

Circuit Court for Washington County
Case No. 21-K-13-048746

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1707

September Term, 2019

M.O.

v.

STATE OF MARYLAND

Shaw Geter,
Gould,
Maloney, John
(Specially Assigned),

Opinion by Shaw Geter, J.
Concurring opinion by Maloney, J.

Filed: March 24, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises from the dismissal of a sexual assault case in the Circuit Court for Washington County against Terrel Nowlin. In 2014, the court found Mr. Nowlin incompetent to stand trial and after multiple yearly review hearings, his condition did not improve and the court continued to find him incompetent. In 2019, Mr. Nowlin filed a motion to dismiss his case, pursuant to § 3-107(a) of the Criminal Procedure Article (“CP”). The State filed an opposition and requested that the victim’s representative be heard. A hearing was held by the court and following argument by all counsel, the matter was taken under advisement. The court later granted Mr. Nowlin’s motion to dismiss the charges. Appellant timely filed this appeal and presents the following questions for our review.

1. Whether a trial court can act on a motion in a criminal case that creates a risk to the safety of the victim, to public safety, and to the defendant, when made by an attorney with no competent client and prior to a guardian being appointed?
2. Whether a trial court has the power under CP §3-107 to refuse for technical reasons to consider the State’s Opposition to a Motion to Dismiss the indictment of an incompetent repeat dangerous sex offender, and the supporting crime victim’s presentation, and then based on the absence of opposition, dismiss the case while conceding that doing so jeopardized both the crime victim’s and the public’s safety?

For reasons discussed below, we affirm the dismissal of the charges by the court.

BACKGROUND

Terrell Nowlin, on June 14, 2013, was charged with two counts of Second-Degree Sex Offense and one count of Sodomy. The incident occurred on February 28, 2011 when the victim, J.O., and Mr. Nowlin participated, as athletes, in a Special Olympics event in

Hagerstown. While sharing a hotel room in Hagerstown, J.O. was assaulted. On February 18, 2014, the circuit court found Mr. Nowlin incompetent to stand trial, in accordance with the results of an evaluation performed by the Maryland Department of Health and Mental Hygiene (“DHMH”). The court subsequently held a number of review hearings and continued to find that Mr. Nowlin was incompetent to stand trial.

On February 15, 2019, Mr. Nowlin, pursuant to CP §3-107(a), filed a Motion to Dismiss, arguing that dismissal was mandated because five years had elapsed since he was found incompetent and the State had not petitioned the court to extend the time for extraordinary cause. On February 21, 2019, the State filed an opposition, arguing that (1) “the State is opposed to dismissal” of the case and (2) “the State requests a hearing on the matter, and that attorneys for the victim’s representative wanted to be heard at the hearing.”

The court held a hearing on May 3, 2019. When asked if the State petitioned for extraordinary cause, the State replied:

Your Honor, the State did not petition this [c]ourt for extraordinary cause. The victim’s representative, the attorney representing the victims in this case did prepare several pleadings in which extraordinary cause is discussed. It was my understanding from reading the statute that the victim, excuse me, that they would be heard from. And so, when [sic] the State’s very simple response to the Motion to Dismiss is that we are opposed to the dismissal and that we basically are deferring to Your Honor and whatever argument the victim’s attorney makes. But we did not . . . petition this [c]ourt to find extraordinary cause.

Counsel for the victim’s representative was allowed to address the court and argued that it was an “unusual extraordinary” case. He asserted because of the nature of the charges and Mr. Nowlin’s physique and mental capacity, extraordinary cause existed. At the conclusion of the hearing, the court took the matter under advisement. On September 27,

2019, the court entered an order dismissing the case.¹ It stated:

THEREFORE IT IS ORDERED that considering Defendant’s Motion to Dismiss, the State’s general Opposition to Motion to Dismiss, but lack of request to extend the time before the case is dismissed, and the Victim’s Assertion of Right to be Heard under MD CODE, CRIMINAL PROC. § 3-107(b) on Possible Dismissal, it is this 26 day of September, 2019, by the Circuit Court for Washington County, Maryland, hereby:

ORDERED that this case be, and hereby is, dismissed pursuant to MD. CODE ANN., CRIM. PROC. § 3-107(a). Had the State petitioned the [c]ourt to defer dismissal under “extraordinary cause”, the [c]ourt would have considered the below circumstances.²

¹ Although the Order states September 26, 2019, it was docketed September 27, 2019.

² The trial court’s order included the following circumstances in a footnote:

Aside from the statute, MD. CODE ANN, CRIM. PROC. § 3-107(a), there is case law that explains where extraordinary cause may be found. The case law also explains the restriction on freedom of an institutionalized individual, *see, e.g., Ray v. State*, 410 Md. 384 (2009). This restriction on an individual’s freedom creates a compelling interest that the statute heavily considers. However, Defendant Nowlin has been living and working in the community. Defendant Nowlin has developmental disabilities and, therefore, regardless of his involvement with the criminal court, he would be residing in a facility that supports the developmentally disabled. Because of this case, he is also subject to an order that creates heavy supervision and structure designed to mitigate the risk that Defendant Nowlin presents to public safety.

Despite this significant structure and supervision in a residential setting that specializes in supporting those with developmental disabilities, Defendant has, in the past, been in contact with the victim and victim’s family. Because this Defendant has made prior threats to the victim, the contacts have caused severe distress to the victim and his family in violation of the conditions of the supervision order.

Also, in direct violation of Defendant’s release conditions and the structure in his residential program, in the past Defendant was able to create and function with many social media accounts and he was able to download and view large amounts of pornography. Viewing of pornography on the internet creates an increased risk that Defendant Nowlin may sexually assault someone else. To mitigate that risk, the [c]ourt required 24/7 supervision of Defendant. After the 24/7 supervision requirement, Defendant Nowlin made

JURISDICTION

Preliminarily, appellee argues that this Court must dismiss the appeal for lack of jurisdiction because appellant has not appealed from a “final order that denies or fails to consider a right secured by the victim.” Appellee also argues that an application for leave to appeal requires specific circumstances, none of which exist in the present case. We note appellant requested this appeal be noted as either an application for leave to appeal or as an appeal. This Court accepted his filing as an appeal.

no more contact with the victim’s family and had no more exposure to pornography.

In terms of the risk that Defendant Nowlin may sexually victimize someone in the future, the [c]ourt must consider that before Defendant Nowlin sexually assaulted the victim in this case, he was convicted of forced sexual assault upon someone else. With two convictions for forced sexual assault, the [c]ourt must conclude that Defendant Nowlin presents a future risk to others.

Even with a prior conviction for forced sexual assault, Defendant Nowlin, with his disabilities, was not supervised adequately to prevent the sexual attack that resulted in this case.

Another compelling circumstance that enhances the public safety risk is that because of Defendant’s own developmental disabilities, Defendant lives with and is in programs with other developmental disabled and uniquely vulnerable individuals.

After dismissal of this case, the [c]ourt has little confidence that the 24/7 supervision will continue. The [c]ourt, therefore, would have found (if the statute did not prevent this action) that dismissal of this case creates a significant safety risk that this Defendant will sexually victimize someone else in the future (and perhaps multiple people). Balanced against that significant risk of harm, the [c]ourt would have found that this Defendant is not incarcerated and lives in no more a restrictive environment than is required to provide him with shelter, food and basic necessities. He has the freedom of working and earning an income. The [c]ourt would have found that the supervision from the current order is no more restrictive than is necessary to keep others safe and does not unreasonably infringe upon Defendant.

Appellant argues the victims of crime are permitted to file applications for leave to appeal from an interlocutory order or an appeal from an order that denies or fails to consider a right secured to the victim by CP §11-402 and § 11-403. Because the victim was not meaningfully heard on his “extraordinary cause” argument, appellant argues this matter is appealable because a crime victim had a statutory right to have his views meaningfully considered and not “simply cast aside and never addressed.”

Maryland Code CP § 11-103(b) states:

(b) Although not a party to a criminal or juvenile proceeding, a victim of a crime for which the defendant or child respondent is charged may file an application for leave to appeal to the Court of Special Appeals from an interlocutory order or appeal to the Court of Special Appeals from a final order that denies or fails to consider a right secured to the victim by subsection (e)(4) of this section, § 4-202 of this article, § 11-102 or § 11-104 of this subtitle, § 11-302, § 11-402, § 11-403, or § 11-603 of this title, § 3-8A-06, § 3-8A-13, or § 3-8A-19 of the Courts Article, or § 6-112 of the Correctional Services Article.

There are twelve enumerated circumstances from which a victim may appeal under CP § 11-103(b).³

3

- (1) CP § 11-103(e)(4) refers to victim rights that were not considered.
- (2) CP § 4-202 refers to criminal cases that were transferred to a juvenile court.
- (3) CP § 11-102 refers to the rights of victims to attend proceedings for those who file a notification request or protection of employment.
- (4) CP § 11-104 refers to the notification of the victim or the victim’s representative about court proceedings.
- (5) CP § 11-302 refers to the victim or the victim’s representative about criminal trials or juvenile hearings.
- (6) CP § 11-402 refers to the victim’s right of a victim impact statement being presented.
- (7) CP § 11-403 refers to the right of a victim or the victim’s representative to speak to the court at sentencing or disposition hearing.

This appeal, however, stems from a dismissal under CP § 3-107(a), which is not enumerated as a proceeding from which a victim may appeal. It states:

(a) Whether or not the defendant is confined and unless the State petitions the court for extraordinary cause to extend the time, the court shall dismiss the charge against a defendant found incompetent to stand trial under this subtitle:

(1) when charged with a felony or a crime of violence as defined under § 14-101 of the Criminal Law Article, after the lesser of the expiration of 5 years or the maximum sentence for the most serious offense charged; or

(2) when charged with an offense not covered under item (1) of this subsection, after the lesser of the expiration of 3 years or the maximum sentence for the most serious offense charged.

Md. Code Ann., Crim. Proc. § 3-107(a).

Appellant, nevertheless, claims the language found in CP §11-402 and CP §11-403 is applicable to the proceedings in the present case. We note that CP §11-402 allows a court to consider a victim impact statement in determining whether to transfer jurisdiction under § 4-202 of this article or waive jurisdiction under § 3-8A-06 of the Court and Judicial Proceedings Article. CP §11-403 relates to sentencing or disposition proceedings and states:

(b) In the sentencing or disposition hearing the court, if practicable, shall allow the victim or the victim's representative to address the court under oath before the imposition of sentence or other disposition:

(8) CP § 11-603 refers to the rights of restitution.

(9) Courts Article § 3-8A-06 refers to waivers.

(10) Courts Article 3-8A-13 refers to the “sufficiency of petition.”

(11) Courts Article 3-8A-19 refers to child disposition.

(12) CP § 6-112 refers to matters involving probation services, presentence investigations, and other investigations.

- (1) at the request of the prosecuting attorney;
- (2) at the request of the victim or the victim's representative; or
- (3) if the victim has filed a notification request form under § 11-104 of this title.

In *Lopez-Sanchez v. State*, the petitioner, a victim of a delinquent act, sought to appeal a restitution award because he had not been notified of the proceedings. 388 Md. 214 (2005). This Court dismissed the appeal, holding that the appeal was not authorized by statute. The Court of Appeals granted certiorari and affirmed this court's decision, holding that "any right of a victim to appeal or to file an application for leave to appeal must originate from the General Assembly, not from this Court." *Id.* at 230. At the time of the proceedings, § 11-103(b) of the Criminal Procedure differed from its current form and did not provide for victim appeals from delinquency proceedings.⁴ The Court of Appeals concluded:

. . . not only is § 11-103 silent as to a right of appeal for victims of delinquent acts, but the plain language of the statute reflects a rejection of language that would have created this right. . . it would be illogical to extend this enlargement to victims of delinquent acts. The Legislature has enacted a statute, § 11-103 of the Criminal Procedure Article, addressing the appellate

⁴ The old version of the statute was as follows:

Right to file for leave to appeal.—Although not a party to a criminal proceeding, a victim of a violent crime for which the defendant is charged may file an application for leave to appeal to the Court of Special Appeals from an interlocutory or final order that denies or fails to consider a right secured to the victim by § 11-302(c), § 11-402, § 11-403, or § 11-404 of this title or § 6-112 of the Correctional Services Article.

Lopez-Sanchez, 388 Md. at 228. The current statute does include delinquent acts.

rights of victims. The rights granted by that statute do not extend to the victims of delinquent acts.

Id. at 229. Similar to the statute cited in *Lopez-Sanchez*, CP §11-103 is silent as to appeals for victims under CP § 3-107(a).

On review, when analyzing a statute, we examine “the plain language, ‘[w]e neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute, and we do not construe a statute with ‘forced or subtle interpretations’ that limit or extend its application.’” *Washington v. State*, 450 Md. 319, 330 (2016) (quoting *Willis v. Montgomery Cty.*, 415 Md. 523, 537 (2010)). Here, we hold that the statute is clear and unambiguous and does not provide crime victims a right of appeal from orders dismissing criminal charges. As such, we must decline to extend the statute by judicial decision.

Appellant argues, alternatively, that this Court has discretion to hear this case as a mandamus action. However, an appellate court’s jurisdiction over a case under mandamus is limited to circumstances, to “restrain a lower court from acting in excess of its jurisdiction, otherwise grossly exceeding its authority, or failing to act when it ought to act.” *In re Petition for Writs of Prohibition*, 312 Md. 280, 307 (1988). The Court of Appeals, in *State v. Manck*, stated:

we recognized that by making possible the review of a potentially unreviewable question [writs such as mandamus and] prohibition aided the appellate process. These writs are used “to prevent disorder, from a failure of justice, where the law has established no specific remedy, and where in justice and good government there ought to be one. The power to issue prerogatory writs is necessarily incident to this Court, to preserve the usefulness of its appellate jurisdiction. If it were otherwise, cases might arise in which the appeal would be but as a shadow, pending which the substance

might be lost.

385 Md. 581, 587–88 (2005) (internal citations and quotations omitted).

In the present case, the trial court did not exceed its jurisdiction or authority but rather, acted in accordance with CP § 3-107(a), which requires a court to dismiss a case “unless the State petitions the court for extraordinary cause to extend the time” when “a defendant [is] found incompetent to stand trial[.]” It is undisputed that the State did not petition the court to extend the time for “extraordinary cause.” While it is not dispositive, it is also undisputed that the victim, through his representative was allowed to present his views on whether the facts demonstrated “extraordinary cause.” The court acknowledged those views but was required to comply with the plain language of the statute.

**APPEAL DISMISSED. JUDGMENT OF
THE CIRCUIT COURT FOR
WASHINGTON COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**

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I agree with the Court’s excellent analysis explaining how the current state of the law does not permit an avenue for appeal by the victim in this case. I write separately to point out what could be an unintended consequence in §3-107(a) of the Criminal Procedure Article (“CP”) that is revealed by the history of this case. The majority opinion highlights that section (a) of the Article indicates that the court “shall dismiss the charge against a defendant found incompetent to stand trial” unless “the State petitions the court for extraordinary cause to extend the time” for dismissal, which is usually five years for felonies pursuant to sub-section (a)(1).¹ The State clearly indicated that it was not seeking extraordinary cause.

¹ The full text of the 7-103 is:

a) Whether or not the defendant is confined and unless the State petitions the court for extraordinary cause to extend the time, the court shall dismiss the charge against a defendant found incompetent to stand trial under this subtitle:

(1) when charged with a felony or a crime of violence as defined under § 14-101 of the Criminal Law Article, after the lesser of the expiration of 5 years or the maximum sentence for the most serious offense charged; or

(2) when charged with an offense not covered under item (1) of this subsection, after the lesser of the expiration of 3 years or the maximum sentence for the most serious offense charged.

Notice and opportunity to be heard

(b) Whether or not the defendant is confined, if the court considers that resuming the criminal proceeding would be unjust because so much time has passed since the defendant was found incompetent to stand trial, the court shall dismiss the charge without prejudice. However, the court may not dismiss a charge without providing the State's Attorney and a victim or victim's representative who has requested notification under § 3-123(c) of this title advance notice and an opportunity to be heard.

**Notice to victim, victim’s representative, and Criminal Justice Information System
Central Repository**

(c) If charges are dismissed under this section, the court shall notify:

(1) the victim of the crime charged or the victim's representative who has requested notification under § 3-123(c) of this title; and

(2) the Criminal Justice Information System Central Repository.

It appears that the legislature may not have anticipated a circumstance such as this in which the State and the victim did not share the same views concerning dismissal of the charges. The statute goes on to give the State and the victim the same right to be heard prior to any dismissal. But in this unique circumstance, as the appellant indicates, it is “a hollow right.” Here, the victim’s words were incapable of influencing the Court’s decision as to dismissal since only the State can ask for extraordinary cause. In this case, the trial court, in its well-written opinion, seemed to suggest that the victim’s words may have influenced its decision had the statute permitted it.

While it is impossible to anticipate every circumstance that may arise when legislation is crafted, I write simply to say that *if* what occurred procedurally in this instance was not the intent of the legislature, the legislature may want to address this unintended consequence.

Md. Code Ann., Crim. Proc. § 3-107.