Circuit Court for Baltimore County
Case No.: K-16-003210

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1982

September Term, 2016

STATE OF MARYLAND

v.

ROMAINE WILSON

Woodward, C.J.,
Shaw Geter,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: November 14, 2017

This case arises from an August 16, 2016, order of the Circuit Court for Baltimore County, committing appellee Romaine Wilson to the Department of Health and Mental Hygiene, after being found incompetent to stand trial. The order directed that appellee be transported to the Clifton T. Perkins Hospital Center immediately. On August 19, 2016, appellee filed a petition for constructive civil contempt against the Department, stating she had not been admitted to the hospital center. The court then issued a show cause order on August 22, 2016. Appellee was admitted to Perkins on August 24, 2016.

On September 9, 2016, the Department moved to dismiss the show cause order as moot. The court held a hearing on September 28, 2016, where it considered both the contempt petition and the motion to dismiss. Thereafter, the court issued a written opinion and order finding the Department in contempt. The order specified that the contempt could be purged if the Department immediately suspended application of its admissions policy and instead put in place "reasonable efforts to comply with court orders, including but not limited to seeking available bed space in appropriate hospitals outside of the geographic area of a given case or classification based on offense." The Department noted a timely appeal. The circuit court stayed the contempt order pending final disposition of the appeal on November 22, 2016.

Appellant presents the following questions for our review:

1. Did the Circuit Court for Baltimore County err in refusing to dismiss the show cause order as moot when Ms. Wilson, the only subject of the order giving rise to the show cause order, had been admitted to Perkins more than a month before the hearing?

2. Did the Circuit Court for Baltimore County err in finding the Department in contempt when (a) the Department had complied with the only directive in the order – Ms. Wilson's commitment to Perkins – before the finding of contempt; (b) the Department had no ability to comply with the commitment order before August 24, 2016 because it did not have an available bed; (c) the Department did not act willfully; and (d) the order was not sufficiently specific to support a contempt finding?

For the reasons set forth below, we shall affirm in part and reverse in part.

BACKGROUND

Appellee Romaine Wilson was arrested and charged with first degree arson, first degree assault, and reckless endangerment after allegedly setting a fire outside of the rental office of her apartment building on May 7, 2016. She was assessed by the medical office of the Circuit Court for Baltimore County on May 11, 2016 for competency to stand trial, and, based on that evaluation, was referred to the Clifton T. Perkins Hospital Center ("Perkins") for further assessment. A subsequent evaluation on August 3, 2016, found appellee was not competent to stand trial and a danger to herself or others because of a mental disorder.

On August 16, 2017, the Circuit Court for Baltimore County signed an order committing appellee to the Department of Health and Mental Hygiene ("the Department") pursuant to section 3-106 of the Criminal Procedure Article. The order stated that "upon receipt of this Order, the transportation unit [identified as BCDC or DHMH] will transport [appellee] immediately to [Perkins]." On August 19, 2016, appellee filed a petition for constructive civil contempt, citing the Department's failure to transport her. The court then signed a show cause order on August 22, 2016, which the Department states they did not

receive until August 29, 2016.[1] On August 24, 2016, eight days after the commitment order was signed, appellee was admitted to Perkins.

The Department responded to the motion and moved to dismiss the show cause order on September 9, 2016. They argued that the show cause order should be dismissed as moot, since appellee had been admitted to Perkins; that the Department had no ability to comply with the order prior to August 24, 2016, the day appellee was admitted; that Department officials had not willfully violated the court's order; and that the show cause order was not sufficiently specific to support a contempt finding.

A hearing was held on September 28, 2016. The Department presented the testimony of three witnesses – Lawrence Brown, Perkins' admissions coordinator; Barbara Bazron, Ph.D., the Executive Director of the Department's Behavioral Health Administration; and John Robinson, Perkins' chief executive officer. Mr. Brown explained that the Department determines which hospital is most appropriate for an individual's care based on their charges, and that, thereafter, the detention centers transport the individuals to the designated hospitals. Perkins is the Department's maximum security forensic hospital, which generally admits those criminal defendants charged with the most serious crimes and found either incompetent to stand trial or not criminally responsible. Brown stated that, due to appellee's arson and assault charges, Perkins was the appropriate facility for the appellee. He confirmed that appellee was not admitted on the date the court signed

[1] In the proceedings below, the Department asserted in its petition that the show cause order was not properly served, but withdrew that assertion at the hearing.

the commitment order because there was no available bed, despite the fact that the hospital had indeed received appellee's commitment order within a day of its issuance.

Dr. Bazron testified that the Department had been attempting to address delays in the admission of individuals committed to the Department as incompetent to stand trial and dangerous due to a mental disorder, including implementing an "aggressive" discharge planning process to free up space in the hospitals. Dr. Brazon stated that a uniform admission policy assists the Department in addressing admission delays and creates "a more equitable system." This policy, she averred, provides a hierarchy of admission priority based on legal status, subject to exceptions based on clinical acuity, intended to prioritize admission to the state's psychiatric hospitals. The policy gives highest priority to an individual on conditional release,[2] who is "referred voluntarily or pursuant to a hospital warrant" upon a finding of probable cause that the individual has violated a condition of his or her release. The hospitals, including Perkins, automatically admit individuals who fall into this category, regardless of whether the hospital is "over census." As Dr. Brazon testified, these individuals "have to come back."

The admission policy gives second priority to individuals like appellee: criminal defendants who are committed to the Department because they have been found not

[2] A person committed for treatment after a verdict of not criminally responsible may be released from commitment, upon certain conditions, if the person does not present "a danger, as a result of mental disorder or mental retardation, to self or to the person or property of others if released from confinement with conditions imposed by the court." Md. Code, Crim. Proc. Art. § 3-114(c).

criminally responsible for the charged crime or because they are incompetent to stand trial and dangerous due to a mental disorder or mental retardation.

Patients with the lowest priority include those on mandatory release from prison, patients referred for evaluation of competency to stand trial or criminal responsibility, and patients "without court involvement" who are referred from another state psychiatric hospital. The policy, however, allows a patient "at a lower priority level" to be "admitted ahead of other, more stable patients at higher priority levels" if the lower priority patient "presents acute clinical issues beyond the capacity of his/her current placement to manage." "Such exceptions are to be made on clinical grounds only," and "[t]he urgency of a legal situation shall not be considered." The policy expressly provides that "[t]he final decision to place a patient in a…facility rests solely with the [Behavioral Health Administration's] Medical Director, who has the authority to make or refuse placement."

Mr. Robinson, Perkins' chief executive officer, testified about his efforts to address delays in admissions to Perkins specifically, including "assess[ing] the daily availability of beds, the numbers of patients ready for discharge, any barriers to those discharges,…efforts to address [those barriers,]…[and] check[ing] with other hospitals in the Department to see if any could accept a transfer from Perkins." Additionally, he testified that although "[t]here was one available bed for a female patient…on the 19th of August," that bed was given to another patient on the waiting list instead of appellee.

The Department presented a letter from then-Secretary of Health and Mental Hygiene, Van T. Mitchell, written on April 28, 2016. In this letter, Secretary Mitchell

alerted the circuit courts' administrative judges as to the Department's issues with hospital capacity and ability to respond expeditiously to commitment orders. He informed the courts that all of the hospitals had been operating over capacity for the past year and explained his concerns about the ability of the hospitals to maintain a safe environment and provide quality care while operating over capacity.

The Department provided no evidence that it had, at any point during the eight day period between the issuing of the commitment order and appellee's admittance to Perkins, informed the court of its inability to comply with the order. When asked why the Department did not inform the court of its inability to comply, Dr. Bazron testified that she "ha[d] no response." The Department also did not make any efforts to open an available bed for appellee before August 24, 2016.

In a written opinion and order, issued October 20, 2016, the circuit court found the Department in contempt. The court concluded the Department did not view compliance with court orders as mandatory, and faulted the Department: for the adoption of its admission policy; its failure to admit appellee in the place of another patient who the Department stated was "higher on the waiting list" on August 19, 2016; and its failure to identify a bed for appellee in one of its other hospitals. The circuit court provided the Department could purge the contempt by immediately suspending the application of the admission policy and by putting "in place reasonable efforts to comply with court orders, including but not limited to seeking available bed space in appropriate hospitals outside of the geographic area of a given class or classification based on offense."

STANDARD OF REVIEW

In a case tried without a jury, "the appellate court will review the case on both the law and evidence." Md. Rule 8-131(c). "It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* "Under the clearly erroneous standard, 'we must consider the evidence in the light most favorable to the prevailing party and decide not whether the trial judge's conclusions of fact were correct, but only whether they were supported by a preponderance of the evidence.'" *Royal Investment Group, LLC v. Wang*, 183 Md. App. 406, 430 (2008) (internal citations omitted).

"We review the court's legal conclusions *de novo*." *Burson v. Capps*, 440 Md. 328, 342 (2014) (internal citations omitted).

