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https://www.courts.state.md.us/data/opinions/coa/2019/57a18.pdf

CORPORATIONS AND ASSOCIATIONS – PARTNERSHIPS – INTENT TO FORM A PARTNERSHIP – COMPETENT MATERIAL EVIDENCE

Facts:

In September 2009, Harry Korotki ("Harry"), Joel Wax ("Joel"), and Mark Greenberg ("Mark") began negotiations to merge their three mortgage companies into one business. The parties concluded that Equity Mortgage Lending, a registered tradename for MAS Associates, LLC was the ideal surviving entity.

The parties retained regulatory counsel, who undertook preparing a "neutral" draft of the business arrangement. In a September 30, 2009 letter, regulatory counsel described the plan to merge the three companies as one "to join forces and establish a business together in some to-be-determined manner."

Following an October 2009 meeting, regulatory counsel, Elliott Cowan, prepared and circulated a summary of the meeting to the parties and their personal legal representatives. This document represented the first unambiguous indication that Harry, Joel, and Mark intended to become members of MAS Associates, LLC ("MAS"). Discussions during the meeting included the "goal" of ownership in MAS and contemplated ownership percentages. The meeting summary indicated that the structure of the potential arrangement included an "Interim Period" and a "Post-Interim Period."

Central to this litigation is the nature of the parties to MAS d/b/a Equity Mortgage Lending during the Interim Period. Specifically, whether the parties had indeed formed a partnership during their failed negotiations to form a limited liability company, MAS Associates, LLC. Harry characterized their association as a partnership, which regularly went unchallenged. Yet, Joel described himself as an "employee of MAS Associates." As set forth in the meeting summary and similarly in the draft Interim Agreement, during the Interim Period, Harry and Joel

were to be "employees of the Company" subject to for-cause termination and "entitled to receive W 2 compensation equal to 1/3 of the profits of the 'origination division' of the Company . . . ." Harry's and Joel's respective companies were to be liquidated and their mortgage lending licenses surrendered. Significantly, the parties never discussed how things would be handled if "the conditions for Harry and Joel to obtain substantial ownership [were] not obtained by the end of the Interim Period."

The parties moved forward with their plans to merge without finalizing either the Interim Agreement or the Operating Agreement. Harry, Joel, and Mark became authorized signatories on five Equity Mortgage Lending bank accounts. The three agreed to split legal fees associated with the combining of their companies. Each party made payments in 2009 and 2010, which were not direct capital contributions because they were not MAS members. Harry considered these to be loans. Actions all taken, despite Cowan's communications to the parties and their attorneys in which he encouraged the parties to finalize the agreements.

In November 2010, Harry, Mark, and Joel still contemplated becoming members of MAS Associates, LLC, but various agreements continued to go unsigned. In March 2011, Harry resigned from his position and set forth an accounting of his requested compensation. When he could not come to agreement on the compensation with Mark and Joel, he filed suit in the Circuit Court for Baltimore County seeking repayment of the two loans that he contributed to the proposed merged business. The most relevant claims included breach of contract and a request for a declaratory judgment asking for, inter alia, a determination of the "buyout price of this partnership interest" and a demand that the partners pay such a price.

The trial court stated there could be no breach of contract because there was no contract between the parties. Nonetheless, the trial court found that a partnership existed between the parties and awarded Harry $1,097,866. The court stated the partnership "consisted of the combined mortgage [] lending business, which was equally operated and owned by" Harry, Joel, and Mark. The Court of Special Appeals affirmed the trial court's ruling, holding that Harry, Joel, and Mark "entered into a joint venture for the short period of time . . . ." Joel and Mark petitioned for *certiorari* in this Court.

Held: Reversed.

The Court of Appeals held that Harry had the burden of producing sufficient facts to conclusively demonstrate the parties' intent to form a partnership, which he did not accomplish here. The record lacked the necessary competent material evidence to conclude that the parties intended to form a partnership, and thus the Court of Appeals held that the trial court's finding to the contrary was clearly erroneous, and reversed to the Court of Special Appeals with instructions to remand to the Circuit Court for Baltimore County to adjust the damage award in a manner consistent with the Court of Appeals' holding.

First, the Court analyzed whether management and control between the parties evidenced a partnership. They determined that although the parties made joint business decisions together, and refer to each other as partners, it was not enough. The Court held when the parties are also actively engaged in the process of negotiating to become members of an LLC, evidence of equal control and joint decision-making authority is not evidence of the parties' intent to form a partnership.

Payments made to the endeavor by Harry were also analyzed to determine partnership intent. The Court of Appeals held the trial court made an error of law in concluding the payments were capital contributions to a partnership under the guise of capital contributions to an LLC. Treating an LLC and a partnership as one-in-the-same is expressly prohibited by Maryland Code, § 9A-202(c) of the Corporations and Associations Article. Thus, the payments were loans, not evidence of partnership intent.

