Circuit Court for Prince George's County
Case No. C-16-CV-23-000857

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0514

September Term, 2024

ANTONIO FOGG

v.

TOWN OF FOREST HEIGHTS POLICE DEPARTMENT, *ET AL.*

Beachley,
Ripken,
Robinson, Dennis M., Jr.
(Specially Assigned),

JJ.

Opinion by Robinson, J.

Filed: May 20, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms with Rule 1-104(a)(2)(B). Md. Rule 1-104.

Antonio Fogg filed a petition for a writ of mandamus pursuant to Maryland Rule 15-701 after the Town of Forest Heights Police Department ("FHPD") terminated his employment as a law enforcement officer with FHPD. After a trial regarding the merits of the petition for a writ of mandamus, the circuit court dismissed the petition and entered judgment in favor of FHPD and the Town of Forest Heights. Fogg presents two questions for our review, which we have rephrased slightly:[1]

I. Whether the circuit court erred in dismissing Fogg's petition for a writ of mandamus.

II. Whether the circuit court committed reversible error by not admitting into evidence exhibits that were the subject of a stipulation between the parties.

For the reasons explained below, we answer these questions in the negative and affirm.

BACKGROUND[2]

Fogg's employment as a law enforcement officer with FHPD began on August 5, 2021. It was his understanding that he would be on probation for one year, *i.e.*, until

[1] Fogg presented the questions for review as follows:

1. Did the Circuit Court err in its legal conclusion that Appellant was not entitled to relief pursuant to a Writ of Mandamus?

2. Did the Circuit Court err or abuse its discretion when the joint exhibits stipulated by the parties to be admitted into evidence were not admitted into evidence?

[2] References to the record are to the testimony provided by Fogg and the FHPD Chief of Police because, as the parties point out in their respective briefs, the stipulated exhibits were not admitted as evidence at trial.

August 5, 2022, but he acknowledged that he was aware at the time he was hired that the probationary period could be extended. The probationary period was extended in July 2022, making the probationary period effective for six months from August 5, 2022. Fogg was notified that Lieutenant Forster had recommended that his probation be extended. Fogg testified at trial that, after he was informed of the recommendation that his probation be extended, he had never received an update regarding that recommendation.

FHPD terminated Fogg's employment with FHPD on January 24, 2023, with a letter that included the following explanation:

> At-will and probationary employees and members other than non-probationary employees or officers under Maryland Code PS 3-101 et seq. may be disciplined and/or released from employment without adherence to any of the procedures set out in this policy and without notice or cause at any time.
>
> These individuals are not entitled to any rights under this policy. However, any of these individuals released for misconduct should be afforded an opportunity solely to clear their name through a liberty interest hearing which shall be limited to a single appearance before the chief of police or the authorized designee.

According to FHPD Chief of Police Anthony Rease, it was standard practice for FHPD to have a probationary period for all new law enforcement officers that typically lasts twelve months. FHPD General Order 2016-1, Chapter 2, Section 3 governs probationary status for new employees and provides:

> The time period, conditions, and rules of sworn and civilian personnel serving in a probationary status will be in accordance with [that] established by the town policy and

> agreed to or as amended by the chief in accordance with the needs of the Forest Heights Police Department and officer safety circumstances.
>
> Two, sworn personnel will remain on probation until successfully completing 12 consecutive months of full-time employment with the Forest Heights Police Department and authorized by the Forest Heights Police Department Chief of Police as having successfully completed the probationary period.

The FHPD Chief of Police extended Fogg's probationary period based on a recommendation from a lieutenant with the FHPD, who expressed concerns about tardiness and absences. The FHPD Chief of Police approved the extension of Fogg's probationary status in writing. Although the memorandum requesting approval of the extension of Fogg's probationary status was dated July 25, 2022, the FHPD Chief of Police's signature was dated July 25, 2023. Notably, the FHPD Chief of Police described this as a "mistake" and/or "typographical error." The act of extending a probationary period of a FHPD police officer is permitted under section 1010.14 of the FHPD Policy Manual, Policy 1010, Personnel Complaints, which provides:

> At will and probationary employees and members of other than non-probationary employees or officers under Maryland Code PS 3-101 may be disciplined and/or released from employment without adherence to any of the procedures set out in this policy and without notice or cause at any time.
>
> These individuals are not entitled to any rights of this, under this policy; however, any of these individuals released for misconduct should be afforded an opportunity solely to clear their name through a liberty interest hearing which shall be limited to a single appearance before the chief of police or the authorized designee.

> Any probationary period may be extended at the discretion of the chief of police in cases where the individual has been absent for more than a week or when additional time to review the individual is considered to be appropriate.

On January 24, 2023, Fogg received a letter notifying him that "[his] employment with the Town of Forest Heights Police Department is hereby terminated effective Tuesday, January 24, 2023, at 1700 hours." The notice further provided: "You are hereby terminated in accordance with General Order Policy 1010.14 Probationary Employees and Other Members," and that "[y]ou are hereby terminated for habitual violations of the time & attendance policies during your extended probationary period." Fogg did not file a post-termination grievance or request a hearing before the Chief of Police.

On February 24, 2023, Fogg filed a verified petition for writ of mandamus. The circuit court held a trial regarding the petition on April 10, 2024. At the conclusion of the trial, the circuit court stated: "There were no exhibits admitted into evidence. They were marked, but no one admitted any evidence. So I don't have any exhibits or evidence to evaluate." The circuit court proceeded to state:

> [R]egardless of the evidence, it really wouldn't have mattered because of the witness testimony consideration. And had the [Appellees] asked me to dismiss it after [Fogg's] case, I would have, because the credibility of [Fogg] is just unbelievable to me." So when I decide, based on the evidence, really, based on [Fogg's] testimony alone, [Appellees] really had to put no evidence. I believe that the evidence is evenly balanced on the issue. Which, by the way, I don't believe that somebody remembered, it just doesn't matter at this point that somebody believed it was 2023 in the middle of June [2022]. I don't believe that. I believe that [Appellees] figured it out and tried to fix it. Unfortunately, that's of no moment, because I believe the evidence is evenly

> balanced on the issue. That is, both were not credible. And so my finding on the issue must be against the party who has the burden of proving it. That would be [Fogg]. The case is dismissed.

The circuit court entered judgment in favor of FHPD and the Town of Forest Heights. This appeal followed.

STANDARD OF REVIEW

Mandamus is an "extraordinary remedy," and is not granted as a matter of course, but only in the "sound legal discretion" of the trial court. *Ipes v. Bd. of Fire Comm'rs of Balt.*, 224 Md. 180, 183 (1961). We will not disturb the dismissal of a petition for a writ of mandamus "unless there has been a clear abuse of discretion on the part of the trial court." *Goodwich v. Nolan*, 102 Md. App. 499, 506-07 (1994), *aff'd*, 343 Md. 130 (1996). A trial court abuses its discretion "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Alexis v. State*, 437 Md. 457, 478 (2014) (internal quotation marks omitted). A circuit court's legal conclusions are reviewed *de novo*. *Romero v. Perez*, 463 Md. 182, 196 (2019).

The admissibility of evidence is committed to the sound discretion of the trial court, and therefore reviewed under an abuse of discretion standard. *See Perry v. Asphalt & Concrete Svcs., Inc.*, 447 Md. 31, 48 (2016).

DISCUSSION

Fogg raises two arguments on appeal. First, he argues that the circuit court committed reversible error by dismissing his petition for a writ of mandamus to require

FHPD to reinstate his employment with the department. Second, he argues that the trial court abused its discretion by not considering documentary evidence that counsel perceived to be admitted pursuant to a stipulation between the parties. For the reasons that follow, we conclude that the circuit court did not err or abuse its discretion and affirm the circuit court.

I. The circuit court did not err or abuse its discretion by dismissing Fogg's petition for a writ of mandamus.

"The fundamental purpose of a writ of mandamus is 'to compel inferior tribunals, public officials, or administrative agencies to perform their function, or perform some particular duty imposed upon them which in its nature is imperative and to the performance of which duty the party applying for the writ has a clear right.'" *Baltimore County v. Baltimore Cnty. Fraternal Order of Police Lodge No. 4*, 439 Md. 547, 569–70 (2014)(quoting *Town of LaPlata v. Faison-Rosewick, LLC*, 434 Md. 496, 511 (2013)). "[A] writ of mandamus will not be granted where the petitioner has a specific and adequate legal remedy to meet the justice of the particular case and where the law affords [another] adequate remedy." *Philip Morris v. Angeletti*, 358 Md. 689, 712 (2000) (internal quotations omitted). The Supreme Court of Maryland has explained that a writ of mandamus is "appropriate where the relief sought involves the traditional enforcement of a ministerial act (a legal duty) by recalcitrant public officials, but not where there is any vestige of discretion in the agency action or decision." *Baltimore County Fraternal Order of Police Lodge No. 4*, 439 Md. at 570 (quoting *Faison-Rosewick*, 434 Md. at 511).

In *Baltimore County Fraternal Order of Police Lodge No. 4*, the Supreme Court of Maryland held that, in order to prevail, a party seeking mandamus must satisfy two conditions:

> First, the party against whom enforcement is sought must have an imperative, "ministerial" duty to do as sought to be compelled, . . . *i.e.*, a duty prescribed by law[.] Therefore, mandamus should not issue ordinarily when the act sought to be compelled of the official or administrative agency is discretionary in nature. [Second], the party seeking enforcement of that duty must have a clear entitlement to have the duty performed. The writ should not be issued where the right to the performance of the duty is doubtful. Where the obligation to perform some particular duty is unclear or involves the exercise of any 'vestige of discretion,' or where the party seeking enforcement of the duty does not have a clear right to the performance of the duty it seeks to compel, the writ of mandamus will not be granted.

Id. at 571-72 (internal quotations and citations omitted).

To be entitled to a writ of mandamus under Maryland law, Fogg had to prove: 1) a public official's clear duty to perform an act, 2) a clear right to have the act performed, and 3) that no adequate remedy exists by which his rights can be resolved. *See Prince George's County v. Carusillo*, 52 Md. App. 44 (1982). There was no clear duty for any public official to perform an act related to Fogg's employment with FHPD.

Whether Fogg was a probationary employee at the time FHPD terminated his employment is critical to our determination regarding whether the trial court properly dismissed Fogg's petition for a writ of mandamus. According to Fogg, his employment was no longer in a probationary status when FHPD terminated his employment, which would mean that he would have been subject to additional protections based on FHPD

employment policies and applicable law. FHPD and the Town of Forest Heights argue that Fogg was still a probationary employee when his employment terminated. In our view, Fogg was still on probation when FHPD terminated his employment as a law enforcement officer.

FHPD General Order No. 2016-1 provides: "Sworn Personnel will remain on probation **until successfully completing 12 consecutive months of full time employment with the FHPD and authorized by the FHPD Chief of Police as having successfully completed the probation period.**" (Emphasis added.) According to this policy, an employee, like Fogg, is essentially on probation until he is released from probation by the FHPD Chief of Police. In a document dated July 25, 2022, a lieutenant with FHPD issued a memorandum to the FHPD Chief of Police, in which he recommended that Fogg's probationary period be extended for an additional six months. Fogg was notified that Lieutenant Forster had recommended that his probation be extended. Although there are some questions surrounding the timing and circumstances related to the FHPD Chief of Police approving the extension of Fogg's probationary period, including an incorrect date characterized by the FHPD Chief of Police as a "mistake" and/or "typographical error," those issues are irrelevant to our analysis.

Fogg was on probation until released from probation by the FHPD Chief of Police regardless of whether twelve months passed and regardless of whether he was formally notified of the extension of the probationary period because, according to FHPD's applicable policy regarding probationary status, an employee, like Fogg, is effectively on

probation until "authorized by the FHPD Chief of Police as having successfully completed the probation period." According to FHPD Policy 1010, Section 1010.14, "[a]t-will and probationary employees and members other than non-probationary employees or officers under Md. Code PS § 3-101 et seq. may be disciplined and/or released from employment without adherence to any of the procedures set out in this policy, and without notice or cause at any time." Even if Fogg otherwise met the criteria of a "police officer" as defined by § 3-101(h) of the Public Safety Article ("PS"), his employment was subject to the probationary period as imposed by the hiring agency. *See* COMAR Reg. 12.04.01.01(19) (providing in relevant part that "'Probationary period' does not relate to or restrict a probationary period that may be imposed by the hiring agency.").

At the time Fogg's employment with FHPD was terminated, he was a probationary employee and was not entitled to mandamus relief. There was no duty on the part of any official to perform an act with respect to Fogg's employment with FHPD. There is no ministerial action to compel any official of the FHPD or Town of Forest Heights to take with respect to Fogg's employment with FHPD. Any action that FHPD took was discretionary action that is not a proper subject of mandamus relief. The circuit court did not err in dismissing Fogg's petition for a writ of mandamus.

II. The circuit court did not err by not admitting into evidence exhibits that were the subject of a stipulation between the parties.

At the end of the trial, the circuit court stated:

> I'm also taking into consideration what constitutes evidence. In making my decision, you must consider the evidence in this case, that is testimony from the witness stand and physical evidence or exhibits admitted into evidence. There were no exhibits admitted into evidence. They were marked, but no one admitted any evidence. So I don't have any exhibits or evidence to evaluate.

Based on their respective briefs, Fogg, FHPD and the Town of Forest Heights seem to have been under the impression that certain stipulated exhibits had been admitted into evidence until the circuit court stated that no exhibits had been admitted. On one hand, we recognize that the record does not reflect a formal motion to admit the stipulated exhibits into evidence. On the other hand, we recognize that it was not unreasonable for counsel to believe that the stipulated exhibits had been admitted as evidence based on these exchanges:

> THE COURT: All right. The two parties can have a seat. Counsel, I understood you had a stipulation?
>
> [APPELLANT'S COUNSEL]: We were actually just trying to finalize that for Your Honor.
>
> THE COURT: Oh, okay.
>
> [APPELLANT'S COUNSEL]: I got to it eventually.
>
> THE COURT: All right, I'll take a moment.
>
> [APPELLANT'S COUNSEL]: Thank you.
>
> THE COURT: Okay, you ready?

[APPELLEE'S COUNSEL]: Your Honor, if I may. We have a total of 10, it's really the 10 exhibits, there's a 4A and 4B. So it's 9 really 11. And then we stipulated an employee handbook –

THE COURT: Okay.

[APPELLEE'S COUNSEL]: -- which will essentially be 12. These are 12 marked –

THE COURT: I don't know if it's going to be 12. It's what she says it's going to be.

[APPELLEE'S COUNSEL]: That's what she said?

THE COURT: Yeah, we don't get to decide is what the Clerk says what the numbers are.

[APPELLEE'S COUNSEL]: Okay, so we have 12.

DEPUTY CLERK: Get to an A and B, so you're correct on that part. Yeah.

[APPELLEE'S COUNSEL]: Okay. So we have 12, including this one that was put in last minute. And 1 have a copy that I would like to submit to the Clerk. And each of them is marked with Defendant 1, Defendant 2, so on, except this last one has no sticker or marker at all.

DEPUTY CLERK: All right. So (indiscernible 9:45:18) 2 joint exhibits?

[APPELLEE'S COUNSEL]: Yes –

DEPUTY CLERK: What I'll do is I will put my own stickers on top of it for you –

[APPELLEE'S COUNSEL]: Perfect.

DEPUTY CLERK: and we'll just let it –

> [APPELLANT'S COUNSEL]: Thank you very much.
>
> DEPUTY CLERK: If you want to hand them over, I'll take care of that right now.
>
> [APPELLEE'S COUNSEL]: Right.
>
> [APPELLANT'S COUNSEL]: Okay, here are the 12.
>
> THE COURT: Okay. Is there anything else preliminarily?
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> * * *
>
> [APPELLEE'S COUNSEL]: And so that will come out in testimony as well and hopefully this case or this hearing will go, trial will go quickly because we have these marked pieces of evidence in the record. So that's all I have for right now, and I'll yield to opposing counsel, Your Honor.
>
> THE COURT: All right, thank you. First witness?

"It is frequently stated that the issue of whether a particular item of evidence should be admitted or excluded 'is committed to the considerable and sound discretion of the trial court,' and that the 'abuse of discretion' standard of review is applicable to 'the trial court's determination of relevancy.'" *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594, 619–620 (2011) (quoting *Merzbacher v. State,* 346 Md. 391, 404–05 (1997)). Indeed, as a practical matter, trial judges are the only judges who can admit evidence. Regardless of whether counsel may have been justified in presuming that the circuit court had at least implicitly admitted the stipulated documents into evidence, the circuit court did not err with respect to the admissibility of the proposed exhibits because there was no motion to admit the evidence.

Although the Maryland Rules do not spell out the process for admitting evidence, there are some rules that suggest the process includes evidence offered for admission by a

circuit court. *See, e.g.* Maryland Rule 2-516 ("All exhibits marked for identification at a hearing or trial, whether or not offered in evidence and, if offered, whether or not admitted, shall form part of the record."); Maryland Rule 2-517(a) ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent.").

At the outset of the trial, the circuit court acknowledged an understanding that counsel had a stipulation to present. Counsel then proceeded to explain that the parties had joint exhibits. There was a related discussion involving the courtroom clerk about the process of marking the exhibits for identification. Appellee's counsel also referred to the proposed stipulated exhibits as "these marked pieces of evidence in the record," but "marked" does not mean "admitted." Regardless of whether counsel at trial understood that the proposed stipulated exhibits had been admitted into evidence, they were not technically admitted because there was no motion or a similar request for the circuit court to admit the exhibits into evidence.

Even if it was an error for the circuit court not to consider the proposed exhibits as admitted into evidence, it was harmless error. "It has long been the policy in this State that [appellate courts] will not reverse a lower court judgment if the error is harmless." *Barksdale v. Wilkowsky,* 419 Md. 649, 657 (2011) (quoting *Flores v. Bell,* 398 Md. 27, 33 (2007)). "The burden is on the complaining party to show prejudice as well as error." *Flores,* 398 Md. at 33. A verdict will not be overturned unless the error was likely to have affected the verdict below, and "an error that does not affect

the outcome of the case is harmless error." *Id*. The complaining party must demonstrate that the prejudice was "likely" or "substantial." *Barksdale,* 419 Md. at 662. It is well established that "an error in evidence is harmless if identical evidence is properly admitted." *Id.* at 663.

In this case, the testimony presented at the trial was sufficient to support the circuit court's denial of Fogg's petition for a writ of mandamus, specifically the uncontroverted testimony by the FHPD regarding the employment policies that are central to this appeal:

> [APPELLEE'S COUNSEL]: I just handed you a document marked Joint, what's it say, Chief?
>
> [FHPD CHIEF OF POLICE]: It says Exhibit Joint 1.
>
> [APPELLEE'S COUNSEL]: Joint 1. And can you describe for the Court what that document is?
>
> [FHPD CHIEF OF POLICE]: This is the Forest Heights Department Policies and Procedural Manual under General Order 2016-1, Chapter 2, Section 3.
>
> [APPELLEE'S COUNSEL]: And does this particular general order govern probation?
>
> [FHPD CHIEF OF POLICE]: Yes.
>
> [APPELLEE'S COUNSEL]: And what does it, just for the Court's indulgence, what does it say about probation?
>
> [FHPD CHIEF OF POLICE]: It says, 'The time period, conditions, and rules of sworn and civilian personnel serving in a probationary status will be in accordance with [that] established by the town policy and agreed to or as amended by the chief in accordance with the needs of the Forest Heights Police Department and officer safety circumstances.[']. 'Two, sworn personnel will remain on probation until successfully completing 12 consecutive

> months of full-time employment with the Forest Heights Police Department and authorized by the Forest Heights Police Department Chief of Police as having successfully completed the probationary period.'
>
> [APPELLEE'S COUNSEL]: And, Chief, is this general order referenced in the recitals of the appointed [indiscernible] resolution for Officer Fogg?
>
> [FHPD CHIEF OF POLICE]: Yes.

Even if the court erroneously concluded that the stipulated exhibits had been admitted, the error was harmless because identical evidence was properly admitted.

CONCLUSION

The relevant FHPD employment policies essentially provide that an employee is on probationary status until the FHPD Chief of Police authorizes the release of the employee from probation. That did not happen here. Fogg is not entitled to mandamus relief because there is no ministerial action to compel a public official to take with respect to the termination of a probationary employee's employment with FHPD. Although we conclude that the circuit court did not err by not admitting the proposed stipulated exhibits into evidence, even if it was error, it was harmless because there was otherwise sufficient evidence to support the circuit court's dismissal of Fogg's petition for a writ of mandamus. For these reasons, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.