

RENDERED: JANUARY 27, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001921-MR

STACY DURHAM

APPELLANT

v. APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 02-CR-00027

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Stacy Durham appeals from a judgment of the Wolfe Circuit Court entered on a conditional plea of guilty on charges related to the manufacturing and trafficking of methamphetamine. Durham argued below that Count III of the indictment should be dismissed because the evidence was insufficient for a jury to conclude that he possessed all of the

¹ Senior Judge John W. Potter, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

chemicals necessary to manufacture methamphetamine. For the reasons stated below, we affirm the judgment.

On December 11, 2001, Durham was arrested in Wolfe County on charges arising from the possession, manufacturing and sale of methamphetamine. Police officers had received a tip that Durham, who had an outstanding warrant for manufacturing methamphetamine, was present at a hotel in Campton, Kentucky. Officers located Durham there and searched his hotel room and vehicle. They discovered methamphetamine, drug paraphernalia, and chemicals and hardware allegedly used for the manufacturing of methamphetamine. These items included Pyrex dishes, scales, coffee filters, tubing, a double-necked beaker, muratic acid and empty bottles of Red Devil lye.

On March 7, 2002, Durham was indicted by the Wolfe County grand jury on one count each of first degree possession of a controlled substance (methamphetamine), first degree trafficking in a controlled substance, manufacturing methamphetamine, and possession of drug paraphernalia. On December 3, 2003, he filed a motion to dismiss the manufacturing count, arguing that he did not possess all of the chemicals necessary to produce methamphetamine.

Hearings on the motion were conducted, whereupon the circuit court entered an order denying the motion to dismiss on June 22, 2004. The court found that the motion should be denied

because a jury issue was created as to whether Durham possessed all of the chemicals necessary to make methamphetamine.

On August 25, 2004, Durham entered a plea of guilty on each of the four counts of the indictment. The plea was conditioned on Durham preserving the right to appeal from the denial of his motion to dismiss the manufacturing count. This appeal followed.

Durham now argues that the circuit court erred in denying his motion to dismiss Count III (manufacturing) of the indictment. Specifically, he maintains that the court improperly failed to conclude that Kotila v. Commonwealth² requires a finding that Durham possessed all of the chemicals necessary to manufacture methamphetamine. He also argues that the statutory law requires a finding that the defendant produced useable methamphetamine, as opposed to producing merely a non-useable form of methamphetamine. Lastly, Durham contends that the Commonwealth should be barred from arguing that Durham's motion was a premature motion for a directed verdict that should have been summarily dismissed as untimely. Durham entered a conditional plea and maintains that if the motion to dismiss is found to be little more than an untimely motion for summary judgment, the plea should be set aside and the matter returned to circuit court.

² 114 S.W.3d 226 (Ky. 2003).

Having closely examined the record including reviewing the arguments presented at the motion hearing, the written arguments and the law, we find no basis for reversing the order denying Durham's motion to dismiss Count III of the indictment. While we have reviewed the Commonwealth's argument that Durham's motion was premature and the appeal should be summarily dismissed, we decline to dismiss the appeal on procedural grounds. Instead, we shall address the substantive issues raised by Durham.

Durham's first argument is that a conviction for manufacturing methamphetamine must be based on a finding that a useable rather than non-useable form of methamphetamine was produced. Durham contends that the chemicals found in his possession could produce, at most, the non-usable liquid form of methamphetamine chemically known as "methamphetamine HI". He argues that methamphetamine HI must be chemically altered to methamphetamine HCL (hydrochloride) to be useable. Since, he contends, he did not possess a sufficient array of chemicals to produce methamphetamine HCL, a conviction for manufacturing methamphetamine could not be sustained and Count III of the indictment should have been dismissed.

However, a review of the documents filed and the testimony of the Commonwealth's witnesses present sufficient evidence to support the court's denial of Durham's motion.

Jennifer Wininger, a forensic drug chemist for the Kentucky State Police, testified that she analyzed several exhibits submitted from those recovered from Durham and found pseudoephedrine, water, red phosphorous and iodine present. These items, she testified, form methamphetamine. As noted, she agreed that these chemicals would produce only non-usable methamphetamine, but methamphetamine all the same. In addition, Jack Reed, who works for the Kentucky State Police in the Central Forensic Laboratory, tested evidence recovered from Durham and identified the elements phosphorous, iodine, iron and arsenic as being present. Finally, the executed search warrant and testimony from Detective Michael Martin of the Kentucky State Police indicate that an empty jar of Red Devil lye and a commercially produced bottle labeled MURIATIC ACID were found. Although neither of these items had been tested prior to being destroyed by the detectives, they had been photographed and testimony as to their presence at the scene of Durham's arrest would have been admissible at trial.

At the time of his arrest, Durham was in possession of methamphetamine. He does not contest that charge. He was also in possession of ingredients to make non-useable methamphetamine. However, he argues that since the muriatic acid and Red Devil lye were not tested, he could not be found guilty of manufacturing methamphetamine. We disagree. In the

recent cases of Johnson v. Commonwealth³ and Varble v. Commonwealth,⁴ the Supreme Court of Kentucky held that sufficiency of the evidence is to be determined by the jury following trial. In Varble, the court held:

In Kotila v. Commonwealth, Ky., 114 S.W.3d 226 (2003), we held that the language "the chemicals or equipment" permits a conviction only if the defendant possesses "all of the chemicals or all of the equipment necessary to manufacture methamphetamine." Id. at 237. Appellant argues that because the search of his premises on November 12, 1999, did not reveal any quantity of anhydrous ammonia or any coffee filters, Kotila precluded his conviction. We disagree. The indictment charged Appellant with possessing the necessary chemicals or equipment "on or about November 12, 1999." Testimony that the odor of anhydrous ammonia was emanating from the two air tanks and that the discoloration of the brass fittings was likely caused by exposure to anhydrous ammonia was circumstantial evidence that Appellant had, in fact, possessed anhydrous ammonia in the recent past. United States v. Morrison, 207 F.3d 962, 966 (7th Cir. 2000)(odor of anhydrous ammonia emanating from cooler found in defendant's residence was circumstantial evidence that defendant had used anhydrous ammonia to manufacture methamphetamine). Appellant's argument is akin to claiming that his possession of twenty-two Sudafed blister packs would not support his conviction because the blister packs were empty. He was found in possession of all of the other chemicals necessary to manufacture methamphetamine, and it was for the jury to decide whether he

³ 134 S.W.3d 563 (Ky. 2004).

⁴ 125 S.W.3d 246 (Ky. 2004).

possessed those same chemicals at the same time that he possessed the anhydrous ammonia (and the Sudafed). The requirement is that the chemicals or equipment be possessed simultaneously, not that they be possessed at the time of the arrest. In a felony case, the failure to prove the specific date of the offense is of no consequence unless time is a material element of the offense.⁵

And in Johnson, our Supreme 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 Johnson under both versions of the manufacturing instruction. There was no error.⁶

In the more recent case of Robinson v. Commonwealth,⁷

the Supreme Court of Kentucky stated:

First, with respect to the Manufacturing Methamphetamine charge, KRS 218A.1432 (in effect at that time) enumerated two avenues of proving the crime. [KRS] 218A.1432(1)(a) provided "a person is guilty when he knowingly and

⁵ Varble, 125 S.W.3d at 254.

⁶ Johnson, 134 S.W.3d at 568.

⁷ ____ S.W.3d ____, slip op. 7-8 (Ky. 2005).

unlawfully manufactures methamphetamine;". Section (1)(b) provided "a person is guilty when he knowingly and unlawfully possesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine."

According to the evidence, numerous items commonly associated with the manufacture of methamphetamine were found in the Clemons house, where the Appellant was a resident; certain items, though not all, contained evidence of methamphetamine residue which, according to the testimony, was a common occurrence in the manufacture of methamphetamine. Additionally, a quantity of methamphetamine was found in the Appellant's bedroom and in other parts of the house. The trial court correctly determined, based upon the evidence, that the Commonwealth had met [its] burden of proof as to KRS 218A.1432(1)(a).

Moving on to KRS 218A.1432(1)(b), the Commonwealth, through its uncontraverted expert witness, Jennifer Winnegar, presented evidence that the chemicals necessary to manufacture methamphetamine a controlled substance were Lithium (or various other metals), anhydrous ammonia, and pseudoephedrine or ephedrine. She further testified that the only equipment necessary for the commission of the crime was a glass jar, like the glass pickle jar found at the Clemons house, in which to contain the necessary chemicals. Again, neither the Appellant nor his co-defendant Clemons presented any evidence to the contrary.

In a close reading of KRS 218A.1432 and 218A.1431, there is no requirement that the methamphetamine be in a "usable" form in order to [] establish a crime. In fact, [KRS] 218A.1431 defines "Methamphetamine" as any substance that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers. Considering

the evidence and testimony on this issue,
the trial court, again, correctly determined
that the Commonwealth had met its burden of
proof as to KRS 218A.1432(1)(b).

Based upon the record, the hearings and the
depositions of the several witnesses, we believe sufficient
evidence existed for the trial court to deny Durham's motions to
dismiss the manufacturing charge. Further, based upon the
recent case law as set forth above, we believe there existed
sufficient evidence upon which to base Durham's conviction for
manufacturing methamphetamine.

For the foregoing reasons, we affirm the Judgment and
Sentence on plea of guilty entered by the Wolfe Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher A. Bates
Paul J. Hershberg
Louisville, KY

ORAL ARGUMENT FOR APPELLANT:

Christopher A. Bates

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, KY

ORAL ARGUMENT FOR APPELLEE:

Ken W. Riggs