

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001498-MR

STEPHEN G. LAMB

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 02-CR-00052

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** **

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Stephen Lamb appeals from a judgment of the Muhlenburg Circuit Court convicting him of manufacturing methamphetamine and sentencing him to fifteen years' imprisonment. Upon careful review of this case, we believe the evidence presented to the jury at trial entitled Lamb to a directed verdict under the Kentucky Supreme Court's decision in Kotila v. Commonwealth, Ky., 114 S.W.3d 226 (2003). We therefore reverse the conviction.

Lamb, along with Nathaniel Barber and Charles Gibson, was arrested on January 23, 2002, in Greenville, Kentucky, after a store clerk notified police that the three men had purchased some ingredients commonly used in the manufacture of methamphetamine. Officers stopped the vehicle which Lamb was driving and discovered a gallon of Liquid Fire, a quantity of isopropyl alcohol and some plastic tubing. They also found an empty pen bottom, which could be used to smoke methamphetamine; however, it was never tested for drug residue. In addition, Barber was carrying a concealed knife and two pairs of pliers, which could be used to remove lithium strips from batteries. All three men were charged with manufacturing methamphetamine, and Barber was also charged with carrying a concealed deadly weapon.

Prior to the trial of Barber and Lamb, Gibson pled guilty to facilitation to manufacturing methamphetamine and accepted a five year sentence in exchange for his testimony against the two co-defendants. According to Gibson, he had helped Barber and Lamb manufacture methamphetamine multiple times, including a batch made with Barber earlier in the month, in exchange for a small amount of the drug for Gibson's personal use. He also testified that all three men had smoked methamphetamine on the day they were arrested and that they had discussed manufacturing methamphetamine in conjunction with the

purchase of the Liquid Fire, isopropyl alcohol, and plastic tubing. Cheyenne Albro, Director of the Pennyrile Narcotics Task Force, described a process using these items that could be used to manufacture methamphetamine. He also testified that a pen is often used to smoke methamphetamine and that the amount of the materials found in the vehicle indicated an ongoing operation to manufacture methamphetamine. Lamb and Barber testified in their own defense that Barber had brought a truck to Lamb's garage for the two of them to repair. According to their testimony, the plastic tubing was to be used to drain the brakes and the alcohol was for getting water out of the gas tank. The jury convicted Lamb of manufacturing methamphetamine, but acquitted him of possessing drug paraphernalia based on the presence of the pen, and this appeal followed.

Lamb argues that under the Kotila case, which was decided subsequently to his May 21, 2002, trial, the Commonwealth presented insufficient evidence to convict him of the offense of manufacturing methamphetamine. His counsel made a motion for a directed verdict based on insufficiency of the evidence, and the trial court, lacking the benefit of the Kentucky Supreme Court's interpretation of KRS 218A.1432(1) (b), overruled the motion. The statute in question, Kentucky Revised Statute (KRS) 218A.1432(1) states as follows:

- (1) A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully:
 - (a) Manufactures methamphetamine; or
 - (b) Possesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.

At the time of his arrest, the defendant in Kotila was in possession of 2.39 grams of methamphetamine, six boxes of Equate antihistamine tablets (which contain the necessary ingredient ephedrine), two lithium batteries, six cans of starting fluid, one glass vial, one Kerr Mason jar, one glass jar with lid, one black cooking pot, one small glass jar, one weighing scale, three pieces of hose (green, black and white), one green funnel, one wooden stirring spoon, a cotton ball, a .22 caliber Ruger handgun, and one glove containing rock salt. In addition, several of the items found tested positive for methamphetamine residue. Nevertheless, the Kentucky Supreme Court found that these items were insufficient evidence to support a conviction for manufacturing methamphetamine pursuant to KRS 218A.1432(1)(b). The Court determined, after a lengthy analysis, that "KRS 218A.1432(1)(b) applies only when a defendant possesses *all* of the chemicals *or all* of the equipment necessary to manufacture methamphetamine." Supra at 240-241. (Emphasis in original.) Lamb, who possessed only Liquid Fire, isopropyl alcohol, and plastic tubing, cannot be said to have possessed

either all of the chemicals or all of the equipment necessary to manufacture methamphetamine at the time of his arrest.

Therefore, under the Kentucky Supreme Court's binding interpretation of KRS 218A.1432(1) (b) found in Kotila, we are required to reverse his conviction and direct the trial court to enter a judgment that he is not guilty of the offense.

The Commonwealth urges us to find that the Kentucky Supreme Court's more recent decision in Varble v. Commonwealth, Ky., 125 S.W.3d 246 (2003), permits Lamb to be convicted of manufacturing methamphetamine upon the evidence introduced at his trial. We disagree. In Varble, the defendant was found to be in possession of all of the chemicals necessary to manufacture methamphetamine, with the exception of anhydrous ammonia. There was evidence that he had recently completed a batch of methamphetamine, including a strong odor of anhydrous ammonia and the discoloration to some of his equipment which suggested that the chemical had been present. The Court determined that this constituted sufficient evidence that Varble had possessed anhydrous ammonia in the recent past and stated "it was for the jury to decide whether he possessed those same chemicals at the same time that he possessed the anhydrous ammonia. . ." Supra at 254. The Commonwealth argues that Gibson's testimony that he and Lamb had manufactured methamphetamine together at some unspecified time was enough,

under Varble, to find that Lamb had simultaneously possessed all of the chemicals required to manufacture methamphetamine. However, Lamb was indicted for manufacturing methamphetamine based on the items he possessed when he was arrested on January 23, 2002. Consequently, the Commonwealth fails to demonstrate that Gibson's testimony was sufficient to transform possession of three items capable of being used in the manufacture of methamphetamine into possession of all of the chemicals or equipment necessary to manufacture methamphetamine as required by KRS 218A.1432(1)(b).

For the foregoing reason, the judgment of the Muhlenburg Circuit Court is reversed and this action is remanded for dismissal of the charge.

ALL CONCUR.

BRIEF FOR APPELLANT:

Euva Denean May
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky