

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-002201-MR

GUY EVANS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NOS. 02-CR-00372 AND 02-CR-00522

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

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

ACREE, JUDGE: Guy Evans appeals from an order of the Hardin Circuit Court denying his motion for post-conviction relief without an evidentiary hearing. Evans filed a motion, pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42, alleging that he received ineffective assistance of counsel when his attorney advised him to plead guilty to manufacturing methamphetamine. He claims that the Commonwealth could not have obtained a conviction at trial because he did not possess anhydrous ammonia, a necessary

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

precursor to methamphetamine. *Kotila v. Commonwealth*, 114 S.W.3d 226 (Ky. 2003), *overruled by Matheny v. Commonwealth*, 191 S.W.3d 599 (Ky. 2006). We disagree with Evans' contention that he received ineffective assistance of counsel and, thus, affirm the trial court.

In 2002, Evans was indicted twice by the Hardin County Grand Jury. Indictment number 02-CR-00372 charged him with first-degree possession of a controlled substance enhanced by a firearm, possession of drug paraphernalia enhanced by a firearm, and carrying a concealed deadly weapon. Indictment number 02-CR-00522 charged Evans with manufacturing methamphetamine second or subsequent offense enhanced by a firearm, first-degree trafficking enhanced by a firearm, and carrying a concealed deadly weapon. Evans was also indicted in 2003 in Hardin County for complicity to commit unlawful possession of a methamphetamine precursor and complicity to commit unlawful distribution of a methamphetamine precursor. Indictment number 03-CR-00331. During this period, he had additional pending charges in Hart County related to manufacturing methamphetamine.

Evans' attorney negotiated a plea bargain which resolved all four indictments and resulted in a fifteen-year sentence. A year after his sentencing, Evans filed a *pro se* RCr 11.42 motion, claiming ineffective assistance of counsel. According to Evans, his attorney's failure to familiarize himself with the facts and applicable law caused him to recommend that Evans plead guilty to manufacturing methamphetamine

when he could not have been convicted of the offense at trial. The trial court denied the motion without a hearing, and this appeal followed.

Evans argues that the Kentucky Supreme Court's decision in *Kotila*, which was controlling case law at the time of his guilty plea, required the dismissal of the manufacturing methamphetamine charge against him. Under *Kotila*, in order to be convicted of manufacturing methamphetamine under the current version of Kentucky Revised Statute (KRS) 218A.1432(1)(b), a defendant was required to possess “all of the chemicals or all of the equipment necessary to manufacture methamphetamine.”² Since Evans did not possess anhydrous ammonia, a chemical which is necessary for the manufacture of methamphetamine, he claims that he could not have been convicted of the charge. Instead, Evans contends his attorney should have advised him that he could only be convicted of unlawful possession of a precursor, a Class D felony.

Generally speaking, ineffective assistance claims require a showing of deficient performance and prejudice resulting from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984). Because he

²The version of KRS 218A.1432(1) in effect at the time read as follows:

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.

The present version of KRS 218A.1432(1)(b), enacted in 2005, requires only possession of two or more chemicals or two or more items of equipment.

pled guilty, Evans had the additional burden to show “that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59; 106 S.Ct. 366; 88 L.Ed.2d 203 (1985). Evans was originally facing a Class A felony charge of manufacturing methamphetamine second or subsequent offense enhanced by a firearm. His attorney negotiated the reduction of some charges and the dismissal of others. The manufacturing charge was reduced to a first offense with no firearm enhancement, a class B felony.

Contrary to Evans' assertions, he did not plead guilty under KRS 218A.1432(1)(b) which specifies guilt by possession of the chemicals or equipment necessary to manufacture methamphetamine. Rather, both his indictment and the plea agreement cite KRS 218A.1432 which includes subsection (1)(a), defining guilt by actually manufacturing methamphetamine, as well as subsection (1)(b). In fact, Count I of 02-CR-00522 reads as follows:

That on or about the 13th day of September 2002, in Hardin County, Kentucky, the above named Defendant committed the offense of Manufacturing Methamphetamine, Second or Subsequent Offense when he knowingly and unlawfully manufactured methamphetamine or possessed the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine. . . .

We have previously held that “a guilty plea is a judicial admission of the underlying requisites to the charge.” *Lovett v. Commonwealth*, 858 S.W.2d 205, 207 (Ky.App. 1993). (Citation omitted.) Thus, Evans is barred from now claiming that the evidence

against him did not support a conviction under KRS 218A.1432(1)(a). Since neither the indictment, nor the judgment against him specify that he was convicted solely under subsection (1)(b), *Kotila* would not have been a bar to his conviction on the charge of manufacturing methamphetamine. Consequently, the trial court correctly found that Evans' claim of ineffective assistance was refuted on its face by the record. Thus, no evidentiary hearing was required. *Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky.App. 1985).

For the foregoing reasons, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Richard Edwin Neal
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Michael A. Nickles
Assistant Attorney General
Frankfort, Kentucky