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McDonald, J., concurs.

https://www.mdcourts.gov/data/opinions/coa/2021/31a20ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

Joseph Ignatius Cassilly, Respondent, a member of the Bar of Maryland, served as an Assistant State's Attorney in Harford County from 1977 until January 3, 1983, at which time he became the elected State's Attorney for Harford County, a position he served in until his retirement in January 2019. Beginning in 1981, in his capacity as an Assistant State's Attorney and later as the State's Attorney, Cassilly represented the State in prosecuting John Norman Huffington for the murder of two people. As State's Attorney, Cassilly represented the State in various postconviction proceedings in Huffington's case and after many years of such proceedings, in 2018, Huffington filed a complaint against Cassilly with Bar Counsel. On September 8, 2020, on behalf of the Attorney Grievance Commission, Petitioner, Bar Counsel filed in this Court a "Petition for Disciplinary or Remedial Action" against Cassilly, charging him with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") and Maryland Attorneys' Rules of Professional Conduct ("MARPC") 3.3(a)(1) (Candor Toward the Tribunal), 3.4(a) (Fairness to Opposing Party and Counsel), 3.8(d) (Special Responsibilities of a Prosecutor), 8.1(a) (False Statement of Material Fact), 8.1(b) (Failing to Respond to a Lawful Demand for Information), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct that is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the Rules of Professional Conduct).

The Court appointed a hearing judge, who made findings of fact and conclusions of law. Among other things, the hearing judge made the following findings of fact. On June 16, 1981, a grand jury in Harford County indicted Huffington on two counts of first-degree murder and related offenses in connection with the deaths of Diane Becker and Joseph Hudson, Jr. On July 28, 1981, the grand jury also indicted a person named Deno C. Kanaras on two counts of first-degree

murder and related offenses. Kanaras admitted that he was present at the time of the murders but alleged that it was Huffington who murdered Becker and Hudson. Huffington and Kanaras were tried separately. Huffington's trial occurred from November 3 to 13, 1981. Assistant State's Attorney Gerard S. Comen served as lead counsel with Cassilly serving as second chair. At trial, Kanaras testified as a witness on the State's behalf. Huffington was convicted of two counts of felony murder and was sentenced to death. Huffington appealed and, on December 6, 1982, the Court of Appeals reversed the judgments of conviction.

From November 8 through 19, 1983, Huffington's second trial occurred. Cassilly and Comen represented the State again. Kanaras was the only eyewitness to the murders and again testified on the State's behalf. By the time of Huffington's second trial, Kanaras had been convicted of Becker's murder. At the second trial, the State called Federal Bureau of Investigation ("FBI") Agent Michael P. Malone as an expert in forensic testing to corroborate Kanaras's testimony that Huffington was at the scene of Becker's murder. Agent Malone testified that hair samples recovered from Becker's trailer "microscopically matched the head hairs of Mr. Huffington – that is, they were indistinguishable from Mr. Huffington's head hairs; you could not tell them apart." (Brackets omitted). When asked on cross-examination, Agent Malone acknowledged, though, that microscopic hair comparison cannot be utilized as a means of positive personal identification.

At the conclusion of the trial, Huffington was again convicted of two counts of felony murder for the deaths of Becker and Hudson and sentenced to death. On November 13, 1985, the Court of Appeals affirmed the judgments of conviction. On January 8, 1991, the circuit court granted, in part, a petition for postconviction relief and ordered a new sentencing hearing. On April 28, 1992, the circuit court sentenced Huffington to life imprisonment. Huffington filed a second petition for postconviction relief, which was denied, and an application for leave to appeal the denial of the second petition for postconviction relief, which was also denied. In addition, Huffington unsuccessfully petitioned in federal court for a writ of habeas corpus.

In relevant part, in connection with a task force established by the Department of Justice ("DOJ") to analyze disclosure issues related to an investigation of the FBI Laboratory by the Office of the Inspector General ("OIG"), the FBI hired forensic scientists to conduct independent reviews of cases in which the work of examiners criticized by the OIG was material to a conviction. This included Huffington's case. Steve Robertson, a hair and fiber analyst hired by the FBI, was assigned to review Agent Malone's conduct in Huffington's case. Robertson reviewed Agent Malone's July 15, 1981 report in Huffington's case, Agent Malone's bench notes, eighty evidence specimens, and Agent Malone's testimony at Huffington's and Kanaras's trials. On September 16, 1999, Robertson issued a report with findings and conclusions entitled "Independent Case Review Report" ("the Robertson Report"). According to the hearing judge, in the report, Robertson stated that "he was unable to determine whether Agent Malone performed the appropriate tests in a scientifically acceptable manner and that Agent Malone's examination results as set forth in the laboratory report were not supported or adequately documented in the bench notes." With respect to Agent Malone's bench notes, Robertson stated:

> The notes are not dated, are in pencil and have some erasures. Some hair were [sic] deemed unsuitable with no documented reason or explanation. The examiner uses abbreviations that are difficult to interpret. Some questioned hair were [sic] matched or eliminated as coming from the known samples without characterization of the microscopic characteristics observed in these questioned or known hair. The technicians do not document the recovery of any hair from the questioned items.

Robertson found that Agent Malone's testimony was consistent with the laboratory report but inconsistent with his bench notes. In addition, Robertson stated that, based on the 1982 transcript of Kanaras's trial, Agent Malone testified that he personally performed certain tests that he (Robertson) had determined were most likely performed by laboratory technicians.

