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Attorney Grievance Commission of Maryland v. Edward Allen Malone, Misc. Docket AG No. 47, September Term 2020, filed November 18, 2022. Opinion by Watts, J.

https://www.mdcourts.gov/data/opinions/coa/2022/47a20ago.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

In *Attorney Grievance Comm'n v. Malone*, 477 Md. 225, 291-92, 269 A.3d 282, 321-22 (2022) ("*Malone I*"), the Court of Appeals concluded that Edward Allen Malone, Respondent, "knowingly and intentionally provided false responses on his sworn Texas bar applications" when he failed to disclose information concerning his prior disciplinary history and bar admissions and "declared under oath in his affidavit that the information he provided was true and correct, thereby committing perjury under Texas law." In addition, the Court concluded that Malone knowingly and intentionally failed to supplement his Texas Bar application and subsequent re-applications with accurate information and thereby failed to correct the misapprehension that he had fully disclosed his disciplinary history in the jurisdictions in which he was licensed. *See id.* at 292, 269 A.3d at 321. The Court determined that, with this misconduct, Malone, a member of the Bar of Maryland, violated Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 8.1(a) and (b) (Bar Admission and Disciplinary Matters), 8.4(a) (Violating the MLRPC), 8.4(b) (Criminal Act), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), and 8.4(d) (Conduct that is Prejudicial to the Administration of Justice). *See id.* at 294, 269 A.3d at 323.

Rather than imposing a sanction, the Court ordered a limited remand to the hearing judge to reopen the evidentiary hearing for the purposes of: (1) permitting Malone to testify concerning mitigating factors; (2) allowing Bar Counsel to call witnesses and introduce exhibits rebutting Malone's testimony with respect to mitigation; (3) allowing the parties to present arguments concerning mitigating and aggravating factors; and (4) allowing the hearing judge to issue supplemental findings of fact and conclusions of law as to mitigating factors and, if necessary, aggravating factors. *See Malone I*, 477 Md. at 293, 269 A.3d at 322. The Court deferred ruling

on any applicable aggravating and mitigating factors and the appropriate sanction pending the outcome of the remand. *See id.* at 236-37, 269 A.3d at 289. The limited remand stemmed from the Court's conclusion that regardless of his invocation of the Fifth Amendment in response to a question from Bar Counsel as to mitigation at a deposition, Malone should have been permitted to testify concerning mitigation at the disciplinary hearing. *See id.* at 294, 269 A.3d at 323. As such, the Court concluded "that the hearing judge's order precluding [] Malone from testifying at the evidentiary hearing was in error to the extent it prevented [] Malone from testifying as to mitigating factors." *Malone I*, 477 Md. at 263, 269 A.3d at 304.

On March 22, 2022, on remand, the hearing judge conducted a hearing. At the hearing, Malone testified as to mitigation and offered exhibits into evidence. On May 10, 2022, the hearing judge filed supplemental findings of fact and conclusions of law, making findings as to mitigating and aggravating factors. The hearing judge found that Malone had demonstrated by a preponderance of the evidence mitigation in the form of his church and volunteer work. In addition, the hearing judge found that Malone "has demonstrated remorse to the degree to which he understands his ethical shortcomings." The hearing judge found the existence of five aggravating factors: (1) prior disciplinary offenses; (2) a dishonest or selfish motive; (3) a pattern of misconduct; (4) bad faith obstruction of the disciplinary proceeding; and (5) substantial experience in the practice of law.

On October 4, 2022, the Court of Appeals heard oral argument.

Held: Disbarred.

The Court of Appeals overruled Malone's exceptions to the hearing judge's failure to find as mitigation timely good faith efforts to make restitution or to rectify consequences of the misconduct, cooperative attitude during the proceedings, that he self-reported his conduct to other courts, lack of a delay in the proceedings, and that no member of the public was harmed by his conduct.

The Court of Appeals overruled Malone's exceptions to the hearing judge's findings concerning the aggravating factors of a dishonest or selfish motive, a pattern of misconduct, bad faith obstruction of the disciplinary proceeding, and substantial experience in the practice of law. As to a pattern of misconduct, although Malone contended that engaging in a pattern of misconduct generally means that an attorney "has a prior history with the Attorney Grievance Commission[,]" and he has no such history, the Court explained that, to establish the aggravating factor, Bar Counsel is not required to demonstrate that an attorney has a history of discipline.

As to bad faith obstruction of the disciplinary proceeding, the Court of Appeals concluded that Malone obstructed the disciplinary proceeding by not participating in the deposition in good faith and caused unnecessary proceedings before the hearing judge, i.e., litigation of the motion *in limine*. Malone invoked the Fifth Amendment privilege against self-incrimination to every question asked at deposition, including three to which the Court specifically found that the

invocation of the Fifth Amendment privilege was in bad faith. *See Malone I*, 477 Md. at 240, 284 n.20, 269 A.3d at 291, 317 n.20. After Malone invoked the Fifth Amendment, although Bar Counsel did not file a motion to compel, Bar Counsel filed a motion *in limine*, Malone filed an opposition to the motion, and the hearing judge conducted a hearing on the motion *in limine* prior to the disciplinary hearing. See id. at 241-42, 269 A.3d at 291-92. After the hearing, the hearing judge issued an order precluding Malone from testifying at the disciplinary hearing, and the Court upheld the hearing judge's decision precluding Malone from testifying as to the merits and remanded to allow Malone the opportunity to testify concerning mitigation. *See id.* at 244, 262-63, 269 A.3d at 293, 304. The Court stated that, regardless of whether Bar Counsel filed a motion to compel, Malone's invocation of the Fifth Amendment privilege against self-incrimination resulted in additional proceedings before the hearing judge and curtailed the deposition. In addition, Malone's blanket invocation of the Fifth Amendment privilege against self-incrimination was contrary to case law, which indicates that it is improper for a deponent to make a blanket assertion of the privilege. *See Malone I*, *id.* at 270, 269 A.3d at 308 (citing *Moser v. Heffington*, 465 Md. 381, 404, 214 A.3d 546, 559 (2019)).

The Court of Appeals offered two notes of caution, however, regarding application of the aggravating factor of bad faith obstruction of the disciplinary proceeding, where the factor relates to an attorney's invocation of the Fifth Amendment privilege against self-incrimination. First, if Bar Counsel chooses not to move to compel an attorney to answer a question as to which the attorney has asserted the privilege against self-incrimination in a non-blanket manner, it should be the rare case in which a hearing judge concludes that the aggravating factor of bad faith obstruction of the disciplinary proceeding applies based on the attorney's invocation of the privilege. The second caveat was that, hearing judges in issuing their findings in attorney grievance cases, and this Court in its independent review of the record, must tread carefully in determining whether an attorney's invocation of the Fifth Amendment privilege during the disciplinary proceeding constitutes bad faith obstruction of the proceeding. The Court must take care not to chill the good faith invocation of the privilege against self-incrimination, recognizing that the line between a valid and an invalid assertion of the privilege is often difficult to discern.

In determining the appropriate sanction, the Court of Appeals concluded that Malone's misconduct was not of the type that coincides with the intentional dishonesty in cases in which a sanction less than disbarment has been warranted. In assessing the appropriate sanction in this case, the Court recognized that, consistent with the holding in *Attorney Grievance Comm'n v. Collins*, 477 Md. 482, 270 A.3d 917 (2022), application of the standard established in *Attorney Grievance Comm'n v. Vanderlinde*, 364 Md. 376 773 A.2d 463 (2001) may no longer be fitting in each and every case of intentional dishonest conduct. The Court pointed out, though, that *Collins* does not stand for the proposition that disbarment is warranted, absent compelling extenuating circumstances, only where there is harm to a client, theft, fraud, or misappropriation of client funds. It was clear from *Collins* that rather than applying a bright-line test, the Court assesses the facts and circumstances of each case individually to determine whether the *Vanderlinde* standard applies. In some instances, the potential applicability of the *Vanderlinde* standard will be quite clear, *i.e.*, cases involving theft, intentional misappropriation, harm to a client, and fraud, and, in other cases, perhaps less so.

Assessing the circumstances of the case led the Court of Appeals to the conclusion that the *Vanderlinde* standard was triggered, and that disbarment was the appropriate sanction. To be sure, as with the misconduct in *Collins*, 477 Md. at 534, 270 A.3d at 948, Malone's misconduct did not involve some of the circumstances for which we have generally applied the *Vanderlinde* standard, for instance, theft, intentional misappropriation, or harm to a client. Malone's misconduct, though, was far more egregious than the misconduct in *Collins*. Although Malone's misconduct did not involve harm to a client, theft, or misappropriation of client funds, the misconduct at issue is of the type that gives rise to deployment of the *Vanderlinde* standard, and, absent a showing of compelling extenuating circumstances, disbarment was warranted.

The Court of Appeals stated that Malone's misconduct involved numerous false statements concealing his prior disciplinary history and bar admissions in applications for bar admission over a period of years and, in its view, constituted fraud. Malone engaged in intentional deception in a bar admission process to influence the Texas Board to make a decision favorable to him for his own personal gain. Malone, through intentionally dishonest conduct, fraudulently obtained admission to the Texas Bar. Malone's misconduct involved not only fraud but also a blatant disregard for the truth and the legal system in general, and the potential for harm to clients. Malone engaged in intentional dishonest conduct over a period of years for the self-serving purpose of fraudulently gaining admission to the Texas Bar by precluding bar admission officials from making an accurate determination of his fitness to practice law. Malone's conduct was both intentionally dishonest and sustained, and demonstrated a fundamental lack of regard for the bar admission process. All of this showed that Malone engaged in intentional dishonesty under circumstances that demonstrated he lacks the basic character traits expected of a lawyer—honesty and respect for the legal system.

The Court of Appeals stated that, even if it had sustained Malone's exceptions to the hearing judge's findings concerning mitigating and aggravating factors and determined that additional mitigating factors were present and that the only aggravating factor was prior attorney discipline, it would still have concluded that the *Vanderlinde* standard applied and that disbarment (rather than a lesser sanction) was warranted based on the nature of the intentional dishonest misconduct in the case.

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In the Matter of Cash-N-Go, Inc. et al., No. 1012, September Term 2021, filed November 30, 2022. Opinion by Ripken, J.

https://www.courts.state.md.us/data/opinions/cosa/2022/1012s21.pdf

EQUITABLE ESTOPPEL – MARYLAND REGULATORY AGENCIES – APPLICABILITY

EQUITABLE ESTOPPEL – MARYLAND REGULATORY AGENCIES – AFFIRMATIVE MISCONDUCT

CONSUMER PROTECTION ACT – MARYLAND CONSUMER LENDING LAW – GOOD FAITH EXEMPTION

CONSUMER PROTECTION ACT – MARYLAND CONSUMER LENDING LAW – RESTITUTION AND CIVIL PENALTIES

Facts:

Cash-N-Go is a Maryland company that began offering financial services that it referred to as "title loans," "title pawns," or "cash advances," in 2007. To receive said services, consumers would request a loan for personal, family, or household purposes. In turn, Cash-N-Go would lend them the money with the expectation of repayment on the principal amount of the loan plus interest. As a prerequisite to receiving a loan, the consumer was required to provide a Cash-N-Go employee with a free and clear title to the consumer's vehicle, proof of current vehicle registration, proof of current insurance, a spare key to the vehicle, a valid driver's license, proof of social security number, a current utility bill, and a current pay stub.

Every title pawn contract contained a payment schedule, titled "minimum amount due," indicating a monthly charge of 30% of the loan principal. The fine print at the bottom of the contract indicated that paying the pawnshop charge would allow consumers to extend their obligation to repay the loan principal by another month. Extending the loan each month by payment of the pawn charge would amount to an annual interest rate of 360%. Cash-N-Go completed 1,601 title pawn transactions, ranging in amount from $140 to $6,000 each.

Cash-N-Go's grace period for late payments was typically two weeks, whereafter an officer or agent of Cash-N-Go would, without written notice, repossess the consumer's vehicle using the spare key that the consumer provided to obtain the loan. To recover their repossessed vehicles from Cash-N-Go, consumers were required to pay the outstanding balance on their loans plus additional fees. Occasionally, Cash-N-Go would sell a repossessed vehicle without providing the consumer with a full accounting of the sale proceeds. Additionally, Cash-N-Go failed to return to consumers any proceeds that exceeded the outstanding balances of their loans. Cash-N-Go collected a total of over $2.2 million in repayment funds on the 1,601 loans it made between 2007 and 2016 and repossessed 147 vehicles.

During this time, three Maryland state regulatory agencies were involved in oversight of the company's business practices to varying degrees. The Maryland Commissioner of Financial Regulation ("CFR") conducted periodic examinations of Cash-N-Go's check cashing services. The Maryland Motor Vehicle Administration received a lien notice for each vehicle title Cash-N-Go obtained through a title pawn transaction. Finally, the Maryland State Police oversaw RAPID, a system for tracking stolen property, in which Cash-N-Go logged each of its title pawn transactions. None of these regulatory agencies were responsible for monitoring whether Cash-N-Go's title pawn practices were, in effect, illicit consumer loans.

CFR investigated Cash-N-Go's title pawn practices only after being alerted that the company's title "pawns" were, in effect, consumer loans. Following the investigation, CFR warned Cash-N-Go that its ongoing business as a title pawn lender, without a consumer lender license, placed the company in conflict with Maryland consumer lending laws. However, Cash-N-Go continued to engage in title pawn transactions.

On April 1, 2019, the Consumer Protection Division ("the Division") of the Office of the Attorney General of Maryland filed a statement of charges against Cash-N-Go for violations of several Maryland consumer protection laws. Cash-N-Go denied all allegations, and the Division referred the case to the Office of Administrative Hearings. After conducting a contested case hearing, the administrative law judge filed a proposed decision, finding that Cash-N-Go had engaged in unfair or deceptive trade practices in violation of the Maryland Consumer Protection Act ("CPA"). The Division subsequently adopted the ALJ's proposed factual findings and conclusions of law, issued a cease-and-desist order prohibiting Cash-N-Go from continuing its unlawful consumer lending practices, and held all Cash-N-Go parties jointly and severally liable for $2,200,00 in restitution payments and $1,200,750 in civil penalties.

On March 16, 2020, Cash-N-Go filed a petition for judicial review of the Division's final order in the Circuit Court for Allegany County. The circuit court held a hearing on July 9, 2021, and subsequently affirmed the Division's findings and assessment of penalties.

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Held: Affirmed.

The Court of Special Appeals held, first, that the Division is not estopped from ordering penalties against Cash-N-Go for violating Maryland's consumer protection laws. In so holding, the Court made clear that state regulatory agencies are not estopped from enforcing a valid law or regulation within the scope of their authority, regardless of a claimant's contention that its unlawful business practices were justified by reliance upon prior statements or conduct of state employees. The Court explained that a state regulatory agency becoming aware of a claimant's illicit behavior and subsequently holding the claimant accountable for such behavior does not amount to the type of "affirmative misconduct" by the State that is required to support an estoppel claim.

Second, the Court held that the Division's assessment of penalties and restitution did not violate the Excessive Fines Clause of the Eighth Amendment. The Court emphasized that section 12-314 of the Maryland Consumer Lending Law permits the Division to order restitution amounts that include the principal, interest, and fees with respect to any loan deemed void or unenforceable under the CPA and that section 13-410 allows for a maximum civil penalty amount of $10,000 per violation of the CPA. Furthermore, the Court established that the good faith exemption under CL § 12-316.1 does not limit the imposition of any civil penalty for a knowing or willful violation of the Consumer Loan Law or limit the power of the Commissioner or the courts to order restitution to a borrower of moneys collected in violation of the Consumer Loan Law.

Finally, the Court held that any error made by the circuit court in excluding Cash-N-Go Pawnbrokers, LLC, Cash-N-Go Pawnbrokers, Inc., and Cash-N-Go's sole owner, Brent Jackson, from participating as parties to the petition for judicial review was harmless.

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Christopher Andrew Linz v. Montgomery County, Maryland, No. 1289, September Term 2021, filed November 1, 2022. Opinion by Eyler, Deborah S., J.

https://mdcourts.gov/data/opinions/cosa/2022/1289s21.pdf

MARYLAND RULES – COMPULSORY JOINDER – RELATION BACK DOCTRINE – ACTION AGAINST GOVERNMENT ENTITY FOR NEGLIGENCE IN USE OF GOVERNMENT OWNED OR LEASED VEHICLE,

COURTS & JUDICIAL PROCEEDINGS – ACTIONS FOR NEGLIGENCE UNDER LOCAL GOVERNMENT TORT CLAIMS ACT – INDEMNITY PROVISION OF LGTCA.

Facts:

Mr. Linz was injured in automobile accident with a vehicle owned by Montgomery County (County) and driven by police officer Michael J. Chindblom. Within the limitations period, Mr. Linz sued the County for negligence. After limitations had expired, Mr. Linz moved to amend his complaint to substitute Officer Chindblom for the County as the sole defendant, on the basis that he had sued the County instead of the officer based on a misnomer, under Rule 2-341(c), and therefore the amended complaint would relate back to the filing time of the original complaint. The circuit court denied the motion and a subsequent motion for reconsideration, concluding that there was not a misnomer, and the relation back doctrine would not apply. After a final judgment was entered, Mr. Linz appealed.

Held: Affirmed.

The circuit court did not abuse its discretion by denying the motions to amend and for reconsideration. The relation back doctrine did not apply and therefore the action against Officer Chindblom was time-barred.

The relation back doctrine has been applied when there has been a misnomer in the name of a party; the complaint is being amended to correct the misnomer; the "new" party was the intended party all along; and the "new" party was on notice of the claim during the limitations period. In addition, it has been applied to add a real party in interest or to join a party subject to compulsory joinder, also when the "new" party was the intended party from the beginning and was on notice during the limitations period.

The undisputed facts surrounding the accident and the filing of the complaint do not support that Mr. Linz mistakenly sued the County instead of Officer Chindblom. Before filing suit, he knew that the officer had caused the accident and was an employee of the County. The language of the complaint made clear that Mr. Linz did not confuse Officer Chindblom with the County. There

was not a misnomer under Rule 2-341(c) that would justify application of the relation back doctrine. In addition, Officer Chindblom was not a real party in interest or subject to compulsory joinder, under Rules 2-201 and 2-211(a), respectively.

The existence of two "critical factors" discussed in the relation back cases - - that the "new" party was the intended party all along and that the "new" party had notice of the claim within the limitations period - - are not by themselves, without satisfaction of the amendment, real party in interest, or compulsory joinder rules, a basis to apply the relation back doctrine. Even if they were, the undisputed facts do not show that Officer Chindblom was the intended defendant. In addition to Mr. Linz's understanding that the officer and the County were not one and the same, counsel for Mr. Linz misunderstood that in a suit filed against the County only, the County would be vicariously liable for all damages caused by Officer Chindblom. On the contrary, the County only partially waived its governmental immunity for injuries caused by negligent use of its automobile in the course of serving the County, up to $30,000. If Officer Chindblom had been sued, the indemnity provision of the Local Government Tort Claims Act would have made the County responsible for paying a judgment against him for compensatory damages, up to $400,000. He was not sued, however, and a misunderstanding of the immunity and indemnity laws is not a basis to apply the relation back doctrine to a late-filed complaint. Finally, even if the officer knew, during the limitations period, that a suit might be filed against him, that knowledge alone was not a basis to eliminate the effect of the statute of limitations or to apply the relation back doctrine.

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Michael Vanison v. State of Maryland, No. 296, September Term 2021, filed October 31, 2022. Opinion by Zic, J.

https://mdcourts.gov/data/opinions/cosa/2022/0296s21.pdf

CRIMINAL LAW – POSSESSION OF WEAPON – PLACE OF CONFINEMENT – BURDEN OF PRODUCTION

CRIMINAL LAW – DEFINITION OF CONTRABAND – PLACE OF CONFINEMENT

CRIMINAL LAW – DANGEROUS WEAPON – CONCEALED WEAPON

Facts:

On January 31, 2020, Michael Vanison, Jr., was transferred from the Maryland Correctional Training Institute to the Roxbury Correctional Institute. Upon arrival, Mr. Vanison was subjected to a strip search. During the search, intake officers discovered and confiscated a makeshift knife: a portion of a fingernail clipper, sharpened to a point, and attached to a plastic handle.

Mr. Vanison was charged with knowingly possessing a weapon while confined in a place of confinement in violation of § 9-414(a)(4) of the Criminal Law Article; knowingly possessing contraband while confined in a place of confinement in violation of § 9 412(a)(3) of the Criminal Law Article; and wearing or carrying a dangerous weapon of any kind concealed on or about the person in violation of § 4-101(c)(1) of the Criminal Law Article. Under § 4-101(a)(5)(i)-(ii) of the Criminal Law Article, "weapon" is defined as including "a dirk knife, bowie knife, switchblade knife, star knife, sandclub, metal knuckles, razor, and nunchaku," but does not include "1. a handgun; or 2. a penknife without a switchblade." Section 9-410(h) of the Criminal Law Article defines "weapon" as "a gun, knife, explosive, or other article that can be used to kill or inflict bodily injury."

At trial, defense counsel argued that because the makeshift knife was not among the enumerated weapons under § 4-101(a)(5)(i), Mr. Vanison could not be convicted on that count. Further, defense counsel argued the makeshift knife could not be considered "contraband" under § 9-412(a)(3) as the definition of "contraband" did not include "weapons." The State countered that the makeshift knife was intended to be used as a weapon, and that § 4-101(a)(5)(i) did not contain an exhaustive list of all dangerous weapons.

The circuit court found that the makeshift knife could be used to kill or inflict serious injury and therefore met the definition of a weapon under § 9-410(h), thus Mr. Vanison was in violation of § 9-414(a)(4). Further, the court found that because contraband is any item, material, substance, or other thing an inmate is prohibited from possessing, the makeshift knife constituted contraband. Finally, the court concluded the list of dangerous weapons in § 4-101 was not

exhaustive and could include the makeshift knife, finding Mr. Vanison guilty on all three counts. Mr. Vanison appealed.

Held: Affirmed

First, the Court of Special Appeals reviewed the description of the makeshift knife and held that under the plain meaning of § 9-410(h), the makeshift knife satisfied the definition of "weapon" as an item "that can be used to kill or inflict bodily injury."

The Court then assessed whether the makeshift knife constituted contraband. Although § 9-410(c) does not include "knife," the Court reasoned that because contraband is defined as items that may not be in possession of inmates or are brought into the facility by prohibited means, and inmates may not possess "weapons," the makeshift knife Mr. Vanison possessed met the definition of contraband.

Finally, the Court rejected Mr. Vanison's contention that the makeshift knife was not a dangerous weapon. While the makeshift knife of a fingernail clipper filed to a sharp point attached to a plastic handle was not an enumerated "dirk knife, bowie knife, switchblade knife, star knife, sandclub, metal knuckles, razor, and nunchaku," it also was not an excepted handgun or penknife without a switchblade. The Court went on to reject Mr. Vanison's assertion that the principle of *ejusdem generis* applied to § 4-101(a)(5)(i). *Ejusdem generis* indicates that when specific things are designated in a statute followed by general words, those general words should be construed to only include things of the same general nature as those enumerated. However, because § 4-101(a)(5)(i) was not simply an enumeration of various knives followed by general words, the principle of *ejusdem generis* did not apply. Instead, the Court applied a four-factor test, from *Anderson v. State*, 328 Md. 426 (1992), to determine whether a defendant's intent transformed a concealed instrument into a concealed dangerous or deadly weapon. The Court looked to "(1) the nature of the instrument, *i.e.*, its size, shape, condition and possible alteration; (2) the circumstances under which it is carried, i.e., the time, place and situation in which the defendant is found with it; (3) defendant's actions vis-[à]-vis the item; and (4) the place of concealment," and determined that Mr. Vanison carried the makeshift knife with the intent to use it as a weapon.

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Brandon Mohan v. State of Maryland, No. 1853, September Term 2021, filed November 30, 2022. Opinion by Berger, J.
Friedman, J., concurs.

https://mdcourts.gov/data/opinions/cosa/2022/1853s21.pdf

SUFFICIENCY OF THE EVIDENCE – STATUTORY INTERPRETATION – INTERPRETATION OF PENAL STATUTE – STATUTORY MEANING OF "PARENT" UNDER CRIMINAL LAW SECTION 3-602(B)(1) – "DE FACTO" PARENT – IN LOCO PARENTIS – STEPPARENT – HEARSAY – PRIOR CONSISTENT STATEMENTS – MD. RULE 5-616(C)(2) – MD. RULE 5-802.1(B) – REMAND FOR RESENTENCING

Facts:

The State charged Brandon Mohan with various sex abuse offenses including a charge for the sexual abuse of a minor under Section 3-602(b)(1) of the Criminal Law Article. The Statement of Charges and the Criminal Information filed by the State specified that Mohan committed the alleged child sexual abuse only as a "parent" of the child. At the close of the State's case, Mohan moved for judgment of acquittal. Mohan argued there was insufficient evidence to convict him as a "parent" of the child, and further, he was not a "parent" under Section 3-602(b)(1) because he was neither the child's biological nor adoptive parent.

The trial judge denied Mohan's motion and held he was a "parent" under the criminal statute. Specifically, the circuit court judge found Mohan was a "parent" under Section 3-602(b)(1) because: (1) he was married to the child's mother at the time of the alleged abuse and acted as a "live-in" stepparent; (2) he was a *de facto* parent; and (3) he stood *in loco parentis* to the child. The circuit court denied Mohan's motion finding there was sufficient evidence to convict him as a "parent" under Section 3-602(b)(1).

The circuit court also determined that certain out of court statements made by the child's mother were admissible as prior consistent statements to rehabilitate the mother's testimony. The mother of the child made three statements to law enforcement and Mohan's mother that conveyed an alleged admission made by Mohan, as well as the child's recounting of the alleged abuse. The circuit court admitted evidence of these statements finding that Mohan's defense counsel had opened the door to admission of prior consistent statements when impeaching the mother on cross-examination.

The jury convicted Mohan of child sexual abuse, one count of third-degree sex offense, one count of fourth-degree sex offense, and one count of second-degree assault. The trial judge sentenced Mohan to twenty-five years' incarceration for the child sexual abuse offense, and ten-years consecutive for the third-degree sex offense, but fully suspended the sentence for the third-degree sex offense in favor of a five-year period of probation and lifetime registration as a sex offender.

Held: Reversed in part; affirmed in part.

Judgment of the Circuit Court for Wicomico County reversed, in part, and affirmed, in part. Sentence for third-degree sex offense vacated. Case remanded to the Circuit Court for Wicomico County for resentencing on the conviction for third-degree sex offense.

The Court of Special Appeals determined that the critical issue on appeal was whether the circuit court erred in its interpretation of Section 3-602(b)(1) and the meaning of the term "parent." The Court first concluded that the meaning of the term "parent" was ambiguous because there was no definition provided by the Legislature. The Court then proceeded to examine whether the term was intended to include "*de facto*" parents, stepparents, and individuals standing *in loco parentis*.

The Court examined the entire statutory scheme and determined that the Legislature intended to criminalize sexual abuse of minor child by five categories of individuals who might stand in a close relationship of trust to a minor child. The Court determined that those five categories were: (1) parents; (2) other persons who have permanent or temporary care or custody of a minor and/or individual standing in loco parentis; (3) other persons who have responsibility for the supervision of a minor; (4) family members related by blood, adoption, or marriage; and (5) household members who live with the minor or have a regular presence in the home at the time of the abuse.

The Court held that the Legislature did not intend for the term "parent" as used in Section 3-602(b)(1) to include individuals who stand *in loco parentis* to a minor child. The Court reasoned that the category of *in loco parentis* was separately delineated from the term "parent" within criminal law section 3-602(b)(1), and therefore, including the category within the term "parent" would result in an unnecessary redundancy.

The Court held that the Legislature did not intend for the term "parent" as used in Section 3-602(b)(1) to include individuals who might be a "*de facto*" parent to a minor child. The Court determined that the legal concept of "*de facto*" parenthood had limited application for establishing standing to contest child custody or visitation rights. The Court further determined that the concept of "*de facto*" parenthood had never been used to interpret a criminal statute or to determine the application of a criminal statute to a criminal defendant. Lastly, the Court concluded that the factors that make an individual a "*de facto*" parent are present in criminal law subsections 3-601(b)(1) as the "responsibility for [] supervision," and subsection 3-601(b)(2) as "household member." Accordingly, the Court concluded that including "*de facto*" parents within the meaning of the term "parent" as used in Section 3-602(b)(1) would result in an unnecessary redundancy.

The Court held that the Legislature did not intend for the term "parent" as used in Section 3-602(b)(1) to include individuals who are stepparents to a minor child. The Court determined by

the plain language of the statute that there was no indication that the Legislature intended "parent" to include stepparents. The Court further determined that narrowly interpreting "parent" to exclusively mean biological or adoptive parent would be consistent with the legislative intent and the remainder of the statute because a stepparent would fall under the definition of a "family member" under criminal law section 3-602(b)(2).

The Court reversed Mohan's conviction for child sexual abuse under Section 3-602(b)(1) because he was not a "parent" under the Legislature's contemplated meaning of the term. The Court further vacated Mohan's sentence for third-degree sexual offense, which was completely suspended, and remanded for resentencing. The Court confirmed that it had the discretion to remand a case for resentencing when a sentencing package has been disturbed by an appellate opinion reversing a conviction. Considering the Court's reversal of Mohan's conviction for child sexual abuse, the only sentence remaining was the suspended 10-year sentence for third-degree sexual offense. Under these circumstances, the Court determined that it was appropriate to vacate Mohan's sentence for third-degree sexual offense and remand for resentencing. The Court noted that the trial court may impose a sentence on the remaining count for third-degree sexual offense, but the new aggregate sentence could not be more severe than the original aggregate sentence.

Lastly, the Court held that the circuit court did not err in admitting certain out of court statements as prior consistent rehabilitative statements under Md. Rule 5-616(c)(2). The Court examined whether three statements made by the child's mother were admissible as either hearsay exceptions, or as nonhearsay as prior consistent statements. The three statements were made by the child's mother to law enforcement and to Mohan's mother. The statements conveyed an alleged admission made by Mohan and the child's recounting of the alleged abuse. The Court determined that the circuit court did not err in allowing the child's mother to testify to the content of the statements because defense counsel had opened the door to rehabilitation by prior consistent statements when questioning the mother on cross-examination. The Court determined that the statements were not offered for their truth, but rather, as rehabilitative statements that could be properly admitted under Md. Rule 5-616(c)(2). The Court further determined that the statements were both consistent with the mother's present testimony and detracted from the impeachment.

