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When Discretionary Agency Action is Not So Discretionary

Office of the Public Defender v. State

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My view of administrative law can basically be boiled down to the following exchange between nine-year-old Cole Sear and his psychiatrist, Malcolm Crowe, in the Academy Award winning movie, "The Sixth Sense":

Cole: "I see dead people."

Malcolm: "In your dreams?"

Cole: Shakes his head no.

Malcolm: "While you're awake?"

Cole: Nods yes.

Malcolm: "Dead people, like, in graves? In coffins?"

Cole: "Walking around like regular people. They don't see each other. They only see what they want to see. They don't know they're dead."

Malcolm: "How often do you see them?"

Cole: "All the time. They're everywhere."

That last line essentially sums up the way I feel about administrative law issues: I see them all the time because they're everywhere. One of the most recent sightings occurred in a case I handled which was decided last year by the Court of Appeals, *Office of the Public Defender v. State*, 413 Md. 411 (2010). The 4-3 majority did not completely eliminate the possibility that I was seeing ghosts, deeming one aspect of my administrative law sighting and approach to the case "by no means a perfect analogy" and only "somewhat analogous." *Id.* at 434. But I know better. Not only am I not a little bit crazy, but, like Cole Sear, I'm not crazy at all, at least for the limited purpose of this article. Why, you ask? Because core principles of administrative law lay at the heart of the holding in this case that a Maryland trial court may override the decision of the Office of the Public Defender and appoint an attorney from the Office

when it has erroneously denied representation for an indigent individual.

I guess it's too late to announce a spoiler alert at this point, but before giving away the entire story, some plot development is necessary to understand fully the role that administrative law played in the Court of Appeals' somewhat novel decision announcing the circumstances in which an executive branch government agency can be ordered to its job.

Conflicting Statutory and Regulatory Role

The Public Defender's Office was established in 1971 to provide a statewide system for representing eligible indigent defendants. The Public Defender's enabling statute states that "[e]ligibility for the services of the Office shall be determined by the need of the applicant," and that "[n]eed shall be mea-

sured according to the financial ability of the applicant to engage and compensate a competent private attorney and to provide all other necessary expenses of representation." Md. Crim. Proc. Code §§ 16-210(b)(1) and (b)(2) (2008 Repl. Vol.). Identifying an applicant's "financial ability" as the core determinant of an individual's eligibility for representation, the statute also provides in § 16-210(b)(3) that financial ability "shall" be determined by considering six separately enumerated factors, including the applicant's assets and disposable income, the nature of the offense and the proceedings, the effort and skill required, and any other foreseeable expense.

The Public Defender's Office promulgated regulations setting forth the manner in which the Office decides an individual's eligibility for representation. Tracking initially the language of § 16-210(b)(1), which provides that an individual's eligibility "shall be determined by the need of the applicant," the first sentence of COMAR 14.06.03.05A states that "eligibility for services of the Office of the Public Defender shall be determined on the basis of need of the individual seeking legal representation." But that is where the symmetry between the enabling statute and the Public Defender's regulations begins and ends with respect to identifying the circumstances in which an individual is eligible for the representation.

As stated previously, the Public Defender's enabling statute provides that an applicant's need "shall be measured" by his or her "financial ability"

to pay for an attorney, and states that the applicant's financial ability "shall be determined" by considering six factors. See § 16-210(b)(2) and (b)(3)(i)-(vi). In contrast, COMAR 14.06.03.05A states, immediately after providing in the first sentence that an individual's eligibility for services is determined on the basis of need, that an applicant's "[n]eed may be measured according to the applicant's maximum annual net income level and asset ceiling." An applicant's "maximum net annual income" varies according to the type of case and may not exceed 110 percent of the federal poverty income guidelines. COMAR 14.06.03.05D(1) and (2). The applicant's "asset ceiling" is subject to a limit, excluding the applicant's principal residence and primary vehicle, of \$1,500 for the applicant, \$2,500 for the applicant and his or spouse, and an additional \$750 for each dependent. COMAR 14.06.03.05E(1) and (2). In no event are any of the six factors listed in § 16-210(b)(3) of the Public Defender's enabling statute to be considered in determining whether an applicant has the financial ability to pay for legal counsel, unless and until "good cause is shown." COMAR 14.06.03.05A.