The Court also found, in light of the parties' ongoing efforts to become members of an LLC, there was meager evidence that the compensation Harry received was profit shares. As such, the trial judge's presumption of partnership based on receipt of profits was also an error of law.

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State of Maryland v. Phillip Daniel Thomas, No. 73, September Term 2018, filed August 9, 2019. Opinion by McDonald, J.

https://www.courts.state.md.us/data/opinions/coa/2019/73a18.pdf

CRIMINAL PROCEDURE – APPEAL – AUTHORITY OF TRIAL COURT TO RESENTENCE DEFENDANT WHEN SUBJECT IS PENDING APPEAL – MOOTNESS.

CRIMINAL PROCEDURE – SENTENCING – RESENTENCING AFTER APPEAL.

Facts:

Phillip Daniel Thomas was convicted of kidnapping and second-degree assault in the Circuit Court for Wicomico County. He received consecutive sentences of 15 years for the former crime and 3 years for the latter for a total of an 18-years imprisonment. Under the statute governing parole, Thomas would be eligible for release on parole after serving one-half of the sentence for kidnapping (7.5 years).

Thomas appealed this sentence and the Court of Special Appeals reversed because the kidnapping and second-degree assault convictions should have been merged for purposes of sentencing. On remand, Thomas was sentenced to 18 years on the kidnapping charge alone. Under this new sentence, however, Thomas would not be eligible for parole until he served 9 years.

Thomas again appealed, and the Court of Special Appeals held the new sentence was illegal because it was more severe than his previous sentence, which is forbidden by the Maryland Code, Courts & Judicial Proceedings Article §12-702(b). Before the Court of Special Appeals issued its mandate and before the deadline for filing a petition for a writ of certiorari to the Court of Appeals had expired, the Circuit Court resentenced Thomas in January 2019 to 15 years imprisonment with parole eligibility after 7.5 years apparently attempting to comply with the views expressed in the opinion of the Court of Special Appeals.

The Court of Appeals granted the State's petition for a writ of certiorari on the issue of the legality of the second sentence. The defendant moved to dismiss the appeal as moot in light of the third sentence; the Court of Appeals deferred any decision on the motion until after oral argument. Before oral argument in April 2019, the Circuit Court vacated the third sentence it had imposed while the case was pending in the Court of Appeals.

On May 2, 2019, the Court of Appeals heard argument as to whether the case was moot and as to whether a sentence of equal maximum duration but with a later parole eligibility date constitutes a more severe sentence.

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Held: Affirmed.

First, the Court of Appeals determined that the case was not moot. Circuit courts retain fundamental jurisdiction over a case while it is on appeal, but they must not act in a way that frustrates the appellate process. Here, the Court of Appeals determined that it did not need to examine whether the Circuit Court could have properly resentenced Thomas in January 2019 because that court had expressly vacated that sentence in April 2019.

The Court of Appeals also ruled that the resentence of Thomas, which resulted in a sentence equal to that of his initial sentence but with a later parole eligibility date, was a more severe sentence in violation of CJ §12-702(b). Using the maximum period of incarceration under a sentence as the sole benchmark of sentence severity would fly in the face of reality. Under such a legal framework, a life sentence without the possibility of parole would be no worse than a life sentence with the possibility of parole.

The Court stated it may not always be easy to determine whether one sentence is "more severe" than another. In the future, the Court may need to determine whether a sentence with a shorter maximum duration but later parole eligibility date is more severe than a sentence with a longer maximum duration but earlier parole eligibility date. But such a scenario is not presented in this matter. This case simply stands for the principle: If, following a successful appeal, a defendant in a criminal case is resentenced to a term of imprisonment of equal length to the original sentence but with a later parole eligibility date, the new sentence is "more severe" than the original sentence for purposes of CJ §12-702(b).

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Delvonta Morten v. State of Maryland, No. 215, September Term 2017, filed September 4, 2019. Opinion by Moylan, J.

https://mdcourts.gov/data/opinions/cosa/2019/0215s17.pdf

HEARSAY – EXCITED UTTERANCE – PRESENT SENSE IMPRESSION

DNA IDENTIFICATION – THE TRUEALLELE METHOD OF DNA IDENTIFICATION – ADMISSIBILITY VERSUS WEIGHT – RELIABILITY IS BOTH A CONTINUUM AND VARIOUS POINTS ON THE CONTINUUM

Facts:

At around 5:00 p.m. on September 21, 2015, Kevin Cannady was killed by a single gunshot to the neck. At 5:11 p.m., police responded to the scene in the 4900 block of Cordelia Avenue, where Cordelia intersects with Reisterstown Road. An unidentified female made anonymous 911 calls at 5:35 p.m., 5:41 p.m., and 5:49 p.m. During the first call, she informed the police that, after having heard the shot, she saw two black males, approximately seventeen years of age, running down an alley near 3716 Arcadia Avenue, about a block from the scene of the shooting. She described one of the men as wearing "a black hoodie with white on it, like a skeleton design" and the other as wearing "a burgundy jacket." She further reported that she had witnessed the men discard an object in an empty yard adjacent to the alley. During her second and third 911 calls, she informed the police that they were searching for the discarded object in the wrong area, and gave more detailed descriptions of location in which it had been discarded. Ultimately, the police recovered a revolver from "the bottom of a tree stump" in the alley behind 4907 Cordelia Avenue.