On October 21, 1999, Lucy Thompson, a senior attorney assigned to the task force, wrote to Cassilly concerning the independent scientific review in Huffington's case and enclosed the Robertson Report. Cassilly did not provide a copy of the Robertson Report to Huffington's counsel. According to the hearing judge, at the disciplinary hearing, Cassilly testified that he kept "the Robertson Report for five years and then discarded [it] and forgot about [it]." The hearing judge found that Cassilly did not maintain a copy of either a report from 1997 or the Robertson Report in the State's file. The hearing judge credited the testimony of Bar Counsel's expert witness, Andrew V. Jezic, Esquire, who was accepted as an expert in criminal law, that the Robertson Report was exculpatory and constituted impeachment material, and that Cassilly was obligated to disclose the Robertson Report.

On August 14, 2003, Huffington filed a "Petition to Preserve Forensic Evidence and Conduct DNA Analysis" seeking, among things, to test "the hairs that were found at trial to be microscopically similar to [] Huffington's hair[.]" At the time of the filing of the petition, Huffington's counsel was unaware of the Robertson Report. On August 28, 2003, Cassilly filed an opposition to the petition and requested permission from the circuit court to destroy the forensic evidence in Huffington's case. The circuit court denied Cassilly's request to destroy the evidence and granted Huffington's request to conduct DNA testing of the hairs found at the scene that had been matched to Huffington. Cassilly sent the hair samples to Huffington's expert, but the expert was not able to identify which hairs Agent Malone had matched to Huffington. On November 1, 2006, Huffington filed a motion to dismiss the petition to conduct the DNA analysis. The court dismissed the petition and granted Huffington's request that the forensic evidence be preserved.

On November 3, 2010, Huffington filed a "Petition for Writ of Actual Innocence." Huffington contended that newly discovered evidence created a significant possibility that the result at trial would have been different. Among other things, Huffington specifically asserted that Agent Malone's hair and fiber analysis and the comparative bullet lead analysis were unreliable. On January 14, 2011, Cassilly had filed a response to the petition, stating: "No evidence has been presented that the conclusion that examiner Malone rendered in court is not correct. References

that Malone was found deficient in another case may be impeaching but it does not prove that his observations in this case are incorrect." On January 20, 2011, Huffington's counsel wrote to Cassilly, requesting that the State produce "any and all results of investigations or examinations conducted on [] Huffington's body or any of his clothing and/or belongings." In a letter dated January 31, 2011, in response to the request, Cassilly denied having any discoverable materials and advised that he was aware that "the State was always required to furnish the defense with the results of all tests that were performed by the State[.]"

On March 30, 2011, the circuit court held a hearing on the petition for a writ of actual innocence. At the hearing, Cassilly stated:

> Now let me just talk a little bit about some of the scientific evidence here, all right? Because, again, they're completely mischaracterizing what was said. Michael Malone, there was an FBI investigation about Mr. Malone's credibility and that did come out and we did receive a letter from the FBI indicating that they had reviewed Malone's testimony in this case and that they concluded that his testimony was appropriate, that he did not overstate the case. Sim, similar letter to the one that you got with respect to the bullet, to the bullet and lead analysis. Unfortunately I, given the length of time was not able to locate that letter. But that's the same kind of letter that we got with respect to Mr. Malone.

The hearing judge found that Cassilly's statements to the circuit court at the hearing "were knowingly and intentionally false[.]"

On November 1, 2011, a reporter for *The Washington Post* contacted Huffington's counsel and provided documents that he had received from the FBI and the DOJ in response to a Freedom of Information Act request. The documents included the Robertson Report. On November 14, 2011, Huffington filed a "Supplemental Memorandum Presenting Additional Newly Discovered Evidence[.]" In response to the circuit court's May 2, 2011 directive, Cassilly advised that the FBI could perform DNA testing on the hair samples. On March 27, 2013, the FBI issued a DNA report concluding that Huffington was excluded as the source of the hair at issue. On May 1, 2013, the circuit court issued a memorandum opinion and order granting the petition for a writ of actual innocence and ordering a new trial.

On July 28, 2014, Norman Wong, Special Counsel to the DOJ, wrote to Richard D. Fritz, the State's Attorney for St. Mary's County, concerning Huffington's case. In the letter, in a section titled "Error Identified in this Matter[,]" Wong detailed errors found in Agent Malone's testimony in Huffington's case. On the same date, Wong sent an identical letter to Fritz regarding Kanaras's case with similar documentation. On July 30, 2014, Fritz forwarded the 2014 DOJ letters to Cassilly. The hearing judge found that Cassilly maintained the letters in the State's file but that he had testified at the disciplinary hearing that he did not read them. Cassilly did not provide a copy of the 2014 DOJ letters to Huffington or his counsel.

Huffington's new trial was scheduled for April 3 through 14, 2017. On July 28, 2016, in preparation for trial, Huffington's counsel wrote to Cassilly and requested any communications

between the State and any law enforcement agency concerning Huffington, the case, or tests of Huffington's person and/or clothing that tended to exculpate Huffington. Cassilly did not produce the 2014 DOJ letters. On September 28, 2016, with the Honorable Theresa M. Adams presiding, the circuit court conducted a pretrial conference. During the conference, Huffington's counsel stated that, on "October 21st, 1999, a senior attorney at the [DOJ] sent a letter to [] Cassilly informing him that FBI agent Michael Malone had testified falsely in [] Huffington's case." In response, Cassilly stated:

> No. They never said that. That has been a patent lie stated by the Defense every time this has come up. There is a written opinion from the [DOJ] saying that they reviewed Malone's testimony in this case and found nothing wrong. Malone subsequently, ten years after this case, was found ti [sic] -- testified falsely in other cases. But there is a written letter which the Defense has which stated that Malone's testimony in this case was within professional limit.

The hearing judge found that Cassilly's "statements to Judge Adams were knowingly and intentionally false[.]" On February 27, 2017, Huffington filed a "Motion to Compel Identification of All Lost or Destroyed Evidence." On March 7, 2017, the circuit court conducted a hearing on the motion. At the hearing, the circuit court asked Cassilly if he had any exculpatory evidence that had not been turned over. Cassilly responded that the FBI sent two letters concerning Agent Malone that ultimately concluded that Agent Malone had testified properly and did not do anything wrong in Huffington's case. The hearing judge found that Cassilly "knowingly and intentionally misrepresented to the [circuit c]ourt that the FBI [had] concluded that they did not find Agent Malone did anything wrong in [] Huffington's case."

On November 9, 2017, Huffington entered *Alford* pleas to two counts of first-degree murder, one count of armed robbery, and one count of burglary. The plea agreement provided that Huffington would receive two concurrent life sentences with all but time served (11,752 days) suspended. As part of the plea agreement, Huffington agreed to waive his appeal and postconviction rights and consented to the destruction of evidence in his case.

On November 13, 2018, Huffington filed with Bar Counsel a complaint against Cassilly. On November 29, 2018, Bar Counsel wrote to Cassilly and enclosed a copy of the complaint. On December 3, 2018, Cassilly responded that he did not withhold any exculpatory evidence in Huffington's case. On January 29, 2019, Bar Counsel requested that Cassilly address his failure to provide Huffington's counsel with materials received from the DOJ. Cassilly responded that "[a] review of the agent's testimony in this case found that he had not overstated his findings."

On September 11, 2019, Bar Counsel wrote to Cassilly to schedule a date to take a statement under oath and, on September 17, 2019, Bar Counsel issued a subpoena pursuant to Maryland Rule 19-712, ordering Cassilly to appear at the Office of Bar Counsel on October 1, 2019 to respond under oath to questions. Cassilly appeared on that date but refused to take the oath. At the disciplinary hearing, Cassilly acknowledged that he refused to take the oath, stating: "I said you are not asking me about stuff from 20 years ago and then criticizing me or trying to pull me

up on some sort of perjury charge because I couldn't remember accurately what we were talking about from 20 years ago."

The hearing judge concluded that Cassilly had violated Rules 3.3(a)(1), 3.4(a), 3.8(d), 8.4(c), 8.4(d), and 8.4(a), but had not violated Rule 8.1.

Held: Disbarred.

Cassilly contended that there was an "inordinate delay" in Huffington's filing of the complaint and in Bar Counsel's filing of the Petition for Disciplinary or Remedial Action that "engendered a due process violation" and essentially argued that the doctrine of laches should bar the attorney discipline proceeding. The Court of Appeals was not persuaded by Cassilly's contentions and concluded that the doctrine of laches was inapplicable in the attorney discipline proceeding. The Court expressed strong reservation as to the applicability of the doctrine of laches in attorney discipline proceedings and concluded that, with the possible exception of cases involving both extraordinary circumstances of delay and actual prejudice resulting in a clear due process violation, applying the doctrine of laches to attorney discipline proceedings would not be consistent with the goal of such proceedings, which is to protect the public. In the case, the Court determined that the record failed to demonstrate the existence of the type of unreasonable delay and prejudice generally prohibited by the doctrine of laches, let alone the type of extraordinary delay and prejudice that would be necessary to affect the ability of an attorney disciplinary case to proceed.

The Court of Appeals concluded that Cassilly violated Rule 3.3(a)(1) by making knowingly false statements. Cassilly made the first knowingly false statement when, on January 14, 2011, in the State's response to the petition for a writ of actual innocence, he stated in writing that "[n]o evidence has been presented that the conclusion that examiner Malone rendered in court is not correct." Next, on March 30, 2011, at a hearing in connection with the petition for a writ of actual innocence, Cassilly made a similar knowingly false statement when he advised the circuit court that "there's no evidence today that anything that [Agent Malone] said in this trial or that subsequent comparison of the hairs that he made in this trial have been shown to be incorrect." It was undisputed that, as the hearing judge found, Cassilly had received the Robertson Report at the time he responded to the petition for a writ of actual innocence, and the report "identified multiple issues with Agent Malone's analysis." Cassilly made another knowingly false statement on September 28, 2016, during the pretrial conference before Judge Adams, when he stated that the DOJ had reviewed Agent Malone's testimony and in a written report found "nothing wrong." Likewise, Cassilly made a knowingly false statement on March 7, 2017, when he advised Judge Adams that the FBI had concluded that Agent Malone "testified properly[.]" The record demonstrated that, by the time that Cassilly made the statements, not only had he previously received the Robertson Report and Thompson's 1999 letter (both of which challenged the accuracy of Agent Malone's testimony) as well as other documents, but in addition, Cassilly had received Wong's 2014 DOJ letters, in which Wong specifically identified numerous errors in

Agent Malone's testimony in Huffington's case and concluded that his testimony exceeded the bounds of science.

The Court concluded that Cassilly violated Rule 3.4(a). Cassilly discarded the Robertson Report, did not advise Huffington and his counsel that he had ever received the report, which was "a document . . . having potential evidentiary value[,]" Rule 3.4(a), and later sought to have the forensic evidence that was the subject of the Robertson Report destroyed.

The Court concluded that Cassilly violated Rule 3.8(d) by failing to disclose the Robertson Report to Huffington's counsel, as it constituted evidence that tended to negate Huffington's guilt. The Court determined that the plain language of Rule 3.8(d) and accompanying comment led to the conclusion that a prosecutor's disclosure obligations under Rule 3.8(d) apply pretrial, during trial, and after trial on appeal and in postconviction proceedings in which a defendant challenges guilt. The Court concluded that the meaning of the phrase in Rule 3.8(d), when the key words are accorded their plain language interpretation as set forth in Black's Law Dictionary, is that a prosecutor is obligated to timely disclose all evidence or information known to the prosecutor that shows in some degree or way that the guilt of the accused is nullified, *i.e.*, that serves to render ineffective or deny the guilt of the accused. Clearly, such evidence or information may come to light after a conviction and require that a prosecutor timely disclose that evidence or information. A comprehensive review of the rulemaking history of Rule 3.8 reinforced the conclusion that Rule 3.8(d) applies to postconviction proceedings. The Court concluded that the hearing judge correctly determined that information in the Robertson Report concerning Agent Malone's testimony was exculpatory and the Court determined that the undisclosed evidence in the case—the Robertson Report—was material because there was a reasonable probability that, had the evidence been disclosed, the result of the proceeding may have been different. The Court concluded, though, that, although pursuant to Maryland Rule 4-263(d)(8), Cassilly would have been required to disclose the 2014 DOJ letters, under the circumstances of the case, it could not say that the failure to do so violated Rule 3.8(d).

The Court sustained Bar Counsel's exception to the hearing judge's conclusion that Cassilly did not violate Rule 8.1(b) and determined that clear and convincing evidence supported the conclusion that by failing to take the oath and provide a statement in compliance with the subpoena, Cassilly knowingly failed to respond to a lawful demand for information from a disciplinary authority in violation of Rule 8.1(b).

The Court determined that clear and convincing evidence supported the hearing judge's conclusion that Cassilly violated Rule 8.4(c). In making four statements of fact that he knew to be false to the circuit court concerning the Robertson Report, Cassilly engaged in conduct involving intentional dishonesty in violation of Rule 8.4(c). The Court determined that clear and convincing evidence supported the hearing judge's conclusion that Cassilly violated Rule 8.4(d). In his role as State's Attorney for Harford County, Cassilly, among other misconduct, knowingly made false statements of fact to the circuit court on multiple occasions, engaged in intentional dishonesty, concealed from Huffington and his counsel the Robertson Report, and sought to destroy the evidence that was the subject of the report. With that misconduct, Cassilly engaged in misconduct that the public would not expect from a member of the legal profession, especially

the State's Attorney of a jurisdiction, and that would negatively impact the perception of the legal profession of a reasonable member of the public. The Court concluded that Cassilly violated Rule 8.4(a) because he violated Rules 3.3(a)(1), 3.4(a), 3.8(d), 8.1(b), 8.4(c), and 8.4(d).

The Court determined that Cassilly's misconduct was aggravated by a dishonest motive, a pattern of misconduct, multiple offenses, a failure to acknowledge the wrongful nature of his misconduct, and substantial experience in the practice of law. The Court determined the same two mitigating factors as the hearing judge—good reputation and the absence of prior attorney discipline.

The Court concluded that the appropriate sanction for Cassilly's misconduct was disbarment. The Court explained that an examination of Cassilly's misconduct, including his various instances of intentionally dishonest misconduct which consisted of knowingly making false statements to the circuit court and Huffington's counsel, demonstrated that, under *Attorney Grievance Comm'n v. Vanderlinde*, 364 Md. 376, 773 A.2d 463 (2001), and its progeny, disbarment was warranted. The very basic premise undergirding the holding in *Vanderlinde* and other cases involving intentional dishonesty is that the Court must protect the public and deter lawyers from engaging in intentional dishonesty of the type that Cassilly engaged in. The two mitigating factors in the case—good reputation and lack of prior attorney discipline—did not constitute compelling extenuating circumstances, or mitigation for that matter, which would result in a sanction less than disbarment. The Court stated that disbarment recognized the seriousness of Cassilly's misconduct and served the goal of protecting the public and ensuring the public's confidence in the legal profession by deterring other attorneys from engaging in similar misconduct. Moreover, in imposing the sanction of disbarment, the Court protected the public by curtailing Cassilly's ability to resume active attorney status (which would not require the permission of this Court) or to practice law in accord with Maryland Rule 19-605(b)(2) while in inactive/retired status.

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Paul Moore v. RealPage Utility Management, Inc., Misc. No. 1, September Term 2021, filed November 30, 3031. Opinion by Getty, C.J.

https://mdcourts.gov/data/opinions/coa/2021/1a21m.pdf

PUBLIC UTILITIES – ENERGY ALLOCATION FOR APARTMENTS – PUBLIC SERVICE COMMISSION APPROVAL

Facts:

The United States District Court for the District of Maryland certified the following question of law to this Court: does Maryland Code ("Md. Code") (1998, 2020 Repl. Vol.), Public Utilities Article ("PU") § 7-304 prohibit the use of energy allocation equipment and procedures, which have not been approved by the Public Service Commission ("PSC"), to bill energy charges to tenants of properties built prior to 1978. This certified question arises in the context of a putative class action lawsuit brought by Appellant Paul Moore, on behalf of residential apartment tenants, against Appellee RealPage Utility Management, Inc., a residential utility billing services company working on behalf of landlords in Maryland. RealPage allocates the energy charges for the apartment complex where Mr. Moore resides, using equipment and procedures that measure the total energy consumption by a multiple residential unit building, measure the square footage of each individual residential unit, and then assess the charges based upon the square footage computation and pro rata assessment per each individual residential unit. Mr. Moore alleges that RealPage improperly bills for utilities owed in violation of PU § 7-304, which requires that the PSC approve energy allocation equipment and procedures that do not measure actual energy use.

PU § 7-304(b) states:

> (1) Approval from the [PSC] is required before energy allocation equipment and procedures may be used by the owner, operator, or manager of an apartment house to determine the amount of gas or electricity used by an individual dwelling unit, if the amount of gas or electricity is determined by means other than by actual measurement of fuel or electric power consumed by the unit.
>
> (2) An energy allocation system may not be used for direct billing of energy costs to the tenant of an individual dwelling unit unless the [PSC] approves the system in accordance with this subsection.

Held:

This Court answered the certified question in the affirmative.

First engaging in a plain language analysis of PU § 7-304(b), this Court concluded that the statutory language does not include a date-of-construction limitation. The plain language of PU § 7-304 and its corresponding Code of Maryland Regulations provisions set forth that energy allocation systems are systems that determine the approximate energy use consumed in an individual dwelling unit with a device that measures a furnace operating or running time, baseboard pipe temperature, or other characteristics. However, PU § 7 301 provides a line of demarcation regarding the use of individual meters in residential multiple occupancy buildings constructed after July 1, 1978. Accordingly, the statute does not require retrofitting of master meters that existed in pre-1978 buildings.

Next, the Court traced the legislative history of PU § 7-304, determining that the legislative intent in enacting the statute has not been altered since its original adoption in 1988. Further, the legislative history demonstrated that it has been a longstanding position of the PSC that the allocation of energy costs solely computed on the basis of square footage computations and pro rata assessments is governed by lease agreements under the Real Property Article and are not within the purview of the PSC. Therefore, the Court concluded that the allocation of energy costs solely computed on the basis of square footage computations and pro rata assessments, as well as added rental components, are exempt from the approval requirements set forth in PU § 7 304.

However, the question of whether RealPage's system is an energy allocation system subject to the PSC's purview is not before this Court, the issue was not briefed, and given the information provided to this Court by the federal district court, it is unclear what type of equipment RealPage's system utilizes. As such, this Court did not determine whether RealPage's system is an energy allocation system governed by PU § 7-304.

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Anna Velicky v. The Copycat Building LLC, No. 1, September Term 2021; *Christopher Walke v. The Copycat Building LLC*, No. 2, September Term 2021, filed November 29, 2021. Opinion by Booth, J.

McDonald and Watts, JJ. dissent.

https://mdcourts.gov/data/opinions/coa/2021/1a21.pdf

LANDLORD-TENANT – UNLICENSED LANDLORD – ABILITY TO SEEK POSSESSION OF PROPERTY – TENANT HOLDING OVER.

APPEAL OF DISTRICT COURT JUDGMENT – AMOUNT IN CONTROVERSY.

Facts:

The two cases that are the subject of this opinion originated in the District Court sitting in Baltimore City when a landlord, Copycat Building, LLC ("Copycat") filed tenant holding over actions against two tenants, Anna Velicky ("Velicky") and Christopher Walke ("Walke"), in which Copycat sought to repossess the apartment units occupied by the tenants. Copycat does not have a current rental license, which is required under the Baltimore City Code of Public Laws, to provide rental housing. The tenants occupied the units as month-to-month tenants. After Copycat provided the tenants with a 60-day notice to quit, and the tenants refused to vacate the premises, Copycat filed tenant holding over actions pursuant to Maryland Code, Real Property Article ("RP") § 8-402 (the "tenant holding over statute"). In both instances, after an appeal, the Circuit Court for Baltimore City determined that Copycat met the requisite statutory elements under the tenant holding over statute and ordered that possession of the property be returned to Copycat.

The tenants each filed a petition for writ of *certiorari* asking the Court of Appeals to hold, based upon principles of public policy, that the tenant holding over statute is unavailable to an unlicensed landlord seeking a writ of possession of the landlord's property after the expiration of a tenancy. Velicky also asserted that the circuit court erred in conducting a de novo appeal, contending that the court was required to consider the value of the right to possession when determining whether the appeal should be on the record or de novo under Maryland Code, Courts and Judicial Proceedings Article ("CJ") § 12-401(f).

Held:

Judgment affirmed with respect to Walke's case. Judgment vacated and remanded with respect to Velicky's case, with instructions to the circuit court to conduct an appeal on the record.

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The Court of Appeals declined to foreclose an unlicensed landlord's right to seek repossession of the landlord's property at the expiration of a tenancy under the tenant holding over statute. The Court determined that there is no reason for it to judicially alter the balance between a property owner's right to repossess the owner's property after the expiration of a tenancy, and a tenant's right to safe and habitable living conditions during a residential tenancy. That balance has been struck by the Legislature through its enactment of a comprehensive statutory framework that governs landlord and tenant relationships, including its modifications to the common law ejectment action and the remedies afforded to tenants to ensure safe and habitable housing. Under these circumstances, the Court held that it would not preclude the availability of a statutory remedy enabling a landlord to seek repossession of the landlord's property interest at the conclusion of the tenancy. The Court concluded that such a holding would unreasonably interfere with property rights.

With respect to Velicky's appeal, the Court held that where the appeal from a District Court judgment involves only a claim for repossession of property with no money judgment, the value of the right to repossession must be considered in deciding whether the appeal should be on the record or de novo under CJ § 12-401(f). Because the circuit court erred in conducting a de novo trial, the Court remanded Velicky's case to the Circuit Court for Baltimore City for that court to conduct an appeal on the record.

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Roger Garcia v. State of Maryland, No. 2355, September Term 2019, filed November 3, 2021. Opinion by Zic, J.

https://mdcourts.gov/data/opinions/cosa/2021/2355s19.pdf

FIRST-DEGREE PREMEDITATED MURDER – SECOND-DEGREE INTENT-TO-KILL MURDER – ACCESSORIES BEFORE THE FACT – DELIBERATION AND PREMEDITATION

Facts:

Roger Garcia, appellant, was charged with multiple crimes related to the shooting and killing of two individuals. A jury trial was held in the Circuit Court for Montgomery County. During the trial, the circuit court instructed the jury on, among other offenses, first-degree premeditated murder, second-degree intent-to-kill murder, second-degree grievous bodily harm murder, and accomplice liability.

Mr. Garcia was convicted of two counts of second-degree murder and two counts of use of a firearm in the commission of a crime of violence. He was acquitted of first-degree premeditated murder, first-degree felony murder, conspiracy to commit murder, armed robbery, and the corresponding use of a firearm count. The verdict sheet did not specify the type of second-degree murder on which he was convicted. The circuit court sentenced Mr. Garcia to 30 years of incarceration for each murder count and 20 years for each corresponding firearm count, each to be served consecutively.

Mr. Garcia appealed, arguing that his convictions may have been based on a legally impossible theory of murder—second-degree intent-to-kill murder based on accessory-before-the-fact accomplice liability.

Held: Affirmed.

The Court of Special Appeals held that second-degree intent-to-kill murder based on accessory-before-the-fact accomplice liability is a legally viable theory of murder. Mr. Garcia's primary

contention was that an accessory before the fact who aids in the perpetration of a killing with the intent to kill necessarily acts with deliberation and premeditation and thus is guilty of first-degree premeditated murder. The Court disagreed, reasoning that it is possible for an accessory before the fact who personally harbors the intent to kill to provide aid without the awareness and reflection required to justify a finding of deliberation and premeditation. Rather, in such circumstances, the accessory's actions could satisfy the elements of second-degree murder of the intent-to-kill variety. In reaching this conclusion, the Court looked to dicta from prior decisions by the Court of Appeals and the Court of Special Appeals indicating that an accessory before the fact can provide aid while possessing the intent to kill and do so without having deliberated or premeditated the killing.

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Brandon Sykes v. State of Maryland, No. 2132, September Term 2019, filed November 18, 2021. Opinion by Ripken, J.

https://www.courts.state.md.us/data/opinions/cosa/2021/2132s19.pdf

CRIMINAL LAW – AUTHENTICATION AND FOUNDATION – TEXT MESSAGES

CRIMINAL LAW – HEARSAY – VERBAL ACTS

CRIMINAL LAW – HEARSAY – STATEMENTS NOT OFFERED FOR THEIR TRUTH

Facts:

Police officers arrested Brandon Sykes and Jessica Feldmeier after the officers found 84 packages of controlled dangerous substances ("CDS") located in Feldmeier's car. After Sykes was arrested and restrained in the backseat of a police car, two officers observed Sykes using a cell phone. One officer saw Sykes unlock the phone and place a phone call, and the second officer saw Sykes talking on the phone. The officers seized the phone and, upon further investigation, discovered that within the ten days preceding Sykes's arrest, the phone was used to send and receive text messages concerning the sale of narcotics. Sykes was charged with possession of CDS with the intent to distribute in the Circuit Court for Talbot County.

At trial, the State introduced a printout of 691 recent text messages that were sent and received from the phone, seized from Sykes, prior to Sykes's arrest. The State also called an expert witness to testify that the content and the terminology in some of the text messages were indicative of narcotics sales and distribution. The trial court admitted all the text messages and allowed the expert testimony over Sykes's objections. Sykes was found guilty by a jury of possession of CDS with the intent to distribute. Sykes noted a timely appeal and argued that the trial court erred in overruling his objections.

Held: Affirmed.

The Court of Special Appeals held that the trial court did not err when it admitted the drug-related text messages from the phone seized from Sykes during his arrest. The Court made three determinations to reach this holding.

