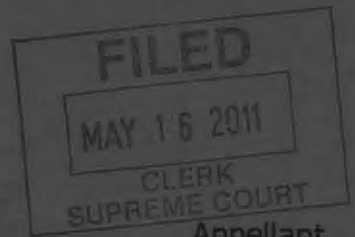


Commonwealth of Kentucky
Supreme Court
2010-SC-0076-D



K.R. a/k/a J.W., A Child

On Discretionary Review from the Kentucky Court of Appeals
No. 2008-CA-001980-MR

v.

Appeal from the Jefferson Circuit Court
Action No. 2008-CI-7535

Commonwealth of Kentucky

Appellee

Brief for Appellant, K.R., A Child

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Certificate of Service

I hereby certify that a copy of this brief was mailed with first-class postage prepaid to: Hon. Martin McDonald or his successor in office, Judge, Jefferson Circuit Court, Division Six, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; Hon. Samuel J. Floyd, Jr., Assistant Commonwealth's Attorney and Special Assistant Attorney General, 514 West Liberty Street, Louisville, KY 40202; and Hon. Jack Conway, Attorney General, Office of Criminal Appeals, Office of the Attorney General, 1024 Capital Center Drive, Frankfort, KY 40601-8204 on May 13, 2011. I further certify that the record on appeal was not removed from the Office of the Clerk of the Supreme Court.


EMILY N. FARRAR-CROCKETT

INTRODUCTION

A final order, entered by Division Six of the Jefferson Circuit Court on October 9, 2008, issued a writ of mandamus requiring the Jefferson District Court Juvenile Division #99 to transfer jurisdiction of K.R. to the Jefferson Circuit Court to be tried as a youthful offender. The Kentucky Court of Appeals rendered an unpublished opinion affirming the entry of the writ of mandamus by the Jefferson Circuit Court, and this Court granted K.R.'s motion for discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes that oral argument would be helpful to this Court. Appellant is requesting that this Court clarify that in order to transfer a juvenile to circuit court for prosecution as a youthful offender, pursuant to KRS 635.020(4), probable cause must be found that the juvenile committed the felony offense and that it was the juvenile facing transfer that used the firearm in the commission of that felony offense. Alternatively, appellant requests that this Court interpret KRS 635.020(4) as requiring probable cause that the juvenile was actually complicit in the use of the firearm. Appellant, therefore, requests oral argument.

NOTICE OF CITATIONS

Citations to the record of the Jefferson Circuit Court Clerk are made (TR, page number). References to the Appendix to this brief are made (App., page number). References to the videotape of the proceedings are made in conformance with CR 98, as follows:

- VR No. 1: 30-J99-08-0023, 0024, probable cause/detention hearing and rulings on issue of transfer conducted in Jefferson District Juvenile Court on June 20, 2008 and June 24, 2008;
- VR No. 2: 30-6-08-VR#82, oral argument on Commonwealth's petition for a writ of mandamus to transfer jurisdiction of K.R. to the circuit court to be tried as a youthful offender.

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STATEMENT OF THE CASE

On June 19, 2008, K.R. was arraigned, in Jefferson District Juvenile Court Division #99, on a juvenile petition charging her with Assault in the First Degree, Burglary in the First Degree, and Tampering with Physical Evidence. (TR, 38; App. D1). At the time the charges were filed against her, K.R. was a sixteen-year-old (D.O.B. 11-18-91) female runaway from the Department of Child Services in Tennessee. (TR, 37; App. C1). On that same date the Commonwealth made a motion to detain K.R. and to transfer her to circuit court for prosecution as a youthful offender. K.R.'s case was passed to June 20, 2008, for a probable cause/transfer hearing. (TR, 38; App. D1).

On June 20, 2008, a probable cause/transfer hearing was conducted pursuant to KRS 635.020(4). The county attorney moved to amend all charges to complicity prior to the hearing. (TR, 39; App. D2; VR No. 1; 6/20/08; 2:09:58). Also, the county attorney agreed to amend the charge of Burglary in the First Degree to Attempted Burglary in the First Degree. (TR, 39; App. D2; VR No. 1; 6/20/08; 2:20:57).

During the transfer hearing the juvenile court considered the testimony of Officer Eidem, the Commonwealth's only witness. According to officer Eidem, K.R. had only been in Louisville for a few months at the time of her probable cause/transfer hearing. (VR No. 1; 6/20/08; 2:21:21). While in Louisville, K.R. had been engaging in prostitution. (VR No. 1; 6/20/08; 2:11:01). Juan

Velasquez, the adult male victim of the charged assault, admitted to engaging in prostitution with K.R. (VR No. 1; 6/20/08; 2:26:27).

Mr. Velasquez was shot while he was at 1416 Arcade Avenue, Apartment #4 on June 8, 2008. Mr. Velasquez lived in this apartment with six other male individuals. Mr. Velasquez previously had a disagreement with K.R. because she refused to perform sexual services without a condom. Mr. Velasquez felt that he was ripped off because he had paid K.R. for the sex she was refusing to have with him and she left with his money. (VR No. 1; 6/20/08; 2:26:27). K.R. told officers that when she refused to have sex with Mr. Velasquez that he and some of the other males in the apartment tried to prevent her from leaving. As she tried to get out of the apartment, she was grabbed by the arm and the bracelet she was wearing was pulled off. (VR No. 1; 6/20/08; 2:11:48).

K.R. told her male friend, Javier Gutierrez,¹ about the incident with Mr. Velasquez and that she wanted to get her bracelet back. According to Officer Eidem, on June 8, 2008, K.R. along with Jose Lopez² (an acquaintance) and Javier Gutierrez went to Mr. Velasquez's apartment to retrieve her bracelet. The three drove past the apartments, and one of the men pulled out a gun and shot

¹ At the time of the transfer hearing and during arguments on the Commonwealth's petition for a writ of mandamus, it was believed that Javier Gutierrez was one of the two adult male co-defendants of K.R. It was later learned that Javier Gutierrez was an alias for Javier Velasquez, who was a juvenile at the time. Javier Velasquez was later indicted in case No. 08CR3717, and his case was consolidated with K.R.'s case in circuit court.

² Jose Lopez was indicted in case No. 08CR2385. His case was also consolidated with K.R.'s case.

toward an apartment.³ This was not the apartment of Mr. Velasquez. (VR No. 1; 6/20/08; 2:11:48). At some point later, the three went to the correct apartment, and K.R. banged on the door and climbed up on the window to try and gain entry. (VR No. 1; 6/20/08; 2:12:05). When K.R. was not able to get into the apartment, she, Mr. Lopez and Mr. Gutierrez started to walk behind the apartments. (VR No. 1; 6/20/08; 2:12:17). Officers believe that at that moment Jose Lopez pulled out his gun and shot Mr. Velasquez when he saw him looking out of a closed window. (VR No. 1; 6/20/08; 2:12:40).

After the shooting, K.R. took Jose Lopez's gun without his permission and gave it to an unidentified male. Mr. Gutierrez believes that she probably took the gun to exchange for drugs. (VR No. 1; 6/20/08; 2:20:18). Mr. Lopez later beat and assaulted K.R. Police believe that the likely reason she was beaten was because she took Mr. Lopez's gun. (VR No. 1; 6/20/08; 2:20:55). Officer Eidem further testified that K.R. never held the gun prior to or during the assault against Mr. Velasquez. She also never directed anyone nor planned with anyone to shoot Mr. Velasquez. (VR No.1; 6/20/08; 2:17:51).

After considering the testimony, the juvenile court judge found probable cause for the charges of Complicity to Assault in the First Degree, Attempted Burglary in the First Degree, and Tampering with Physical Evidence, for the purposes of detention only. The court continued the case for a ruling as to

³Neither K.R. nor her co-defendants were ever charged with any crimes relating to a shooting of a residence prior to the indicted offenses relating to Juan Velasquez and his residence.

whether the requirements of KRS 635.020(4) were met to transfer K.R. to circuit court. (TR, 39; App. D2; VR No. 1; 6/20/08; 2:39:38–2:42:15). On June 24, 2008, the juvenile court held that there was not probable cause to believe that K.R. used the firearm, as required by KRS 635.020(4), and that there was no basis to transfer K.R. to circuit court pursuant to that statute. (TR, 40-41; App. D3-D4; VR No. 1; 6/24/08; 1:22:03-1:33:29).

On July 17, 2008, the Commonwealth filed a petition for a writ of mandamus along with a memorandum of authorities, requesting that the Jefferson Circuit Court direct the juvenile court to transfer K.R. to circuit court to be tried as a youthful offender. (TR, 1-12). The case was assigned to Division Six of the Jefferson Circuit Court. K.R. filed a response to the petition for a writ of mandamus on August 6, 2008. (TR, 22-44). Oral arguments were heard on September 24, 2008. (VR No. 2; 9/24/08; 10:58:20–11:21:35). On October 9, 2008, an order was entered granting a writ of mandamus requiring the district court in juvenile file 08J701130 to transfer K.R. to circuit court in order to be tried as a youthful offender. (TR, 103; App. B1-B6).

K.R. filed a timely notice of appeal on October 20, 2008, stating her intention to take an appeal to the Court of Appeals from the final order entered by the circuit court on October 9, 2008, issuing a writ of mandamus. (TR, 109-110). On January 8, 2010, the Court of Appeals issued an unpublished opinion affirming the entry of the writ of mandamus by the Jefferson Circuit Court. (App. A1-A8).

K.R. filed a timely motion for discretionary review, and on March 16, 2011, this Court entered an order granting the motion. Additional facts will be discussed as necessary in the arguments below.

ARGUMENT

I. THE COMMONWEALTH'S WRIT OF MANDAMUS SHOULD NOT HAVE BEEN GRANTED AS THE COMMONWEALTH FAILED TO ADEQUATELY DEMONSTRATE ALL REQUIREMENTS NECESSARY FOR THE ISSUANCE OF SUCH AN EXTRAORDINARY REMEDY.

A. PRESERVATION

The issue was properly preserved for review by the appellant's response to the Commonwealth's petition for a writ of mandamus and by the arguments made before the circuit court on September 24, 2008. (TR, 22-44; VR No. 2; 9/24/08; 10:58:20-11:21:25).

B. BACKGROUND

At the probable cause/transfer hearing, conducted on June 20, 2008, the juvenile court declined to rule on the Commonwealth's motion to transfer K.R. to circuit court to be tried as a youthful offender, pursuant to KRS 635.020(4), until further researching the applicable law. (VR No. 1; 6/20/08; 2:39:30-2:42:15). On June 24, 2008, the juvenile court specifically found that the "Transfer Statute," meaning KRS 635.020(4), required that both probable cause for a felony and probable cause for "use" of a weapon in the commission of a felony be found in order to transfer a juvenile to circuit court. (TR, 40-41; App. D3-D4; VR No. 1; 6/24/08; 1:22:03-1:33:29). The juvenile court also found

that there was "[n]o evidence of use other than complicity theory that [K.R.], by extorting them, actually 'used' a gun." (App. D4). The court clearly stated that there was no basis for transfer because there was insufficient evidence to find probable cause for "use" as required by KRS 635.020(4). The "use" of a firearm that the juvenile court found needed to exist was "use" by the charged juvenile facing transfer, not "use" by another individual in the commission of the felony offense. (TR, 40-41; App. D3-D4; VR No. 1; 6/24/08; 1:22:03-1:33:29). After that ruling the Commonwealth sought the issuance of a writ of mandamus ordering the juvenile court to transfer K.R. to circuit court. (TR, 1-3).