DISCUSSION

I. The Circuit Court for Baltimore County did not err in refusing to dismiss the show cause order for mootness.

"A question is moot if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide." *Attorney General v. Anne Arundel County School Bus Contractors Ass'n, Inc.*, 286 Md. 324, 327 (1979) (internal citations omitted). The Court of Appeals "has consistently held that when the chronology of a case makes it apparent that nothing we could do could undo or remedy that which has already occurred, except under the most extraordinary circumstances requiring a decision in the public interest, the case must be

dismissed as moot." *In re Special Investigation No. 281*, 299 Md. 181, 189-90 (1984) (*Maryland Tobacco Grow v. Maryland Tob. Auth.*, 267 Md. 20, 25-26 (1972)).

Appellant contends the circuit court erred in not dismissing the show cause order as moot because "the only directive in the order as to which the Department was held in contempt was the commitment of [appellee] to Perkins." "By the time of the contempt hearing…[appellee] had been admitted to Perkins." "Thus, she had obtained the entirety of the relief that she sought in the circuit court."

Appellee, however, argues that, even "if the contempt issue was technically moot, the circuit court did not err in denying the Department's motion to dismiss because the case presented several exceptions to the mootness doctrine." First, they argue, that, "as the circuit court recognized," this case presents an issue capable of repetition but evading review. They contend that, "[d]ue to the notice and hearing requirements governing civil contempt proceedings, it is unlikely that a court would ever be able to decide the issue before the Department took custody of the defendant" except "in the most egregious cases." Second, they argue that a second exception to the mootness doctrine, requiring the presence of a pressing issue of public interest, applies to this case. "The lawfulness of the Department's delay in complying with court orders to admit criminal defendants signal[s] a public issue of paramount importance."

In analyzing the mootness issue, the circuit court, in its written opinion and order, relied on *State v. Dixon*. In *Dixon*, the Department appealed an order of the court requiring the immediate transportation of Dixon to Perkins for evaluation as to his competency and

criminal responsibility. *State v. Dixon*, 230 Md. App. 273 (2016). The Department questioned whether the circuit court's order violated sections 3-105 and 3-111 of the Criminal Procedure Article. Dixon moved to dismiss the appeal, asserting that because the Department had already completed his competency evaluation, the question presented by the Department was moot.

This Court held that, although "[a]s a general rule, courts do not entertain moot controversies," "[t]here are, however, circumstances in which this Court will address the merits of a moot case." *Dixon*, 230 Md. App. at 277. "The first is where the controversy, even though moot at the time of judicial review, 'is capable of repetition but evading review.'" *Id.* (citing *Sanchez v. Potomac Abatement, Inc.*, 198 Md. App. 436, 443 (2011)). "The second exception 'allows us to express our views on the merits of a moot case to prevent harm to the public interest.'" *Id.* (citing *Sanchez*, 198 Md. App. at 443). We have previously found the circuit courts also have the "discretion to decide a case under one of the recognized exceptions to the mootness doctrine." *Stevenson v. Lanham*, 127 Md. App. 597, 625 (1999) (concluding that the circuit court had, but did not exercise, this discretion in a declaratory judgment action).

We further stated that, although the issue had been resolved, "the relevant statutes specify that competency and responsibility examinations must be completed within a certain time after they are ordered, [and therefore] it is most unlikely that appellate review would ever be accomplished before a court-ordered examination was completed." *Dixon*, 230 Md. App. at 277-78. "Consequently, we [were] persuaded that the issue is capable of

repetition yet evading review and is, therefore, not moot." *Id.* at 278. We then went on to address the Department's contentions.

Appellant argues that *Dixon* is inapplicable to the present case because, there, we were not addressing a contempt proceeding. Appellant avers that the reasoning in *Dixon* is limited to the short time frame required by the statutes in question, which do not apply here. Further, appellant reasserts that "[u]pon [appellee's] admission, there was nothing for the Department to do under the terms of the August 16 order." Appellee, conversely, argues that "the notice and hearing requirements governing civil contempt proceedings" would, similarly to those in *Dixon*, likely prohibit a court from being able "to decide the issue before the Department took custody of the" individual. We agree with appellee.

The issue presented in this case is moot. Nevertheless, the circuit court did not err in addressing the merits of the case, and we will express our views on the matter, because it falls under the exceptions to the doctrine, as it is capable of repetition but evading review and a matter of public interest. *See Sanchez v. Potomac Abatement, Inc.*, 198 Md. App. 436, 444-45 (2011) (finding that, although the issue in the case was moot, because the case implicated "the 'public interest' offshoot of the mootness doctrine," "we believe the public interest would be served by an expression of our views for the guidance of courts, litigants, and the Commission."). In every similarly situated case, circuit courts would be utterly without the ability to hold the Department responsible for willfully ignoring a court's order so long as the Department managed to transfer the individual prior to the contempt hearing. Moreover, as the Court of Appeals stated in *Powell*, "[i]t is not uncommon for an individual

who has been found incompetent to stand trial to be restored to competence through treatment and then, for any variety of reasons, to alter lapse back into incompetence." *See Powell, et al. v. Maryland Dep't of Health, et al.*, __ Md. __, No. 77, Sept. Term 2016, 2017 WL 3699338, *8 (Aug. 28, 2017) (internal citations omitted). "Indeed, [CP § 3-104(c), which governs court determinations of competence] contemplates that the court may need to reconsider the defendant's competence during the course of the prosecution." *Id.* The Court continued:

> It is thus conceivable that one or more of the [a]ppellants, having experienced that cycle, will again be the subject of a commitment order under CP § 3-106(b) [governing findings of incompetency] in connection with his or her criminal case. The question whether, and to what extent, the judge who issues that commitment order may specify a deadline for admission of the [a]ppellant to Perkins and whether [the Department's] admission policy complies with the statute and Constitution would likely again be an issue. And, assuming that [a]ppellant again challenges any delay under the [Department's] policy in his or her admission to Perkins, it seems likely that the [a]ppellant would again be admitted to Perkins before that challenge reaches this Court. If we decline to decide the case on the ground of mootness, this important question of the [Department's] compliance…will escape decision.

Powell, et al. v. Maryland Dep't of Health, et al., __ Md. __, No. 77, Sept. Term 2016, 2017 WL 3699338, *8 (Aug. 28, 2017).

The Department's failure to comply with court orders in these cases is a recurring issue, and former Secretary of Health and Mental Hygiene, Van T. Mitchell, described the lack of available space as "a crisis" in his letter to the courts. Moreover, according to the Department, they are not required to transfer defendants immediately as stated in court orders, but can delay compliance at their discretion. Further, "[e]ven if it is unlikely that

the same party will be subject to the same action, the exception may also apply if the issue is of public importance and affects an identifiable group for whom the complaining party is an appropriate surrogate." *Powell, et al. v. Maryland Dep't of Health, et al.*, __ Md. __, No. 77, Sept. Term 2016, 2017 WL 3699338, *8 (Aug. 28, 2017).

Consequently, the circuit court did not err in failing to dismiss the order for mootness.

II. The circuit court did not err in finding the Department in contempt, but abused its discretion in the imposition of its purging provision.

"[A] civil contempt proceeding is intended to preserve and enforce the rights of private parties to an action and *to compel obedience to orders and judgments entered primarily for their benefit*." *Arrington v. Dep't of Human Res.*, 402 Md. 79, 93 (2007) (emphasis added). "These proceedings are generally remedial in nature and are intended to coerce future compliance." *Lynch v. Lynch*, 342 Md. 509, 519 (1996) (internal citations omitted).

In order to find a defendant in contempt, the petitioner must prove "that the defendant acted in contradiction of the applicable court order." *Lynch*, 342 Md. at 520. "In the case of a court order prescribing, or prohibiting, a specified course of conduct, the petitioner must establish that the defendant did or failed to do what was required." *Id.* However, to find a defendant in contempt they must have had "the ability to perform the act required by the court order." *Rawlings v. Rawlings*, 362 Md. 535, 547 (2001) (internal citations omitted). The inability to perform the act required by the court is a defense to contempt, *Lynch*, 342 Md. at 521 (internal citations omitted), but the onus is on the

defendant to establish that they are "unable to conform his or her conduct in compliance with the court order." *Ott v. Frederick Cty. Dept. of Soc. Servs.*, 345 Md. 682, 689 (1997) (internal citations omitted). "An appellate court may reverse a finding of civil contempt only 'upon a showing that a finding of fact upon which the contempt was imposed was clearly erroneous or that the court abused its discretion in finding particular behavior to be contemptuous." *Gertz v. Maryland Dep't. of Env't*, 199 Md. App. 413, 424 (2011) (internal citations omitted).

The circuit court, in its written opinion and order, held the Department in contempt, finding that the additional eight days detainment had violated appellee's due process; and that the Department had willfully failed to comply with the court's commitment order, because of the Department's admissions policy. The court held that the Department could purge itself of the contempt by abandoning its admission policy.

The State argues that in holding them in contempt, "the circuit court ignored that contempt proceedings are intended to obtain compliance with a court order – not to review the appropriateness of a party's conduct or alleged systemic problems beyond the order at issue." Moreover, they contend that the order "did not clearly, definitely, and specifically order the Department to admit [appellee] by a date certain or to transport her to the hospital." They aver that, given this lack of specificity, they cannot be held in contempt.

The State finally argues that the court does not have the discretion to order them to remove their admission policy.[3]

Appellee argues that "[a] court can achieve th[e] more expansive purpose of protecting the dignity of the judiciary by making a record than an individual willfully violated a court order – even if the violator has come into compliance." Appellee concedes, however, that the court did not have the authority to hold the Department in contempt beyond the date that she had been admitted to Perkins.

We have already discussed the court's determination that the issue *sub judice* was not moot. As to the state's contention that the order was not sufficiently specific as to properly inform the Department of the required action, we disagree. The court's commitment order clearly stated "[i]t is further ORDERED upon receipt of this Order, the transportation unit named below will transport Defendant *immediately* to the designated facility" which was listed as Perkins. Immediately having its normal and common definition and usage, it is unlikely the Department could not ascertain "by what date" the court had ordered appellee be admitted to Perkins.

[3] The State also argues that appellee provided no evidence that the Department had an available bed for appellee and failed to provide her admittance to the hospital, and therefore they cannot be held in contempt. However, appellant's witness John Robinson, Perkins' chief executive officer, testified that prior to the date appellee was admitted to Perkins, there was a bed available for a female patient. Moreover, appellant's witnesses testified that they made no efforts to ascertain if there was an available bed in one of the Department's other facilities available to appellee while she awaited her admittance to Perkins.

They also argue that because the court listed either the "BCDC or DHMH" as the transportation unit, the Department did not know what exactly they were required to do. This, too, is unlikely. It is the Department's responsibility to admit defendants to the facility they designate, and, therefore, even if the department of corrections transports the defendants, they would need the directive of the Department to do so. It is unreasonable to imply that any alleged confusion on the Department's part as to *who* would transport the appellee to Perkins somehow led to a misunderstanding of *when* the appellee was to be admitted to their facilities.

Neither party has adequately addressed the court's finding that the Department's delay violated appellee's due process. However, the Court of Appeals examined this issue in another recent case, where the Department failed to admit criminal defendants subject to a court order. *See Powell, et al. v. Maryland Dep't of Health, et al.*, __ Md. __, No. 77, Sept. Term 2016, 2017 WL 3699338 (Aug. 28, 2017).

The appellants[4] in *Powell* had all been found incompetent to stand trial and dangerous. In each case, the circuit court issued a written order committing the appellants to the Department as a result of those findings, which directed the Department to admit the appellants "immediately," with a handwritten addition requiring the appellants be admitted "no later than" the day after the date of the commitment order. None of the appellants was admitted to the assigned Department's facility by the deadline set forth in their respective

[4] Fredia Powell, James Powell, Shane Dorsey, and Ivan Burrell.

orders.[5] The appellants, thereafter, filed a complaint, alleging two causes of action, both premised on the Department's failure to comply with the court orders, including that the delay violated their substantive due process rights under Article 24 of the Maryland Declaration of Rights.

The Court first addressed the Department's contention that, because the appellants in *Powell* had either already been admitted or declared competent, the case was moot. The Court disagreed, and found that the issue fell under an exception to the mootness doctrine because the issue was capable of repetition but evading review. It stated that "[e]ven if it is unlikely that the same party will be subject to the same action, the exception may also apply if the issue is of public importance and affects an identifiable group for whom the complaining party is an appropriate surrogate." It then went on to address appellant's contention that the delay had violated their substantive due process rights.

The Court of Appeals held that "[w]hen the prosecution of the criminal case cannot proceed because the defendant is incompetent to stand trial, the defendant may not be detained on account of the criminal charge more than a reasonable period of time to determine where there is a substantial probability that the defendant will become competent in the foreseeable future." *Powell*, 2017 WL 3699338, *12. In keeping with the Supreme Court's holding in *Jackson v. Indiana*, 406 U.S. 715 (1972), that "due process requires the nature and duration of commitment bear some reasonable relation to the purpose for which

[5] Instead of being admitted within one day of the commitment order, as stated in the handwritten addition to each form order, the defendants were admitted between 12 and 36 days after the dates of their respective commitment orders.

the individual is committed," the Court found that, "[a]ny delay in transferring [a defendant who has been found incompetent and dangerous to themselves or others] to a designated facility pursuant to a commitment order must be reasonable in relation to the purpose of treating the defendant while protecting both the defendant and the public." "What delay is reasonable with respect to a particular defendant depends on the circumstances of the particular case." It ultimately found in *Powell*, however, that although "[i]t may well be that the Circuit Court's assessment that the delays experienced by the [appellants] were reasonable under the circumstances and did not violate the substantive due process guarantee of Article 24 is correct," it could not reach a conclusion "as a matter of law based on the limited record in [the] case."

