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APR 21 2014
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SUPREME COURT

SUPREME COUT OF KENTUCKY
CASE NUMBER: 2013-SC-000210

Q.M., A CHILD UNDER EIGHTEEN

APPELLANT

VS.

Appeal from Christian Circuit Court
Hon. John L. Atkins, Judge
Confidential Case No: 12-XX-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR APPELLANT

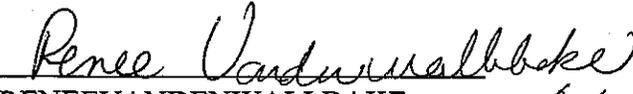
Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2014, the foregoing "Reply Brief for Appellant" was served by first class mail or messenger mail upon the following:

- Hon. John L. Atkins, Judge, Christian Circuit Court, 100 Justice Way, Hopkinsville, KY 42240;
- Hon. James G. Adams, Jr., District Judge, Christian District Court, 100 Justice Way, Hopkinsville, KY 42240;
- Hon. Lynn Pryor, Commonwealth Attorney, 511 S. Main Street, 2nd Floor, Courthouse Annex, Hopkinsville, KY 42240;
- Hon. J. Michael Foster, Christian County Attorney, P.O. Box 24, Hopkinsville, KY 42240;
- Hon. Duncan Cavanah, Assistant County Attorney, P.O. Box 648, Hopkinsville, KY 42240;
- Hon. Jason Holland, 951 L.C. Ave., Hopkinsville, KY 42240; and
- Hon. Jack Conway, Attorney General, Capital Center Complex, 1024 Capital Center Drive, Third Floor, Frankfort, Kentucky 40601.


RENEEVANDENWALLBAKE

by
JCK

INTRODUCTION

The issues raised on appeal are whether the informal adjustment in this juvenile case was improperly revoked and whether the Appellant's guilty plea was valid in the absence of being informed of the constitutional rights he was waiving and the consequences to pleading to a juvenile sex offense. The purpose of this Reply is to respond to the arguments in the Appellee's Brief and clarify the issues on appeal to the extent necessary.

ARGUMENT

I. Evidence of a Material Breach is Required before an Informal Adjustment Agreement can be Revoked

The Appellant's charge of sexual abuse in the third degree was informally adjusted on May 24, 2011 on the condition that he "moves to Oklahoma to live w/ Dad." (TR, vol.I, p.21). The informal adjustment was revoked over four months later. (TR, vol.I, p.23). The Appellant asserts that notice and a fair hearing is required under due process of law before an informal adjustment can be revoked. However, even if due process is not applicable to an informal adjustment, contract principles should apply, which require evidence of a material breach.

Generally, agreements between the Commonwealth and a defendant are interpreted under contract principles. See e.g., McClanahan v. Commonwealth, 308 S.W.3d 694, 701 (Ky. 2010) (applying contract principles to plea agreement). As such, when a defendant has detrimentally relied on the agreement and substantially performed his part of the bargain, the Commonwealth must also be held to the agreement. Commonwealth v. Reyes, 764 S.W.2d 62, 65 (Ky. 1989); see also Workman v. Commonwealth, 580 S.W.2d 206, 207 (Ky. 1979) (overruled on other grounds by Morton v. Commonwealth, 817 S.W.2d 218 (Ky. 1991)). ("When as here, our historical ideals of fair play and substantial justice do not permit attorneys for the

Commonwealth to disregard promises and fail to perform bargains, it does not permit the judge to allow such iniquities to succeed.”).

Further, any ambiguity in the agreement is construed against the Commonwealth. “Both constitutional and supervisory concerns require holding the government to a greater degree of responsibility than the defendant...” United States v. Johnson, 979 F.2d 396, 399 (6th Cir. 1992) (internal quotation and citation omitted). The Appellee agrees that contract principles apply but argues that it is the Appellant that is in breach. (Appellee’s Brief, p.9). The Appellant respectfully disagrees. The parties entered a binding non-prosecution agreement that gave Q.M. a cognizable property and liberty interest in not being prosecuted. The Appellant detrimentally relied on this agreement by relocating almost a thousand miles away. The agreement did not specify how long he was to remain in Oklahoma, simply that he “move” there to “live with”—or reside with—his father (as opposed to a different relative). This involved transporting all of his belongings, enrolling in a new school, and leaving behind his friends and mother. Any ambiguity as to the required length of his stay in Oklahoma should be resolved in the Appellant’s favor. Therefore, the Commonwealth did not present evidence of a material breach of the agreement and it was error for the lower court to revoke the informal adjustment.

The revocation of the informal adjustment in this case was palpable error. A serious sex offense charge was launched against a child with little process or review when there was a prior agreement to abandon prosecution and the child did everything he could to abide by that agreement. As a result, he was ultimately ripped from his family and home and labeled a Juvenile Sex Offender. Therefore the Appellant respectfully requests that this Court enforce the informal adjustment agreement and vacate the adjudication and disposition in this case.

II. A Juvenile Cannot Implicitly Waive the Rights and Consequences Surrounding a Guilty Plea

The Appellant asserts that his guilty plea was invalid because he was not advised of the rights he was waiving as well as the unique and serious consequences to pleading to a juvenile sex offense. The Appellee argues that the plea was knowingly, voluntarily, or intelligently made noting that “this was not his first brush with the juvenile justice system.” (Appellee’s Brief, p.10). It was, however, the Appellant’s first guilty plea since his prior juvenile offense was diverted by the Court Designated Worker and never brought before a judge. (Appellee’s Brief, p.1; TR, vol.II, p.266). The lower court did not inform the sixteen year old Appellant of the constitutional rights he was waiving. The lower court did not inform him of a single consequence to waiving these rights. These are two requirements clearly required of the court for a plea to be valid under Boykin v. Alabama and its interpreting case law in Kentucky. 395 U.S. 238, 243-44 (1969). (See Appellant’s Brief, pp.14-18).

In the case Kozak v. Commonwealth, this Court held that a juvenile must be informed of the rights he is waiving—including particular rights afforded under the Juvenile Code—before a guilty plea can be accepted. Further, the Court stated that **this obligation falls to the trial court.** Kozak v. Commonwealth, 279 S.W.3d 129, 134 (Ky. 2008). “In short, since juveniles lack the emotional and intellectual sophistication to waive impliedly the rights that the General Assembly has carefully provided them in the juvenile code, we cannot accept the Commonwealth’s contention that Kozak has impliedly waived the juvenile code rights of which he was not made aware.” Id. While Kozac involved a plea in the context of sentencing as a youthful offender under the Juvenile Code, this case similarly involves the weighty consequences of being labeled a “Juvenile Sex Offender” under the Juvenile Code. Kentucky has consistently recognized the special care that juvenile courts need to employ when they have a child before them that is

waiving their constitutional rights. See e.g., D.R. v. Commonwealth, 64 S.W.3d 292, 296 - 297 (Ky.App. 2001) (waiver of right to counsel); Humphrey v. Commonwealth, 153 S.W.3d 854, 858 (Ky. App. 2004) (waiver of transfer hearing); Commonwealth v. B.J., 241 S.W.3d 324, 328 (Ky. 2007) (waiver of right to be present). If a juvenile must be informed of his rights under the Juvenile Code prior to his plea, certainly he must also be warned of the penalties triggered by his plea as well. Therefore, the Appellant respectfully requests that this Court reverse and vacate his plea to sexual abuse in the third degree.

Sincerely,



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