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APPELLATE COURT OF MARYLAND

John Michael Ingersoll, Jr. v. State of Maryland, No. 1477, September Term 2021, filed May 31, 2024. Opinion by Zic, J.

Friedman, J., concurs.

<https://www.courts.state.md.us/data/opinions/cosa/2024/1477s21.pdf>

CRIMINAL LAW – EXPERT TESTIMONY – LAW ENFORCEMENT OFFICER
TESTIFYING AS EXPERT ON GANGS

CRIMINAL LAW – LAW ENFORCEMENT OFFICER TESTIFYING AS EXPERT ON
GANGS – PROBATIVE VALUE

MARYLAND WIRETAP ACT – LAW ENFORCEMENT SUPERVISION

Facts:

On June 4, 2001, Gregory Collins was shot and killed while driving home from his job as a correctional officer at the Eastern Correctional Institution (“ECI”). Mr. Collins died from a single gunshot wound to the back of his head. A state trooper found his pickup truck on the side of the road with Mr. Collins dead in the driver’s seat. John Ingersoll, Jr. was initially a person-of-interest, but the case went cold.

Mr. Ingersoll was incarcerated at ECI from August 1999 to October 2000 and housed in the compound in which Mr. Collins worked. There was evidence Mr. Ingersoll was a member of the prison gang DMI since 1999.

Mr. Ingersoll began renting a room from, and living with, a woman referred to in the opinion as Ms. Doe in May 2019. In June 2019, Ms. Doe contacted Special Agent Ryan McCabe, a member of an FBI narcotics taskforce assigned to the Eastern Shore of Maryland. Ms. Doe informed Agent McCabe that her new tenant, Mr. Ingersoll, may have information regarding Mr. Collins’ murder. After August 8, 2019, Ms. Doe was in contact with Agent McCabe and Corporal Scott Sears of the MSP Homicide Division in Salisbury, Maryland on a daily basis.

Recordings taken by Ms. Doe on August 25 and 30, 2019 were admitted at Mr. Ingersoll’s trial. Mr. Ingersoll stated that he knew Mr. Collins while he was incarcerated at ECI, and Mr. Collins

had made a disparaging comment about Mr. Ingersoll's mother. Mr. Ingersoll responded, "Bitch, you're good as [f*cking] dead." This occurred in front of other DMI members and a highly ranked member of the gang, Perry Roark. Mr. Roark told Mr. Ingersoll that he "better follow through with that." Mr. Ingersoll told Ms. Doe that he had no choice but to carry it out. After he was released from prison, Mr. Ingersoll executed his threat, murdering Mr. Collins, and detailed this in the recordings.

During trial, Lieutenant David Barnhart, who worked in the investigative division of the intelligence unit in the Department of Public Safety and Correctional Services, testified as an expert in prison gangs and gangs generally. He testified to the hierarchal structure of prison gangs, tattoos associated with prison gangs and their meanings, and prison gang membership processes.

A jury in the Circuit Court for Dorchester County convicted Mr. Ingersoll of first-degree murder, use of a handgun in the commission of a crime of violence, and illegal possession of a firearm. The court sentenced Mr. Ingersoll to serve life without the possibility of parole, plus 20 years.

Held: Affirmed

First, the circuit court allowed Lt. Barnhart, a correctional officer, to testify as an expert in gangs. Maryland Rule 5-702 requires an expert to be qualified by knowledge, skill, experience, training, or education; the expert testimony to be appropriate on the particular subject; and the expert's testimony to be supported by a sufficient factual basis. *See Covell v. State*, 258 Md. App. 308, 329 (2023). Lt. Barnhart had received extensive training on prison gangs for a period of 15 years and directly engaged with prison gang members while working with the intelligence unit.

In *Rochkind v. Stevenson*, 471 Md. 1 (2020), the Supreme Court of Maryland extended the U.S. Supreme Court's standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) to qualify expert witnesses under Md. Rule 5-702. Here, the Appellate Court of Maryland held that the circuit court correctly allowed Lt. Barnhart to testify as an expert based on the non-exclusive *Daubert-Rochkind* factors.

The Court then held that Lt. Barnhart's testimony as an expert created a nexus between Mr. Collins' murder and Mr. Ingersoll's gang membership. Lt. Barnhart's testimony illuminated the close relationship of Mr. Ingersoll's membership with DMI to his motive to murder Mr. Collins. In *Gutierrez v. State*, 423 Md. 476 (2011), the Supreme Court of Maryland held that the State must demonstrate, as a threshold matter, a nexus between the crime and the gang membership through fact evidence. Additionally, the probative value of expert testimony must not be substantially outweighed by any unfair prejudice to the defendant under Md. Rule 5-403. Here, the Court held that the circuit court did not err in balancing the probative value of that evidence against its prejudicial impact and correctly admitted Lt. Barnhart's testimony.