At the intersection of Cordelia Avenue and Reisterstown Road are located a car dealership and a grocery store, both of which are equipped with surveillance cameras. Footage from the dealership's surveillance camera showed a person wearing a black hoodie and grey pants approach Cannady from behind, shoot him, and run up Cordelia Avenue alongside an individual wearing a burgundy jacket. Footage from inside the grocery store depicted the appellant, Delvonta Morten, wearing a black hoodie inside the store at approximately 4:05 p.m. The grocery store was also equipped with an outdoor surveillance camera, which recorded an individual wearing a black hoodie walk past the store at 5:01 and turn onto Cordelia at 5:08.

Thomas Heibert, the DNA analyst for the Baltimore City Police Department, conducted a one-on-one manual comparison of Morten's DNA with DNA taken from the revolver. When the initial results proved inconclusive, Mr. Heibert conducted an adjusted comparison, assuming that (i) there were two contributors to the DNA sample taken from the revolver and (ii) Morten was a minor contributor to that sample. In so doing, he utilized the TrueAllele system of DNA analysis—a less reliable method reserved for cases in which manual interpretation is inconclusive because the sample is small, has been contaminated, or consists of DNA from more than one person. That test yielded a match.

At a pre-trial hearing on the admissibility of the TrueAllele test results, the defense argued that the admission of such unreliable DNA test results violated due process. The defense called Dr. Charlotte Word (a Ph.D. specializing in molecular biology and immunology and an experienced consultant in the realm of DNA identification testing) as an expert witness. The State, in turn, called Mr. Heibert as its expert witness. While the former testified at length that TrueAllele is unreliable (both in general and in the instant case), the latter testified to the contrary. Ultimately, the court ruled that the use of the TrueAllele method did not offend due process as a matter of law, and that the TrueAllele test results were admissible pursuant to Courts and Judicial Proceedings Article, §10–915 and *Phillips v. State*, 451 Md. 180, 152 A.3d 712 (2017).

While Mr. Heibert and Dr. Word testified without limitation at the admissibility hearing, at trial the scope of Dr. Word's testimony was narrowly constrained. Specifically, Dr. Word was prohibited from opining as to both TrueAllele's general reliability and its reliability in this case. She was so prohibited because (i) she had not conducted a full TrueAllele analysis and (ii) the court ruled that the issue of TrueAllele's reliability had been conclusively decided at the suppression hearing. Also at issue were the three anonymous 911 calls made the night of the shooting. The State offered recordings of those calls into evidence. Though the defense objected to their admission, contending that they were inadmissible hearsay, the court ruled that the first call was admissible under the Excited Utterance exception, while the latter two calls were admissible as Present Sense Impressions.

Held: Vacated and remanded.

The Court of Special Appeals held that the 5:35 p.m. 911 call did not qualify as an Excited Utterance, and was not, therefore, exempt from the Rule Against Hearsay. The Court further held that eleven of the thirteen statements uttered during the 5:41 p.m. and the 5:49 p.m. 911 calls did not qualify as Present Sense Impressions. Finally, the Court held that Dr. Word was erroneously prohibited from fully presenting her views about TrueAllele DNA testing at trial.

In order to qualify as an Excited Utterance, the proponent of the exception must prove that the out-of-court declaration (i) was made in the wake of an "event sufficiently startling to render inoperative the normal reflective thought processes of the observer," *McCormick on Evidence* Sect. 297, at 854–55 (E. Cleary 3d Ed. 1984), (ii) was made while the declarant was still in the throes of excitement, and (iii) described the particular event that produced the excitement.

Where, as here, the hearsay declarant was unidentified, moreover, there is a heightened burden on the proponent of the hearsay to prove its trustworthiness. In this case, the declarant's first call was placed 24 minutes after the shooting and its content was completely in the past tense. The declarant's decision to call 911 was, moreover, a conscious and reflective decision. The content of the declarant's first 911 call was not, therefore, made while in the throes of excitement. Further, the content of that call was by no means limited to a description of the exciting event at issue. It did not, therefore, qualify as an Excited Utterance.