First, the text messages were authenticated. A reasonable juror could find that it was more likely than not that Sykes sent the outgoing messages and received the incoming messages based on the direct and indirect evidence at trial. Second, the drug-related text messages were relevant and not unfairly prejudicial because Sykes's intent was a central issue to the charge. The Court determined that while the non-drug-related messages were irrelevant, the trial court's admission of these messages was harmless error. Third, the drug-related text messages did not constitute

hearsay because the messages were either a verbal part of legally significant acts—an offer and acceptance of a sale of drugs—or not offered for the truth of the matter of any direct or implied assertions, but only offered to show that the existence of an operative fact—that a drug transaction occurred.

The Court also held that the trial court did not abuse its discretion in allowing the State's expert to testify because Sykes failed to demonstrate how the allegedly deficient expert notice prejudiced his defense when the notice did include the basis for the expert's opinion and the subject matter of what the expert would testify to at trial.

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In re K.H., J.H., & D.H., No. 193, September Term 2021, filed November 18, 2021. Opinion by Ripken, J.

https://www.courts.state.md.us/data/opinions/cosa/2021/0193s21.pdf

JUDGES – BIAS, RECUSAL, AND DISQUALIFICATION – IN GENERAL

JUDGES – BIAS, RECUSAL, AND DISQUALIFICATION – PRESUMPTION OF IMPARTIALITY

FAMILY LAW – DISPOSITION PROCEEDINGS – NATURE AND SCOPE OF DISPOSITION

Facts:

In May 2018, Y.H.L. ("Mother") and Mr. O ("Father") were arrested for offenses in connection with child abuse and neglect of Mother's natural children, K.H., J.H., & D.H ("the H. Children"). The Montgomery County Department of Health and Human Services ("the Department") filed a CINA petition in the Circuit Court for Montgomery County, sitting as a juvenile court, alleging physical and sexual abuse of the H. children. In June 2018, the juvenile court adjudicated the H. children CINA. The court placed the H. children with their maternal aunt, S.C., who traveled from California to Maryland to care for the children. When S.C. intended to return to California and move the H. children with her, the juvenile court determined that custody with S.C. in California was not a viable option and placed the H. children in foster care. In February 2020, the juvenile court changed the H. children's permanency plan to adoption by a non-relative.

On July 8, 2020, the Department filed a petition for guardianship with the right to consent to the adoption of the H. Children. In December 2020, the juvenile court found that it was in the best interest of the children to reaffirm the permanency plan of adoption by a non-relative. The juvenile court considered and denied Mother's request to have the court place the children with S.C. in California pursuant to the Interstate Compact for Placement.

In February 2021, Father consented to the termination of his parental rights of the H. children. In March 2021, the court held a contested guardianship/termination of parental rights ("TPR") hearing for Mother. At the start of her TPR hearing, Mother filed a motion for recusal, based on the judge's comment to Father, in his hearing, that consenting to adoption was the right thing for him to do. The motion for recusal was denied. Mother again pursued placement of the H. children with S.C. The court terminated Mother's parental rights and granted the Department guardianship with the right to consent to adoption. Mother's timely appeal followed.

Held: Affirmed.

The Court of Special Appeals first held that the juvenile court did not abuse its discretion in denying Mother's motion for recusal because Mother did not demonstrate any evidence of personal bias or prejudice on the part of the judge. The Court reasoned that the judge's comments to the Father in his TPR hearing had no relation to or bearing on Mother's TPR hearing and the record clearly reflected that the juvenile court decided the merits on the evidence presented.

The Court also held that there was no error with the juvenile court's decision to terminate Mother's parental rights. First, the Court determined that the juvenile court appropriately refused to consider, during Mother's TPR hearing, the placement of the H. children with their maternal aunt. The Court reasoned that the juvenile court previously, during the CINA hearing, considered placement with the maternal aunt and that the appropriate focus of Mother's TPR hearing was her fitness as the children's parent. Second, the Court determined that the juvenile court's factual findings were not clearly erroneous and that the juvenile court correctly applied the legal factors based on the evidence presented. The Court determined that Mother's abuse and neglect of the H. children, failure to complete a required psychological examination, minimal efforts to improve her circumstances, and lack of emotional ties with the children justified the juvenile court's decision to terminate her parental rights and grant the Department guardianship.

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Breona C. v. Rodney D., No. 299, September Term 2021, filed November 17, 2021. Opinion by Fader, C.J.

https://www.courts.state.md.us/data/opinions/cosa/2021/0299s21.pdf

CONTEMPT – CIVIL CONTEMPT – NATURE AND ELEMENTS OF CONTEMPT – ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT

Facts:

Mother and Father are the parents of Child, who is six years old. In December 2019, the circuit court modified the parties' pre-existing custody arrangement and granted (1) Father primary physical custody of Child and (2) Mother parenting time with Child every weekend ("Custody Order"). That arrangement remained in effect through the date of the March 2021 contempt hearing in this case.

In August 2020, after a weekend visit, Mother did not return Child to Father as required by the Custody Order and Father filed a petition to hold mother in contempt. Mother subsequently obtained a temporary protective order but, when the court denied her a final protective order, again failed to return Child to Father as required by the Custody Order. Father filed an emergency motion for custody, which the court granted on August 28, 2020. Mother then returned Child to Father. From then through the March 2021 hearing, Mother was in compliance with the Custody Order.

Notwithstanding Mother's compliance with the Custody Order, proceedings pursuant to Father's August 2020 petition for contempt continued. The court held a hearing on March 31, 2021, after which the court granted Father's petition and held Mother "in contempt for violating the December 18, 2019 Custody Order" by not returning Child immediately once the final protective order was denied on August 24, 2020. The written contempt order does not identify a sanction but provides that Mother "may purge this contempt by strictly following and complying with the ongoing December 18, 2019 Custody Order." Father appealed.