Finally, the Court analyzed whether Ms. Doe acted appropriately under Cts. & Jud. Proc. § 10-402(c)(2)(ii) of the Maryland Code, which allows a person who is acting under the supervision of an investigative or law enforcement officer to record another person without the person being recorded having knowledge. Ms. Doe's consistent, daily communications with either Agent McCabe or Cpl. Sears, with the intention of receiving updates about Mr. Ingersoll's involvement with Mr. Collins' murder, was sufficient for Ms. Doe to be considered "under supervision" and the recordings to be compliant with Cts. & Jud. Proc. § 10-402(c)(2)(ii) of the Maryland Code.

The Supreme Court of Maryland held in *Seal v. State*, 447 Md. 64 (2016), that a "complete absence of supervision" did not satisfy the statute but emphasized that the appropriate level of supervision is a fact specific inquiry, based upon the unique context of an investigation. Based on Ms. Doe's circumstances, the Court held that the circuit court correctly admitted the two recordings made by the third party because, considering the need to protect the third party's safety, the law enforcement officers maintained sufficient contact with the third party to deem her to be under their supervision.

Delonte Teshawn Howard v. State of Maryland, No. 338, September Term 2023, filed April 24, 2024. Opinion by Leahy, J.

<https://www.mdcourts.gov/data/opinions/cosa/2024/0338s23.pdf>

CRIMINAL LAW – EVIDENCE – BURDEN OF PROOF – MATTERS EXCEPTED IN STATUTE DEFINING OFFENSE

Facts:

Mr. Jose Martinez-Cruz’s rifle was stolen out of the back of his truck in the early evening of July 14, 2022, when he went into the Tres Amigos restaurant located in Rockville, Maryland, to pick up a sandwich. Before entering the restaurant, Mr. Martinez-Cruz stopped to chat for about ten minutes with a group of men congregated on the sidewalk, one of whom he identified as Delonte Teshawn Howard, (“Appellant”). Appellant was later convicted by a jury in the Circuit Court for Montgomery County on the following charges: Count I for possession of a regulated firearm after a prior conviction of a crime of violence; Count II for possession of a rifle after having been convicted of a crime of violence; Count III for theft of property valued between \$100 and \$1,500; Count IV for conspiracy to commit theft of property with a value between \$100 and \$1,500; and, Count V for possession of a stolen regulated firearm. The firearm was never recovered.

The defense argued that the State did not meet its burden to show that the stolen firearm was a regulated firearm under Maryland Code, (2003, 2022 Repl. Vol.), Public Safety Article (“PS”), § 5-101(r)(2). The statute lists forty-five regulated firearms but carves out one exception under PS § 5-101(r)(2)(xv) for “Colt AR-15 Sporter H-BAR rifle.” During trial, the State showed Mr. Martinez-Cruz a photograph of an AR-15, and he was able to describe similarities and differences between the firearm in the photograph and his stolen firearm, but he could not recall the brand name of his firearm. While the State was able to prove beyond a reasonable doubt that the firearm possessed by the defendant was an AR-15, the State did not prove that the AR-15 was not a Colt AR-15 Sporter H-BAR rifle exempted under PS § 5-101(r)(2)(xv). The State argued that the defense was required to raise the exception to the statute as an affirmative defense, and the defense argued that it was the State’s burden to negate the statutory exception.

Held: Affirmed in part and reversed in part.

The Court determined that Appellant failed to preserve his argument under Count II regarding the firearm’s classification as a rifle within Maryland Code (2002, 2021 Repl. Vol.), Criminal Law Article (“CR”), § 4-201(e). However, the Court reversed Appellant’s convictions under Counts I and V because the evidence was legally insufficient for a jury to find, beyond a reasonable doubt, that the stolen firearm was a “regulated firearm.” Drawing on the test

established in *Mackall v. State*, 283 Md. 100 (1978), the Appellate Court held that when the exception to a statute is descriptive of the offense, it is the State's burden to negate the exception to prove its case. Here, the Colt AR-15 Sporter H-BAR exception was incorporated within the same definition that brings other "Colt AR-15, CAR-15, and all imitations" within the purview of PS § 5-101(r)(2)(xv). Moreover, applying the instructions regarding statutory interpretation delineated in *Smith v. State*, 425 Md. 292 (2012), the Court observed that it would be illogical and contrary to firmly established principles of criminal law to require the Appellant to establish that the stolen firearm fell within the exception to statute, especially as Appellant claimed he had no knowledge of the firearm and maintained his innocence.

