Commonwealth of Kentucky
Kentucky Supreme Court

CASE NO. 2013-SC-00254-D
(2012-CA-001768-DR)

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

v.

Appeal from Woodford Circuit Court
Hon. Robert Johnson, Chief Regional Judge
Circuit Court File No. 2011-XX-1

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Commonwealth's Brief

Submitted by,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellee has been mailed, postage pre-paid, this 20th day of October, 2014, to: Hon. Robert Johnson, Chief Regional Judge, Woodford Circuit Court, Scott County Justice Center, 119 North Hamilton Street, Georgetown, KY 40324; Hon. Vanessa Dickson, Judge, Woodford District Court, 310 Main Street, Paris, KY 40361; Hon. Alan George, Woodford County Attorney, 103 South Main Street, Room 300, Versailles, KY 40383; Hon John Wampler, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601 and Hon. Rebecca Ballard DiLoreto, Children's Law Center, Inc, Amicus, 1555 Georgetown Road, Lexington, KY 40511; and via electronic mail to: Hon. Gordie Shaw, Commonwealth's Attorney. The record on appeal was not checked out for purposes of this appeal.

Gregory C. Fuchs
Assistant Attorney General

INTRODUCTION

This appeal is before the Court on discretionary review of an appeal to the Woodford Circuit Court of the Woodford District Court, Juvenile Session adjudication finding appellant to be a public offender following appellant's guilty plea to misdemeanor charges of sexual misconduct and the amended charge of attempted possession of material portraying a sexual performance by a minor. Appellant had appealed on two issues as to whether the charges were void ab initio and whether the district court abused its decision in designating appellant a juvenile sex offender.

STATEMENT REGARDING ORAL ARGUMENT

Given several important issues related to the individualized nature of juvenile proceedings and issues that may be appealed after an unconditional voluntary and intelligent guilty plea, the Commonwealth believes that oral argument is warranted in this case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Commonwealth does not accept appellant's Statement of the Case as it relies upon several items from non-testimonial filings to present the Court with a picture that the two parties were similarly situated. There though is limited evidence in the record as to the circumstances of C.W. versus the circumstances of B.H.. The second sentence of appellant's Statement of the Case states "B.H.'s troubles began when C.W.'s parents found the nude pictures on their daughter's phone...." (Brief for Appellant on p. 1). It is important to note here that appellant's troubles began more than a year before when he was adjudicated a public offender upon a charge of indecent exposure after he knocked on the door of a neighbor late in the evening of August 9, 2009 dressed only in a towel asking to be let in to use the phone and then removed the towel to expose himself to the neighbor when she returned with the phone and after leaving as she asked he returned to her door again naked, knocked again and when she answered was playing with himself. (See TR III p. 293 appended to Commonwealth's Counterstatement).

Appellant was placed on probation for this charge and accordingly the AOC-JW-40e form initiating this proceeding reflected that appellant had been previously adjudicated, had been through the CDW informal disposition process on at least two prior separate occasions and an informal proceeding on this occasion was accordingly inappropriate. (See TR I 18-19). At the time of these charges, appellant was still on probation for the prior charges. But other than the statement of C.W. filed at the time of the AOC-JW-40e form, no additional information is known as to her individual circumstances or prior contact with the juvenile justice system.

Appellant, furthermore, fails to note from the voluntary statement that while C.W. stated that "I was scared but willing" her statement itself is far from clear thereto with regard to appellant's comparative culpability or innocence noting at one time "Force was applied" vs. later "He was never forceful. But he would talk about how good or how bad I was to his best friend. He would tell everything we would do if I didn't do what he wanted me to do." (See TR I 14-16). There is, in fact, other indication therein that appellant initiated the acts in that C.W. also noted "He would tell me what to do and how to do it." (Id.).

Appellant was then charged with misdemeanor sexual misconduct and felony possession of matter portraying sex performance by minor. (TR I 7). After entering an unconditional guilty plea on the charges with the latter felony offense being amended to misdemeanor attempt and being found to be a juvenile sex offender following the dispositional hearing, appellant appealed to the Woodford Circuit Court raising two issues-- 1) that the charges were void ab initio and the district court lacked jurisdiction to adjudicate the charges; and 2) that the district court erred in finding him a juvenile sex offender. (See TR II 207). The Woodford Circuit Court affirmed the district court finding no evidence of selective prosecution nor error in the disposition. (See TR III 350-355).

The Court of Appeals denied discretionary review but this Court by an order of March 12, 2014 granted further review. On discretionary review, the former question has been split into two issues and the validity of the trial court's finding that appellant is a juvenile sex offender is no longer being contested.

ARGUMENT

I.

THE WOODFORD DISTRICT COURT DID NOT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE IN ITS ADJUDICATION UPON APPELLANT'S UNCONDITIONAL GUILTY PLEA TO THE OFFENSE OF SEXUAL MISCONDUCT AS APPELLANT WAS 15 AT THE TIME OF THE CONDUCT IN QUESTION AND THE COMPLAINT CHARGED A PUBLIC OFFENSE AS DEFINED IN KRS 600.020(47) AND THE DISTRICT COURT, JUVENILE SESSION IS VESTED WITH EXCLUSIVE JURISDICTION IN PROCEEDINGS CONCERNING A CHILD UNDER THE AGE OF EIGHTEEN CHARGED WITH A PUBLIC OFFENSE UNDR KRS 610.010.

Appellant's first argument is that KRS 510.040 is unconstitutional as applied. Appellant concedes that the issue raised are unpreserved. (See Appellant's Brief at 3). However, the issues are not merely unpreserved, but they are waived. Appellant may have preserved these claims in the district court by a conditional guilty plea under RCr 8.09 reserving the issues for appeal but appellant's plea in this case was an unconditional and otherwise valid guilty plea. And "the effect of a valid plea of guilty is to waive all defenses other than that the indictment charges no offense." Commonwealth v. Elza, 284 S.W.3d 118, 121 (Ky. 2009) (*citing* Quarles v. Commonwealth, 456 S.W.2d 693, 694 (Ky. 1970)).

Appellant first raises a series of constitutional questions claiming that the charges are unconstitutional as applied, violate his right to due process, violate his right to privacy, is void for vagueness and violate his right to equal protection. Those might have been legitimate defense to these proceedings if preserved. However as noted by this

Court in Elza and for a long time and many times before, the plea waives all defense, even constitutional ones, except that the indictment charges no offense. See Quarles and Commonwealth v. Watkins, 398 S.W.2d 698 (Ky. 1966). And in that regard, appellant's citation of the Ohio case of In re D.B., 950 N.E.2d 528 (Ohio 2011) is not well made as it considers only the same constitutional issues that appellant waived in making his guilty plea.

Appellant also asks this Court to conduct palpable error review. However, RCr 10.26 does not preclude the waiver of palpable error. West v. Commonwealth, 780 S.W.2d 600 (Ky. 1986). By all appearances, appellant was well aware that C.W. was not being formally proceeded against for the same offenses, counsel though did not object but more importantly the record does not reflect that counsel was ignorant of any prejudicial implication and as such waived any objection thereto by his guilty plea. Much like the defendant in West, there appears to be a strong indication that such may have been a tactical decision as appellant apparently desired to avoid the juvenile sex offender designation and little benefit could be gained by the institution of proceedings against C.W.

The only remaining issues should then be whether the complaint charged an offense or whether the court had jurisdiction. The district court, juvenile session though has exclusive juridiction over public offense actions alleging that a juvenile committed a public offense. See KRS 610.010(1). A public offense action encompasses prosecutions for any public offense, which if committed by an adult, would be a crime, whether the same is a felony, misdemeanor or violation. See KRS 600.020(47). The only exceptions

thereto is that the public offense action includes the offenses under KRS 527, e.g. possession of a firearm by a minor and excludes traffic offenses. KRS 510.140, however, would be a crime if committed by an adult and as such it cannot be disputed that the complaint set forth a public offense.

In making his argument that the Kentucky legislature did not intend to criminalize sexual behavior between similarly-aged peers both under the age of consent vis-a-vis the sexual misconduct statute, appellant ignores the fact that the sexual misconduct statute was part of the 1974 rewrite of the criminal code and KRS 600.020(47) and KRS 610.010 as part of the juvenile code did not come into fruition until 1986 and while KRS 600.020(47) exempts certain offenses from the district court's jurisdiction it does not exempt sexual misconduct. And it is always presumed that the legislature had knowledge of a prior statute when it enacted a later one. See Haven Point Enterprises, Inc. v. United Kentucky Bank, 690 S.W.2d 393 (ky. 1995).

There is good reason why the legislature would not exempt the offense from prosecution in the juvenile session of the district court in that the prosecution is not a criminal prosecution and the public offense action is not punitive. See KRS 600.010(2)(a)-(e). It is not absurd for the legislature to retain the ability to protect our children from these actions even when the children are of the same age.

While the Pennsylvania Court in the case of In re B.A.M., 806 A.2d 893 (Pa. Super. 2002) stated its conclusion that it was not proper to prosecute one of two 11 year olds engaging in anal intercourse it also came to that conclusion only because the words of the statute were not explicit. The legislature in this case though was explicit in

classifying sexual misconduct as a public offense.

While both B.H. and C.W. were both too young to consent, their equal status in that regard is not carte blanche for either to engage in gratuitous sex without culpability under the Pennsylvania court case. The court in B.A.M. observed the following:

> Moreover, the children here are both deemed by the Legislature to be incapable of consenting to sexual activity. If, by virtue of age alone a child under 13 is incapable of consenting to sexual activity, he or she must be presumed, absent clear evidence to the contrary, to be equally incapable, in any sense implicating criminal liability, of initiating such conduct. Otherwise, appellant's adjudication becomes a matter of strict criminal liability without any demonstration that the sexual result, which is an element of the crimes charged, was ever intended, or could have been intended to occur. It is therefore absurd to penalize one youngster while the other faces no sanction for precisely the same behavior. Either both boys must be punished/counseled/treated, or neither can be; as the trial court definitively found, both boys were willingly participants and J. was not victimized by the experience. The law was not intended to render criminal *per se* the experimentation carried on by young children, even where the acts may evoke disapprobation or censure.

The court in that case would seem to allow for prosecution with individualized consideration of each child's circumstances or punishment/counseling/treatment of one as long as the other faces a consequence.

While the Commonwealthbelieves that the Court need not consider either the Ohio case of D.B. or the Pennsylvania case of B.A.M. in this case, if it elects to do so in this case it should also consider that other states have rule\d to the contrary. See, e.g., In re John C. 569 A.2d 1154 (Conn. App. 1990) and 18 A.L.R. 5th 856. As defined in KRS

500.080(12), personwithin the context of the penal code would not exclude appellant as a minor from culpability for committing the offense.

But regardless while C.W. may not have been prosecuted there is no evidence that her actions were not considered inappropriate but not just acted upon in the formal sense whereas appellant's actions were prosecuted in light of his prior public indecency adjudication. Appellant, in this regard, is engaging in pure speculation here. This Court though must refrain from any such speculation and needs to consider the failure to otherwise produce a full record as supporting the action of the trial court. Commonwealth v. Thompson, 697 S.W.2d 143, 147 (Ky. 1985).

Given the opportunity to explain more than likely there would be good reason for the different treatment of the two in this case and the victim's singular statement can in no way be seen as the full extent of the evidence and investigation. Reversal now is not warranted on the basis of the inadequate record and appellant's knowing and intelligent plea.

II.

THE WOODFORD DISTRICT COURT DID NOT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE IN ITS ADJUDICATION UPON APPELLANT'S UNCONDITIONAL GUILTY PLEA TO THE OFFENSE OF ATTEMPTED POSSESSION OF MATTER PORTRAYING A SEXUAL PERFORMANCE BY A MINOR AS THE COMPLAINT CHARGED A PUBLIC OFFENSE AS DEFINED IN KRS 600.020(47) AND THE DISTRICT COURT, JUVENILE SESSION IS VESTED WITH EXCLUSIVE JURISDICTION IN PROCEEDINGS CONCERNING A CHILD UNDER THE AGE OF EIGHTEEN CHARGED WITH A PUBLIC OFFENSE UNDR KRS 610.010.

Appellant's second argument is that KRS 531.335 is also unconstitutional as applied to a child engaging in consensual sexual activity with a peer and the legislature did not intend to criminalize such behavior when both parties are members of the class to be protected. Appellant again concedes that the issues raised are unpreserved. (See Appellant's Brief at 13). However, the issues are not merely unpreserved, but they are waived.

Appellant as stated in Argument I, may have preserved these claims in the district court by a conditional guilty plea under RCr 8.09 reserving the issues for appeal but appellant's plea in this case was an unconditional and otherwise valid guilty plea. And "the effect of a valid plea of guilty is to waive all defenses other than that the indictment charges no offense." Commonwealth v. Elza, 284 S.W.3d 118, 121 (Ky. 2009) (*citing* Quarles v. Commonwealth, 456 S.W.2d 693, 694 (Ky. 1970)). His constitutional arguments then can not stand. Id.

Appellant again also asks this Court to conduct palpable error review. However, RCr 10.26 does not preclude the waiver of palpable error. See West. By all appearances, appellant was well aware that C.W. was not being formally proceeded against for the same offenses, counsel though did not object but more importantly the record does not reflect that counsel was ignorant of the prejudicial implication and as such waived any objection thereto by his guilty plea.

Again, much like the defendant in West, there appears to be a strong indication that such may have been a tactical decision as appellant apparently desired to avoid the

juvenile sex offender designation and little benefit could be gained by the institution of proceedings against C.W. The claim of palpable error then was waived.

But even so, even if an unpreserved error is both palpable and prejudicial, it "still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice; in other words, unless the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" Miller v. Commonwealth, 283 S.W.3d 690, 695 (Ky. 2009) (quoting Martin v. Commonwealth, 207 S.W.3d 1, 4 (Ky. 2006). To make this determination, "a reviewing court must plumb the depths of the proceeding . . . ." Martin, 207 S.W.3d at 4. Thereunder palpable error "must involve prejudice more egregious than that occurring in reversible error[.]" Id. The error must be reviewed in light of all evidence presented in the case, and again "the inquiry is heavily dependent upon the facts of each case." Id. (citing United States v. Young, 470 U.S. 1, 16, 105 S.Ct. 1038 (1985)). And in this case, appellant on just limited facts presented is clearly more culpable sending the first photo and threatening the victim if she did not send him the naked picture of herself. It then would not be jurisprudentially intolerable to prosecute him alone for its possession.

The only remaining issues should then be whether the district court, juvenile session had jurisdiction. The district court, juvenile session though has exclusive juridiction over public offense actions alleging that a juvenile committed a public offense. See KRS 610.010(1). A public offense action encompasses prosecutions for any public offense, which if committed by an adult, would be a crime, whether the same is a felony, misdemeanor or violation. See KRS 600.020(47). The only exceptions are those

offenses to be included under KRS 527, e.g. possession of a firearm by a minor, and traffic offenses which neeed to be excluded. . KRS 531.335 though is neither . KRS 531.335 would be a crime if committed or attempted by an adult and as such it cannot be disputed that the complaint set forth a public offense over which the juvenile session had jurisdiction.

In making his last argument that the Kentucky legislature did not intend to criminalize consensual sexual behavior between similarly-aged peers, appellant ignores the fact that he plead guilty to possession under KRS 531.335 and his possession had nothing to do with any consensual sexual activities with C.W..

His argument might be better suited for a charge under KRS 531.310 based upon his inducing her to take the photographs. But then, unless the picture was of the two of them, his argument would still fail even if they both were in the picture as he is not necessary in the picture for there to be a crime under KRS 531.310 and the question there is "inducement" not consent, The pictures on his phone though included a picture of his girlfriend alone and he was only charged with its possession (as opposed to its inducement) and plead guilty to its attempted possession.

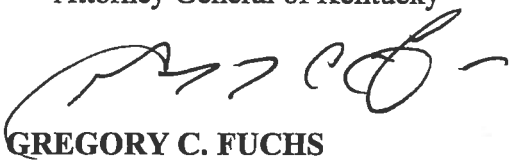
The legislature in no way intended to "protect" appellant in possession of naked pictures of his 13 year old girl friend while enacting KRS 531.335. The legislature clearly intended to sanction anyone's possession of child pornography. Appellant is not a victim in his possession.. There was only one victim in this case, C.W., and it is just as illegal for appellant as a 15 year old to possess that child pornography as it would be if he was 51 years old. Reversal now is otherwise unwarranted.

CONCLUSION

For all the foregoing reasons, in particularly the fact that appellant entered an unconditional plea waiving the claims, the Commonwealth respectfully submits that the adjudication of the Woodford District Court be affirmed.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky



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APPENDIX