Held: Reversed.

The Court of Special Appeals held that an order holding a person in constructive civil contempt must: (1) impose a sanction; (2) include a purge provision that gives the contemnor the opportunity to avoid the sanction by taking a definite, specific action of which the contemnor is reasonably capable; and (3) be designed to coerce the contemnor's future compliance with a valid legal requirement rather than to punish the contemnor for past, completed conduct.

Accordingly, the Court concluded that the order of civil contempt must be reversed. First, the order lacked a valid sanction. The circuit court did not impose on Mother a fine, period of

incarceration, or any other penalty. Second, the order lacked a valid purge provision because the perpetual obligation to comply with the Custody Order did not permit Mother to avoid a defined sanction by engaging in specific conduct. Third, the order punished past noncompliance, which is the function of criminal contempt, rather than compelling future compliance, which is the function of civil contempt. No order of constructive civil contempt could have been imposed on Mother at the time of the March 2021 hearing because, by that point, she had been in compliance with the Custody Order for several months.

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J.H. v. TidalHealth Peninsula Regional, Inc., No. 754, September Term 2020, filed November 18, 2021. Opinion by Ripken, J.

https://www.courts.state.md.us/data/opinions/cosa/2021/0754s20.pdf

MENTAL HEALTH – ADMISSION OR COMMITMENT PROCEDURE – ERROR

MENTAL HEALTH – ADMISSION OR COMMITMENT PROCEDURE – EVIDENCE

Facts:

The Peninsula Regional Medical Center ("the Hospital") admitted J.H. based on a petition for an emergency psychiatric evaluation. The petition alleged that J.H. was not taking his medication and was threating his family and experiencing delusions. An attending psychiatrist examined J.H. and certified that J.H. met the criteria for involuntary admission. Two other physicians completed certificates for involuntary admission.

On October 31, 2019, an Administrative Law Judge ("ALJ") presided over a hearing to determine whether J.H. should be involuntarily admitted to the Hospital for continued treatment. At the hearing, the Hospital acknowledged that the record did not contain a written application for J.H.'s involuntary admission. The attending physician testified regarding his psychiatric evaluation of J.H. and his provisional diagnosis of a psychotic disorder. J.H.'s Mother testified regarding the repeated threats of violence that J.H. made to the family. J.H. testified that his Mother was lying. At the conclusion of the hearing, the ALJ found that the procedural error—lack of the written application—did not warrant release and that J.H. satisfied the criteria for involuntary admission. The ALJ ordered J.H. to be involuntarily admitted. J.H. petitioned for judicial review, and the Circuit Court for Wicomico County affirmed the ALJ's order. J.H. noted a timely appeal.

Held: Affirmed.

The Court of Special Appeals held that the lack of a written application for J.H.'s involuntary admission was not a substantial error warranting J.H.'s release. The Court reasoned that although an error occurred, it was not a substantial because the error did not deprive J.H. of the opportunity for a full and fair hearing to challenge his involuntary admission. The Court also determined that the ALJ had authority to hear J.H.'s involuntary admission despite the lack of the written application because J.H. received separate notices informing him of the hearing and the substance of the hearing.

The Court also held that the ALJ did not err in finding that the Hospital satisfied the requirements of involuntary admission. The Court reasoned that evidence in the record supported the criteria for involuntary admission. Based on the family member's testimony and the

evaluating physician's testimony and provisional diagnosis, the Court determined that J.H. had a mental disorder; was a danger to himself or to the life or safety of others; could not be voluntarily admitted; needed inpatient treatment; and no less restrictive form of intervention was available consistent with his welfare and safety.

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ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated August 30, 2021, the following attorney has been indefinitely suspended by consent, effective November 1, 2021:

CALISTRATOS SPIROS STAFILATOS

*

This is to certify that the name of

JONATHAN FREDERICK SEAMON LOVE

has been replaced upon the register of attorneys in this State as of November 2, 2021, by an Order of the Court of Appeals dated September 24, 2021.

*

This is to certify that the name of

OLUFOLAJIMI ABAYOMI KOLAWOLE

has been replaced upon the register of attorneys in this State as of November 10, 2021.

*

By an Order of the Court of Appeals dated November 15, 2021, the following attorney has been indefinitely suspended by consent, effective *nunc pro tunc* to September 13, 2021:

ISAAC H. MARKS

*

By an Order of the Court of Appeals dated November 19, 2021, the following attorney has been temporarily suspended:

ANITHA WILEEN JOHNSON

*

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*

By an Order of the Court of Appeals dated November 19, 2021, the following attorney has been temporarily suspended:

EVAN J. KRAME

*

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JUDICIAL APPOINTMENTS

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On October 26, 2021, the Governor announced the appointment of **CARA YVONNE LEWIS** to the District Court for Baltimore City. Judge Lewis was sworn in on November 4, 2021 and fills the vacancy created by the retirement of the Hon. Brian D. Green.

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RULES ORDERS AND REPORTS

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A Rules Order pertaining to the 208th Report of the Standing Committee on Rules of Practice and Procedure was filed on November 9, 2021.

http://mdcourts.gov/sites/default/files/rules/order/ro208.pdf

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UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

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