State of Maryland v. Anthony Brooke, No. 963, September Term 2023, filed June 26, 2024. Opinion by Graeff, J.

<https://www.mdcourts.gov/data/opinions/cosa/2024/0963s23.pdf>

STATUTE OF LIMITATIONS – DISMISSAL OF INDICTMENT

Facts:

On February 23, 2023, a grand jury indicted Anthony Brooke, appellee, on charges of misconduct in office relating to an assault on February 23, 2021. Appellee filed a motion to dismiss the indictment, arguing that the State failed to initiate the prosecution within the two-year statute of limitations set forth in Md. Code Ann., Cts. & Jud. Proc. (“CJ”) § 5-106(f). After a hearing, the Circuit Court for Prince George’s County granted the motion.

Held: Reversed

Pursuant to the common law, Md. Code Ann., Gen. Prov. § 1-302(a), and Md. Rule 1-203, the date of the offense is not included when computing a statutory limitations period. The statute of limitations period begins to run the day following the offense.

The circuit court dismissed the indictment for violation of the two-year statute of limitations period set forth in CJ § 5-106(f). The offense was committed on February 23, 2021, and the prosecution was initiated on February 23, 2023. The indictment was timely filed, and court erred in dismissing the indictment on the ground that the statute of limitations had expired.

Maxwell Dundore v. State of Maryland, No. 798, September Term 2023, filed June 26, 2024. Opinion by Beachley, J.

<https://www.mdcourts.gov/data/opinions/cosa/2024/0798s23.pdf>

CRIMINAL LAW – STATUTE OF LIMITATIONS – EMERGENCY TOLLING

Facts:

The State indicted Maxwell Dundore on July 15, 2021, charging him with second-degree assault related to an incident which occurred on April 27, 2020. Mr. Dundore moved to dismiss the second-degree assault charge based on the State’s failure to file the charge within the one-year statute of limitations period. The Circuit Court for Baltimore City denied Mr. Dundore’s motion based on Chief Judge Barbera’s administrative orders tolling statutes of limitations during the COVID-19 pandemic. After a bench trial, the court found Mr. Dundore guilty of second-degree assault. Mr. Dundore then appealed.

Held: Affirmed.

The Appellate Court reviewed the history of the emergency tolling orders issued by the Chief Judge during the COVID-19 pandemic, and the analysis of those orders in *Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333 (2022). Consistent with *Murphy*, the Court held that the orders applied to both criminal and civil cases. The Court rejected Mr. Dundore’s argument that because criminal statutes of limitations are “substantive, not procedural,” the administrative tolling orders were unconstitutional as applied to criminal cases. The Appellate Court held that *Murphy*’s reasoning is equally applicable to civil and criminal proceedings. Because COVID-19 affected civil and criminal cases in similar ways, the Court concluded that there was no reason to differentiate them with regard to the emergency tolling orders. In summary, the Court held that the Chief Judge did not violate Article IV, § 18 of the Maryland Constitution by tolling criminal statutes of limitations for the amount of time courts were closed during the COVID-19 pandemic.

Zuri Kelly v. State of Maryland, No. 68, September Term 2023, filed June 27, 2024. Opinion by Zarnoch, J.

<https://www.mdcourts.gov/data/opinions/cosa/2024/0068s23.pdf>

STATUTES – RETROACTIVITY – EXCLUSIONARY RULE IN STATUTE PREVENTING LAW ENFORCEMENT OFFICERS FROM STOPPING OR SEARCHING A VEHICLE SOLELY ON THE BASIS OF THE ODOR OF CANNABIS.

Facts:

In 2021, Zuri Kelly, appellant, was arrested and charged, in the Circuit Court for Baltimore County, with various narcotics-related offenses after a police officer, upon detecting the odor of cannabis emanating from Kelly’s vehicle during a traffic stop, conducted a warrantless search of Kelly’s vehicle and found evidence of drug possession and distribution. Prior to trial, Kelly filed a motion to suppress the evidence found in his vehicle. That motion was denied. Kelly thereafter entered a conditional plea of guilty to one count of possession with intent to distribute cocaine, and the court sentenced Kelly to a total term of twelve years’ imprisonment, with all but two years suspended. He appealed.

While Kelly’s appeal was pending, a 2023 law governing searches pursuant to the odor of cannabis became effective in Maryland. That law, which was codified in § 1-211 of the Criminal Procedure Article (“CP”) of the Maryland Code, prohibited a police officer from conducting a search of a person’s vehicle based solely on the odor of cannabis. The law also stated that any evidence obtained in violation of the statute was inadmissible.

On appeal, Kelly argued that the new law applied retroactively to his case barring the evidence of cannabis odor and warranting reversal of his conviction.

Held: Affirmed.

Statutes are presumed to operate prospectively. However, there are exceptions to this presumption: 1) a legislative change affecting procedure only and not substantive rights; 2) a statute that has remedial effect and does not impair vested rights; and 3) a statute that affects a matter still in litigation. An important caveat to each of these exceptions is that they cannot be applied if the General Assembly expresses a contrary intent.

In § 1-211, the Legislature expressed an intent that the law apply prospectively. This is evidenced by the structure and text of the provision, as well as the purpose of an exclusionary rule. Section 1-211 has two relevant prongs: a “right” prong, namely, that a law enforcement officer may not initiate a search of a vehicle based solely on the odor of burnt or unburnt

cannabis; and a “remedy” prong, namely, that “[e]vidence discovered or obtained *in violation of this section*” is inadmissible. CP § 1-211(a), (c) (emphasis added). By structuring the statute in such a manner, the Maryland General Assembly clearly indicated that, for a defendant to avail himself of the “remedy” of exclusion, the evidence at issue must have been discovered in violation of the “right” established by the statute. Clearly, that “right” did not exist before the statute became effective.

Relying on cases from Virginia and New Jersey, the Court emphasized the deterrence purpose of an exclusionary rule. Quoting from *State v. Burstein*, 427 A.2d 525, 531 (N.J. 1981), the Court said:

In cases where the new rule is an exclusionary rule, meant solely to deter illegal police conduct, the new rule is virtually never given retroactive effect. The reason is that the deterrent purposes of such a rule would not be advanced by applying it to past misconduct.

Esau Antonio Orellana Velasquez v. Cecilia Del Carmen Carranza Fuentes, No. 1547, September Term 2023, filed June 26, 2024. Opinion by Wells, C.J

<https://www.mdcourts.gov/data/opinions/cosa/2024/1547s23.pdf>

FAMILY LAW – CUSTODY – DEFAULT JUDGMENTS

FAMILY LAW – CUSTODY – REVISORY POWER

FAMILY LAW – CUSTODY – MODIFICATION

FAMILY LAW – CUSTODY – RES JUDICATA

Facts:

This appeal concerns a custody dispute between Father and Mother regarding their minor child. Father filed a complaint for custody in the Circuit Court for Prince George’s County, but Mother did not file an answer. At Father’s request, the court entered an order of default. Later, after a hearing, the court enrolled a custody order. Mother did not appeal that judgment, but instead moved to modify custody. A magistrate denied Mother’s motion, finding she had not proven a threshold material change in circumstances. Mother then filed exceptions. After a hearing, the circuit court sustained Mother’s exceptions and, without notice to either party, the court *sua sponte* vacated the custody order. Only weeks later did Mother move to set aside the order of default, which the circuit court granted. Father timely appealed and asked this Court whether the circuit court erred when it vacated the default judgment and the custody order, and when it granted Mother’s exceptions to the magistrate’s recommendations.

Held: Reversed.

Discussion: Default judgments are governed by Maryland Rule 2-613. In the child custody realm, default judgments require a nuanced application. Under very specific circumstances, circuit courts have discretion to utilize Rule 2-613(e) and (f)’s “ameliorating flexibility” to modify default orders before they become enrolled final judgments.

The Maryland Code Annotated Courts and Judicial Proceedings (CJP) Article § 6-408 and Maryland Rule 2-535(a) provide courts with the power to revise judgments under certain circumstances. CJP § 6-408 provides that within thirty days after a judgment is entered, or thereafter pursuant to a motion filed within that period, a court has power to revise its judgment. Rule 2-535(a) provides that, on motion filed within thirty days after a judgment is entered, the court may exercise its revisory power. Under Rule 2-535(b), on motion of a party, a court may exercise its revisory power over a judgment but only in case of fraud, mistake, or irregularity. As interpreted by appellate cases, an “irregularity” is a failure to follow required process or

procedure, which can include the failure of a court employee from performing a duty required by statute or rule. Proof of an irregularity provides very narrow grounds for revising final judgments, specifically, to prevent hardships that may result from a lack of notice and the corresponding lack of opportunity to interpose defenses prior to enrollment of judgment.

