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COURT OF APPEALS

CRIMINAL LAW - WEAPONS - MANUFACTURE, SALE, GIFT, LOAN, POSSESSION, OR USE - THE TEMPORARY GRATUITOUS EXCHANGE OR LOAN OF A REGULATED HANDGUN BETWEEN TWO ADULT INDIVIDUALS, WHO ARE OTHERWISE PERMITTED TO OWN AND OBTAIN A REGULATED HANDGUN, DOES NOT CONSTITUTE AN ILLEGAL "TRANSFER" OF A FIREARM.

CRIMINAL LAW - NATURE AND ELEMENTS OF CRIME - CRIMINAL INTENT AND MALICE - IN GENERAL - THE INCLUSION OF THE WORD "KNOWINGLY" IN MARYLAND CODE (1957, 1996 REPL. VOL., 2002 SUPP.), ARTICLE 27, § 449(f), PLACED IN CONTEXT WITH THE STATUTE AS A WHOLE, INDICATES A SPECIFIC INTENT *MENS REA*.

Facts: On April 2, 2003, Man Nguyen contacted Todd Lin Chow, petitioner, about purchasing a gun for his protection. The two men met at a restaurant for lunch and, sometime during the course of the meeting petitioner handed Nguyen a nine-millimeter semi-automatic handgun that he had owned since 1996.

Nguyen expressed to petitioner his desire to test fire the handgun before purchasing it. The two men then got into Nguyen's vehicle and headed to a firing range. The trip to the firing range was interrupted when Nguyen received a business call about a situation that required his attention. The trip was called off and Nguyen returned to the restaurant to drop petitioner back off at his car. When petitioner exited Nguyen's vehicle the handgun was left in Nguyen's car.

Later that day, Nguyen contacted the petitioner, who told him to keep the handgun in the house and he would pick it up. Nguyen later testified that he anticipated the handgun would be returned to petitioner "as soon as possible."

On April 4, 2003, Nguyen was stopped in his vehicle by the Prince George's County Police on a warrant for a prior illegal possession of a handgun. The police searched Nguyen's car and discovered petitioner's loaded handgun in the center console. The police determined that the handgun was not stolen and was fully operable.

On July 31, 2003, Chow was charged with illegally transferring a regulated firearm pursuant to Maryland Code (1957, 1996 Repl. Vol., 2002 Supp.), Article 27, § 442. On November 25, 2003, a bench trial was held in the Circuit Court for Prince George's

County. At the close of the State's case, petitioner made a motion for judgment of acquittal. Petitioner argued that § 442(d) does not cover the temporary exchange of a firearm. In addition, petitioner argued that he did not "knowingly" violate the statute, pursuant to § 449(f). The State argued that the plain meaning of "transfer" covers the temporary exchange or loan of a handgun. The trial court denied petitioner's motion and petitioner rested without putting on any evidence.

The trial court then found petitioner guilty and sentenced him to sixty days, suspended the sentence, and fined him \$200. The court specifically found that the exchange of the handgun was a temporary transfer or loan and that such an exchange was a "transfer" under § 442(d).

A timely appeal was made to the Court of Special Appeals and on June 2, 2005, after hearing arguments, the court filed its decision affirming the Circuit Court's decision. *Chow v. State*, 163 Md. App. 492, 881 A.2d 1148 (2005). Petitioner then timely filed a Motion for Reconsideration, which was denied on October 4, 2005. On October 19, 2005, petitioner timely filed a petition for writ of certiorari to the Court of Appeals. Certiorari was granted on December 19, 2005. *Chow v. State*, 390 Md. 284, 888 A.2d 341 (2005).

