

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-001313-MR

KENNETH ROSE

APPELLANT

v. ON REMAND FROM SUPREME COURT OF KENTUCKY  
NO. 2006-SC-0191-DG

APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE R. JEFFREY HINES, JUDGE  
ACTION NO. 02-CR-00173

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, SCHRODER, AND TAYLOR, JUDGES.

SCHRODER, JUDGE: This case is on remand from the Kentucky Supreme Court for reconsideration of our prior decision in light of Matheney v. Commonwealth, 191 S.W.3d 599 (Ky. 2006). Our prior decision was based on Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003), which was abrogated by Matheney. In light of Matheney, we affirm the trial court in denying Rose's motion pursuant to CR 60.02 to vacate his conviction for attempt to manufacture methamphetamine.

The facts as summarized previously by this court are as follows:

On or about May 22, 2002, Kenneth Rose went shopping with Wayne Welch at the Kroger store in Paducah, Kentucky. They purchased a large quantity of pseudoephedrine pills and left. The police were notified and the Paducah Police Department stopped a motor vehicle being driven by Welch. Welch consented to a search of the vehicle and the following was recovered:<sup>1</sup> "pill bottle with a missing label with white powder residue, a jean jacket in the back seat with electronic scales, 288 pills of pseudoephedrine, and two boxes of matches."<sup>2</sup> Rose, who was a passenger in the vehicle, told two detectives on the scene that "I am going to get you" and "I'll get payback." While being booked into jail, Rose also gave his father's social security number as his own.

Rose was indicted by the McCracken County Grand Jury on May 30, 2002 for Attempt to Manufacture Methamphetamine,<sup>3</sup> Terroristic Threatening,<sup>4</sup> Disorderly Conduct,<sup>5</sup> and Giving a False

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<sup>1</sup> From the Bill of Particulars.

<sup>2</sup> 2000 red-phosphorous tipped matches (from Commonwealth's response to CR 60.02 motion).

<sup>3</sup> KRS 218A.1432.

<sup>4</sup> KRS 508.080.

<sup>5</sup> KRS 525.060.

Name or Address to a Police Officer.<sup>6</sup> On August 23, 2002, Rose entered a plea of guilty to all charges, and was sentenced to eight (8) years for the Attempt to Manufacture Methamphetamine conviction, twelve (12) months on the Terroristic Threatening conviction, ninety (90) days each on the Disorderly Conduct and Giving False Information convictions, all to run concurrently for a total sentence of eight (8) years.

After Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003), was decided by the Kentucky Supreme Court, Rose filed a CR 60.02 motion to vacate his conviction on the grounds that he too did not have all the equipment nor all the chemicals required to manufacture methamphetamine. The circuit court denied said motion and Rose appealed to this Court. On appeal, Rose contended that his conviction for attempt to manufacture methamphetamine should be vacated because Kotila defines KRS 218A.1432(1)(b) in such a way that his conduct did not constitute a crime, or any attempt to commit a crime.

In Kotila, 114 S.W.3d at 240-241, the Kentucky Supreme Court construed the language of KRS 218A.1432(1)(b) as requiring that a defendant possess all of the chemicals or all of the equipment necessary to manufacture methamphetamine. Kotila further held that, in the absence of certain circumstances, the lesser included offense of criminal attempt to manufacture

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<sup>6</sup> KRS 523.110.

methamphetamine could also not be found where the defendant possessed less than all of the chemicals or all of the equipment. Id. at 243-246. As Rose was not in the process of manufacturing, and as he possessed only some of the chemicals, we concluded that, under Kotila, he could not be found guilty of criminal attempt. Accordingly, in an opinion rendered on October 21, 2005, we held that Kotila entitled Rose to CR 60.02 relief as to the attempt to manufacture methamphetamine conviction.

In 2006, the Kentucky Supreme Court rendered its decision in Matheney v. Commonwealth, 191 S.W.3d 599 (Ky. 2006), wherein the Court held that Kotila was wrongfully decided. Matheney held that Kotila's construction of KRS 218A.1432(1)(b), as requiring all of the chemicals or all of the equipment necessary to manufacture methamphetamine, was incorrect. Abrogating Kotila, Matheney held "[w]e construe the language in KRS 218A.1432(1)(b) that states 'the chemicals or equipment for the manufacture of methamphetamine' to mean that one must possess two or more chemicals or items of equipment with the intent to manufacture methamphetamine to fall within the statute." Matheney, at 604.

In light of Matheney, we conclude that Rose is not entitled to relief under CR 60.02. The judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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