The second and third 911 calls consisted of nine and four statements respectively. While the statements with which each call began may have constituted Present Sense Impressions, the remaining eleven statements either narrated past events or reiterated what had been said in the 5:35 p.m. 911 call. Those eleven statements did not, therefore, quality as Present Sense Impressions.

Finally, the court's ruling that TrueAllele was sufficiently reliable to be admissible did not foreclose Dr. Word's testifying to its unreliability at trial. The court's pre-trial reliability ruling was on the threshold admissibility of the TrueAllele results as a matter of law, and not on the persuasive weight to be afforded them as a matter of fact. A ruling on the former does not limit the ability of the opponent of such evidence to mount a challenge to the latter.

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Clifton Johnson v. State of Maryland, No. 1386, September Term 2017, filed September 9, 2019. Opinion by Kehoe, J.

https://mdcourts.gov/data/opinions/cosa/2019/1386s17.pdf

CRIMINAL PROCEDURE – TRAFFIC CHECKPOINTS – FOURTH AMENDMENT

Facts:

On May 7, 2016, at around 4:30 or 5:00 p.m., seven officers from the Baltimore City Police Department conducted what they referred to as a "traffic initiative" at the intersection of West Pratt Street and South Payson Street. The officers were positioned on foot, near the traffic light, and were looking for drivers halted at the light on Pratt Street who were not wearing their seat belts or using their cell phones.

When vehicles were halted at the red light, the officers would walk in front of or beside vehicles to see if the occupants were wearing their seat belts or were talking on a cell phone. If the light was green, the officers did not initiate any traffic stops, even if they observed an infraction. Instead, the officers allowed the vehicles to proceed on Pratt Street, unimpeded. In that way, drivers were stopped only during the red light sequences and the flow of traffic was not adversely affected.

There were no places where a car could turn around between those two locations; that there were no signs indicating that the police were conducting a checkpoint; and that this police activity was not advertised in any manner. Additionally, orange traffic cones were located on the side of the street, but only for purposes of officer safety, and were not used in any way to funnel traffic down to one lane.

At the preceding signalized intersection west of this location were another seven police officers who would alert the officers if they saw someone driving by without a seat belt or while talking on a cell phone. No drug sniffing dogs were present at either intersection. The initiative ended at around 6:00 or 6:30 p.m.

Midway through the initiative, at around 5:35 p.m., Johnson stopped his vehicle at the red light located at Pratt and Payson Streets. An officer walked by the side of the vehicle and noticed that Johnson was not wearing his seat belt. Johnson was asked by the officer to pull around the corner so that he could be issued a citation.

As Johnson was pulling over, the officers ran a check on the vehicle's license plate number and learned that the Maryland Motor Vehicle Administration did not have any record for the license plate that was displayed on Johnson's vehicle. Specifically, the information came back as "No record found."

Johnson was unable to provide his driver's license or the registration for the vehicle, but, based on Johnson's name and date of birth, the officer ascertained that there was an open warrant for Johnson's arrest.

Johnson was arrested, and, in subsequent inventory search of the vehicle, the officer found a loaded handgun in plain view under the driver's seat.

Pursuant to Md. Rules 4-252 and 4-253, Johnson filed a motion to suppress the handgun. A hearing was held at which Johnson argued (1) that the traffic initiative constituted an unlawful checkpoint under *Little v. State*, 300 Md. 485 (1984), and (2) assuming that the stop was illegal, counsel contended that the discovery of Johnson's arrest warrant did not attenuate the unlawful stop based on the U.S. Supreme Court's analyses in *Brown v. Illinois*, 422 U.S. 590 (1975), and *Utah v. Strieff*, __ U.S. __, 136 S. Ct. 2056 (2016). The State responded that the traffic initiative was not a checkpoint; instead, this was simply a number of police officers making observations inside those vehicles that were halted by a traffic control device. Further, the State argued that the police had probable cause to stop Johnson because, not only was Johnson's vehicle not properly registered, but Johnson also had an open arrest warrant. Therefore, the handgun was discovered through a lawful inventory search.

The motions court agreed with the State, concluding that the traffic initiative was not a checkpoint, but did not make a ruling on the attenuation argument, and denied the motion to suppress.

After trial, a jury convicted Johnson of illegal possession of a regulated firearm, wearing, carrying, and transporting a handgun on his person and in a vehicle, and possession of ammunition. Johnson was sentenced to eight years for illegal possession of a regulated firearm, the first five without possibility of parole, and concurrent sentences of one year, respectively, on the remaining counts. Johnson timely appealed.

Held: Affirmed.

Canvassing a series of police checkpoint cases from Maryland courts, the United States Supreme Court, and other jurisdictions shows that checkpoints have certain characteristics that set them apart from other police operations. First, inherent in all the checkpoints is that motorists are stopped by the police without having a reasonable articulable suspicion to do so. Second, every motorist, or motorists in a predetermined sequence, passing through the checkpoint is stopped by the police. Next, checkpoints use a "roadblock," which can be effectuated through traffic cones, flares, and other objects that act as barriers to motorists. Together, the road-block and its component parts serve the purpose of funneling traffic into a limited number of lanes to facilitate easier inspection by police. Finally, at a checkpoint, motorists are subjected to varying degrees of intrusion, depending on the purpose of the checkpoint.

Taken together, the amalgamation of police vehicles blocking a motorist's pathway, emergency lights, barriers, cones, flares, flashing signs, visual inspections, and questioning manifests into a

significant police presence that would undoubtedly put an approaching motorist on notice that a checkpoint designed to halt vehicles expressly for the purpose of police inspection lies ahead.

The Court of Special Appeals determined, by comparing these characteristics to the those of the traffic initiative here, that the traffic initiative was not an unlawful police checkpoint. Motorists were allowed to proceed down Pratt Street, past South Payson Street, when the light was green. When the light turned red, forcing motorists to stop, officers walked through the intersection to inspect vehicles for visible traffic violations. If a motorist was not wearing his or her seat belt, or was otherwise in violation of the vehicle laws, the motorist was directed by the police to pull around the corner on South Payson Street to receive a citation. Thus, the police officers conducting the traffic initiative did not create a roadblock. Although police cruisers were present at the traffic initiative, the cruisers were parked around the corner on Payson Street where motorists were issued citations. Additionally, the officers conducting the traffic initiative did not impede or direct traffic themselves. The police officers only entered Pratt Street on a red light, and left Pratt Street once the light turned green, even if they spotted a violation. Thus, the officers present did not prevent motorists from using any lane of Pratt Street, funnel traffic to a single lane for easier inspection, or other-wise slow traffic.

Next, the Court of Special Appeals concluded that the stop of Johnson was lawful under the Fourth Amendment. Johnson, halted at the traffic light, was driving without a seat belt in clear violation of state traffic laws. The police officer witnessed this violation while walking alongside Johnson's vehicle. This gave the officer sufficient justification to instruct Johnson to pull onto Payson Street so that another officer could issue a citation. Johnson's subsequent inability to provide accurate information regarding his vehicle gave the officers reason to impound the car and conduct the inventory search that, consequently, led to the discovery of the loaded handgun under the driver's seat.

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Pablo Javier Aleman v. State of Maryland, Nos. 823 and 2021, September Term 2018, filed September 25, 2019. Opinion by Gould, J.

https://mdcourts.gov/data/opinions/cosa/2019/0823s18.pdf

EXTRADITION AND DETAINERS – INTERSTATE AGREEMENT – CUSTODY, TRANSFER AND RETURN OF PRISONER

Facts:

In early 2016, Appellant Pablo Aleman fatally stabbed his former landlord at the latter's home in Baltimore County. He then fled Maryland. Two weeks later, in Ohio, Mr. Aleman had an altercation with the police during which he threatened an officer with a knife. The officer shot Mr. Aleman to disarm and apprehend him. An Ohio jury convicted Mr. Aleman of felonious assault, resulting in an eleven-year prison sentence.

Maryland authorities notified Ohio of the charges still pending in Maryland by way of a "detainer." As a result, Mr. Aleman filed a request under the Interstate Agreement on Detainers ("IAD") to face trial for the murder charges pending against him in Maryland. Upon his return to Maryland, Mr. Aleman asserted a plea of not criminally responsible ("NCR") in the Circuit Court for Baltimore City and then pleaded guilty to second degree murder.

Mr. Aleman's plea of NCR was tried by a jury on May 31, 2018. The jury found that he was NCR at the time of the murder, and the court entered an order committing him to the Department of Health.

Local officials refused to transport Mr. Aleman to the Department of Health facility, and instead "prepared to return him to Ohio" pursuant to the IAD, which requires that a prisoner who has been transferred to face charges in another state be promptly returned to the incarcerating state once trial is completed. Mr. Aleman filed a petition for a writ of habeas corpus to challenge his continued confinement in the local detention center, arguing that he should have been committed to the Department of Health instead. The court denied the habeas corpus petition and determined that Mr. Aleman should be sent back to Ohio. The court stayed its prior order of commitment to the Department of Health but enjoined Maryland from returning him to Ohio pending this appeal.

Held: Affirmed.

On appeal, Mr. Aleman argued that Maryland's mandatory commitment statute (Md. Code Ann., Crim. Proc. ("CP") § 3-112 (2001, 2018 Repl. Vol.)) trumped the obligation under the IAD to return him to Ohio. Mr. Aleman also argued that Article VI of the IAD—which states that the IAD does not apply to a defendant adjudicated to be mentally ill—dictated that the IAD no

longer applied to him once the jury found him NCR, and therefore Maryland had no duty to return him to Ohio.

The Court of Special Appeals disagreed. First, the Court held that CP § 3-112 does not apply to a defendant whose presence in Maryland resulted from the defendant's transfer from another state pursuant to the IAD. Therefore, pursuant to the IAD, such a defendant must be promptly returned to the state of original incarceration—the "sending state"—once the Maryland charges have been tried. The Court reasoned that the IAD specifies that Maryland's custody over such a prisoner is limited to prosecuting Maryland's charges against him, and for all other purposes, the sending state retains custody and jurisdiction over the prisoner. Accordingly, Maryland does not have sufficient custodial rights over such a prisoner to apply CP § 3-112 to a defendant transferred pursuant to the IAD.

Next, the Court held that Article VI of the IAD is not triggered when a defendant is found NCR after he has already been transferred from the state of incarceration to face charges in another state. The Court analyzed the plain language, context, and purpose of the IAD and found that the drafters of the IAD intended Article VI to apply to a defendant adjudicated to be currently mentally ill, not to a defendant found to have been mentally at the time the underlying crime was committed.

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In re: Adoption/Guardianship of J.T., Nos. 2811 and 3098, September Term 2018, filed July 31, 2019. Opinion by Adkins, J.

https://www.courts.state.md.us/data/opinions/cosa/2019/2811s18.pdf

FAMILY LAW – TERMINATION OF PARENTAL RIGHTS – BEST INTERESTS OF THE CHILD – WITHDRAWAL OF FOSTER FAMILY

FAMILY LAW – TERMINATION OF PARENTAL RIGHTS – FAMILY LAW ARTICLE § 5-323 – PARENT'S MENTAL ILLNESS

Facts:

Appellant T.N. ("Mother") gave birth to J.T., on April 1, 2016. The child's father, Appellant J.M. ("Father"), lives in Cameroon. Shortly after giving birth to J.T., Mother experienced a mental health crisis. J.T. was removed from Mother's care, named a CINA by the juvenile court, and placed in kinship care with a licensed foster parent who was a friend of Mother.

Following child in need of assistance ("CINA") proceedings and a termination of parental rights trial ("TPR") (Case No. 2811), the Circuit Court for Montgomery County terminated Mother's and Father's parental rights pursuant to its November 2018 Order. Both Mother and Father appealed from this Order. Mother also appealed the change in her visitation schedule (Case No. 3098), and the two appeals were consolidated.

Mother has suffered serious mental health problems since 2013, her diagnoses include post-traumatic stress disorder and recurrent major depressive disorder with psychotic features. According to social workers and psychologists who have dealt with Mother, she can successfully manage her illness with therapy and medication. From J.T.'s birth through August 2017, Mother was in and out of hospitals, shelters, and assisted living facilities. She developed a relationship with J.T. through supervised then unsupervised visits. During this time J.T. resided with—and continued to form a bond with—her foster family.

Around December 2016, Mother became pregnant again, which appeared to affect her mental health adversely. In an August 18, 2017 report to the juvenile court, the Department of Social Services ("DSS") noted that Mother was still exhibiting symptoms of anxiety and depression, and her pregnancy limited the medications she was able to take. DSS also reported, however, that Mother's "prognosis appears to be fairly good if she continues to comply with medications, participate in psychotherapy and receive supportive services." DSS acknowledged J.T. exhibited a connection to Mother, but also emphasized that J.T.'s "strongest attachment is to her foster parents." Following the August 18 hearing the juvenile court changed J.T.'s permanency plan from "Reunification" to "Adoption by a Non-Relative."

DSS argued before the court that J.T. was in a loving and stable foster home, and the foster parents were committed to adopting her. The foster parents, however, asked DSS to remove J.T. from their home on October 1, 2018, *after* the close of evidentiary hearings on the TPR. No reason was given for the foster parents' decision.

Held: Reversed.

The Court of Appeals recently pronounced that "[m]any cases of mental illness can be treated and managed and need not be cause for termination of parental rights." *In re: Adoption/Guardianship of C.E.*, 464 Md. 26, 62 n.18 (2019). Mental illness is common in TPR cases. Here, however, the Court of Special Appeals noted a rarity —Mother's demonstrated insight into her mental illness, her willingness to follow a regimen of medication and therapy, and the success of that regimen. It also noted that unlike so many TPR cases, nothing in the record reflected that Mother was irresponsible with her child, or that she willingly neglected J.T. Additionally, Mother's mental health had been improving—becoming stable—for about six months prior to the end of the TPR hearing.

The Court of Special Appeals found the juvenile court diligently addressed most of the rigorous statutory factors it must before it "finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child. Md. Code Ann. (2005, 2012 Repl. Vol.), § 5-323(b) of the Family Law Article. The issue, however, was that twelve days after the last day of the TPR trial, before the court's decision, J.T.'s foster parents requested that J.T. be removed from their home. J.T. had lived with the foster parents for over two years; adoption by the foster parents was anticipated; and DSS, in its presentation to the juvenile court, emphasized repeatedly that the strong bond between J.T. and the foster parents bolstered the case for terminating the parents' rights. This issue was crucial to the Court of Special Appeals, because, as of October 1, J.T.'s relationship with Mother, and her limited, video-only relationship with Father, were her only permanent attachments.

In light of J.T.'s unexpected removal from the care of her foster parents and considering the progress Mother was making in managing her mental illness at the time of the TPR hearing, the Court of Special Appeals concluded that the juvenile court's assessment fell short. It failed to adequately take into account the foster parents' unexplained decision to return J.T. to the care of DSS. The Court of Special Appeals remanded the case to the juvenile court to hold a new evidentiary hearing, at which evidence about J.T., Mother, Father, and any other relevant evidence shall be considered, including evidence relating to time periods up until the time of the new evidentiary hearing.

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George M. Hayden v. Maryland Department of Natural Resources, No. 2434, September Term 2017, filed September 3, 2019. Opinion by Kehoe, J.

https://mdcourts.gov/data/opinions/cosa/2019/2434s17.pdf

STATUTORY INTERPRETATION – NATURAL RESOURCES LAW

Facts:

On February 25, 2017, a Maryland DNR police officer observed George M. Hayden harvesting oysters, using a hydraulic dredge, in an area of the Chesapeake Bay closed to oyster harvesting by the Maryland Department of the Environment. Hayden was issued three citations for: (1) using a hydraulic dredge to harvest oysters in a non-designated area; (2) harvesting oysters during a closed season; and (3) harvesting oysters from an area closed by the MDE due to pollution.

Although the State did not pursue the criminal charges against Hayden, the Department, as required by Nat. Res. § 4-1210, sought to revoke Mr. Hayden's authorization to engage in commercial oyster harvesting. On June 19, 2017, a hearing was held before an administrative law judge.

The Department's theory of the case was that "knowingly," as used in Nat. Res. § 4-1210(b), means "intentionally" or "deliberately." According to the Department, Hayden's culpability was abundantly clear under this standard because he admitted that he that he had relayed oysters from a closed area, out of season, using a hydraulic dredge. Hayden argued that, in order for the administrative law judge to find that he "knowingly" violated the statute, the Department had to prove that he was subjectively aware that he was violating the law when he removed oysters from the closed area. Operating under this theory, Hayden asserted that when he relayed oysters from the closed area, he was not aware that doing so was illegal. At trial, evidence was produced that, when the Department issued Hayden a commercial tidal fish license, Hayden signed a copy of the Oyster Surcharge Sheet acknowledging that he would know and comply with all laws governing shellfish, and certified, under penalty of perjury, that he received the Department's maps and coordinates of oyster sanctuaries and areas closed to shellfish harvesting; and that Hayden received a copy of the Department's Shellfish Closure Manual dated June 2016.

The administrative law judge revoked Hayden's authorization to engage in commercial oyster activity under Nat. Res. § 4-1210, concluding that the Department had proved by a preponderance of the evidence that Hayden had taken oysters from a location more than 200 feet within a closed area, which is prohibited by Nat. Res. § 4-1210(a)(2)(i). The administrative law judge concluded as a matter of law that Nat. Res. § 4-1210 does not have a scienter requirement and that, accordingly, Hayden had violated the statute. The administrative law judge also found that that Hayden willfully disregarded the oyster harvesting laws by virtue of signing his name to

the Oyster Surcharge Sheet and receiving a copy of the Shellfish Closure Manual. Hayden appealed.

Held: Affirmed.

The Court of Special Appeals held that "knowingly" as used in Nat. Res. § 4-1210(b)(2) means "deliberately" or "intentionally." To reach that conclusion, the Court looked to the statute's plain language, its statutory context, and its legislative history. Although the plain language did not clearly support either party's interpretation, the statutory context in which "knowingly" is used in other provisions of Title 4 of the Natural Resources Article supports the Department's interpretation. Moreover, the way in which "knowingly" is used elsewhere in Title 4 is not consistent with Mr. Hayden's argument.

Further, the legislative history of the statute supported the Department's interpretation. The bill file for S.B. 159, which would become Nat. Res. § 4-1210, demonstrates that the then-current criminal penalties and civil sanctions were inadequate to protect the Bay's oyster habitat. Specifically, criminal prosecutions often resulted in violators receiving fines. Instead of acting as a deterrent, the fines were viewed by some watermen as merely a cost of doing business. Mere suspension of a license allowed repeat offenders to return to the oyster fishery and, potentially, commit further violations.

In response to these concerns, S.B. 159 authorized permanent revocation, and not merely temporary suspension, of a licensee's authorization to engage in commercial oyster harvesting. S.B. 159 also required the Department to initiate revocation proceedings whenever a licensee was charged with committing one or more of the predicate offenses, and required the Department to revoke the license if an administrative law judge finds that the licensee "knowingly" committed a predicate offense. The Court noted that although the sanction imposed by Nat. Res. § 4-1210—lifetime revocation of authorization to engage in the oyster fishery—is harsh, it was a measure deemed necessary by the General Assembly to strengthen what was perceived as an ineffective system of criminal and civil penalties

Then, the Court of Special Appeals concluded that there was substantial evidence that Hayden knowingly violated Nat. Res. § 4-1210(b)(2). At the administrative hearing, there was no dispute that Mr. Hayden intentionally harvested oysters from a location more than 200 feet within a closed area, a violation of Nat. Res. § 4-1006(b). (In fact, he was 1,198 feet into the closed area.) Mr. Hayden's only defense was that he did not know his actions violated the law.

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In the Matter of Bernard Collins, No. 591, September Term 2018, filed August 2, 2019. Opinion by Eyler, Deborah S., J.

https://mdcourts.gov/data/opinions/cosa/2019/0591s18.pdf

WORKERS' COMPENSATION ACT – RELEASE OF CLAIM – DEATH BENEFITS.

Facts:

Bernard Collins suffered a work related occupational disease for which he filed a claim for workers' compensation with the Workers' Compensation Commission. His employer and its insurers contested the claim. Eventually the claim was settled by means of an agreement for immediate payment of disability benefits and long-term payment of certain medical expenses. The agreement included a Release. Peggy Collins, Mr. Collins's wife, was not a party to his claim and did not sign the Release.

Two years later Mr. Collins died of the occupational disease his claim was based on. Before the Commission, Mrs. Collins filed a claim for death benefits under the Workers' Compensation Act (Act). The Commission ruled that her claim was barred by the Release her husband had signed when he settled his claim. In an action for judicial review, the circuit court upheld the Commission's decision. This appeal followed.

Held: Vacated and remanded.

Judgment vacated and claim for death benefits remanded for further proceedings before the Commission. The Release did not bar Mrs. Collins's claim for death benefits.

When a worker who has suffered an accidental injury or occupational disease covered by the Act later dies of that injury or disease, his dependent(s) is entitled to pursue death benefits in conformity with the criteria required by the Act. The worker's claim for disability, medical, and vocational compensation is distinct and separate from his dependent's claim for death benefits. Although both the worker's claim and the dependent's claim arise out of an injury or disease of the worker that is compensable under the Act, they are separate and independent claims. The dependent's claim for death benefits is not derivative of the worker's claim for compensation.

Mrs. Collins's claim for death benefits arose when he died from his occupational disease; his death was the compensable event. Mr. Collins did not have the power to release his wife's death benefits claim, which was inchoate at the time he settled his own workers' compensation claim, only coming into fruition when he died of his occupational disease. Moreover, even if he did have the power to do so, which he did not, the language of the Release did not evidence an intention to do so.

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ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated August 21, 2019, the following attorney has been suspended for sixty (60) days by consent, effective September 1, 2019:

EDWARD DORSEY ELLIS ROLLINS, III

*

By an Order of the Court of Appeals dated August 12, 2019, the following attorney has been indefinitely suspended by consent, effective September 1, 2019:

ATHANASIOS THEODORE TSIMPEDES

*

By an Order of the Court of Appeals dated August 12, 2019, the following attorney has been disbarred by consent, effective September 3, 2019:

NICHOLAS PETER PANTELEAKIS

*

By an Order of the Court of Appeals dated September 4, 2019, the resignation of the following attorney from the further practice of law has been accepted and his name has been stricken from the register of attorneys in this State.

SCOTT GREGORY ADAMS

*

This is to certify that the name of

ALEX BENEDICT LEIKUS

has been replaced upon the register of attorneys in this State as of September 5, 2019.

*

*

By an Order of the Court of Appeals dated September 11, the following attorney has been disbarred by consent:

STEVEN COCHARIO ANTHONY

*

By an Order of the Court of Appeals dated August 19, 2019, the following attorney has been suspended for sixty (60) days by consent, effective September 20, 2019:

JANE TOLAR

*

By an Opinion and Order of the Court of Appeals dated August 26, 2019, the following attorney has been indefinitely suspended, effective September 25, 2019:

EUGENE IGNATIUS KANE, JR.

*

By an Order of the Court of Appeals dated September 26, 2019, the following attorney has been placed on inactive status by consent:

BREON LAMAR JOHNSON

*

By an Order of the Court of Appeals dated September 27, 2019, the following attorney has been suspended by consent:

EDWARD GONZALEZ

*

By an Order of the Court of Appeals dated September 27, 2019, the following attorney has been suspended:

EPHRAIM CHUKWUEMEKA UGWUONYE

*

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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

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