

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001664-ME

T.J., A CHILD UNDER 18

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 13-CI-03850

THE HONORABLE T. BRUCE BELL,
FAYETTE DISTRICT JUDGE, IN HIS
OFFICIAL CAPACITY AND THE
COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: ACREE, CHIEF JUDGE; KRAMER AND THOMPSON, JUDGES.

KRAMER, JUDGE: T. J., who was a male child under the age of eighteen at the time this appeal was filed,¹ appeals the Fayette Circuit Court's order denying his

¹ According to the record before us, T. J. was born on January 27, 1996. Although he was still a child at the time this appeal was filed, he is now an adult. Nonetheless, if we were to reverse upon finding that the juvenile court should have held a competency hearing prior to transferring appellant to circuit court, the juvenile court may still "exercise dispositional power" over him

petition for a writ of mandamus which sought an order directing the Honorable T. Bruce Bell to hold a competency hearing prior to holding a hearing to determine if T.J. would be transferred to circuit court to be tried as an adult. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Although we do not have the record from T.J.'s criminal case before us, according to filings contained in the record for the present case T.J. was charged with murder and first-degree robbery. It was alleged these offenses occurred on or about August 21, 2012, when T.J. was sixteen years old.² T.J. moved for a competency evaluation and a competency hearing in district court. It appears the circuit court ordered Timothy M. Houchin, M.D. to complete a competency evaluation. Dr. Houchin's report concerning his competency evaluation of T.J. was dated August 19, 2013, and in it, he stated that in his opinion "within a reasonable degree of medical certainty, [T.J.] is presently incompetent to stand trial in the adult court system."

The Commonwealth moved to strike Dr. Houchin's report on the basis that it did not satisfy the requirements set forth in KRS³ 504.100(2) pertaining to competency reports. The Commonwealth also objected to the motion for a

until he reaches the age of twenty-one. *Commonwealth v. Robertson*, 431 S.W.3d 430, 440 (Ky. App. 2013), *disc. review denied* (Ky. 2014). Therefore, T. J.'s claims are not moot.

² T.J. apparently has co-defendants, but his co-defendants are not involved in the present appeal from the denial of appellant's petition for a writ of mandamus.

³ Kentucky Revised Statute.

competency hearing on the grounds that the Commonwealth had moved for T.J. to be proceeded against as a youthful offender pursuant to KRS 635.020(2) and KRS 635.020(4) and it had requested a hearing on that motion. The Commonwealth argued that, according to *Commonwealth v. Deweese*, 141 S.W.3d 372, 378 (Ky. App. 2003), “only the Rules of Criminal Procedure applicable to preliminary hearings apply in a juvenile transfer hearing pursuant to KRS 635.020(4).”

Therefore, the Commonwealth contended that

[p]ursuant to RCr^[4] 3.07, [the] youthful offender preliminary hearing shall be conducted in accordance with Chapter III of the Rules of Criminal Procedure, and RCr 8.06 does not apply until after the youthful offender hearing is conducted and the case is before the “judge having authority to try the offense charged.”

A hearing was held in juvenile (*i.e.*, district) court concerning the Commonwealth’s objection to the motion for a competency hearing. At the conclusion of that hearing, the court agreed with the Commonwealth that the juvenile court could not hold a competency hearing until it was determined if T.J.’s case should be transferred to circuit court. The juvenile court stated that following that determination, T.J.’s competency could be addressed in the court that would try him.

T.J. then filed his petition for a writ of mandamus in the circuit court asking it to direct the juvenile court to hold a competency hearing before conducting a hearing to determine if T.J. should be tried as an adult. The Commonwealth opposed the petition for a writ of mandamus. The circuit court

⁴ Kentucky Rules of Criminal Procedure.

denied T.J.’s petition, reasoning that “[b]ecause the Commonwealth intends to proceed [treating T.J.] as [a] youthful offender pursuant to KRS 635.020(4), the [juvenile court] has no discretion whatsoever to retain the case should it determine that probable cause of the Juvenile’s age and commission of a felony involving a firearm exists.” The court continued, explaining that if the juvenile court finds “probable cause, it is mandatory that the case then be transferred to Circuit Court.” The circuit court also found that T.J.

did not sufficiently demonstrate that there is no adequate remedy on appeal or that he will suffer irreparable harm should [the circuit court] not grant the writ. He will be afforded a competency hearing at the appropriate time by the court that has jurisdiction to try the case and make final determinations in the matter subsequent to the probable cause proceeding.

T.J. now appeals, contending that: (a) the juvenile court erred in denying him a competency hearing prior to holding a transfer hearing and transferring him to circuit court to be tried as an adult;⁵ and (b) the circuit court erred in denying his petition for a writ of mandamus.

II. STANDARD OF REVIEW

“[T]he function of a writ of mandamus is to compel an official to perform duties of that official where an element of discretion does not occur.”

County of Harlan v. Appalachian Regional Healthcare, Inc., 85 S.W.3d 607, 612 (Ky. 2002).

⁵ In the Commonwealth’s appellate brief, it states that the transfer hearing occurred while this appeal was pending and during that hearing, “the district court found probable cause to transfer Appellant to circuit court. Appellant is now pending in circuit court with his co-defendants.”

A writ of mandamus is an extraordinary remedy which compels the performance of a ministerial act or mandatory duty where there is a clear legal right or no adequate remedy at law. . . . A writ of mandamus is granted for only two purposes: (1) when the lower court is acting beyond its jurisdiction; and (2) when the lower court is acting or is about to act erroneously, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Sowers v. Lewis, 241 S.W.3d 319, 321-22 (Ky. 2007) (internal quotation marks omitted).

III. ANALYSIS

We are faced herein with an issue of first impression on the narrow issue presented by T.J. of whether he is entitled to a competency hearing in the district court before a transfer hearing pursuant to KRS 635.020(4) can be held.

To begin, we set forth KRS 635.020(4), which provides:

Any other provision of KRS Chapters 610 to 645 to the contrary notwithstanding, if a child charged with a felony in which a firearm, whether functional or not, 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 transferred to the Circuit Court for trial as an adult if, following a preliminary hearing, the District Court finds probable cause to believe that the child committed a felony, that a firearm was used in the commission of that felony, and that the child was fourteen (14) years of age or older at the time of the commission of the alleged felony. If convicted in the Circuit Court, he shall be subject to the same penalties as an adult offender, except that until he reaches the age of eighteen (18) years, he shall be confined in a facility or program for juveniles or for youthful offenders, unless the provisions of KRS 635.025 apply or unless he is released pursuant to expiration of sentence or parole, and

at age eighteen (18) he shall be returned to the sentencing Circuit Court for proceedings consistent with KRS 640.030(2).

With that statute as the backdrop for our review, we begin by examining *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), on which T.J. relies for the following statement in his brief: “[in *Kent* the Court found] that juveniles were entitled to due process of law and fundamental fairness during the critically important hearing to determine if their case would be transferred to adult criminal court.” However, the issue with relying on *Kent* to make T.J.’s case is that *Kent* involved interpretation of the District of Columbia Juvenile Act wherein waiver of juvenile jurisdiction must be based on a “full investigation.” *Id.* at 547, 86 S.Ct. 1045. In other words, the trial court had discretion over whether to waive jurisdiction after a statutorily required in-depth review of the matter.

In *Kent*, the trial court did not comply with the requirement of a “full investigation.” Rather, no hearing was held and no findings as required by the statute were made by the trial court supporting waiver of jurisdiction. Under these circumstances and under a *statutory* scheme mandating certain procedural due process be afforded to the juvenile prior to transfer into the realm of adult proceedings, the United States Supreme Court held that:

We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony--without hearing,

without effective assistance of counsel, without a statement of reasons....

The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the corpus juris. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge. But the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness.

Id. at 554-55, 86 S.Ct. 1045.

In T.J.'s case, as compared to the *Kent* case, transfer was sought under what is termed an "automatic transfer" mechanism, *i.e.*, KRS 635.020(4). This is a significant difference. The Kentucky Supreme Court has spoken several times regarding the difference between a discretionary transfer proceeding and an automatic transfer proceeding. In *Caldwell v. Commonwealth*, 133 S.W.3d 445 (Ky. 2004), the Court specifically noted the difference between the nature of KRS 635.020(4) and the discretionary transfer proceeding reviewed in *Kent*. In no uncertain terms, the Kentucky Supreme Court in *Caldwell* plainly held that the limited process provided for in KRS 635.020(4) satisfies *Kent*. In *Caldwell*, the Court explained that:

A juvenile transfer proceeding does not involve sentencing or a determination of guilt or innocence. The decision to transfer a juvenile to circuit court involves the

determination of which system is appropriate for a juvenile defendant. We recognize that a juvenile transferred to circuit court and tried as an adult offender will be exposed to the statutory maximum sentence on the applicable criminal statute, which in most cases will exceed the statutory maximum disposition in the juvenile system.

The Kentucky juvenile transfer statute does not violate the fair hearing requirement of *Kent, supra*. That case held that, where the federal statute allowed the juvenile court to waive its exclusive jurisdiction over a juvenile offender after the court made a full investigation, due process required that the court hold a hearing before waiving jurisdiction. Here, a preliminary hearing was held after which the district court found probable cause to believe that Caldwell was fourteen years of age when he committed a felony with a firearm. *The essentials of due process and fair treatment required by Kent were satisfied.*

Id. at 453 (emphasis added).

A few years after *Caldwell*, the Kentucky Supreme Court decided *K.R. v. Commonwealth*, 360 S.W.3d 179 (Ky. 2012). Therein, the Court reviewed a petition for a writ after the district court refused to transfer jurisdiction under KRS 635.020(4). In noting the difference between the statutes which grant discretion to the district court over transfers as compared to the “automatic” transfer provision of KRS 635.020(4), the Court held:

If this were a case about *discretionary* transfer under one of the categories listed in KRS 635.020, a writ would most likely be unavailable. Under those provisions, the General Assembly has specifically granted the district court great leeway to consider various factors in deciding whether transfer would be appropriate. Even if such a decision is erroneous, it does not undermine the law and is unlikely to result in a substantial miscarriage of justice.

KRS 635.020(4), on the other hand, provides that transfer is *mandatory* when a firearm is used in commission of the underlying offense. By treating offenses in which a firearm is used differently, the General Assembly has declared a different public policy, one of essentially no tolerance of gun-related crimes by juveniles. In light of that policy, it would be unjust to allow a juvenile who has used a firearm to avoid prosecution as a youthful offender.

Id. at 184.

In further accentuating the point of the mandatory nature of KRS 635.020(4), the Court in *K.R.* explained the rationale for the unyielding nature of the statute as follows:

While the statute includes some other qualifiers that are important, this language sets forth the legislative intent to place juveniles who are involved in gun crimes in a different position than other public offenders. ... [T]he seriousness with which the legislature regards the use of guns by juveniles is clearly presented.

Id. at 185.

Later in the opinion, the Court elaborated on the policy behind the mandatory provision of KRS 635.020(4), stating that “[t]he risk to the public from juveniles, who are thought to be less capable of good judgment, using firearms to settle disputes is even more frightening than adults doing so, and is likewise properly controlled by governmental action.” *Id.* at 187.

Given that the Kentucky Supreme Court patently views transfer hearings under the mandatory provision of KRS 635.020(4) differently from

hearings which require more process, the reliance by T.J. on *Humphrey v. Commonwealth*, 153 S.W.3d 854 (Ky. App. 2004), is also misplaced. Foremost, in *Humphrey*, the Court reviewed the issue of transfer under KRS 640.010(2), not KRS 635.020(4). This is a significant difference because under KRS 640.010(2),⁶ the district court is to conduct a preliminary hearing, wherein eight factors are considered by the district court prior to a transfer decision. Accordingly, *Humphrey* does provide guidance on this issue. And, for the same reasons, T.J.'s reliance on *Harden v. Commonwealth*, 885 S.W.2d 323 (Ky. App. 1994), and *Commonwealth v. Robertson*, 431 S.W.3d 430 (Ky. App. 2013), are also misplaced.

There being no binding precedent in case law for the special procedures T.J. seeks, we now address T.J.'s argument that he will be deprived of the special protections afforded juveniles in district court if a transfer hearing takes place prior to a competency hearing. Having reviewed this in detail, we conclude that T.J. cannot prevail based on this argument.

⁶ (b) If the District Court determines probable cause exists, the court shall consider the following factors before determining whether the child's case shall be transferred to the Circuit Court:

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;
7. The likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system; and
8. Evidence of a child's participation in a gang.

We begin with the Kentucky Constitution's delineation of jurisdiction of the district court. It is the province of Kentucky's General Assembly to determine the jurisdiction of that court.

Section 113(6) of the Kentucky Constitution states that district courts are courts of limited jurisdiction which exercise original jurisdiction only as may be provided by the General Assembly. Section 112(5) of the Kentucky Constitution provides: "The Circuit Court shall have original jurisdiction of all justiciable causes not vested in some other court. It shall have such appellate jurisdiction as may be provided by law."

Commonwealth v. Halsell, 934 S.W.2d 552, 554 (Ky. 1996).

In reviewing KRS 635.020(4), the Court in *Halsell* held that the statute was "reasonably construed as a limitation by the General Assembly of the district court's jurisdiction over the accused as youthful offender once the district court has determined there is reasonable cause to believe the accused is a child over the age of 14 and is charged with a felony involving the use of a firearm." *Id.* at 555. The Court held that it was clearly "within the prerogative of the General Assembly to place such limitations on the jurisdiction of the district court under Section 113(6)" of the Kentucky Constitution. *Id.* "It is axiomatic that a juvenile offender has no constitutional right to be tried in juvenile court." *Stout v. Commonwealth*, 44 S.W.3d 781, 787 (Ky. App. 2000) (citing *Woodard v. Wainwright*, 556 F.2d 781, 785 (5th Cir. 1977), *cert. denied*, 434 U.S. 1088, 98 S.Ct. 1285 (1978) ("[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.”));⁷ *see also Caldwell*, 133 S.W.3d at 453 (“[T]here is no constitutional right to be treated as a juvenile.”)

Although juveniles are granted a number of protections by the Kentucky General Assembly, it is well settled that T.J. has no constitutionally protected right to these specialized procedures or to remain in district court. Even the shield of confidentiality given to juveniles in district court is not constitutionally sheltered. “The United States Supreme Court has held that state actions that injure a person’s reputation alone do not constitute a deprivation of life, liberty or property necessary to invoke the protection of the due process clause.” *State v. Hazen*, 543 N.W.2d 503 (Wis. App., 1995) (citing *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155 (1976)).

Given the rigidity of KRS 635.020(4) embedded in an otherwise overall statutory scheme of protections for juveniles and a general goal of rehabilitation rather than punishment, it is evident as noted by Justice Noble in *K.R.*, 360 S.W.3d at 184, that “the General Assembly has declared a ... public policy, one of essentially no tolerance of gun-related crimes by juveniles. In light of that policy, it would be unjust to allow a juvenile who has used a firearm to avoid prosecution as a youthful offender.” Consequently although T.J. may have been the chronological age of a minor when he was charged with a firearm-related felony,

⁷ For sake of clarity, we note that *Stout* involved the discretionary transfer of juvenile offenders, KRS 635.020(1), not KRS 635.020(4).

the General Assembly no longer views T.J. as a child. Hence, he loses any statutory protections granted by the General Assembly to remain in juvenile court.

With these thoughts in mind, we turn to the primary argument advanced by T.J., *i.e.*, he is entitled to a competency hearing in the district court prior to the KRS 635.020(4) transfer hearing because the transfer hearing is a “critical stage” of the proceedings to which constitutional rights to assist his counsel or otherwise aid in his defense attach. If he is successful, he believes that he can put forth a compelling argument that he cannot assist counsel with the transfer hearing, *see generally Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), and therefore his right to substantive due process will be violated. *See Bishop v. United States*, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 830 (1956).

As we set forth *supra*, there is a clear distinction in the case law in evaluating a transfer hearing wherein the juvenile court has been given discretion over whether to transfer to adult court and those wherein the transfer is put in motion by an automatic statutory transfer provision. *Kent*, for example, as explained *supra* involved a discretionary transfer hearing.

It is well settled that a criminal defendant has protections cautiously guarded by the Constitution during “critical stages” of proceedings. *See, e.g., Stone v. Commonwealth*, 217 S.W.3d 233 (Ky. 2007) (citing *Henderson v. Commonwealth*, 396 S.W.2d 313 (Ky. 1965); *United States v. Wade*, 388 U.S. 218, 224, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)).

Courts have long struggled with a precise definition of what constitutes a “critical stage.” *See Van v. Jones*, 475 F.3d 292 (6th Cir.2007). The U.S. Supreme Court has defined a ‘critical stage’ in various terms: “any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial,” *Wade*, 388 U.S. at 226, 87 S.Ct. at 1932; a “moment when available defenses may be irretrievably lost, if not then and there asserted,” *Hamilton v. Alabama*, 368 U.S. 52, 54, 82 S.Ct. 157, 159, 7 L.Ed.2d 114 (1961); a period when counsel's attendance is necessary to “mount a meaningful defense,” *Wade*, 388 U.S. at 225, 87 S.Ct. at 1931; a stage when “potential substantial prejudice to defendant's rights inheres in the ... confrontation and the ability of counsel to help avoid that prejudice,” *Coleman v. Alabama*, 399 U.S. 1, 9, 90 S.Ct. 1999, 2003, 26 L.Ed.2d 387 (1970).

Stone, 217 S.W.3d at 238.

Given that we are reviewing an automatic transfer hearing under KRS 635.020(4), as compared to one wherein there is some measure of discretion given a juvenile court,⁸ we conclude that it is not a “critical stage” as that phrase is referenced in a constitutional evaluation. Even if T.J. is not competent to assist counsel or aid in his own defense at the KRS 635.020(4) transfer hearing, he does not stand to risk losing anything to which he is constitutionally entitled and nothing at the automatic transfer hearing will interfere with his right to a fair trial in circuit court.

“A juvenile transfer proceeding does not involve sentencing or a determination of guilt or innocence. The decision to transfer a juvenile to circuit

⁸ We limit the holding of this case to automatic transfer hearings under KRS 635.020(4). Questions arising under the discretionary statutes are not presently before the Court; accordingly, we will not address those issues.

court involves the determination of which system is appropriate for a juvenile defendant.” *Caldwell*, 133 S.W.3d at 453. It is not a criminal proceeding but rather a civil one addressing only the forum in which one of a minor age at the time he is charged of a crime involving a firearm is viewed by the Legislative Branch as so serious that he shall be automatically transferred into the adult proceedings. *See e.g., United States v. Juvenile Male*, 554 F.3d 456, 459 (4th Cir. 2009). “Because such a proceeding is civil in nature, ‘[t]he procedures ... do not need to conform to all the requirements of a criminal trial.’” *Id.* at 459-60 (quoting *United States v. Doe*, 871 F.2d 1248, 1255 (5th Cir. 1989)). The purpose of a transfer hearing “is not to *incriminate*, but to select the proper forum for trial.” *Id.* at 467 (citing *United States v. A.R.*, 38 F.3d 699, 703-04 (3d Cir. 1994) (“The determination is not one of guilt or innocence, or even of delinquency or non-delinquency, but rather concerns the manner in which the state elects to proceed against an alleged malefactor.”)).

