

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002258-MR

ANGELA MATHENEY

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELEER, JR., JUDGE
ACTION NO. 01-CR-00122

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND MINTON, JUDGES.

BARBER, JUDGE: Appellant, Angela Matheney (Matheney), appeals her conviction for manufacturing methamphetamine. We reverse the conviction below.

Matheney was indicted on one count of manufacturing methamphetamine, a Class B felony pursuant to KRS 218A.1432. Her husband was also indicted for the same offense. The record shows that Mr. Matheney went to a variety of stores and bought two boxes of cold medicine at each store. Ms. Matheney did not

enter most of the stores, and just purchased two boxes of cold pills. When a store employee became suspicious of Mr. Matheney's purchases, the police were called and received permission to search the car trunk. In the trunk was a gallon of "liquid fire," nine boxes of cold medicine, and several cans of starter fluid.

When questioned, Mr. Matheney told the investigating officer that the cold medicine was for him and the children; the "liquid fire" was for the septic system; and the starter fluid was used to start farm equipment. Ms. Matheney made no comment regarding the purchases. The investigation revealed that the Matheneys did not have all the items necessary to manufacture methamphetamine. Ms. Matheney was convicted and sentenced to ten years. Although Matheney did not provide contemporaneous objection to the errors she raises on appeal, the errors were preserved for review in pre-trial motions and motions for directed verdict made at the close of the Commonwealth's case, and at the close of the defendant's case.

Matheney argues on appeal that it was improper to convict her of manufacturing methamphetamine when she possessed some, but not all of the chemicals necessary to manufacture the drug. KRS 218A.1432(1)(b) holds that an individual is guilty of manufacturing methamphetamine when he knowingly and unlawfully:

Possessed the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.

Matheney argues that this language indicates the necessity that the defendant have all the necessary precursors in order to be found guilty. Matheney states that if the legislature had intended to authorize a conviction based on some, rather than all, of the necessary precursors, the statute would have used words such as "some" or "any." Pursuant to the Kentucky Supreme Court's ruling in Kotila v. Commonwealth, Ky., 114 S.W.3d 226, 236 (2003), Matheney's conviction must be reversed as she did not have in her possession all the precursors for the manufacture of methamphetamine.

Matheney argues that error was introduced when the Commonwealth argued that she could be convicted if she had the intent that the materials in her husband's possession be used to manufacture the drug. KRS 218A.1432 expressly requires an intent to manufacture, rather than knowledge that another intends to manufacture using the items. A separate statute, KRS 218A.1437 makes it a class D felony to possess a drug product or combination of drug products containing ephedrine or pseudoephedrine with the intent that those drug products be a precursor to the manufacture of methamphetamine. Matheney contends that the Commonwealth's claims that she had the requisite intent to manufacture were misrepresentations, and

require reversal. Mattingly v. Commonwealth, Ky., 878 S.W.2d 797 (1994). The law requires that the Commonwealth provide evidence sufficient to permit a reasonable juror to believe that the defendant had an intent to manufacture methamphetamine. Kotila v. Commonwealth, supra., 114 S.W.3d at 241. The record did not support such a finding. For this reason, the conviction must be reversed.

Matheney claims that the jury instructions were in error as they failed to provide a correct statement of the law, but rather instructed the jury to find her guilty if she had possession of some of the materials used to manufacture the drug. Matheney also argued that the instructions permitted a finding of guilty if she had equipment for the manufacture of methamphetamine, and stated that there was no evidence that she had any such equipment. On appeal, the Commonwealth attempts to claim that since she had bottles with spraying mechanisms in the trunk, this qualified as equipment. Such an argument was not presented to the court, and there is no showing that a spray nozzle on a container of liquid fire is equipment for drug manufacture. In fact, the Commonwealth did not dispute Matheney's assertion at trial that she had none of the equipment for manufacture. For this reason, the Commonwealth's argument must fail.

Matheney asserts that it was error for her to be tried with her husband and represented by the same counsel in absence of a waiver. RCr 8.30 requires a written waiver to be placed in the record. Matheney argues that this unpreserved error was palpable and reversible under RCr 10.26. No written waiver was executed by either party with regard to the joint representation. On the morning of trial the court addressed the waiver issue with both Mr. and Ms. Matheney, jointly, as they sat with counsel at the defense table. Matheney argues that this joint address by the court was insufficient to constitute an informed waiver. Kentucky law requires a signed written waiver in cases of joint representation. Jackson v. Commonwealth, Ky., 3 S.W.3d 718 (1999). This written waiver must be in addition to individual questioning by the court regarding the defendant's understanding of the potential conflict and the execution of the waiver. Parker v. Commonwealth, Ky., 952 S.W.2d 209, 214 (1997). No such individual questioning or individual discussion of the potential for conflict caused by a waiver was undertaken in the present case.

The record shows that settlement offers were made jointly, rather than separately, to the parties. Matheney was not offered a plea bargain separate from that of her husband. Her husband rejected all offers. Matheney was not permitted to

enter into a separate plea agreement on her own behalf. Matheney was not given the opportunity to present a separate defense at trial. Matheney was also prejudiced by statements made by her husband, which were admitted into evidence, and by testimony refuting her husband's statements to the investigating officers. This prejudicial testimony was irrelevant to the charges against Matheney, and there is no showing that the evidence would have been admissible had she been tried alone.

Where an appellant argues that the joint representation prejudiced her rights, she must show that real conflict of interest existed at the time of the joint representation. Kirkland v. Commonwealth, Ky., 53 S.W.3d 71, 75 (1999). Matheney made such a showing on appeal. Matheney asserts that she had a separate defense from that of her husband, but was unable to provide such a separate defense at trial. Matheney also showed this Court that her husband's refusal of the plea agreements offered made it impossible for her to enter into a plea agreement on her own behalf. Matheney has shown prejudice sufficient to have affected her right to a fair trial. For this reason, the conviction must be reversed. For the foregoing reasons, the judgment of the circuit court is reversed, and the action remanded.

ALL CONCUR.

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