COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2006-CA-002450
2008-SC-213

PETITIONERS F, G, H, J, AND K, JUVENILES **APPELLANTS**

V.

Appeal from Franklin Circuit Court, Division I
Hon. Sam McNamara, Judge
Case No. 06-CI-00214

BRIDGET SKAGGS BROWN,
COMMISSIONER, DEPARTMENT OF JUVENILE JUSTICE,
IN HER OFFICIAL CAPACITY **APPELLEE**

REPLY BRIEF FOR APPELLANT

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of this Reply Brief have been served by first class mail, postage prepaid on March 31, 2009 to Hon. Sam McNamara, Franklin Circuit Court, Courthouse, 214 St. Clair Street, Frankfort, Kentucky 40601; Joslyn Olinger, Department of Juvenile Justice, 1025 Capital Center Drive, Third Floor, Frankfort, Kentucky 40601 and Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, 3rd Floor, Frankfort, Kentucky 40601. I also certify that the record was not withdrawn from the Supreme Court of Kentucky.

Gail Robinson

PURPOSE OF THIS REPLY BRIEF

The purpose of this Reply Brief is to respond to the arguments in the Brief for Appellee to the extent space permits.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

APPELLEE DOES NOT HAVE THE AUTHORITY TO REMOVE DNA FROM ADJUDICATED PUBLIC OFFENDERS WHO HAVE NOT BEEN CONVICTED OF A CRIME

Appellee repeatedly quotes KRS 17.174 in its "Brief for Appellee", generally asserting that the statute is "clear and unambiguous." *See, e.g.,* Brief for Appellee, pg. 10. According to Appellee: "KRS 17.174 clearly adds adjudicated public offenders to existing classes of persons subject to DNA sampling for the offenses described in KRS 17.170 and KRS 17.171". *Id.*, p. 9. In making this argument, Appellee is asking this Court to ignore the fact that neither KRS 17.174, nor the DNA collection statute (KRS 17.170) nor the testing statute (KRS 17.175) authorizes the Appellee to collect and test DNA from adjudicated youth.

In effect, Appellee is asking this court to pretend that KRS 17.174 really says this:

> ***KRS 17.170 and 17.175*** ~~KRS 17.171 and 17.172~~ shall apply to a public offender adjudicated a public offender or in the custody of the Department of Juvenile Justice on or after July 15, 2002, for any offense defined in KRS 17.170, ~~or~~ 17.171, ***or 17.172*** or an attempt to commit one (1) of the named offenses. ***For purposes of this statute, the Department of Juvenile Justice shall have the same authority to collect DNA samples as the Department of Corrections. The Kentucky State Police shall treat the samples collected in the same manner as samples collected from convicted persons.***

Of course, this is not the statute which was passed by the General Assembly. This court "must look to the express language of a statute rather than surmising what may have been intended by the legislature but was not expressed." *Coy v. Metropolitan Property and Casualty Ins. Co.*, 902 S.W.2d 73 (Ky.App. 1996).

As Appellants noted in their principal brief, much of the design of the juvenile justice system is calculated to avoid giving the impression that society regards the child as a convict. *See* KRS 635.040 (juvenile offender is not "convicted"); *Dryden v. Commonwealth*, 435 S.W.2d 457, 461 (Ky. 1968)("A jury trial, with all the clash and

clamor of the adversary system that necessarily goes with it, would certainly invest a juvenile proceeding with the appearance of a criminal trial, and create in the mind and memory of the child the same effect as if it were.") As the Court of Appeals stated in *J.D.K. v. Commonwealth*, 54 S.W.3d 174 (Ky.App. 2001), if the legislature's objective was to dispense with juvenile court protections and require a child to have his DNA forcibly taken and placed in the "convicted offender database", it would not have left the matter to implication. Nevertheless, the only thing "clear and unambiguous" about KRS 17.174 is that it does not in any way alter, amend or modify either the DNA collection statute (which applies only to convicted persons) or the DNA testing statute (which likewise applies only to convicted persons). The only thing it does do is direct that two statutes, which require the Department of Corrections to collect blood from certain convicted offenders, shall also apply to public offenders who have been adjudicated of certain public offenses. Taken literally, the statute does nothing more than require the Department of Corrections to obtain DNA samples from convicted criminals who have a qualifying juvenile adjudication, even if they do not have a qualifying criminal conviction.

Appellee also asserts that KRS 17.174 was "the most significant statutory section added by the Legislature" in House Bill 4, arguing that KRS 17.174 was an attempt by the legislature to respond to the concerns raised by the Court of Appeals in *J.D.K.* (Brief for Appellee, pg. 7). However, a review of House Bill 4 (a copy of which is attached) shows that the bill, as a whole, was not an attempt to deal with *J.D.K.*, but an attempt to determine how best to utilize a forensic tool (DNA evidence) which had the power both to identify wrongdoers and exonerate the wrongly convicted. The provisions of the bill were as follows:

- Section 1: Created KRS 422.285, a new section which permitted persons on death row to have evidence subjected to DNA testing, where that test result might exonerate the accused.

- Section 2: Created KRS 422.287, a new section which established a procedure for allowing a person facing a death sentence (or a prosecutor seeking a death sentence) to require certain items of evidence to be DNA tested.
- Section 3: Created KRS 422.290, a new section setting forth rules for obtaining DNA testing from the Kentucky State Police, and describing who bears the costs for such testing.
- Section 4: Amended 17.170 to permit DNA samples to be taken from convicted (but not adjudicated) offenders through non-invasive means.
- Section 5: Created KRS 17.171.
- Section 6: Created KRS 17.172
- Section 7: Created KRS 17.173
- Section 8: Created KRS 17.174
- Section 9: Amended 17.175 to change the phrase "blood samples" to "DNA samples"
- Section 10: Created KRS 524.140, a new section which prohibits the Commonwealth from destroying evidence prior to trial where that evidence may be subject to DNA testing.
- Section 11: Created KRS 17.177, which sets forth the time for implementing the various provisions of this statute.

In other words, this statute contained new provisions which allowed persons on death row to get DNA evidence tested, created a process for DNA testing in all capital cases, and which prohibited authorities from destroying evidence subject to DNA testing, to say nothing for those sections which expanded dramatically the number of inmates subject to having their DNA placed in the "convicted offender database." To say that KRS 17.174 – which the

legislature placed on the lowest priority for implementation, see KRS 17.177(3)[1] – is the "most significant statutory section added by the Legislature" in House Bill 4 beggars belief.

Likewise, the claim that House Bill 4 was merely a vehicle to deal with *J.D.K.* – or that *J.D.K.* was even considered by the legislature in passing that bill – is completely unfounded. In House Bill 4 the General Assembly amended both KRS 17.170 and KRS 17.175, yet left the "convicted of a felony offense" language completely intact. KRS 17.170 was reenacted in 2002 and 2006 without adding the "or adjudicated" language suggested by the Court of Appeals in *J.D.K.* Moreover, the legislature's actions in 2006 manifested a belief that the 2002 amendments did not provide for testing of any juveniles, including convicted youthful offenders.

Appellants acknowledge that 2008 HB 683 did contain language applying DNA sampling to adjudicated juveniles. The legislature rejected the bill supported by the Justice Cabinet which would have permitted DNA sampling from any youth adjudicated of a felony offense regardless of age and enacted a bill allowing sampling only of youth thirteen or older adjudicated guilty of offenses included in the violent offender or incest statutes. The Franklin Circuit Court on February 25, 2009 declared 2008 HB 683 void because it was enacted in violation of the Kentucky Constitution, Section 56. *Petitioner A, a Juvenile, et al. v. Haws et al.,* Franklin Circuit Court File No. 08-CI-1088. However, the legislature just passed 2009 HB 321 which allows samples collected pursuant to that law to be maintained and used pursuant to the new law. The juveniles to whom DNA sampling will be applicable pursuant to the new law are those fourteen or older adjudicated of incest or sex offenses under KRS Chapter 510 or declared to be sex offenders under KRS 635.510.

In light of the foregoing, it is clear that the legislature did not give Appellee the authority via HB 4 to forcibly take DNA samples from youth who have never been

[1] KRS 17.177(3) directed that KRS 17.171-17.175 be implemented "in numerical order." As the change to KRS 17.175 was merely a language change, that meant that KRS 17.174 was the lowest priority for implementation.

convicted of a criminal offense. The Court of Appeals erred by finding that the Appellee had that authority, and reversal is required.

II. THE COLLECTION OF BIOLOGICAL MATERIAL FROM ADJUDICATED PUBLIC OFFENDERS FOR DNA TESTING PURPOSES DEPRIVES THOSE YOUTH OF THEIR RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES CONTRARY TO THE 4TH AND 14TH AMENDMENTS, UNITED STATES CONSTITUTION AND SECTIONS 2, 10 AND 11, KENTUCKY CONSTITUTION.

The limitations which the state and federal constitutions place upon Kentucky's right to take DNA samples from non-convicted persons, such as juvenile offenders, have never been definitively resolved by either this Court, or the United States Supreme Court. In its initial brief before this Court, Appellants argued that the principles articulated by the United States Supreme Court and this Court require that this Court prohibit the practice in juvenile cases, because it does not satisfy the "special needs" test described in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), *Ferguson v. City of Charleston*, 532 U.S. 67, 69 (2001), and *Williams v. Commonwealth*, 213 S.W.3d 671 (Ky. 2006). For its part, the Appellee responds by claiming that the Commonwealth's "interest in the 'identification, detection and exclusion of individuals who are subjects of the investigation or prosecution of sex related crimes, violent crimes, or other crimes. . .'" is somehow readily distinguishable from the kind of "law enforcement interests" which *Edmond*, *Ferguson* and *Williams* identify as the kinds of interests which cannot justify a suspicionless search. Appellee can offer no basis to distinguish between those interests except that everybody else appears to be doing so.

Many of the cases relied upon by the Appellee have tended to analogize DNA profiling with fingerprinting, and authorized DNA testing on the theory that it offered a minimal intrusion, and did little more than provide information identifying the offender. Such cases generally either involved adult criminals, or juveniles in justice systems which lacked Kentucky's commitment to juvenile rehabilitation. More importantly, most were decided before the Federal Bureau of Investigation's recent decision to permit "familial searching" implicated the privacy rights of individuals other than the offender himself.

Recently, the Federal Government has authorized "familial" or "kinship" searches of its DNA database. Mark Hansen, *Match Point: How a Denver Rape Probe Got the FBI to Change Policy and Release Kinship DNA*, 92 A.B.A.J. 48, Dec. 20, 2006. "'Familial searching' is premised on the notion that siblings and other closely related individuals share more common genetic material than nonrelated individuals. The technique involves looking for a 'partial match' between DNA specimens taken from the crime scene with those in an offender database. Such a 'partial match' might indicate a close family member of the person whose DNA was left at the scene of the crime." Tania Simoncelli, Barry Steinhardt *California's Proposition 69: A Dangerous Precedent for Criminal DNA Databases*, 34 J.L. Med. & Ethics 199, 203 (2006).

A DNA sample taken into the Kentucky's DNA system is generally required to be uploaded into the federal system. KRS 17.175(1). Neither Kentucky nor the United States government requires samples, once uploaded into the system, to be destroyed. As such, the sample taken from a juvenile offender will have the effect of placing not only that offender, but the offender's entire immediate family (and perhaps other relatives as well) under lifetime genetic surveillance, searchable by every law enforcement agency in the nation with access to CODIS. Of course, many of these innocent individuals will become suspects for no reason other than their relation to the offender, and in most cases this suspicion will prove to be completely unfounded.[2] No case has yet considered the legal implications of this technological advance.

In light of the continuing advances in DNA technology, and the implications those advances have for protecting the privacy of innocent persons, this Court should be reluctant to accept the Appellee's invitation to simply rely on cases which were based upon a more

[2] *See* Henry T. Greely, Daniel P. Riordan, Nanibaa' A. Garrison, Joanna L. Mountain, *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L. Med. & Ethics 248, 252 (2006)(Describing the success rate of kinship profiling in Great Briton, where the practice began, as "about 25 percent", and noting an example of a case where "Two random Britons would be expected to match on six or seven of the twenty alleles used in the United Kingdom's system. The partial search turned up about twenty-five white males in the relevant geographical region who matched DNA from the brick and the car at eleven or more alleles." Of course, virtually all of those individuals, and all of their families, were innocent.)

primitive and limited technology. The fact that a juvenile offender's DNA profile puts his entire family's genome on public display should be a key consideration weighing against the Appellee's claims in this case.

The other significant reason for not simply acquiescing to the majority rule, is that most of the cases relied upon by the Appellee do not apply to juveniles at all. Those few opinions which do arise out of juvenile cases involve juvenile justice systems[3] very different from what Kentucky has developed.

Only nine appellate courts have addressed whether DNA testing of adjudicated juveniles constitutes an illegal search, and only two of the nine were the state's highest court. *See* Brief for Appellant, pg. 29-31. Those courts have generally failed to distinguish at all between convicted felons and adjudicated juveniles or given the differences between the two classes little weight in their analysis of the issue. Additionally, some of the juvenile justice systems at issue really were essentially indistinguishable from adult criminal justice systems. *See In Re Lakisha M.*, 882 N.E.2d 570 (Ill. 2008) where the Illinois Supreme Court acknowledged the "radical" alternation of the state's juvenile system in 1999, importing adult terms such as "trial" and "sentencing" and permitting jury trials in some cases.

This Court has generally resisted analogies between the criminal justice system and the juvenile justice system, principally in order to ensure that our juvenile code maintains its rehabilitative focus. *See W.D.B. v. Commonwealth*, 246 S.W.3d 448, 449-152 (Ky. 2007)(finding that the juvenile code is rehabilitative in nature, and repealed common law infancy defenses); *A.W. v. Commonwealth*, 163 S.W.3d 4 (Ky. 2005)(refusing to apply adult rules to probation revocation, in order to provide the court with the continued jurisdiction over the child for rehabilitative purposes); *Commonwealth v. W.E.B.*, 985 S.W.2d 344 (Ky. 1998)(Refusing to permit juvenile sentences to be "stacked" in the same manner as adult

[3] In this regard, Appellee's reference to our juvenile justice system as "the juvenile *criminal* justice system" (Brief for Appellee, pg. 8) is quite troubling. The Department of Juvenile Justice is the agency charged with treating and rehabilitating children pursuant to our juvenile code, which specifically distinguishes between juveniles who are adjudicated and are not deemed criminals and adults who are convicted and are labeled criminals. *See* KRS 600.010(2)(d); KRS 605.100(3); KRS 15A.065(1)(g)5; KRS 635.040.

sentences, relying on the rehabilitative model of the juvenile code). Requiring children to provide DNA samples to be included permanently in an interstate database is indeed stigmatizing and certainly telegraphs to the child that society does not believe he can be rehabilitated and thus must hedge its bets in case the child reoffends.

This reliance on rehabilitation is well justified. The population at which DNA testing is primarily aimed, juvenile sex offenders, is a group highly amenable to treatment for whom DJJ has an effective program with a ninety-seven percent successful completion rate. Gibson, Paul, *"Analysis of Juvenile Sexual Offender Statistics*, FY 2003-2004". In fact, DJJ tracks juvenile sex offenders as required by KRS 635.545 and the most recent report reveals that the rate of sexual re-offending is low – about six percent. *Id.* National research also reveals that juvenile sex offender are more responsive to treatment than adult sex offenders and their rate of sexually re-offending is generally low - about five to fourteen percent. National Center on Sexual Behavior of Youth, NCSBY Fact Sheet, "*What Research Shows About Adolescent Sex Offenders*". *See* www.ncsby.org.

In short, there is no "special need" to DNA test adjudicated juveniles and the program was clearly enacted for law enforcement purposes. *See* Brief for Appellant, pg. 27-28. While appellee attempts to disavow reliance on the Directives of the DJJ Commissioner and contends that the database "does not generate criminal prosecutions" (Brief for Appellee, pg. 16), in fact KRS 17.175(4) specifies that the DNA information obtained through the program "shall be used only for law enforcement purposes" and the Directives specifically describe DNA collection as "a valuable law enforcement tool" which solves many serious crimes (A II 20). The criminal justice purpose of the program is obvious and incompatible with both the rehabilitative mission of our juvenile code and DJJ's successful treatment program for juvenile sex offenders.

Taking DNA from adjudicated juvenile offenders violates their right to be free from unreasonable searches and seizures and their right to privacy. Reversal is necessary.

III. RESPONDENT HAS VIOLATED KRS CHAPTER 13A BY FAILING TO ISSUE AN ADMINISTRATIVE REGULATION CONCERNING DNA SAMPLING AND INSTEAD RELYING ON "DIRECTIVES" AND INTERNAL POLICIES.

KRS 13A.120(6) unambiguously states that "[N]o administrative body shall issue standards or by any other name issue a document of any type where an administrative regulation is required or authorized by law". DJJ, an administrative body, has issued "standards" – directives and an internal policy – when an administrative regulation is required by KRS 13A.100(1). That statute mandates an administrative regulation for any "form of action that implements; interprets; prescribes law or policy". Directives 06-02 and 06-05 and DJJ Policy 138 certainly implement and interpret KRS 17.174. Since they do so they are prohibited by KRS 13A.120(6).

Appellee's response is that nothing empowers or requires DJJ to promulgate a regulation on the subject, and only the state police have the authority to implement a regulation on this topic (Brief for Appellee pg. 21-22). Appellee is wrong on both points. KRS 13A.100(1) mandates a regulation since DJJ is the agency implementing and interpreting KRS 17.174. And 502 KAR 32:010, issued by the KSP, addresses DNA sampling for adults and youthful offenders whose cases are in circuit court but does not deal with juvenile public offenders. The trial court's conclusion that the regulation could apply by "extrapolation" to those juveniles lacked substance. A regulation is necessary and DJJ's Directives 06-02 and 06-05 and Policy 138 are void.

IV. APPELLEE HAS VIOLATED FINAL ACTION BY THE JUSTICE CABINET BY ISSUING DIRECTIVES AND POLICIES INSTITUTING DNA SAMPLING.

KRS 17.177(3) directed the Secretary of the Justice Cabinet to notify the Reviser of Statutes when KRS 17.174 and the adjacent statutes were implemented. The Secretary informed the Reviser in a letter dated April 5, 2003 that the Department of Corrections and the KSP "have completed their preparations for implementation of the Act" and that the applicable sections [which included KRS 17.174] were to be effective May 1, 2003 (App. 37-38). The Justice Cabinet had no program at that time for collecting DNA samples from

adjudicated juveniles. Appellee's position is that KRS 17.177(3) "specifically did not require the Justice Cabinet to notify regarding the 'date of implementation of testing'" and thus there was no problem with DJJ implementing a DNA sampling program for adjudicated juveniles nearly three years later (Brief for Appellee, pg. 23). Appellants ask how Justice could have "implemented" KRS 17.174 without having a testing program for adjudicated offenders. There is no other way to "implement" the statute in question and Appellee violated final action by the Justice Cabinet when she instituted the 2006 DNA sampling program. Reversal is necessary.

CONCLUSION

For the foregoing reasons, and for all reasons stated in the original "Brief for Appellant", the judgment of the Court of Appeals should be reversed, and case remanded with instructions that the injunction sought by the Appellants be granted.

Respectfully Submitted

Timothy G. Arnold

Gail Robinson