RENDERED: APRIL 2, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001718-MR
AND
NO. 2009-CA-000803-MR

CHARLES R. STANFILL — APPELLANT

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 07-CR-00148

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART AND
VACATING IN PART

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; CAPERTON, JUDGE; WHITE,[1] SENIOR JUDGE.

[1] Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

WHITE, SENIOR JUDGE: These consolidated appeals are brought by Charles Stanfill from a judgment and sentence of the Calloway Circuit Court entered on July 15, 2008, and an order denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion entered on April 20, 2009.

On the afternoon of July 13, 2007, Officers Tye Jackson and Chris Garland of the Pennyrile Narcotics Task Force, Samantha Mighell of the Calloway County Sheriff's Office, and Chris Hendricks, a probation and parole officer, went to Stanfill's property at 180 Meacham Drive. They were searching for a wanted fugitive or fugitives named Brett Preston or Billie Joe Preston. Officers Jackson and Garland testified that they went to the property at the request of the Sheriff's Office or probation and parole. Officer Mighell testified that they were looking for either Brett or Billie Joe, or both, and that they had warrants for one or both of them. She did not know where the warrants originated or who had provided the tip to go to Stanfill's property. Officer Hendricks thought that the sheriff's office had initiated the search, but he also did not know who had provided the tip.

Officer Jackson testified that when he climbed out of his vehicle at the top of Stanfill's driveway, he observed several people on the property and also detected an "incredibly strong" chemical odor that he thought was ether. There were three buildings in the area: a main trailer, an abandoned trailer, and an outbuilding. Jackson thought the odor was coming from the outbuilding. He also stated that, according to his training and experience, such an odor is usually indicative of a methamphetamine lab in the area.

Officer Jackson gathered everyone on the property together to identify and talk to them, as well as to ensure the officers' safety. Stanfill told Officer Jackson that he owned the property and lived in the main trailer with Janessa Keyes. He also informed Jackson that he did not own the outbuilding but that he stored some personal items in it. Officer Jackson obtained Stanfill's consent to search the outbuilding. When they arrived, Stanfill opened the door of a refrigerator located on the porch. It contained a "generator" or bottle with tubing which is used in the manufacture of methamphetamine. According to Officer Jackson, Stanfill had a look of shock on his face when he saw the "generator." On the basis of what he saw in the refrigerator and the odor he had detected, Officer Jackson again gathered everyone on the property together, advised them of their rights, and handcuffed them.

Jackson also observed a padlocked deep freezer behind the outbuilding and inquired as to its contents. Stanfill told him that it was not his freezer, but upon questioning told the police he had a key to the padlock. Jackson and Garland took Stanfill to the freezer, and Stanfill handed Garland a key chain with several keys on it. Officer Jackson told Stanfill several times that he could refuse to consent to a search of the freezer, but Stanfill gave Garland permission to open it. Inside the freezer, the officers found an illegally modified propane tank and a modified oxygen tank which tested positive for anhydrous ammonia. The officers arrested Stanfill and Keyes and obtained a search warrant for the property. As a result of the search, the police found various items of drug paraphernalia,

ingredients used to make methamphetamine, and some finished product. The police also arrested another man who was on the property, Tim Smith, for violating the terms of his probation.

At trial, the defense attempted to implicate Tim Smith for the crimes. Stanfill's neighbor, Dena Oakley, testified that Stanfill had told her to watch his property and care for his dogs during the week that his arrest occurred. He told her that he was going to Tennessee to visit his family and might be gone for a few days. According to Oakley, she saw Smith on Stanfill's property at least twice that week. She drove to the property once upon seeing him, but he left. She also saw a four-wheeler on Stanfill's property that week, but she did not know to whom it belonged.

Marti Triplett, whose husband, Chris, was a friend of Smith's, testified that she had seen Smith cook methamphetamine with her husband on multiple occasions. Although Marti Triplett was incarcerated at the time of Stanfill's arrest, she received information from Smith that he and Chris had been making methamphetamine next to Stanfill's house and that Stanfill had been arrested. According to Triplett, Smith told her that he felt badly about it, but that he would have to let Stanfill "take the heat" because Smith was facing a twenty-year sentence if he violated the terms of his probation.

Smith initially testified that he had not been to Stanfill's property during the ten days prior to the arrest, but then conceded that he may have been there during that time. He stated that he was there on the day of the arrest to trade

tires with Stanfill and to review a title. Smith had skipped a mandatory visit to his probation and parole officer Hendricks that day. When Hendricks spotted Smith, he informed him that he had violated his probation and handcuffed him. Smith testified that he had used methamphetamine with Stanfill two or three days prior to his arrest. He also admitted that he had previously been charged twice with manufacturing methamphetamine but had never been convicted.

Tammy Thomas testified that she was on Stanfill's property on the day of the arrest and that she and Janessa Keyes smoked methamphetamine which Keyes had stored in her bedroom, but that Stanfill was not present at the time.

Stanfill was convicted of (1) possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, (2) first-degree possession of a controlled substance, (3) manufacturing methamphetamine, and (4) use of drug paraphernalia. Stanfill filed a direct appeal and also a motion pursuant to Kentucky Rules(s) of Civil Procedure (CR) 60.02, in which he sought to introduce further evidence regarding the speed and direction of the wind at the time of his arrest, which contradicted the testimony of the police. The motion was denied and he appealed. On December 1, 2009, this Court entered an order granting the Commonwealth's motion to hear the two appeals together.

Stanfill raises four arguments in his appeals: (1) the trial court erred in denying his motion to suppress the evidence against him; (2) the trial court erred in refusing to grant a mistrial after the Commonwealth revealed to the jury that Stanfill's fiancée, Janessa Keyes, had pled guilty; (3) that his convictions for both

manufacturing and possession of methamphetamine are barred by double jeopardy; and (4) the trial court erred in denying his post-conviction motion made pursuant to CR 60.02. We affirm the final judgment and sentence and the subsequent order denying post-conviction relief, with one exception. Because the jury instructions failed to protect Stanfill's right to be free of double jeopardy, we vacate his conviction for possession of methamphetamine.

"Under our settled jurisprudence, it is fundamental that all searches without a warrant are unreasonable unless it can be shown that they come within one of the exceptions to the rule that a search must be made pursuant to a valid warrant." *Owens v. Commonwealth*, 291 S.W.3d 704, 707 (Ky. 2009) (citation and internal quotation marks omitted). Stanfill contends that the trial court erred in denying his suppression motion because the officers' warrantless search of the refrigerator and deep freezer did not fall within any of the exceptions to the warrant requirement. He further argues that all the evidence subsequently seized after the officers obtained a search warrant must also be suppressed as fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963).

Our review of a trial court's suppression ruling is a two-step process whereby we review its factual findings under a clearly erroneous standard, and its application of the law to those facts under *de novo* review. *Henry v. Commonwealth*, 275 S.W.3d 194, 197 (Ky. 2008). Findings of fact are not clearly erroneous if they are supported by substantial evidence. *Hallum v.*

Commonwealth, 219 S.W.3d 216, 220 (Ky. App. 2007). Substantial evidence constitutes facts that a reasonable mind would accept as sufficient to support a conclusion. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

Stanfill argues that the officers' stated reason for going to his property, to serve warrants on the Prestons, was pretextual. He contends that there are inconsistencies in the officers' testimony regarding which of the Prestons was being sought, who initiated the search, who provided the tip to go to Stanfill's address, and whether the officers had arrest warrants. He further contends that the trial court failed to issue an order to release the 911 and police dispatch logs and records, even though the trial court told Stanfill that it believed he was entitled to them.

In its order denying the suppression motion, the trial court noted that probation officer Hendricks testified as to the Prestons' identity. The court further noted that Janessa Keyes, Stanfill's codefendant, testified that Stanfill actually offered to help the officers find Billie Preston. On the basis of this evidence, the trial court concluded that

> Defendant's witness corroborates the testimony of the officers as far as their testimony regarding why they were present at that location. Considering that defendant or Keys[2] apparently knew of the whereabouts of the fugitives, it is clear that the officers were not engaging in some sort of pretextual search.

[2] This name is spelled "Keyes" in the appellant's brief, and that is the spelling we have adopted in this opinion.

We conclude that substantial evidence supports the trial court's findings of fact on this issue. As to Stanfill's contention that he was entitled to the police logs, there is no citation to the record, nor are we able to find any indication in the record, to show that Stanfill ever pursued the matter with the trial court, either by filing a written motion requesting this material, or by requesting the trial court at the hearing to enter a written order to that effect.

Ultimately, however, we are not persuaded that the mere arrival of the officers at the top of Stanfill's driveway, for whatever reason, was improper or constituted a warrantless "search." In *Quintana v. Commonwealth*, 276 S.W.3d 753 (Ky. 2008), the Kentucky Supreme Court held that:

> [C]ertain areas such as driveways, walkways, or the front door and windows of a home frequently do not carry a reasonable expectation of privacy because they are open to plain view and are properly approachable by any member of the public, unless obvious steps are taken to bar the public from the door.
>
> The answer in basic knock and talk cases then is clear: the officer who approaches the main entrance of a house has a right to be there, just as any member of the public might have. When a resident has no reasonable expectation to privacy if someone approaches his front door for a legitimate purpose, police officers may also so approach. As a leading treatise on the subject has noted, the basic rule is
>
> > "that police with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public," and in so doing they "are free to keep their eyes open and use their other senses." This means, therefore, that if police utilize "normal means of access to and egress from

> the house," for some legitimate purpose, such as to make inquiries of the occupant or to introduce an undercover agent into the activities occurring there, it is not a Fourth Amendment search for the police to see or hear or smell from that vantage point what is happening inside the dwelling.
>
> 1 Wayne R. LaFave, *Search and Seizure: Looking at or Listening at the Residence* § 2.3(c) (4th ed.2007). quoted in *Young v. City of Radcliff*, 561 F.Supp.2d 767, 786 (W.D.Ky.2008). Essentially, the approach to the main entrance of a residence is properly "invadable" curtilage, . . . because it is an area that is open to the public.

Id. at 758.

There is no evidence, nor has Stanfill claimed, that the officers upon their arrival penetrated into those areas of Stanfill's property where he had a reasonable expectation of privacy, or went beyond the "invadable" curtilage. Officer Jackson testified that he smelled ether when he climbed from his vehicle at the top of Stanfill's driveway. Once Jackson smelled the ether, he was justified in questioning the individuals who were present.

Stanfill also argues that the officers' testimony that they smelled ether when they were on the property was not substantiated. The officers found and seized jars of ether after obtaining the search warrant, but the evidence was destroyed without being tested. The officers did identify jars of ether in photographs taken on the property. The containers in the photographs contained a blue liquid, and the officers admitted that they had never seen blue ether before. Nonetheless, the trial court's finding that the officers detected the odor of ether

was consistently supported by their testimony and was not, therefore, clearly erroneous.

Stanfill next contends that the Commonwealth failed to prove that he had the authority to give valid consent to the search of the refrigerator and freezer.

> [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

United States v. Matlock, 415 U.S. 164, 171-72, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974). In *Nourse v. Commonwealth*, 177 S.W.3d 691 (Ky. 2005), the Kentucky Supreme Court held that "[t]he test for whether third-party consent is valid is whether a reasonable police officer faced with the prevailing facts reasonably believed that the consenting party had common authority over the premises to be searched." *Id*. at 696. Stanfill argues that the officers failed to investigate whether he had common authority over the outbuilding. But this inquiry is necessary only in cases where an individual other than the defendant gives consent to search the property of the defendant. The argument regarding the validity of Stanfill's authority under *Matlock* and *Nourse* could be raised by the actual owner of the outbuilding, were he the defendant, but not by Stanfill himself. It should also be noted that Stanfill had the key to the freezer in his possession.

Stanfill also disputes the trial court's finding that he gave voluntary consent to the search of the freezer. He points specifically to the trial court's

statement that Stanfill unlocked and opened the freezer, which is contrary to testimony that Stanfill was in handcuffs when consent was obtained and that Officer Garland opened the freezer with a key provided by Stanfill. He argues that his consent to search the freezer could not have been valid and was obtained by duress or coercion because at that point he had been placed in handcuffs by the police who were uniformed and equipped with handguns.

"The issue of whether the consent was indeed voluntary must be determined from the specific circumstances of a case." *Farmer v. Commonwealth*, 6 S.W.3d 144, 146 (Ky. App. 1999). "The question of voluntariness is to be determined by an objective evaluation of police conduct and not by the defendant's subjective perception of reality." *Id*. (quoting *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992)). Officers Jackson, Garland, and Mighell all testified that Stanfill consented to a search of the freezer. Furthermore, he was advised several times that he did not have to consent and that he could withdraw his consent. Stanfill concedes that Officer Jackson informed him that he had the right to refuse or withdraw his consent to the search but argues that this was undermined by Jackson's testimony at the suppression hearing that if Stanfill had denied consent, he would have obtained a search warrant. But at the time of the search, Officer Jackson did not inform Stanfill that he would seek a warrant if Stanfill did not consent to the search; Jackson's unvoiced thoughts could not possibly have exercised a coercive effect on Stanfill. We conclude that the trial court's finding

that Stanfill voluntarily gave consent is supported by substantial evidence and therefore not clearly erroneous.

Following his conviction, Stanfill filed a motion pursuant to CR 60.02 seeking to introduce more evidence regarding wind direction on the day of his arrest. He argued that the police testimony regarding the odor of ether was contradicted by certified weather reports which showed that wind patterns would have made it impossible for the officers to detect such an odor from the direction of the outbuilding. Stanfill submitted certified weather charts showing wind speeds, wind direction, and wind gusts for the date, time, and location in question, and asked the court to consider the charts as newly discovered evidence under CR 60.02(b). Stanfill also argued that 911 and police dispatch logs were never provided to him as he had requested. He contends that the logs were potentially exculpatory in nature because they could have contained information refuting the officers' testimony that they were dispatched to Stanfill's property to serve a warrant on a fugitive or fugitives.

The trial court denied Stanfill's motion on the grounds that it raised issues which either had been raised at trial or could be raised on direct appeal. We agree. At the suppression hearing, Stanfill submitted wind charts downloaded from the internet. Over the prosecutor's objection, the trial court stated that it would look at the charts. In its order denying the suppression motion, the court described the charts as "undocumented hearsay evidence regarding wind currents[.]" Stanfill argues that because there was no indication that the court took

any of the information in the charts into consideration, the certified wind charts constituted new evidence worthy of consideration pursuant to CR 60.02.

> CR 60.02 . . . authorizes relief from a final judgment based upon newly discovered evidence only if: (1) the evidence was discovered after entry of judgment; (2) the moving party was diligent in discovering the new evidence; (3) the newly discovered evidence is not merely cumulative or impeaching; (4) the newly discovered evidence is material; and (5) the evidence, if introduced, would probably result in a different outcome.

Hopkins v. Ratliff, 957 S.W.2d 300, 301-02 (Ky. App. 1997). The certified charts in this case were merely cumulative evidence, and there is no indication that the introduction of the charts would have caused the trial court to rule differently regarding the suppression of the evidence or that their introduction at trial would have resulted in a different outcome. The trial court did not, therefore, abuse its discretion in ruling that Stanfill was not entitled to extraordinary relief pursuant to CR 60.02. Stanfill's argument that he was entitled to the 911 and police dispatch logs has already been addressed above and will not be addressed again here.

