

RENDERED: DECEMBER 22, 2005; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000989-MR  
AND  
NO. 2004-CA-001480-MR

GARY CALDWELL

APPELLANT

v. APPEALS FROM UNION CIRCUIT COURT  
HONORABLE TOMMY W. CHANDLER, JUDGE  
INDICTMENT NOS. 99-CR-00014 & 01-CR-00014

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

DYCHE, JUDGE: In March 1999 Gary Caldwell was indicted for manufacturing methamphetamine, a Class B felony. On June 7 of that year, Caldwell entered a plea of guilty to trafficking in methamphetamine, a Class C felony. He was sentenced to ten years' imprisonment. Caldwell received shock probation the following December for testifying as a witness for the Commonwealth against several others.

In December of 2000, a search warrant was executed at Caldwell's residence. Caldwell had methamphetamine on his person and various ingredients and equipment necessary for the manufacture of that drug. He was indicted in March 2001 for a second offense of manufacturing methamphetamine plus first degree possession of a controlled substance and the status offense of persistent felony offender in the second degree (PFO II). The next month the Commonwealth moved to revoke Caldwell's probation for these new charges and for failing to pay his supervision fee.

After Caldwell filed a motion to suppress evidence, the Commonwealth offered to amend the charges against him in exchange for a guilty plea. On October 8, 2001, Caldwell entered pleas of guilty to manufacturing methamphetamine (first offense) and possession of a controlled substance in the first degree. He was sentenced to ten years' and two years' incarceration, respectively, said sentences to run concurrently with each other but consecutively with Caldwell's previous sentence.

In 2003 the Kentucky Supreme Court rendered its opinion in Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003), cert. denied, 540 U.S. 1198 (2004).<sup>1</sup> In April 2004, based upon the Kotila decision, Caldwell filed motions pursuant to CR 60.02

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<sup>1</sup> Kotila has been superceded by statute in KRS 218A.1432(1)(b) (2005) (now requiring possession of only two or more chemicals or items of equipment).

(e) and (f) challenging the validity of his convictions in each of these cases. He also requested a hearing. The Union Circuit Court summarily denied both motions, and Caldwell appeals. We affirm.

Kotila can be distinguished from Caldwell's situations: In Kotila, the defendant was convicted of possessing materials necessary to manufacture methamphetamine following a jury trial. The Kentucky Supreme Court found the evidence insufficient to support the verdict, as the Commonwealth had failed to prove that Kotila had possessed all of the chemicals or all of the equipment necessary to manufacture the drug. Here Caldwell entered pleas of guilty to his charges. His first guilty plea was to trafficking, not manufacturing, methamphetamine. As such, Kotila has no application, regardless of Caldwell's argument otherwise.

Furthermore, the record indicates that Caldwell "was involved in an active meth lab that exploded in this case and injured the Defendant." As such, he can hardly claim "actual innocence." See Bousley v. United States, 523 U.S. 614, 618 (1998). In Varble v. Commonwealth, 125 S.W.3d 246, 254 (Ky. 2004), the defendant "did not deny that his garage was a methamphetamine laboratory. He only denied that it was so used by him." Thus intent to manufacture the drug could be inferred from the circumstance of its taking place in appellant's

presence. See also Johnson v. Commonwealth, 134 S.W.3d 563, 568 (Ky. 2004). The Commonwealth could have amended the indictment to prove intent to manufacture pursuant to KRS 218A.1432(1)(a) rather than (1)(b).

Caldwell's second methamphetamine conviction was also a result of the plea bargaining process. There he was able to avoid recidivist sentencing by having his PFO charge dismissed. Again there was no claim of "actual innocence," and the trial court correctly denied CR 60.02 relief.

The orders of the Union Circuit Court are affirmed.

ALL CONCUR.

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