Circuit Court for Howard County
Case No. 13-C-16-106942

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 484

September Term, 2017

RUSSELL WARE

v.

STATE OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONAL SERVICES

Wright,
Arthur,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: August 3, 2018

This appeal arises from a declaratory action in the Circuit Court for Howard County, wherein appellant sought to avoid registering with the Maryland Sex Offender Registry. He argued his abusive sexual contact conviction by court-martial is not equivalent to Maryland's fourth-degree sex offense. He also argued that in classifying him as a tier I sex offender, appellee, the Department of Public Safety and Correctional Services, violated his right to procedural Due Process under the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights. The Department, in response, filed a Motion for Summary Judgment, arguing appellant's conviction, if committed in Maryland, would constitute a fourth-degree sex offense. The Department asserted no hearing was required to make this determination because no facts regarding the military offense were in dispute, and, furthermore, appellant was provided with all process to which he was due. The circuit court, thereafter, granted the Department's motion for summary judgment.

Appellant presents the following questions for our review:

1. Did the lower court err in granting summary judgment to appellee and in finding that the military offense to which Mr. Ware pled guilty is the equivalent of a fourth-degree sex offense in the State of Maryland, requiring registration on the Sex Offender Registry for a period of fifteen years as Tier I registrant?

2. Did the circuit court err in finding no violation of Mr. Ware's constitutional rights to due process?

For the reasons discussed below we affirm.

BACKGROUND

On November 20, 2014, appellant Russell Ware, a Sergeant in the United States Army stationed in Texas, was convicted by court-martial under Article 120 of the Uniform Code of Military Justice (UCMJ) of two counts abusive sexual contact involving a 17-year-

old girl. Appellant was ordered to a reduction in grade, in addition to confinement, and forfeiture of all pay and allowances for five months. He was released on March 3, 2015 and required to register as a sex offender for life.

In July of 2015, the Texas Department of Public Safety sent a Notice of Intent to Relocate to the Maryland Department of Public Safety and Correctional Services (the "Department"), regarding appellant's intention to move to Maryland. Appellant subsequently relocated to Howard County. Section 11-704(a)(4) of the Maryland Criminal Procedure Article requires "a sex offender who" enters Maryland to "resid[e] or to habitually live," who "is required to register [as a sex offender] by another jurisdiction" to register on the Maryland Sex Offender Registry ("MSOR"). The Department determined that Ware's military conviction was equivalent to a fourth-degree sex offense under § 3-308 of the Criminal Law Article, and ordered him to register as a tier I registrant for a period of fifteen years. He thereafter registered on July 28, 2015.

On March 14, 2016, appellant filed a Complaint for Declaratory Judgment in the Circuit Court for Howard County, arguing he should not be required to register on the MSOR because his military conviction is not equivalent to a fourth-degree sex offense. Appellant contended the military statute under which he was convicted includes consensual sexual contact, while § 3-308 requires the touching to be non-consensual. Further, he argued the Department's failure to provide a hearing before rendering its decision as to the equivalent offense violated his right to Due Process under the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights.

The Department filed a Motion for Summary Judgment, arguing appellant's military conviction was clearly equivalent to a fourth-degree sex offense because the "offensive touching" modality under which appellant was convicted necessarily means the touching was nonconsensual. The Department further asserted no hearing was necessary to make this determination, because the facts of his conviction were undisputed. Moreover, they contended, any Due Process to which he was due was provided by the court in his declaratory judgment proceeding.

On March 13, 2017, appellant filed a response and a Cross-Motion for Summary Judgment, which the Department thereafter opposed. On April 27, 2017, the circuit court granted the Department's motion.

This appeal followed.

DISCUSSION

I. The court did not err in granting summary judgment.

A motion for summary judgment shall be granted "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Maryland Rule 2-501(f). We, therefore, first determine whether there was any dispute as to any material fact, and then whether the trial court was legally correct. *Windesheim v. Larocca*, 443 Md. 312, 326 (2015) (internal citations omitted). "[A]n appellate court ordinarily may uphold the grant of summary judgment only on the grounds relied on by the trial court." *Ashton v. Brown*, 339 Md. 70, 80 (1995).

Appellant was charged with two charges or 'specifications' of abusive sexual contact, described as:

> Did, at or near San Antonio Texas, on or about 2 February 2014, touch through the clothing the hips of KPA by causing bodily harm to KPA, to wit: grabbing KPA's hips while moving his lips toward the face of KPA, with the intent to arouse and gratify the sexual desire of MASTER SERGEANT RUSSEL C. WARE.
>
> Did, at or near San Antonio Texas, on or about 2 February 2014, touch through the clothing the hips and buttocks of KPA and touch directly the face and head of KPA by causing bodily harm to KPA, to wit: grabbing KPA's hips, buttocks, and head, and kissing her on the cheek, with the intent to arouse and gratify the sexual desire of MASTER SERGEANT RUSSEL C. WARE.

On November 20, 2014, appellant was found guilty of Specification 1, and, with regard to Specification 2, the following was found:

> Guilty, excepting the word "buttocks" substituting therefore the word "buttock," excepting the words "face and," excepting the word "buttocks," substituting therefore the word "buttock," of the excepted words: not guilty; of the substituted words: guilty.

Upon conviction, appellant was required to register with the Texas Department of Public Safety on the Texas Sex Offender Registry for life.

When appellant moved to Maryland, he was ordered under Maryland law to register for a period of 15 years. Because the actions he pled guilty to were consensual, he argues, his registration requirement is illegal, as his conviction for abusive sexual contact, under Article 120 of Uniform Code of Military Justice, does not constitute a fourth-degree sex offense under Maryland Criminal Code § 3-308. According to appellant, Article 120 does not require the touching at issue to be nonconsensual, while § 3-308 does. The Department, conversely, argues the military court's finding that the touching caused 'bodily harm'

necessarily means the touching was nonconsensual because the statute defines 'bodily harm' as an 'offensive touching,' and if "the victim consented to having her buttock grabbed, the touching could not logically be offensive."

Article 120(d) of the Uniform Code of Military Justice provides "[a]ny person…who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and will be punished as a court-martial may direct." Article 120(b)(1)(B) states "[a]ny person…who…commits a sexual act upon another person by…causing bodily harm to that other person…is guilty of sexual assault." Article 120(g)(2)(B) defines "sexual contact" as "any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person," and such "[t]ouching may be accomplished by any party of the body." "Bodily harm," under subsection (g)(3), is defined as the "offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact."

Maryland Criminal Code § 3-308(b)(1), defining a fourth-degree sex offense, states "[a] person may not engage in" "sexual contact with another without the consent of the other." "Sexual contact" is defined in § 3-301(e)(1) as "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." A person convicted of a violation of § 3-308 is considered a tier I sex offender under § 11-701 of the Maryland Criminal Procedure Article, and is required to register on the MSOR for a term of 15 years under § 11-707(a)(4)(i).

Appellant argues that the definition of "bodily harm," as the "offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact," implies consensual acts are also included. We disagree. Black's Law Dictionary defines "offensive" as "[m]aking attack; aggressive;" "[o]f, relating to, or designed for attack;" "[u]npleasant or disagreeable to the senses; obnoxious;" "[c]ausing displeasure, anger, or resentment; esp., repugnant to the prevailing sense of what is decent or moral." *Offensive*, BLACK'S LAW DICTIONARY (10th ed. 2014). Merriam-Webster defines it similarly, including "relating to or characterized by attack;" "aggressive;" "giving painful or unpleasant sensations;" and "causing displeasure or resentment." *Offensive*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3rd ed. 2002).

Moreover, a look at opinions from military tribunals establishes that "in order to convict the appellant of [abusive sexual contact], the government was required to prove beyond a reasonable doubt that [the victim] did not consent to the…sexual contacts."[1] *United States v. Motsenbocker*, 2017 WL 3430569, *3 (N-M. Ct. Crim. App. 2017); *see also United States v. Gomez*, 2018 WL 1616633, *4 (N-M. Ct. Crim. App. 2018) ("*Bodily harm* is a defined term in the relevant punitive article, and it put the appellant on notice that the government would have to prove lack of consent."). In this case, appellant does not dispute his contact with KPA caused bodily harm. As defined, a consensual touching cannot logically be "offensive." The specification that "*any* nonconsensual sexual act or

[1] The Military Judges' Benchbook explains consent is an affirmative defense to abusive sexual contact under the bodily harm modality. *See Military Judges' Benchbook,* 3-45-6 Abusive Sexual Contact (Article 120), d. Definitions and Other Instructions, Note 6 at 519 (Jan. 2010).

nonconsensual sexual contact" can be 'offensive,' therefore, instead means that touching of any kind "by any part of the body" can cause bodily harm. That appellant was convicted of causing his victim "bodily harm," then, necessarily means the touching was non-consensual. Given the above, we find appellant's conviction under Article 120 is equivalent to § 3-308.

As such, the court did not err. There were no disputes of any material fact, and the court was legally correct in upholding the Department's determination of the equivalent statute.

II. The Department's determination did not violate appellant's Due Process Rights.

Appellant next argues the Department's determination of an equivalent statute, without providing a hearing, violated his Due Process rights under the U.S. Constitution and Maryland Declaration of Rights. "[T]here is no notice, no opportunity to be heard, and no opportunity for judicial review of the decision made by whomever is in charge of making such decisions." The Department, conversely, argues a hearing was not necessary, as the determination of an equivalent statute is an administrative function under § 11-713. Appellant's registration requirement arises out of his conviction, in which he was given a sufficient opportunity to be heard, and there were no disputed facts considered by the Department in its determination. Therefore, they contend, appellant's ability to file for judicial review after the Department's determination satisfies due process.

"The minimum requirements of procedural due process [under the Fourteenth Amendment to the U.S. Constitution and the Maryland Declaration of Rights] are 'notice

and [an] opportunity for hearing *appropriate to the nature of the case*." *State v. Cates*, 417 Md. 678, 698 (2011) (citing *Canaj, Inc. v. Baker & Div. Phase III*, 391 Md. 374, 424 (2006) (internal citations omitted)). We use the balancing test set forth by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to determine the procedures required:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such an interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

"Under the *Mathews* test, due process is flexible and calls only for such procedural protections as the particular situation demands." *Cates*, 417 Md. 698 (internal citation and quotation omitted). "We have also stated that 'due process does not necessarily mean judicial process.'" *Id.* at 699. "'It is sufficient if there is at some stage an opportunity to be heard suitable to the occasion and an opportunity for judicial review[.]'" *Id.* "Thus, we look at whether the amount of procedure provided by the agency, along with opportunities for judicial review, gave the parties proper notice and a fair opportunity to be heard." *Id.*

We find that there was. First, appellant was provided sufficient notice. He was initially notified he would be required to register with the authority of any municipality where he resided by the Texas Department of Public Safety. In the Notice of Release/Acknowledgement of Convicted Sex Offender Registration Requirements, he initialed his acknowledgment that he was "subject to registration requirements as a sex offender in any State or U.S. territory in which I reside, be employed, carry on a vocation,

or be a student." Shortly after his move, he was notified by the Department of its determination of his registration requirements.

Second, there was an appropriate opportunity for judicial review, and a fair opportunity to be heard. It was appellant's already existing requirement to register with another state that 'triggered' his requirement to register in Maryland, under Crim. Proc. § 11-704.[2] Appellant contends the private interests to be considered, under the *Mathews* test, include his "interest in privacy, in travel, and in child-rearing." These interests, however, have already been affected – he was, at all times since his release, required to register for life with the Texas Sex Offender Registry. The Department did not create a new requirement for appellant, but instead determined whether, and for how long, appellant's requirement must continue upon his move into the State. This also means there was a reduced risk of an erroneous deprivation, under *Mathews*.

Moreover, the determination of an equivalent statute is a legal conclusion that does not require a prior hearing. The Supreme Court, in *Connecticut Dep't of Pub. Safety v. Doe*, held Connecticut's sex offender registration statute had not violated the respondent's due process rights because that "law's requirements turn on an offender's conviction alone – a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest." 538 U.S. 1, 7 (2003) (internal citations omitted). The Court found because the fact respondent sought to prove was of no legal consequence, no due process hearing was

[2] Section 11-704(a)(4) of the Maryland Criminal Procedure Article requires "a sex offender who" enters Maryland to "resid[e] or to habitually live," who "is required to register [as a sex offender] by another jurisdiction" to register on the Maryland Sex Offender Registry.

necessary. *Id.* at 7. "Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme." *Id.* at 8. Appellant does not contest any of the facts of his conviction, and therefore no prior hearing was required.

Still, appellant argues there is an increased risk of an erroneous deprivation, given the Department's lack of stated procedures for these determinations. We disagree. Section 11-713 states the Department is "responsible for receiving…intrastate…communications relating to the registration of sex offenders; and" "keep[ing] a central registry of registrants." As the Court of Appeals has held, "legislative delegations of authority to administrative agencies will often include the authority to make 'significant discretionary policy determinations.'" *Board of Physician Quality Assur. v. Banks*, 354 Md. 59, 69 (1999) (quoting *Christ v. Dep't of Nat. Res.*, 335 Md. 427, 445 (1994)). Additionally, an agency's expertise in their own field is given wide discretion. *Id.* at 68-69 (internal quotations and citations omitted).

Courts have the authority to review the agency's final determinations to see if they are supported by sufficient evidence and legally correct, an opportunity which appellant has here availed himself of. *See Maryland Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005) (internal citations and quotations omitted). There is little probable value in additional or substitute procedural safeguards. In cases such as appellant's, the Department's determination merely transfers an existing requirement to register, thus, there is less need for review prior to registration. Although appellant delayed his declaratory

action, registrants who disagree with the Department's determination may file their action with the courts as soon as they are notified.

Conversely, the Government has a strong interest in ensuring that those who are required to register do so as quickly as possible after moving into the State. Maryland then, "like every other State, has responded…by enacting a statute designed to protect its communities from sex offenders." *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (internal citations omitted). Requiring the Department to delay every registration until after a judicial proceeding would create an undue delay for those individuals for whom we consider this necessary.

Given the above, we find the Department's determination without a prior hearing did not violate appellant's Due Process rights. We therefore affirm.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.