The Seeds of the Controversy

The conflict between the Public Defender Office's enabling statute and its regulation governing the determination of eligibility for services presented a real problem, as evidenced by the case giving rise to the Court of Appeals' decision in *Office of the Public Defender v. State* and a number of other cases like it. The seeds took a while to grow into a full-blown controversy, but they were planted by *Thompson v. State*, 284 Md. 113 (1978).

Primarily on the basis of certain language from *Thompson*, the Public Defender's Office took the position in all of these cases that the question whether a person was indigent and eligible for

representation was exclusively for the Office to decide and beyond the power of the judiciary to second-guess. But as a result of other language in *Thompson*, i.e., its holding, the trial judges in the same cases recognized that they had an obligation to ensure that indigent individuals would receive legal representation in qualifying cases. And in at least one jurisdiction, the judges had been informed that the local government had no funds to pay for any public defender fees not covered by the State and that the members of the local bar were unwilling to provide these services pro bono.

So how did *Thompson* cause so much mischief, you may ask? The Public Defender's Office in that case had originally decided that the defendant was eligible for representation, but it later determined otherwise. Nevertheless, as the Court of Appeals in *Thompson* stated, the Public Defender "wanted to leave it up to the court, making clear that if the court so ordered he would provide representation." 284 Md. at 128. Planting the seeds for the controversy which would not bloom until three decades later, the Court of Appeals then made the following observation: "The court refused to so order, properly we believe, on the ground that the question whether the Public Defender represented a particular defendant was for the Public Defender and not for the court." *Id.*

Commenting on this same passage in another case decided several years after *Thompson*, *Baldwin v. State*, 51 Md.App. 538 (1982), Judge Wilner wrote for the Court of Special Appeals that *Thompson* "seemed to hold that if the Public Defender declines to represent a defendant – even on grounds of non-eligibility (as opposed to a potential conflict of interest) – the court has no authority to order him to provide representation." 51 Md.App. at 552. As Judge Wilner observed after quoting the two sentences above from *Thompson*,

"[i]t would appear from this, by logical extension, that, although the court may appoint any other qualified counsel to represent an indigent defendant, it may not appoint the Public Defender against his wish." *Id.* at 553 n.11.

Now back to the other part of the problem created by *Thompson*. Stating that "there is the clear duty imposed on the [trial] court, in order to decide whether it should appoint counsel, upon the Public Defender declining to do so, to make its own independent determination whether a defendant is indigent and otherwise eligible to have counsel provided," the Court of Appeals in *Thompson* observed that the trial "judge originally in the case was completely content with the Public Defender's conclusion, whatever it may have been based upon, that Thompson was not entitled to have representation provided – 'you tell me he is not eligible and that is good enough for me.'" 284 Md. at 129-30. Commenting that "[t]his view governed the court's action in the face of an utter lack of the data contemplated by art. 27A, § 7 [recodified as § 16-210(b)(3) of the Criminal Procedure Article], the absence of any expression by the Office of the Public Defender of the reasons why it declined to provide representation, and the fact that the Public Defender had represented Thompson in the District Court," the Court of Appeals noted that the trial court "made no attempt to determine whether the refusal of the Office of the Public Defender to provide representation was despite Thompson's eligibility to have counsel provided." 284 Md. at 130. The Court reversed the judgment, holding that the trial court "was obligated to make that determination" and that it erred "in not making a determination upon proper considerations whether Thompson was eligible to have it appoint counsel upon the refusal of the Public Defender to provide representation." *Id.* at 130-31.

The Controversy in Office of the Public Defender v. State

The Public Defender's Office's view that only it could decide whether to represent a particular defendant went unchallenged for a significant period of time, from the year *Thompson* was decided in 1978 when Jimmy Carter was president, gas cost 63 cents a gallon, and the great classic – but definitely not in an Academy Award way – “Animal House” was released, until 40 years later when matters came to a head in a number of different cases. One of these cases was a criminal proceeding in the Circuit Court for Cecil County in which the Public Defender's Office refused to represent an individual named Jason Flynn Stinnett after determining that Mr. Stinnett's income exceeded the allowable limit imposed by COMAR 14.06.03.05A and D(2).

