

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001250-MR

LLOYD WINGLER

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 01-CR-00226

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, COMBS, and KNOPF, Judges.

COMBS, JUDGE. Lloyd Wingler appeals from a judgment of the Laurel Circuit Court convicting him of manufacturing methamphetamine. We affirm.

James Lawson went to the apartment of his granddaughter, Jennifer Jones, on June 30, 2001. He heard loud music coming from inside the apartment. At first no one answered the door. A little boy eventually opened the door and let Lawson enter the apartment. Lawson then found Melanie

Loveless (Loveless) lying on his granddaughter's bed. He was unable to wake her. He observed a needle, a spoon, and cotton beside the unconscious woman. In a box against the wall, Lawson observed a box containing hoses, jars, and other items. He testified that when he left to call 911, he took the box outside with him, fearing it might be dangerous. He phoned 911 from a downstairs apartment.

Deputy Young of the Laurel County Sheriff's Department arrived in response to the 911 call. He determined that the box contained a methamphetamine lab and called for officers specialized in dismantling such labs. Allen Lewis of the Kentucky State Police Drug Enforcement Unit responded to that call.

Loveless was arrested and was originally charged with complicity to manufacture methamphetamine. Jennifer Jones and her husband, George Jones, were also arrested and charged with manufacturing methamphetamine. Based on information provided by Loveless, Wingler was arrested and indicted for manufacturing methamphetamine. Pursuant to plea agreements in which Loveless and the Joneses agreed to testify against Wingler, their charges were reduced to facilitation to manufacture methamphetamine.

Wingler was tried on April 23, 2002. The jury found him guilty and recommended a sentence of ten years to be served consecutively to a sentence that he had received in federal

court. At his final sentencing, the trial court imposed the sentence as recommended by the jury.

Wingler raises six issues on appeal: 1) that the trial court erred in failing to grant a motion for a directed verdict; 2) that KRS¹ 218A.1432(1) is void for vagueness; 3) that KRS 218A.1432 violates the prohibition against cruel and unusual punishment; 4) that the evidence that he had manufactured methamphetamine in the apartment and had regularly supplied Loveless with methamphetamine was more prejudicial than probative; 5) that he was entitled to an instruction regarding the weight to be given Ms. Loveless's testimony; 6) that he was entitled to penalty phase instructions on residual doubt, effect of a felony conviction, and parole eligibility.

The standard for a directed verdict is set forth as follows:

On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given.

Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

KRS 218A.1432 provides in pertinent part:

(1) A person is guilty of manufacturing methamphetamine when he knowingly and

¹ Kentucky Revised Statutes.

unlawfully:

- (a) Manufactures methamphetamine; or
 - (b) Possesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.
- (Emphasis added.)

In order to prove its case, the Commonwealth was required to establish that Wingler knowingly possessed the chemicals or equipment to manufacture methamphetamine. Wingler was not in actual possession of the methamphetamine lab. However, constructive possession could be established by a showing that the equipment was subject to his dominion or control.² Wingler argues that there was no proof that the box was ever in his dominion and control and that, therefore, he was entitled to a directed verdict.

Loveless testified that Wingler had moved some boxes into the apartment, that she did not see what was in the boxes, and that she believed the box and equipment must have been Wingler's because it did not belong to her. Loveless and the Joneses all testified that Wingler sometimes stayed at the apartment with Loveless. A letter written by Wingler to Loveless while she was jailed on the charges was admitted into evidence. Wingler wrote, "Sorry I can't help from being upset with myself for ever letting anything like this happen and for you got [sic] blamed for the stuff I had and it should be me in

² Hargrave v. Commonwealth, Ky., 724 S.W.2d 202, 203 (1986) citing Rupard v. Commonwealth, Ky., 475 S.W.2d 473, 475 (1972).

there and I wish it was." Loveless also testified that three days prior to her arrest, Wingler had been manufacturing methamphetamine in the apartment and that he had regularly supplied her with the drug.

There was contradictory testimony by the Joneses that some other person had carried the boxes into the apartment and that they had never witnessed methamphetamine being made in the apartment. However, this conflict in testimony did not preclude submission of the case to the jury. "Credibility and weight of the evidence are matters within the exclusive province of the jury." Commonwealth v. Smith, Ky., 5 S.W.3d 126, 129 (1999) citing Estep v. Commonwealth, Ky., 957 S.W.2d 191, 193 and Benham, 816 S.W.2d 186 (1991). In drawing all fair and reasonable inferences in favor of the Commonwealth pursuant to the Benham criteria, a reasonable juror could have concluded beyond a reasonable doubt that the methamphetamine lab had been subject to Wingler's dominion and control.

Wingler also argues that it would have been unreasonable for a jury to find the requisite intent to manufacture methamphetamine because Allen Lewis (from the Kentucky State Police Drug Enforcement Unit) testified that muriatic acid, rock salt, and aluminum were needed to produce methamphetamine. However, the statute does not require that the defendant possess the chemicals and the equipment; it only

requires that the defendant possess the chemicals or the equipment. A review of Lewis's testimony establishes that the box contained the equipment necessary to manufacture methamphetamine. He described it as a red phosphorous methamphetamine lab. As noted earlier, Loveless testified that three days prior to her arrest, Wingler had been manufacturing methamphetamine in the apartment and that he supplied her with methamphetamine. The combined testimony of Lewis and Loveless was sufficient evidence for a reasonable jury to conclude beyond a reasonable doubt that Wingler intended to use the equipment to manufacture methamphetamine.

Wingler next argues that KRS 218A.1432 is void for vagueness. The Kentucky Supreme Court has quite recently addressed this issue in Kotila v. Commonwealth, Ky., ___ S.W.3d ___, (2003). The Court held that the statute was not unconstitutionally vague because it clearly requires the Commonwealth to prove that the defendant possessed either all of the equipment or all of the chemicals necessary to manufacture methamphetamine. It also requires the Commonwealth to prove that the possession be with the intent to manufacture methamphetamine. Its requirements are specific and leave no room for speculation so as to constitute vagueness.

Wingler also argues that the statute violates the constitutional prohibition against cruel and unusual punishment

because the punishment is disproportionate to the nature of the offense. KRS 218A.1432(2) characterizes the manufacture of methamphetamine as a Class B felony for the first offense and a Class A felony for subsequent offenses. The maximum term of imprisonment for a Class B felony is from 10 to 20 years. KRS 532.060(b). The maximum term of imprisonment for a Class A felony is from 20 to 50 years -- or life. KRS 532.060(a). In analyzing a claim of cruel punishment as to proportionality, we must consider three factors: (1) the gravity of the offense and harshness of the penalty; (2) the sentences imposed on other offenders in the same jurisdiction; (3) the sentences imposed for commission of the crime in other jurisdictions. Solem v. Helm, 463 U.S. 277, 291, 103 S.Ct. 3001, 3010, 77 L.Ed. 637 (1983).

Wingler argues that the penalty is too harsh because guilt can be premised solely upon possession of common legal substances. However, guilt is to be determined not by mere possession of a few common household items or chemicals but upon possession of all of the chemicals or equipment with the intent to manufacture methamphetamine.

Wingler argues that other offenders in the same jurisdiction receive much lighter sentences for much more serious offenses. Yet he fails to identify what those "more serious offenses" might be or to cite any authority for his

claim. We note that the appropriate range for the length of sentence is "purely a matter of legislative prerogative." Hampton v. Commonwealth, Ky., 666 S.W.2d 737, 741 (1984) citing Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). The General Assembly has determined that the manufacturing of methamphetamine presents a serious threat to society warranting classification as a Class B felony. We have no basis to interfere with its exercise of its legislative function as set forth in the statute.

Wingler argues that "several jurisdictions impose a sentence of six years or less for the offense." Again, he fails to cite any authority for his claim. Nor does he demonstrate that the General Assembly of Kentucky is bound to follow the sentencing parameters of other jurisdictions.

Wingler also contends that evidence that he previously manufactured methamphetamine and supplied Loveless with the drug was more prejudicial than probative. We agree with the Commonwealth that this issue is only partially preserved. Loveless testified that she had not actually witnessed the manufacturing of the drug but that she knew it had happened. On re-direct examination, Loveless testified that she knew it had happened because three days earlier, Wingler told her that he was in the bathroom manufacturing methamphetamine. There was no objection to this testimony. Loveless was later recalled to the

stand and testified that on a previous occasion, she had seen Wingler manufacture methamphetamine and that she obtained methamphetamine from Wingler. Still there was no objection.

When Loveless testified that Wingler was her main supplier of drugs, the defense counsel objected, arguing that this evidence was not relevant. However, the objection referred only to the testimony that Wingler had supplied methamphetamine to Loveless -- not to the testimony that Loveless had witnessed Wingler manufacturing methamphetamine. "The general rule is that a party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived." Commonwealth v. Pace, Ky., 82 S.W.3d 894, 895 (2002).

The only issue properly preserved is that regarding the admissibility of Loveless's statement that Wingler was her main supplier of drugs. In a criminal prosecution, prejudice is defined as "that which is unnecessary and unreasonable." Partin v. Commonwealth, Ky., 918 S.W.2d 219, 223 (1996). This evidence was both necessary and reasonable -- and therefore permissible pursuant to KRE³ 401 and KRE 403. Since the Commonwealth was not introducing the testimony as evidence of a prior bad act under KRE 404(b) but rather to establish intent, notice was not required pursuant to KRE 404(c). We conclude that the evidence was probative of the proposition that Wingler possessed the

³ Kentucky Rules of Evidence.

equipment with the intent to manufacture methamphetamine and that it was properly admitted. See Walker v. Commonwealth, Ky., 52. S.W.3d 533 (2001).

Wingler's next argument is that Loveless's testimony was so incredulous that he was entitled to an instruction that it should be given lesser weight. The Kentucky Supreme Court rejected this same argument in Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 850 (2000), as follows:

Kentucky follows the "bare bones" principle with respect to jury instructions. Instructions such as those requested by Appellant tend to overemphasize particular aspects of the evidence. Evidentiary matters should be omitted from the instructions and left to the lawyers to flesh out during closing arguments.

Hence, Wingler was not entitled to an instruction on the weight to be accorded to the testimony of Loveless.

Wingler last argues that the trial court erred when it refused to give requested instructions in the penalty phase on residual doubt, the effect of a felony conviction, and parole eligibility. In a death penalty case, the Kentucky Supreme Court rejected the argument on residual doubt in Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 40 (1998), holding that it "plays no role in jury instructions." As to the other requested instructions, we find no constitutional principle to support Wingler's proposed instructions as to the effect of a felony

conviction or parole eligibility date. The trial court properly instructed the jury. We find no error.

The judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Emily Holt
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky