

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-000429-MR

MONTY THOMPSON

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT  
HONORABLE DENNIS R. FOUST, JUDGE  
ACTION NO. 00-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ABRAMSON AND GUIDUGLI, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

ABRAMSON, JUDGE: Monty Thompson appeals from a single order of the Calloway Circuit Court denying two motions, one made pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 and the other pursuant to Kentucky Rule of Civil Procedure (CR) 60.02. In both motions, Thompson sought to vacate his conviction stemming from charges related to the manufacturing of

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

methamphetamine. Thompson raises only one issue on appeal - that his conviction must be set aside pursuant to the Kentucky Supreme Court's decision in Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003), which held that a defendant could not be convicted of manufacturing methamphetamine if he possessed some, but not all, of the chemicals or equipment necessary for the drug's manufacture. As Kotila is no longer the law in the Commonwealth, we conclude that Thompson is not entitled to the relief he seeks and, thus, we affirm.

Following receipt of an anonymous tip that Thompson and others were manufacturing methamphetamine, the Calloway County Sheriff's Department executed a search warrant at Thompson's residence on December 9, 1999. As a result of the search, officers discovered several items associated with the manufacture of methamphetamine, including a plastic bag containing suspected methamphetamine, a pocket knife with suspected methamphetamine residue, a bowl of antihistamine tablets, lithium batteries, digital scales, mason jars containing approximately 36 grams of methamphetamine, an ice cream bucket that had valves showing the presence of anhydrous ammonia, a mason jar containing a dried liquid with dark colored residue, empty cans of starting fluid, jars containing methamphetamine residue and empty cans of denatured alcohol. A search at a second address resulted in the discovery of a

chemical generator, coffee filters, glass mason jars, a can of ether and a water jug smelling of anhydrous ammonia. Firearms were also found at both addresses.

On January 10, 2000, Thompson was indicted by the Calloway County Grand Jury on charges of (1) manufacturing methamphetamine by "possessing the equipment for manufacturing methamphetamine with the intent to manufacture methamphetamine"; (2) trafficking in a controlled substance (methamphetamine); (3) trafficking in marijuana; and (4) possession of drug paraphernalia. Each of the offenses was enhanced due to Thompson's possession of a firearm.

Approximately six months later, on July 7, 2000, Thompson entered an unconditional guilty plea to each of the charges set forth in the indictment.<sup>2</sup> During the plea colloquy with the trial court pursuant to Boykin v. Alabama, 395 U.S. 238 (1969), Thompson stated that he was pleading guilty of his own volition and without coercion because he was "truly guilty" of the crimes. He further admitted that he was satisfied with his counsel's advice and was of the opinion that his counsel had done a good job. As a result, the court accepted the plea after finding it to have been knowingly and voluntarily made. The court subsequently sentenced Thompson to twelve years in prison.

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<sup>2</sup> The enhancement as a result of firearm possession was deleted from the charge of manufacturing methamphetamine.

On August 14, 2003, Thompson filed a *pro se* motion seeking relief pursuant to RCr 11.42. As grounds for his motion Thompson alleged that his trial counsel was deficient for failing to move to suppress evidence seized as a result of an allegedly defective search warrant. Thompson also argued that his counsel coerced him into pleading guilty.

On January 16, 2004, while his RCr 11.42 motion was pending, Thompson filed another *pro se* motion, this time pursuant to CR 60.02 seeking to set aside his conviction for manufacturing methamphetamine based on the Kentucky Supreme Court's Kotila decision. He argued in support of his motion that while he possessed some of the chemicals or equipment required for the manufacture of the drug, he did not possess all of the necessary chemicals or equipment. Thompson also alleged that one of the police officers involved in the case falsified evidence.

On February 1, 2005, the trial court denied both of Thompson's motions. Relevant to the issue on appeal, the court stated that Thompson's reliance on Kotila was misplaced because his admission of guilt in conjunction with his guilty plea acted as a waiver of all defenses he may have had to the charge of manufacturing methamphetamine. The court further held that "[s]ince the Defendant entered a plea of guilty, there is no evidence before this Court to determine if the Commonwealth

could have proved its case, and Kotila does not require the Court to do so after the entry of a plea of guilty." Order Denying RCr 11.42 and CR 60.02 Motions, Record on Appeal (R.A.), p. 145. This appeal followed.

Despite the various issues raised in his RCr 11.42 and CR 60.02 motions, Thompson raises only one on appeal - that his conviction should be set aside pursuant to Kotila, *supra*. The record reveals, however, that at the time Thompson entered his plea of guilty before the trial court on July 7, 2000, the Kentucky Supreme Court had not yet rendered its decision in Kotila and would not do so until June 12, 2003 - nearly three years later. Thus, at the time the guilty plea was entered, it was reasonable for Thompson's counsel to believe that the Commonwealth could obtain a conviction following trial. Because of this, we cannot now conclude that Thompson's counsel should have somehow foreseen the future change in the law and made recommendations accordingly. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct.*" Strickland v. Washington, 466 U.S. 668, 690 (1984) (emphasis added).

[A] voluntary plea of guilty intelligently made *in the light of the then applicable law* does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of

guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

Elkins v. Commonwealth, 154 S.W.3d 298, 300 (Ky. 2004), quoting Brady v. United States, 397 U.S. 742 (1970) (emphasis added).

Moreover, subsequent to the filing of the parties' briefs in this matter, the Kentucky Supreme Court abrogated its decision in Kotila. In the recent case of Matheney v. Commonwealth, 191 S.W.3d 599 (Ky. 2006), our Supreme Court held that the elements of the offense of manufacturing methamphetamine set forth in KRS 218A.1432 are satisfied if it is established that a defendant possessed two or more of either the chemicals or pieces of equipment necessary for the manufacture of the drug. Thus, the premise for Thompson's appeal - that his conviction should be vacated because he did not possess either all of the chemicals or equipment necessary for manufacturing methamphetamine - no longer exists.

The judgment of the Calloway Circuit Court is affirmed.

ALL CONCUR.

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