

RENDERED: March 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002302-MR

MATTHEW WAYNE HOWARD

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NOS. 00-CR-00100 AND 00-CR-00148

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: Matthew Howard, *pro se*, appeals from an order of August 18, 2003, of the Daviess Circuit Court which denied his post-conviction motion for relief filed pursuant to RCr¹ 11.42. As we have found no error, we affirm.

On April 10, 2000, the Daviess Grand Jury returned an indictment charging Howard with nine criminal acts: trafficking in methamphetamine (three counts); cultivating marijuana (five

¹ Kentucky Rules of Criminal Procedure.

plants or more); possession of a controlled substance in the first degree; possession of drug paraphernalia (two counts); criminal attempt to manufacture methamphetamine; and theft by unlawful taking of property valued at less than \$300. On May 2, 2000, the grand jury returned another indictment charging Howard with manufacturing methamphetamine in violation of KRS² 218A.1432 and being a persistent felony offender (PFO) in the first degree.

While represented by counsel, Howard negotiated a plea agreement with the Commonwealth concerning all of the charges contained in both indictments. Pursuant to the agreement, Howard pled guilty to eight of the nine offenses charged in the first indictment; with respect to the remaining item, the Commonwealth moved for the dismissal of the charge of criminal attempt to manufacture methamphetamine. It recommended a sentence of seven years in prison for the charge of manufacturing methamphetamine contained in the second indictment. Howard pled guilty to the crime of manufacturing methamphetamine. In exchange for this plea, the Commonwealth recommended a sentence of ten years (to be served consecutively as to the seven-year sentence) and dismissed the PFO count of the indictment.

² Kentucky Revised Statutes.

In accepting the guilty pleas, the trial court engaged in a careful and thorough colloquy with Howard to insure that he understood the charges against him and the implications of his plea. On January 5, 2001, Howard was sentenced in accordance with the Commonwealth's recommendation to serve seventeen (17) years in prison.

On July 31, 2003, Howard, *pro se*, filed a motion pursuant to RCr 11.42 to vacate his conviction for manufacturing methamphetamine under the second indictment. He raised numerous grounds as the basis for post-conviction relief. The motion was denied, and this appeal followed.

Howard has abandoned all but one of the claims raised in his RCr 11.42 motion. In his only remaining claim, Howard contends that his plea of guilty to the charge of manufacturing methamphetamine was nullified by Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003), in which the Supreme Court examined and construed KRS 218A.1432(1)(b).

KRS 218A.1432(1) 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.

Rendered three years after Howard's conviction, Kotila holds that a conviction for manufacturing methamphetamine under

subsection (b) of KRS 218A.1432(1) cannot be obtained unless the Commonwealth proves that the defendant possessed **all** of the chemicals necessary to produce the drug or **all** of the necessary equipment. Id. at 240-241. Howard argues that he did not possess either all of the chemicals or all of the necessary equipment. Therefore, he could not have been found guilty under Kotila's interpretation of 218A.1432(1)(b). He contends that his plea was necessarily involuntary and unintelligent and that, therefore, his conviction should be set aside.

Although [Howard] pled guilty to Manufacturing Methamphetamine he is entitled to relief in this case because his plea was not knowing and intelligent and because at the time of the plea he was misinformed about the law. Thus, although he pled guilty to manufacturing methamphetamine, he did so while misunderstanding the substance of the offense. As such defense counsel would have apprised him of the elements of manufacturing methamphetamine, understood at the time of the plea to be less than all the chemicals or equipment. It would therefore be in violation of due process and inequitable to give this judgment further application and the judgment of the trial court should be reversed and remanded with directions to vacate and set aside the manufacturing methamphetamine conviction.

(Appellant's brief, at p. 8.)

In response to Howard's argument, the Commonwealth correctly observes that Kotila focused solely **on subsection (b)** of KRS 218A.1432(1), which defines the elements of the offense as: (1) the possession of the necessary ingredients or tools to

manufacture methamphetamine and (2) the requisite intent to manufacture the drug. The Commonwealth argues that Kotila has no effect on Howard's unconditional guilty plea to the actual manufacture of methamphetamine as set forth by subsection (a) of KRS 218A.1432(1).

Our review of the plea proceedings reveals that Howard unequivocally admitted to **manufacturing** methamphetamine -- not to the mere possession of some of the ingredients or some of the equipment. Thus, we conclude that Howard's plea was neither affected nor rendered involuntary by the clarification of the law in Kotila. See also, Fulcher v. Commonwealth, 149 S.W.3d 363 (Ky. 2004).

Howard argues that the Commonwealth did not have sufficient evidence against him to support a conviction for manufacturing methamphetamine. However, when he entered into a plea agreement with the Commonwealth, he forfeited the right to attack any alleged insufficiency in the Commonwealth's case against him.

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 offenses 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 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).

The judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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