

RENDERED: June 12, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-0966-MR

LARRY KEITH NICHOLS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 95-CR-001482

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: BUCKINGHAM, KNOX, AND MILLER, JUDGES.

KNOX, JUDGE: Appellant Larry Keith Nichols entered a conditional plea of guilty in the Jefferson Circuit Court to second-degree assault and first-degree robbery, reserving the issue of whether KRS 635.020(4) violates the constitutional guarantees of due process of law and equal protection. The trial court sentenced appellant to ten years' imprisonment on each offense, to be served concurrently, for a total of ten years. Appellant now appeals the issue of constitutionality, claiming that KRS 635.020(4), the "juvenile transfer statute" (or "waiver statute") under which appellant was transferred to circuit court to be

tried as an adult, violated his constitutional rights to due process of law and equal protection.¹

Appellant was arrested in March 1995 on charges of first-degree assault and first-degree robbery, stemming from an incident wherein appellant, fifteen years old at the time, and co-defendant in the case, Keith Satterfield, allegedly forced the victim into his own apartment, demanded money, and then shot the victim six times with a .22 caliber handgun. A juvenile petition was filed on March 27, 1995, in district court, and the case was set for a preliminary hearing the following month to determine whether appellant should be transferred to circuit court due to the nature of the charges.

At the preliminary hearing, the district court found probable cause to believe that first-degree assault and first-degree robbery (class B felonies) were committed by appellant, and further found that appellant was fifteen years old at the time he committed the alleged offenses. Given appellant's age and in light of appellant's having used a firearm in committing the two felonies with which he was charged, the presiding judge transferred appellant to circuit court in accordance with KRS 635.020(4), which provides in part:

Any other provision of KRS Chapters 610 to 645 to the contrary notwithstanding, if a child charged with a felony in which a firearm was used in the commission of the offense had attained the age of fourteen (14)

¹ It is the 1994 version of KRS 635.020(4) which this Court reviews. That version has since been revised by the legislature, effective July 1997.

years at the time of the commission of the alleged offense, he shall be tried in the Circuit Court as an adult offender and shall be subject to the same penalties as an adult offender

In June 1995, the grand jury returned an indictment charging appellant with criminal attempt to commit murder and first-degree robbery. Later that year, in December, appellant entered a conditional plea of guilty to an amended charge of second-degree assault and to first-degree robbery, pursuant to RCr 8.09, which permits a defendant to enter a conditional plea of guilty while reserving the right to appeal from "the adverse determination of any specified trial or pretrial motion." In light of the trial court's having denied appellant's motion to declare KRS 635.020(4) unconstitutional, appellant reserved the right to appeal that issue to this Court. Judgment was entered on March 4, 1996, and sentence was imposed as recommended by the Commonwealth, i.e. ten years' imprisonment on each felony offense, to be served concurrently, for a total of ten years.

Appellant argues that KRS 635.020(4) is an arbitrary infringement upon due process of law and, further, that it denies those subjected to its mandates equal protection under the law, in violation of Section 2 of Kentucky's Constitution: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." We note here that at the time appellant filed this appeal, the constitutionality of KRS 635.020(4), insofar as it allegedly violated Sections 27, 28, 112, and 113 of the

Constitution, was pending before Kentucky's Supreme Court. Commonwealth v. Halsell, Ky., 934 S.W.2d 522 (1996). In fact, this Court ordered appellant's appeal abated pending the outcome of Halsell, which became final in November 1996.

Halsell held that (1) KRS 635.020(4) does not violate those provisions of Kentucky's Constitution (Sections 112 and 113) governing jurisdiction of district and circuit courts; and, (2) It does not conflict with KRS 640.010, which requires the district court, in some circumstances, to consider certain mitigating factors prior to determining whether jurisdiction should be transferred to circuit court. Additionally, the court in Halsell analyzed KRS 635.020(4) under Sections 27 and 28 of the Constitution, and found that it did not violate the separation of powers doctrine. In light of Halsell, this Court issued an order directing appellant in this case to show cause why the Jefferson Circuit Court's ruling as to the constitutionality of KRS 635.020(4) should not be summarily affirmed. Appellant responded by noting that KRS 635.020(4) has not yet been analyzed under Section 2 of the Constitution to determine whether it violates the guarantees of due process of law and equal protection. This Court found sufficient cause to continue the appeal, and we now address appellant's arguments.