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Sheila Caldwell v. Marquita Sharrice Sutton, No. 424, September Term, 2022, filed November 30, 2022. Opinion by Graeff, J.

https://mdcourts.gov/data/opinions/cosa/2022/0424s22.pdf

FAMILY LAW – THIRD-PARTY CUSTODY OF CHILD – *DE FACTO* PARENTHOOD – CONSENT TO FORMATION AND ESTABLISHMENT OF PARENT-LIKE RELATIONSHIP WITH CHILD – "GOOD CAUSE" TO AWARD CUSTODY PURSUANT TO MD. CODE ANN., FAM. LAW ART. § 9-101.2

Facts:

Appellee ("Mother") filed a motion to modify custody and visitation of her son ("Child"), who had been placed in the legal and physical custody of her mother, appellant ("Grandmother"), after Mother killed her husband and Child's father. The circuit court found that there had been a material change in circumstances justifying a modification of custody, and there was good cause pursuant to Md. Code Ann., Fam. Law Art. ("FL") § 9-101.2 (2019 Repl. Vol.), to permit an award of custody to Mother, a parent found guilty of murdering Child's other parent. The court further found that Mother was a fit and proper person to have custody of Child. It found that Grandmother failed to prove that she was a *de facto* parent or that exceptional circumstances existed pursuant to the requisite factors to consider. The court stated, however, that, because the prior murder conviction could, but unlikely would be found to be, an exceptional circumstance, the court would assume that there were exceptional circumstances and address the best interests of Child. The court found that it was in Child's best interests for Mother to be awarded sole legal and physical custody of him, with a three-month graduated transition period for the change in physical custody.

Held: Affirmed in part and vacated in part. Case remanded for further proceedings.

A court order granting custody to a third party, by itself, does not terminate the biological parent's parental rights or give the third party status as a legal parent in a subsequent custody dispute.

When a legal parent, who consented to custody while the parent was in jail, is released and desires to regain custody, the trial court did not err in finding a material change in circumstances.

FL § 9-101.2(a) provides that "a court may not award custody of a child or visitation with a child" to a parent who has been found "guilty of first degree or second degree murder of the other parent of the child," "unless good cause for the award of custody or visitation is shown by clear and convincing evidence." In this context, "good cause" means a substantial reason to find that it is in the child's best interests to return to the parent's custody. The trial court did not

abuse its discretion in finding good cause where Mother, who had been found guilty of murdering her husband and the father of her child, had no prior convictions, there was no evidence that she had committed any acts of violence or aggression since the murder, her motivation for committing the murder stemmed from years of physical and sexual abuse at the hands her husband, she had taken concrete steps to rebuild her life, she had complied with the terms of her probation, and she genuinely wanted to be with her son.

If a legal parent consents to a parent-like relationship between a child and a third party, a court may find, even if the parent subsequently opposes the grant of *de facto* parenthood status, that such status is shown if all factors of the test set forth in *Conover v. Conover*, 450 Md. 51 (2016), are satisfied.

The first factor, consent to a parent-like relationship, was shown where Mother signed a form consenting to Grandmother having sole legal and physical custody while Mother was facing first-degree murder charges and an indefinite, likely lengthy, sentence. She did not seek to modify custody until years later, after she was released from prison and Grandmother had fulfilled the role of Child's parent for many years.

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ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated November 18, 2022, the following attorney has been suspended for nine months:

KATHLEEN ANNE DOLAN

*

This is to certify that

KAMAH MENSELEH GUEH-THORONKA

has been replaced upon the register of attorneys in this State as of November 18, 2022.

*

By an Opinion and Order of the Court of Appeals dated November 18, 2022, the following attorney has been disbarred:

EDWARD ALLEN MALONE

*

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JUDICIAL APPOINTMENTS

*

On October 4, 2022, the Governor announced the appointment of **CHRISTINE M. CELESTE** to the Circuit Court for Anne Arundel County. Judge Celeste was sworn in on November 1, 2022, and fills the vacancy created by the retirement of the Hon. William C. Mulford, II.

*

On October 4, 2022, the Governor announced the appointment of **PATRICK JOSEPH DEVINE** to the District Court for Charles County. Judge Devine was sworn in on November 4, 2022, and fills the vacancy created by the retirement of the Hon. W. Louis Hennessy.

*

On October 4, 2022, the Governor announced the appointment of **JOSEPH A. RILEY** to the District Court for Caroline County. Judge Riley was sworn in on November 10, 2022, and fills the vacancy created by the elevation of the Hon. Heather L. Price to the Circuit Court for Caroline County.

*

On October 20, 2022, the Governor announced the appointment of **MAGISTRATE CATHI VAN DE MEULEBROECKE COATES** to the District Court for Worcester County. Judge Coates was sworn in on November 21, 2022, and fills the vacancy created by the retirement of the Hon. Daniel R. Mumford.

*

On October 20, 2022, the Governor announced the appointment of **JUSTIN N. GREGORY** to the Circuit Court for Garrett County. Judge Gregory was sworn in on November 30, 2022, and fills the vacancy created by the retirement of the Hon. Raymond G. Strubin.

*

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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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