Amicus Curiarum

VOLUME 40
ISSUE 12 DECEMBER 2023

A Publication of the Office of the State Reporter

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SUPREME COURT OF MARYLAND

Attorney Grievance Commission of Maryland v. Donald Dorin Davis, AG No. 28, September Term 2022, filed October 23, 2023. Opinion by Eaves, J.

https://mdcourts.gov/data/opinions/coa/2023/28a22ag.pdf

ATTORNEY DISCIPLINE – SANCTION – INDEFINITE SUSPENSION

Facts:

Respondent, Mr. Donald Davis, was admitted to the Maryland Bar in December 2019 and kept a law office in Washington, D.C., which he eventually closed due to the COVID-19 pandemic.

Mr. McGilvrey retained Respondent on August 4, 2020, regarding the enforcement of a custody agreement that Mr. McGilvery previously entered into with the mother of his minor child. That same day, Mr. McGilvrey paid Respondent a $2,500 retainer. To pursue enforcement of the custody agreement, Respondent drafted a contempt motion that both he and Mr. McGilvrey signed on December 15, 2020. Respondent emailed Mr. McGilvrey on January 6, 2021, stating that the "motion was filed yesterday with the clerk." At some point after sending that email, Respondent closed his law practice due to constraints resulting from the COVID-19 pandemic; however, Respondent failed to inform Mr. McGilvrey. Following the January 6 email, Mr. McGilvrey attempted to contact Respondent four times, but he never received a response, and there was no further communication between the two. Additionally, Respondent did not refund any portion of the $2,500 Mr. McGilvrey paid to Respondent.

Mr. McGilvrey filed a complaint with the Attorney Grievance Commission of Maryland ("Commission"). The Commission, acting through Bar Counsel, emailed Respondent on July 12, 2021, requesting a written response to Mr. McGilvrey's complaint. In his response, Respondent misrepresented the scope of his work and claimed that the fees associated with the contempt matter exceeded the $2,500 retainer. Thus, according to Respondent, Mr. McGilvrey was not owed a refund. Bar Counsel sent two follow-up correspondences, the first of which went unanswered. Respondent replied to Bar counsel's second request; however, he provided incomplete responses and failed to provide any of the requested documents. On February 4, 2022, after Respondent failed to reply to Bar Counsel's three previous correspondences, Respondent sent an incomplete response.

After an evidentiary hearing for which the Respondent did not appear, the hearing judge concluded that Respondent violated the following Maryland Attorneys' Rules of Professional Conduct (MARPC): 1.1 (Competence); 1.3 (Diligence); 1.4 (Communication); 1.5(a) (Fees); 1.16(d) (Declining or Terminating Representation); 8.1(a)–(b) (Bar Admission and Disciplinary Matters); and 8.4(a), (c) and (d) (Misconduct). No exceptions were filed.

Held: Affirmed

The Supreme Court of Maryland held that the hearing judge's conclusions were supported by clear and convincing evidence.

Despite drafting the contempt motion, Respondent failed to "formally initiate the matter with the circuit court for which he was retained[;]" as such, Respondent failed to pursue any meaningful course of action for Mr. McGilvrey. This conduct violated Rules 1.1 and 1.3.

Following the January 6 email, Respondent terminated all communication with Mr. McGilvrey and summarily disregarded Mr. McGilvrey's four subsequent attempts to contact him. This conduct, the Supreme Court held, demonstrated that Respondent violated his ethical requirement to comply with requests for information and reasonably inform Mr. McGilvrey. Consequently, Respondent violated Rule 1.4(a). The Court further noted that by failing to disclose the closure of his law practice, Respondent delayed and impeded Mr. McGilvrey's ability to make informed decisions regarding his representation and whether he should obtain new counsel; as such, Respondent violated Rule 1.4(b).

The Supreme Court noted that Respondent's failure to file the contempt motion deprived Mr. McGilvrey of the services for which he bargained. Additionally, Respondent failed to refund any portion of the $2,500 retainer. Such conduct violated Rule 1.5(a).

As to Rule 1.16(d), Respondent fully ignored Mr. McGilvrey after sending the January 6 email. Respondent did not notify Mr. McGilvrey that Respondent was closing his law practice, and he failed to return any portion of the $2,500 retainer. Thus, the Supreme Court affirmed the hearing judge's conclusion that Respondent violated Rule 1.16(d).

Respondent's interactions with Bar Counsel demonstrated violations of Rule 8.1. Respondent violated Rule 8.1(a) when he "knowingly and intentionally misrepresented to Bar Counsel that he did not send the January 6, 2021[,] email to Mr. McGilvrey." Respondent's awareness that Bar Counsel was investigating him, and his outright refusal to respond to requests for information and documents, as well as his incomplete responses, demonstrate a Rule 8.1(b) violation.

Respondent's misrepresentation that he filed the contempt motion established a Rule 8.4(c) violation. Further, Respondent prejudiced the administration of justice and violated Rule 8.4(d) when he failed to (1) provide Bar Counsel with prompt and complete responses, (2) keep Mr.

McGilvrey informed regarding his case, and (3) refund any unearned fees. As a result of the other sustained violations, Respondent also violated Rule 8.4(a).

The Supreme Court agreed with the hearing judge's finding of eight aggravating factors: a dishonest or selfish motive, a pattern of misconduct, multiple rule violations, bad faith obstruction of the disciplinary proceeding, submission of false evidence or statements, a refusal to acknowledge the misconduct's wrongful nature, indifference to making restitution, and a likelihood of repeating the misconduct. Because Respondent did not participate in the disciplinary process or appear for the disciplinary hearing, the hearing judge found that Respondent did not prove by a preponderance of the evidence any mitigating factor. The Supreme Court agreed.

For purposes of rendering an appropriate sanction, the Supreme Court likened this case to *Attorney Grievance Commission v. Kirwan*, 450 Md. 447 (2016). Following the application of governing law to the facts and circumstances, the Supreme Court concluded that an indefinite suspension without a specified minimum duration of time Respondent must wait to petition for reinstatement was the appropriate sanction.

Francois Browne v. State of Maryland, No. 2, September Term 2023, filed November 28, 2023. Opinion by Fader, C.J.

Watts, J., dissents.

https://mdcourts.gov/data/opinions/coa/2023/2a23.pdf

EVIDENCE – MD. RULE 5-404(b) – RULE OF EXCLUSION

EVIDENCE – MD. RULE 5-404(b) – IDENTITY AND MODUS OPERANDI

EVIDENCE – MD. RULE 5-404(b) – CONTESTED ISSUE

EVIDENCE – MD. RULE 5-404(b) – DOCTRINE OF CHANCES

Facts:

Francois Browne was tried for murder and child abuse in connection with the death of a 17-month-old child, Zaray Gray. Before trial, the prosecution sought permission to admit evidence that, several years prior, Mr. Browne was convicted of child abuse resulting in the death of his own infant son, Kendall Browne. The State argued the evidence was admissible, despite Maryland Rule 5-404(b)'s general prohibition on other bad acts evidence introduced to show a defendant's propensity to engage in criminal activity. The State argued that the evidence was relevant: (1) pursuant to a theory known as the doctrine of chances, to show that it was objectively improbable that both deaths were an accident, thus negating the possibility that Zaray's death was an accident and establishing Mr. Browne as the wrongdoer; and (2) to prove Mr. Browne's identity as Zaray's killer because the circumstances surrounding the incidents were so similar that they illustrated a common *modus operandi*.

The Circuit Court for Baltimore City admitted the evidence, finding that it was relevant to show Mr. Browne's intent and knowledge, to identify him as Zaray's killer, and to rebut any indication that Zaray's death was an accident. Following trial, the jury found Mr. Browne guilty of second-degree murder and first-degree child abuse resulting in death. The Appellate Court affirmed, finding in a 2-1 unreported decision that the doctrine of chances was a separate theory of relevance to which Rule 5-404(b) is inapplicable. The Supreme Court granted certiorari to decide whether the evidence was properly admitted at trial.

Held: Reversed and remanded for a new trial.

The Court first summarized Rule 5-404(b) and principles drawn from the caselaw applying it. In doing so, the Court reaffirmed that the rule is one of exclusion and that the burden is on the proffering party to show, in accordance with the Rule, that the evidence of prior bad acts is

offered to prove something other than the accused's propensity to commit crime, among other requirements.

Applying that framework, the Court first addressed the State's argument that evidence of Kendall's death was relevant to show Mr. Browne's identity as Zaray's murderer, because the two crimes were similar enough to establish a common *modus operandi* attributable to Mr. Browne. The Court held that the similarities between the two crimes—that both involved the death of preverbal babies by blunt force trauma, several years apart—were not so unusual and distinctive as to constitute a *modus operandi*. Thus, the evidence was not relevant to show that the same person who killed Kendall must have killed Zaray.

Next, the Court considered the State's argument that the evidence was relevant to show that Zaray's death was not an accident. The Court explained that other bad acts evidence must be offered to prove an issue that is genuinely contested in the case, and that lack of accident was not a genuine issue here. Before trial, Mr. Browne had disavowed any intent to argue that Zaray's death was an accident, which did not change at trial. The State and the defense experts agreed that Zaray's death was a homicide caused by blunt force trauma, and there was no serious suggestion at trial that Zaray's injuries resulted from an accident.

Finally, the Court rejected the State's argument that the evidence was independently relevant pursuant to a theory known as the doctrine of chances. That theory posits that other bad acts evidence may be relevant based on the objective unlikelihood that two similar events occurred by chance, as opposed to through human intervention. The Court held that the theory is not an independent ground upon which to admit other bad acts evidence. The Court noted that the doctrine of chances could potentially underpin another theory of relevance, but here, where the State sought to use it to prove Mr. Browne's identity as the murderer, the doctrine was stretched beyond its limits. The Court held that the State's theory of identity was based on impermissible propensity reasoning, as the State sought to show that Mr. Browne must have been the person who killed Zaray because he had killed Kendall several years earlier.

The Court thus held that the evidence of Kendall's death was not relevant to any contested issue in the case other than Mr. Browne's propensity to commit crime. Therefore, the evidence was inadmissible under Rule 5-404(b). The Court accordingly reversed and remanded the case for a new trial.

APPELLATE COURT OF MARYLAND

Ronald Junior Francois v. State of Maryland, No. 1254, September Term 2022, filed November 30, 2023. Opinion by Taylor, J.

https://mdcourts.gov/data/opinions/cosa/2023/1254s22.pdf

EVIDENCE – LAY OPINION TESTIMONY – PRESERVATION – HARMLESSNESS

EVIDENCE – PRIOR BAD ACTS – SPECIAL RELEVANCE

CLOSING ARGUMENT – FACTS NOT IN EVIDENCE

Facts:

In the Circuit Court for Montgomery County, appellant, Ronald Junior Francois, was convicted of unlawfully possessing a regulated firearm and ammunition. Gilbert Gray was called by his daughter, Jamia Gray, to intervene in a domestic dispute between Jamia and her husband, appellant, Ronald Francois. At trial, Mr. Gray, testified that he observed Francois open the driver's door of a box truck, reach in, and display a handgun. When Mr. Gray called 911, he reported that Francois had displayed a bronze-colored handgun "like a 9 mm." During his testimony, Mr. Gray stated that he had some familiarity with firearms and described the gun he saw as a "bronze . . . Like 380." On cross-examination, defense counsel elicited additional testimony from Mr. Gray regarding his familiarity with firearms in general and 9mm firearms. On redirect, the State returned to the topic of Mr. Gray's familiarity with handguns and asked Mr. Gray about the differences between a 9 mm and 380 mm to which the defense objected.

A search of Mr. Francois' phone revealed text messages regarding different types of firearms and his fondness for visiting the shooting range to try out these weapons. On appeal, Francois challenges: (1) the Circuit Court's admission of expert testimony from Mr. Gray, a lay witness, regarding the differences between types of firearms; (2) the admission of text messages regarding the use and possession of firearms by the appellant; and (3) the admission of the prosecutor's statement in closing argument that "kill" in a text message was meant to indicate agreement.

Held: Affirmed.

First, Francois contends that Mr. Gray's testimony regarding the difference in size of different types of handguns was improper expert testimony and that its admission constitutes the basis for reversing his conviction. The Court disagreed, reasoning that any error is unpreserved, as the defense failed to object to the initial opinion testimony, elicited additional opinion testimony on cross-examination and then failed to object to all but one of the opinion testimony questions on redirect. Additionally, the Court found that any error was harmless as Mr. Gray's testimony regarding the differences between handguns was not relevant in this case. The State needed to only prove that the weapon was a regulated firearm, not the caliber of the firearm or any other specifics.

Next, Francois argued that the admission of text messages exchanged with another individual about types of firearms and going to the shooting range violated Md. Rule 5-404(b). Md. Rule 5-404(b) states, in pertinent part, that "[e]vidence of other crimes, wrongs, or other acts including delinquent acts . . . is not admissible to prove the character of a person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident[.]" The Court found that the admission of these text messages was relevant for the purpose of showing ownership and possession of firearms. Francois's recent possession of firearms and ammunition was relevant to show that he possessed a firearm and that the ammunition found in his vehicle belonged to him. The admission of these text messages was not to show that Francois had a general propensity to commit crimes. The evidence was admitted to corroborate and bolster the testimony that Francois possessed a handgun and ammunition on a specific date and place.

Further, the motions court did not abuse its discretion in determining that the probative value of the evidence outweighed the risk of unfair prejudice. The jury was being asked to convict Francois of possessing firearms and ammunition because an eyewitness testified that he possessed firearms and ammunition. That testimony was corroborated by text messages showing that in the days and weeks preceding the incident, he possessed firearms and ammunition. The text messages from February, March and June 2021 could help a reasonable fact finder decide if what Mr. Gray had observed on July 1 and described was, in fact, a firearm, and that the ammunition in his vehicle belonged to him.

Lastly, Francois contends the trial court erred when it failed to sustain his objection to the prosecutor's closing remarks. During closing argument, the prosecutor read a portion of Francois's text message exchanged with another individual: "Defendant says 'LOL. Kill.' I suggest to you that means, 'LOL. Yes, I'm up for it.'" Francois argues that this constitutes improper argument; argues facts not in evidence; and that the use of the word "kill" in this context requires a witness with the appropriate knowledge to define the term as used in Francois's texts. Again, the Court disagreed. Francois used the word "kill" on one other occasion that could be interpreted to mean agreement. However, there was no trial testimony as to its meaning in this context. The Court found the prosecutor was arguing for a particular context-based interpretation of the phrase rather than revealing new evidence. Further, even if improper, reversal is not warranted. There is nothing to suggest the interpretation of the word "kill" actually misled the jury or was likely to have misled or influenced the jury.

Christine Marie Nolan v. Michael W. Nolan, Jr., No. 695, September Term 2022, filed November 29, 2023. Opinion by Zic, J.
https://mdcourts.gov/data/opinions/cosa/2023/0695s22.pdf

DIVORCE – EQUITABLE DISTRIBUTION OF TRUSTEE'S FEES

Facts:

In January 2015, Christine Nolan and Michael Nolan entered into a marital settlement agreement, which was incorporated into the circuit court's March 2015 Judgment of Absolute Divorce. The settlement granted Ms. Nolan exclusive use and possession of the marital home for a period of three years and required Ms. Nolan to pay all mortgage and maintenance expenses. After either the expiration of the exclusive use and possession period or Ms. Nolan's remarriage, the marital home was to be listed for sale. Proceeds or deficiencies of the sale of the home were to be shared equally between the parties.

Ms. Nolan remained in the home after the expiration of the three-year exclusive use and possession period and refused to sell following the expiration of the period. Mr. Nolan began paying half of the marital home's mortgage in July 2019. Following a hearing on October 30, 2020, the court ordered the sale of the marital home pursuant to Family Law § 8-202 and Real Property § 14-107 and appointed a trustee to conduct the sale on November 6, 2020. Ms. Nolan was ordered to provide a key and relevant documents to the trustee to facilitate the sale of the home.

During the October 30, 2020 hearing, the circuit court noted that it "is a court of equity," and found that it would be inequitable for Ms. Nolan to remain in the home any longer. Finding that Ms. Nolan benefited by remaining in the marital home for an additional three years, with Mr. Nolan paying one-half of the mortgage for over a year, the court ordered Ms. Nolan to pay the costs of the trustee appointed to sell the home.

The marital home was sold, and once all debts on the property were settled, the total proceeds from the sale amounted to $36,062.84. On November 10, 2021, the trustee requested payment of $22,875. On May 6, 2022, the circuit court held a hearing and determined that Mr. and Ms. Nolan were each entitled to one-half of the net proceeds from the sale of the home, or $18,031.42 each. Implementing the circuit court's November 6, 2020 order, the court ordered Ms. Nolan to pay $4,843.58 to the trustee: the difference between the compensation of $22,875 owed to the trustee, and what was covered by Ms. Nolan's half of the proceeds of the sale. Ms. Nolan appealed, challenging the circuit court's authority to order that her half of the sales proceeds go towards the entirety of the trustee's fees.

Held: Affirmed

First, the Appellate Court noted that the circuit court's ability to order partition and sale of the Nolan's marital home pursuant to Family Law § 8-202 and Real Property § 14-107 was not in question, only the court's subsequent decision to order Ms. Nolan to pay the entirety of the trustee's fees after splitting the proceeds of the sale equally. Real Property § 14-107(a) granted circuit courts the power to order a property's "sale and divide the money resulting from the sale among the parties according to their respective rights."

The Court then discussed Maryland appellate courts' long history of holding that courts sitting in equity have broad discretionary authority, and noted that an action under Real Property § 14-107 is one such action that is "equitable in nature so that the [circuit court] is accorded broad discretionary authority." *Maas v. Lucas*, 29 Md. App. 521, 525 (1975). Noting that there is a "latitude allowed [to] an equity court in distributing the proceeds of a partition sale," this Court reiterated that there is broad discretionary authority granted to a court of equity. *Id*. The proceeds of the marital home were split equally between Mr. and Mrs. Nolan, with each party receiving $18,031.42. The circuit court found that Ms. Nolan remained in the home after the three-year period concluded, with Mr. Nolan paying half of the mortgage payments beginning in July 2019, and consistently refused to sell the home, to the point where the court was required to appoint a trustee. Pursuant to the discretion granted to the court in Real Property § 14-107 to "divide the money resulting from the sale among the parties according to their respective rights," the circuit court ordered Ms. Nolan to pay the trustee's fees. The circuit court exercised its "broad, discretionary authority to distribute the proceeds of sale to the parties" after considering Ms. Nolan's actions prior to and during the sale. *Meyer v. Meyer*, 193 Md. App. 640, 654 (2010) (citing *Maas*, 29 Md. App. at 525-26). The Court held that it was within the circuit court's discretionary authority after balancing the equities of the parties to order Ms. Nolan to pay the entirety of the trustee's costs on the sale of the martial home.

Ellen M. Elbert, et al. v. Charles County Planning Commission, Nos. 1753 & 1754, September Term 2022, filed November 29, 2023. Opinion by Storm, J.

https://mdcourts.gov/data/opinions/cosa/2023/1753s22.pdf

ADMINISTRATIVE LAW AND PROCEDURE — NATURE, REQUISITES, AND FINDINGS IN GENERAL

ZONING AND PLANNING – FINDINGS REQUIRED

Facts:

The Charles County Planning Commission approved two related site development plans to develop a distribution center and associated parking on adjacent properties. The two properties are located in the Planned Unit Development zone for Smallwood Village in Charles County. Accordingly, review was required under both the Charles County Code and the Revised and Restated Docket 90 Order. The Smallwood Village Planning & Design Review Board ("PDRB") granted its Docket 90 approval in a letter which stated, without explanation, that the proposed use was approved. At the conclusion of separate hearings held on each application, the Planning Commission approved by motion each SDP, "with the findings and recommendations included in the Staff Report," which also referenced the Docket 90 approval. No written decision was issued by the Planning Commission. Rather, the Planning Commission memorialized its decisions in Minutes that were approved at its next meetings. Aggrieved adjacent property owners appealed to the Circuit Court for Charles County, which affirmed the Planning Commission's actions. On appeal to the Appellate Court of Maryland, the issue was whether the Planning Commission sufficiently articulated the bases for its decisions.

Held: Reversed and remanded.

The appellate courts of this State have criticized the "failure of administrative boards, whether or not required by statute, to accompany their decisions by specific findings of fact." *Gough v. Board of Zoning Appeals for Calvert County, Maryland*, 21 Md. App. 697, 702 (1974). *See also Hooper v. Mayor and City Council of Gaithersburg*, 270 Md. 628, 637 (1974); *Baker v. Board of Trustees*, 269 Md. 740, 747 (1973); *Adams v. Board of Trustees*, 215 Md. 188, 195 (1957). Such findings are necessary because without reasoned analysis, "a reviewing court cannot determine the basis of the agency's action. If the agency fails to meet this requirement, the agency's decision may be deemed arbitrary." *Mortimer v. Howard Research and Development Corp.*, 83 Md. App. 432, 442 (1990).

In this case, the Planning Commission simply incorporated by reference the Staff Report, notwithstanding that additional information was received at one of the hearings. In addition, as

related to the significant issue of compliance with the Docket 90 requirements, the Staff Reports upon which the Planning Commission relied simply incorporated findings of the Smallwood Village PDRB, which also failed to provide any analysis, explanation or basis for its conclusion. The Planning Commission could not satisfy its articulation obligations by the simple expedient of referencing a Staff Report that was itself inadequate given its incorporation of a PDRB letter that was devoid of analysis. *See Colao v. County Council of Prince George's County*, 109 Md. App. 431, 458-62 (1986). This case is distinguishable from *Maryland-National Capital Park and Planning Commission v. Greater Baden-Aquasco Citizens Assoc.*, 412 Md. 73 (2009). In that case, the Supreme Court of Maryland found a planning board's resolution (which included large portions of a staff report but added additional findings of fact and conclusions) adequate.

ATTORNEY DISCIPLINE

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This is to certify that the name of

DANA PAUL

has been replaced on the register of attorneys permitted to practice law in this state as of November 21, 2023.

*

This is to certify that the name of

CALISTRATOS SPIROS STAFILATOS

has been replaced on the register of attorneys permitted to practice law in this state as of November 21, 2023.

*

RULES ORDERS

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A Rules Order pertaining to the 218th Report of the Standing Committee on Rules of Practice and Procedure was filed on November 17, 2023.

http://mdcourts.gov/sites/default/files/rules/order/ro218.pdf

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A Rules Order pertaining to the 219th Report of the Standing Committee on Rules of Practice and Procedure was filed on November 28, 2023.

http://mdcourts.gov/sites/default/files/rules/order/ro219.pdf

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UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

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