Held: Reversed. The Court of Appeals found that the temporary gratuitous exchange or loan of a regulated handgun between two adult individuals, who are otherwise permitted to own and obtain a regulated handgun, does not constitute an illegal "transfer" of a firearm in violation of § 442(d). The plain language of § 442(d), when construed in harmony with the rest of the subheading, reveals that "transfer" can only refer to a *permanent* exchange of title or possession and does not include gratuitous temporary exchanges. The Court also concluded that the inclusion of the term "knowingly" in § 449(f) creates a specific intent *mens rea* for violations of that subsection.

Todd Lin Chow v. State of Maryland, No. 99 September Term, 2005, filed July 27, 2006. Opinion by Cathell, J.

REAL PROPERTY - RESTRICTIVE COVENANTS - REASONABLY STRICT CONSTRUCTION

Facts: On December 7, 2000, Eric Miller, petitioner, purchased Lot 27, block 32, from Bay City Property Owners Association, Inc, ("BCPOA"), respondent. The lot was conveyed to petitioner in fee simple under a special warranty deed. Subsequently, petitioner submitted plans to build a residence on the lot. Initially, respondent agreed to permit a variance reducing the front line setbacks on the lot to allow construction of the proposed building. Eventually, however, respondent changed its mind and denied petitioner's request to build on the lot. Respondent argued that the lot was reserved for use as a community boat harbor pursuant to a 1952 deed and a 1975 declaration. The 1952 deed provided that the original developer reserved the right to

"select, fix and determine the location, upon the waters of Board [sic] Creek, of a parcel of land, to be known and designated as a 'Community Boat Harbor Reservation' and to show and designate said 'Community Boat Harbor Reservation', upon a plat thereof, to be hereafter filed for record among the Land Records of Queen Anne's County."

The deed also provided that once the plat, designating the "Community Boat Harbor Reservation," was filed, the designated lot would be restricted to be used in that manner. A plat designating the "Community Boat Harbor Reservation" was never filed. Instead, respondent's predecessor in interest recorded a "declaration" in 1975 stating that Lot 27 along with two other lots on the opposite side of the creek were designated as the "Community Boat Harbor Reservation." Although lot 27 was not used as a boat harbor, the two other lots were so used since the time the declaration was recorded. Petitioner filed suit in the Circuit Court for Queen Anne's County claiming that the lot was not restricted to use as a boat harbor because respondent never recorded the required plat designating the lot for that use. The Circuit Court agreed and granted petitioner's motion for summary judgment. The Court of Special Appeals disagreed and reversed the Circuit Court in an unreported opinion.

Held: Reversed. Restrictive covenants are subject to a reasonably strict construction. The covenant will first be analyzed based upon the written language used in creating it. When that language clearly defines the intent of the parties, the court will interpret the covenant strictly so as to comply with that intent. In this case, the language of the deed is clear and unambiguous. It provides that one and only one community boat

harbor reservation can be designated. That designation must be on a plat recorded in the Land Records. Respondent attempted to create two boat harbors and failed to comply with the platting requirement. As a result, the requirements set forth on the 1952 deed have not been met and the 1975 declaration, therefore, is not binding upon Lot 27. Lot 27 is not designated as a boat harbor reservation and the Circuit Court properly granted petitioner's motion for summary judgment.

Eric Miller v. Bay City Property Owners Association, Inc., No 131, September Term, 2005, filed July 31, 2006. Opinion by Cathell, J.

COURT OF SPECIAL APPEALS

APPEALS - DECISIONS REVIEWABLE - FINAL JUDGMENT

SUMMARY JUDGMENT - TRIAL COURT'S DISCRETION

SUMMARY JUDGMENT - GENUINE DISPUTE OF MATERIAL FACT

BALTIMORE CITY POLICE DEPARTMENT - POLICE COMMISSIONER -
APPOINTMENT AND REMOVAL

 Facts: In 2003, Kevin P. Clark was appointed Police Commissioner of Baltimore City by the Mayor of Baltimore, and the appointment was confirmed by the City Council. Clark entered into a Memorandum of Understanding ("MOU") with the City, which provided for his removal by the Mayor without cause. In November 2004, Clark was removed without cause pursuant to the terms of the MOU. He filed a complaint in the Circuit Court for Baltimore City. The Mayor moved for summary judgment, and the court granted summary judgment in April 2005. The circuit court found that the Mayor had a valid contractual right to terminate Clark without cause.

 Held: An opponent of summary judgment must submit "an affidavit or other written statement under oath" demonstrating that material facts are genuinely disputed, Md. Rule 2-501(b), or an affidavit "that the facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit." Md. Rule 2-501(d). Clark failed to demonstrate any genuine dispute of material facts. Moreover, it was not an abuse of discretion to grant summary judgment prior to the completion of discovery. The issue was one of law.

The Baltimore City Police Department is a State agency, but the Mayor of Baltimore has statutory authority to appoint and remove the Police Commissioner. The Mayor's power of removal is limited to that provided for in the statute granting the removal power. The Mayor may remove the Police Commissioner only "for official misconduct, malfeasance, inefficiency or incompetency, including prolonged illness, in the manner provided by law in the case of civil officers." Code of Public Local Laws of Baltimore City § 16-5(e) (2005). Removal of a civil officer by the Mayor therefore requires, at a minimum, notice of the complaint against the officer and a hearing.

To the extent that it provided for removal of the Police Commissioner without cause, the MOU was invalid and unenforceable

because removal without cause is beyond the Mayor's statutory authority.

Kevin P. Clark v. Martin O'Malley et al., No. 276, September Term, 2005, filed June 30, 2006. Opinion by Kenney, J.

CRIMINAL LAW - SENTENCING - GROSSLY DISPROPORTIONATE SENTENCE - PROPORTIONALITY REVIEW NOT REQUIRED WHERE A SUBSTANTIAL PART OF SENTENCE IS SUSPENDED

CRIMINAL LAW - FIRST DEGREE ASSAULT - SUFFICIENCY OF THE EVIDENCE - SERIOUS PHYSICAL INJURY

Facts: Appellant, Robin Tyrone Cathcart, was convicted, in the Circuit Court for Prince George's County, of first degree assault, second degree assault, and false imprisonment. After merging the two assault convictions, appellant was sentenced to 10 years in prison for first degree assault and a consecutive life sentence for the false imprisonment conviction, with all but 10 years suspended.

On appeal, appellant challenged the trial court's imposition of a life sentence for common-law false imprisonment, arguing that the sentence was so disproportionate as to constitute cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Article 28 of the Maryland Declaration of Rights. He also contended that the evidence was insufficient to support his conviction for first degree assault.

Held: Affirmed. The trial court sentenced appellant to "life, suspend all but ten years," and no period of probation was imposed. See Md. Rule 4-346(a) (2005). Since an individual sentenced to life in prison is not eligible for parole until after having served 15 years, see COMAR 12.08.01.17(7) (a), the "life" sentence was effectively a 10 year, no parole sentence. Thus, if appellant is paroled, his only future exposure is the balance of the 10 year

term. If, on the other hand, appellant serves the entire 10 years, his exposure ends, as there is no probation to be violated.

Given the facts of the case, and the court's broad discretion in sentencing matters, the imposition of a ten-year sentence for false imprisonment was not so disproportionate as to constitute cruel and unusual punishment.

The evidence, viewed in the light most favorable to the State, was sufficient for the jury to infer that appellant intended to cause serious physical injury to the victim.

Cathcart v. State, No. 2758, September Term, 2004, filed June, 30, 2006. Opinion by Sharer, J.

INDECENT EXPOSURE - PUBLIC PLACE

Facts: Appellant, Gerald Wisneski, was charged with the crime of indecent exposure when he exposed his genitals to three people while in the home of a third party. At trial, appellant moved for a judgment of acquittal, on the grounds that the exposure was not committed in a "public place." The court denied the motion, reasoning that the "public place" element of the crime of indecent exposure is satisfied "if it occurs under circumstances where it could be seen by other people if they happen to look...."

