

RENDERED: July 28, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001262-MR

GREGORY KILDOW

APPELLANT

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 99-CR-00039

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

VANMETER, JUDGE: Gregory Kildow appeals from an order entered by the Marshall Circuit Court denying his motion seeking RCr 11.42 and CR 60.02 relief. For the reasons stated hereafter, we affirm.

On July 19, 1999, pursuant to *North Carolina v. Alford*,² Kildow entered a guilty plea to several charges including the manufacturing of methamphetamine in violation of

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.

² 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

KRS 218A.1432(1). He did not deny that he possessed some of the chemicals or equipment needed for the manufacture of methamphetamine.

At the time of Kildow's conviction,³ KRS 218A.1432(1) provided in part:

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, in *Kotila v. Commonwealth*,⁴ the Kentucky Supreme Court interpreted KRS 218A.1432(1)(b) as requiring evidence of "all of the chemicals or all of the equipment necessary to manufacture methamphetamine."⁵ However, that statutory interpretation very recently was abrogated by *Matheney v. Commonwealth*,⁶ wherein the supreme court held that *Kotila* incorrectly construed KRS 218A.1432(1)(b), and that the elements of the offense in fact were satisfied if, with the intent to

³ KRS 218A.1432(1) was amended in 2005 to clarify that a person "is guilty of manufacturing methamphetamine when he knowing and unlawfully . . . (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."

⁴ 114 S.W.3d 226 (Ky. 2003), *abrogated by Matheney v. Commonwealth*, 191 S.W.3d 599 (Ky. 2006).

⁵ 114 S.W.3d at 237.

⁶ 191 S.W.3d. 599 (Ky. 2006).

manufacture methamphetamine, a defendant possessed two or more of either the chemicals or the items of equipment needed for the manufacture of methamphetamine.

Meanwhile, in February 2005 Kildow filed the underlying motion, seeking to vacate and set aside his conviction in light of *Kotila's* holding that KRS 218A.1432(1) required proof that a defendant possessed intent and *all* of the ingredients or equipment necessary to manufacture methamphetamine. The trial court denied the motion and this appeal followed.

Appellant's sole contention on appeal is that despite his *Alford* plea, he is not precluded from challenging the trial court's judgment on the ground that there was insufficient evidence to satisfy the *Kotila* requirement that he possess all, rather than only some, of the items or equipment needed for the manufacture of methamphetamine. However, this argument is rendered moot by *Matheney's* recent abrogation of the *Kotila* requirement. It follows, therefore, that we need not give further consideration to this issue.

The judgment of the Marshall Circuit Court is affirmed.

ALL CONCUR.

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