Circuit Court for Howard County
Case No. 13-K-17-057624, 13-K-17-057671

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1468

September Term, 2017

STATE OF MARYLAND

v.

DENNIS TURNBAUGH

Berger,
Arthur,
Shaw Geter,

JJ.

Opinion by Berger, J.

Filed: July 6, 2018

This appeal arises from a criminal proceeding in the Circuit Court for Howard County. Dennis Turnbaugh ("Turnbaugh"), appellee, was charged with arson, malicious burning, reckless endangerment, and malicious destruction of property of value greater than $1000. Turnbaugh pleaded not criminally responsible to all charges, and the circuit court scheduled a hearing to determine whether Turnbaugh was competent to stand trial.

On August 10, 2017, Turnbaugh's counsel asked that Turnbaugh be moved from the Howard County Detention Center ("HCDC") to a medical facility pending his competency hearing. Turnbaugh's counsel stated that Turnbaugh's mental condition had deteriorated at HCDC and that Turnbaugh was harming himself, threatening suicide, and refusing to meet with his own expert. The circuit court, finding that Turnbaugh was a danger to himself, remanded him to the custody of the Maryland Department of Health and Mental Hygiene ("the Department"), appellant, pending his competency hearing.

On appeal, the Department raises the following question for our review:

> Whether the circuit court exceeded its statutory authority in remanding Turnbaugh to the custody of the Department pending his competency hearing.

For the reasons stated herein, we dismiss the appeal for mootness.

FACTUAL AND PROCEDURAL BACKGROUND

On February 23, 2017, Turnbaugh was charged in two separate cases with arson, malicious burning, reckless endangerment, and malicious destruction of property of value greater than $1000. He pleaded not criminally responsible to all charges.

On March 15, 2017, the circuit court ordered the Department to examine Turnbaugh for criminal responsibility and competency pursuant to Md. Code (2001, 2008 Repl. Vol.),

§ 3-111(a) of the Criminal Procedure Article ("Crim. Proc.")[1] and report its opinion within sixty days. Turnbaugh was transported from HCDC to meet with Dr. Samson Gurmu ("Dr. Gurmu") at Clifton T. Perkins Hospital Center ("Perkins Hospital") on April 12, 2017. Thereafter, the Department requested a thirty-day extension in order to obtain Turnbaugh's medical records. The circuit court granted the extension. On May 22, 2017, Dr. Gurmu notified Turnbaugh's counsel that he was still having trouble gathering Turnbaugh's medical records.

Dr. Gurmu examined Turnbaugh again on May 26, 2017, and a third time on June 7, 2017. Each time, Turnbaugh was transported to Perkins Hospital for the examination and subsequently returned to HCDC. The Department submitted its report to the circuit court on June 20, 2017, five days after the deadline. In its report, the Department stated that Turnbaugh was competent to stand trial and criminally responsible for his actions.

The circuit court scheduled a competency hearing for August 4, 2017. Defense counsel asked for a postponement because Turnbaugh had twice refused to meet with the defense's expert. In response, the circuit court moved the hearing date to August 10, 2017. Defense counsel subsequently subpoenaed Dr. Erik Roskes ("Dr. Roskes"), a Department employee, to testify at the competency hearing. Dr. Roskes was unavailable, however, and the Department filed a motion to quash the subpoena or postpone the hearing.

[1] Under Crim. Proc. § 3-111(a), "[i]f a defendant has entered a plea of not criminally responsible, the court may order the Health Department to examine the defendant to determine whether the defendant was not criminally responsible under § 3-109 of this title and whether the defendant is competent to stand trial."

Counsel for Turnbaugh, the State, and the Department appeared before the circuit court on August 10, 2017. Turnbaugh's counsel asked the court to postpone the competency hearing once more so that Turnbaugh could be evaluated by the defense's expert. Turnbaugh's counsel also requested that Turnbaugh be moved to Perkins Hospital pending his competency hearing. The basis for this request was that Turnbaugh had deteriorated during his confinement at HCDC:

> He's being segregated. They said he's not to be put in general population, because of some of the issues that we will address in the hearing to follow that was scheduled today.
>
> That he typically has to be escorted by two guards. That he has self-injured himself by banging his head against the wall and picking broken sores on his arm. And that based on these medical records, they do not have optimism that this behavior will not repeat itself as he has done many times. And he has threatened to self-harm and commit suicide to a family [sic] and to the detention center.

The State agreed with Turnbaugh's counsel, noting that "there's just been a roadblock every possible opportunity to have Mr. Turnbaugh's situation dealt with in an appropriate manner." The Department argued that it could not guarantee admittance to a medical facility within the time frame requested by Turnbaugh's counsel.

The circuit court granted the parties' request to postpone the competency hearing. A new hearing was scheduled for September 28, 2017. The circuit court agreed that Turnbaugh should be moved to a medical facility:

> Mr. Turnbaugh needs to be in a hospital setting. He is decompensating while in detention for over the past six months. [. . .] He is in solitary confinement. He is injuring himself. He is banging his head against the wall. He is, I

> believe he said picking at wounds. He has made threats of suicide. He has refused to take medications.
>
> This court has found and appointed a guardian and he is required to be medicated. And if he refuses medication, he can be forcibly medicated under the guardianship, but we don't have that in his current situation at the detention center. The court does find it's in his best interest to be in a -- what I would say, hospital setting, in the case -- in the custody of [the Department] pending the competency hearing where he can be properly medicated. And they will also be able to assist in dealing with his counsel and any other experts or witness that they need to interview.

The circuit court ordered that Turnbaugh "be placed in a facility that is authorized and approved by [the Department] within seven days of today."

The circuit court entered a written order on August 14, 2017 remanding Turnbaugh to the custody of the Department. The Department moved to vacate the order on the grounds that the circuit court had exceeded its statutory authority. The circuit court denied the motion, and the Department timely appealed.

DISCUSSION

The Department has asked us to determine whether the circuit court exceeded its authority under Crim. Proc. § 3-111(b) in ordering that Turnbaugh be committed to a State hospital pending his competency hearing.[2] We will not address this issue, however, because the Department's appeal is moot.

[2] Crim. Proc. § 3-111(b)(2)(ii) provides that "[a]fter the examination, unless the Health Department retains the defendant, a court unit shall return the defendant to the place of confinement." In the Department's view, this provision "gives the Department the authority to decide whether it is necessary for the Department to retain custody of the defendant until a hearing and decision on competency or criminal responsibility."

A case is moot if "there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide." *Powell v. Md. Dep't of Health*, 455 Md. 520, 539 (2017) (quoting *Mercy Hosp., Inc. v. Jackson*, 306 Md. 556, 561 (1986)); *accord State v. Dixon*, 230 Md. App. 273, 277 (2016). Appellate courts "do not sit to give opinions on abstract propositions or moot questions, and appeals which present nothing else for decision are dismissed as a matter of course." *La Valle v. La Valle*, 432 Md. 343, 351-52 (2013) (citing *State v. Ficker*, 266 Md. 500, 506-07 (1972)); *see also Dixon*, *supra*, 230 Md. App. at 277 ("As a general rule, courts do not entertain moot controversies."). Only in rare instances will a reviewing court address the merits of a moot case. *See Green v. Nassif*, 401 Md. 649, 655 (2007) ("This Court, on rare occasions, has decided moot cases.").

In this case, the Department seeks review of the circuit court's August 14, 2017 order remanding Turnbaugh to the custody of the Department pending his competency hearing. On September 28, 2017, however, the circuit court held a competency hearing and found that Turnbaugh was incompetent to stand trial because of a mental disorder. The circuit court further found that Turnbaugh was a danger to himself and/or the person or property of another, and Turnbaugh was committed to the custody of the Department until further order or ruling. The Department did not appeal the September 28, 2017 order and has not requested a stay in the underlying proceedings. Because the competency hearing has taken place, the August 14, 2017 order is no longer in effect, and the underlying controversy has ended. Turnbaugh is currently being held by the Department pursuant to a separate court order, which the Department does not challenge here. Assuming *arguendo*

that the circuit court exceeded its statutory authority, there is no effective remedy that this Court can provide. The appeal, therefore, is clearly moot.

The Department argues that we should address the merits in this case notwithstanding its mootness because "[t]he question presented in this appeal is capable of repetition yet evading review and addresses an important issue regarding the duties of government." We disagree.

An appellate court may address the merits of a moot case if the controversy "is capable of repetition but evading review." *Dixon, supra*, 230 Md. App. at 277 (quoting *Sanchez v. Potomac Abatement, Inc.*, 198 Md. App. 436, 443 (2011)); *see also Suter v. Stuckey*, 402 Md. 211, 220 (2007) ("If a case implicates a matter of important public policy and is likely to recur but evade review, this court may consider the merits of a moot case.") (citing *Coburn v. Coburn*, 342 Md. 244, 250 (1996)). Additionally, we may "express our views on the merits of a moot case to prevent harm to the public interest." *Dixon, supra*, 230 Md. App. at 277 (quoting *Sanchez v. Potomac Abatement, Inc.*, 198 Md. App. 436, 443 (2011)).

In the present case, the record shows that the circuit court's decision was grounded in the specific details of a factual situation that is unlikely to recur. The Department concluded in its report, submitted on June 20, 2017, that Turnbaugh was competent. By the August 10, 2017 hearing, however, Turnbaugh's mental condition had deteriorated to such a degree that he was banging his head against the wall and threatening suicide. More importantly, Turnbaugh was no longer cooperating with his counsel:

> One of the issues in the case is whether or not my client is able to assist counsel. Because two attempts to have the expert visit Mr. Turnbaugh were declined, it was postponed to this day.

In order to give the defense's expert more time to evaluate Turnbaugh, the circuit court decided to postpone the competency hearing:

> It's clearly in Mr. Turnbaugh's best interest for this court to further move this matter out based on the fact that he has not been able to be evaluated by his own expert for competency.

Notably, the present appeal is only before us because the competency hearing was postponed. While it is not uncommon for a competent individual "to later lapse back into incompetence," *Powell*, *supra*, 455 Md. at 540, it is unusual that Turnbaugh deteriorated so rapidly in a span of two months, and that his illness was so disruptive to his representation that the competency hearing had to be postponed.

Critically, Turnbaugh's counsel, the trial judge, and the prosecutor all agreed that Turnbaugh had deteriorated at HCDC. The prosecutor opined at the hearing that Turnbaugh had "been allowed to decompensate at the jail." The trial judge, who had previously dealt with Turnbaugh in a guardianship proceeding, noted that Turnbaugh was visibly changed:

> And he even looks like a different person than I dealt with in the guardianship. He didn't have all that facial hair before. [. . .] So I can just see this is a different man. So he from my perspective from what I can see is decompensating.

The Department's counsel did not attempt to argue at the hearing that Turnbaugh had not deteriorated; she merely argued that the Department could not guarantee a bed for Turnbaugh within seven days.

The situation that the circuit court faced on August 10, 2017 was especially urgent because of prior delays in Turnbaugh's case. The circuit court had originally ordered the Department to evaluate Turnbaugh within sixty days of March 15, 2017. At the Department's request, the court extended the deadline to June 15, 2017. The Department did not deliver its report to the court, however, until June 20, 2017. At the August 10, 2017 hearing, the trial judge also noted that "the court was closed for mechanical issues and that pushed things forward a little bit." As a result of these delays, the trial judge found that Turnbaugh had been "decompensating while in detention for over the past six months."

The trial judge was confronted, therefore, with a defendant who had rapidly deteriorated after a series of unforeseen delays, and whose committal was supported by both the prosecutor and the defense counsel. In addition, the trial judge noted that Turnbaugh was already subject to a guardianship and could be forcibly medicated:

> Because we have a situation where I know Mr. Turnbaugh, as I said, from the guardianship situation where he needs to be medicated and he can be forcibly medicated in the guardianship setting. But we now have him in a detention center where he has the option and he's choosing not to take his medication, which is probably adding to his decompensation.

The trial judge was presumably concerned that Turnbaugh could not be forcibly medicated prior to his competency hearing without a guardianship. The trial judge reiterated this point at the end of the hearing:

> This court has found and appointed a guardian and he is required to be medicated. And if he refuses medication, he can be forcibly medicated under the guardianship, but we don't have that in his current situation at the detention center.

In remanding Turnbaugh to the custody of the HCDC, the circuit court was, in essence, leveraging Turnbaugh's guardianship to facilitate cooperation between Turnbaugh and his counsel:

> The court does find it's in his best interest to be in a -- what I would say, hospital setting, in the case -- in the custody of [the Department] pending the competency hearing where he can be properly medicated. And [the Department] will also be able to assist in dealing with his counsel and any other experts or witness that they need to interview.

Because the circuit court's decision was highly fact-specific and tailored to resolve an unusual and urgent situation, the Department's appeal does not present a recurring issue that would compel us to depart from the general rule against deciding moot cases.

The Department argues that we should address the merits of their appeal because this Court found that a similar issue was "capable of repetition, yet evading review" in *State v. Dixon*, 230 Md. App. 273 (2016). In *Dixon*, we considered whether a trial court could order the immediate transportation of a defendant to a State medical facility pending examination for competency and criminal responsibility. *Id.* at 277. Although the appeal was moot, we chose to address the merits because "it is most unlikely that appellate review would ever be accomplished before a court-ordered examination was completed." *Id.* at 277-78.

The underlying facts in *Dixon* were typical for a criminal case involving competency issues. The circuit court ordered the Department to examine the defendant for criminal responsibility and competency to stand trial. *Dixon*, *supra*, 230 Md. App. at 279. Before the examination could take place, the circuit court found that the defendant would

be endangered by confinement in a correctional facility. *Id.* at 280. Pursuant to Crim. Proc. § 3-111, the court ordered that the defendant be held at Perkins Hospital.[3] *Id.* Indeed, we found it necessary to delineate the parameters of the circuit court's authority in *Dixon* precisely because the underlying situation was so common. *See id.* at 278 n.2 (noting that "the ability of the Department to promptly admit criminal defendants to hospitals for evaluation and treatment has recently been the focus of hearings in several circuit courts and the Maryland General Assembly, multiple media articles and commentaries, as well as the basis for a lawsuit filed against the Department in June of 2016").

In the present case, by contrast, the record shows that the circuit court crafted an unorthodox solution to an unusual problem -- namely, a defendant who had visibly deteriorated after a series of unforeseen delays, who could be forcibly medicated under a guardianship, and whose committal was supported by both the prosecutor and the defense counsel. The confluence of events leading to this appeal was *sui generis* and not "likely to recur with frequency." *Suter*, *supra*, 402 Md. at 220 (quoting *Lloyd v. Supervisors of*

[3] Crim. Proc. § 3-111(b)(2) provides the following:

> If a defendant is to be held in custody for examination under this section, the defendant shall be confined in a correctional facility until the Health Department can do the examination. If the court finds it appropriate for the health or safety of the defendant, the court may order confinement:
>
> (i) in a medical wing or other isolated and secure unit of the correctional facility; or
>
> (ii) if a medical wing or other secure unit is not available, in a medical facility that the Secretary of the Health Department designates as appropriate.

Elections, 206 Md. 36, 43 (1954)). For the same reason, we cannot say that the public interest "clearly will be hurt if the question is not immediately decided." *Id.* We, therefore, dismiss the appeal as moot.

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.