Following Mr. Stinnett's receipt of a letter from the Office apprising him of his ineligibility for representation, Mr. Stinnett appeared before the Circuit Court at a hearing at which he reiterated his request for representation because he could not afford private counsel. Stating that the Public Defender's regulations are “actually contrary” to the Public Defender's enabling statute, the Circuit Court conducted “a separate, independent determination” of Mr. Stinnett's financial ability in accordance with *Thompson* by considering the six factors set forth in § 16-210(b)(3). *Office of the Public Defender v. State*, 413 Md. at 418. After asking Mr. Stinnett questions concerning his assets, income, and financial obligations, the Circuit Court concluded that he was indigent and issued an order appointing the Deputy District Public Defender for Cecil County as his attorney, but providing that compliance with the order may occur if the Office assigned one of its attorneys or a panel attorney to represent Mr. Stinnett. *Id.* at 420-21.

The Deputy District Public Defender filed a notice of appeal from the order

appointing him as Mr. Stinnett's counsel, following which the Circuit Court conducted a hearing at which Mr. Stinnett appeared but his newly-appointed lawyer did not. *Id.* at 421. The Circuit Court found Mr. Stinnett's counsel in direct contempt of court and fined him \$10 for failing to appear for the hearing, accepted Mr. Stinnett's guilty plea, and imposed a three-year suspended sentence of imprisonment and two years unsupervised probation. *Id.* Mr. Stinnett did not file an appeal from the judgment entered against him but his lawyer appealed the order finding him in direct contempt. *Id.* at 421-22. He and the Public Defender's Office also filed a petition for a writ of certiorari, which the Court of Appeals granted. *Id.* at 422.

The Core Administrative Law Principles At Issue

I was retained as special counsel to represent the State of Maryland and sensed an administrative law apparition haunting the case based on the Circuit Court's determination that the Public Defender's Office did not apply the statutory criteria in deeming Mr. Stinnett ineligible for representation, but, rather, did so in accordance with a regulation which the Circuit Court found to be contrary to the legislation creating the Public Defender's Office.

The Public Defender's Office is an executive branch agency whose authority derives from the General Assembly, which identified in § 16-210(b)(3) the factors that the Public Defender “shall” consider in determining an applicant's eligibility for representation. As an executive branch agency, the Public Defender's Office is subject to “the inherent power” of the courts, which may “review and correct actions by an administrative agency which are arbitrary, illegal, capricious or unreasonable.” *Harvey v. Marshall*, 389 Md. 243, 275 (2005), quoting *Criminal Injuries*

Comp. Bd. v. Gould, 273 Md. 486, 500-01 (1975). In light of the Circuit Court's determination that the Public Defender's indigency decision was based solely on the Public Defender's regulations, those regulations “must be consistent with the letter and the spirit of the law under which the agency acts.” *Medstar Health v. Maryland Health Care Comm'n*, 376 Md. 1, 20 (2003). The Circuit Court had “the right to consider for itself whether [the] administrative regulation exceeds the power of the agency.” *Id.* at 26.

Even though “courts owe a higher level of deference to functions specifically committed to the agency's discretion than they do to an agency's legal conclusions or factual findings,” *Spencer v. Maryland State Bd. of Pharmacy*, 380 Md. 515, 529 (2004), an agency has no discretion to disregard its statutory mandate. The Public Defender's failure to consider any of the statutory factors in rendering an indigency decision was not a discretionary act but rather a dereliction of an executive branch agency's “non-discretionary mandatory duties.” *Murrell v. Mayor & City Council of Baltimore*, 376 Md. 170, 196 (2003). As a result of the Public Defender's mandatory duty under § 16-207(a) to provide representation for indigent individuals, “the substance of the circuit court action was a common law mandamus action.” *Murrell*, 376 Md. at 196, citing *Maryland Transportation Authority v. King*, 369 Md. 274, 287 (2002) (“mandamus or other traditional actions may lie to enforce administrative compliance with procedural requirements or duties”). See also *Talbot County v. Miles Point Prop., LLC*, 415 Md. 372, 392-98 (2010); *Bucktail, LLC v. County Council*, 350 Md. 530, 541-42 (1999). The Public Defender could not escape this duty by invoking a regulation that is in contravention of, rather than “consistent with the statutory scheme under which the agency operates.” *Medstar Health v. Maryland Health Care Comm'n*, 376 Md. at 22.

An Almost Perfect Analogy

When viewed against the backdrop of these fundamental administrative law principles, I argued that the Circuit Court did nothing exceptional when it discharged the "clear duty" recognized in *Thompson*, 284 Md. at 129, by considering at a hearing all of the § 16-210(b) (3) factors, determining that Mr. Stinnett was entitled to legal representation in light of those factors, and requiring the Public Defender's Office to represent him. A majority of the Court of Appeals in *Office of the Public Defender v. State* agreed with this position and, while expressing the view that a particular aspect of the administrative law analogy was not quite perfect, it confirmed the manner in which settled administrative law principles affected the way in which the case was decided.

The Court stated at the beginning of its analysis that "it is clear to this Court, as it was to the Circuit Court in the proceedings below, that the local OPD denied erroneously representation to Stinnett. . . . Rather than apply the statutorily-mandated criteria for determining indigency . . . , the local OPD, in denying representation to Stinnett on this record, relied on certain language contained in COMAR 14.06.03.05A and D(2)." 413 Md. at 424. Invoking the administrative law principle discussed earlier that an administrative agency's regulations must be consistent with the agency's statute, the Court of Appeals declared that as a result of the Public Defender's misapplication of the law, "the local OPD applied the incorrect standard for determining indigency of applicants and erred, both legally and factually, in concluding that Stinnett did not qualify for representation by its attorneys." *Id.* at 426. The Court held that "under a proper evaluation of the indigency factors" set forth in the statute, the Circuit Court properly found that Mr. Stinnett qualified as indigent and that "the local OPD's conclusion to the contrary, based solely on the maximum

net annual income level and asset ceiling language of COMAR 14.06.03.05A and D(2), was erroneous and contrary to law." 413 Md. at 428.

So far, so good. The qualification of the administrative law analogy occurred in the Court's rejection of the Public Defender's argument that the Circuit Court exceeded its authority in appointing an attorney from the Public Defender's Office once the Office declined representation of Mr. Stinnett. After addressing the language from *Thompson* and *Baldwin* discussed earlier, the Court held, in accordance with the actual holdings in those cases and the language of the Public Defender Office's enabling legislation, that:

[W]here the local OPD declines representation of a defendant erroneously, because of the local OPD's failure to consider properly the statutorily-mandated criteria for determining indigency, and where a court finds, upon its subsequent mandatory independent review, that the individual qualifies for representation, the trial court, in carrying out its role as 'ultimate protector' of the Constitutional right to counsel, may appoint an attorney from the local OPD to represent the indigent individual unless an actual and unwaived or unwaivable conflict of interest would result thereby.

Id. at 434. Immediately following this explication of the holding, the Court stated:

Though by no means a perfect analogy to the situation here, such a procedure is somewhat analogous to legislatively-sanctioned judicial review of decisions made by an administrative agency. Where an administrative agency acts contrary to law by ignoring its statutory mandate and instead relies solely on a self-initiated regulation that does not comply with its enabling statute, a court has the power to order the agency to

comply with its statutory mandate. See *Harvey v. Marshall*, 389 Md. 243, 302, 884 A.2d 1171, 1207 (2005) ("An agency decision, for example, may be deemed 'arbitrary or capricious' if it is contrary to or inconsistent with an enabling statute's language or policy goals.").

Id. at 434-35.

I suppose that this judicial review feature of administrative law does not provide a perfect analogy because, as Chief Judge Bell pointed out in his dissenting opinion, a court which concludes that an administrative agency applied an erroneous standard would ordinarily return the matter to the agency to apply the correct standard. *Office of the Public Defender v. State*, 413 Md. at 472 (Bell, C.J., dissenting). This particular aspect of administrative law, however, must necessarily yield to an indigent criminal defendant's right to a lawyer and a speedy trial.

In all other respects, the administrative law glove fits this case perfectly. As the majority stated, the Public Defender Office's eligibility determination "is entitled to deference" when it is based on the Office's application of the statutory criteria and will be overturned only if it is "arbitrary and capricious." *Id.* at 435. But when the Office acts "contrary to its statutory mandate by wholly disregarding the indigency factors" contained in the statute, "it abuses its discretion and its eligibility is entitled to no weight." *Id.* These statements are based on classic principles of administrative law. See, e.g., *Harvey v. Marshall*, 389 Md. at 302; *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571-77, 581 (2005); *Medstar Health v. Maryland Health Care Comm'n*, 376 Md. at 26.

And they fully vindicate my OCD/I-see-administrative-law-issues-everywhere view of the law.

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