

RENDERED: JULY 1, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002035-MR
AND
NO. 2004-CA-000440-MR

KEVIN GRAY

APPELLANT

v. APPEALS FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 02-CR-00097

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; MILLER, SENIOR
JUDGE.¹

COMBS, CHIEF JUDGE: Kevin Gray appeals from two orders of the
Grant Circuit Court entered August 15, 2003, and February 2,
2004, denying motions for post-conviction relief which he filed

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

pursuant to the provisions of RCr² 11.42 and CR³ 60.02. After our review of the record and pertinent precedent, we affirm.

The criminal charges against Gray arise from his interaction with Floyd T. Combs, an undercover agent with the Northern Kentucky Drug Strike Force. In a series of audio-recorded telephone conversations, Gray proposed to develop a methamphetamine lab and to teach Combs how to manufacture meth in exchange for a supply of anhydrous ammonia. He arranged a meeting with Combs at a barn in Dry Ridge on the evening of June 19, 2002. The site chosen for the lab was kept under surveillance. Combs falsely represented to Gray that he had brought a tank of anhydrous ammonia for their use. After Gray had unloaded his equipment and supplies, he was placed under arrest.

Gray was indicted on the charge of manufacturing methamphetamine, a Class B felony, pursuant to KRS⁴ 218A.1432(1)(b) and as a persistent felony offender (PFO), second degree, pursuant to KRS 532.080. While represented by counsel, Gray negotiated a plea agreement with the Commonwealth, pleading guilty to manufacture of methamphetamine. In exchange, the Commonwealth moved for the dismissal of the PFO count of the

² Kentucky Rules of Criminal Procedure.

³ Kentucky Rules of Civil Procedure.

⁴ Kentucky Revised Statutes.

indictment and recommended the minimum sentence of ten-years' imprisonment.

Before accepting Gray's guilty plea, the trial court engaged in a careful and thorough colloquy with him to insure that he understood both the charge and the implications of his plea. On November 15, 2002, Gray was sentenced in accordance with the Commonwealth's recommendation and was ordered to pay a \$1,000.00 fine.

Several months later, the Supreme Court of Kentucky rendered its decision in Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003), in which it analyzed the provisions of KRS 218A.1432(1)(b) (the statute specifically defining the offense of manufacturing methamphetamine). The statute provides as follows:

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.

(Emphasis added.) In Kotila, the Supreme Court construed the phrase "the chemicals or equipment" as authorizing a conviction only if the defendant possessed "all of the chemicals or all of

the equipment necessary to manufacture methamphetamine." 114 S.W.3d at 237.

Shortly after the opinion was rendered, Gray filed a *pro se* motion for relief pursuant to the provisions of RCr 11.42. Gray argued that he did not possess all of the chemicals or all of the equipment necessary for the manufacture of methamphetamine at the time of his arrest. He contended that his counsel's failure to "analyze and research the statute under which [he] was charged" and to "realize that the evidence obtained by the police was insufficient to sustain the charge" amounted to ineffective assistance of counsel as provided in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). He also claimed that his plea was not constitutionally valid since it was not entered "knowingly and voluntarily." The trial court summarily denied Gray's motion to vacate the judgment of conviction, and Gray filed the first of the appeals now before us.

Gray then filed a motion pursuant to the provisions of CR 60.02. Again in reliance on the court's holding in Kotila, Gray contended that he should be relieved of the judgment of conviction since the Commonwealth would not have been able to produce evidence sufficient to convict him of the charge of manufacturing methamphetamine if he had chosen to go to trial rather than to plead guilty. The trial court denied this motion

as well, and Gray accordingly filed his second notice of appeal. These separate appeals have been consolidated for our review.

Gray contends that since he did not possess any quantity of anhydrous ammonia (a reduction agent necessary for the manufacture of methamphetamine) or its tank at the time of his arrest, Kotila precluded his conviction for manufacturing methamphetamine. He argues that the trial court erred by summarily denying his motion for relief from the conviction since his counsel failed to move for a dismissal of the charges against him, advising him instead to negotiate a plea agreement with the Commonwealth. We disagree with this contention.

In order to demonstrate that his counsel was ineffective, Gray "must [first] show that counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-688. A court "deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, **viewed as of the time of counsel's conduct.**" Id. at 690 (emphasis added).

With respect to the reasonableness of counsel's conduct, an attorney's performance must be evaluated "on the basis of the existing law as there is no general duty on the part of defense counsel to anticipate changes in the law." United States v. Davies, 394 F.3d 182, 189 (3d Cir.

2005)(quoting Gov't of Virgin Islands v. Forte, 865 F.2d 59, 62 (3d. Cir. 1989). Our Court recently reiterated this very principle in a similar context involving a methamphetamine case in Elkins v. Commonwealth, 154 S.W.3d 298, 300 (Ky. 2004). The Elkins court relied on the highly pertinent reasoning of the landmark United States Supreme Court case of Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970):

[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

KRS 218A.1432(1) was enacted in 1998. Until the Supreme Court rendered its decision in Kotila, the statutory provision had been interpreted broadly to support a conviction if a defendant possessed **any** of the chemicals or equipment for the manufacture of methamphetamine -- coupled with an intent to manufacture the substance.

The record demonstrates that Gray's counsel knew that at the time of his arrest, Gray had the requisite intent to

manufacture methamphetamine and that he possessed the equipment and every chemical necessary to produce the substance -- with the sole exception of anhydrous ammonia. There is no indication that Gray's counsel could have prevailed on a motion to dismiss the charge of manufacturing methamphetamine merely by arguing that Gray did not possess anhydrous ammonia or a tank within which to transport it at that time. In light of the interpretation of the law prevailing at the time of the representation, Gray's counsel acted wholly reasonably by advising him to accept the favorable plea offer made by the Commonwealth. The trial court correctly determined that the record refutes Gray's claim of defective performance of counsel; thus, he was not entitled to an evidentiary hearing or the appointment of counsel on this claim.

Gray also argues that the judgment and sentence must be set aside since the Commonwealth did not have sufficient evidence against him to support a conviction of manufacturing methamphetamine. However, as the Commonwealth correctly observes, Gray forfeited the right to attack any alleged insufficiency in its case against him by pleading guilty to the offense.

Entry of a voluntary, intelligent plea of guilty has long been held by Kentucky Courts to preclude a post-judgment challenge to the sufficiency of the evidence. The reasoning behind such a conclusion is obvious. A

defendant who elects to unconditionally plead guilty admits the factual accuracy of the various elements of the offense with which he is charged. By such an admission, a convicted appellant forfeits the right to protest at some later date that the state could not have proven that he committed the crimes to which he pled guilty. To permit a convicted defendant to do so would result in a double benefit in that the defendants who elect to plead guilty would receive the benefit of the plea bargain which ordinarily precedes such a plea along with the advantage of later challenging the sentence resulting from the plea on grounds normally arising in the very trial which defendant elected to forego.

(Citations omitted.) Taylor v. Commonwealth, 724 S.W.2d 223, 225 (Ky.App. 1986).

In evaluating the element of waiver, we must also analyze the well-recognized principle that the plea must have been made "knowingly and voluntarily." See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 273 (1969). Gray relies on this exception as the basis of his final argument. He asserts that the record reveals that neither he nor his counsel properly understood the essential elements of the crime with which he was charged. He also believes that the court misrepresented those elements. If these contentions are correct, Gray's guilty plea could not be deemed constitutionally valid. See Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998).

The parties agree (and the meager record in this case reflects) that at the time of his arrest, Gray possessed all of the chemicals necessary for the "Nazi method" of manufacture of methamphetamine -- with the exception of the anhydrous ammonia that he believed would be supplied to him by Combs. The record also reveals that Gray possessed all of the equipment (mostly household items) that a jury could conclude was needed for the manufacture of methamphetamine except for a storage container for the ammonia. See Fulcher v. Commonwealth, 149 S.W.3d 363 (Ky. 2004). The necessary container was supposed to have been provided to Gray by Combs. The items recovered during Gray's arrest on June 19, 2002, were sufficient evidence to support a conviction of manufacturing methamphetamine under the prevailing construction of KRS 218A.1432(1)(b) as applied by the courts at the time of his arrest and indictment.

After our review of the comprehensive colloquy between the trial court and Gray -- and especially in view of the pre-Kotila state of the law, we do not agree that Gray's plea was not entered voluntarily and intelligently. We find no constitutional infirmity.

We affirm the judgment of the Grant Circuit Court.

ALL CONCUR.

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