

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002581-MR

CHAD ELLENBERGER

APPELLANT

v. ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2006-SC-0219-DG

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 99-CR-00083

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.
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

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

Matheney, we affirm the trial court's denial of Ellenberger's motion pursuant to CR 60.02 to vacate his conviction for manufacturing methamphetamine.

The underlying facts were previously summarized by this court as follows:

On May 25, 1999, the Marshall County Sheriff's Office responded to a call placed by Chad Ellenberger's grandmother complaining about a strange odor coming from her backyard. The Sheriff and a deputy responded and discovered the odor was coming from a Mason jar containing ether. They also discovered a glass dish in Ellenberger's bedroom (in the grandmother's house) containing a white powder and several used coffee filters containing a pink residue. A field test conducted on the white powder revealed it to be methamphetamine. Later that same day, Ellenberger was stopped for operating on a suspended license and consented to a search of his vehicle. The officers found a loaded pistol under the seat, an open package of coffee filters, and an empty battery package in the trunk. Ellenberger was arrested and placed into custody. The following day a deputy jailer found a white substance in a cigarette pack in Ellenberger's pants pocket which Ellenberger admitted was methamphetamine, and a razor blade, for which he was charged separately with promoting contraband.

On July 19, 1999, a Marshall County grand jury returned an indictment charging Chad Ellenberger with: Count 1, manufacturing methamphetamine "by knowingly and unlawfully being in possession of the chemicals and ingredients used to produce methamphetamine"; Count 2, carrying a concealed deadly weapon ".25 automatic handgun"; and Count 3, operating on a suspended license. Ellenberger entered a plea of not guilty and subsequently filed a motion to suppress. Before the trial court ruled on Ellenberger's motion, he accepted the Commonwealth's offer to plead guilty in exchange for the deletion of the firearm enhancement language from the methamphetamine manufacturing charge; a recommended 10-year sentence; and the Commonwealth not opposing the sentence for Ellenberger's separate promoting contraband charge running concurrently with the sentence in this case.

On November 1, 1999, Ellenberger appeared before the Marshall Circuit Court, with counsel, to withdraw his plea of not guilty and enter an unconditional plea of guilty to the pending charges, as amended.² On December 10, 1999, a Judgment and Sentence on Plea of Guilty was entered, and Ellenberger was sentenced to ten (10) years.

² In addition to pleading guilty in this case (99-CR-83), Ellenberger also pled guilty to the promoting contraband charge in 99-CR-84.

After Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003) was decided by the Kentucky Supreme Court, Ellenberger filed a CR 60.02 motion to set aside the judgment and plea on the grounds that he did not possess all the equipment nor all the chemicals required to manufacture methamphetamine. The circuit court denied said motion and Ellenberger appealed to this Court.

Prior to June 20, 2005,³ KRS 218A.1432(1) provided:

A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully:

- (a) Manufactures methamphetamine; or
- (b) Possesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.

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. Ellenberger possessed only some of the chemicals and some of the equipment necessary for manufacturing. Although there was methamphetamine in the glass dish, there was no brewing going on. We concluded,

³ Effective June 20, 2005, the General Assembly modified KRS 218A.1432(1)(b) as requiring possession of two or more chemicals or two or more items of equipment. Kotila and Matheney involve the interpretation of the prior version of KRS 218A.1432(1)(b), under which Ellenberger, whose charged conduct occurred in 1999, was convicted.

therefore, that while Ellenberger could have been found guilty of possession of methamphetamine, under Kotila, he could not be found guilty of manufacturing. Accordingly, in an opinion rendered on November 18, 2005, we held that Kotila entitled Ellenberger to CR 60.02 relief as to the manufacturing 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, Ellenberger is not entitled to CR 60.02 relief. Accordingly, the judgment of the Marshall Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Benjamin J. Lookofsky
Mayfield, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky