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OCTOBER 15, 2008
(FILE NO. 2008-SC-000213-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002450-MR

PETITIONER F; PETITIONER G;
PETITIONER H; PETITIONER I;
PETITIONER J; PETITIONER K;
AND PETITIONER L — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SAM G. MCNAMARA, JUDGE
ACTION NO. 06-CI-00214

BRIDGET SKAGGS BROWN,
COMMISSIONER, DEPARTMENT OF
JUVENILE JUSTICE — APPELLEE

OPINION
AFFIRMING IN PART, AND
REVERSING AND REMANDING IN PART

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

VANMETER, JUDGE: Under Kentucky law, the Department of Corrections (DOC) is required to take DNA samples from persons convicted of certain criminal offenses. In

February 2006, Bridget Skaggs Brown, Commissioner of the Department of Juvenile Justice (DJJ), issued a general directive that the DJJ collect DNA samples from youth adjudicated of certain offenses. The issue we must resolve in this appeal is whether the Franklin Circuit Court erred by granting summary judgment in Brown's favor as to whether the DJJ could collect DNA samples from seven unnamed juveniles. For the following reasons, we affirm in part and reverse and remand in part.

Since 1992, the General Assembly has required the DOC to take DNA samples from persons convicted after a certain date of felony sexual or incest offenses under KRS[1] Chapter 510 or KRS 530.020. *See* KRS 17.170(1).[2] The resulting information is retained in a centralized database to assist criminal justice and law enforcement agencies. KRS 17.175. In construing KRS 17.170 in 2001, this court held that there was "no legitimate basis for treating [a juvenile's] juvenile court adjudication as a conviction—much less as a felony conviction—for purposes of the DNA database[,]" and that a lower court erred by ordering a juvenile "to provide a blood sample for the DNA database." *J.D.K. v. Commonwealth*, 54 S.W.3d 174, 176-77 (Ky.App. 2001).

In 2002, the General Assembly further subjected to KRS 17.170's DNA sampling requirements persons convicted of additional offenses. KRS 17.171 (violation of or felony attempt to commit first-degree unlawful transaction with a minor, use of a minor in a sexual performance, or promoting a sexual performance by a minor), KRS 17.172 (violation of or felony attempt to commit first- or second-degree burglary), KRS

[1] Kentucky Revised Statutes.

[2] The statute also authorized, but did not require, the DOC to obtain DNA samples from those who were in the DOC's custody under KRS 510 or KRS 530.020 on the date, July 14, 1992.

Further, we note that in analyzing the issues before us, we refer to the statutes in effect at the time appellants filed their petition below, i.e., February 15, 2005.

17.173 (capital offense, Class A felony, or Class B felony involving the death of or serious physical injury to the victim).

The General Assembly also enacted the statute at issue here, KRS 17.174, which provides as follows:

> **17.174. Application of KRS 17.171 and 17.172 to public offenders**
>
> KRS 17.171 and 17.172 shall apply to a public offender adjudicated a public offender or in the custody of the Department of Juvenile Justice on or after July 15, 2002, for any offense defined in KRS 17.170 or 17.171 or an attempt to commit one (1) of the named offenses.

In early February 2006, Brown issued a general directive that, pursuant to KRS 17.170 through KRS 17.174, the DJJ "shall collect DNA samples from youth adjudicated of certain" offenses. Thereafter, appellants, each of whom had either been committed to the DJJ or had a pending case which could subject him to DNA sampling, filed this action requesting the Franklin Circuit Court to prohibit the DJJ from collecting the DNA samples and declare the DJJ's directive unconstitutional. After giving the parties an opportunity to brief the issue, the circuit court ultimately entered a summary judgment denying appellants' petition. This appeal followed.

I. Application of KRS 17.174 to Persons Who Have Not Been Convicted of a Crime

Appellants argue that the circuit court erred by denying their petition since KRS 17.174 does not apply to persons who have not been convicted of a crime. They continue that KRS 17.174 permits the DOC to obtain DNA samples "from convicted persons who did not have a qualifying conviction, but who did have a qualifying juvenile adjudication." We disagree.

The proper interpretation of a statute is purely a legal issue, and our review is *de novo*. *J.D.K.*, 54 S.W.3d at 175. A court must construe a statute to effectuate "the plain meaning and unambiguous intent expressed in the law." *Id.* (quoting *Bob Hook Chevrolet Isuzu v. Commonwealth of Kentucky, Transp. Cabinet*, 983 S.W.2d 488, 492 (Ky. 1998)).

The Kentucky Unified Juvenile Code, found in KRS Chapters 600-645, deals with, *inter alia*, status offenders (Chapter 630), public offenders (Chapter 635), and youthful offenders (Chapter 640). A "public offense action" is, in part, "an action, excluding contempt, brought in the interest of a child who is accused of committing an offense under KRS Chapter 527 or a public offense which, if committed by an adult, would be a crime[.]" KRS 600.020(46). To that end, the General Assembly instructs a court to proceed under KRS Chapter 635 if "there is a reasonable cause to believe that a child before the court has committed" certain felonies, misdemeanors, or violations. KRS 635.020(1). Thus, while the term "public offender" is not expressly defined, it is clear that a public offender is a juvenile who commits a public offense action.

Further, public offenders are "adjudicated" rather than convicted. KRS 635.040. Accordingly, KRS 17.174 applies to juveniles who have been adjudicated public offenders for the commission or attempted commission of offenses defined in KRS 17.170 or KRS 17.171, rather than, as appellants argue, only to convicted persons who do not have qualifying convictions, but have qualifying juvenile adjudications. Had the legislature intended for this section to apply to convicted individuals, it could have said so, as it did in KRS 17.170 through KRS 17.173.

Appellants argue that this result is inconsistent with the purpose and language of Kentucky's Unified Juvenile Code. In addition to the statutory expressions of such purpose, the Kentucky Supreme Court has explained that

> a principle theory of juvenile law [is] that an individual should not be stigmatized with a criminal record for acts committed during minority. By providing young people with treatment oriented facilities rather than simple punishment, antisocial behavior can be modified and the offenders will develop as law abiding citizens.

Jefferson County Dep't for Human Servs. v. Carter, 795 S.W.2d 59, 61 (Ky. 1990). Still, regardless of any purpose of Kentucky's Juvenile Code, the purpose of which we assume the General Assembly is aware, *Cook v. Ward*, 381 S.W.2d 168, 170 (Ky. 1964), the General Assembly chose to enact KRS 17.174 in 2002.

A different result is not compelled by the fact that the General Assembly did not amend KRS 17.170 to include "adjudicated" persons after this court stated when construing that statute in *J.D.K.*, 54 S.W.3d at 177, that "if the legislature had intended to include within the statute those minors adjudicated in juvenile court, it would have articulated that intent clearly and unambiguously[.]"[3] While the General Assembly could have amended KRS 17.170 to require DNA samples to be taken from "adjudicated" persons, it instead chose to enact a separate statute doing so, *i.e.*, KRS 17.174.

Further, the fact that the circuit court relied upon a "fiscal note" in construing KRS 17.174 does not compel a different result.[4] The circuit court held that

[3] We note that the General Assembly has amended KRS 17.170 three times since our holding in *J.D.K.* The first, which became effective before appellants filed suit below, authorized samples other than blood to be taken. 2002 Ky. Acts Ch. 154, Section 4. The second, effective after appellants filed suit below, required youthful offenders to give DNA samples. 2006 Ky. Acts Ch. 182, Section 2. The third merely added the word "Kentucky" in front of "State Police." 2007 Ky. Acts Ch. 85, Section 91.

[4] The circuit court's opinion quotes the note as follows: "HB 4 . . . creates a new section of KRS Chapter 17 . . . making all of the previously mentioned statutes apply to public offenders in the custody of the Department of Juvenile Justice."

this statute was unambiguous but also held that even if the statute was ambiguous, outside sources supported its construction of the statute. More specifically, the circuit court expressly stated in its order that it found the fiscal note accompanying the house bill which created KRS 17.174 to be persuasive, even though it was not bound by it.

Finally, appellants' arguments relating to the interplay among KRS 17.170 through KRS 17.175 do not compel a different result. Again, when a statute's words "are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as it is written." *Mondie v. Commonwealth*, 158 S.W.3d 203, 209 (Ky. 2005). Thus, the wording of the statutes surrounding KRS 17.174 does not compel a different result.

II. Juveniles Adjudicated of Burglary

Next, appellants argue that even if these statutes require DNA samples to be taken from certain juvenile public offenders, they do not require samples to be taken from juveniles who have been adjudicated of burglary. We agree.

Again, the first portion of KRS 17.174 states that "KRS 17.171 and 17.172 shall apply to a public offender adjudicated a public offender or in the custody of the [DJJ] on or after July 15, 2002[.]" KRS 17.172 requires DNA samples to be taken from persons convicted of first- or second-degree burglary. Thus, were this all of KRS 17.174, it would be clear that DNA samples must be taken from public offenders adjudicated for burglary. However, the first portion of KRS 17.174 is qualified by the second portion of the statute, so that KRS 17.171 and 17.172 apply to public offenders "for any offense defined in KRS 17.170 or 17.171 or an attempt to commit one (1) of the named

offenses." As such, the statute does not apply to the offenses found in KRS 17.172, i.e., first- and second-degree burglary.

III. Administrative Regulations

Appellants also argue that the circuit court erred by denying their petition because Brown has not promulgated the requisite administrative regulations. We disagree.

Pursuant to KRS 13A.120(1)(a), "[a]n administrative body may promulgate administrative regulations to implement a statute only when the act of the General Assembly creating or amending the statute specifically authorizes the promulgation of administrative regulations[.]" Further, administrative bodies shall not promulgate administrative regulations "[w]hen the administrative body is not authorized by statute to regulate that particular matter[.]" KRS 13A.120(2)(d). Here, KRS 17.175(6) requires the Department of State Police forensic laboratory to "promulgate administrative regulations necessary to carry out the provisions of the DNA database identification system to include procedures for collection of DNA samples and the database system usage and integrity." These statutes do not require the DJJ to promulgate any administrative regulations. Instead, they only require the secretary of justice to notify the Reviser of Statutes of the date on which each section is implemented. KRS 17.177(3).[5] Accordingly, the DJJ was not required to promulgate any administrative regulations prior to its implementation of DNA sampling as required by KRS 17.174.

IV. Brown's Directives

[5] The Legislative Research Commission note following this statute states that the Secretary of the Justice Cabinet indicated that the sections were implemented effective May 1, 2003.

Appellants argue next that Brown erred by directing the DJJ to collect DNA samples from certain juveniles in February 2006, as her directive was contrary to the Justice Cabinet Secretary's statement that the measure was implemented effective May 1, 2003. We disagree.

Pursuant to KRS 17.177(3), KRS 17.171 through KRS 17.175 shall be implemented in numerical order, as funding becomes available. At the implementation of each section, "the Reviser of Statutes shall be notified by the secretary of justice, in writing, as to the date of implementation." KRS 17.177(3). On April 15, 2003, the Secretary of the Justice Cabinet notified the Reviser of Statutes that the DOC and the Department of State Police had completed their preparations for implementation of the statutes, and they were to be effective May 1, 2003.

Appellants argue that Brown's February 2006 directive for the DJJ to collect DNA samples from certain juveniles was contrary to the Justice Cabinet Secretary's statement. However, the Justice Cabinet Secretary's April 2003 statement did not prohibit further action in maintaining the DNA database. Nor does the statutory scheme prohibit any further action. The only statutory requirement is, to the contrary, that once KRS 17.171 through KRS 17.175 were implemented, they were not to be discontinued. KRS 17.177(4). As such, nothing prohibited Brown's February 2006 directive.

V. Fourth Amendment

Appellants argue that the collection of their DNA samples "without any degree of suspicion" violates their right to be free from unreasonable searches and

seizures under the Fourth Amendment to the United States Constitution and §10 of the Kentucky Constitution.[6] We disagree.

The taking of a sample of one's blood constitutes a search and implicates the Fourth Amendment and state constitutional limitations on searches. *Farmer v. Commonwealth*, 169 S.W.3d 50, 52 (Ky.App. 2005) (citing *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). Moreover, the ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested person's privacy interests. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989). Thus, the question becomes whether these searches were reasonable, *Skinner*, 489 U.S. at 619, 109 S.Ct. at 1414 (Fourth Amendment proscribes unreasonable searches and seizures), which is determined by examining the totality of the circumstances, *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 421, 136 L.Ed.2d 347 (1996). We note that while this is an issue of first impression in Kentucky, numerous courts faced with this issue have held that "a state's DNA database statute, in requiring certain persons to submit a DNA sample in the absence of a warrant or individualized suspicion, does not authorize an unreasonable search and seizure in violation of that amendment[,]" Robin Cheryl Miller, Annotation, *Validity, construction, and operation of state DNA database statutes*, 76 A.L.R.5th 239 § 14 (2000).

In deciding that Tennessee's statutes governing their DNA database did not violate the Fourth Amendment, the Tennessee Supreme Court explained:

> The United States Supreme Court has emphasized "the longstanding principle that neither a warrant nor probable

[6] Section 10 of Kentucky's Constitution does not provide any greater protection than the federal Fourth Amendment. *LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky. 1996).

> cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989); *see also Skinner*, 489 U.S. at 624, 109 S.Ct. 1402 (recognizing that "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable"); *Illinois v. Lidster*, 540 U.S. 419, 424, 124 S.Ct. 885, 157 L.Ed.2d 843 (2004) (acknowledging that "special law enforcement concerns will sometimes justify [seizures] without individualized suspicion"). Rather, "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624, 109 S.Ct. 1402.

State v. Scarborough, 201 S.W.3d 607, 617 (Tenn. 2006). Many courts have utilized this reasoning and applied this balancing test to DNA databases, *see* Miller, *supra,* which we find persuasive and now apply.

The extraction of a sample of one's blood using a needle is minimally intrusive.[7] *Combs v. Commonwealth*, 965 S.W.2d 161, 165 (Ky. 1998); *see also Skinner*, 489 U.S. at 625, 109 S.Ct. at 1417 (citing *Schmerber v. California*, 384 U.S. 757, 771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). Further, samples are taken from adults and juveniles who have been convicted and/or adjudicated of certain offenses. These processes necessarily involve neutral judges or juries evaluating the evidence against the individuals. And these individuals have been found to have a lesser expectation of privacy than non-convicted individuals. *Crump v. Curtis*, 50 Fed.Appx. 217, 218 (6th Cir. 2002) ("convicted prisoner maintains some reasonable expectations of privacy while in prison, but those privacy rights are less than those enjoyed by non-prisoners") (citing

[7] KRS 17.170(1) also permits DNA samples to be taken through an oral swab or a noninvasive procedure. The former method is even less intrusive than using a needle to take a blood sample, and the latter must be, by definition, noninvasive.

Bell v. Wolfish, 441 U.S. 520, 558, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)). *See Samson v. California*, 547 U.S. 843, --, 126 S.Ct. 2193, 2198, 165 L.Ed.2d 250 (2006) ("parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment").

On the other hand, the Commonwealth has a strong interest in maintaining identifying information for certain convicted felons and adjudicated juveniles. The acceptance of fingerprinting these individuals is widely accepted, and DNA sampling is simply another form of identifying individuals. Indeed, DNA evidence may be helpful in some investigations in which fingerprinting evidence would not. Simply put, it is beyond argument that the Commonwealth has a profound interest in "the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of sex-related crimes, violent crimes, or other crimes and the identification and location of missing and unidentified persons[,]" KRS 17.175(2).

Weighing the totality of these circumstances, the collection of the appellants' DNA samples is reasonable, and does not violate the appellants' right to be free from unreasonable searches and seizures.

Appellants argue that because the samples obtained from the searches here are used for law enforcement purposes, they are not "special needs" searches and therefore, violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Some courts have upheld these types of searches on a "special needs" basis. Miller, *supra*. However, as we have upheld the searches on an alternate basis, as set forth above, we need not reach the issue of whether the searches are appropriate as "special needs" searches.

VI. Fourteenth Amendment

Appellants also argue that the collection of their DNA samples violates their "right to privacy" found in the Fourteenth Amendment to the United States Constitution and §§1, 2, and 11 of the Kentucky Constitution. We disagree.

In support of their argument, appellants cite to *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992). In that case, the Kentucky Supreme Court recognized that "[n]o language specifying 'rights of privacy,' *as such*, appears in either the Federal or State Constitution." *Id.* at 492. Still, the court held that there are "guarantees of individual liberty provided in [Kentucky's] 1891 Kentucky Constitution [which] offer greater protection of the right of privacy than provided by the Federal Constitution as interpreted by the United States Supreme Court[.]" *Id.* at 491. Indeed, these guarantees were violated by the statute penalizing "deviate sexual intercourse with another person of the same sex[.]" *Id.* at 489, 491.

In a subsequent case, the Kentucky Supreme Court reaffirmed its holding that the Kentucky Constitution guarantees greater protection of the right of privacy than the Federal Constitution. *Colbert v. Commonwealth*, 43 S.W.3d 777, 780 (Ky. 2001). However, the court noted that it had "never extended these greater protections to the rights in property interests against warrantless search and seizure." *Id.* Rather, the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment. *Id.* This holding is dispositive of appellants' argument here, since we held above that the collection of DNA samples does not violate appellants' right to be free from unreasonable searches and seizures under the Kentucky or federal constitutions. Indeed, the United States Supreme Court has noted that the "right of privacy" includes

the right to be free in one's private affairs from governmental surveillance and intrusion, which is directly protected by the Fourth Amendment. *Whalen v. Roe*, 429 U.S. 589, 600 n.24, 97 S.Ct. 869, 877 n.24, 51 L.Ed.2d 64 (1977).

Appellants also cite the following statement from *New Jersey v. T.L.O.*, 469 U.S. 325, 337-38, 105 S.Ct. 733, 740-41, 83 L.Ed.2d 720 (1985) (footnote omitted): "A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." However, that case has little application to this matter as it deals with the application of the exclusionary rule "as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities." *Id.* at 327, 105 S.Ct. at 735.

VII. Fifth and Sixth Amendments

Finally, appellants argue essentially that the collection of their DNA, without having been tried by a jury, violates their right to due process of law under the Fifth Amendment to the United States Constitution and §§2 and 11 of the Kentucky Constitution. We disagree.

"Juvenile offenders are not afforded all the constitutional rights that adult offenders receive." *Jefferson County Dept. for Human Servs. v. Carter*, 795 S.W.2d 59, 61 (Ky. 1990). Specifically, they are not constitutionally entitled to a trial by jury. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 91 S.Ct. 1976, 1986, 29 L.Ed.2d 647 (1971). What juveniles are afforded is the right to fair treatment. *Jefferson County Dept. for Human Servs.*, 795 S.W.2d at 61 (citing *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18

L.Ed.2d 527 (1967) and *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984)).

The Franklin Circuit Court's summary judgment order is affirmed in part and reversed and remanded in part.

ALL CONCUR.

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