COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO: 2013-SC-00254-D
(2012-CA-001768-DR)

B.H., A CHILD UNDER EIGHTEEN **APPELLANT**

VS. On Discretionary Review From the Kentucky Court of Appeals

COMMONWEALTH OF KENTUCKY **APPELLEE**

REPLY BRIEF FOR APPELLANT

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2014, the foregoing "Reply Brief for Appellant" was served by first class mail upon the following: Hon. Robert Johnson, Chief Regional Judge, Woodford Circuit Court, Scott County Justice Center, 119 N. Hamilton St., Georgetown, KY 40324; Hon. Vanessa Dickson, Judge, Woodford County District Court, 310 Main St. Paris, KY 40361; Hon. Alan George, Woodford County Attorney, 103 S. Main Street Room 300, Versailles, KY 40383; Hon. Gordie Shaw, Commonwealth Attorney, 187 South Main Street, Versailles, KY 40383; and via state messenger mail to: Hon. Jack Conway, Attorney General, Office of the Attorney General, Capital Center Complex, 1024 Capital Center Drive, Frankfort, KY 40601.

John Wampler

PURPOSE OF REPLY

The purpose of this Reply Brief is to clarify where there are discrepancies as to fact between Appellant's and Appellee's briefs and to respond to argumentation, analysis, and legal authorities contained in Appellee's brief. If Appellant chooses not to respond to a particular point or argument, this means that Appellant reasserts the arguments made in his original Brief.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

B.H. herein re-asserts the Statement of Facts as stated in his original Brief, but seeks to make the following clarifications and response to the Commonwealth's Counterstatement:

The Commonwealth wastes little time in seeking to draw this Court's attention to matters that are not the subject of the current appeal before this Court, namely: B.H.'s prior record. (Commonwealth's Brief at 1.) Due to the nature of juvenile court dispositions, B.H.'s prior record is indeed part of the trial court file and official court record in this case. However, B.H.'s prior record, or the fact that information regarding his girlfriend C.W.'s "prior contact with the juvenile system" is unknown (Commonwealth's Brief at 1), have no bearing on the Constitutional issues to be considered by this Court in the current case on appeal.

Secondly, B.H. takes issue with the Commonwealth's assertion that "the validity of the trial court's finding that appellant is a juvenile sex offender is no longer being contested." (Commonwealth's Brief at 2.) While it is true that B.H. elected to no longer raise a challenge to the trial court's finding regarding juvenile sex offender designation, this should not be interpreted as meaning that he now concedes that the trial court's decision on that issue was valid. It must be noted that a decision by this Court in favor of B.H.'s position on the Constitutional issues would render any further decision on the issue of juvenile sex offender designation unnecessary. Further, though there are additional reasons for not continuing to challenge the juvenile sex offender designation at this higher level of appellate proceedings, such factual justifications exist outside of the court record, and counsel will accordingly refrain from introducing them in this Reply.

Regardless, B.H. does not in any way concede the validity of the trial court's designation of him as a juvenile sex offender.

ARGUMENT

I.
THE ISSUES BEFORE THIS COURT WERE NOT WAIVED. BY THEIR VERY NATURE, THEY CANNOT BE WAIVED.

The Commonwealth's reliance on *Commonwealth v. Elza*[1] to assert that B.H. has waived certain issues in this case (Commonwealth's Brief at 3, 8) is woefully misplaced. *Elza* was a case arising out of an appeal of an action brought under RCr 11.42, alleging ineffective assistance of counsel. The discussion in *Elza* cited to by the Commonwealth regarding the waiver of defenses was related to the validity of the appellant's guilty plea at trial, and *had nothing to do with* whether or not an issue may be reviewed by an appellate court under palpable error even in the absence of a conditional plea.

Additionally, when the issues to be addressed are whether the individual charges against the child are unconstitutional as applied, there arises a jurisdictional issue: namely, that the juvenile court did not have jurisdiction over the case, because the charges were void *ab initio*. Issues of subject matter jurisdiction cannot be waived. *Commonwealth Health Corp. v. Crosslin*, 920 S.W.2d 46 (Ky. 1996).

Finally, it must again be noted that the Woodford Circuit Court conducted *de novo* review of the legal issues raised in this case, and B.H. would urge this Court to do the same. In this case, the Commonwealth may not now be allowed at this stage of the appellate process to assert a procedural bar when the Circuit Court reached the merits of B.H.'s appeal in its order denying relief. See *Singleton v. Commonwealth*, 740 S.W.2d

[1] 284 S.W. 3d 118, 121 (Ky. 2009)(citing *Quarles v. Commonwealth*, 456 S.W. 2d 693, 694 (Ky. 1970)).

159, 160, n. 2 (Ky.App.1986) (Even though appeal was belatedly perfected, Court of Appeals nonetheless considered the appeal on the merits "**in view of the fact the circuit court expressed an opinion upon the constitutional issue raised in the district court.**")[Emphasis added].

II.
CRIMINALIZATION OF CONSENSUAL TEEN SEXUAL BEHAVIOR,PROVIDED THAT BOTH PARTIES RECEIVE A "CONSEQUENCE" IS ABSURD AND INAPPROPRIATE

Charging *both* children as criminals is not the proper response

The Commonwealth has interpreted the case of *In re B.A.M*[2].as "seem[ing] to allow for prosecution with individual consideration of each child's circumstances or punishment/counseling/treatment of one as long as the other faces a consequence." (Commonwealth's Brief at 6.) There are two problems with this position. First, that is *not* the holding of *B.A.M.* In that case, the Court explicitly stated: "we find that the Legislature *did not* intend to criminalize consensual sexual activity between peers." *Id* at 897. [Emphasis added.]

Second, to accept the Commonwealth's argument that the application of criminal charges to teenage paramours engaging in sexual behavior is permissible so long as both parties are charged (i.e. "faces a consequence") is to invite an "absurd or unreasonable result." *Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 500 (Ky. 1998.) It should be noted that in light of *D.B.*, children of B.H.'s and C.W's age who engage in consensual sex with each other in Cincinnati, Ohio can no longer be criminally prosecuted, but under the Commonwealth's arguments, if they cross the river to Newport, Kentucky, they still can.

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[2] 806 A. 2d 893 (Pa. Super 2002)

According to a 2013 pediatric study, approximately one third of all adolescents in America have been sexually active by age sixteen (16.)[3] Under the Commonwealth's arguments in this case, not only is it appropriate to make potential criminals out of thousands of children who engage in sexual behavior with their similarly-aged peers, but such damage should be *doubled* by making sure that *both* children involved are charged with crimes.

C.W. was not charged with any crimes in connection with her sexual acts involving B.H.; therefore the Commonwealth was wrong in charging B.H. with a crime

B.H. has already outlined in great detail and length in his original brief the arguments against charging *either* B.H. or C.W. as criminals for their consensual sexual acts, and he reasserts them here.

However, B.H. further notes that if the Commonwealth's position is to be accepted, then by the Commonwealth's own argument, the charging of B.H. was only appropriate "as long as the other faces a consequence." (Commonwealth's Brief at 6.) At no time in the appellate proceedings has the Commonwealth argued that the "other," in this case, B.H.'s similarly-aged girlfriend CW was ever charged with a crime. Accordingly, even by the Commonwealth's *own argument* presented to this Court, charging B.H. with a crime was improper.

Unequal Charging of two parties whose behavior is inextricably linked violates Equal Protection

However, shortly after asserting that charging teen peers with a crime for having sex with each other is okay so long as each "faces a consequence," the Commonwealth does an about-face, and seeks to argue that the Commonwealth's decision to charge B.H.

[3] Finer LB and Philbin JM, Sexual initiation, contraceptive use, and pregnancy among young adolescents, *Pediatrics*, 2013,available online at:
http://pediatrics.aappublications.org/content/early/2013/03/27/peds.2012-3495

and not C.W. is nevertheless permissible. (Commonwealth's Brief at 7.) The Commonwealth then charges B.H. with engaging in "pure speculation," while in nearly the same paragraph making statements of its own such as "[g]iven the opportunity to explain *more than likely* there would be good reason for the different treatment of the two in this case." (Commonwealth's Brief at 7. Emphasis added.) B.H.is not asking this Court to speculate regarding the Commonwealth's disparate treatment of two equally situated juveniles. C.W. was not prosecuted, while B.H. was. That is a fact that the Commonwealth itself acknowledges. (Commonwealth's Brief at 7.)

There need not be any speculation as to why the Commonwealth prosecuted one child and not the other, because there can be no acceptable justification whatsoever in doing so. B.H. reiterates that the selective prosecution of B.H. as offender and designation of C.W. as victim raises both Equal Protection and Due Process concerns. B.H. will not repeat all of his previous arguments in this Reply, but will restate one of them: charging B.H. and not C.W. cannot be justified under the guise of "prosecutorial discretion." The sexual acts between B.H. and C.W. linked them inextricably as primary actors engaging in a "crime" (as defined by the Commonwealth) that intimately involved the other primary actor. In such instances, charging one actor and not the other constitutes arbitrary and discriminatory enforcement. *See, D.B. v. Commonwealth,* 129 Ohio St. 3d 104, 110; 950 N.E.2d 528, 534 (Ohio 2011.)

***In re John C.*[4] is wholly distinguishable from the current case**

In its Brief, the Commonwealth cites to "*In re John C.* 569 A.2d 1154 (Conn. App 1990) and 18 ALR 5th 856" as an example of a state ruling "to the contrary" of the positions found in *D.B.* and *In re B.A.M.* that B.H. has urged this Court to adopt.

[4] 20 Conn. App. 694, 569 A.2d 1154

However, the Commonwealth overlooks several key factual differences between those cases and *In re John C.* First, the two children involved in the case were not similarly-aged peers engaging in sexual behavior: John C. was thirteen (13), while his victim was eight (8.) *Id* at 695, 1155. Secondly, the Court in *In re John C.* was clearly of the opinion that the behavior engaged in was *not* consensual in that case: "we will not interpret the law to give minors license to sexually molest other minors." *Id* at 696, 1156.

B.H. is not asking for this Court to grant him a license to sexually molest his girlfriend. He was not charged with that. The charge against him was based on C.W. being "unable to give consent due to her age." (See Juvenile Complaint, Record at 17.)

III.
EXCHANGING "SEXTS" IS SEXUAL BEHAVIOR, AND THE AGE OF BOTH PARTIES INVOLVED PROPERLY INFORMS THE ANALYSIS OF THE CONSTITUTIONALITY OF KRS 531.335 AS APPLIED

"Sexting" is sexual behavior, especially among teenagers

The Commonwealth argues that B.H.'s possession of text messages containing nude images ("sexts") of his girlfriend C.W. "had nothing to do with any consensual sexual activities with C.W." (Commonwealth's Brief at 10.) Sending "sexts," or "sexting is clearly a sexual activity. To the extent that the Commonwealth is seeking to argue that the sexting was not "consensual," it must be noted that the "threatening" referred to by the Commonwealth (Commonwealth's Brief at 9) consisted of B.H. allegedly[5] telling C.W. that if she did not send him a nude photo, he would tell everyone they had sex. (See Juvenile Complaint, Record at 17.)

[5] There was no full allocution at the time of B.H.'s guilty plea. Accordingly, there was no admission of specific facts, and the statement allegedly made would not have in and of itself been necessary for an adjudication of delinquency on the charge brought under KRS 531.335. (As noted in B.H.'s original Brief and elsewhere in this Reply, KRS 531.335 is one of strict liability.)

Such an action definitely does not earn B.H. any points for "boyfriend of the year." However, whether or not such a statement constituted a threat that so overbore C.W.'s will as to render her sending of the sext non-consensual is a matter for speculation. Also, as the Commonwealth itself notes, B.H. was not charged with "inducing [C.W.] to take the photographs" under KRS 531.310. (Commonwealth's Brief at 10.) C.W. ultimately chose to send B.H. a sext. Accordingly, the fact remains that C.W. and B.H. exchanged sexts within the context of a teenage romantic relationship.

The application of the strict liability of KRS 531.335 on teenage peers exchanging "sexts" is improper

Furthermore, the true issue in this case regarding the "sexting" between B.H. and C.W. is that applying the strict liability provisions of KRS 531.335 within the context of teenagers exchanging "sexts" amongst each other remains problematic. B.H. would note that even if his actions could be found to constitute a "threat," a fact beyond dispute in this case is that a teenage boy was prosecuted for a sex offense felony for having on his phone a nude picture of a teenage girl he knew. By the logic laid out in the Commonwealth's Brief, any young man (or young woman, for that matter) who is sent a nude photo of a fellow teen peer on their cell phone, Facebook page, or other electronic media, and does not immediately delete it[6] is guilty of a sex offense felony. ("The legislature clearly intended to sanction *anyone's* possession of child pornography." Commonwealth's Brief at 10, Emphasis added.)

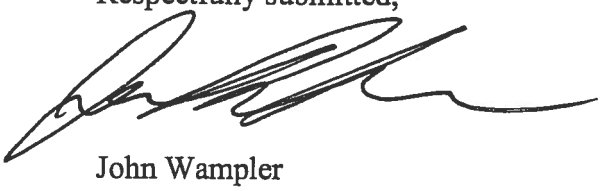
B.H. otherwise herein re-asserts all the arguments made in his original brief on this matter, and further asserts that the Commonwealth's interpretation of the statute as contained in the Commonwealth's Brief leads to an improper "absurd or unreasonable

[6] KRS 531.335 provides an exception for "accidental or inadvertent viewing."

result." *Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 500 (Ky. 1998.)

WHEREFORE, for the foregoing reasons, and the reasons previously stated in his original brief, appellant requests that this Court order that the charges against him be dismissed and the lower court's judgment be vacated.

Respectfully submitted,



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