Commonwealth of Kentucky
Supreme Court

Case No. 2008-SC-899

ORLANDO SAXTON — **APPELLANT**

v.

Appeal from Graves Circuit Court
Hon. Timothy Stark, Judge
Indictment No. 2006-CR-00195

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief for the Commonwealth was served on the following named individuals by U.S. mail, postage pre paid, on this 24th day of July, 2009 to: Hon.Timothy Stark, Judge, Graves Circuit Court, Courthouse, Box 5, 100 E. Broadway, Mayfield, Ky. 42066 ; via electronic mail to: Hon. David Hargrove, Commonwealth's Attorney, P. O. Box 315, Mayfield, Ky. 42066-0315; and sent state delivered messenger mail to: Hon. Jamesa L. Drake, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 301, Frankfort, Ky. 40601.

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INTRODUCTION

This case is before the Court upon a grant of discretionary review. Appellant was convicted of three (3) counts of trafficking in a controlled substance (cocaine) and one (1) count of trafficking in marijuana within 1,000 yards of a school. He was sentenced to a total of sixteen (16) years imprisonment. Appellant's appeal only concerns his conviction for trafficking within 1,000 yards of a school. Appellant argues the Commonwealth must prove that he knew he was within 1,000 yards of a school, and he argues entrapment because the controlled transaction occurred within 1,000 yards of a school.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument would aide the Court in deciding this appeal. But, the Commonwealth stands ready to present oral argument is so ordered.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL HISTORY OF THE CASE.

On June 30, 2006, appellant, Orlando J. Saxton, was indicted by the Graves County Grand Jury. Appellant was charged with three (3) counts of violating KRS 218A.1412, trafficking in a controlled substance (cocaine), a Class C felony, and one (1) count of violating KRS 218A.1411, trafficking in a controlled substance (marijuana) within 1,000 yards of a school, a Class D felony. TR I p. 1-2. A jury trial was held on May 31, 2007, and appellant was found guilty as charged. TR II p. 201, side 2. Appellant was sentenced to a term of five (5) years imprisonment for each count of violating KRS 218A.1412, and he was sentenced to a term of one (1) year imprisonment for violating KRS 218A.1411. TR II p. 202. All sentences were ordered to be served consecutively, for a total of 16 years imprisonment. TR II p. 202.

B. THE FACTS AS FOUND BY THE COURT OF APPEALS.

The facts of this case are not in serious dispute. In its Opinion of November 7, 2008, the Court of Appeals made basic findings of fact:

> On June 30, 2006, the Graves County grand jury indicted Saxton on three counts of first-degree trafficking in a controlled substance and one count of trafficking in a controlled substance within 1,000 yards of a school. The indictment arose from events occurring on January 6 (sic), 2006, and January 25, 2006, when Saxton sold marijuana and cocaine to Saxton's aunt, Anna Saxton, and her finace' Henry Island. Anna and Henry had agreed to act as informants and to purchase the substances from Saxton in a hotel room being monitored by police officers of the Pennyrile Narcotics Task Force. The hotel was located within 1,000 yards of a school, and the transactions were videotaped. Opinion at p. 2.[1]

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[1] Appellant violated KRS 189A.1411 on Saturday, January 7, 2006. The drug sale on January 25, 2006 only involved cocaine. TR I p. 13 - 14.

C. APPELLANT'S ADMISSION OF BASIC FACTS.

On page 1 of his "Brief for Appellant" before the Court of Appeals, appellant admitted that he trafficked in marijuana when he sold 8.3 grams of marijuana to two (2) confidential informants--appellant's aunt, Anna Saxton, and her fiancé, Henry Island. Appellant also admitted, on page 1 of said Brief, that "[t]he Days Inn motel [where the transaction occurred] is located within 1,000 yards of the Graves County High School." On page 1 of his "Brief for Appellant" before this Court, appellant admits: "Defendant sold marijuana to two informants 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. A copy of the appellant's "Brief for Appellant" before the Court of Appeals is appended to this Brief.

D. THE COURT OF APPEALS' CONCLUSIONS OF LAW.

In its Opinion of November 7, 2008, the Court of Appeals made the following, relevant conclusions of law:

> Contrary to Saxton's claim, KRS 218A.1411 does not require the actor to "knowingly" traffic in a controlled substance within 1,000 yards of a school in order to be convicted of the offense. That is to say, there is no requirement that a conviction for violation of KRS 218A.1411 arises from proof that the actor knew the sale was conducted in proximity to a school. Rather, KRS 218A.1411 is silent as to *mens rea*. It merely requires proof of the unlawful transaction of a controlled substance or controlled substance analogue (i.e., fake drugs) within 1,000 yards of a school.
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> We are further persuaded that a requirement of *mens rea* is not imparted to KRS 218A.1411 by application of any provision of the Kentucky Penal Code. As the

> Commonwealth properly notes, KRS 501.050(1) requires proof of a mental state (intentionally, knowingly, wantonly or recklessly) for felonies set out in the Kentucky Penal Code, KRS Chapter 500, et seq. The offense of trafficking within 1,000 yards of a school is not a provision of the Kentucky Penal Code, and KRS 501.050(1) is not applicable. Since the clear language of KRS 218A.1411 does not set out the mental state of "knowingly" as an element of the offense, and because we find that no other statutory provision imparts to KRS 218A.1411 the requirement of proof of a mental state, we find no error on the issue. Opinion at p. 3 - 4.
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> Saxton has acknowledged the responsibility for trafficking in controlled substances, stating in his written argument that "Defendant's ill-fated decision to sell drugs was his own." It is clear from the record and the entirety of the circumstances surrounding this matter that the Pennyrile Narcotics Task Force merely afforded Saxton the opportunity to commit the offense at issue, and that Saxton's choice to both sell controlled substances and to do so within 1,000 yards of a school rested solely with Saxton. Thus, even if this issue were preserved-which Saxton acknowledges it is not-we would find no error. Opinion at p. 5.

ARGUMENT

I.

TO OBTAIN A CONVICTION UNDER KRS 218A.1411, THE COMMONWEALTH DID NOT HAVE TO PROVE THAT APPELLANT KNEW THAT HE WAS WITHIN 1,000 YARDS OF A SCHOOL WHILE TRAFFICKING IN MARIJUANA.

On appeal, appellant argues that he should have been granted a directed verdict of acquittal because the Commonwealth failed to prove that he knew he was within 1,000 yards of a school when he sold marijuana to two (2) confidential informants. Appellant presupposes that

KRS 218A.1411 places a *mens rea* of "knowingly" upon the situs of the crime. No authority interprets KRS 218A.1411 consistent with appellant's position.

Appellant was convicted of violating KRS 218A.1411–trafficking in a controlled substance within 1,000 yards of a school. KRS 218A.1411 provides:

> Any person who unlawfully traffics in a controlled substance classified in Schedules I, II, III, IV or V, or a controlled substance analogue in any building used primarily for classroom instruction in a school or on any premises located within one thousand (1,000) yards of any school building used primarily for classroom instruction shall be guilty of a Class D felony, unless a more severe penalty is set forth in this chapter, in which case the higher penalty shall apply. The measurement shall be taken in a straight line from the nearest wall of the school to the place of the violation.

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."[2] Thus, Appellant admits to each and every element of violating KRS 218A.1411.

KRS 218A.1411 does not contain a *mens rea*. Nonetheless, appellant argues that KRS 218A.1411 requires a *mens rea* of "knowingly." In other words, appellant argues that the Commonwealth must prove that appellant knew he was within 1,000 yards of a school when he sold the marijuana to Island and Saxton. To obtain a conviction under KRS 218A.1411, the Commonwealth need not prove that the appellant knew he was within 1,000 yards of a school

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[2] Appellant lived with both confidential informants. That is why a motel was used for the controlled purchase.

when he sold marijuana. Appellant admits he sold the marijuana and that he was within 1,000 yards of Graves County High School when he sold the marijuana. His conviction was proper.

Per KRS 501.050(1), all felonies under the Kentucky Penal Code require proof of one of the mental states provided for in KRS 501.020, i.e., intentionally, knowingly, wantonly or recklessly. But, if the felony offense falls outside of the Kentucky Penal Code, then no mental state is required so long as "the statute clearly indicates a legislative purpose to impose absolute liability for the conduct described." KRS 501.050(2).

The Kentucky Penal Code begins at KRS Chapter 500, et. Seq. Thus, KRS 218A.1411 "falls outside" of the Kentucky Penal Code. KRS 218A.1411 is an "offense defined by a statute other than this Penal Code[.]" KRS 501.050(2). Thus, KRS 501.050 does not require a *mens rea* for KRS 218A.1411. *See* Walker v. Commonwealth, 127 S.W.3d 596, 607 (Ky. 2004); Robertson v. Commonwealth, 82 S.W.3d 832, 846-47 (Ky. 2002) (Keller, J.., dissenting); and, Love v. Commonwealth, 55 S.W.3d 816, 824 (Ky. 2001) for the proposition that KRS 501.050 does not require a *mens rea* for offenses falling outside of the Kentucky Penal Code.

Since KRS 218A.1411 falls outside of the Kentucky Penal Code, its failure to provide a *mens rea* is not fatal. In KRS Chapter 218A, every offense involving the sale, possession, cultivation and/or the manufacture of controlled substances requires a *mens rea* of "knowingly"–every offense, that is, except for trafficking in controlled substances within 1,000 yards of a school. This omission is not accidental. It is purposeful and is evidence of legislative intent that KRS 218A.1411 be a strict liability offense. On page 12 of his "Brief for Appellant," appellant argues that KRS 218A.1411 is not a strict liability offense because "[t]he **text** of KRS 218A.1411 does **not** clearly indicate a legislative purpose to impose absolute liability. (Emphasis

original.)" The Commonwealth disagrees. The fact that KRS 218A.1411 is the **only** offense in KRS Chapter 218 without a *mens rea* is a clear indication of legislative intent to impose strict liability.

The legislature has made KRS 218A.1411 a strict liability offense for good reason. There are valid public policy reasons for treating schools differently as it relates to trafficking in controlled substances. Schools must be safe places where children come to learn, free from the evils and dangers of the outside world. Students cannot learn if they are high on controlled substances. Students cannot learn if they walk school halls in fear of drug dealers or drug-related gang violence. Students cannot learn when they are repeatedly solicited to buy controlled substances. And these evils do not end inside the schoolhouse. They continue on the playground. They continue on the street corner near the school. They continue on the sidewalks the students use to walk to and from school. And, they continue in the surrounding neighborhoods where the students live.

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. KRS 218A.1411 is a legislative attempt to prevent these events. The legislature has taken a zero tolerance, strict liability policy when it comes to schools and their surrounding neighborhoods. That is their prerogative.

The legislature has stated its zero tolerance by enacting KRS 218A.1411. If someone traffics in marijuana within 1,000 yards of a school, they have committed a felony. It does not matter if they knew they were within 1,000 yards. And, per KRS 501.050, this is wholly proper.

The Commonwealth would also noted that KRS 189A.1411 is not the only strict liability offense adopted by the legislature pertaining to the safety of children. KRS 17.545 forbids registered sex offenders from residing within 1,000 feet of a "high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility." There is no *mens rea* in KRS 17.545. The registered sex offender need not know that he is residing within 1,000 feet of any of those facilities. The legislature is very cognizant when it enacts strict liability legislation concerning the safety of children.

In the alternative, the legislature's failure to provide a mental state in KRS 218A.1411 is not fatal. "Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to **some** or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state. (Emphasis added.)" KRS 501.040.

Before the Court of Appeals, appellant cited as authority United States v. Wake, 948 F.2d 1422, 1433 (5th Cir. 1991). Appellant does not cite Wake before this Court, but Wake is very persuasive. Wake concerned 21 U.S.C. Sections 841(a)(1) and 845a(a). In Wake, the defendant was indicted for the federal crime of possessing controlled substances, within 1,000 yards of a school, with intent to distribute. The defendant in Wake argued that the government not only had to prove that he intended to distribute controlled substances, but also that he intended

to distribute the controlled substances within 1,000 yards of a school. The Firth Circuit Court of Appeals rejected this argument. The Court held that the defendant did not have to intend to distribute within 1,000 feet of a school. Rather, the defendant only had to possess, within 1,000 feet of a school, a sufficient amount of controlled substance to evidence an intent to distribute, anywhere. Id at p. 1430 - 1433. In other words, the Wake Court held that the *mens rea* of intent applied to the *actus reus,* i.e., possessing, rather than the situs of the crime, i.e., where the drug was possessed.

Though the relevant federal law in Wake was an "intentional" crime, its logic applies equally to "knowingly" crimes. Thus, if the Court concludes that KRS 218A.1411 is a "knowingly" crime, the Commonwealth argues the "knowingly" requirement should only apply to the *actus reus*, i.e., the actual transfer of the controlled substance, rather than the situs of the crime, i.e., within 1,000 yards of a school. This would be wholly proper per KRS 501.040, supra.

The Commonwealth proved, beyond a reasonable doubt, that appellant knowingly and unlawfully trafficked in marijuana. The Commonwealth also proved (and appellant admits) that appellant trafficked marijuana within 1,000 yards of a school. Per KRS 218A.1411, the Commonwealth was not required to prove that appellant knew he was within 1,000 yards of a school at the time he trafficked the marijuana. The trial court did not err in overruling the motion for a directed verdict. The trial court must be affirmed.

II.

APPELLANT WITHDREW HIS REQUEST THAT THE JURY BE INSTRUCTED ON THE DEFENSE OF ENTRAPMENT. APPELLANT FAILED TO MEET HIS BURDEN OF PROVING THE AFFIRMATIVE DEFENSE OF ENTRAPMENT.

On page nine (9) of his "Brief for Appellant" before the Court of Appeals, appellant stated: "Defendant did not argue that the state was estopped from prosecuting defendant for trafficking within 1,000 feet (sic) of a school on the ground that any resulting conviction would be impermissibly tainted by police entrapment. Nonetheless, palpable error occurred." On page 26 of his "Brief for Appellant" before this Court, appellant reverses field and argues that the his motion for a directed verdict properly preserved the issue for appellate review. It did not. Appellant, at a minimum, had to request that the jury be instructed on the defense of entrapment. Appellant initially made, and then withdrew, his request for such an instruction. The issue of entrapment, thus, was not properly preserved for appeal. The Court of Appeals properly held that appellant's allegation of error did not rise to the level of palpable error.

Appellant admits that he sold marijuana to two (2) confidential informants. Appellant admits that this transaction occurred within 1,000 yards of a school. Brief for Appellant, page 1. Appellant admits that the "ill-fated decision to sell drugs was his own." Opinion of the Court of Appeals of November 7, 2008 at p. 5. Appellant admits that he was not "induced or encouraged"[3] to commit a crime "he was not otherwise disposed" to commit. KRS 505.010(1). Appellant also admits that he was merely provided the "opportunity to commit" the

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[3] Appellant's "Brief for Appellant" before the Court of Appeals, at p. 10.

offense. KRS 505.010(2). Thus, appellant admits that he wholly failed to meet his burden of proving entrapment per KRS 505.010.

Appellant was arrested after a series of controlled buys using two (2) confidential informants. Appellant claims that he was entrapped because the police specifically picked a location within 1,000 yards of a school. In other words, appellant does not argue that he was entrapped into committing the *actus reus*. Rather, appellant argues he was entrapped by the situs of the *actus reus*. Appellant cites no authority holding that entrapment applies to the **situs** of the *actus reus*. This Court should decline appellant's invitation to create such authority.

Appellant's argument is dangerous. Situs is **always** an element of a criminal offense, i.e., venue. If appellant's argument is taken to its logical end, defendants will argue that every controlled purchase made by the Kentucky State Police is entrapment. Defendants will argue that the Kentucky State Police commit entrapment when they arrange a purchase in "County X" (because its juries are allegedly known for tougher sentences) as opposed to "County Y" (and its allegedly defendant-friendly juries). The Court can see where appellant's argument would lead.

Also, local police agencies have limited jurisdictions. If appellant were to prevail in his argument, local police agencies would always be subjected to claims of entrapment because they set up the controlled buys within their own jurisdiction rather than another jurisdiction. Appellant's argument, taken to its logical end, would lead to an absurd result. The trial court did not err in allowing the jury to decide appellant's guilt under KRS 218A.1411. The trial court must be affirmed.

Lastly, appellant mocks the Commonwealth for arranging the January 7, 2006 marijuana sale within 1,000 yards of a school. Appellant argues that it was the Commonwealth, not the appellant, who created the risk of possible harm to school children. Appellant's mockery rings hollow. January 7, 2006 was a Saturday, and the sale occurred after 5:30 p.m. VR, 5/31/07, 2:48:00 - 15 and 2:52:00 - 15. Obviously, no students were in school at that time. The illegal drug transaction of January 25, 2006 did not involve the sale of marijuana, and that sale occurred at a different location from the sale of marijuana. VR, 5/31/07, 11:09:20 - 11:10:14. The trial court must be affirmed.

CONCLUSION

WHEREFORE, the Commonwealth asks that the Opinion of the Court of Appeals of November 7, 2008, affirming the trial court, be AFFIRMED.

Respectfully submitted,

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