As earlier analyzed, T.J. has absolutely no constitutional basis, and no statutory basis, to compel adjudication in district court. He will not lose a meaningful defense, a right to a fair trial, the right to confront witnesses, etc., *i.e.*, he will not suffer any losses that would otherwise make the automatic transfer hearing a critical stage in which he has the right to have his competency evaluated prior to the transfer proceeding. Further, there is no reason to impugn the integrity of the circuit court by an inference that T.J. will not get an opportunity to have his competency evaluated sufficiently to survive constitutional scrutiny. The statute

under review merely establishes which court has jurisdiction over juveniles charged with a felony in which a firearm was involved. Given this, we are compelled to hold that a mandatory transfer hearing under KRS 635.020(4) is not a critical stage to which certain constitutional rights attach.

We are highly attentive to the fact that proceedings are vastly different in juvenile and adult court and that T.J. desires to be evaluated through the processes that are generally available to a juvenile. However, the crime for which he is charged mandates that his crime be adjudicated in adult court. We have done extensive research on the specific issue that T.J. argues. However, we find nothing that compels us to step over the line of authority held by the General Assembly to define the jurisdiction of the district court. Although not binding, we conclude that the view that the Seventh Circuit articulated in *Grigsby v. Cotton*, 456 F.3d 727 (7th Cir. 2006), best describes the rationale of why T.J. cannot prevail.

Grigsby involved a habeas corpus petition wherein Anthony Grigsby argued he was being held in violation of his Sixth Amendment right to counsel during a juvenile waiver hearing in Indiana state court. Grigsby argued that he did not have the assistance of counsel during a juvenile transfer hearing. The Court noted that Grigsby's petition turned on whether the juvenile waiver hearing was a "critical stage[] of the prosecution...." *Id.* at 732 (quoting *Jackson v. Miller*, 260 F.3d 769, 775 (7th Cir. 2001)). The Seventh Circuit noted that when Grigsby was charged Indiana vested jurisdiction over "individuals under the age of eighteen (18) years at the time of the offense is alleged to have been committed" in the juvenile

courts. *Id.* (citing Ind. Code §31-5-7-14 (1976)). The Court noted that “[g]enerally, juvenile[s] are entitled to counsel at [a] waiver hearing.” *Id.* (citations omitted). However, at the time that Grigsby’s waiver hearing would have occurred, Indiana’s state criminal court had original jurisdiction over a juvenile charged with first-degree murder given the law in place at the time. *Id.* (citing Ind. Code §31-5-7-13 (1976)). Thus, the Court held that under the operation of the statutory scheme in place at the time Grigsby was charged with first-degree murder, the transfer hearing was not a critical stage given that jurisdiction over the criminal charge of first-degree murder was vested in the criminal courts, not the juvenile courts. *Id.* at 733. Thus, the Seventh Circuit held that “[i]f the transfer to criminal court was *fait accompli*, as the state suggests it was, Grigsby’s Sixth Amendment right could not have been transgressed.” *Id.*

As in *Grigsby*, T.J.’s charges are those over which the criminal courts, *i.e.*, the circuit courts in Kentucky, have mandatory jurisdiction. Consequently “if probable cause is found, jurisdiction is automatically vested in the circuit court.” *Deweese*, 141 S.W.3d at 375. In this circumstance, the perpetrator, even if under the age of majority, is not viewed as a child in the eyes of the law.

Under KRS 635.020(4), proceedings held in district court are very limited—a determination of whether the child is over the age of fourteen, whether there is probable cause to believe a felony was committed, and whether a firearm was used during the commission of the felony. “[T]he finding of probable cause is not a finding of guilt; it is simply a threshold or condition precedent to additional

proceedings.” *K.N. v. Commonwealth*, 375 S.W.3d 816, 820 (Ky. App. 2012). The transfer hearing

occurs at the *charging* stage of the proceedings. . . . The standard to be applied at the transfer stage is whether there is probable cause to believe the crime has been committed . . . and whether a firearm was used in the commission of that offense. Whether the evidence would ultimately support a conviction, or whether there are appropriate defenses, is not germane at this point in the proceedings. Instead, the trial court is only deciding whether, under the evidence, it is appropriate for a case to be transferred to circuit court under the youthful offender statute. For example, at the transfer hearing in this case, there was some testimony that would tend to show that Appellant was not complicit. But this evidence should not control the outcome of the hearing because there was also testimony, . . . , that would establish probable cause that Appellant was complicit to the first-degree assault.

K.R., 360 S.W.3d at 188.

Although reviewing the discretionary transfer hearing process, the Court in *Barth v. Commonwealth*, 80 S.W.3d 390 (Ky. 2001), well establishes the low-threshold standard for evaluating probable cause in the district court. In *Barth*, the Court noted that

KRS 640.010 grants district courts the power to transfer juvenile offenders to circuit court for trial as an adult. For those juveniles who fall within the purview of KRS 635.020, the district judge must hold a preliminary hearing to determine if, *inter alia*, probable cause exists that a serious offense was committed and that the juvenile committed it. KRS 640.010(2).

Id. at 387.

In *Barth*, the juvenile argued that transfer was improper because the only evidence linking him to the crime was his brother's confession, which was hearsay as it pertained to the juvenile. Accordingly, he contended that absent such hearsay evidence there would have existed insufficient evidence of probable cause to justify the transfer. Although the hearsay statements were not admissible at trial, the Kentucky Supreme Court held that the statements were sufficient to establish probable cause for the purposes of transfer to adult court. *Id.* at 388.

Given the low threshold of probable cause at a KRS 635.020(4) transfer hearing and given that T.J. has no constitutional right to proceed only in district court, we discern no reason why the district court, rather than the circuit court, is the venue in which T.J.'s competency must be evaluated. We return again to the very basic precept that it is fully within the General Assembly's authority to set the boundaries of district court jurisdiction. In doing so, it vastly limited the district court's authority in dealing with certain categories of offenses with which juveniles are charged. The General Assembly could have easily incorporated a provision in the juvenile code for determining competency prior to a KRS 635.020(4) transfer hearing. It did not do so, however, and this Court would be overstepping the boundaries of its authority to add language to KRS 635.020(4) and to increase the limited authority of the district court.

While there are no cases on point in the Commonwealth reviewing the precise issue before us, prior decisions by our courts inform us that we are correct in our review of this issue. For example, in *Deweese*, the issue was "whether a

juvenile subject to transfer pursuant to KRS 635.020(4) is entitled to discovery prior to the transfer hearing.” *Deweese*, 141 S.W.3d at 375. This Court noted that following a KRS 635.020(4) probable cause hearing, “if probable cause is found, jurisdiction is automatically vested in the circuit court.” *Id.* The Court stated that

[i]n *Commonwealth v. Halsell*, [934 S.W.2d 552, 555 (Ky. 1996)], the Kentucky Supreme Court held as follows:

Following a determination of reasonable cause to believe a child over the age of 14 has been charged with a felony in which a firearm was used in the commission of the offense, KRS 635.020(4) operates to limit the jurisdiction of the district court to act further. By operation of Section 112(5) of the Kentucky Constitution, the circuit court then becomes vested with jurisdiction as to that particular class of offenders.

* * *

The juvenile court is granted limited jurisdiction to hold the preliminary hearing.

That being said, we must still determine whether this limited jurisdiction includes jurisdiction to order discovery prior to the transfer hearing. [The juvenile] argues that KRS 610.015(1) evidences an intent by the legislature that the criminal rules should only apply full force after the hearing pursuant to KRS 635.020(4) is conducted and the decision to try the juvenile as an adult is made.

* * *

[W]e believe the legislature intended that the criminal rules governing preliminary hearings should apply to preliminary transfer hearings in juvenile court. Until the court has determined that transfer is appropriate, the entirety of the criminal rules do not apply. RCr 3.07 is

specifically a rule pertaining to preliminary hearings and states in pertinent part:

When a person is brought or appears before a judge having authority to try the offense charged, the judge shall proceed in accordance with Chapters VI-XIII of these Rules. If the judge does not have authority to try the offense charged but does have venue to hold a preliminary hearing, the judge shall proceed in accordance with the remainder of Chapter III.

As stated in *Halsell*, the legislature has limited the jurisdiction of the district court in juvenile cases brought pursuant to KRS 635.020(4), to that of holding the preliminary hearing to establish probable cause. *Halsell*, 934 S.W.2d at 555. Therefore, the juvenile court is limited to proceeding in accordance with Chapter III of the criminal rules. Discovery is available under Chapter VII, which is not triggered until probable cause is established.

According to *Deweese*, the entirety of the criminal rules does not apply until the court determines that transfer is appropriate. Because the present case was brought against T.J. pursuant to KRS 635.020(4), the juvenile court only had limited jurisdiction to hold the preliminary hearing to establish probable cause. In other words, the juvenile court did not have jurisdiction to conduct a competency hearing pursuant to Chapter VIII of the criminal rules before conducting the preliminary transfer hearing pursuant to Chapter III to determine probable cause, as explained in *Deweese*.

For the reasons as stated, we affirm the circuit court's denial of T.J.'s petition for a writ. The lower court did not act erroneously in conducting T.J.'s transfer hearing without first conducting a competency hearing, and the circuit

court did not err in denying his petition for a writ of mandamus. *See Sowders*, 241 S.W.3d at 321-22.

ACREE, CHIEF JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I believe the majority opinion interprets *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), and the opinions that follow it, too narrowly. Our case law and the case law of our sister courts establish that any transfer hearing⁹ is a critical stage of the proceedings to which due process rights attach and such hearing cannot proceed if the juvenile is not competent and, therefore, cannot assist his attorney and receive effective assistance of counsel. I would reverse.

“It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial.” *Medina v. California*, 505 U.S. 437, 439, 112 S.Ct. 2572, 2574, 120 L.Ed.2d 353 (1992). This fundamental right predates our Constitution and covers all critical stages of the criminal process as explained in Blackstone’s Commentaries:

⁹ States have a variety of names for the hearing held to determine whether it is appropriate to transfer a juvenile to be tried as an adult. These include transfer hearings, referral hearings, certification hearings, declination hearings and waiver hearings. Within Kentucky what is popularly termed a transfer hearing is actually a preliminary hearing to determine whether transfer is appropriate. To avoid confusion, I will refer to all such hearings as transfer hearings unless directly quoting an opinion.

[I]f a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.

Ryan v. Gonzales, 133 S.Ct. 696, 704 n.4, 184 L.Ed.2d 528 (2013) (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 24–25 (1769)).

Juveniles have a right to due process during juvenile proceedings as explained in *Commonwealth v. B.J.*, 241 S.W.3d 324, 326-327 (Ky. 2007) (internal quotations and citations omitted):

As set forth in Section 11 of the Kentucky Constitution and the Sixth Amendment of the U.S. Constitution, a criminal defendant has the right to be present at every critical stage of the proceedings against him. . . . [Because even status offenses have] potentially severe consequences to the child, due process must be afforded, despite the non-criminal nature of juvenile proceedings. Where the fault of the child is at issue and penalties, including loss of liberty, may attach, criminal protections provided by the constitution apply. A juvenile enjoys all the rights afforded by the Bill of Rights.

Transfer statutes, in which the juvenile court decides whether to transfer juveniles charged with certain crimes from its exclusive jurisdiction, must be “read in the context of constitutional principles relating to due process and the assistance of counsel.” *Kent*, 383 U.S. at 557, 86 S.Ct. at 1055. “It is clear beyond dispute

that the waiver of jurisdiction is a ‘critically important’ action determining vitally important statutory rights of the juvenile.” *Id.* at 556, 86 S.Ct. at 1055. “[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.” *Id.* at 554, 86 S.Ct. at 1054.

The Nevada Supreme Court has noted “the [transfer] of a juvenile offender to an adult court has been accurately characterized as the worst punishment the juvenile system is empowered to inflict. . . . [because it] is a much more momentous and life-changing event for a juvenile than is an adjudication of delinquency.” *In re William M.*, 124 Nev. 1150, 1161-1162, 196 P.3d 456, 463 (2008) (internal quotations and citations omitted). Therefore, a transfer hearing is a critical stage during which a juvenile is entitled to competent assistance of counsel. *In re Gault*, 387 U.S. 1, 36, 87 S.Ct. 1428, 1449, 18 L.Ed.2d 527 (1967); *Smith v. Commonwealth*, 412 S.W.2d 256, 259 (Ky. 1967); *Commonwealth v. Robertson*, 431 S.W.3d 430, 438-440 (Ky.App. 2013).

During the transfer hearing process provided in KRS 635.020(4), a juvenile is entitled to personally participate in the hearing and the juvenile is given an opportunity to present evidence and call witnesses to dispute probable cause. *See K.N. v. Commonwealth*, 375 S.W.3d 816, 819-820 (Ky. App. 2012). Under these circumstances, and given that discovery is not permitted prior to a transfer hearing, see *Commonwealth v. DeWeese*, 141 S.W.3d 372, 378 (Ky. App. 2003), counsel must rely on the juvenile’s perspective of how the events unfolded.

A juvenile has a due process right to a mandatory competency hearing by the juvenile court if the juvenile establishes a sufficient factual predicate for the juvenile court to doubt his competency. *Humphrey v. Commonwealth*, 153 S.W.3d 854, 861 (Ky.App. 2004)¹⁰; *In re Steven M.*, 264 Conn. 747, 762-765, 826 A.2d 156, 168-169 (2003); *James v. Superior Court*, 77 Cal.App.3d 169, 172, 143 Cal. Rptr. 398 (1978). Juveniles have a due process right to be competent for a transfer hearing so that they may understand the nature of the proceedings and assist counsel. *State ex. rel. D.C. v. McShane*, 136 S.W.3d 67, 71 (Mo. 2004). “Logically, this right to counsel [under *Gault*] means little if the juvenile is unaware of the proceedings or unable to communicate with counsel due to a psychological or developmental disability.” *Golden v. State*, 341 Ark. 656, 660, 21 S.W.3d 801, 803 (2000). As Justice Palmore once stated in a dissent, “one who does not have sufficient mental capacity to understand or participate in a proceeding being held for the purpose of depriving him of his liberty is no different from an unconscious person[.]” *Kellems v. Bushigani*, 518 S.W.2d 788, 789 (1974) (Palmore, J.)(dissent).

The majority opinion seeks to distinguish *Kent*, *Robertson* and *Humphrey*, by emphasizing those decisions addressed discretionary judicial transfers in which a variety of factors had to be considered, while KRS 635.020(4) limits the juvenile

¹⁰ While *Humphrey v. Commonwealth*, 153 S.W.3d 854, 857-859 (Ky.App. 2004), applied the incorrect standard to evaluate whether *Humphrey*’s due process right to be competent was violated (determining a competency hearing had to be held if the court had reasonable doubt of his competency, rather than substantial evidence of incompetence as explained in *Padgett v. Commonwealth*, 312 S.W.3d 336, 347-349 (Ky. 2010)), its general proposition that a competency hearing is needed after an appropriate showing remains.

court to determining whether probable cause is established. It relies on *Caldwell v. Commonwealth*, 133 S.W.3d 445 (Ky. 2004), for the proposition that the limited process provided for in KRS 635.020(4) satisfies *Kent*. However, inexplicably, the majority opinion then determines that a transfer hearing held pursuant to KRS 635.020(4) does not need to satisfy *Kent*'s due process and fair treatment requirements, because it is not a critical stage in the criminal process. This is at odds with *Kent* and *Caldwell*, and diminishes the importance of the transfer hearing in the criminal prosecution process.

A juvenile's right to due process during a judicial transfer hearing does not evaporate when the juvenile court is granted less discretion in making its transfer decision. *Kent* sets out the required parameters for all types of judicial transfer hearings and the process that is provided must satisfy the due process requirements for a critical stage in the criminal process. Transferring juveniles to circuit court deprives them of the special rights and immunities provided while under the exclusive jurisdiction of the juvenile court system, including being shielded from publicity and a limited term of detainment compared to that faced in the circuit court. *See Kent*, 383 U.S. at 556-557, 86 S.Ct. at 1055.

I do not agree that the reasoning contained in *Grigsby v. Cotton*, 456 F.3d 727, 732-734 (7th Cir. 2006), provides a valid basis for determining T.J.'s transfer hearing was not a critical stage entitling him to counsel. In *Grigsby*, the Seventh Circuit relied extensively upon the interpretation of Indiana statutes contained in

Lindley v. State, 268 Ind. 83, 373 N.E.2d 886 (1978), to determine that the transfer hearing at issue was not a critical stage of the proceedings.

Lindley explains that Indiana had a dual system for dealing with juveniles charged with murder. Pursuant to legislative waiver, juveniles indicted for first-degree murder would automatically be tried as adults in the criminal court. Juveniles charged with other degrees of murder would begin in the juvenile system, but could be transferred to the criminal court after a hearing. Accordingly, when a juvenile case of murder was pending in juvenile court, a transfer hearing would be scheduled, but if that juvenile was then indicted for first-degree murder, the juvenile court would lose jurisdiction and have no duty to perform a transfer hearing because the criminal court would then gain original jurisdiction. *Id.* at 86-87, 373 N.E.2d at 887-889.

In *Grigsby*, the juvenile was originally charged with murder, and transferred to criminal court after a transfer hearing at which he was not provided counsel. However, after the hearing, he was indicted for first-degree murder, which automatically placed him before the criminal court; therefore, whether or not the transfer hearing was conducted properly was irrelevant because it was ultimately unnecessary, and an unnecessary hearing could not be a critical stage. *Grigsby*, 456 F.3d at 732-734.

Our statutes do not similarly provide for such a dual process. In Kentucky, the juvenile court has exclusive jurisdiction unless a juvenile qualifies for transfer after the statutory requirements for transfer are satisfied. *Johnson v.*

Commonwealth, 606 S.W.2d 622, 623 (Ky. 1980); KRS 610.010(1); KRS 635.020; KRS 640.010. Pursuant to KRS 635.020(4), a juvenile's transfer is never automatic. Therefore, transfer could never be a *fait accompli* regardless of how "mandatory" the transfer. The circuit court has no jurisdiction where there is a valid and pending juvenile case until the juvenile court adjudicates or transfers the case. *Johnson*, 606 S.W.2d at 623.

The reasoning of our sister court in *James*, 77 Cal.App.3d at 172, is apropos:

[the Court held] that in the absence of any statutory procedure for so doing the juvenile court has the inherent power to determine a minor's mental competence to understand the nature of proceedings pending under [California's juvenile transfer statute] and to assist counsel in a rational manner at that hearing.

The *James* Court rejected the argument that the juvenile court must first determine whether it has jurisdiction over the juvenile before proceeding to determine competency. *Tyrone B. v. Superior Court*, 164 Cal.App.4th 227, 231, 78 Cal.Rptr.3d 569, 572 (2008).

Accordingly, I dissent.

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