

Commonwealth Of Kentucky

Court of Appeals

NO. 2000-CA-002426-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2001-CA-000804-DG

v. APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 99-CR-00064

DANNY W. ARNDELL, JR.

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * *

BEFORE: DYCHE, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE. This matter is before this court on remand from the Kentucky Supreme Court for reconsideration in light of Kotila v. Commonwealth, Ky., 114 S.W.3d 226 (2003). For the reasons stated hereafter, we vacate the order of the Caldwell Circuit Court and remand this matter for further proceedings.

The underlying facts previously were summarized by this court as follows:

Appellee [Danny Arndell] was stopped by police and was found to be in possession of numerous boxes of Sudafed® and Actifed®, as well as several packs of lithium batteries stolen from two separate Walmarts. The police also seized methamphetamine and a portion of a burnt pen which contained methamphetamine residue. Appellee was charged and was subsequently indicted for the offenses of possessing chemicals for the manufacture of methamphetamine with the intent to manufacture such, possession of a controlled substance in the first degree, possession of drug paraphernalia, and misdemeanor theft by deception. Appellee thereafter made a motion to dismiss Count I of the indictment on the ground that KRS 218A.1432(1)(b) was unconstitutional as being void for vagueness and overbreadth. The court granted the motion and dismissed Count I.

On appeal, a panel of this court concluded that the trial court erred by finding that KRS 218A.1432(1)(b) was unconstitutional as being overly broad or void for vagueness. The trial court's order was reversed and remanded "with directions to reinstate Count I of the indictment herein." Subsequently, after granting discretionary review, the Kentucky Supreme Court vacated and remanded the matter to this court for reconsideration in light of *Kotila v. Commonwealth*, Ky., 114 S.W.3d 226 (2003).

Kotila examined the constitutionality of KRS 218A.1432(1), which provides in pertinent part that:

A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully:

. . .

(b) Possesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.

The supreme court rejected claims that the statute was unconstitutionally vague, and it construed "**the** chemicals or equipment" (emphasis added) as meaning "all of the chemicals or all of the equipment necessary to manufacture methamphetamine." 114 S.W.3d at 237. Thus, regardless of intent, the possession of some but not all of the necessary chemicals or equipment for manufacturing methamphetamine does not satisfy the elements of the offense. As the trial court's instructions failed to require the jury to find beyond a reasonable doubt that Kotila possessed all of the necessary chemicals or equipment for manufacturing methamphetamine, the matter was reversed and remanded for a new trial.

It follows, pursuant to *Kotila*, that the trial court erred below by finding that KRS 218A.1432(1)(b) is void for vagueness. Moreover, we reject the court's finding that KRS 218A.1432(1)(b) is overly broad for the reasons stated in our previous opinion as follows:

At the outset, we note that although appellee and the trial court analyzed the constitutionality of KRS 218A.1432(1)(b) for overbreadth and found it lacking, the overbreadth doctrine simply is not implicated here. That doctrine is used to analyze statutes to determine whether the state, in an effort to control impermissible conduct, has also prohibited constitutionally permissible conduct.

Commonwealth v. Ashcraft, Ky. App., 691 S.W.2d 229 (1985). Clearly, because there is no constitutional right to possess chemicals or equipment with the intent of using such to manufacture methamphetamine, KRS 218A.1432(1)(b) cannot be attacked on the ground that it is overbroad as attempting to regulate constitutionally permissible conduct. Moreover, it is not significant for these purposes that the chemicals used to manufacture methamphetamine may be extracted from legal products such as Sudafed® and Actifed®, since possession of these legal substances is rendered illegal only if the actor possesses them with the intent to use them to manufacture methamphetamine. Obviously, therefore, the statute is not overbroad as seeking to regulate legally protected conduct associated with the possession and utilization of over-the-counter drugs for their intended purposes.

Given the conclusion that the trial court erred by finding that KRS 218A.1432(1)(b) is unconstitutional as being void for vagueness or overly broad, it follows that the court erred by dismissing Count I of the indictment based on such findings. On remand, therefore, the trial court must determine whether evidence existed to show under Count I that Arndell possessed all of the chemicals or equipment needed to manufacture methamphetamine, and whether Count I was properly dismissed. *Kotila, supra*.

For the reasons stated, the court's order is vacated and remanded for further proceedings consistent with the views stated herein.

ALL CONCUR.

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