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KENTUCKY SUPREME COURT
File No. 2008-SC-899

ORLANDO SAXTON **APPELLANT**

ON REVIEW FROM THE KENTUCKY COURT OF APPEALS

V. **Appeal from Graves Circuit Court**
Hon. Timothy Stark, Judge
Indictment No. 06-CR-00195

COMMONWEALTH OF KENTUCKY **APPELLEE**

REPLY BRIEF FOR APPELLANT ORLANDO SAXTON

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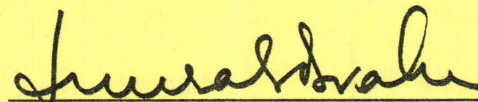
Certificate required by CR 76.12(b)

The undersigned certifies that this reply brief was served by U.S. mail, postage prepaid, on the Hon. Timothy Stark, Judge, Graves Circuit Court, Courthouse, Box 5, 100 E. Broadway, Mayfield, Kentucky 42066; the Hon. David Hargrove, P.O. Box 315, Mayfield, Kentucky 42066-0315; the Hon. Josh W. Nacey, 503 North 16th Street, Murray, Kentucky 42071; and by messenger mail to: the Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204 on August 10, 2009.



JAMESA J. DRAKE

STATEMENT OF POINTS AND AUTHORITIES

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I. A PERSON IS GUILTY OF TRAFFICKING WITHIN 1,000 YARDS OF A SCHOOL ONLY IF HE IS AWARE OF HIS PHYSICAL PROXIMITY TO THE SCHOOL AT THE TIME HE TRAFFICS. 1

KRS 218A.1411 .... 1, 3

CR 76.12(4)(iv) 1

Black's Law Dictionary 51 (8th ed. 2004) 1

KRS 218A.1412 3

KRS 218A.1414 3

Arthur Andersen LLP v. United States, 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005) 4

II. THE POLICE ENTRAPPED DEFENDANT INTO TRAFFICKING WITHIN 1,000 YARDS OF A SCHOOL WHEN THEY SPECIFICALLY ARRANGED FOR A CONTROLLED BUY AT A LOCATION WITHIN 1,000 YARDS OF A SCHOOL 4

CONCLUSION 6

KRS 218A.1411 6

I.

A PERSON IS GUILTY OF TRAFFICKING WITHIN 1,000 YARDS OF A SCHOOL ONLY IF HE IS AWARE OF HIS PHYSICAL PROXIMITY TO THE SCHOOL AT THE TIME HE TRAFFICS.

The Commonwealth argues that defendant "admits to each and every element of violating [the trafficking within 1,000 yards of a school statute,] KRS 218A.1411." Commonwealth's Brief at 2. To support that contention, it cites to the **Statement of the Case** in the Appellant's Brief filed in the Court of Appeals. *Id.* at 2.

Defendant's Statement of the Case – both in his brief to this Court and in his brief to the Court of Appeals – complies with CR 76.12(4)(iv). As such, it provides a "narrative" of the "facts" found by the jury that are "necessary to an understanding of the issues presented by the appeal." In an abundance of caution, defendant explains the obvious. The narrative portion of his Statement of the Case refers to places in the record where the Commonwealth presented evidence that, *inter alia*, defendant sold marijuana, the sale took place at the Days Inn motel, and the Days Inn motel was located within 1,000 yards of Graves County High School. Defendant disputed those "facts" at trial by pleading not guilty, and he did not "admit" those "facts" on appeal by reciting them (with a corresponding citation to the record) in his Statement of the Case. An "admission" is "an acknowledgement that facts are true." Black's Law Dictionary 51 (8th ed. 2004). An acknowledgement that facts are **true** is different than an acknowledgement that facts are **proved.** The Commonwealth's argument that defendant somehow "admitted" **anything** on appeal is wrong.

More to the point, the question is not whether defendant admitted, or the Commonwealth proved, the ***actus reas*** elements of the trafficking within 1,000 yards of a school statute. *See* Commonwealth's Brief at 4 ("On page 1 of his 'Brief for Appellant,' appellant admits that he sold marijuana to two confidential informants. On page 1 of his 'Brief for Appellant,' appellant also admits that the January 7, 2006 marijuana transaction occurred 'at the Days Inn motel, which is located within 1,000 yards of Graves County High School.' Thus, Appellant admits to each and every element of violating KRS 218A.1411.")

This case concerns the ***mens rea*** elements of the trafficking within 1,000 yards of a school statute. The fact that the Commonwealth proved the *actus reus* elements is inconsequential to the question of whether the Commonwealth proved the *mens rea* elements. It did not.

The trafficking within 1,000 yards of a school statute contains **two** *mens rea* elements. *First*, as in every "trafficking" statute, the Commonwealth must prove that the defendant *knowingly* trafficked in a controlled substance. *Second*, the Commonwealth must also prove that defendant *knowingly* trafficked in a controlled substance *within 1,000 yards of a school.* The Commonwealth failed to prove the second *mens rea* element.

The Commonwealth's argument to the contrary goes too far. Rather than acknowledge that the trafficking within 1,000 yards of a school statute – like **every** other trafficking in controlled substances statute – contains at least one *mens rea* element, *i.e.* the defendant *knowingly* trafficked in a controlled substance, the

Commonwealth argues that the statute does not contain **any** *mens rea* elements at all. *See* Commonwealth's Brief at 4, 7. That argument is problematic for three obvious reasons. *One*, **nothing** suggests that the legislature intended to criminalize the reckless, negligent, or accidental transfer of controlled substances **under any circumstances**. **None** of the generic trafficking statutes, KRS 218A.1412 through 218A.1411, codify strict liability offenses. *Two*, the crime of trafficking in controlled substances within 1,000 yards of a school is a felony offense. The Commonwealth ignores the **universal** condemnation of strict liability offenses for "serious" crimes. *See* Appellant's Brief at 7-8. *Three*, the Commonwealth overlooks the proportionality problems with its argument. The trafficking in controlled substances within 1,000 yards of a school statute proscribes trafficking in, *inter alia*, Schedule IV or V controlled substances near a school. The third-degree trafficking in controlled substances statute also proscribes trafficking in Schedule IV or V controlled substances. Third-degree trafficking is a misdemeanor offense, and it is **not** a strict liability offense. KRS 218A.1414. Trafficking within a 1,000 yards of a school is a felony offense, and, contrary to the Commonwealth's assertion otherwise, it, too, is **not** a strict liability offense.

A person is guilty of trafficking within 1,000 yards of a school – much like a person is guilty under **all** of the other trafficking statutes – only if, *inter alia*, the person *knowingly* traffics in a controlled substance. If this Court accepts that the trafficking within 1,000 yards of a school statute contains one *mens rea* element, the only remaining question is whether that element applies "to other elements down the

statutory chain." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005). For all of the reasons discussed in the Appellant's Brief at 19-25 (and thus not repeated here), the *mens rea* element *knowingly* applies to the *within 1,000 yards of a school* element.

Again, the Commonwealth makes **no** argument that it presented **any** evidence from which the jury could infer that defendant knew his physical proximity to Graves High School when he trafficked in a controlled substance. The proper remedy to vacate defendant's conviction for trafficking within 1,000 yards of a school.

II.

THE POLICE ENTRAPPED DEFENDANT INTO TRAFFICKING WITHIN 1,000 YARDS OF A SCHOOL WHEN THEY SPECIFICALLY ARRANGED FOR A CONTROLLED BUY AT A LOCATION WITHIN 1,000 YARDS OF A SCHOOL.

The Commonwealth has doubled-down on its rhetoric about the dangers inherent in drug dealing in or near a school: "Bullets travel long distances. The drug trade is a violent trade. Guns are tools of the drug trade. It is no secret that gangs are involved in the drug trade, often violently. And they use guns to settle their differences. Drug deals gone bad often lead to gunfire and death. When those bad deals occur within 1,000 yards of a school, the students are in real danger. They are in real danger of being struck by stray bullets. It seems that the media reports, almost daily, of a child killed by stray bullets from drug-related gang violence." Commonwealth's Brief at 6. Apparently then, the Commonwealth agrees that what the police did in the instant case – *i.e.* purposefully arrange multiple purchases of

narcotics at a location within 1,000 yards of a school – is repugnant **and should never happen again**. No parent wants the police arranging controlled buys within 1,000 yards of their child or their child's school **on purpose**.

The Commonwealth's failure to respond to the merits of defendant's entrapment argument is telling. The Commonwealth has **no** response to defendant's argument that: "The record does not contain a scrap of evidence to suggest that defendant had in the past, would have on that occasion, or would in the future, traffic marijuana at the Days Inn or at any other location near a school. The record is devoid of any evidence from which a rational factfinder could conclude that defendant was disposed to traffic marijuana **within 1,000 yards of Graves County High School** before the confidential informants instructed him to do so." Appellant's Brief at 34 (emphasis in the original).

Instead, the Commonwealth argues that "[t]he issue of entrapment...was not properly preserved for appeal...[and does] not rise to the level of palpable error." Commonwealth's Brief at 9. At the same time, however, the Commonwealth makes **no** argument that a directed verdict of acquittal is not the appropriate remedy where the Commonwealth has failed to disprove entrapment beyond a reasonable doubt. For all of the reasons discussed on pages 27 though 31 of the Appellant's Brief (and thus not repeated here), where, as here, the Commonwealth fails to produce **any** evidence from which a rational factfinder could conclude that the defendant was disposed to commit the criminal act prior to first being approached by Government agents, a directed verdict of acquittal is in order. A criminal conviction tainted by police

entrapment constitutes palpable error. Again, the proper remedy is to vacate defendant's conviction for trafficking within 1,000 yards of a school.

CONCLUSION

For all of the reasons discussed herein and in the Appellant's Brief, defendant respectfully requests that this Court vacate his conviction for trafficking in a controlled substance within 1,000 yards of a school, KRS 218A.1411.

Respectfully submitted,

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