

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-002590-MR

DEREK DOUGLAS ROADHOUSE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NO. 05-CR-001175

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CHIEF JUDGE COMBS; ACREE, JUDGE; KNOPF, SENIOR JUDGE.<sup>1</sup>

ACREE, JUDGE: Derek Roadhouse appeals from a judgment of the Jefferson Circuit Court convicting him of possessing anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, manufacturing methamphetamine, and possession of methamphetamine. He was sentenced to a total of fifteen years' imprisonment after a jury trial. On appeal, Roadhouse argues that the Commonwealth

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

failed to prove beyond a reasonable that the substance identified as anhydrous ammonia met the definition of that substance contained in Kentucky Revised Statute (KRS) 250.482(3). After a careful review of the evidence at trial, we find there was sufficient evidence to survive a motion for directed verdict. Thus, we affirm the trial court.

Roadhouse was present at the home of Micheal Sweeney on February 8, 2005, when Sweeney's parole officers decided to check whether he was compliant with his curfew. Officers Darren Gray and Sheree Galloway noticed several cars in the yard and a bright light in the garage when they arrived. When Sweeney opened the door, Gray asked his permission to check out the garage. As they approached the garage, both officers smelled a strong chemical odor which became noticeable at a distance of eight to ten feet. Their eyes began to water and they felt a burning sensation in their throats.

When the garage door was opened, Gray and Galloway saw a methamphetamine lab which appeared to be in use. Roadhouse and Timothy Ogle were standing beside the equipment wearing disposable face masks. Both men looked startled when they saw the officers. Ogle immediately came outside after Gray identified himself as a law enforcement officer, but Roadhouse stepped out of sight for a few moments. The officers arrested both men. Galloway noted that Roadhouse seemed to be under the influence and exhibited sores on his face characteristic of people who ingest lithium. Gray and Galloway called for assistance since they had been trained not enter a meth lab themselves.

Sweeney, Ogle and Roadhouse were all indicted for manufacturing methamphetamine. Sweeney pled guilty and testified against his co-defendants at trial.

He told the jury that Roadhouse and Ogle had come to his house and asked to work in his garage at 3 p.m. on February 7<sup>th</sup>. Sweeney believed they were going to repair an automobile. He testified that he had gone out to the garage at various times during the day with the latest time being around 9:30 p.m. When his parole officers arrived at 1:00 a.m. on the 8<sup>th</sup> and asked to see the garage, he noticed a strong smell emanating from it. He admitted using meth in the house with the others during the day, but denied taking any part in manufacturing it.

In addition, the Commonwealth introduced testimony from law enforcement officers who described their investigation of the scene and explained the processes that were occurring in Sweeney's garage where both methamphetamine and anhydrous ammonia were being manufactured. At the conclusion of the Commonwealth's case, Roadhouse asked the trial court to grant a directed verdict, arguing insufficient evidence had been introduced to show that the anhydrous ammonia was not in a proper container. The trial court overruled the motion, and the defendants put on their cases.

Roadhouse and Ogle both gave the jury a substantially similar version of events. According to their testimony, they were hanging drywall on the 7<sup>th</sup> and went to Sweeney's house to borrow a sander. Ogle claimed that he did not know Sweeney and went to his house at Roadhouse's urging. After they arrived the three men talked for a while before smoking methamphetamine in a back bedroom. When Sweeney looked out the window and saw his parole officers approaching, he hid Ogle and Roadhouse in the garage. Ogle testified that Sweeney told them to put on the face masks and that he locked

them inside the garage from the outside. After about ten minutes, the parole officers opened the garage and ordered Ogle and Sweeney outside. Both men admitted using meth that day, but denied participating in the manufacturing process. Roadhouse told the jury he had both used and sold meth on other occasions and he was probably addicted to it.

At the conclusion of the evidence, the trial court denied the renewed motion for a directed verdict, and instructed the jury on all of the offenses in the indictment. The jury heard closing arguments and retired to deliberate. Roadhouse was found guilty of all charges and the jury recommended a sentence of fifteen years on both the anhydrous ammonia and the manufacturing methamphetamine charges and five years on the possession charge. The trial court imposed the recommended sentence, and this appeal followed.

Roadhouse now argues the Commonwealth failed to prove beyond a reasonable doubt that he possessed anhydrous ammonia. Thus, he claims he was entitled to a directed verdict on the charge under *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). Although he concedes that this issue was not preserved for review, he urges us to consider it under the palpable error rule.<sup>2</sup> Kentucky Rule of Criminal Procedure 10.26. Roadhouse persuasively contends that his conviction of two Class B felonies may have led the jury to set a longer sentence than if he had only been convicted of one Class

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<sup>2</sup> Roadhouse made a motion for directed verdict on the anhydrous ammonia charge at trial. However, he argued that the Commonwealth had failed to prove that the garden sprayer was an unapproved container as defined by KRS 250.482(4). He raises the issue of the chemical composition of the substance in the sprayer for the first time on appeal.

B felony. Consequently, we choose to review the issue of whether the Commonwealth is required to present chemical analysis evidence to prove possession of anhydrous ammonia to survive a motion for directed verdict.