DUE PROCESS

KRS Chapter 640 controls proceedings against juveniles who are transferred from district court to circuit court as "youthful offenders" due to the nature of the offenses with which

they have been charged. Those offenses which trigger transfer are identified in KRS 635.020, e.g. capital offenses, class A and B felonies, class C and D felonies under some circumstances, and felonies in which a firearm was used to commit the offense. In most cases, transfer will not be considered unless and until the county attorney has moved that the juvenile be proceeded against as a youthful offender. If such a motion is made, the district court conducts a preliminary hearing wherein it is obligated to consider certain mitigating factors prior to transferring the juvenile. These factors are set out in KRS 640.010(2)(b):

1. The seriousness of the alleged offense;
2. Whether the offense was against persons or property, with greater weight being given to offenses against persons;
3. The maturity of the child as determined by his environment;
4. The child's prior record;
5. The best interest of the child and community;
6. The prospects of adequate protection of the public; and
7. The likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system.

If, however, a juvenile is charged with a felony in which a firearm was used to commit the crime, he is automatically transferred to circuit court under KRS 635.020(4), absent any consideration by the court of KRS Chapter 640's mitigating factors. Appellant argues that automatic transfer cannot be reconciled with the procedural protections afforded in KRS 640.010(2), that automatic transfer divests juveniles of the constitutionally "protected" status they acquired in Kent v.

United States, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), and that Kent nonetheless forbids transfer absent consideration of mitigating factors. Before we take up appellant's interpretation of Kent, we note that Kentucky's Supreme Court has already addressed the issue of whether KRS 635.020(4) can be reconciled with KRS 640.010(2)(b), and has held not only that the two statutes are not in conflict, but that consideration of KRS 640.010(2)(b) mitigating factors is not required prior to deciding whether a firearm felony should be transferred to circuit court for trial. Commonwealth v. Halsell, Ky., 934 S.W.2d 552 (1996). The Court in Halsell noted, first of all, that consideration of the seven factors listed in KRS 640.010(2)(b) is triggered only by the county attorney's motion to proceed under Chapter 640, and that no such motion was made in that case. Likewise, we note the absence of any such motion in the case now under review. The Halsell Court further stated:

Considering KRS 635.020 as a whole, we note that subsection (1) directs the district court initially to proceed under the provisions of Chapter 635 if, prior to an adjudicatory hearing, there is a reasonable cause to believe a child has committed a firearm felony of the type described in subsection (4) of that chapter. Subsection (4) itself, is prefaced by the words, "*Any other provision of KRS Chapter 610 to 645 to the contrary notwithstanding, if a child charged with a felony in which a firearm was used in the commission of the offense had attained the age of fourteen (14) years at the time of the commission of the alleged offense, he shall be tried in the circuit court as an adult offender. . . .*" [emphasis added]. Thus, KRS 635.020(4) makes it clear that the provisions of KRS 640.010(2) are not

applicable if the district court has found there is reasonable cause to believe that the elements of KRS 635.020(4) have been established.

Id. at 555-56 (emphasis in original).

The court in Halsell concluded that regardless of whether reasonable cause is determined at a preliminary hearing described in KRS 640.010(2) or prior to an adjudicatory hearing as described in KRS 635.020(1), "[O]nce the district court has reasonable cause to believe that a child before the court has committed a firearm felony as described in subsection (4) of KRS 635.020, jurisdiction vests in the circuit court, the provisions of KRS 640.010(2)(b) and (c) to the contrary notwithstanding."

Id. at 556.

We disagree that Kent requires consideration of mitigating factors in each and every case, prior to transfer. In Kent, the juvenile court transferred a sixteen-year-old boy without conducting an evidentiary hearing, in spite of the fact that the District of Columbia's waiver statute required a "full investigation" prior to transfer. The U.S. Supreme Court stated that the statute "assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.'" Kent, 383 U.S. at 553. The court, noting that the statute itself gave the juvenile court a "substantial degree" of discretion as to factual considerations to be weighed, concluded the sixteen-year-old defendant was

entitled to a hearing and a statement of reasons for his transfer. Id.

The holding in Kent is limited in that it identified the minimum procedural process due pursuant to specific language of the waiver statute it reviewed, which clearly created the expectation of an evidentiary transfer hearing. We do not believe, however, the court created a hard-and-fast rule that a full-blown investigatory hearing is required in each and every transfer of a juvenile. In fact, in a case decided nearly ten years later, the U.S. Supreme Court, analyzing its holding in Kent, specifically denied that it had intended to prescribe the type, or amount, of evidence necessary to transfer a juvenile. Breed v. Jones, 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975). Breed involved a juvenile who had been subjected to in-depth evidentiary and adjudicatory proceedings at both the juvenile court and circuit court levels, which the court ultimately found to constitute double jeopardy. Pertinent to the case we now review, however, is Breed's articulation of the due process requirement, in general, within the context of juvenile transfer proceedings:

In Kent v. United States . . . the Court held that hearings under the statute there involved "must measure up to the essentials of due process and fair treatment." However, the Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court. We require only that, whatever the relevant criteria, and whatever the evidence demanded, a State determine whether it wants to treat a juvenile within the juvenile-court system

before entering upon a proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty, rather than subject him to the expense, delay, strain, and embarrassment of two such proceedings.

Breed, 421 U.S. at 538 (emphasis added).

The due process requirement, then, as it has been articulated by the U.S. Supreme Court in Breed, is simply that the juvenile must not be subjected to more than one adjudicatory proceeding. Contrary to appellant's position, the court in Kent made no decision whatsoever concerning the type of evidence that Kentucky's, or any other state's, juvenile courts must consider prior to transferring a juvenile to circuit court. Further, we believe that KRS 635.020(4) addresses the concern, and satisfies the due process requirement, expressed in Breed that juveniles be transferred as expeditiously as possible, prior to any type of adjudicatory proceeding.

Finally, we disagree with appellant's argument that juveniles possess an inherent right to be afforded certain protections and immunities due solely to their juvenile status. Even Breed recognized that "not all juveniles can benefit from the special features and programs of the juvenile-court system and that . . . transfer to an adult court should be available." Breed, 421 U.S. at 535. The fifth circuit, in its review of a Florida waiver statute, had this to say about juvenile status:

[T]reatment as a juvenile is not an inherent right but one granted by the state legislature, therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or

discriminatory classification is involved. .
. . Doubtless the Florida legislature
considered carefully the rise in the number
of crimes committed by juveniles as well as
the growing recidivist rate among this group.

Woodard v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977). State
courts, too, have grappled with the same issue and concluded as
such:

[H]istorically, a juvenile has no right to
remain before the juvenile court, except as
provided by statute. A juvenile is not even
constitutionally entitled to a hearing before
transfer to adult court. In light of this
history, we conclude that a legislature may
completely exclude certain serious offenses
from juvenile court jurisdiction.

In the interest of A. L., 271 N.J.Super. 192, 203, 638 A.2d 814,
820 (1994). Kentucky's juveniles are afforded special immunities
and protections by way of the legislature, not the constitution.

We briefly address appellant's remaining due process
arguments. Appellant attacks the language, "charged with a
felony in which a firearm was used in the commission of the
offense," as too vague for the purpose of distinguishing between
violent and nonviolent offenses, and between mere possession of a
weapon and actual use of it. We disagree, and adopt the analysis
and reasoning set forth in Haymon v. Commonwealth, Ky., 657
S.W.2d 239 (1983), involving a statute which precludes
eligibility for probation if the commission of the offense
"involved the use of a weapon from which a shot or projectile may
be discharged that is readily capable of producing death or other
serious physical injury. . . ." Id. at 240. The defendant in
Haymon, having stolen a shotgun, was armed with that gun as he

left the premises, although he never actually fired the gun during the commission of burglary. Nonetheless, he was denied probation under the above-referenced statute. Defendant argued that the statute's language "use of a weapon" was ambiguous and that, further, because he was merely "armed" with the gun, but had not "used" it, his offense did not fall within the scope of the statute. Kentucky's Supreme Court agreed that the phrase "use of a weapon" was ambiguous as used in the statute, and reversed denial of defendant's probation, holding that defendant was "entitled to the benefit of the ambiguity." Id.

In light of Haymon, we believe the appellant in this case is entitled to the benefit of any ambiguity inherent in the phrase "felony in which a firearm was used." This ambiguity, however, does not benefit appellant, who shot his victim six times with a .22 caliber handgun, and as a result, was charged with first-degree assault and first-degree robbery. In the context of this particular case, we have no trouble making the distinctions appellant denies can be made, and say with certainty that appellant "used" his firearm in the commission of a "violent" crime. Thus, appellant clearly falls within the scope of KRS 635.020(4).

Finally, appellant interprets the language in KRS 635.020(4), "shall be subject to the same penalties as an adult offender," as completely exempting juveniles automatically transferred to circuit court from the sentencing protections otherwise afforded in KRS Chapter 640, e.g. exemption from

capital punishment and persistent felony offender provisions. Appellant argues that the statute is thus unconstitutionally arbitrary as to the penalties it imposes. First of all, we believe that the Supreme Court in Halsell, 934 S.W.2d at 552, clearly characterized KRS 635.020(4) as a purely jurisdictional statute, thus precluding any attack upon it as a penal statute. More significant to our review, however, is the recent holding in Britt v. Commonwealth, Ky., ___ S.W.2d ___, 45 Ky. L. Summ. 4, 22 (March 19, 1998), that juveniles automatically transferred to circuit court under KRS 635.020(4) are, in fact, "eligible for the ameliorative sentencing provisions of KRS Chapter 640." Id. at 23. In light of Britt, appellant's premise that the sentencing protections of KRS Chapter 640 are not extended to juveniles who are automatically transferred to circuit court, is faulty. Appellant, and others similarly situated, are entitled to those protections and thus, appellant's due process argument is without merit.

EQUAL PROTECTION

Appellant argues that KRS 635.020(4) draws an arbitrary, irrational line between, e.g., a capital juvenile offender who chooses to use a firearm to kill his victim and a capital juvenile offender who, by "mere fortuity," uses some means other than a firearm to kill his victim. Appellant notes that in the first case, the juvenile is denied consideration of certain KRS Chapter 640 mitigating factors and is, additionally, subject to adult penalty enhancement or even execution. Whereas

in the latter situation, the juvenile is afforded all the circumstantial and sentencing protections of KRS Chapter 640. Appellant argues that this differentiation in treatment effectively denies juveniles such as appellant the "legal status" (i.e. juvenile status) to which they are entitled and results in unequal treatment of individuals similarly situated. We disagree.

First, we are mindful that treatment as a juvenile is not an inherent right. In fact, the extent of any right to treatment as a juvenile is derived from statutory law and is defined by state legislatures. Thus, appellant has not been stripped of a status to which he is constitutionally entitled. Second, we believe that when subjected to the rational basis test, KRS 635.020(4) survives appellant's constitutional challenge.

"Legislative distinctions between persons, under traditional equal protection analysis, must bear a rational relationship to a legitimate state end." *Chapman v. Gorman*, Ky., 839 S.W.2d 232, 239 (1992). Put another way, "[t]he proper test to be applied under the equal protection clause and the cited sections of the Kentucky Constitution is whether there is a rational basis for the different treatment." *Hooks v. Smith*, 781 S.W.2d 522, 523 (1989).

Roberts v. Mooneyhan, Ky. App., 902 S.W.2d 842, 844 (1995). This Court in Roberts reiterates the presumption that statutes enacted by the General Assembly are constitutionally valid, and that "those attacking the rationality of the legislative

classification have the burden 'to negative every conceivable basis which might support it.'" Id. (citation omitted).

We believe there is a legitimate interest in holding juveniles who use firearms during the commission of a crime accountable for their behavior. Further, we believe there is a legitimate interest in protecting the community from such behavior. As our Supreme Court has stated, "[f]irearms are inherently more dangerous to human life than other weapons. . . ." Parrish v. Commonwealth, Ky., 581 S.W.2d 560, 563 (1979). The legislative decision to transfer juveniles charged with a felony in which a firearm was used, is rationally related to these goals. Appellant has failed to persuade this Court otherwise.

As for the legislature's having singled out a particular group of offenders for different treatment, each of whom chooses to use a deadly weapon to further commission of a felony offense, we find this language to be applicable:

[T]he equal protection clause does not prevent the legislature from recognizing "degrees of evil. . . ." [A] State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. Nor is it prevented by the equal protection clause from confining "its restrictions to those classes of cases where the need is deemed to be clearest."

Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 2d 1655 (1942) (citations omitted).

We hold that KRS 635.020(4) does not violate appellant's due process or equal protection rights. Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

BUCKINGHAM, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS AND FILES SEPARATE OPINION.

MILLER, JUDGE, CONCURS BY SEPARATE OPINION. I reluctantly concur. In view of Section 2 of our Kentucky Constitution, I have great reservation about a criminal statute that arbitrarily considers a juvenile an adult predicated upon the use of a firearm. Hopefully, this matter will be later examined by the supreme court.

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