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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court Of Appeals**

NO. 1998-CA-002860-MR

MICHAEL DAVIS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 98-CR-00352

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING WITH DIRECTIONS
** **

BEFORE: JOHNSON, MCANULTY AND MILLER, JUDGES.

MILLER, JUDGE: Michael Davis brings this appeal from a November 10, 1998, judgment of the Kenton Circuit Court. We reverse and remand with directions.

Davis was charged in the Juvenile Session of the Kenton District Court with second-degree wanton endangerment (Kentucky Revised Statutes (KRS) 508.070), first-degree trafficking in a controlled substance (KRS 218A.1412), and resisting arrest (KRS 520.090). The Commonwealth moved the district court to transfer jurisdiction to the Kenton Circuit Court under KRS 635.020(3) and

KRS 640.010(2). First, the Commonwealth argued that Davis was eligible for transfer pursuant to KRS 635.020(3), which provides for removal when a juvenile (1) has reached 16 years of age, (2) is charged with a Class C or D felony, and (3) has on one prior separate occasion been "convicted" as a public offender for a felony offense. It is undisputed that Davis was sixteen years of age at the time of the offense and was charged with a Class C felony. The remaining element was whether Davis had a prior felony offense within the meaning of KRS 635.020(3). Davis' record included a juvenile adjudication in 1997 for possession of marijuana while in possession of a firearm. KRS 218A.1422 and KRS 218A.992. The Commonwealth claimed that such juvenile adjudication constituted a prior felony conviction within the meaning of KRS 635.020(3). Second, the Commonwealth maintained that Davis met the requirements for transfer to circuit court as a youthful offender pursuant to KRS 640.010(2).

The district court concluded that Davis was indeed eligible for transfer under KRS 635.020(3). The court then considered the factors of KRS 640.010(2) and determined that Davis should be transferred to the circuit court. In support thereof, the court cited these factors: (1) the child's prior record; (2) the prospects of adequate protection of the public; and (3) the likelihood of reasonable rehabilitation of the child by use of procedures, service and facilities currently available to the juvenile justice system. KRS 640.010(2).

Subsequent to transfer, Davis was indicted by the Kenton County Grand Jury on the charges of first-degree trafficking in a controlled substance (KRS 218A.1412 and KRS 635.020) and tampering with physical evidence (KRS 524.100 and KRS 635.020). At a jury trial in October, 1998, he was found guilty of these charges. The circuit court sentenced Davis to thirteen years' imprisonment. This appeal followed.

Davis contends the circuit court did not have subject matter jurisdiction. Specifically, Davis maintains that his 1997 juvenile adjudication for possession of marijuana while in possession of a firearm was improperly considered a prior felony "conviction" under KRS 635.020(3). Davis admits that the issue was not brought to the attention of the district or circuit courts. Rather, he raises the issue of subject matter jurisdiction for the first time on appeal. The Commonwealth urges this Court not to consider the jurisdictional issue as Davis waived same in the lower courts. We disagree.

KRS 610.010 places exclusive subject matter jurisdiction over juvenile matters in the district court unless otherwise exempted by KRS Chapters 600 to 645. Thereunder, the district court may validly waive jurisdiction to the circuit court in accordance with statutory mandates. In Schooley v. Commonwealth, Ky. App., 556 S.W.2d 912, 915-916 (1977), the Court recognized that "[c]ircuit courts also have general jurisdiction to try juvenile felony offenders **if there has been a valid transfer order**. . . ." (Emphasis added.) Thus, it is axiomatic

that the circuit court's subject matter jurisdiction over a juvenile matter is premised upon a valid transfer order from the district court. Without same, the circuit court is simply without subject matter jurisdiction to hear "this kind of case" -- juvenile matters. Cf. Ducan v. O'Nan, Ky., 451 S.W.2d 626 (1970) (citing In Re Estate of Rougeron, 17 N.Y.2d 264, 217 N.E.2d 639 (1966)).

In short, we are of the opinion the circuit court is vested with subject matter jurisdiction over juvenile matters **only if there exists a valid transfer order** from district court; if no such valid transfer order exists, the circuit court simply lacks subject matter jurisdiction.

In Hamilton v. Commonwealth, Ky., 534 S.W.2d 802 (1976), it was observed that an appellate court will consider whether a waiver from juvenile court to circuit court was invalid even if the issue had not been raised at trial. Indeed, Ky. R. Crim. P. 8.18 states that "the lack of jurisdiction . . . shall be noticed by the court at any time during the proceedings." As a valid transfer order is *a priori* to the circuit court's subject matter jurisdiction, we do not think such issue was waived by Davis' failure to argue same in the lower courts. Hence, we now address the validity of the district court's transfer order.

