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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2011-SC-00271-DG

N.C., A CHILD UNDER EIGHTEEN (18)

APPELLANT

V.

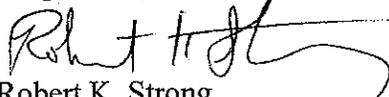
Appeal from Nelson Circuit Court
Hon. Charles C. Simms, Judge
Case No. 10-XX-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

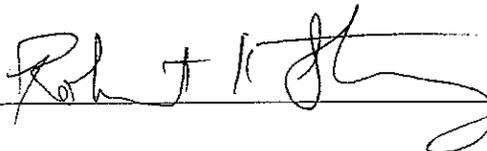
REPLY BRIEF FOR APPELLANT

Respectfully submitted,


Robert K. Strong
Assistant Public Advocate
Dept. of Public Advocacy
100 Fair Oaks Lane, Ste. 302
Frankfort, Kentucky 40601
(502) 564-8006

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of this Reply Brief for Appellant, first class mail, postage prepaid, on August 20, 2012 to Hon. John S. Kelley Jr., Nelson County Attorney, 202 E. Stephen Foster Ave., Bardstown, Kentucky 40004; Hon. Terry Geoghegan, Nelson Commonwealth Attorney, 116 E. Stephen Foster Ave., Bardstown, Kentucky 40004; Hon. Robert Heaton, Judge, Nelson County District Court, Justice Center, 200 County Plaza, Bardstown, KY 40004; Hon. Charles Simms, Judge, Nelson Circuit Court, Courthouse Annex, 209 W. High St., Hodgenville, Kentucky, 40004 and Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, 3rd Floor, Frankfort, Kentucky 40601. I also certify that the record was not checked out from the Supreme Court of Kentucky.


v. 8/20/12

PURPOSE

The purpose of this Reply Brief is to respond to legal authority, argument, and analysis in the Commonwealth’s brief. This case involves the interrogation of a juvenile by an armed deputy (school resource officer) and an assistant principal in the principal’s office. After the officer and the assistant principal escorted the juvenile (N.C.) behind closed doors, in tandem, they confronted him about a bottle of prescription pills found at school. Given that the officer testified that the assistant principal was aware that N.C. had given some pills away before they interrogated him, the interrogation was a criminal investigation because it was likely to result in disclosure of information which would form the basis for prosecution. And although the juvenile faced significant deprivation of his freedom and was not informed that he was free to leave or to contact his mother, the lower court denied him the right to suppress his unwarned statements. Under the guidance of United States Supreme Court and Kentucky Supreme Court precedent, N.C.’s statement should have been excluded.

A lack of a response to any of the Commonwealth’s particular points or arguments means that Appellant reasserts the arguments made in his opening brief.

STATEMENT OF POINTS AND AUTHORITIES

<u>PURPOSE</u>	i
<u>STATEMENT OF POINTS AND AUTHORITIES</u>	ii
<u>ARGUMENT</u>	1
I. THE CIRCUIT COURT’S CONFLATED “STATE ACTOR” AND “IN-CUSTODY” ANALYSIS IS REVIEWABLE	1
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966)	passim

CR 73.01	2,3
CR 76.20	2,3
<u>Turner v Commonwealth</u> , 59 Ky 619 (Ky. 1859).....	3
<u>Central Kentucky News – Journal v. George</u> , 306 Sw.3d 41 (Ky. 2010).....	3
<u>Buster v. Commonwealth</u> , --- S.W.3d ----, 2012 WL 1450447 (Ky. 2012)	3
<u>Welch v. Commonwealth</u> , 149 S.W.3d 407, 410 - 11 (Ky. 2004).....	passim
<u>New Jersey v. TLO</u> , 469 U.S. 325, 336-37 (1985)	4
<u>Wilkerson v. State</u> , 173 S.W.3d 521 (Tex.Crim.App. 2005).....	4
<u>Buster v. Commonwealth</u> , --- S.W.3d ----, 2012 WL 1450447, 6 (Ky. 2012)	4
<u>Hartsfield v. Commonwealth</u> , 277 S.W.3d 239 (Ky.2009)	4,5
II. N.C. WAS IN CUSTODY WHEN HE WAS INTERROGATED BEHIND CLOSED DOORS BY ASSISTANT PRINCIPAL GLASS IN TANDEM WITH AN ARMED SHERIFF DEPUTY	6
<u>Stanbury v. California</u> , 511 U.S. 318 (1994)	6
<u>C.W.C.S. v. Commonwealth</u> , 282 S.W.3d 818 (Ky. App. 2009)	passim
KRS 158.154.....	6
<u>U.S. v. Salvo</u> , 133 F.3d 943 (6th Cir.1998)	7,9
<u>J.D.B. v. North Carolina</u> , 131 S.Ct. 2394 (2011).....	passim
<u>Eddings v. Oklahoma</u> , 455 U.S. 104, 115 (1982)	8
<u>Bellotti v. Baird</u> , 443 U.S. 622, 635(1979).....	8
<u>Graham v. Florida</u> , 130 S.Ct. 2011, 2026 (2010).	8
<u>In re Gault</u> , 387 U.S. 1, 45 (1967).	8
<u>CONCLUSION</u>	9

ARGUMENT

I. THE CIRCUIT COURT'S CONFLATED "STATE ACTOR" AND "IN-CUSTODY" ANALYSIS IS REVIEWABLE

The Commonwealth contends that the circuit court's misapplication of the state actor analysis is not preserved for review because "that issue was not addressed in Appellant's Appeal to the Nelson Circuit Court."¹ However, as N.C. explained in his Brief for Appellant, the circuit court mistakenly conflated the state actor and custody analysis and it clouded the lower court's review of the relevant custody analysis. N.C. properly preserved the issue for appeal but N.C. could not have predicted that the *circuit* court would misapply a legal standard *before* the court did so. Pursuant to applicable Kentucky Civil Rules of Procedure N.C. properly raised the error on appeal. It is properly before this Court.

In evaluating the custody analysis, the circuit court went to great lengths to attempt to distinguish legal authority that supported N.C.'s right to *Miranda*² protections (TE I, 47 - 48). The circuit court opined that "[N.C.] was not entitled to a Miranda warning **because the questioning was not initiated by a law enforcement officer**" (TE I, 47)(emphasis added). The court attempted to distinguish precedent from the Kentucky Court of Appeals and other persuasive legal support (concerning custodial interrogations from other jurisdictions) "because each case involves **law enforcement officers** who questioned students about **criminal investigations.**" (TE I, 47)(emphasis in the original).

¹ Brief for Appellee, entered 8/14/2012, p. 2 (hereinafter, "Brief for Appellee").

² See Miranda v. Arizona, 384 U.S. 436 (1966).

N.C. properly raised the issue of the lower court's error in conflating the two analyses. The method for such appellate review was promulgated by this Court. Specifically, Kentucky Civil Rule 73.01 states:

All appeals shall be taken to the next higher court by filing a notice of appeal in the court from which the appeal is taken. ... A motion for discretionary review by the Supreme Court of a decision of the Court of Appeals, or by the Court of Appeals of an appellate decision of the circuit court, shall be made as provided in Rule 76.20.

Accordingly, Civil Rule 76.20 states that in order to properly preserve an argument, the motion for discretionary review shall contain:

A clear and concise statement of (i) the material facts, (ii) the questions of law involved, and (iii) the specific reason or reasons why the judgment should be reviewed[.]
CR 76.20(3)(d).

Stated simply, N.C. properly filed a motion for discretionary review (MDR) of the circuit court's misapplication of the state actor analysis in its review of the custody analysis. See CR 73.01. And pursuant to CR 76.20(3)(d), N.C. expressly raised these questions of law and the specific reasons why the judgment should have been reviewed. In his MDR, N.C. stated:

- “The lower courts’ decisions were erroneous”³
- “On appeal the **circuit court** [held] that no Miranda warnings were required⁴ ‘because the questioning was not initiated by a law enforcement officer’”
- “In any event, **the assistant principal was himself a ‘state actor’** for Miranda purposes ...”⁵

³ Motion for Discretionary Review, entered 5/6/11, p. 6 (emphasis removed).

⁴ Motion for Discretionary Review, entered 5/6/11, p. 7 (emphasis added).

⁵ Motion for Discretionary Review, entered 5/6/11, p. 8 (emphasis added).

The Kentucky Supreme Court has long possessed the jurisdiction to revise and correct erroneous and illegal sentences and judgments. Turner v Commonwealth, 59 Ky 619 (Ky. 1859). And such a misapplication of law is properly reviewed *de novo* by the appellate court. See Central Kentucky News – Journal v. George, 306 Sw.3d 41 (Ky. 2010).

Contrary to the Commonwealth's errant assertion that "[N.C.] never mentions whether state action was present," N.C. expressly stated in the MDR that "the assistant principal was himself a 'state actor' for Miranda purposes[.]" (Motion for Discretionary Review, entered 5/6/11, p. 8). And N.C. raised the "state actor" issue as directed by this Court. See CR 73.01; CR 76.20(3)(d). Admittedly, N.C. did not draft the MDR and the Brief for Appellant in an identical fashion. However, an expectation of such redundancy would be absurd. The MDR and the Brief for Appellant serve different purposes. A bit oversimplified, the MDR is filed to seek the Court's permission to be granted an audience and the Brief for Appellant is designed to more thoroughly express the substantive issues requiring a remedy. Compare CR 73.01 and CR 76.20(3)(d).

The Commonwealth is off the mark. To preserve an error on MDR, pinpoint accuracy is unnecessary. Ibid. On MDR, the arrow must only hit the target to score a point, not the bulls-eye. Or as this Court more eloquently explained, "It is not uncommon for litigants to refine their claims when they get to the appeals stage to present clearer and better supported arguments." Buster v. Commonwealth, --- S.W.3d ----, 2012 WL 1450447, 2 (Ky. 2012).

With the more refined, yet properly preserved point at hand, N.C. is confident that this Court's guidance and sound reasoning should remove the lower court's mistaken attempt to distinguish applicable legal authority to N.C.'s custody analysis.

II. MR. GLASS WAS A STATE ACTOR

The sound reasoning of this Court confirms that Assistant Principal Glass (Mr. Glass) was a state actor.

As this Court explained in Welch, the critical inquiry for determining a state actor is "whether the interrogation was ... likely [to] result in disclosure of information which would lead to facts that would form the basis for prosecution." Welch v. Commonwealth, 149 S.W.3d 407, 410 - 11 (Ky. 2004).

Put simply, a person does not have to be a police officer to be a state actor. New Jersey v. TLO, 469 U.S. 325, 336-37 (1985); Wilkerson v. State, 173 S.W.3d 521 (Tex.Crim.App. 2005)(holding that when a non-law enforcement agent is acting in tandem with police to investigate and gather evidence for a criminal prosecution *Miranda* warnings are required). See also, Buster v. Commonwealth, --- S.W.3d ----, 2012 WL 1450447, 6 (Ky. 2012); Hartsfield v. Commonwealth, 277 S.W.3d 239, 245 (Ky.2009).

A state actor is defined not by professional title but by the likelihood that information would arise that would form that basis of a prosecution. Welch v. Commonwealth, 149 S.W.3d 407, 410 - 11 (2004). This Court recently illustrated this point again when it found that a social worker for the Cabinet for Health and Family Services working in tandem with the police was such a state actor. Buster v. Commonwealth, --- S.W.3d ----, 2012 WL 1450447, 6 (Ky. 2012). This Court held that non-law enforcement state actors "[are] subject to the same constraints as a police

officer” pursuant to the protections granted under *Miranda*. Id.; See also, Hartsfield v. Commonwealth, 277 S.W.3d 239, 245 (Ky.2009) (finding that a SANE nurse's interview was the “functional equivalent of police questioning”).

The Commonwealth contends that because Mr. Glass is an assistant principal who was furthering the school’s interests, that this Court should ignore its holdings in Hartsfield, Welch, and Buster. (Brief for Appellee at pgs. 3-4). N.C. disagrees.

The school’s interest is not the test for defining a state actor. Whether an interrogation is likely to lead to facts that will form the basis of the prosecution is the test. Welch v. Commonwealth, 149 S.W.3d 407, 410 - 11 (2004).

In this case, the officer testified that Mr. Glass was aware that N.C. had given some pills away *before* they interrogated him. (VR; 5/4/09; 2:41:49). And the officer maintained a continual presence and participation throughout the entire interrogation. (VR; 5/4/09; 2:29:32, 2:29:39, 2:40:10, and 2:45:58). The officer was armed and in Sheriff’s attire when Mr. Glass escorted N.C. to the school office for interrogation. Mr. Glass conducted the interrogation in tandem with the officer. Mr. Glass admitted extensive experience and familiarity with how the officer operated in criminal investigations. (VR; 5/4/09; 2:33:10). And this was not their “first go around” interrogating juveniles together. (VR; 5/4/09; 2:33:30).

Furthering school interests or not, an assistant principal securing an armed escort for a student to a closed-door interrogation of a juvenile that Assistant Principal Glass knew had previously given some prescription pills away is clearly the type of

interrogation that is likely to lead to facts to form the basis of a prosecution. Welch v. Commonwealth, 149 S.W.3d 407, 410 - 11 (Ky. 2004). Mr. Glass was a state actor.⁶

III. N.C. WAS IN CUSTODY WHEN HE WAS INTERROGATED BEHIND CLOSED DOORS BY ASSISTANT PRINCIPAL GLASS IN TANDEM WITH AN ARMED SHERIFF DEPUTY

A confession must be suppressed where the person is subjected to a custodial interrogation without first being warned that his statements may be used against him in court, and that he has the right to remain silent and to consult with counsel prior to questioning. Miranda v. Arizona, 384 U.S. 436 (1966). A person is considered “in custody” when the circumstances would lead a reasonable person to conclude that he was not free to leave. Stanbury v. California, 511 U.S. 318 (1994). However, the Commonwealth contends that that N.C. was not in custody. The Commonwealth cites C.W.C.S. v. Commonwealth, 282 S.W.3d 818 (Ky. App. 2009) to suggest that because N.C. was not formally arrested, he could not have been deemed in custody. The Commonwealth ignores however, that the appellate court made the conclusion that C.W.C.S. was not in custody specifically because the juvenile was advised of his right to leave. Id. at 822. Yet the Commonwealth complains that “The Appellant would have the Court believe that the absence of this fact alone is enough to differentiate this case from C.W.C.S.”⁷

The Commonwealth is only half right. N.C. does indeed believe this Court will distinguish C.W.C.S. with the facts of this case. But N.C. also believes the Court will do

⁶ Support can be found that school personnel should even be deemed *per se* state actors pursuant to KRS 158.154. Under KRS 158.154, school personnel are mandated to report offenses to law enforcement upon the reasonable belief that an offense occurred on school property.

⁷ Brief for Appellee, p. 6.

so for many reasons, including this Court's respect for the guidance and precedent of the United States Supreme Court.

The Commonwealth utters disbelief that N.C. would suggest that the fact that he was not advised of his right to freely leave the interrogation could significantly differentiate his situation from C.W.C.S. But not only did the Kentucky Court of Appeals expressly base their conclusion on that factor in C.W.C.S.,⁸ such a factor has long played a significant role in the custody analysis in the federal courts. U.S. v. Salvo, 133 F.3d 943, 950 (6th Cir.1998)(holding that other indicia of custody for *Miranda* purposes include **“whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so”**)(emphasis added). Much like our Kentucky Court of Appeals, the Sixth Circuit Court of Appeals expressly highlighted the significance of informing a person under interrogation that they are free to leave. U.S. v. Salvo, 133 F.3d at 951.

Moreover, the Commonwealth asks this court to ignore that “It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.” J.D.B. v. North Carolina, 131 S.Ct. 2394, 2398-99 (2011).

In eerily similar fashion to J.D.B., N.C. was removed from class by Mr. Glass and a law enforcement officer to discuss information that was likely to form the basis of the underlying prosecution. Like J.D.B., an armed officer and assistant principal escorted N.C. to a remote and secure location. Like J.D.B., the interrogation occurred behind closed doors. Like J.D.B., neither Officer Campbell nor Mr. Glass attempted to contact his guardian – or to even inform him that he could do so. Like J.D.B., he was not given

⁸ C.W.C.S. v. Commonwealth, 282 S.W.3d 818, 822 (Ky. App. 2009).

Miranda warnings. Like J.D.B., he was not advised that he did not have to speak to them. Like J.D.B., he was not told he was free to leave. And like J.D.B., N.C.'s transportation home and release was arranged only after obtaining inculpatory statements. N.C.'s circumstances are clearly analogous to J.D.B.⁹ Such similarity is significant because juveniles are highly susceptible to making false confessions and at heightened risk for coercion. See J.D.B. v. North Carolina, 131 S.Ct. 2394, 2401 (2011) (citing empirical studies that illustrate the heightened risk of false confessions from juveniles).

A juvenile's heightened risk of coercion in confessions is easily understood because juveniles "generally are less mature and responsible than adults," Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," Bellotti v. Baird, 443 U.S. 622, 635(1979).

Put simply, juveniles are less mature and more vulnerable to outside pressures. Graham v. Florida, 130 S.Ct. 2011, 2026 (2010). And "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." Id.

The United States Supreme Court has made it abundantly clear that juvenile confessions require "special caution." In re Gault, 387 U.S. 1, 45 (1967). Special caution necessarily includes taking juveniles heightened risks for coercion in interrogations into consideration. J.D.B. v. North Carolina, 131 S.Ct. 2394, 2401 (2011) and special caution includes whether the target of an interrogation was informed of the right to leave. Both the Kentucky and the federal appellate courts have factored this heavily in the custody

⁹ J.D.B., 131 S.Ct. 2394 (2011).

analysis. See C.W.C.S. v. Commonwealth, 282 S.W.3d 818, 822 (Ky. App. 2009); J.D.B. v. North Carolina, 131 S.Ct. 2394, 2401 (2011); U.S. v. Salvo, 133 F.3d 943, 950 (6th Cir.1998).

After Mr. Glass was alerted to an empty prescription bottle found in the bathroom and after he discovered that some of the pills in the bottle had been given away, Mr. Glass and the officer set out in tandem to escort N.C. to a closed-door interrogation in the principal's office. This was not their "first go around" investigating criminal matters together so Mr. Glass's familiarity with how to proceed was not in question. Confronted with the prescription bottle and in the presence of an armed deputy, and without being advised that he was free to leave or that he could contact his parent or guardian N.C. succumbed to the pressure that the United States Supreme Court has cautioned courts to guard against and made an incriminating statement. It is clear that N.C. was in custody.

CONCLUSION

For the reasons stated herein and in the Brief for Appellant, N.C.'s adjudication must be reversed and the case remanded to the Nelson District Court for a determination consistent with the guiding principles of this Court and the United States Supreme Court.

Respectfully Submitted,



Robert K. Strong

Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
(502) 564-8006

