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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000871-MR

MICHAEL D. ROBINSON

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 01-CR-00025

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Michael D. Robinson appeals, pro se, from an opinion and order entered by the Muhlenberg Circuit Court on April 1, 2004, denying his CR 60.02 motion. We affirm.

Robinson was indicted on February 23, 2001, on the charges of manufacturing methamphetamine in violation of KRS 218A.1432 and being a persistent felony offender in the second

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

degree (KRS 532.080). The indictment as to the manufacturing of methamphetamine stated that Robinson had:

Committed the offense of manufacturing methamphetamine by manufacturing methamphetamine or possession the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.

The indictment complied with the language of KRS 218A.1432, which states:

- (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.

Robinson's motion to suppress the evidence seized and statements made by Robinson and his co-defendant, Robert W. Noffsinger, was denied. Robinson then entered a conditional plea of guilty to the manufacturing methamphetamine charge. The PFO II and another charge from a separate indictment (possession of a controlled substance, first degree (KRS 218A.1415)) were dismissed. Section 3 of the Commonwealth's offer on a conditional plea of guilty (AOC Form 491.1) entitled Facts of the Case stated: Defendant manufactured methamphetamine. The

form was signed by Robinson and his attorney.² Also, in relevant part, both the order on a conditional plea of guilty entered April 5, 2001, and the judgment and final sentencing entered April 24, 2001, stated:

Whereupon, pursuant to a bargain of plea, the defendant entered his conditional plea of "guilty" to the offense of manufacturing methamphetamine by manufacturing methamphetamine or possessing the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine, a Class "B" felony, a violation of KRS 218A.1432.

We have emphasized the language of the statute, the indictment, the plea and the final judgment to point out that Robinson pled guilty to the offense of manufacturing methamphetamine by manufacturing methamphetamine or possessing the chemicals or equipment to manufacture the drug. This is important because Robinson's CR 60.02 motion contends that his conviction should be vacated based upon Kotila v. Commonwealth, 114 S.W.2d 226 (Ky. 2003). In Kotila, the Kentucky Supreme Court reversed a conviction under KRS 218A.1432(1)(b) because the defendant did not possess "all of the chemicals or all of the equipment necessary to manufacture methamphetamine." Id. at 237. However, as pointed out, Robinson pled guilty to actually manufacturing methamphetamine which is a violation of KRS

² We note that Robinson did file an appeal from his conditional plea but the appeal was dismissed on his own motion. See Court of Appeals Case No. 2001-CA-001119-MR.

218A.1432(1)(a). This distinction was recently pointed out in Johnson v. Commonwealth, 134 S.W.3d 563 (Ky. 2004). Similar to this case, Johnson was charged with violation of KRS 218A.1432(1) manufacturing methamphetamine. Following a jury trial, the court instructed the jury as to both KRS 218A.1432(1)(a) manufacturing methamphetamine and KRS 218A.1432(1)(b) possessing the chemicals or equipment for manufacturing the drug. In addressing this issue in light of Kotila, the Court, in Johnson, held:

On appeal, Johnson argues that the instructions given in this case violated his right to a unanimous verdict because there was insufficient evidence to support his conviction under Part B of the instruction above, and, therefore, he was denied his right under the Kentucky Constitution to a unanimous verdict. We disagree.

We begin by noting that there was sufficient evidence to convict Johnson of actually manufacturing methamphetamine under Part A of the above instruction. This evidence consisted of five glass jars containing a solid residue of methamphetamine, a glass jar containing methamphetamine oil, and testimony from a number of witnesses that either put Johnson in possession of some of the chemicals and equipment necessary to manufacture methamphetamine or explained how he obtained possession of these items.

On appeal, Johnson argues that the Commonwealth failed to introduce evidence that Johnson had possession of either all of the chemicals or all of the equipment used to manufacture methamphetamine with the intent of manufacturing it. Thus, Johnson

argues that there was insufficient evidence to convict him of manufacturing methamphetamine under KRS 218A.1432(1)(b), see *Kotila v. Commonwealth*, Ky., 114 S.W.3d 226, 240-41 (2003), and, therefore, he was denied his right to a unanimous verdict. See, e.g., *Burnett v. Commonwealth*, Ky., 31 S.W.3d 878, 884 (2000). (When a juror is presented, in a single instruction, alternate theories of guilt for the same offense, "each juror's verdict [must] be based on a theory of guilt in which the Commonwealth has proven each and every element beyond a reasonable doubt.") But Johnson ignores the fact that there was sufficient evidence to support his conviction for actually manufacturing methamphetamine under Part A of the manufacturing instruction.

A necessary inference from proof of actual manufacture is that, at some point in time, he must have had possession of both all the equipment and all the ingredients necessary to manufacture methamphetamine. In other words, just as you can't make an omelet without breaking some eggs, you can't make methamphetamine without having possession of the necessary chemicals and equipment. Nor, as demonstrated in the next section, it is likely that someone would inadvertently combine the chemicals and use the equipment to manufacture methamphetamine by accident. Thus, intent to manufacture can be inferred from the act of manufacturing as well. Therefore, we hold that there was sufficient evidence to convict Johnson under both versions of the manufacturing instructions. There was no error. *Wells v. Commonwealth*, Ky., 561 S.W.2d 85, 88 (1978).

Johnson, 134 S.W.3d at 567-578.

We note that Robinson pled guilty to actually manufacturing methamphetamine. Also, at the suppression

hearing, Robinson and co-defendant Noffsinger made statements that were admitted into evidence. The court determined that the statements were freely given after the defendants had been advised of their constitutional rights and waived same. The statement by each defendant admitted they had possessed the necessary chemicals to manufacture methamphetamine and, in fact, had manufactured such. Noffsinger stated, "I had made crank today on a haul road using the componets (sic) and was (sic) found on 8594 Hyway (sic) 70 W, Kathy Noffsinger's. The componets (sic) at my mother's residence was used today to manufature (sic) meth also." Robinson made two separate statements. His first included the statement that "[t]he bag of crank that you found on me I made today out at a gravel road." The second statement admitted into evidence at the suppression hearing and signed by Robinson stated:

I, Michael Robinson, freely admit to having all items including the red container of anhydrous ammonia acid to produce and manufacture meth that was on the property belonging to Kathy Noffsinger on 8594 Highway 70 West. Also, the meth I had on me that the Greenville Police Department found on me tonight was made from these components found on 8594 Highway 70 West at Kathy Noffsinger's.

The trial court relied on Johnson v. Commonwealth, 103 S.W.3d 687 (Ky. 2003) and Taylor v. Commonwealth, 724 S.W.2d 223 (Ky.App. 1986), in denying Robinson's CR 60.02 motion. The

court was correct in that these cases preclude a post-judgment challenge to the sufficiency of the evidence following a guilty plea. However, we believe that the more correct reason for denying Robinson's CR 60.02 motion is that he admitted to and pled guilty to the actual manufacturing of methamphetamine under KRS 218A.1432(1)(a) and that his reliance on Kotila is misplaced and erroneous.

For the foregoing reasons, the opinion and order of the Muhlenberg Circuit Court denying Robinson's CR 60.02 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael D. Robinson, Pro Se
Central City, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Frankfort, KY