KRS 635.020(3) states as follows:

If a child charged with a Class C or Class D felony has on one (1) prior separate occasion been adjudicated a public offender for a felony offense and had attained the age of sixteen (16) at the time of the alleged

commission of the offense, the court shall, upon motion of the county attorney made prior to adjudication, and after the county attorney has consulted with the Commonwealth's attorney, that the child be proceeded against as a youthful offender, proceed in accordance with the provisions of KRS 640.010.

Davis alleges that transfer under the above statute was improper as he had no prior felony conviction. The record reveals that the Commonwealth utilized Davis' 1997 juvenile adjudication of possession of marijuana while in possession of a firearm as the prior felony conviction under KRS 635.020(3). However, KRS 635.040 specifically mandates that "[n]o adjudication by a juvenile session of district court shall be deemed a conviction"

We view the language of KRS 635.040 as clear and unambiguous. The legislature clearly signaled its intent that juvenile adjudications not be considered "convictions." Equally clear is the language of KRS 635.020(3) requiring a juvenile to be "convicted" of a prior felony to qualify for transfer status thereunder. Juxtaposing KRS 635.020(3) and KRS 635.040, our conclusion is inescapable -- Davis' 1997 juvenile adjudication cannot properly be considered a "conviction." Simply put, we do not believe Davis was eligible for transfer as a juvenile offender under KRS 635.020(3), thus rendering the district court's transfer order invalid. As such, the circuit court was without subject matter jurisdiction.

We deem appellant's remaining contentions as moot.

For the foregoing reasons, the judgment of the Kenton Circuit Court is reversed and this matter is remanded with directions that the circuit court remand same to district court for disposition consistent with this opinion.

MCANULTY, JUDGE, CONCURRING.

JOHNSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING: I respectfully dissent. In my opinion, the issue of whether Davis' previous adjudication for possession of marijuana was by virtue of the firearm possession elevated to a felony conviction involved a jurisdictional element that was necessary to establish subject-matter jurisdiction in circuit court. This jurisdictional element was required to be found in order to support the transfer of the juvenile from district court to circuit court. For Davis to succeed in defeating the finding of this jurisdictional element, he must successfully attack the 1997 juvenile adjudication. However, since Davis failed to challenge the 1997 juvenile adjudication at the trial level in the case sub judice, I do not believe that it can now be attacked in this appeal.

Davis argues that since subject-matter jurisdiction may be challenged at any time in a proceeding,¹ his failure to raised the issue before the circuit court does not prevent him from

¹Louisville & Nashville Railroad Co. v. Mottley, 211 U.S. 149, 154, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908).

raising it on appeal. I do not disagree with this basic tenet, but as the often-cited case of Duncan v. O'Nan² explains, there is much more to be considered in the meaning of subject-matter jurisdiction:

As we pointed out in Commonwealth Dept. Of Highways v. Berryman (citation omitted): "The word 'jurisdiction' is more easily used than understood." That case recognized the general elementary principle that subject-matter jurisdiction cannot be waived. A party will not be estopped to show lack of subject-matter jurisdiction at any time. The parties may not confer subject-matter jurisdiction by agreement. The problem, however, is in delineating the concept 'jurisdiction of the subject matter.' Chief Judge Desmond of the Court of Appeals of New York undertook to do so in In Re Estate of Rougeron, 17 N.Y.2d 264, 271, 270 N.Y. S.2d 578, 583, 217 N.E.2d 639, 643, in this language:

"In other words the rule that subject-matter jurisdiction cannot be born of waiver, consent or estoppel has to do with those cases only where the court has not been given any power to do anything at all in such a case, as where a tribunal vested with civil competence attempts to convict a citizen of a crime. In other words, 'subject matter' does not mean 'this case' but 'this kind of case.'"

. . .

The circuit court had general jurisdiction of the subject matter. It had the power to try this kind of case. A jurisdictional element of this particular case was a judgment complying with formal requisites properly entered in county court.

²Ky., 451 S.W.2d 626, 631-32 (1970).

. . .

Once it is understood that the circuit court had subject-matter jurisdiction in the pervasive sense and that the mechanics of perfecting invocation of that jurisdiction were jurisdictional elements, then the emphasis shifts from a power concept to a policy concept.³

As was stated in Schooley v. Commonwealth,⁴ "[c]ircuit courts have general jurisdiction to try felony cases. . . [and] to try juvenile felony offenders if there has been a valid transfer order."⁵ "The circuit court had general jurisdiction of the subject matter. It had the power to try this kind of case."⁶ "[W]here a court has general jurisdiction of the subject matter, a lack of jurisdiction of the particular case, as dependent upon the existence of particular facts, may be waived. 21 C.J.S., Courts, § 109, p. 166." Accordingly, in my opinion, Davis has failed to preserve this issue for appellate review.⁷

³Duncan, supra at 631. Cf. Gordon v. NKC Hospitals, Inc, Ky., 887 S.W.2d 360 (1994).

⁴Ky.App., 556 S.W.2d 912 (1977).

⁵Id. at 915-16.

⁶Duncan, supra at 631.

⁷Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 229 (1989).

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