

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001196-MR

KENNETH GOURLEY

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 03-CR-00063

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Kenneth Gourley appeals from a judgment of the Fulton Circuit Court convicting him of complicity to tampering with anhydrous ammonia with intent to manufacture methamphetamine. Gourley contends that the evidence at trial was insufficient to warrant the court submitting the case to the jury and that the court should have directed a verdict on the charge. We disagree and thus affirm.

On August 16, 2003, an officer discovered a vehicle parked behind an anhydrous ammonia storage facility called Speed

Ag Service. The driver of the vehicle was a young woman named Mary Collins. Collins was the fiancée of Robert Cahill. She acknowledged to the officer that she had driven Gourley and Cahill to the location so that they could steal anhydrous ammonia.

After investigating further and finding that the anhydrous ammonia tank had been tampered with, the officer realized that Gourley and Cahill had fled into a nearby cornfield. He ordered them out of the field, threatening to release a canine unit. Cahill emerged from the field and was arrested, but Gourley had fled the scene.

Melissa Harrison, who lives about a mile and one-half from Speed Ag, testified that Gourley appeared at her front door that same evening. Gourley told Harrison that his car had run out of gas and that he would pay her to use her telephone. Harrison did not let Gourley into the house, and she contacted a neighbor for help.

Police arrived on the scene a short time later and confronted Gourley. The officer who questioned Gourley said that Gourley was dirty and had cuts and scratches on his arms as if he had been running through a field of dry corn stalks. The officer asked Gourley what he was doing at the Harrison residence, and Gourley said his car had run out of gas and he needed to use a telephone. The officer had already talked to

Collins at Speed Ag, and she told the officer that Cahill and Gourley had been there with her before the police arrived. When the officer confronted Gourley with this information, he changed his story and admitted being at Speed Ag.

A Fulton County grand jury indicted Gourley and Cahill on several criminal offenses. The circuit court held a jury trial in February 2004. The Commonwealth called Mary Collins as a hostile witness, and she testified that her memory of the events was faulty. The Commonwealth attorney then presented her with her prior sworn statement about the incident. Collins testified that the previous statement was true. She further claimed she did not know whether Gourley and Cahill were going to manufacture methamphetamine themselves or if someone else was going to do it.

The Commonwealth also presented the testimony of the officer who first saw the car parked at Speed Ag. He testified that he called for backup and later found Cahill coming out of a nearby cornfield. Further, the Commonwealth presented testimony from a deputy sheriff in Fulton County who testified as to the physical evidence at the scene. He stated that he found the top portion of a plastic soft drink bottle affixed to the large tank using duct tape and a length of hose attached to the bottle top. Apparently, the perpetrators used the plastic top to funnel the substance into the hose and then into a separate container.

The deputy stated that he found these items still attached to the tank and that anhydrous ammonia was still leaking out of it. The hose matched a length of hose found in the vehicle. The deputy also found the lid to a container, but no container to match. In the vehicle, the deputy found aluminum foil, wire ties that matched the wire ties found on the tank, and some yellow Vivarin pills. The next day the deputies went back to the field and found a container with a small amount of liquid inside that had the odor of ammonia.

Several law enforcement officers testified at trial about methamphetamine labs and production. The Fulton County sheriff, who had extensive training in the area of methamphetamine labs, testified about the various unauthorized containers he had seen used to hold anhydrous ammonia, including the one found in the cornfield behind Speed Ag. He stated that from his experience he knew of no purpose for putting the substance into such a container other than for use in methamphetamine production. The sheriff acknowledged, however, that the ammonia could be traded to a manufacturer and that none of the evidence at the scene indicated that Gourley and Cahill were going to manufacture the drug themselves.¹

¹ No precursors were found at the scene, in the vehicle, or on the persons of Gourley, Cahill, or Collins.

Following the close of the Commonwealth's case, Gourley's counsel moved the court for a directed verdict of acquittal on the charge, arguing that there was insufficient evidence of intent. The court conceded that the issue was "close," but it overruled the motion, stating that there was enough evidence to present the manufacturing charge to the jury. When the court instructed the jury at the close of the case, it included an instruction on the lesser-included offense of complicity to tampering with anhydrous ammonia. The purpose of the instruction was to allow the jury to convict the defendants of the lesser-included offense in the event it did not believe beyond a reasonable doubt that Gourley and Cahill had the intent to manufacture methamphetamine.

The jury found Gourley guilty of the greater offense, complicity to tampering with anhydrous ammonia with the intent to manufacture methamphetamine, a Class B felony. The jury also found Gourley guilty of complicity to third-degree criminal trespass. Pursuant to the jury's recommendation, the court sentenced Gourley to ten years in prison, the minimum sentence for the tampering charge, and fined him \$250 on the trespass charge. This appeal followed.

The applicable statute states as follows:

- (1) It shall be unlawful for any person to tamper with equipment, containers, or facilities used for the storage,

handling, transporting, or application of anhydrous ammonia.

- (2) Tampering occurs when any person who, having no right to do so, or any reasonable ground to believe that he has the right for a legitimate or legal purpose, transfers or attempts to transfer anhydrous ammonia to another container, or intentionally or wantonly defaces, destroys, or damages the equipment, container, or facility containing anhydrous ammonia.

KRS² 250.4892. KRS 250.991(3) states that "[a] violation of KRS 250.4892 is a Class D felony unless it is proven that the person violated KRS 250.4892 with the intent to manufacture methamphetamine in violation of KRS 218A.1432, in which case it is a Class B felony for the first offense and a Class A felony for each subsequent offense."

Gourley was charged and convicted as an accomplice to Cahill under the complicity statute. See KRS 502.020. The applicable jury instruction allowed the jury to find Gourley guilty if it believed that he "aided and assisted Robert Curtis Cahill, III" in committing the crime.

Gourley argues in this appeal that there was insufficient evidence of intent to manufacture methamphetamine. He asserts, therefore, that the court should have granted his motion for a directed verdict on that issue and should have

² Kentucky Revised Statutes.

instructed the jury solely on the charge of complicity to tampering with anhydrous ammonia, the lesser-included offense.

The directed verdict rule is set out in Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991), as follows:

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.

Id. at 187. "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." Id. Further, "there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." Id.

There was little physical evidence suggesting that Gourley and Cahill had the intent to manufacture methamphetamine. However, the circumstances of the crime and testimony from witnesses constituted sufficient evidence to submit the charge to the jury. Gourley and Cahill trespassed

onto private property in order to steal anhydrous ammonia, a necessary ingredient for the manufacture of methamphetamine. They had been driven to the scene by Collins, who acknowledged that she had used methamphetamine in the past. Further, the implication she made in her statement was that the anhydrous ammonia was going to be used in connection with the manufacture of methamphetamine, although she stated she did not know if Gourley and Cahill were going to manufacture the drug themselves.

In addition to the circumstances surrounding the crime, the testimony from the Commonwealth's witnesses provided information from which the jury could conclude that Gourley and Cahill were going to manufacture methamphetamine themselves. In short, we conclude that the circumstances surrounding the crime together with the testimony of Collins and the law enforcement officers provided sufficient evidence to overcome Gourley's directed verdict motion.

The judgment of the Fulton Circuit Court is affirmed.

ALL CONCUR.

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