When the Commonwealth sought a writ of mandamus, it did not claim that the writ fell into the special category of cases in which the prerequisite showing of great injustice and irreparable harm may be put aside.⁴ Instead, the Commonwealth alleged in its petition for a writ of mandamus that the Commonwealth did not have an adequate remedy by appeal and that a great injustice would result if K.R. were not transferred to circuit court. (TR, 5-7). The Commonwealth further stated that the juvenile court's finding of probable cause for the offense of Complicity to Assault in the First Degree was inconsistent with that court's holding that a firearm was not used in the offense. The Commonwealth argued that this finding was erroneous. (TR, 7-10; VR No. 2; 9/24/08; 11:00:53-11:03:24). For those reasons, the Commonwealth believed

⁴ It is important to note that the Commonwealth also never argued to the Court of Appeals that this case fell into the special category of cases.

that a writ of mandamus was an appropriate remedy. (TR, 10; VR No. 2; 9/24/08; 11:00:53-11:04:36; VR No. 2; 9/24/08; 11:15:55-11:18:08).

K.R. argued that the Commonwealth's claim that it would suffer irreparable harm if K.R. was not transferred to circuit court, pursuant to KRS 635.020(4), had no basis since the option to seek transfer of K.R. to circuit court pursuant to KRS 635.020(2) and KRS 640.010 had not been exhausted. The Commonwealth still had means available to not only seek transfer, but to also insure that the community would be protected and K.R. would be properly punished if she were in fact adjudicated. (TR, 25-28; VR No. 2; 9/24/08; 11:10:47; VR No. 2; 9/24/08; 11:15:25).

K.R. also argued that the juvenile court's ruling was not clearly erroneous or inconsistent. K.R. asserted that the juvenile court appropriately sought to examine, separately, probable cause for the offense and probable cause as to whether the juvenile "used" the firearm. Based on the application of the two-pronged probable cause analysis, it was not inconsistent to find probable cause for the offense itself and at the same time find that the juvenile defendant did not "use" a firearm in the alleged offense within the meaning of KRS 635.020(4). (TR, 29-34; VR No. 2; 9/24/08; 11:11:16-11:13:13).

The circuit court ruled in favor of the Commonwealth on all points. In doing so, it did not place the Commonwealth's writ of mandamus in any special category. Instead, the circuit court applied the standard test for a writ of mandamus as set forth in Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004).

Specifically, the circuit court determined that there was not an adequate remedy available to the Commonwealth by appeal or otherwise. The circuit court stated that it could not say that requiring the Commonwealth to seek transfer under KRS 640.010 would be an adequate remedy for the juvenile court's failure to transfer the case under the mandatory provisions of KRS 635.020(4). The circuit court reasoned that the two sets of statutes in question neither require the same inquiry, nor have the same standard for transfer. The circuit court also found that the Commonwealth's concerns over penalties were sufficient to demonstrate the necessary harm for the purpose of a writ. (TR, 99-101; App. B3-B5).

The circuit court also held that the juvenile court, while acting within its jurisdiction, acted erroneously and inconsistently. The circuit court found that in the present case, there is no question that a firearm was used in the offense and that any party who is complicit in the offense in which the firearm was used is equally liable for the use of the firearm. (TR, 101-102; App. B5-B6). The circuit court relied on Pruitt v. Commonwealth, 700 S.W.2d 68 (Ky. 1985), in reaching that conclusion. (TR, 101; App. B5). The circuit court also distinguished K.R.'s case from that in W.L. v. Commonwealth, No. 2003-CA-0000486-MR, 2004 WL 406537 (Ky. App. 2004), which was relied upon by the juvenile court to establish that a two-pronged probable cause standard should be applied to KRS 635.020(4) to determine if there is both probable cause for the offense and probable cause to believe that the juvenile defendant "used" a firearm within the meaning of the transfer statute. (TR, 101-102; App. B5-B6). The circuit court

was not persuaded that K.R. did not “use” a firearm as the term is used in KRS 635.020(4) simply because she was not the “trigger person” in the crime.

Therefore, the circuit court believed that the juvenile court erred in its failure to find use of a firearm in the commission of the offense and stated that K.R. was subject to the transfer provision of KRS 635.020(4). (TR, 102; App. B6).

The Court of Appeals, however, applied a different standard when reviewing the issuance of the writ of mandamus. The Court of Appeals affirmed the entry of the Commonwealth’s writ of mandamus, in part, based on the conclusion that the writ sought fell into a special category of cases where a substantial miscarriage of justice will result if the lower court is proceeding erroneously, and correction of the error is necessary and appropriate in the interest of orderly judicial administration. As a result, the Court of Appeals further concluded the requirement that the petitioner must prove great injustice and irreparable harm was waived. (Court of Appeals Opinion, pp. 3-4; App. A3-A4). In reaching said conclusions, the Court of Appeals cited to the cases of Cox v. Braden, 266 S.W.3d 792 (Ky. 2008), Bender v. Eaton, 343 S.W.2d 799 (Ky. 1961), and Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803 (Ky. 2004). (Court of Appeals Opinion, pp. 3-4; App. A3-A4). However, the Court of Appeals did not provide any analysis as to why it thought that this case fell into the “certain special cases” category. The Court of Appeals simply stated, “We are persuaded that the writ in this case falls within the ‘special cases’ category.” (Court of Appeals Opinion, p. 4; App. A4).

C. LEGAL ANALYSIS

An action for extraordinary relief is available only in certain narrowly-defined circumstances. In order to prevail in an action for mandamus when alleging that a lower court has acted erroneously within its jurisdiction, a petitioner must show: (1) an absence of an adequate remedy by appeal and (2) that irreparable harm or great injustice will be suffered unless such relief is obtained. Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004); see also, Goldman v. Eichenholz, 851 S.W.2d 463, 465 (Ky. 1993). Implicit in this requirement is that the petitioner show the inevitable occurrence of irreparable harm or great injustice and that such harm was caused by the trial court's erroneous refusal to take the action which the petitioner is seeking to compel. Goldman v. Eichenholz, 851 S.W.2d at 465. There are also "certain special cases" that allow for remedy by writ where "a substantial miscarriage of justice will result if the lower court is proceeding erroneously, and the correction of the error is necessary and appropriate in the interest of the orderly judicial administration." Bender v. Eaton, 343 S.W.2d 799, 801 (Ky. 1961).

1. The Commonwealth's writ of mandamus does not fall within the special category of cases providing for the issuance of a writ without the prerequisite showing of great injustice and irreparable harm.

Writs of mandamus are extraordinary in nature, and the courts of this Commonwealth "have always been cautious and conservative both in entertaining petitions for and in granting such relief." Bender v. Eaton, 343 S.W.2d 799, 800 (Ky. 1961). The writs that fall into the "certain special cases"

are rare exceptions and "reserved" for "exceptional cases [where] the remedy may be invoked as a 'shield from injustice to preserve the orderly administration of the laws.'" Cox v. Braden, 266 S.W.3d 792, 797 (Ky. 2008). In such situations "the court is recognizing that if it fails to act the administration of justice generally will suffer the great and irreparable injury and that a decision would be of value to the Bench and Bar of Kentucky." Commonwealth of Kentucky Department of Corrections v. Engle, 302 S.W.3d 60, 65 (Ky. 2010); see also, Bender v. Eaton, 343 S.W.2d at 801. This Court has "tended to apply this exception only in those limited situations where the action for which the writ is sought would blatantly violate the law, for example by breaching a tightly guarded privilege or by contradicting the requirements of a civil rule." The Independent Order of Foresters v. Chauvin, 175 S.W.3d 610, 616-617 (Ky. 2005); see also, Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 808 (Ky. 2004).

Such an extreme remedy was not warranted in this case to preserve the orderly administration of the laws. The juvenile court judge did not act erroneously or outside of her jurisdiction. No carefully-guarded privileges were violated, and no requirements of a civil rule were contradicted. The juvenile court judge gave this case careful consideration at the probable cause hearing and also passed the case to research the issue further so a reasoned decision could be reached. (App. D1-D4). Furthermore, the administration of justice generally will not suffer a great and irreparable injury from the juvenile court judge's ruling that K.R. would not be transferred to circuit court pursuant to KRS 635.020(4).

- a. The juvenile court judge did not act erroneously by failing to transfer K.R. to circuit court pursuant to KRS 635.020(4) where the co-defendant, not K.R., used a gun during the commission of the felony.**

Contrary to the circuit court's and the Court of Appeal's determination, the juvenile court's ruling that K.R. would not be transferred to circuit court pursuant to KRS 635.020(4) was not erroneous. The Commonwealth asserted the ruling was erroneous because it believed that the ruling was inconsistent and that the "use" of a firearm required by KRS 635.020(4) applies regardless of whether or not the juvenile facing transfer is the defendant who "used" the firearm. (TR, 8-9; VR No. 2; 9/24/08; 11:00:53–11:04:11). In making these assertions, the Commonwealth did not fully evaluate the ruling issued by the juvenile court or the rationale applied. The ruling issued by Judge Dewese was not inconsistent or erroneous.

In its memorandum in support of its petition for a writ of mandamus, the Commonwealth incorrectly stated that "[t]he juvenile court's finding of probable cause for the offense of Complicity to Assault in the First Degree was inconsistent with that court's holding that a firearm was not used in the offense." (TR, 8). But the juvenile court did not rule that a firearm was not used in the offense. The juvenile court ruled that while there was probable cause to believe that K.R. was complicit to the offense of Assault in the First Degree, albeit "questionable all around," there was not probable cause to believe that K.R. "used" the firearm as required by KRS 635.020(4). (VR No. 1; 6/20/08; 2:39:38)

The juvenile court appropriately sought to examine, separately, probable cause for the offense and probable cause as to whether the juvenile "used" the firearm. KRS 635.020(4) clearly indicates that the juvenile court must first find probable cause that the child committed a felony offense and then determine whether there is probable cause that a "firearm was used...." The Court of Appeals specifically recognized this two-step probable cause determination in the unpublished case of W.L. v. Commonwealth, No. 2003-CA-000486-MR, 2004 WL 406537 (Ky. App. 2004).⁵ In that case, the Court of Appeals examined whether a juvenile should have been transferred to circuit court pursuant to the same statute at issue in this case, KRS 635.020(4). W.L. was alleged to have committed a robbery. In the course of that robbery W.L. kept his hand in his pocket. No gun was seen by any witness, nor was a gun ever found. Id. at 1. The juvenile court found probable cause to believe that W.L. committed robbery, but declined to transfer the case because there was not probable cause that the child "used" a firearm. Id. at 1. The Commonwealth sought and obtained a writ of mandamus. The Court of Appeals, however, determined that the writ was improperly granted, finding that "[t]he analysis required under [KRS 635.020(4)] does not end with a finding of probable cause under the charged offense." Id. at 2. "The transfer statute clearly states that the district court must separately find

⁵ According to CR 76.28(4)(c), "unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration of the court if there is no published opinion that would adequately address the issue before the court. "Pursuant to this rule, a copy of the opinion is attached to this brief as App. E1-E3.

probable cause to believe that the juvenile used a firearm during the commission of the offense, in addition to and distinct from the finding of probable cause on the charged offense." Id. at 2.

The two-step probable cause analysis discussed in W.L. now seems to be supported by this Court's analysis of the requirements of KRS 635.020(4) in the published decision of Chipman v. Commonwealth, 313 S.W.3d 95 (Ky. 2010). In that case this Court examined whether a juvenile, who was transferred to circuit court based on her "use of a firearm," but who was convicted of a second-degree robbery, was exempt from youthful offender sentencing by virtue of KRS 640.040 a statute requiring that children convicted of certain offense be sentenced under the Unified Juvenile Code. As part of the analysis in that case, this Court discussed the requirements of KRS 635.020(4), specifically, the portion that requires that the "child committed a felony [and] that a firearm was used in the commission of that felony." Id. at 98-99. This Court noted that the "firearm was used" provision was "fact-specific." Id. at 99. While any felony could qualify with certain factual scenarios, "the seeming breadth of this provision is curtailed because the use of the firearm must be tied to the child." Id. at 99. "This is because the statute refers to a firearm being 'used in the commission of *that* felony,' referring back to the felony '*that the child committed.*'" Id., quoting KRS 635.020(4) (Emphasis added by Court).

This is the exact same analysis that was appropriately conducted by the juvenile court in K.R.'s case. The juvenile court first examined probable cause as

to the underlying charge and then examined probable cause as to whether or not K.R., the juvenile, "used" the firearm. Transfer to circuit court was appropriately denied based on Judge Dewese's finding that probable cause did not exist to believe that K.R. used the firearm.

The circuit court tried to distinguish K.R.'s case from W.L. v. Commonwealth in its findings of fact and conclusions of law. The circuit court referenced the fact that in W.L., the juvenile court did not find probable cause for the original charged offense of Robbery in the First Degree, but instead found probable cause for Robbery in the Second Degree. (TR, 101-102; App. B5-B6). Additionally, the circuit court noted that the juvenile court in W.L. found that no firearm was used in the offense. As a result, the circuit court stated that the juvenile court's probable cause and transfer findings in W.L. were not in conflict. The court in that instance could reasonably find based upon the evidence that no firearm was used in the commission of the offense, whereas in K.R.'s case a firearm was clearly used in the offense. (TR, 102; App. B6).

The circuit court's attempt to distinguish W.L. from K.R.'s case is flawed. The court ignored the language in W.L., which clearly stated that "[e]ven if the facts alleged supported a finding on the charge of first-degree robbery, the circuit court's analysis of the automatic transfer statute was insufficient and must be reversed." Id. at 2. The Court of Appeals was clear in W.L. that the focus is not only on whether or not probable cause exists for the charged offense, but also whether "the juvenile used the firearm in the commission of the offense."

Id. at 2. The circuit court interpreted Judge Dewese's ruling incorrectly, as did the Commonwealth. Again, Judge Dewese did not find that a firearm was not used in the offense. She found that K.R., the juvenile the Commonwealth was seeking to transfer to circuit court, did not use the firearm as required by KRS 635.020(4). The juvenile court clearly applied the correct analysis, and the probable cause findings were not in conflict with one another.

The Court of Appeals also erred in this case when it concluded that KRS 635.020(4) "mandate[d] transfer" of K.R. because K.R.'s co-defendant had used a gun during the commission of the felony for which they were both charged. (Court of Appeals Opinion, p. 7; App. A7). In reaching this conclusion, the Court of Appeals stated that "KRS 635.020(4) unambiguously provides that transfer is mandatory if 'a firearm was used in commission of that felony.' It does not provide that the juvenile had to be the person who handled the firearm." (Court of Appeals Opinion, p. 7; App. A7). Based on the foregoing, the Court of Appeals concluded that the district court had erred in interpreting the law not to require the transfer of K.R. to circuit court. (Court of Appeals Opinion, p. 7; App. A7).

The appellant acknowledges that in Chipman this Court stated that for purposes of transferring a juvenile to circuit court pursuant to KRS 635.020(4), "the child must use the firearm while committing a felony, or at least be complicit in another person's use of a firearm." Chipman, 313 S.W.3d at 99. However, the appellant submits that the extension of KRS 635.020(4) to include complicity is an overly broad interpretation.

The language used in KRS 635.020(4) can be distinguished from the language in KRS 533.060(1), which the Commonwealth relied on to infer that KRS 635.020(4) should lead to automatic transfer of juveniles if they are complicit to a felony offense in which a firearm was used by a codefendant. In its memorandum the Commonwealth argued that “[t]here is no requirement under KRS 635.020(4) that K.R. be the person who actually used the weapon” and that “[o]ur court has made clear that [the] term ‘use’ does not require K.R. to be the trigger person.” (TR, 9). The circuit court agreed with the Commonwealth when it stated that it was not persuaded that K.R. did not “use a firearm as that term is used in KRS 635.020(4) simply because K.R. was not the trigger person.” (TR, 102; App. B6).

To support their position, the Commonwealth and the circuit court relied on the case of Pruitt v. Commonwealth, 700 S.W.2d 68 (Ky. 1985). (TR, 9, 102). In Pruitt, this Court considered whether a person guilty of complicity to commit murder could be denied probation pursuant to KRS 533.060(1), which precludes probation for persons convicted of Class A, B, and C felonies where “the commission of the offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury....” Id. at 69. Pruitt argued that she did not “use the weapon” as contemplated by KRS 533.060(1) because she did not fire the weapon. Id. at 69. This Court disagreed and ruled that “while the statute does pertain to the ‘use of a weapon’ and there is a legitimate question as to the type

of use contemplated, it does not concern itself at all with which person actually used the weapon." Id. at 69. The Court reasoned that the statute prohibited probation if the commission of the offense "involved the use of a weapon" and that the plain reading of the statute did not indicate any basis for a distinction based upon the identity of the person who used that weapon. Id. at 69.

However, a clear distinction can be made between the terminology used in KRS 533.060(1) and that used in KRS 635.020(4). While KRS 533.060(1) uses the phrase "involved the use of a weapon," the General Assembly chose to exclude the word "involved" in KRS 635.020(4). Rather than including the broad, inclusive language of "involved the use of weapon," KRS 635.020(4) requires that "a firearm was used." Thus, unlike KRS 533.060(1), which does not draw a distinction as to who fired the weapon for probation purposes as long as a weapon was "involved," KRS 635.020(4), at the very least, is ambiguous as to whether or not the defendant has to be the one who actually "used" the firearm. K.R., therefore, "is entitled to the benefit of the ambiguity." Haymon v. Commonwealth, 657 S.W.2d 239, 240 (Ky. 1983).

Furthermore, it is not logical that the General Assembly would include the broad term of "involved" in only one of the statutes yet intend both statutes to be as inclusive as the other. When enacting KRS 635.020(4), the General Assembly surely considered the notion that a juvenile cannot be found to have "used" a firearm merely because he or she was complicit in an adult principal's offense. The General Assembly found it important to transfer a certain class of

juveniles, those who use firearms and those who are involved in serious felony offenses, to circuit court for trial because of the severe risk they pose to the community and themselves. This intent can be gleaned from the very language and considerations contained in the statutes at issue in this case. It is hard to imagine that the General Assembly would create a statutory scheme whereby a juvenile who commits a murder with a knife would be entitled to a waiver hearing pursuant to KRS 635.020(2), but a sixteen-year-old female prostitute, in the company of violent males who are in control and assaultive toward her, should be automatically transferred to circuit court pursuant to KRS 635.020(4) simply because she was with them as one of them decided, of his own volition, to shoot a person.

This Court applied this same rationale in the case of Darden v. Commonwealth, 52 S.W.3d 574 (Ky. 2001), where the Court considered whether a juvenile who possessed a firearm on school property should be transferred to circuit court pursuant to KRS 635.020(4). The Court stated the terms "possession of a weapon" and "use of a weapon" were two entirely different concepts. Id. at 577. "Further, doubts in the construction of the penal statute are to be resolved not only in favor of lenity, but also against a construction that would produce extremely harsh or incongruous results." Id. This Court also reasoned that it is "inconceivable that the Legislature would provide that waiver is discretionary if a child murders someone, but provide that waiver is mandatory for a minor who merely brings his hunting rifle to school...." Id.; see also, State v. Hanning, 728

N.E.2d 1059 (Ohio 2000) (holding that state's complicity statute did not apply to a juvenile for the purposes of automatically transferring his case to an adult criminal court where the "bindover" statute itself did not provide that a child could be "bound over" based on the fact that a firearm was used by an accomplice).

Furthermore, "[t]he decision to transfer a juvenile to circuit court involves the determination of which system is appropriate for a juvenile defendant." Caldwell v. Commonwealth, 133 S.W.3d 445, 453 (Ky. 2004). As this Court has recognized, it is the "[juvenile] offender who is transferred to circuit court, not the offense." Pollini v. Commonwealth, 172 S.W.3d 418, 425 (Ky. 2005), citing Osborne v. Commonwealth, 43 S.W.3d 234, 238 (Ky. 2001). The true focus of all transfer cases is whether transfer of a juvenile to circuit court is appropriate for that juvenile. The Legislature's concern in creating KRS 635.020 was not the offenses themselves, but the specific individual juveniles who need to be prosecuted outside of juvenile court to ensure the safety of the community and a just result. The ambiguity in KRS 635.020(4), when viewing it with an eye towards lenity and a focus on preventing harsh or incongruous results, can only lead to the conclusion that when finding that a juvenile should be transferred pursuant to KRS 635.020(4), there must be probable cause that the juvenile committed a felony offense *and* probable cause that it was the juvenile facing transfer that used the firearm in the commission of that felony offense. The language used by the General Assembly in KRS 635.020(4) and this Court's

recognition in Osborne and Pollini that it is the juvenile who is transferred to circuit court, not the charge, indicate that the General Assembly meant only to deny a juvenile a trial in juvenile court when that juvenile is the one who actually used the firearm. To reason otherwise would create a system in which the offense itself is the focus. Such a system would be contrary to the true intent of the Legislature. If probable cause does not exist as to the juvenile's use of a firearm, the County Attorney and the Commonwealth should, if they deem appropriate, seek transfer through the waiver hearing process provided by the other subsections of KRS 635.020 and KRS 640.010.

Alternatively, even if this Court does interpret KRS 635.020(4) to include complicity the appellant submits that this Court should require the lower courts to specifically examine whether or not probable cause exists for both the underlying felony and the child's use or actual complicity in the use of the firearm. In fact, this Court appeared to apply this analysis in Chipman. In Chipman the child admitted during the plea colloquy that she was with an adult co-defendant who was carrying a .25 caliber pistol and that the adult pistol whipped the victim. Id. This Court noted that those facts did not establish the child's use of the pistol and that her statement was not an admission that she used the pistol. Id. This Court found that the child's admission that a co-defendant happened to have a gun was a "far cry from admitting to even a personal connection to the gun, much less a personal use especially since [she] had maintained throughout the proceedings that she was unaware her

companion had brought the pistol with him." Id. This Court ultimately concluded that the child's use of the firearm could not be established. Id. at 100-101.

In light of Chipman, it is clear, at the very least, that the Court of Appeals' analysis was incomplete when ruling that K.R. "used a firearm" as required by KRS 635.020(4). There was no analysis as to whether probable cause existed that K.R. was actually complicit in the use of the firearm. The Court of Appeals simply stated it was in agreement with the Commonwealth's contention that the statute mandated transfer because K.R.'s co-defendant had used the gun during the commission of the charged felony. (App. A7). Additionally, the Court of Appeals noted that there was a judicial determination that probable cause existed to believe that she participated in the commission of a felony, that the felony assault consisted of a gunshot wound, and that a firearm was used in the commission of that felony. (App. A7).

Again, the juvenile court judge did not err when she ruled that probable cause did not exist with regard to K.R.'s "use of a firearm" as required for transfer pursuant to KRS 635.020(4). Like in Chipman, K.R. did not supply the firearm. She did not hold the gun prior to or during the assault. While there is arguably some evidence to indicate that she may have known that one of her co-defendants was armed, she did not devise a plan to have her co-defendant use the firearm during her attempt to retrieve her property. She also did not direct her co-defendant to shoot the victim. (VR No.1; 6/20/08; 2:17:51). Based on Officer Eidem's testimony it appears that the male co-defendant who shot the

victim did so spontaneously without direction from anyone upon seeing the victim in the window. Given this factual scenario and in light of Chipman, K.R.'s use of the firearm by complicity or otherwise cannot be established. Therefore, the juvenile court judge did not err when she did not find probable cause that K.R. used a firearm for purposes of transfer pursuant to KRS 635.020(4).

b. The administration of justice generally will not suffer a great and irreparable injury.

In addition to the failure of the Court of Appeals to provide any analysis as to why it thought that this case fell in to the "certain special cases" category, it also did not state how the juvenile court judge's ruling would cause the administration of justice generally to suffer a great and irreparable injury. (App. A1-A8). There is simply no indication that an extreme remedy was needed in this case to preserve the orderly administration of the laws.

This case can clearly be distinguished from cases in which this Court felt writs fell into the "certain special cases" category because failure to act would result in the administration of justice generally suffering a great and irreparable injury. For example, this Court in Commonwealth of Kentucky Department of Corrections v. Engle, 302 S.W.3d 60 (Ky. 2010), examined whether the Court of Appeals erred in denying a writ of prohibition filed by the Department of Corrections (DOC) seeking to have an order vacated that directed the agency to transport a DOC inmate from the Shelby County Detention Center to Perry County for court appearances. DOC contended that KRS 441.510(2) required the sheriff of the requesting county to conduct such transports. This Court ordered

that the Court of Appeals decision denying the writ of prohibition be vacated. In doing so, this Court placed the writ in the "certain special cases" category. While this Court could not say that requiring DOC to conduct the single transport would result in a "great injustice and irreparable injury," there was concern that erroneous orders, such as the one issued, may occur multiple times across all counties in Kentucky. Such orders forcing DOC to transport prisoners across the state would "ultimately have a substantial impact on its resources, and distort the legislature's budgetary considerations implicit in its statutes designating the county sheriffs to transport inmates" Id. at 65-66. This Court felt that those broad concerns made the resolution of the controversy "important to the orderly transportation of DOC inmates housed in county detention centers." Id. Thus, the decision was "of value to the Bench and Bar of Kentucky," and correction of the error was "in the interest of orderly judicial administration." Id.

In this case, the judge's order pertaining to K.R. did not, and could not, have the type of broad, statewide implications that this Court was concerned with in Commonwealth of Kentucky Department of Corrections v. Engle which necessitated correction in the interest of orderly judicial administration. The juvenile court judge gave this case careful consideration at the probable cause hearing and also passed the case to research the issue further so a reasoned decision could be reached. (App. D1-D4). The judge reviewed the W.L. case, which at the time was the only case that provided the judge with some direction in terms of how probable cause for "use of a firearm" was to be examined.

Interestingly, the writ of mandamus at issue in W.L. sought to overturn the decision not to transfer W.L. by Judge Deweese, who is the same judge who presided over the probable cause hearing in K.R.'s case. The Court of Appeals in that case agreed with Judge Deweese's two-pronged probable cause analysis. Based on that decision, Judge Deweese felt that she was appropriately examining probable cause for "use of a firearm" in K.R.'s case. She was clearly acting within her jurisdiction when making the probable cause determinations and, as indicated above, was not doing so erroneously given the guidance from the Court of Appeals that she had previously received.

Furthermore, at worst for the Commonwealth, the juvenile court in this case would have made a case-specific decision to try the least culpable person in the incident in juvenile court. The Commonwealth would not have been barred from prosecuting those whom they felt were involved in any way. In addition, as will be discussed later in this brief, the Commonwealth could have sought to send K.R. to circuit court based on a separate yet entirely applicable statute, and the juvenile court's ruling did not prevent the Commonwealth from pursuing that option. For these reasons the appellant also believes that the writ was not necessary to prevent an action that would violate the law. Nor did the actions of the juvenile court judge have such broad implications that the issuance of a writ was necessary to preserve the orderly administration of the laws.

The Court of Appeals decision to place the Commonwealth's writ of mandamus in the "certain special cases" category, as a means to uphold the

circuit court's issuance of the writ when the Commonwealth failed to adequately show the requirements necessary for the issuance of a writ, has much broader implications and a greater chance of disrupting the orderly administration of the law than did the juvenile court judge's decision not to transfer K.R. to circuit court as a youthful offender. The decision as to whether probable cause exists in a juvenile case belongs solely to the juvenile court judge. If this writ of mandamus is deemed proper, the door could be opened for the Commonwealth to challenge every probable cause determination that it did not agree with by way of seeking a writ of mandamus. This could have massive implications, particularly in juvenile court, where probable cause determinations are made pursuant to not only KRS 635.020(4) and KRS 640.010, but also KRS 610.280, which requires the juvenile court judge to make a probable cause determination where detention of a child is being sought. A writ of mandamus should not be a tool for the Commonwealth to use to bypass decisions by the juvenile court judge when the Commonwealth fails to meet its burden of establishing probable cause.

2. The Commonwealth failed to adequately demonstrate the requirements that it had no adequate remedy by appeal or otherwise and that it would suffer a great and irreparable injury, as is necessary for the issuance of a writ of mandamus.

The circuit court, unlike the Court of Appeals, applied the standard test for the issuance of a writ of mandamus when the lower court has allegedly acted erroneously. The circuit court examined whether the Commonwealth had an adequate remedy by appeal *or otherwise*, and whether the Commonwealth

showed great and irreparable injury. While the proper test was applied by the circuit court, it erred when finding that the Commonwealth's only remedy in this case was to petition for a writ of mandamus.⁶ Likewise, the Court of Appeals also erred by affirming the circuit court's finding that a petition for a writ of mandamus was the only remedy available to the Commonwealth. Furthermore, the Commonwealth failed to adequately show that the juvenile court's ruling would result in irreparable harm or great injustice if K.R. was not transferred to circuit court pursuant to KRS 635.020(4). Because the Commonwealth did not make the appropriate showings as set forth in Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004) a writ of mandamus was not the appropriate remedy and should not have been granted.

The Commonwealth's first claim that it would suffer irreparable harm, if K.R. was not transferred to circuit court pursuant to KRS 635.020(4), was that it would be barred from proceeding against K.R. in circuit court if she was adjudicated in juvenile court. (TR, 6). The second assertion made by the Commonwealth was that a great injustice would occur if K.R. was not transferred because the difference between a juvenile adjudication and a criminal conviction is significant. (TR, 6-7). The Commonwealth believed that the community would be protected and that K.R. would be punished only if she was transferred because she would receive a brief period of regenerative treatment as a juvenile, but a significant sentence if tried as an adult. (TR, 7). Both of these assertions

⁶ The appellant does not contest the findings by the circuit court and the Court of Appeals that the Commonwealth did not have a remedy by appeal.

were erroneous and failed to demonstrate how any inevitable irreparable harm or great injustice would occur.

The Commonwealth's first assertion of harm incorrectly assumed that the juvenile court's ruling not to transfer K.R. pursuant to KRS 635.020(4) would result in K.R. being tried in juvenile court. The decision as to whether K.R. would be tried in circuit court or juvenile court had not been decided by the juvenile court judge's previous ruling. The ruling issued by Judge Deweese in K.R.'s case was that K.R. would not be transferred pursuant to KRS 635.020(4) because there was not probable cause to believe that K.R. used the firearm in the alleged offense. Judge Deweese never ruled nor made any statements that the County Attorney could not seek the transfer of K.R. pursuant to other statutory means. The County Attorney could have sought to transfer K.R. pursuant to KRS 635.020(2) and the provisions of KRS 640.010.

At the point in time in which the writ of mandamus was sought, the County Attorney had only attempted to transfer K.R. to circuit court pursuant to KRS 635.020(4). This subsection of KRS 635.020 is commonly referred to as the "automatic transfer" statute and requires that a juvenile be transferred to circuit court if there is probable cause to believe that a child fourteen years of age or older has committed a felony and that a firearm was used in the commission of that felony.

The County Attorney, upon a proper motion before the juvenile court, could have sought to transfer K.R. to circuit court pursuant to KRS 635.020(2)

and the provisions of KRS 640.010. The statutory transfer mechanism in KRS 635.020(2) provides that a child who is charged with a Class B felony and has attained the age of fourteen at the time of the alleged commission of the offense can be proceeded against as a youthful offender in accordance with the provisions of KRS 640.010. The provisions of KRS 640.010 direct the juvenile court judge to have a bifurcated hearing in which the judge first determines if there is probable cause to believe that an offense was committed by the child and that the child is of sufficient age to fall within the purview of KRS 635.020. If the juvenile court judge finds probable cause for the aforementioned, the second hearing, commonly known as a "waiver" hearing, will be held. In that hearing, the juvenile court judge determines whether the child's case shall be transferred to circuit court. This decision is made based on the consideration of eight different factors listed in the statute. These factors include a consideration of the seriousness of the offense, whether the offense is against a person, and whether the best interest of the child and the community will be better served if the child is transferred to circuit court. The judge may transfer the child to circuit court at the conclusion of this hearing if two or more factors were found by the judge in favor of transfer.

The differences in the type of inquiry and standard of transfer do not make the application of KRS 635.020(2) and KRS 640.010 an inadequate remedy in this case, as found by the circuit court and as upheld by the Court of Appeals. If a juvenile court judge transfers a child to circuit court pursuant to these

aforementioned statutes, it has the same effect as a transfer pursuant to KRS 635.020(4). The only difference between the two proceedings is that if a motion for transfer is made pursuant to KRS 635.020(2) and the provisions of KRS 640.010, the juvenile court judge has limited discretion as to whether to transfer the child based on the eight different criteria. Furthermore, the waiver proceeding in KRS 640.010 would insure that the juvenile court judge would carefully examine whether K.R. is a danger to the community, whether she is amenable to treatment, whether her interests are better served by being transferred, and takes into account the seriousness of the offense against a person. This careful examination of the entire set of circumstances and factors in a case acts as a safeguard and demonstrates that the application of the alternative transfer statutes would serve as an adequate remedy.

This mechanism for transfer would have been applicable in K.R.'s case because she was sixteen-years-old at the time, probable cause as to the charge of Complicity to Assault in the First degree (a Class B felony) had been found and the Commonwealth had stated that it had an interest in seeking the transfer of K.R. to Circuit Court. The ability to seek transfer of K.R. pursuant to KRS 635.020(2) and the provisions of KRS 640.010 clearly indicates that the great injustice that the Commonwealth asserted had not occurred and was not inevitable.

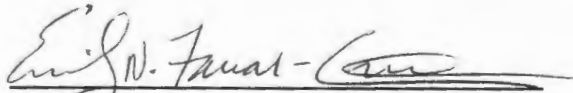
The Commonwealth's stated concern for injustice or harm centered around a belief that if K.R. was not transferred to circuit court, the community

would not be protected and K.R. would not be properly punished. The circuit court incorrectly found that these concerns as well as the fact that the manner of the case may change was sufficient to demonstrate the necessary harm for a writ. (TR, 100-101; App. B4-B5). This stated injustice had not occurred and was not inevitable because the Commonwealth had not taken any steps at that point to seek transfer pursuant to KRS 635.020(2) and KRS 640.010. Furthermore, the Commonwealth had not been prevented from seeking transfer pursuant to this alternative. The juvenile court never stated that it would not consider transferring K.R. to circuit court. The juvenile court only ruled that the requirements were not met to transfer K.R. to circuit court pursuant to KRS 635.020(4). (VR No. 1; 6/24/08; 1:22:03-1:33:29).

The Commonwealth clearly did not adequately demonstrate that any harm or injustice had occurred or would have occurred because it had failed to seek other alternative transfer measures that would have addressed its concerns. Furthermore, the Commonwealth's petition for a writ of mandamus was premature as there was still an adequate remedy for the court's failure to transfer K.R. to circuit court pursuant to KRS 635.020(4). Thus, the extraordinary remedy of a writ of mandamus was not warranted.

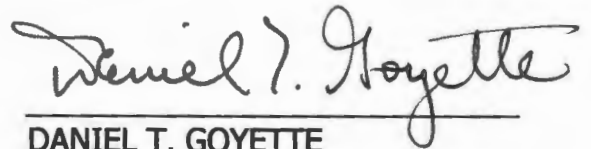
CONCLUSION

For the foregoing reasons, the appellant, K.R., by counsel, respectfully submits that the order of the Court of Appeals affirming the entry of the writ of mandamus by the Jefferson Circuit Court should be vacated and that jurisdiction of K.R. should be returned to Jefferson District Court Juvenile Division #99.

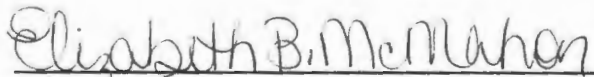


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