

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000987-MR

RANDALL SPIVEY

APPELLANT

v. APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 02-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, McANULTY AND MINTON, JUDGES.

GUIDUGLI, JUDGE: Randall Spivey appeals from a judgment of the Jackson Circuit Court reflecting a jury verdict of guilty on one count of manufacturing methamphetamine. Spivey contends that the evidence failed to support his conviction, that laboratory results were improperly admitted into evidence, and that the jury was not instructed on an essential element necessary for conviction. For the reasons stated below, we affirm the judgment on appeal.

On November 18, 2001, Jackson County Sheriff Tim Fee received an anonymous complaint of a strong odor and possible methamphetamine manufacturing occurring in an abandoned barn. Fee investigated, and after receiving information from the barn's owner that no one should be present in the barn, he approached the barn with three deputies. Fee smelled ether emanating from the barn area, and observed Spivey come out of the barn and pour or dump something into a creek. A second individual, William Lawson, appeared to be burning something outside the barn. Spivey was also observed moving things around in the barn.

Spivey and Lawson began walking away from the barn and were taken into custody. The barn was searched, and Fee and the deputies found evidence of methamphetamine manufacturing, including a tank of anhydrous ammonia, coffee filters, cans of starter fluid, and pseudo-ephedrine. A dough-like substance was found in the creek. A Kentucky State Police laboratory analysis of the substance found that it contained pseudo-ephedrine/ephedrine.

In March, 2002, the Jackson County grand jury indicted Spivey for manufacturing methamphetamine by possessing chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine. The matter was tried before a jury on October 22, 2002, where Spivey testified that

he was merely visiting a friend who lived near the barn. Spivey stated that he heard dogs barking and went with Lawson to investigate. Noticing that a horse had no hay or water, Spivey said that he went to get water at the creek while Lawson went into the barn to get hay. Spivey denied having any connection to the material found in the barn which could be used to manufacture methamphetamine.

The matter went before the jury, which returned a guilty verdict. Spivey later received a sentence of ten years in prison. This appeal followed.

Spivey first argues that the evidence produced at trial failed to support the conviction. He maintains that he was entitled to a directed verdict because the Commonwealth failed to prove that he possessed the chemicals and equipment found in the barn. He argues that he exercised no dominion and control over the items, that the barn was not locked and was easily accessible to anyone, and that he had no property interest in the barn or the realty. He further contends that no evidence exists proving the element of intent. In sum, he maintains that the trial court erred in failing to grant his motion for a directed verdict, and he seeks an order reversing his conviction.

We find no error in the trial court's denial of Spivey's motion for a directed verdict. We must first note that

this issue is not preserved for appellate review. Spivey moved for a directed verdict at the close of the Commonwealth's evidence, but did not renew the motion at the close of all of the evidence. This failure, taken alone, forms a sufficient basis for sustaining the trial court's ruling on this issue.¹ The alleged error does not arise to the level of palpable error affecting Spivey's substantial rights.²

Arguendo, even if the denial of the motion for a directed verdict were appealable, we would find no error. Commonwealth v. Benham³ sets forth the standard for reviewing motions for a directed verdict. It states that,

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.[⁴]

¹ RCr 10.24; Commonwealth v. Pevely, 759 S.W.2d 822 (Ky. App. 1988).

² CR 61.02.

³ 816 S.W.2d 186 (Ky. 1991)

⁴ Benham, 816 S.W.2d at 187.

Under the evidence as a whole, it was not clearly unreasonable for the jury to conclude that Spivey possessed the chemicals and equipment found in the barn. The jury heard direct testimony that law enforcement personnel observed Spivey in the barn with the chemicals and equipment, and saw him dump a substance in a creek. The substance was later found to contain pseudo-ephedrine/ephedrine, which is a component used in the manufacturing of methamphetamine. Spivey also was found to be in possession of a lithium battery, which contains a compound (lithium) used to manufacture methamphetamine. Drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, the trial court properly denied Spivey's motion for a directed verdict. We find no error in this ruling.

Spivey next argues that the trial court erred in failing to rule that certain laboratory results were inadmissible for lack of chain of custody. He states that there was some discrepancy in the record regarding which Kentucky State Police officer delivered an evidence bag to the state police laboratory. He argues that because the chain of custody was not precisely established, and since the laboratory's chemical analysis cannot be discounted as harmless, the trial court erred in allowing the evidence to be admitted.

We find no error on this issue. Absolute precision in the chain of custody is not required.⁵ "All possibility of tampering does not have to be negated. It is sufficient in these cases that the actions taken to preserve the integrity of the evidence are reasonable under the circumstances."⁶

While a discrepancy exists in the record as to which individual delivered the evidence bag to the laboratory, it is uncontroverted that the bag was at all times in police custody and was delivered either by detective David Hoffman or officer Joey Barnes. The bag was secured by a tamper-proof seal at the crime scene and remained in that condition until opened by KSP laboratory personnel. We cannot conclude that the KSP's actions to preserve the evidence were unreasonable under the circumstances, and there is no basis for finding error on this issue.

Spivey's final argument is that the jury was not instructed on an essential element for conviction. He points to Kotila v. Commonwealth⁷ for the proposition that one cannot be convicted under KRS 218A.1432(1)(b)⁸ unless he possesses all of the equipment or chemicals necessary to manufacture

⁵ Pendland v. Commonwealth, 463 S.W.2d 130 (Ky. 1971).

⁶ Id., citing Brown v. Commonwealth, 449 S.W.2d 738 (Ky. 1969).

⁷ 114 S.W.3d 226 (2003).

⁸ KRS 218A.1432(1)(b) states in relevant part that "[A] person is guilty of manufacturing methamphetamine when he knowingly and unlawfully . . . [p]ossesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine."

methamphetamine. Since the jury instructions in the instant case did not use the word "all" to describe the equipment and chemicals, Spivey maintains that an essential element to the case is absent and that the trial court erred in failing to so rule.

This argument must fail for two reasons. First, and as Spivey acknowledges, this argument was not raised below and is not preserved for appellate review. One may not raise on appeal a claim of error regarding the instructions without having given the trial court the opportunity to correct the alleged error.⁹ And second, Kotila was not rendered until after Spivey was found guilty and it cannot be applied retroactively. The instructions properly reflected the elements of KRS 218A.1432(1)(b), and we find no error on this issue.

For the foregoing reasons, we affirm the judgment of the Jackson Circuit Court.

ALL CONCUR.

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⁹ RCr 9.54.