

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001500-MR

DOUGLAS C. NORDIKE

APPELLANT

APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE JOHN R. GRISE, JUDGE
INDICTMENT NOS. 02-CR-00726 & 02-CR-00726-004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

DYCHE, JUDGE: Douglas C. Nordike is currently serving a ten year sentence for two counts of knowingly possessing anhydrous ammonia in other than an approved container (KRS 250.991) and one count of complicity to manufacture methamphetamine (KRS 218A.1432(1)(a) and KRS 502.020). He appeals, making five arguments. We affirm.

Nordike was the owner of record of less than ten acres in Warren County, Kentucky. Of this acreage, approximately four were tillable; there were two wooden structures on the property; the property looked otherwise abandoned. On May 23, 2002, with

the permission of an adjoining landowner, the Kentucky State Police and Warren County Drug Task Force conducted surveillance of Nordike's property. The police were able to verify a tipster's representation that a large tank of anhydrous ammonia was present on the property. Although the large tank was a legal anhydrous ammonia container, its contents were being transferred into several smaller (1,000 gallon), unauthorized containers which were partially buried in pits dug into the ground of an old hog barn. The barn itself was completely open to view on one side.

By day's end, the surveillance team witnessed the manufacture of methamphetamine by several men. Although Nordike was not a party to the actual mixing of ingredients, he was present on the property during part of the day, he owned the property, he and another were the purchasers of the anhydrous ammonia, he off loaded the anhydrous ammonia into the smaller tanks, he returned the nurse tank to the farm supply store whence it came, and he owned the vehicle driven by one of the manufacturers of methamphetamine. All were indicted for their part in the illegal manufacturing of methamphetamine. Nordike's indictment included seven counts; he was convicted of three and was sentenced as previously mentioned.

On appeal Nordike first complains that he was improperly denied a directed verdict of acquittal on the charge

of manufacturing methamphetamine by complicity. He maintains that the Commonwealth's proof was "absolutely lacking" or "circumstantial at best" in regard to any covert act which would tie him to the cooking of methamphetamine.

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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991)(citation omitted). In addition to the facts already disclosed, the Commonwealth introduced evidence that there were no crops planted (nor had there ever been) on Nordike's farm; that, in spite of his four tillable acres, he purchased enough anhydrous ammonia to fertilize eighty to one hundred acres; that in 2002 anhydrous ammonia sold for up to \$1,000 per gallon, and Nordike had 2,250 gallons for sale. There was additional evidence that this was not the first but the second methamphetamine cook

attended by Nordike. Thus, “[t]he prosecution produced evidence that was considerably more than a mere scintilla and the case was properly presented to the jury for determination.” Id. at 188.

Nordike argues next that the trial court erred in its instruction to the jury on complicity to manufacture methamphetamine. Nordike bases this argument on Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003), cert. denied, 540 U.S. 1198 (2004), superceded by statute in KRS 218A.1432(1)(b) (2005) (now requiring possession of only two or more chemicals or items of equipment). See also Varble v. Commonwealth, 125 S.W.3d 246 (Ky. 2004). Nordike ignores KRS 218A.1432(1)(a), which allows for conviction if a defendant manufactures methamphetamine rather than simply possesses the chemicals or equipment necessary for its production. See Johnson v. Commonwealth, 134 S.W.3d 563, 568 (Ky. 2004). As the Johnson court stated,

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, is it 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 [appellant] There was no error.

Id. We likewise find no error in the instruction.

The third issue is whether Nordike was properly denied his motion to suppress the introduction of evidence (including photographs) concerning the offending tanks used to store the anhydrous ammonia. Nordike complains that, because the tanks were destroyed prior to trial, he was “undermined of an opportunity to have an expert testify on his behalf who could indicate whether the containers did or did not conform to the statutory requirements of KRS 250.482(4).” Nordike continues that the error was compounded by the trial court’s failure to instruct the jury on missing evidence.

Appellant fails to demonstrate that inspection of the tanks would have yielded exculpatory evidence. There was overwhelming evidence that the tanks did not comply with the statutory requirements, and Nordike offers no argument that inspection by the defense would have altered that evidence in any way. The trial court correctly denied Nordike’s motion to suppress.

Nordike’s fourth argument disregards the trial court’s duty to instruct on lesser included offenses. See Parker v. Commonwealth, 952 S.W.2d 209, 211 (Ky. 1997). We decline to discuss it further.

Nordike lastly urges that he was entitled to a directed verdict of acquittal on the two counts of possessing anhydrous ammonia in other than an approved container. He insists that there was insufficient evidence that he possessed the chemical for anything other than agricultural use. To the contrary, there was more than sufficient evidence of Nordike's guilt of those two offenses, and a directed verdict of acquittal on either would have been improper. Benham, supra.

The judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

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