KRS 250.482(3) defines anhydrous ammonia as the compound formed by the combination of the two (2) gaseous elements, nitrogen and hydrogen, in the proportion of one (1) part nitrogen to three (3) parts of hydrogen by volume. Anhydrous ammonia is ammonia gas in compressed or liquefied form, and is not aqueous ammonia.

KRS 250.489 makes it a crime for a person to possess anhydrous ammonia in an unapproved container. Possession of anhydrous ammonia in an unapproved container is a Class D felony—unless the Commonwealth proves possession with intent to manufacture methamphetamine. In that case, the charge is a Class B felony for a first offense and a Class A felony for a subsequent offense. KRS 250.991(2). Due to the extremely dangerous nature of the chemicals involved in manufacturing methamphetamine, police are forbidden to transport them from the scene of a clandestine lab. Thus, the substance in the garden sprayer was never tested by a chemist to determine its composition.

Instead, the Commonwealth relied primarily on the testimony of Sergeant Jamie Hill, the leader of a FLEX unit in the Louisville Metro Police Department. His unit mainly investigates drug crimes, and Hill had undergone 160 hours of DEA training in recognizing and dismantling meth labs since 1998. He described the process he followed as a member of a two-person team in dismantling at least fifty clandestine labs in the Louisville area.

Police procedures forbid any officer who is not a member of a lab disposal team from entering a suspected meth lab. Thus when a lab is found, Hill and his partner are called to the scene. They are required by OSHA to wear full body suits consisting of a bottom layer of fire resistant material, a white hazardous materials suit with the seams secured by chemical tape, three pairs of gloves, boots, and a self-contained breathing apparatus. The chemicals used in manufacturing methamphetamine are high flammable as well as being toxic; thus, Hill must alert the fire and health departments to be on stand-by while he investigates a suspected lab.

Before investigating and dismantling a lab, the team checks the air quality to make sure that other people in the vicinity are not being exposed to dangerous chemicals. They also examine the scene to determine the risk of an explosion. OSHA regulations label the chemicals involved in manufacturing meth as hazardous materials and forbid them to be collected and stored as evidence. Consequently, Hill and his partner examine all the items in a suspected lab, photographing them before they are moved, and then they write a description of their finds. As the lab is dismantled, the chemicals and equipment are placed outside on a tarpaulin. Louisville Metro contracts with a hazardous waste disposal company which collects and destroys items found in a meth lab. The investigative team must wait at the scene until all the items are safely removed.

Hill followed this procedure during the investigation of Sweeney's garage. Among the items cataloged by Hill were lye, ammonium nitrate granules, a modified garden sprayer, and a cooler containing jars of clear liquid on dry ice. Hill described an

elaborate setup which he had not previously seen, but which he has since encountered, for manufacturing anhydrous ammonia.

The garden sprayer had been modified by drilling holes and attaching PVC pipes with shut-off valves and plastic tubing. It was three quarters full of liquid. The plastic tubing ran up into the rafters before running into a glass jar with something that appeared to be cat litter in the bottom. From that jar, the tubing ran into jars containing clear liquid sitting inside a cooler of dry ice. Hill explained that lye and water could be added to ammonium nitrate granules to manufacture anhydrous ammonia. After the water was removed from the resulting liquid, it would be cooled to preserve it in a liquid, rather than a gaseous, state. Lye was found in the garage, along with a partially emptied container of ammonium nitrate granules.

Based on the chemicals and equipment found in Sweeney's garage, Hill believed the defendants were manufacturing their own anhydrous ammonia for use in making meth. Hill testified that the garden sprayer did not meet the statutory description of an approved container for storing anhydrous ammonia. He also informed the jury that OSHA regulations forbade him to remove the substance from the garage for testing.

The Kentucky Supreme Court has already addressed Roadhouse's claim that the Commonwealth was required to provide evidence that the anhydrous ammonia found in Sweeney's garage had the chemical composition described in KRS 250.482(3). *Fulcher v. Commonwealth*, 149 S.W.3d 363 (Ky. 2004). In *Fulcher*, an investigating officer's testimony that a liquid substance found in a meth lab smelled, based on his training and experience, like anhydrous ammonia was held to be sufficient evidence to

support a conviction under KRS 250.489(1). The Court stated that, “A reasonable jury could have believed from [the officer's] testimony that the substance in the glass jar found in Appellant's residence . . . was anhydrous ammonia.” *Fulcher* at 372. (Citation omitted.)

In the case at hand, Hill testified that all of the chemicals necessary for manufacturing anhydrous ammonia were present. He described a process that could have been used to do so and explained how the garden sprayer and items connected to it would be employed to manufacture anhydrous ammonia. In addition, there was ample evidence introduced to show that meth was actually being manufactured when officers arrived on the scene. Hill described for the jury the method of manufacturing employed by Roadhouse and his co-defendants and affirmatively stated that the process could not take place without anhydrous ammonia. Based on all of the evidence found at the scene, a reasonable juror could have believed beyond a reasonable doubt that Roadhouse possessed anhydrous ammonia in an improper container. Thus, the trial court committed no error in refusing to direct a verdict

For the foregoing reason, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.



**BRIEF FOR APPELLANT:**

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