Modifying custody requires a court to engage in a two-step process. The first and threshold requirement is that the moving party prove a material change in circumstances. If the moving party fails to prove such a change, the court's inquiry stops there. But if the moving party proves a material change in circumstances, the court may then consider which of now two competing custody alternatives is in the best interest of the child.

The doctrine of *res judicata* holds that a judgment between the same parties is a bar to another suit arising upon the same cause of action, including matters which could have been litigated in the original suit. In custody cases, the "material change" standard upholds the principles of *res judicata* by requiring that the movant prove such a change before a custody order may be modified.

In this case, the custody order resulted from an order of default properly entered by the circuit court, rendering it an enrolled final judgment. Under the circumstances, the circuit court did not have broad authority to *sua sponte* vacate that order merely because it arose from a judgment of default. Further, the court acted improperly in vacating the custody order several months outside of the thirty-day window when neither party moved to revise the judgment under the statute or Rule because appellate authority has determined that if a court acts to *sua sponte* revise a judgment under CJP § 6-408 or Rule 2-535(a) it must do so within the thirty-day time limit set forth in the statute or Rule. Moreover, in this instance, the seeming unavailability of a recording or transcript of the custody proceeding is not an irregularity under Rule 2-535(b). Mother did not lack notice of the custody hearing nor was she unable to put on a case. In short, Mother failed to establish hardship simply because a recording of the custody proceeding appeared to be unavailable at the time of a later hearing.

Additionally, a magistrate determined Mother had not proven a material change in circumstances and stopped the analysis. Mother filed exceptions arguing that the magistrate should have engaged in a best interest of the child analysis. The court agreed with Mother and incorrectly remanded to the magistrate to perform a best interest analysis. The circuit court erred in concluding that the magistrate was required to conduct a best interest analysis when determining if a material change in circumstances occurred. Finally, because the custody order in this case was viable, *res judicata* prohibited Mother from litigating at the modification hearing and the subsequent hearing on exceptions issues that occurred before the custody order was enrolled.

In the Matter of Morgan Stanley and Co. Inc., et al., No. 1554, September Term 2022, filed May 30, 2024. Opinion by Graeff, J.

<https://www.mdcourts.gov/data/opinions/cosa/2024/1554s22.pdf>

WORKERS' COMPENSATION – MOLD EXPOSURE

Facts:

Appellee worked as a financial advisor for Morgan Stanley, where he discussed and advised clients regarding their financial situation and potential investments. Appellee developed pneumonitis and alleged that exposure to mold in his office caused his condition.

The Maryland Workers' Compensation Commission (the "Commission") issued a decision finding that appellee had "sustained an occupational disease of pneumonitis (lungs) arising out of and in the course of employment" as a financial advisor. Appellants sought judicial review of the Commission's decision, and the case was tried before a jury in the Circuit Court for Anne Arundel County. Appellants moved for judgment at the close of all of the evidence, arguing that, as a matter of law, appellee did not sustain an occupational disease compensable under the Maryland' Workers' Compensation Act. The court denied the motion and a jury returned a verdict in favor of appellee.

Held: Reversed.

To obtain compensation for an occupational disease in a workers' compensation case, under Md. Code Ann., Labor & Empl. ("LE") § 9-502(d)(1)(ii), the employee must prove exposure to a biological, chemical or physical agent that is a distinctive feature of the type of work performed, as opposed to a specific condition at the employee's particular workplace. Exposure must be a recognized risk of employment, "it is not enough that the ailment is caused by the specific place in which the claimant happens to work." *Dando v. Binghamton Bd. of Educ.*, 490 N.Y.S.2d 360, 361 (N.Y. App. Div. 1985).

Claimant's pneumonitis, which was alleged to be caused by exposure to mold in an office-setting, was not attributable to claimant's type of employment as financial advisor, which involved primarily discussing and advising clients regarding their financial situation and potential investments. There was no evidence that mold exposure is a known risk or distinctive feature of the job of financial advisor.

ATTORNEY DISCIPLINE

DISBARMENTS/SUSPENSIONS/INACTIVE STATUS

By Order of the Supreme Court of Maryland dated June 17,2024, the following attorney has been indefinitely suspended by consent:

KELLEE GENEAN BAKER

*

UNREPORTED OPINIONS

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

<https://mdcourts.gov/appellate/unreportedopinions>

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