Held: Affirmed. The element of "public place" is not limited to acts that occur in the outdoors or in a place that is open to all others, without restriction.

What constitutes a public place with regard to indecent exposure depends on the circumstances of the case. Here, there is no dispute that, when appellant was a guest in a private home, he exposed himself to three people, none of whom were members of his family or members of his household. It is also uncontroverted that

Wisneski was not in an area of the home that is generally regarded as private, such as a bedroom or bathroom. Moreover, it is clear that appellant intentionally exposed himself to the other two invitees and the host without their permission or consent to engage in such lewd behavior. Under the circumstances of this case, in which appellant was a guest in the residence of another and, while in an area of the home not traditionally regarded as private, he intentionally exposed himself to others, his conduct constituted indecent exposure in a "public place."

Gerald Wisneski v. State of Maryland, No. 222, September Term, 2005, filed July 12, 2006. Opinion by Hollander, J.

INSURANCE - INTERPRETATION OF THE LIMIT OF LIABILITY PROVISION IN INSURANCE POLICY - UNITED SERVS. AUTO. ASS'N v. RILEY, _____ MD. _____, NO. 40, SEPTEMBER TERM, 2005 (FILED JUNE 1, 2006); CIRCUIT COURT'S DECLARATORY JUDGMENT ORDER PROPERLY CONCLUDED THAT: (1) CONTINUING EXPOSURE TO LEAD PAINT AT THE SAME PROPERTY OVER MULTIPLE POLICY YEARS CONSTITUTED MULTIPLE OCCURRENCES DESPITE LANGUAGE THAT "[A]LL BODILY INJURY . . . RESULTING FROM . . . CONTINUOUS OR REPEATED EXPOSURE TO SUBSTANTIALLY THE SAME GENERAL CONDITIONS SHALL BE CONSIDERED TO BE THE RESULT OF ONE OCCURRENCE"; (2) THE LIMITATION OF LIABILITY LANGUAGE IN THE POLICY PROVISIONS WAS INEFFECTIVE TO PRECLUDE "STACKING" OF OCCURRENCE LIMITS IN POLICIES COVERING SUCCESSIVE YEARS AND TRIGGERED BY A "CONTINUING INJURY"; AND (3) COVERAGE FOR LATER YEARS WAS TRIGGERED BY INJURIES THAT HAD ALREADY MANIFESTED AND BEEN DIAGNOSED PRIOR TO THE INCEPTION OF SUCH COVERAGE.

Facts: Appellant insurance carrier sought a declaratory judgment in Circuit Court for Baltimore City asking that the court determine whether appellant invoking six separate insurance policies, was required to indemnify a property management company and a landlord where two former child tenants experienced elevated levels of lead and were poisoned from lead-based paint over a

period of approximately three years. Appellant argued that the policy language contained in each policy - "All bodily injury . . . resulting from . . . continuous or repeated exposure to substantially the same general conditions shall be considered to be the result of one occurrence" - should restrict appellees' recovery under the limit of liability provision to one per occurrence of exposure and preclude appellees from collecting the limit of liability cap amounts from sequential policies. Appellees contended that the child tenants continued to suffer lead poisoning injuries during each of the policy periods and were thus entitled to coverage under each policy where the child tenants were injured. The circuit court declared that the child tenants' exposure to lead paint and proof of bodily injury constituted an occurrence under each of the six policies, that such exposure triggered coverage under the policies and that "stacking" of the liability caps was permitted. The court also found that coverage under subsequent policy years was triggered by tenants' injuries which had already manifested and were diagnosed prior to the inception of the later policies.

 Held: Affirmed. *United Servs. Auto. Ass'n v. Riley*, ___ Md. ___ (2006), No. 40, September Term, 2005, slip op. at p.25 (filed June 1, 2006) (concluding that petitioner insurance carrier's policies, which contained limit of liability provisions and bodily injury definitions nearly identical to appellant's policies, were ambiguous and that "a reasonably prudent person could . . . read the policies to mean that each separate policy is implicated by a continuing occurrence.") The court did not err in declaring that the child tenants' continuing and multiple lead-based injuries constituted occurrences that triggered coverage under each applicable policy and concluding that the policy language was not sufficient to preclude "stacking" of each cap limit of the policies. The court also did not err in finding that the child tenants' injuries, which had manifested and were diagnosed before inception of coverage for later policies, triggered coverage under those policies. The case was remanded for entry of declaratory judgment on separate document.

Maryland Casualty Company v. Phillip Hanson et al., No. 819, September Term, 2005, decided July 3, 2006. Opinion by Davis, J.

LANDLORD/TENANT PROCEEDINGS- SUMMARY EJECTMENT- RENT ABATEMENT

Facts: The Law Offices of Taiwo Agbaje, P.C. ("Lessee") and JLH Properties II, LLC ("Lessor") entered into a three year commercial lease, under which Lessor was obligated to undertake repair and rehabilitation of the leased premises "with reasonable dispatch" in the event of "fire or other casualty resulting in damage to premises." The Lease further provided that, if the leased premises were subject to repair and rehabilitation, "the rental herein shall be abated in that proportion that the amount of space which is not available to and usable by L[essee] as a result of such casualty."

Two to three months after occupying the property, Lessee complained to Lessor that waste water seepage into the leased premises rendered it untenable and "unusable as a law office." As a result, Lessee claimed that it was entitled to full rent abatement and it stopped paying rent shortly thereafter. Although it continued occupying the property in some capacity for the next fifteen months, and did not pay rent, Lessee maintained that the waste water problem persisted.

Approximately ten months after Lessee stopped paying rent, Lessor filed an ejectment proceeding in the District Court of Maryland pursuant to Maryland Code (1974, 2003 Repl. Vol.), § 8-401 of the Real Property Article, seeking repossession of the property and accrued rent. When the Lessee requested a jury trial, the case was removed to the Circuit Court for Prince George's County, where Lessor moved for summary judgment. Lessee opposed the motion, asserting that no rent was owed because the leased premises were rendered one-hundred percent unusable and that it was, therefore, entitled to a one-hundred percent abatement of rent. In support of its opposition to summary judgment, Lessee offered the affidavit of its managing partner, in which he attested to the waste water problems and notifications provided to Lessor concerning those problems.

Following a hearing, the circuit court determined that, because it had filed a collateral breach of contract action against Lessor, Lessee could not assert its contractual right to rent abatement as a defense in the ejectment proceeding. Accordingly, the court granted Lessor's motion for summary judgment, awarding it possession of the leased premises and rent for the entire period that Lessee occupied the property without paying rent.

Held: Reversed. Because Lessee's obligation to pay rent was not independent of Lessor's duty to keep the leased property in a state of repair, under the Lease, Lessee only owed rent for that

proportion of the leased property that was available to and usable by Lessee. Therefore, Lessee should have been permitted to assert the contractual abatement provision as a defense in the ejectment proceeding instituted by Lessor, in which Lessor sought past due rent and repossession of the property. Even if Lessee was not entitled to one-hundred percent rent abatement, the circuit court erred in determining that Lessee could not assert the abatement provision of the Lease as a defense in an ejectment proceeding. Moreover, the court erred in resolving genuine disputes of material fact, namely that Lessor maintained the property in a state of repair throughout the duration of the Lease and that Lessee was not entitled to abatement of the rental.

Law Offices of Taiwo Aqbafe, P.C. v. JLH Properties, II, LLC, No. 2705, September Term, 2004, filed June 29, 2006. Opinion by Kenney, J.

STATE PERSONNEL - TRAVEL TIME - COMPENSABLE TIME - EMPLOYEE GRIEVANCE - COMAR 17.04.11.02b(1)(j)

Facts: Appellee, Janet M. Miller, filed a grievance against the Comptroller of Maryland (the "Comptroller"), appellant, concerning the Comptroller's method of computing compensable work time when an employee travels from home directly to a remote work site, rather than to the regularly assigned office. Appellee claimed she was entitled to compensation for all of her travel time, while the Comptroller concluded that an employee is not entitled to compensation for time the employee would normally spend commuting to work. An Administrative Law Judge ("ALJ") concluded that the Comptroller's policy was arbitrary and unsupported by law, but "denied and dismissed" Miller's grievance because she failed to present evidence as to the remedy she sought. The circuit court affirmed the ALJ's decision rejecting the Comptroller's policy, but remanded the matter to OAH to determine the specific relief to which Miller was entitled. This appeal followed.

Held: Reversed. The ALJ erred in concluding that an employee is entitled to compensation for all travel time, without any deduction for the time that the employee would have spent in commuting to the regularly assigned office. The employee is entitled to compensation only for travel time that exceeds ordinary commuting time.

Code of Maryland Regulations ("COMAR") 17.04.11.02B(1)(j) defines "work time" as the time during which an employee "[t]ravels between home and a work site other than the assigned office, in accordance with the Standard Travel Regulations under COMAR 23.02.01." The Standard Travel Regulations under COMAR 23.02.01.01(c)(2) provide: "Reimbursement to employees or officials who use State-owned, State-leased or privately owned motor vehicles to conduct official business for the State is within the jurisdiction of the State Fleet Administrator, Department of Budget and Management, and subject to policies issued by the Secretary...." Section 5.01.05 of the "State Vehicle Fleet Policies and Procedures" manual provides that an employee is entitled to payment for mileage that exceeds the mileage for the employee's daily commute. The regulations set out in the "State Vehicle Fleet Policies and Procedures" are incorporated by reference into COMAR 17.04.11.02B(1)(j). The Secretary of DBM has chosen to apply to travel time the policy applicable for mileage, awarding compensation for travel time minus normal commuting time. Commute time is not work time, and an employee who is on travel status is not entitled to compensation for time that the employee regularly spends to commute.

Comptroller of Maryland v. Janet M. Miller, No. 02505, September Term, 2004, filed June 29, 2006. Opinion by Hollander, J.

ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated June 27, 2006 the following attorney has been disbarred by consent from the further practice of law in this State:

ROBERT C. HESSON

*

By an Order of the Court of Appeals dated July 19, 2006 the following attorney has been indefinitely suspended by consent from the further practice of law in this State:

DAVID ALLAN RODGERS

*

By an Opinion and Order of the Court of Appeals dated July 27, 2006 the following attorney has been indefinitely suspended from the further practice of law in this State:

NORMAN JOSEPH LEE, III

*

JUDICIAL APPOINTMENTS

On June 8, 2006 the Governor announced the appointment of Jonas Daniel Legum to the District Court for Anne Arundel County. Judge Legum was sworn in on July 12, 2006 and fills the vacancy created by the retirement of the Hon. Essom C. Ricks, Jr.

*

On June 23, 2006 the Governor announced the appointment of YVETTE M. BRYANT to the Circuit Court for Baltimore City. Judge Bryant was sworn in on July 18, 2006 and fills the vacancy created by the retirement of the Hon. Bonita J. Dancy.

*

On June 23, 2006 the Governor announced the appointment of JOHN A. HOWARD to the Circuit Court for Baltimore City. Judge Howard was sworn in on July 20, 2006 and fills the vacancy created by the untimely death of the Hon. Stephanie L. Royster.

*

On June 23, 2006 the Governor announced the appointment of the HON. TIMOTHY J. DOORY to the Circuit Court for Baltimore City. Judge Doory was sworn in on July 24, 2006 and fills the vacancy created by the retirement of The Hon. Thomas E. Noel.

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