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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000946-MR

KEITH BRADLEY — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 02-CR-00483

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE; HOWARD,[2] SPECIAL JUDGE.

HOWARD, SPECIAL JUDGE: Keith Bradley appeals from an order of the Warren Circuit Court denying his motion for a new trial under RCr 11.42 and CR 60.02. He maintains that he is entitled to relief from judgment because he was not aware of the

[1] 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 KRS 21.580.

[2] Special Judge James I. Howard completed this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling.

elements of the offense with which he was charged, manufacturing methamphetamine, and as such entered a guilty plea which was not knowing, intelligent and voluntary; that the Kentucky Supreme Court has defined KRS 218A.1432(1)(b) in such a way as to make it clear that his conduct did not constitute a crime and that his counsel provided ineffective assistance by failing to so advise him. He also maintains that he was entitled to an evidentiary hearing on the motion. For the reasons stated below, we affirm.

On July 15, 2002, an information was filed in Warren Circuit Court charging Bradley with one count each of manufacturing methamphetamine, possession of a controlled substance in the third degree and trafficking in a controlled substance in the first degree. He was also charged with several traffic violations. The charges arose from a traffic stop, at which time Bradley was found to be in possession of methamphetamine, diazepam, and various components and equipment used in the production of methamphetamine, including ephedrine, Prestone starting fluid, liquid fire, ether, sea salt, batteries, hoses, baggies, a bean grinder, an electric scale and various plastic and Tupperware-like containers.

On the same date the information was filed, July 15, 2002, Bradley entered a plea of guilty on the manufacturing and trafficking counts, in exchange for the Commonwealth's recommendation of a 15 year sentence and the dismissal of the possession count and the traffic violations. After engaging in the standard guilty plea colloquy and upon finding that Bradley made a knowing and voluntary waiver of his constitutional rights, the trial court accepted Bradley's guilty plea. Bradley was sentenced on August 5, 2002, in accordance with the Commonwealth's recommendation

and final judgment was entered the following day. Though opposed by the Commonwealth, the circuit court probated Bradley's sentence for a period of five years. On November 13, 2002, his probation was revoked when a drug screen revealed that he had used a controlled substance in violation of the terms of his probation. Bradley was returned to prison to serve the remainder of his sentence.

On December 29, 2003, Bradley filed a *pro se* motion to vacate his sentence pursuant to RCr 11.42. He was appointed counsel to represent him on that motion, which was later supplemented to include a claim of entitlement to CR 60.02 relief. As a basis for his motion, Bradley argued that he would not have entered a guilty plea had he known that *Kotila v. Commonwealth*, 114 S.W.3d 226 (Ky. 2003) required the Commonwealth to prove his possession of all of the chemicals or all of the equipment necessary to produce methamphetamine in order to sustain a conviction. He maintained that had he known of *Kotila*, he would have proceeded to trial and would have prevailed. Bradley also argued that he received ineffective assistance of counsel.

On January 21, 2005, the trial court entered an order denying that portion of the motion which sought CR 60.02 relief from judgment and on April 15, 2005 denied the remainder of the motion under RCr 11.42, both without conducting an evidentiary hearing. This appeal followed.

Bradley now argues that the trial court committed reversible error in denying his motion for a new trial, under both CR 60.02 and RCr 11.42. He maintains, as he did in the circuit court, that if he had known of *Kotila's* requirement that the Commonwealth prove possession of all the chemicals or all of the equipment, he would

not have entered a plea of guilty and would have gone to trial. Directing our attention to the "Nazi", "P2P" and "red phosphorus" methods of producing methamphetamine described in *Commonwealth v. Hayward*, 49 S.W.3d 674 (Ky. 2001) and *Fulcher v. Commonwealth*, 149 S.W.3d 363 (Ky. 2004), Bradley maintains that he did not possess either anhydrous ammonia nor a tank to contain it, and therefore did not possess all of the chemicals or all of the equipment necessary to produce methamphetamine. He argues that his lack of knowledge as to the *Kotilla* requirements rendered his guilty plea unknowing and involuntary. Having heard the oral arguments and closely examined the record and the law, we find no basis for reversing the circuit court order.

In order to evaluate the issues raised herein, it is necessary for us to review the recent history and development of the law in this area. KRS 218A.1432 was adopted and became effective in 1998. As it read until 2005, that is, at all times relevant to this case, this statute provided,

> (1) 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. ...

