

RENDERED: DECEMBER 29, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002211-MR

JAMIE C. FERGUSON

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
INDICTMENT NO. 02-CR-00480

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

DYCHE, JUDGE: On September 21, 2002, a security guard in a Kroger store observed Jamie C. Ferguson conceal on his person several boxes of generic pseudoephedrine. When the guard approached Ferguson, the latter threw the boxes at the guard and attempted to flee. A scuffle ensued, during which Ferguson injured the guard. Ferguson ultimately admitted to his attempt to steal those pills as well as over 300 from a nearby

Walgreen's store; he stated that he used them to manufacture methamphetamine.

A Hardin Circuit Court grand jury indicted Ferguson the following month for the offenses of Manufacturing Methamphetamine, Second Degree Robbery, and the status offense of Persistent Felony Offender in the First Degree (PFO I). On January 17, 2003, Ferguson, in exchange for dismissal of the robbery charge, entered a plea of guilty to the drug offense and PFO I. He received a sentence of twenty years' incarceration, ordered to run consecutively with sentences received in Hopkins and Ohio Counties.

On February 17, 2004, Ferguson filed a motion pursuant to CR 60.02 to vacate his convictions based on the Kentucky Supreme Court's opinion in Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003). There it was decided that KRS 218A.1432(1)(b) as it was written then¹ required possession of all the chemicals or all the items of equipment necessary to effect the manufacture of methamphetamine. Ferguson insisted then, as he does here, that possession of only one chemical (albeit a vast quantity of it) rendered his guilty plea invalid as "based on . . . misinformation." The Hardin Circuit Court denied the requested relief, and Ferguson appeals. We affirm.

¹ The statute has since been amended (effective June 20, 2005) to require, for conviction of possession with intent to manufacture methamphetamine, possession of two or more chemicals or items of equipment necessary for same.

Kotila can be distinguished simply from Ferguson's situation. There the defendant maintained his innocence throughout and was tried and convicted by a jury. Ferguson made no claim of innocence. Bousley v. United States, 523 U.S. 614, 618 (1998). Cf. Fiore v. White, 531 U.S. 225 (2001). In fact, Ferguson admitted that he manufactured methamphetamine. See KRS 218A.1432(1)(a); Johnson v. Commonwealth, 134 S.W.3d 563, 570 (Ky. 2004); and Varble v. Commonwealth, 125 S.W.3d 246, 254 (Ky. 2004). It was not incumbent upon the Commonwealth to prove any of the statutory elements. The trial court properly denied Ferguson's CR 60.02 motion.

The order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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