RENDERED: AUGUST 11, 2017; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001452-MR

D.M.K. (A JUVENILE) APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 15-CI-003566

HONORABLE GINA KAY CALVERT
AND THE COMMONWEALTH OF
KENTUCKY APPELLEES

OPINION
AFFIRMING AND REMANDING

** ** ** ** **

BEFORE: DIXON, J. LAMBERT AND MAZE, JUDGES.

MAZE, JUDGE: Appellant, D.M.K. (a juvenile), appeals from an order of the Jefferson Circuit Court granting the Commonwealth's petition for a writ of mandamus and ordering the Jefferson District Court to find probable cause for two counts of first-degree wanton endangerment. We affirm the circuit court's order

granting the writ, although on different grounds than set forth in the circuit court's order, and we remand the matter to the district court for further findings required for transfer under Kentucky Revised Statute (KRS) 640.010.

The charges in this case stem from a fatal shooting that occurred on March 13, 2015. At the time, D.M.K, born October 17, 1997, lived in Jefferson County with his mother, thirteen-year-old sister, six-year-old brother, and four-year-old sister. D.M.K.'s six-year-old brother stated that, on the day in question, he observed D.M.K. playing with a gun he had obtained, cocking the hammer back and forth. Shortly thereafter, D.M.K. and his family left the house to go to the hospital to visit D.M.K.'s newborn child. D.M.K. left the loaded gun sitting on a low dresser in his bedroom. Following the hospital visit, the family, except for D.M.K., returned to the house. Apparently, the six-year-old and four-year-old were in D.M.K.'s room when the little girl saw a bag of coins sitting on his dresser and attempted to reach for it. When she did so, she accidently grabbed the gun, causing it to discharge. D.M.K.'s sister was killed by a single gunshot to her head.

Later that same evening, police interviewed D.M.K., who admitted to having left the gun on the dresser. Kentucky State Police subsequently tested the gun and determined that the trigger pull was two or three pounds when it was cocked and thirteen pounds when it was not. Accordingly, police concluded that the gun had been left behind with the hammer cocked back.

On March 28, 2015, D.M.K. was arrested and charged with four counts of first-degree wanton endangerment – one count for each family member at the

house at the time of the shooting – and one count of possession of a handgun by a minor, first offense. He was arraigned on March 30, 2015. On that same day, the Commonwealth moved to transfer D.M.K. to circuit court under KRS 635.020(3) and (4) as a youthful offender since D.M.K. had several prior felony adjudications.

The following day, the district court held a waiver/transfer hearing. The Commonwealth announced that it was only proceeding under KRS 635.020(3), which permits, but does not mandate, transfer of a juvenile to circuit court if the juvenile has been charged with a Class C or D felony, was at least sixteen years old at the time of the alleged offense, and previously had been adjudicated a public offender for a felony offense. Accordingly, the district court proceeded with a preliminary hearing to "determine if there [was] probable cause to believe that an offense was committed, that [D.M.K.] committed the offense, and that [he was] of sufficient age and ha[d] the requisite number of prior adjudications[.]" KRS 640.010(2)(a).

During the hearing, the district court took judicial notice of D.M.K.'s "file," which established that he met both the age requirement and the prior number of adjudications. However, following the presentation of evidence, the district court ruled that it did not believe there was probable cause for first-degree wanton endangerment. The district court explained, in part,

> Clearly in reading all of the commentary and all of the cases, the basic differentiation between wanton endangerment one and wanton endangerment two with weapons is what you actually do with the weapon. Do you point it at a person directly? Do you shoot into a

> loaded vehicle directly? . . . . Going on and reading more of the commentary . . ., the commentary says, and I quote, "for example, aimlessly firing a gun in public is not as wanton in degree as firing a gun into an occupied automobile and should not carry the same criminal sanction." Whether I agree with it or not, whether I like it or not, I believe the case law and commentary have made it clear, um, that under these circumstances with a weapon being left unattended and cocked, um, still does not meet the level of wanton endangerment first degree under the established case law, principles, and commentary. Uh, therefore I'm not able to make a finding of wanton endangerment in the first degree based upon the case law and commentary, regardless of my personal beliefs.

The district court did make a finding that probable cause existed for four counts of second-degree wanton endangerment.

The Commonwealth thereafter filed a motion for the district court to reconsider its ruling as it related to the two children who were in D.M.K.'s room at the time of the incident. Following a second hearing, the district court denied the motion to reconsider. The district judge again noted that her decision was based upon her experience as a prosecutor, the lengthy probable cause hearing, case law, commentary and legislative intent, and that nothing in the Commonwealth's motion had swayed her to change her legal position that probable cause for first-degree wanton endangerment had not been established. As a result, because there was no finding of probable cause for a felony offense, the district court ruled that D.M.K. could not be transferred to the circuit court under KRS 635.020(3).

The Commonwealth then filed a petition in the circuit court seeking a writ of mandamus ordering the district court to find probable cause for two counts of first-

degree wanton endangerment. Following a hearing, the circuit court granted the writ. This appeal ensued. Additional facts are set forth as necessary.

The decision whether to grant or deny a petition for a writ of prohibition or mandamus is within the sound discretion of the court in which the petition is filed. *Commonwealth v. Peters*, 353 S.W.3d 592, 595 (Ky. 2011). As such, the decision is reviewed by an appellate court for an abuse of discretion. However, if the basis for granting or denying the petition involves a question of law, the appellate court reviews the decision *de novo*. *Id.*

D.M.K. argues on appeal that the circuit court erred in issuing the writ of mandamus because findings made by the district court in a discretionary juvenile transfer case are not subject to a writ. Further, D.M.K. contends that, in issuing the writ, the circuit court failed to properly defer to the district court's finding that probable cause did not exist for first-degree wanton endangerment. Before addressing the merits of D.M.K.'s arguments, we believe that a discussion of Kentucky's juvenile transfer procedures is warranted.

"[N]ot all juvenile offenders should be proceeded against in juvenile court," and "the state has a compelling interest in protecting the public from a juvenile who will not be helped by the juvenile system . . . ." *Stout v. Commonwealth*, 44 S.W.3d 781, 786-88 (Ky. App. 2000). To that end, under certain circumstances a juvenile offender accused of violating the penal law may be transferred by the district court to circuit court to be proceeded against as a youthful offender. *Jackson v. Commonwealth*, 363 S.W.3d 11, 17 (Ky. 2012).

KRS 635.020 provides for both automatic and discretionary transfer of certain juvenile offenders to circuit court. *Stout,* 44 S.W.3d at 786.

Transfer under KRS 635.020(4) is referred to as a mandatory or automatic transfer because transfer is mandatory when a firearm is used in the commission of the underlying offense so long as the other statutory elements are met. *K.R. v. Commonwealth*, 360 S.W.3d 179 (Ky. 2015). In other words, a district court is without discretion to transfer; transfer to circuit court for trial as an adult is mandatory once the requisite findings are made. *K.N. v. Commonwealth*, 375 S.W.3d 816 (Ky. App. 2012). On the other hand, transfer under the other provisions of KRS 635.020 is known as discretionary transfer because the district court is referred to KRS 640.010, which outlines certain determinations that must be made. Specifically, the statute provides, in relevant part:

> (2) In the case of a child alleged to be a youthful offender by falling within the purview of KRS 635.020(2), (3), (5), (6), (7), or (8), the District Court shall, upon motion by the county attorney to proceed under this chapter, and after the county attorney has consulted with the Commonwealth's attorney, conduct a preliminary hearing to determine if the child should be transferred to Circuit Court as a youthful offender. The preliminary hearing shall be conducted in accordance with the Rules of Criminal Procedure.
>
> (a) At the preliminary hearing, the court shall determine if there is probable cause to believe that an offense was committed, that the child committed the offense, and that the child is of sufficient age and has the requisite number of prior adjudications, if any, necessary to fall within the purview of KRS 635.020.

(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.

(c) If, following the completion of the preliminary hearing, the District Court finds, after considering the factors enumerated in paragraph (b) of this subsection, that two (2) or more of the factors specified in paragraph (b) of this subsection are determined to favor transfer, the child may be transferred to Circuit Court, and if the child is transferred the District Court shall issue an order transferring the child as a youthful offender and shall state on the record the reasons for the transfer. The child shall then be proceeded against in the Circuit Court as an adult, except as otherwise provided in this chapter.