On June 12, 2003, the Kentucky Supreme Court issued its opinion in *Kotila v. Commonwealth, supra*. This opinion became final on September 18, 2003, when rehearing was denied. *Kotila* interpreted KRS 218A.1432(1)(b) to require the possession of either all the necessary chemicals or all the necessary equipment for manufacturing methamphetamine for a conviction under that section.

Kotila is the authority of which Bradley complains that he was unaware. We first note that the obvious reason why Bradley was not informed of *Kotila* prior to pleading guilty, either by the court or by counsel, is that the *Kotila* opinion was not rendered until some 10 months *after* his plea. Therefore, any claim for ineffective assistance of counsel is without merit. Counsel cannot be required to anticipate developments in the law that have not yet occurred. *Taylor v. Commonwealth,* 63 S.W.3d 151 (Ky. 2001). However, Bradley's claim that his guilty plea, to conduct subsequently determined not to be a crime, was therefore not knowing and voluntary requires further consideration.

In 2005 the legislature amended KRS 218A.1432 to read as follows:

> (1) A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully:
> (a) Manufactures methamphetamine; or
> (b) With intent to manufacture methamphetamine possesses two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine. ...

This amendment, of course, was not – and could not have been – made retroactive, so it has no direct application to Bradley or to this case. However, in 2006 the Supreme Court issued its opinion in *Matheney v. Commonwealth,* 191 S.W.3d 599 (Ky. 2006), and reversed itself, declaring that *Kotila* was "wrongfully decided." *Matheney,* 191 S.W.3d 599, 601. The Supreme Court declared in *Matheney,*

> We 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. This construction is based on a common sense

> approach that gives proper import to the use of the plural 'chemicals.' Of course, any conviction must also satisfy the scienter requirement contained in KRS 218A.1432(1)(b). *Matheney*, 191 S.W.3d 599, 604.

Thus, under *Matheney,* the law is exactly the same both in cases governed by the 2005 amendment to KRS 218A.1432(1)(b) and those governed by the pre-amendment statute. If a defendant possesses two or more of the necessary chemicals or two or more of the necessary items of equipment for the manufacture of methamphetamine, with the intent to manufacture, he can be convicted of manufacturing methamphetamine.

It is significant that *Matheney* dealt with a case that arose and went through the trial court *before* the Supreme Court issued its opinion in *Kotila,* the same situation as in this case. Thus, *Matheney* is the controlling authority in this case and it is unnecessary for us to analyze whether there might be a different result had Bradley entered his plea during the time when *Kotila* was the law of Kentucky.

Bradley engaged in the guilty plea colloquy with the circuit judge and stated on the record that he understood his plea, the waiver of his constitutional rights, and the consequences of the plea. After a lengthy conversation with Bradley, the circuit court accepted the plea as knowing, intelligent and voluntary. The burden rests with Bradley, then, to overcome the strong presumption that the trial court's ruling was correct *City of Louisville v. Allen*, 385 S.W.2d 179 (1964) and to establish convincingly that he was deprived of some substantial rights which would justify the extraordinary relief of

setting aside a judgment of conviction and ordering a new trial. *Dorton v. Commonwealth*, 433 S.W.2d 11 (Ky. 1968).

Bradley has not met this burden. The *Kotila* decision -- upon which he bases his claim of error -- has been overruled and *Matheney* is the controlling authority on this issue. It is clear from the record that Bradley did, in fact, possess at least two of the chemicals and at least two of the items of equipment necessary for the manufacture of methamphetamine. As such, we find no error in the denial of Bradley's motion for RCr 11.42 relief. Because the motion could be resolved by reference to the record, no hearing was required. *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998).

For the same reasons, we are not persuaded by Bradley's contention that he is entitled to CR 60.02 relief. "[T]he determination to grant relief from a judgment or order pursuant to CR 60.02 is one that is generally left to the sound discretion of the trial court." *Schott v. Citizens Fidelity Bank and Trust Company*, 692 S.W.2d 810 (Ky. App. 1985). The circuit court did not abuse that discretion in denying Bradley's motion for CR 60.02 relief, and accordingly we find no error.

For the foregoing reasons, we affirm the order of the Warren Circuit Court.

ALL CONCUR.

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