

No. 09-102241-A

IN THE COURT OF APPEALS OF
THE STATE OF KANSAS

FILED

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CAROL G. GREEN
CLERK OF APPELLATE COURTS

IN THE MATTER OF:

D M-T, Juvenile

Date of Birth: January 30, 1991

Case # 04 JV 1646

REPLY BRIEF OF APPELLANT

Appeal from the District Court of Wyandotte County, Kansas
Juvenile Division
Honorable Wes Griffin, Judge
District Court Case Number 04JV1646

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ORAL ARGUMENT REQUESTED

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ISSUES ON REBUTTAL

- A. This Court has jurisdiction to entertain this juvenile's appeal.
- B. *State v. Bowers* requires that DM-T be granted a new trial.

ARGUMENT, CITATIONS and AUTHORITIES

- A. This Court has jurisdiction to entertain this juvenile's appeal.

Rebuttal to: "The State first argues that DM-T lacks statutory authority to bring this appeal." Brief of Appellee, p. 3.

Standard of review: "The interpretation of a statute is a question of law, and our review on appeal of questions of law is unlimited." *Cooper v. Werholtz*, 277 Kan. 250, 252 (2004); accord, *State v. \$6,618.00 U. S. Currency*, 35 K.A.2d 54; 128 P.3d 413, 414 (Kan. 2006).

K.S.A. 38-2380 allows a juvenile to bring an appeal from "a judgment ... entered for an offense committed on or after July 1, 1999" which does not include sentences which are withing the presumptive sentence for the crime or entered by agreement with the State. K.S.A. 38-2380(B)(2). DM-T's appeal is based on the district court's most recent judgment denying him a jury trial based on the Kansas Supreme Court's pronouncement in *In Re L.M.*, 286 Kan. 460 (2008). It does not challenge those matters brought originally on direct appeal.

There is no case law interpreting substantively what matters may be brought on appeal under this statute. Therefore, as matter of first impression, this Court has the authority to review post-conviction juvenile judgments.

B. *State v. Bowers* requires that DM-T be granted a new trial.

Rebuttal to: "The right to a jury trial in juvenile offender proceedings is a new rule of procedure; ... This right will apply only to cases pending on direct review or not yet final on the date of filing of this opinion." *In Re L.M.*, 286 Kan. 460 (2008). Brief of Appellee, p. 8.

Standard of review: "[A] de novo standard of review applies to the interpretation of case law." *Wurtz v. Cedar Ridge Apartments*, 28 K.A.2d 609, 611 (2001).

In Re L.M. determined that juveniles have the right to a trial by jury. This Court, in *State v. Bowers*, slip op. #100,805 (Ks.Ct.App., September 25, 2009), stated that "an attorney may not waive a defendant's constitutional rights unless the record establishes the attorney has discussed the matter with the defendant and the defendant has voluntarily waived those rights. Further, the advisement regarding a jury trial must come from the court and not from counsel." *Id.* at p. 2. This is precisely DM-T's argument to this Court from the district court's denial of post-conviction relief.

As in *Bowers*, the trial record below for DM-T was silent as to whether he waived or raised the issue of a trial by jury. The record does not reflect whether DM-T's trial counsel discussed the matter with DM-T or if DM-T even knew he might have a right to a trial by jury in juvenile court. The *Bowers* court quoted *State v. Gaudina*, 284 Kan. 354, 372 (2007) that generally, "even constitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review", but noted that there were exceptions. *Id.* at p. 2. These include "(1) when the newly asserted theory involves

only a question of law arising on proved or admitted facts and is finally determinative of the case; [and] (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights". *Id.*

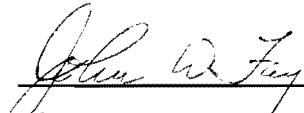
The only difference between *Bowers* and DM-T is that DM-T was a juvenile at the time of trial. When DM-T was tried, *In Re L.M.* had not been decided, and a trial by jury as a matter of right could not have been asserted on direct appeal. DM-T's raising the issue as a post-conviction remedy when the time had not yet expired to apply for *certiorari* with the United States Supreme Court allows this Court to determine the issue now. DM-T's appellate argument involves only a question of law arising on admitted facts and is finally determinative of this case. To prevent denial of a criminal defendant's fundamental right to a trial by jury, DM-T urges this Court to consider *Bowers* as controlling and dispositive of his appeal.

CONCLUSION

This Court has jurisdiction to hear DM-T's appeal. *State v. Bowers* requires this Court to grant DM-T the right to have a jury determine whether or not the crime for which he was tried before a judge occurred.

For all the above reasons, appellant DM-T requests this Court to reverse the district court's denial of his request for a trial by jury and remand this matter to the district court for a trial by jury on all criminal charges.

Respectfully submitted,



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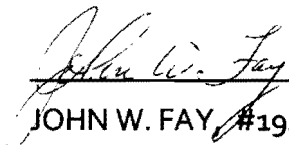
CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the Reply Brief of Appellant were mailed, postage prepaid and properly addressed on the 30 day of NOV, 2009, to the following persons, pursuant to Sup.Ct.R. 6.09 and 6.10:

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