COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2011-SC-00615

MARK STINSON — APPELLANT

ON REVIEW FROM THE KENTUCKY COURT OF APPEALS
CASE NO. 2010-CA-001647

ON APPEAL FROM MADISON CIRCUIT COURT, HON. JEAN C. LOGUE, JUDGE
CASE NO. 09-CR-00316

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT, MARK STINSON

Respectfully submitted,

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CERTIFICATE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by first-class U.S. Mail, postage prepaid, on this the 21 day of September, 2012: Honorable Jean C. Logue, Judge, Madison Circuit Court, Madison County Courthouse, 101 W. Main St., Richmond, KY 40475; Hon. David Smith and Hon. Jennifer Hall Smith, Commonwealth's Attorneys for the 25th Judicial Circuit, 101 N. 1st Street, P.O. Box 717, Richmond, KY 40475; Hon. Jack Conway, Kentucky Attorney General, Office of Criminal Appeals, 1024 Capitol Center Drive, Frankfort, KY 40601; and Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. The undersigned does also certify that the record on appeal was not removed from the Kentucky Supreme Court.

Matthew R. Malone, Esq.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

Appellant, Mark Stinson ("Stinson"), by counsel, Replies to the following particular issues raised in Appellee, the Commonwealth of Kentucky's ("Commonwealth"), brief:

I. *Baker* and *Holbrook* are not persuasive in this case.

Holbrook v. Commonwealth, 662 S.W.2d 484 (Ky. App. 1984) did not involve KRS 510.110(1)(d). It involved use of a minor in a sexual performance in violation of KRS 531.310. *Id.* at 485. In fact, the *Holbrook* defendant, like Stinson, engaged in consensual sexual activity with a 17 year old; notably, the *Holbrook* defendant was not charged for the sexual activity. See *id.* at 485-86, 488. And *Holbrook* did not condemn the actual acts. The issue was that the *Holbrook* defendant violated KRS 531.310 by recording the sexual activity. *Id.*

First, lack of consent was not an issue in *Holbrook* and KRS 531.310, as it is in Stinson's case, because neither KRS 510.020 nor any similar statute exists to supply lack of consent as an element of KRS 531.310 or other offenses defined in KRS Chapter 531. Further, *Holbrook* turned on the specific statutory language of KRS 531.310, and, as described below, that language differs from the language used in KRS 531.310.

Baker v. Commonwealth, 103 S.W.3d 90 (Ky. 2003) also involved KRS 531.310, not KRS 510.110(1)(d). See, e.g., *Baker*, 103 S.W.3d at 94. In addition, the victim in *Baker* was 12 and thus incapable of consent even under KRS 510.020. See *Id.* at 91; KRS 510.020(3)(a). The *Baker* opinion concluded that consent was not a defense because the terms "employs, consents to, authorizes, or induces"[1] (the language used in KRS 531.310 to prohibit **use** of a minor in a sexual performance) "all imply the possibility of voluntary participation by a minor, as the idea of force or coercion is not ordinarily conveyed by these words." *Id.* at 94. However, *Holbrook* clarified that the terms "employ" and "induce" would likely require an affirmative act and thus

[1] "A person is guilty of the **use** of a minor in a sexual performance if he **employs**, **consents to**, **authorizes** or **induces** a minor to **engage** in a sexual performance." KRS 531.310(1)(emphasis added).

lack of consent; it is the "consent to" and "authorize" language that makes lack of consent irrelevant. See *Holbrook*, 662 S.W.2d at 488.

In contrast, KRS 510.110(1)(d) refers to "subjecting" a minor to sexual contact. Despite the Commonwealth's argument that "subjects" precludes consent (see Commonwealth's Brief at 6-7), you cannot "subject" a person to something that the person wants to do or does willingly. In other words, by its plain terms, KRS 510.110(1)(d) only prohibits a person in a position of special trust or authority from **subjecting** a minor to sexual contact; it does not prohibit that person from simply **having** or **engaging** in sexual contact with the minor.

II. The lack of consent element does not invalidate KRS 510.060 or KRS 510.090.

The Commonwealth suggests that KRS 510.060(1)(c) makes it a crime, regardless of consent, for a foster parent **to have** sexual intercourse with a foster child and that KRS 510.090(1)(c) makes it a crime, regardless of consent, for a foster parent **to have** deviate sexual intercourse with a foster child. Commonwealth's Brief, p. 5.[2] The Commonwealth also notes that KRS 510.090(1)(e) and KRS 510.090(1)(e) make it unlawful for a Department of Corrections employee **to have** sexual intercourse or deviate sexual intercourse with a juvenile that in the custody of that department.[3]

KRS 510.060 and KRS 510.090 are actually consistent with KRS 510.020. They address situations where the minor is in the care or custody of a state or local agency (i.e. the Cabinet for Health and Family Services or the Department of Corrections) and the alleged offender (the corrections employee or the foster parent) is acting on behalf of that agency. KRS 510.020(3)(e) makes a person (of any age) incapable of consent when "[u]nder the care or custody of a state or

[2] The Commonwealth indicates that these sections pertain to "sexual contact", but they actually pertain to "sexual intercourse" and "deviate sexual intercourse".
[3] The Commonwealth indicates that these sections pertain to "sexual contact", but they actually pertain to "sexual intercourse" and "deviate sexual intercourse".

local agency pursuant to court order and the actor is employed by or working on behalf of the state or local agency." Moreover, KRS 510.060(1)(c) and KRS 510.090(1)(c) do not refer to "having" intercourse; they utilize the term "engage". Further, KRS 510.060(1)(e) and KRS 510.090(1)(e) use the term "subjects" rather than "having" to define the crime. Accordingly, lack of consent as an element of KRS 510.110(1)(d) is consistent with and does not invalidate KRS 510.060 or KRS 510.090.

III. The distinct language used in KRS 510.110(1)(d) must be given effect.

In addition to the provisions cited by the Commonwealth, KRS 510.060(1)(d) and KRS 510.090(1)(d) make it unlawful when a person *in a position of special trust or authority* "**engages**" in sexual intercourse or deviate sexual intercourse with a minor less than eighteen years (18) old". KRS 510.060(1)(d)(emphasis added); KRS 510.090(1)(d)(emphasis added). In contrast, KRS 510.110(1)(d) only operates when a person *in a position of special trust or authority* "**subjects** a minor less than eighteen (18) years old" to sexual contact. KRS 510.110(1)(d). Again, "subjects" and "engages" have two different meanings. That is, even when the same person in a position of special trust or authority is involved, the law differs based on the nature of the conduct. The legislature has consistently treated sexual intercourse and deviate sexual intercourse as being more serious than sexual contact. The fact that the legislature used different terms must be given effect.

IV. Recognizing lack of consent does not invalidate KRS 510.110(1)(d).

At page 8 of its brief, the Commonwealth suggests that lack of consent would make KRS 510.110(1)(d) meaningless because KRS 510.110(1)(a) already prohibits forcible sexual contact. However, this is unpersuasive because the law recognizes that there can be lack of consent even

in situations where there is no use of physical force. See, e.g., KRS 510.110(1)(a); KRS 510.020(2); KRS 510.130(1).

V. The Commonwealth is attempting to ignore the plain statutory language.

The Commonwealth repeatedly addresses the alleged legislative intent behind KRS 510.110(1)(d). However, the Commonwealth's view on what the law should be and its beliefs about what the legislature did or should have intended are irrelevant. It is well-accepted that "a court must refer to the words used in enacting the statute rather than surmising what may have been intended but was not expressed." *Stogner v. Commonwealth*, 35 S.W.3d 831, 835 (Ky. App. 2000). The terms of KRS 510.110(1)(d) and KRS 510.020 clearly embody lack of consent, and neither the Court not the Commonwealth can surmise the underlying intent to give the statutes some other effect. Lack of consent is clearly an element of KRS 510.110(1)(d). There must be some evidence that the position of special trust or authority was actually misused to coerce, unduly influence, or otherwise affirmatively induce non-consensual sexual contact.

HB 211 is the only authority the Commonwealth cited regarding legislative intent. HB 211 does not support the Commonwealth.[4] Even if HB 211 is consistent with the Commonwealth's arguments about lack of consent, the language in HB 211 is not the language that was enacted into law. The meaning of KRS 510.110(1)(d) and KRS 510.020, as part of the comprehensive the statutory scheme of KRS Chapter 510 as a whole, is clear on its face. Therefore, the Court cannot consider outside aids, such as HB 211. See *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). When the statute is clear, it does not matter what the legislature intended; the law must be applied as enacted. "Where a statute is intelligible on its

[4] The introduction to HB 211 (not the proposed lanague) refers to amending KRS 510.110 to "**prohibit** any person over the age of 21 from **subjecting** a minor under the age of 16 to sexual contact or engaging in masturbation in the minor's presence, and to **prohibit** a person in a position of authority or special trust from **engaging in the same prohibited acts** [i.e. subjecting the minor ...] with a minor under the age of 18." See HB 211, Com's Brief, Apx. 1. That is, the prohibited conduct is "*subjecting*" the minor to what would amount to non-consensual sexual contact.

face, the courts are not at liberty to supply words or insert something or make additions however just or desirable it might be to supply an omitted provision." *University of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 692 (Ky. 2010). "[N]o construction is required and any legislative 'hope,' or intent, is irrelevant." *Id.*

VI. KRS 510.020 does not contain any relevant "catch all" provision.

The "catch all" provision referenced at page 12 of the Commonwealth's brief is presumably KRS 510.020(2)(c).[5] Minors under 16 are the only minors deemed incapable of consent. KRS 510.020(3)(a). KRS 510.020(2)(c) does not define or authorize the creation of a new class of minors unable to consent; it only states that lack of consent exists where the other person did not consent. Even if it did, nothing in KRS 510.110(1)(d) contains the sort of explicit language needed to create or deem a class of minors incapable of consent. See KRS 510.020(3).

VII. KRS 510.020 is still a viable and valid statute that cannot be ignored.

Statutes dealing with the same subject matter must be construed in a manner that allows both statutes to stand and gives force and effect to each. Commonwealth's Brief at 10 (citing *MPM Fin. Group, Inc. v. Morton*, 289 S.W.3d 193, 198 (Ky. 2009)). However, the Commonwealth is essentially arguing to completely ignore KRS 510.020. According to *Sprague v. Commonwealth*, 2011 WL 6275988 (Ky. App. Dec. 16, 2011), an unpublished case attached to the Commonwealth's brief at Apx. 3, "[t]he Commonwealth contends that KRS 510.020 is merely a vestigial remnant of a prior version of KRS Chapter 510 which the General Assembly inadvertently failed ot remove when the Chapter was amended, and that it should be subsumed in KRS 510.110 or otherwise disregarded." *Sprague*, 2011 WL 6275988, at *5. This result would cause a vast judicial expansion of KRS Chapter 510 that is not authorized by the law and not

[5] Lack of consent result from: "If the offense charged is sexual abuse, any circumstances in addition to forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct."

supported by any statutory language. Even if the legislature did inadvertently fail to remove the statute, it is not the Commonwealth or the courts' place to do so. The power to modify or repeal the statute is reserved exclusively for the legislature.

Moreover, given the 2012 amendment to KRS 510.020, it is not reasonable to contend that the legislature *forgot* about the statue or *accidentally* failed to repeal it, or that its terms should be ignored. The Commonwealth suggests that the 2012 amendment to KRS 510.020 is irrelevant because it did nothing more than change the terms used to refer to individuals with intellectual disabilities. Commonwealth's Brief at 8-9. However, the amendment is relevant *because* it did not make any substantive changes. The legislature is clearly aware of KRS 510.020. The legislature could have created a new class of minor incapable of consent, or repealed or modified KRS 510.020, or limited the statute's application. But it did not.

Finally, contrary to the Commonwealth's inflammatory and misleading characterizations, recognizing that lack of consent is an element of KRS 510.110(1)(d) does **not** "allow teachers to solicit sexual partners from amongst consenting students", it does **not** allow "those in positions of power over minors [] to use their authority to find sexual partners amongst their underage charges", it does not confer a "right to solicit sex from minors", it does **not** "serve as justification to abuse children", it does **not** give anyone a "license to attempt to influence these impressionable teenagers and pressure them for sexual activities", it does **not** allow any person to "use his or her relationship or authority to coerce and manipulate a minor into engaging in sexual contact", it does **not** allow a probation officer to "coerce a juvenile into a sexual relationship", and it does **not** give anyone a "license to troll for sexual partners amongst the impressionable and dependent children entrusted to their influence." Commonwealth's Brief at 3, 4, 5, 6, and 11.

The Commonwealth has mischaracterized what will be allowed if Stinson prevails. In actuality, the evils that the Commonwealth mentions are still prohibited. First, under KRS 510.020, anyone under 16 is incapable of consent so the only issue is those persons who are 16 and 17 years of age. Further, the situations described by the Commonwealth are all situations that are and should be unlawful to the extant that they involve actual coercion, undue influence, duress, etc., even where no physical force is involved. It is the actual circumstances that matter. Nothing in KRS 510.110(1)(d) makes coercion, undue influence, etc. presumptive or automatic; there must be some evidence that the accused actually misused the position to achieve (i.e. subject) the other person to the unwanted contact. Adopting the view of the Commonwealth would be tantamount to saying that all males who have sex are guilty of forcible rape, regardless of whether force was used and regardless of whether the sex was consensual, simply because the male might have been able to exert force or because some males do use force to have sex. The facts of what actually happened, not what may or could have happened, are relevant and controlling. There is nothing in KRS 510.110(1)(d) or elsewhere to support any other result.

CONCLUSION

Accordingly, Stinson respectfully requests the relief specified in his appellant's Brief.

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