

**Commonwealth of Kentucky  
Supreme Court  
2010-SC-0076-DG**

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

Appellant

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

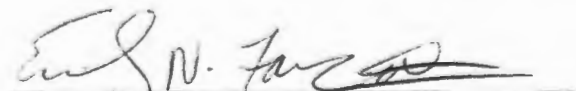
Appellee

**Reply 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. Dorislee Gilbert, 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 July 28, 2011. I further certify that the record on appeal was not removed from the Office of the Clerk of the Supreme Court.

  
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## **PURPOSE OF THIS BRIEF**

The purpose of this brief is to demonstrate the deficiencies in the arguments made by the appellee in its brief and to address the characterization of the facts by the appellee.

## **ISSUES TO WHICH THIS BRIEF IS ADDRESSED**

- 1. THE MORE APPROPRIATE RECITATION OF THE FACTS IS NOT THE ONE CONTAINED IN THE COURT OF APPEALS OPINION AFFIRMING THE JEFFERSON CIRCUIT COURT'S ISSUANCE OF A WRIT OF MANDAMUS.**

The appellee has expressed its belief to this Court that the more appropriate recitation of the facts to guide this Court's inquiry is the one that was stated by the Court of Appeals in its opinion affirming the Jefferson County Circuit Court's issuance of the writ of mandamus. K.R. believes a more detailed recitation of the facts and closer examination of the record on appeal is warranted in this case.

This Court must consider that the facts relied on by the Court of Appeals with regard to the charges filed against K.R. are based solely on a probable cause hearing conducted in the juvenile court. At that hearing Officer Eidem was the only witness. The facts as stated in his testimony were not tested in any other type of hearing or trial.

The Commonwealth and the Court of Appeals have placed great significance on the alleged fact K.R. knew her codefendants had a gun and were willing to use it against Juan Velasquez because she was with them when they

shot at an apartment originally thought to be Mr. Velasquez's prior to going to the correct apartment later in the day. A more comprehensive recitation of the facts would include the fact that upon Judge Dewese's inquiry, the Commonwealth stated that K.R. was not charged for the alleged shooting of the wrong apartment. (VR No. 1; 6/20/08; 2:37:16-2:37:24). The Commonwealth is essentially asking this Court to place great significance on a fact that is not supported by the record in any way other than Officer Eidem's testimony. Presumably one could argue that probable cause must not have existed for that allegation or K.R. would have been charged in connection with the first alleged shooting.

Furthermore, the record is not dispositive as to whether or not K.R. was present for the first alleged shooting. Officer Eidem only specifically stated that Jose Lopez shot into the wrong apartment. (VR No. 1; 6/20/08; 2:11:52). When testifying about that incident, he stated "they drove by once" and that when "they" found out it was the wrong apartment "they" went back. *Id.* The Commonwealth and the Court of Appeals have assumed that K.R. was included in "they." However, a close examination of Officer Eidem's testimony raises a real question as to whether or not K.R. was present when the wrong apartment was allegedly shot. Officer Eidem further testified that K.R. later directed her codefendants to the correct apartment because she is the person who knew the correct location of Mr. Velasquez's residence. Mr. Velasquez told Officer Eidem that K.R. had been coming to the apartment for 3 to 4 weeks on Friday and

Saturday nights. (VR No. 1; 6/20/08; 2:26:47-2:27:20). It does not make sense that K.R. would have been present at the alleged shooting of the wrong apartment. She knew exactly where Mr. Velasquez lived. If she was directing Jose Lopez and Javier Velasquez to help her get her bracelet back, she surely would have had them take her to the correct apartment. The record is at best ambiguous as to whether K.R. was initially present when Jose Lopez fired a gun at the wrong apartment. Therefore, a more complete recitation of the facts is warranted.

**2. THIS CASE IS NOT ONE OF THE "CERTAIN SPECIAL CASES" ELIGIBLE FOR RELIEF BY WRIT, AND THE COMMONWEALTH HAS NOT ESTABLISHED GREAT AND IRREPARABLE HARM ENTITLING IT TO RELIEF.**

The Commonwealth in support of its argument that this case falls within the "certain special cases" category, stated that the juvenile court's decision not to transfer K.R. pursuant to KRS 635.020(4) affects the orderly administration of justice. (Brief for Appellee, pp. 8-13). Specifically, the Commonwealth notes that the transfer statutes were put in place by the legislature to deal with youthful offenders who cannot benefit from the treatment contemplated by the juvenile court system. (Brief for Appellee, p. 10). It also focused on the fact that "the state has a compelling interest in protecting the public from a juvenile who will not be helped by the juvenile justice system." (Brief for Appellee, p. 11). It is the Commonwealth's contention that a substantial miscarriage of justice occurred in this case because neither the state's interest in protecting its citizens, the interests of K.R., nor other juveniles for whom transfer will be sought, were

appropriately shielded because of the juvenile court judge's ruling with regard to the transfer of K.R. (Brief for Appellee, p. 11). Additionally, the Commonwealth claims that "the order in this case was ruinous to the Commonwealth Attorney's obligation 'to see that every defendant receives a fair trial....'" (Brief for Appellee, p. 14). The Commonwealth's arguments are deficient based on the record that exists in this case.

The Commonwealth never examined whether or not K.R. would benefit from treatment in the juvenile court system or whether it was in K.R.'s best interest to seek her transfer to circuit for trial as an adult pursuant to KRS 635.020(4). Nor, did the Commonwealth evaluate whether the public needed to be protected from K.R. The Assistant Commonwealth's Attorney specifically stated during the oral argument on its motion for a writ of mandamus that in looking at KRS 635.020(4), the legislature said when a juvenile is at least fourteen years old and uses a weapon, that juvenile belongs in circuit court. "We are not dealing with the best interest of the child or weighing anything out." (VR No. 2; 9/24/08; 11:16:33). This is contrary to the express legislative intent as provided for in the Unified Juvenile Code. For example, "[t]he Commonwealth shall direct its efforts to promoting protection of children." KRS 600.010(2)(a). "Any child brought before the court under KRS Chapters 600 to 645 shall have the right to treatment reasonably calculated to bring about an improvement of his or her condition." KRS 600.010(2)(d). Finally, "KRS Chapter 635 shall be interpreted to promote the best interests of the child through providing

treatment and sanctions...." KRS 600.010(2)(e). While KRS 635.020(4) may appear to focus only on specific criteria mandating the transfer of a child to circuit court, the inquiry is not that simple. The best interests of the child, per express legislative intent, are still to be considered. The time for that consideration is prior to the probable cause hearing. The Commonwealth should have been fully evaluating the case and whether the facts were sufficient to support the notion that K.R. was the kind of child that the legislature contemplated needing to be transferred to circuit court when it enacted KRS 635.020(4). Instead, the discussion surrounding the decision by the County Attorney to seek transfer of K.R. to circuit court centered around his belief that the Commonwealth "doesn't want an empty chair up there" in circuit court when the codefendants are tried because it would "look bad." (VR No. 2; 9/24/08; 11:11:23-11:11:45, 11:15:33). The Commonwealth's desire to have K.R. in circuit court for the stated purpose of making the case against the codefendants stronger was never challenged by the Commonwealth's Attorney during the oral arguments regarding the writ of mandamus. Based on the foregoing, it is evident that the orderly administration of justice was not disturbed by the juvenile court judge's rulings. Furthermore, the order was certainly not ruinous to the Commonwealth's obligation to see that K.R. received a fair trial.

### **3. COMMONWEALTH V. ECKERT SHOULD NOT BE USED AS PERSUASIVE AUTHORITY IN THIS CASE**

The Commonwealth cited to the unpublished opinion of Commonwealth v. Eckert, 2002-CA-002416-MR, 2003 WL 1344875 (Ky. App. Feb. 21, 2003), in its

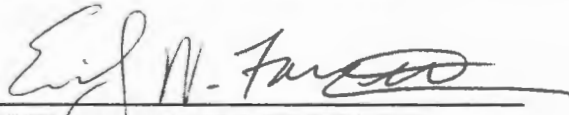
brief. (Brief for Appellee, p. 6). “[U]npublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court.” CR 76.28(4). The Commonwealth appears to be citing to this case as authority for the position that it did not have an adequate remedy by appeal. However, the Commonwealth already cited ample published case law to support that position. Furthermore, K.R. has conceded that the Commonwealth did not have a remedy by appeal.

The Commonwealth also appears to be citing to this case to support the idea that it is appropriate for the Commonwealth to request a writ of mandamus when juvenile court orders are issued denying transfer of juveniles to circuit court. That is not an issue raised by K.R. in this case. Rather, K.R. has asserted that it was not proper for the Commonwealth to seek a writ of mandamus in this particular case. Therefore, the case of Commonwealth v. Eckert, 2002-CA-002416-MR, 2003 WL 1344875 (Ky. App. Feb. 21, 2003), should not be used as persuasive authority in this case.

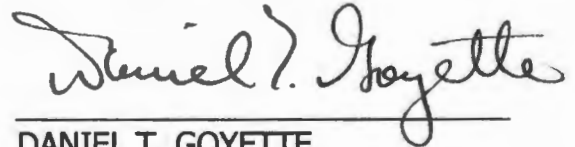


**CONCLUSION**

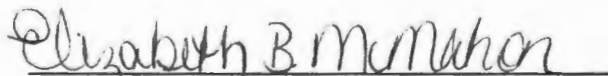
For the reasons stated in this brief and in her original brief, the appellant, K.R., by counsel, respectfully submits that the order of the Court of Appeals affirming the entry of the writ of mandamus by the Jefferson Circuit Court should be vacated and that jurisdiction of K.R. should be returned to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



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