

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002135-MR

STEVEN MITCHELL JACOBI

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NOS. 02-CR-00333 & 03-CR-00391

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: The Hardin County Grand Jury returned an indictment in case number 00-CR-00318 charging Steven Mitchell Jacobi with possession of drug paraphernalia, first offense; possession of marijuana; trafficking in marijuana under eight ounces, first offense; cultivation of marijuana, five or more plants, first offense; first-

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

degree possession of a controlled substance, first offense; and manufacturing methamphetamine, first offense.

Jacobi was again arrested on May 19, 2002 and was charged with manufacturing methamphetamine and possession of drug paraphernalia in Hardin County case number 02-F-00247. Those charges were bound over to the grand jury which returned an indictment. On September 27, 2002, he was arraigned in Hardin Circuit Court in case number 02-CR-00333 and was charged with manufacturing methamphetamine, second offense and possession of drug paraphernalia, second offense.

The Commonwealth filed a notice on April 21, 2003 indicating the intent to introduce evidence of “the Defendant's prior case number 00-CR-318 as evidence at the trial by Jury, under KRE 404(b) . . .” and filed an additional identical notice on August 21, 2003. Jacobi responded on August 26, 2003 with a request for a motion in limine asking the trial court to “FORBID the Commonwealth from presenting any evidence from case number 00-CR-0318 . . . based upon the fact that the Commonwealth moved the Court and the Court granted a dismissal of case number 00-CR-00318 on 19 November 2002.” There is nothing in the record to indicate Jacobi ever requested a ruling from the Court and no order was ever entered.

On August 29, 2003, the Commonwealth extended an offer on plea of guilty for the charges in case number 02-CR-00333. Handwritten on the offer is the indication that it also included an offer involving case number 03-CR-00391, yet another case where Jacobi was facing charges involving manufacturing of methamphetamine. Also

handwritten on this offer is an indication that the offer in case number 02-CR-00333 was to run consecutive to the offer in case number 03-CR-00391 that was an indictment by information. This offer recommended a sentence of twenty years in case number 02-CR-00333 for the charges of manufacturing methamphetamine and possession of drug paraphernalia, both second offenses. It then notes that in case number 03-CR-00391, the offer was an additional twenty years for the charge of manufacturing methamphetamine with a gun enhancement. That sentence was to run consecutive to the twenty years in case number 02-CR-00333 for a total of forty years but the entire sentence was to be probated. Jacobi's initials and those of counsel appear in the margins near this handwritten addition.

Jacobi submitted a motion to enter guilty plea in cases 02-CR-00333 and 03-CR-00391. This motion was signed by both counsel and Jacobi. The trial court accepted that guilty plea and in an order entered September 2, 2003, Jacobi was found guilty of the charge of manufacturing methamphetamine, gun enhanced in case number 03-CR-00391 with a sentence of twenty years. He was also found guilty of the charges of manufacturing methamphetamine, second offense and possession of drug paraphernalia, second offense in case number 02-CR-00333. He was sentenced to serve twenty years on the manufacturing methamphetamine charge and two years on the drug paraphernalia charge with those sentences to run concurrent with each other. The sentences in each case were to run consecutively for a total sentence of forty years. Those sentences were then probated for five years.

On November 7, 2003, Jacobi submitted to a random drug screen as a condition of his probation. He tested positive for amphetamines and opiates. On December 17, 2003, he was again tested and was positive for amphetamines, opiates and another narcotic, propoxyphene. The probated sentences in cases numbered 02-CR-00333 and 03-CR-00391 were revoked and he was ordered to serve the previously imposed and agreed upon sentence of forty years.

Jacobi then sought to vacate the judgment pursuant to CR 60.02. The trial court denied relief and Jacobi filed this appeal. The Department of Public Advocacy was initially ordered to represent Jacobi. After a review of the record, the Department of Public Advocacy moved to be relieved from the case indicating the appeal was “not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.” Kentucky Revised Statutes (KRS) 31.110(2)(c). That request was granted and Jacobi has proceeded with this appeal *pro se*.

His first issue on appeal is the argument that the Kentucky Supreme Court decision of *Kotilla v. Commonwealth*, 114 S.W.3d 226 (Ky. 2003) invalidated Jacobi's convictions. We disagree. In *Kotilla*, the Kentucky Supreme Court construed the language of KRS 218A.1432(1)(b) to require that a person possess all of the chemicals or all of the equipment before one could be convicted of manufacturing methamphetamine. *Id* at 240-241. Our review of the record shows that in fact, Jacobi merely possessed some of the chemicals and some of the equipment. Although *Kotilla* construed the statute in effect at the time Jacobi committed the crime and entered the plea of guilty, it was not yet

final. Subsequently, the Kentucky Supreme Court rendered its decision in *Matheny v. Commonwealth*, 191 S.W.3d 599 (Ky. 2006).² In *Matheny*, the Court determined *Kotilla* was wrongfully decided and determined the proper analysis of the statute merely required possession of two or more of the chemicals or items of equipment needed to manufacture methamphetamine. “[O]ne must possess two or more chemicals or items of equipment with the intent to manufacture methamphetamine to fall within the statute.” *Id* at 604. Our review of the record shows Jacobi possessed two or more of the chemicals or items of equipment needed to manufacture the drug. Contrary to his argument, Jacobi entered a plea of guilty to the crime of manufacturing methamphetamine and did indeed meet the statutory definitions for that crime. There was no error.

Next he brings to our attention his belief that the gun enhancement of the charge in case number 03-CR-00391 was improper based on the evidence. Again, we disagree. While the record reflects that Jacobi was already lodged in jail when his home was searched, a firearm was found in his bedroom. He argues that because it was not loaded, there is no nexus between the gun and the crime. On the contrary, the evidence seized to support the charge of manufacturing methamphetamine was found in and about the residence along with the firearm. Jacobi waived any requirement that the Commonwealth prove a nexus between the firearm and the criminal act when he entered a plea of guilty and admitted those facts. There is sufficient evidence in the record to allow

² Both *Kotilla* and *Matheny* construed the version of KRS 218A.1432(1)(b) in effect prior to its amendment effective June 20, 2005, although the amendment took effect before the release of *Matheny* and was referred to in the body of that opinion.

the trial court to have a reasonable belief that the firearm was connected to the crime and to enter a finding of guilt. “Entry of a voluntary, intelligent plea of guilty has long been held by Kentucky Courts to preclude a post-judgment challenge to the sufficiency of the evidence.” *Taylor v. Commonwealth*, 724 S.W.2d 223, 225 (Ky.App. 1986).

We also note that Jacobi repeatedly raises the issue that he was provided ineffective assistance of counsel and that pursuant to RCr 11.42 he seeks a review of counsel's performance. We have addressed his *Kotilla* argument that counsel allowed him to enter an unfounded plea of guilty and found it lacking. His original request for relief pursuant to Rcr. 11.42 was withdrawn after then current counsel reviewed the facts and record and consulted with Jacobi. The trial court was never asked to ruled on any allegations of ineffective assistance of counsel and we now decline to review that issue.

The order of the Hardin Circuit Court denying Jacobi's motion for CR 60.02 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven Mitchell Jacobi, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky