

Talbot County deputies tried to arrest Charles Butler because he had an open warrant. After the deputies announced their intent to arrest him, Butler fled leading the deputies on a car chase into Dorchester County where deputy sheriffs from that county joined the pursuit. After his car's tires were deflated and the car crashed, Butler physically fought several deputies in a protracted battle. Butler was twice tased and only surrendered after a police dog bit him. Afterward, he was transported by ambulance to the hospital. During the ambulance ride an EMT asked Butler, "How did we get here?" A sheriff's deputy was present when Butler, in part, responded to the EMT saying, "I shouldn't have gone for [a deputy's] gun." Butler was later charged and convicted by a jury of multiple offenses, including trying to disarm a law enforcement officer in the performance of his duties, second-degree assault, and resisting arrest. On appeal, he challenges: 1) the circuit court's denial of his motion to suppress his statement to the EMT; 2) the sufficiency of the evidence for his conviction of disarming a police officer; and 3) the court's failure to merge second-degree assault into resisting arrest at sentencing.

Held: Affirmed.

Before the Court of Special Appeals, Butler, first, contended that the circuit court should have suppressed his statement to the EMT because the EMT was acting as an agent of the State for Fifth Amendment purposes. The Court disagreed reasoning that although civilians may sometimes become agents of law enforcement and solicit an incriminating statement from an unwitting suspect, that was not proven here. Butler was required to show that he was in custody during the ambulance ride and that the EMT's questions were posed at the direction of law enforcement. The EMT testified that he only posed questions to Butler to determine what medical care was appropriate. The deputy riding along testified that she was present because it was customary to do so in situations such as this to ensure that Butler did not pose a danger to medical providers or try to escape. The deputy testified that she asked Butler no questions and did not ask the EMT to pose questions to Butler. The deputy did confirm that Butler was in custody. In short, the circuit court concluded that it had no evidence from which to conclude that the EMT was coopted to act as a mouthpiece for law enforcement. After an independent review

of the evidence, the Court of Special Appeals agreed with the circuit court, concluding that the court did not err as a matter of law in denying Butler's motion to suppress.

Next, Butler argued that the evidence was insufficient to show that he tried to disarm a law enforcement officer under Criminal Law Article, section 4-103(b). In reaching the opposite conclusion, the Court found that: 1) Butler's statement to the EMT; 2) the testimony of the officer in question; and 3) a still photograph from the officer's body-worn camera supplied sufficient evidence from which a reasonable juror could have concluded that Butler tried to disarm the officer.

Finally, Butler maintained that the circuit court erred in not merging his conviction for second degree assault into that for resisting arrest. Butler premised his argument on the holding in *Nicolas v. State*, 426 Md. 385 (2012), which Butler contended established a bright-line rule that any assaultive behavior that occurs after the police have announced an intent to arrest constitutes resisting and therefore merges. Put another way, according to Butler's reading of *Nicolas*, for the offenses not to merge the State must show that that assault came before the police announced that the defendant was under arrest or after the defendant had been taken into custody.

Once again, the Court of Special Appeals disagreed. The Court concluded that *Nicolas* did not adopt a hard rule about merger, but rather held that where the verdict was ambiguous about whether an assault constituted resisting, that ambiguity is resolved in the defendant's favor. Here, there was less ambiguity about how the jury viewed the evidence. For example, the verdict sheet specifically asked the jury whether the assault constituted a crime separate from resisting arrest. Further, in closing argument the prosecutor urged the jury to find that Butler's actions during the melee constituted assaultive behavior separate from mere resisting. The Court also found support in *Britton v. State*, 201 Md. App. 589 (2011) and *Purnell v. State*, 375 Md. 678 (2003). In *Britton*, this Court held that merger of second-degree assault and resisting was not mandated under the required evidence test. In *Purnell*, the Court of Appeals held that a defendant may be guilty of multiple assaults in the course of resisting arrest. Further, *Purnell* suggested that merging assault into resisting arrest in every instance might lead to "troubling" results. Namely that a defendant could seriously injure a law enforcement officer, potentially meriting the maximum 10-year sentence for second-degree assault but would only face a misdemeanor conviction and a maximum 3-year term for resisting arrest. The Court of Special Appeals' independent review of the record led to the conclusion that there was sufficient evidence against merger based on the facts adduced at trial, the prosecutor's closing argument, and the verdict sheet.

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ATTORNEY DISCIPLINE

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By an Order of the Court of Appeals dated July 7, 2022, the following attorney has been temporarily suspended effective September 6, 2022:

KENNETH WENDELL RAVENELL

*

By an Order of the Court of Appeals dated September 13, 2022, the following attorney has been disbarred:

DAVID OLLIE CAPLAN

*

By an Order of the Court of Appeals dated September 26, 2022, the following attorney has been temporarily suspended:

SUSAN ENGONWEI TINGWEI

*

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JUDICIAL APPOINTMENTS

*

On September 1, 2022, the Governor announced the appointment of **NICOLE K. BARMORE** to the Circuit Court for Baltimore City. Judge Barmore was sworn in on September 19, 2022, and fills the vacancy created by the retirement of the Hon. Karen Friedman.

*

On September 1, 2022, the Governor announced the appointment of **MICHAEL S. BARRANCO** to the Circuit Court for Baltimore County. Judge Barranco was sworn in on September 21, 2022, and fills the vacancy created by the retirement of the Honorable H. Patrick Stringer, Jr.

*

On September 1, 2022, the Governor announced the appointment of **DONNELL W. TURNER** to the Circuit Court for Prince George's County. Judge Turner was sworn in on September 26, 2022, and fills the vacancy created by the resignation of the Hon. Ingrid M. Turner.

*

On September 1, 2022, the Governor announced the appointment of **KATHLEEN C. MURPHY** to the District Court for Baltimore County. Judge Murphy was sworn in on September 28, 2022, and fills the vacancy created by the retirement of the Hon. Philip N. Tirabassi.

*

On September 1, 2022, the Governor announced the appointment of **CAMERON A. BROWN** to the Circuit Court for Cecil County. Judge Brown was sworn in on September 30, 2022, and fills the vacancy created by the retirement of the Hon. Jane C. Murray.

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RULES ORDERS AND REPORTS

*

A Rules Order pertaining to the 211th Report of the Standing Committee on Rules of Practice and Procedure was filed on September 30, 2022.

https://mdcourts.gov/sites/default/files/rules/order/ro211.pdf

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UNREPORTED OPINIONS

The full text of Court of Special Appeals unreported opinions can be found online:

https://mdcourts.gov/appellate/unreportedopinions

	Case No.	*Decided*
A		
Animashaun, Damilola v. State	0908 *	September 28, 2022
Ansari, Aslam v. Zuibaida	0407 *	September 9, 2022
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