(d) If, following completion of the preliminary hearing, the District Court is of the opinion, after considering the factors enumerated in paragraph (b) of this

> subsection, that the child shall not be transferred to the Circuit Court, the case shall be dealt with as provided in KRS Chapter 635.

Clearly, KRS 640.010(2)(b) & (c) grant the district court considerable discretion in considering these factors and balancing the needs of the juvenile with those of society. *Stout,* 44 S.W.3d at 788. *See Pevlor v. Commonwealth*, 638 S.W.2d 272, 274 (Ky. 1982). Consequently, the district court's decision whether to transfer a juvenile to circuit court for trial as a youthful offender will only be disturbed for abuse of that discretion. *Id.*

> A district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) *or a clearly erroneous factual finding*, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.

See Miller v. Eldridge, 146 S.W.3d 909, 915 n. 11 (Ky. 2004) (emphasis in original). With this framework in mind, we now turn to whether a writ was an available remedy and, if so, whether such was warranted under the facts presented herein.

A writ of mandamus or prohibition may be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted. *Cox v.*

Braden, 266 S.W.3d 792, 796 (Ky. 2008) (quoting *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004)); *see also Commonwealth v. Eckerle*, 470 S.W.3d 712 (Ky. 2015). However, in the second class of writs, where a court is acting within its jurisdiction but erroneously, our Supreme Court has recognized "certain special cases" that merit remedy by a writ where "a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration." *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961). (Emphasis in original); *Cox*, 266 S.W.3d at 797. In those special cases involving the interest of the orderly administration of justice, the requirement that the petitioner must prove great injustice and irreparable harm is waived. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 808 (Ky. 2004). Notwithstanding, if there is an adequate remedy by appeal, this type of writ is not available. *Id.*

We agree with the circuit court's finding that the Commonwealth did not have an adequate remedy by appeal in this case. The district court's denial of the motion to transfer D.M.K. to circuit court was an interlocutory order because further proceedings were necessary in district court to dispose of all the issues in the case. A district court's interlocutory orders cannot be immediately appealed to the circuit court; instead, only final actions of the district court may be appealed. *See* KRS 23A.080(1). Further, once a juvenile case has reached final adjudication, the double jeopardy clause of the Fifth Amendment would bar the Commonwealth

from appealing the district court's decision not to transfer the case. *Breed v. Jones,* 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975).

The next question is whether the Commonwealth demonstrated that it would suffer great injustice and irreparable injury or whether "a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration." *Cox*, 266 S.W.3d at 797; *Bender*, 343 S.W.2d at 801.
The circuit court herein issued the writ under the first category, finding that the Commonwealth's inability to prosecute D.M.K. as a youthful offender satisfied the second element of great injustice and irreparable injury. In this Court, the Commonwealth argues that it demonstrated its entitlement to a writ under either category.

D.M.K. responds that the discretionary nature of the transfer proceeding at issue in this case precludes the entry of a writ. D.M.K. points to *K.R. v. Commonwealth*, *supra*, in which our Supreme Court granted discretionary review of this Court's affirmance of entry of a writ of mandamus by the Jefferson Circuit Court requiring the Jefferson District Court to transfer the juvenile, K.R., to circuit court as a youthful offender pursuant to the mandatory transfer language in KRS 635.020(4). In that case, the juvenile had been charged with first-degree assault, first-degree burglary and tampering with physical evidence. At the probable cause transfer hearing, the Commonwealth amended the charges to complicity to commit first-degree assault and attempted first-degree burglary.

Because the charges involved the use of a firearm, the Commonwealth moved the district court to order transfer to the circuit court under KRS 635.020(4).

At the conclusion of the hearing, the district court ruled that there was no probable cause to believe that the juvenile had personally "used" a weapon and, as such, declined to transfer the juvenile to the circuit court. The Circuit Court thereafter granted a writ of mandamus ordering the district court to transfer the juvenile and this Court affirmed the issuance of the writ on appeal.

Our Supreme Court concluded that the matter fell within the "special cases" category and that the writ was appropriate, noting that transfer is mandatory under KRS 635.020(4) when firearm is used in the commission of the underlying offense. *K.R.*, 360 S.W.3d at 184. Turning to the merits of the Commonwealth's claim, the Court concluded that the district court erred in finding (1) that a juvenile, who is charged as being complicit to a crime in which a firearm is used, cannot be transferred to circuit court as a youthful offender under the mandatory provisions of KRS 635.020(4), and (2) that a firearm was not used in the offense with which the juvenile was charged. *Id.* at 189.

D.M.K. points out that the Commonwealth in *K.R.* only sought to transfer the juvenile under KRS 635.020(4). The Court in *K.R.* further observed,

> 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.

Id. at 184. D.M.K. argues that, unlike the facts presented in *K.R.*, the Commonwealth herein sought transfer under KRS 635.020(3), a discretionary subsection of the statute, which grants the district court the authority not to send the juvenile to circuit court, even where he or she is found to qualify for said transfer. As such, D.M.K. contends that it was within the district court's discretion pursuant to *K.R.* to decline transfer based upon a lack of probable cause and that such decision was not subject to a writ.

The Commonwealth, on the other hand, argues that the relied-upon language in *K.R.* is merely dicta, and that the decision does not foreclose the availability of a writ even where discretionary transfer is at issue. Furthermore, the Commonwealth contends that the above-cited discussion in *K.R.* is not applicable because the district court in this case never reached the various discretionary factors for which it is given "great leeway." The Commonwealth relies upon *Jackson v. Commonwealth*, 363 S.W.3d at 19, where the Kentucky Supreme Court noted that KRS 640.010(2)(a) lays out the mandatory findings which the district court must make prior to considering the discretionary factors of KRS 640.010(2)(b). Essentially, the Commonwealth's position is that the district court's probable cause determination was a mandatory, rather than a discretionary finding, rendering inapplicable the Court's language in *K.R.* that a writ would likely not be available in discretionary transfer cases. We agree.

KRS 640.010(2)(a) lays out the mandatory findings which the district court must make to affect a discretionary transfer. As noted in *Jackson*, these findings require that the court find whether the juvenile satisfies the criteria for transfer as laid out in KRS 635.020. *Id.* at 19. If the district court finds that those criteria were not met, then the inquiry ends. But if the district court finds that those criteria were met, then the court must make findings on the discretionary factors set out in KRS 640.010(2)(b). *Id.*

In this case, the Commonwealth moved to transfer D.M.K. under the discretionary provision of KRS 635.020(3). Consequently, the district court was first required to make a finding of probable cause that D.M.K.: (1) was charged with a Class C or Class D felony, (2) had committed the offense, (3) had on one prior separate occasion been adjudicated a public offender for a felony offense, and (4) had attained the age of sixteen at the time of the alleged commission of the offense. While these are questions of fact for the trial court to decide, the determination is simply subject to review under a clearly erroneous standard. Using those facts, the reviewing court then conducts a *de novo* review of the trial court's application of the law to those facts to determine whether the decision is correct as a matter of law. *Commonwealth v. Jones*, 217 S.W.3d 190, 193 (Ky. 2006).

As noted above, the district court's probable cause determination would not be subject to direct appellate review. Furthermore, we agree with the circuit court that the Commonwealth demonstrated "a substantial miscarriage of

justice will result if the lower court is proceeding erroneously, and correction of the error is necessary and appropriate in the interest of orderly judicial administration." *Cox*, 266 S.W.3d at 797. Therefore, we agree with the circuit court that the mandatory findings under KRS 640.010(2)(a) can be the proper subject of a writ of mandamus.

We now turn to whether the district court abused its discretion in making the probable cause determination required under KRS 640.010(2)(a). The district court's factual findings are conclusive if they are supported by substantial evidence. *Jones*, 217 S.W.3d at 193. In this case, however, we must conclude that the district court's findings rest upon an error of law. Specifically, the district court misinterpreted its role in the probable cause determination under KRS 640.010(2)(a).

The district court undertook to determine whether there was probable cause to believe that D.M.K. was properly charged with the Class D felony of first-degree wanton endangerment or the Class A misdemeanor of second-degree wanton endangerment. This analysis would be appropriate in a mandatory transfer proceeding under KRS 635.020(4). However, in a discretionary transfer case, KRS 640.010(2)(a) directs the district court to determine "if there is probable cause to believe that an *offense* was committed, [and] that the child committed the *offense*, ..." (Emphasis added). The legislature's use of the broader term "offense," rather than the specific term "felony," indicates that the district court's probable-cause determination should be focused on whether there is probable cause to

support the named offense. But in cases where the offense can be prosecuted as either a felony or a misdemeanor, the district court is not responsible for determining whether there is probable cause for the felony charge.

Furthermore, KRS 640.010(3) charges the grand jury, not the district court, with the task of determining whether the child is properly charged with a felony or misdemeanor. That statute provides:

> If the child is transferred to Circuit Court under this section and the grand jury does not find that there is probable cause to indict the child as a youthful offender, as defined in KRS 635.020(2), (3), (5), (6), (7), and (8), but does find that there is probable cause to indict the child for another criminal offense, the child shall not be tried as a youthful offender in Circuit Court but shall be returned to District Court to be dealt with as provided in KRS Chapter 635.

It is important to note that a transfer hearing occurs at the charging stage of the proceedings, and thus the standard to be applied is whether there is probable cause to believe the crime has been committed. "Probable cause has . . . been defined as a 'reasonable grounds for belief, supported by *less than prima facie proof* but more than mere suspicion.'" *Jones*, 217 S.W.3d at 200 (Scott, J., dissenting) (citing *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990)). "[P]robable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules." *Rodgers v. Commonwealth*, 285 S.W.3d 740, 754 (Ky. 2009) (quoting *Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

At this point in the proceedings, it is not relevant whether the evidence would ultimately support a conviction, whether there are appropriate defenses, or as in this case, the requisite level of culpability can be established with reasonable certainty. Instead, the district 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. *See K.R.*, 360 S.W.3d at 179. Furthermore, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. *Commonwealth v. McKinney*, 594 S.W.2d 884, 888 (Ky. App. 1979) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604, 611 (1978)).

Under the statutory framework set out in KRS 640.010, the grand jury must make the initial determination of whether a felony charge is appropriate. Consequently, we conclude that the district court applied the wrong legal standard when it addressed whether D.M.K. was properly charged with felony or misdemeanor wanton endangerment. The district court clearly found that D.M.K. was charged with a Class D felony, that there was probable cause to believe he committed the offense of wanton endangerment, that he had the requisite number of prior juvenile adjudications, and that he had attained the age of sixteen at the time of the commission of the alleged offense. The district court abused its discretion in further finding that probable cause only existed for second-degree

wanton endangerment, and denying transfer based on that conclusion. For this reason, the circuit court properly granted the writ of mandamus.

While we find that the district court abused its discretion in making the mandatory findings under KRS 640.010(2)(a), the district court still has the discretion to determine whether transfer is appropriate under the factors set out in KRS 640.010(2)(b). The district court is not required to order transfer, but "may" do so if it finds at least two of the eight enumerated factors under that section favor transfer. KRS 640.010(2)(c). In this case, the district court never reached that issue. Since this a matter specifically within the purview of the district court, we must remand this matter for additional findings under this section.

For the reasons set forth herein, we affirm the order of the Jefferson Circuit Court granting a writ of mandamus and remand the matter to the district court for further proceedings.

LAMBERT, J., JUDGE, CONCURS.

DIXON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

DIXON, DISSENTING: I must respectfully dissent from the majority's ultimate conclusion in this case that the district court's findings herein "rest upon an error of law." "Specifically," the majority holds, "the district court misinterpreted its role in the probable cause determination under KRS 640.010(2)(a)." How did the district court "misinterpret" its role? By "under[taking] to determine whether there was probable cause to believe that D.M.K. was properly charged with the Class D felony of first-degree wanton

endangerment or the Class A misdemeanor of second-degree wanton endangerment." Yet, the majority had previously acknowledged "the district court was first required to make a finding of probable cause that DMK: (l) was charged with a Class C or Class D felony . . . ."[1] This was one of the "mandatory" findings the majority determined satisfied the criteria for a writ. Nevertheless, despite the clear language of KRS 640.010(2)(a), the majority now holds, "in cases where the offense can be prosecuted as either a felony or a misdemeanor, the district court is not responsible for determining whether there is probable cause for the felony charge."

The majority attempts to reconcile the obvious contradiction of its holding with the statutory requirements by parsing semantics. The majority states, "KRS 640.010(2)(a) directs the district court to determine 'if there is probable cause to believe that an *offense* was committed, [and] that the child committed the *offense,* . . . .' (Emphasis added)." Without any legislative guidance, the majority decrees, "[t]he legislature's use of the broader term 'offense,' rather than the specific term 'felony,' indicates that the district court's probable-cause determination should be focused on whether there is probable cause to support the named offense."

I believe the majority's analysis on this point is flawed. The majority's interpretation fails to consider the role of KRS 635.020 in a district

[1] Majority opinion, p. 14.

court's determination as to transfer. As previously noted, the majority has concluded that the district court erred by making a probable cause determination that D.M.K. could not be *properly* charged with the felony offense of first-degree wanton endangerment based upon the facts presented at the transfer hearing. According to the majority, KRS 640.010(2)(a) does not require such a decision. However, subsection (2) of this statute states the juvenile must be alleged a youthful offender *by falling in the purview of KRS 635.020 (2), (3), (5), (6), (7), or (8)*. That statute is entitled "**Criteria for determining how child is to be tried.**" Pursuant to this statute, a juvenile (child) may only be proceeded against under KRS 640.010 where that juvenile has been charged with a *felony offense*. KRS 635.020 refers to "felony" offenses primarily because under that statute, juveniles charged with different classes of felony offenses are treated differently in determining how they will be tried (as is indicated by the title to the statute itself). Such a description in KRS 640.010(2)(a) is wholly unnecessary because it is a priori that a juvenile must have been charged with a *felony* offense in order for its provisions to even apply.

Thus, the *offense* described in KRS 640.010 is inextricably intertwined with a required *felony offense* charge as described in KRS 635.020. The felony charge must exist before the district court even gets to the requirements of KRS 640.010, as noted by the statute itself. To leap to a conclusion that the legislature meant such a drastic difference in meaning, as the majority propounds, without any legislative guidance, I believe, is misplaced. Clearly, the offense of

which the district court is to find probable cause must be the felony offense charged.[2]

Finally, the majority concludes, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and to what charge to file or bring before the grand jury, generally rests entirely in his discretion." Certainly, the prosecutor is generally free to file charges as he or she deems proper. However, the prosecutor's *belief* as to probable cause has never been the test of transfer of charges from district to circuit court—whether those charged are juveniles or adults. Our penal code requires a district court judge determine whether probable cause exists on all felony criminal charges filed before those charges may be transferred to circuit court. *See* KRS 24A.110; RCr[3] 3.07, 3.10, 3.14. It is the judge's belief, not the prosecutor's, as to probable cause which is determinative. In the same vein, it is equally irrelevant that a grand jury ultimately determines whether a juvenile is ultimately tried in circuit court.

Therefore, for the foregoing reasons, I believe the entry of a writ of mandamus was improper.

[2] Even the district court in *Jackson v. Commonwealth*, 363 S.W.3d 11, 19 (Ky. 2012), upon which the Commonwealth and majority here rely so heavily, determined probable cause for the crime as charged. The district judge stated: "I do find probable cause to believe that the felony offenses *as charged* were committed and that Mr. Jackson committed those." (Emphasis added).
[3] Kentucky Rules of Criminal Procedure.

BRIEF FOR APPELLANT:

Joshua Michael Reho
Louisville, Kentucky

BRIEF FOR APPELLEE:

Andrew Graham Beshear
Attorney General of Kentucky

Dorislee Gilbert
Assistant Attorney General
Frankfort, Kentucky

Gina Kay Calvert
Louisville, Kentucky