Returning to the present case, because neither party properly presented argument with regards to this issue, we are unable to reach a conclusion as a matter of law. *See Anne Arundel Cty. v. Harwood Civic Ass'n*, 442 Md. 595, 614 (2015) (citing *Klauenberg v. State*, 355 Md. 528, 552 (1999) ("[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal.")).

We next examine the court's finding that the Department willfully failed to comply with the court's commitment order, or at least made no efforts to do so. "In a contempt proceeding, '[w]illfull conduct is action that is '[v]oluntary and intentional.'" *Gertz v. Maryland Dep't of Env't*, 199 Md. App. 413, 430 (2011) (internal citations omitted). During the show cause hearing, the court queried the Department about its interpretation of its obligation to accept custody of individuals immediately, under Criminal Procedure §

3-106(b), "as in the case of a defendant committed to the Department of Public Safety and Correctional Services." "Counsel advised that the Department considers the term to have a different meaning when applied to the Department, and that it does not require that the Department immediately assume custody of the defendant."[6] Additionally, the following exchange occurred during the testimony of Dr. Bazron:

> [Appellee's Counsel]: Okay. Now, when Romaine Wilson was denied admission to Clifton T. Perkins Hospital pursuant to the Department's facilities administration policy, did anyone write to Judge Purpura to request an extension for her admission to the hospital?
>
> [Dr. Bazron]: Not to my knowledge.
>
> [Appellee's Counsel]: Isn't that routinely done by the Department in cases of an evaluation when the Department can't comply with a court order that an evaluation be done within seven days?
>
> [Dr. Bazron]: Yes.
>
> [Appellee's Counsel]: So in those circumstances the Department doesn't just ignore the order because it's impossible for them to comply within seven days, they write to the Court and they request an extension.
>
> [Dr. Bazron]: She was evaluated very quickly.
>
> [Appellee's Counsel]: No, what I –
>
> [Dr. Bazron]: She was evaluated within a couple of days
>
> The Court: No, his question – go ahead.
>
> [Appellee's Counsel]: My question is if you can do it for evaluations, why didn't you do it when ordered to admit Romaine Wilson?
>
> [Dr. Bazron]: I have no response. I don't know.

[6] The Court of Appeals, in the *Powell* case, also noted the Department's belief that its compliance with court orders is "optional."

> [Appellee's Counsel]: So there was no seeking by DHMH permission of the Court to not comply with the order for any of the capacity reasons cited, it was just a decision she wasn't going to be admitted and the court order was not gonna be complied with.
>
> [Appellant's Counsel]: Objection.
>
> The Court: Overruled.
>
> [Appellee's Counsel]: There was no –
>
> The Court: Is that the case, ma'am?
>
> [Dr. Bazron]: I've already stated what we've done.
>
> The Court: No ma'am. The question is there was no request for an extension?
>
> [Dr. Bazron]: No, there was no request for an extension.

In our view, the Department's compliance with court orders is required. The circuit court's order was detailed and required prompt action. If, as the Department alleges here, it was unable to comply with the explicit directive of the court, it, like any other party under order of the court, the Department needed to inform the court of its inability to comply. *See Johnson v. Johnson*, 241 Md. 416, 420 (1966) (holding the court had erred in finding father in contempt for failure to pay child support *because* he had informed the court of his inability to do so several times). While "a present inability to comply with the prior order…is a defense in a civil contempt action," *Dorsey and Craft v. State*, 356 Md. 324, 351 (1999), the onus is on the defendant in the contempt proceeding to establish that they are "unable to conform his or her conduct in compliance with the court order." *Ott v. Frederick Cty. Dep't of Soc. Servs.*, 345 Md. 682, 689 (1997) (internal citations omitted).

The Department cannot, as was the case here, do nothing and simply wait until the opposing party has filed a petition for contempt to inform the court of its inability to immediately perform the ordered action. While there may have been a dilemma concerning the lack of available bed space, the Department is not exempted from communicating with the court. A letter from the Secretary to administrative judges statewide, generally describing its circumstances and dated in April of 2016, does not suffice.

Given the above, we hold the circuit court was not clearly erroneous in finding that the Department had willfully failed to comply with its order. Both parties agree there was an eight day period of noncompliance. Further, it appears from the record that there was an available bed for a female patient at Perkins during the eight day delay, which was given to a different patient. No further efforts were made to secure a placement for appellee in the interim in another facility or otherwise comply with the court's order. The Department admits no information was communicated to the court until the Department's response to appellee's motion for contempt, almost a month after the court's initial order, and eighteen days after the court's show cause order.

As stated in Powell, court imposed deadlines for the admittance of defendants who have been found either not criminally responsible or incompetent to stand trial and dangerous due to a mental disorder or mental retardation "may [ ] be enforced [by the courts] through the court's contempt powers." *Powell, et al. v. Maryland Dep't of Health, et al.*, 2017 WL 3699338, *11 (2016) (published August 28, 2017). Relevant to the instant

case, count one in *Powell* alleged that the Department had violated § 3-106(b)[7] of the Maryland Code, Criminal Procedure Article, with respect to each appellant because it had failed to comply with the court order concerning that appellant.[8] The Court found that although the Department could not be held in violation of the *statute* for a violation of a court imposed deadline, "[i]f a court order has been violated, a party with standing, or the court itself, may institute contempt proceedings for that violation," specifically citing Maryland Rule 15-206(a), dealing with constructive civil contempt.

Appellant next argues the court erred in its imposed purge provision because it was a penalty for its past failure to comply with the court's order, and not remedial, and because the court did not have the authority to order the Department to abandon its admissions policy. Furthermore, both parties contend the court erred in holding the Department in contempt past the date of compliance.

It is well established that, "because the intended purpose of [civil contempt] proceedings is remedial – intended to benefit the other party to the action by compelling the defendant to obey the court order," "there must be a means [for the court to] forc[e] the

[7] Section 3-106(b) of the Maryland Code, Criminal Procedure Article states that "[i]f, after a hearing, the court finds that the defendant is incompetent to stand trial and, because of mental retardation or a mental disorder, is a danger to self or the person or property of another, the court may order the defendant committed to the facility that the Health Department designates until the court finds that" "the defendant no longer is incompetent to stand trial," "the defendant no longer is, because of mental retardation or a mental disorder, a danger to self or the person or property of others," or "there is not a substantial likelihood that the defendant will become competent to stand trial in the foreseeable future."

[8] Count two of the complaint in *Powell* alleged that the Department had violated the appellant's right to due process. *Supra* pp. 14-16.

defendant to conform his or her conduct to what the court order requires, to force the defendant to obey the court order." *Id.* "Such a means is available when, in addition to entering a contempt finding, the court is able to impose penalties designed to achieve that effect and which, in fact, make the achievement more likely." *Id*. Any sanction imposed for civil contempt, however, "must provide for purging that permits the defendant to avoid the penalty by some specific conduct that is within the defendant's ability to perform." *Kowalczyk v. Bresler*, 231 Md. App. 203, 209 (2016) (citing *Bryant v. Howard Cty. Dep't Soc. Servs. ex. rel. Costley*, 387 Md. 30, 46 (2005)); *see also Dodson v. Dodson*, 380 Md. 438, 450 (2004).

We have previously upheld a finding of civil contempt for past failure to comply with the court's order because of the "exceptional circumstances" in the case. *Royal Investment Group, LLC v. Wang*, 183 Md. App. 406 (2008). In that case, appellant Royal Investment Group ("Royal") attempted to negotiate the purchase of a property with the property owner. Negotiations broke down, and the parties did not proceed to settlement. The property owner advised Royal that the contract was terminated and that they had no authority to enter the property. Royal then proceeded to demolish the existing home on the property, and, during the ensuing lawsuit, build a new home totaling over $700,000.

The circuit court rejected Royal's request for specific performance on the real estate contract and found Royal liable for trespass. Upon learning of the court's order, Royal returned to the property and removed the cabinets it had installed in the home. As a result, the circuit court held Royal in constructive civil contempt, and imposed a sanction of

incarceration, subject to a purge provision of $75,000, the amount of the removed cabinets. Royal, however, argued on appeal that the court's order was not "definite, certain and specific" enough in its terms to give Royal sufficient notice of the prohibited action, and that the court could not impose the sanction and purge provision because it constituted an award of compensatory damages, which the Court of Appeals held in *Dodson v. Dodson*, 380 Md. 438 (2004), could not be recovered in a civil contempt action.

After finding that the court had relied on sufficient evidence to conclude that Royal had willfully violated the court's order, we addressed whether Royal could be held in civil contempt for its past violation. We first noted that while "[i]t is not clear to us…how the court's order…was intended to coerce present or future compliance with the court order," Maryland law neither explicitly authorized nor prohibited "a monetary sanction in a civil contempt proceeding to compensate for damages caused by the contemnor," and "[w]e believe[d] that Maryland should join the 'clear majority of states' that permit [it], in appropriate circumstances." 183 Md. App. at 454. Thereafter finding that "the Court of Appeals in *Dodson*, [had] suggested ['exceptional circumstances'] 'could form the basis'" for a sanction of a past failure to comply with the court's order in a civil contempt case, *Royal Investment Group*, 183 Md. App. at 453 (citing *Dodson*, 380 Md. at 454), we agreed with the circuit court that such "'exceptional circumstances' were present [in *Royal*] based on Royal's" "egregious conduct" and "willful violation" of the court order. *Id.* at 455-56.

Given the particularities of this case, we believe our reasoning in *Royal Investment Group* is instructive. The Department was, in fact, in contempt of the court order for the 8

days in question. It is undisputed that they did not transport the appellee, and there was an available bed for a female patient during that 8 day delay. The Department did not communicate its inability to comply with the court, and its representatives have testified it has a different understanding of what is required of it for 'immediate' compliance. Nor did the Department make any attempt to find a suitable alternative for appellee while awaiting admittance to Perkins.

The Department has also readily admitted that this is a recurring problem, and its 'difficulty' in complying with court orders as directed is equally so. These cases, therefore, are clearly capable of repetition, yet evading review. In addition, the public import, as well as the Department's failure to adequately address the issue, make this an "exceptional circumstance" as in *Royal*. Courts in other states, likewise, have also found that government actors may be held in civil contempt for past failure to comply with court orders, finding that "[t]o hold otherwise on this record would create an unwarranted precedential loophole and exception for public officials to escape appropriate public accountability in judicial forums for failure to comply with court orders." *McCain v. Dinkins*, 84 N.Y.2d 216, 228 (NY 1994) ("The case is before us with detailed and affirmed findings of a serious, significant and persisting failure to comply with judicial decrees…Courts are justified and enjoy few alternative options in such circumstances except to exercise their 'inherent power to enforce compliance with their lawful order through civil contempt").

Therefore, in the interest of "compel[ling] obedience to orders and judgments," *Arrington*, 402 Md. at 93, and "coerc[ing] future compliance" with these future orders, *Lynch*, 342 Md. at 519, holding the Department in contempt for its willful failure to comply with the court's order in this instance was not an abuse of discretion. *See also Dodson v. Dodson*, 380 Md. 438, 448 (2004) ("[O]ur opinions have explained that 'remedial' in [the context of civil contempt actions] means to…issue ancillary orders for the purpose of facilitating compliance or encouraging a greater degree of compliance with court orders."). We believe the circumstances in this case are indeed "exceptional" and justify the finding of contempt.

We agree, however, that the court did not have the authority to order the Department to remove or change its admissions policy as a sanction, nor to hold the Department in contempt past the date of compliance. In *Comptroller of Maryland v. Miller*, 169 Md. App. 321 (2006), we reviewed the decision of the Comptroller of Maryland, concerning its policy towards computing compensable work travel.[9] After detailing "the well-established principles of administrative law" that guide our review of administrative agency decisions, we noted that "[c]ourts have long recognized that it is within the power of agencies to enact regulations." *Id.* at 343. We found that, because "it would be impossible for the Legislature to deal directly with the multitude of details in the complex conditions upon which it

[9] The appellant in *Miller* contested the Comptroller of Maryland's determination that an employee temporarily assigned to a remote work location could not be compensated for travel time that they would otherwise normally spend in commute, and filed a grievance, which was heard by an administrative law judge at the Office of Administrative Hearings.

legislates…it has become customary for the Legislature to delegate to each administrative agency the power to make rules and regulations to carry legislation into effect." *Id.* at 345 (citing *Comptroller of Treasury v. Rockhill, Inc.*, 205 Md. 226, 232-33 (2006)). "Generally, administrative agencies are afforded 'ample latitude to adapt their rules and policies to the demands of changing circumstances.'" *Frederick Classical Charter School, Inc. v. Frederick County Board of Education*, 454 Md. 330, 406 (2017) (citing *Montgomery Cty. v. Anastasi*, 77 Md. App. 126, 137 (1988)). Therefore, our review of an agency's policy is limited to ensuring it is "reasonable and consistent with the letter and policy of the statute under which the agency acts." *Miller*, 169 Md. App. at 345-46 (2006) (internal citations omitted). Appellee did not argue, nor did the court find, that the Department's policy was unreasonable or inconsistent with the letter and policy of the statute under which the agency acts. Therefore, suspension of the Department's admission policy was not an available sanction for the court to have imposed. *See Anne Arudnel County v. Harwood Civic Ass'n*, 442 Md. 595, 614 (2015) (citing *Klauenberg v. State*, 355 Md. 528, 552 (1999)) ("[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal.").

We therefore find the court did not err in finding the Department in contempt, but did not have the authority to hold it in contempt past the date appellee was admitted, or to order the Department to change its admissions policy.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS AFFIRMED IN PART AND REVERSED IN PART. COSTS TO BE SPLIT.