Stanfill next argues that the trial court erred in refusing to grant a mistrial after the Commonwealth called Stanfill's fiancée, Janessa Keyes, as a rebuttal witness and revealed before the jury that she had pled guilty.

After the defense announced the closing of its case, the Commonwealth informed the trial court that it planned to call Keyes as a rebuttal witness. The Commonwealth explained that Keyes's prior affidavit, in which she averred that Stanfill was "cooking" methamphetamine on the day of his arrest,

could serve to refute the defense theory that Tim Smith, not Stanfill, was manufacturing methamphetamine. The defense argued that such rebuttal testimony was inappropriate because no witness had stated that Stanfill was not manufacturing methamphetamine on the day in question. The trial court allowed the Commonwealth to call Keyes but stated that the testimony would be limited.

The Commonwealth Attorney asked Keyes whether Stanfill was cooking methamphetamine on the day of the arrest. When she denied it, the Commonwealth Attorney asked her if she remembered signing an affidavit on September 28, 2007. Keyes replied that she recalled signing it but that she did not write it. She further stated that part of the affidavit was true and part of it was not.

The Commonwealth Attorney asked the trial court to declare Keyes a hostile witness. Defense counsel advised the court that the Commonwealth had previously asked that multiple defense witnesses be advised of their rights against self-incrimination and that this situation merited the same treatment. The Commonwealth Attorney replied, within hearing of the jury, "Well, your honor, she's pled guilty, so she doesn't have to be advised of her rights unless you want to advise of her rights for perjury. That seems to be the flavor of the day, your honor; no one wants to tell the truth." Defense counsel objected to the Commonwealth Attorney's remark on the ground that he was "over-editorializing." The trial court admonished the jury to disregard any editorial comments and advised the attorneys to save such comments for closing arguments.

The Commonwealth called one more rebuttal witness, and then the trial court ordered a lunch break. At that point, defense counsel told the trial court that he was moving for a mistrial because the Commonwealth had mentioned a co-defendant's guilty plea. The trial court denied the motion, finding that there had been no calculated misconduct on the part of the Commonwealth. It also denied subsequent defense motions for judgment of acquittal notwithstanding the verdict and for a new trial which restated this as one of the grounds.

Stanfill argues that the jury interpreted the Commonwealth Attorney's remark "she's pled guilty" to mean that Keyes had entered a plea of guilty to the same charges as Stanfill. Stanfill argues that the prejudice resulting from the Commonwealth Attorney's remark was serious enough to warrant reversal of his conviction under *Tipton v. Commonwealth*, 640 S.W.2d 818 (Ky. 1982).

We disagree. The comment by the Commonwealth Attorney was not sufficiently prejudicial to warrant reversal under *Tipton*. In fact, it was not prejudicial at all. In *Tipton*, the prosecutor "repeatedly elicited testimony regarding Hodge's, the co-indictee's, plea of guilty to second-degree robbery, cross-examined Hodge concerning the plea, and referred to the potential sentence the plea would carry." *Id*. at 820. The Court explained that

> It has long been the rule in this Commonwealth that it is improper to show that a co-indictee has already been convicted under the indictment. To make such a reference and to blatantly use the conviction as substantive evidence of guilt of the indictee now on trial is improper regardless of whether the guilt has been established by plea or verdict, whether the indictee does

> or does not testify, and whether or not his testimony implicates the defendant on trial.

Id. (internal quotation marks omitted).

In the case before us, the Commonwealth Attorney's remark contained only one brief reference to Keyes's guilty plea and was directed primarily at impeaching her veracity as a witness, not at implying that Stanfill was guilty. Indeed, there is support in our case law for using evidence of a guilty plea to impeach a witness. As the *Tipton* court noted, *Parido v. Commonwealth,* 547 S.W.2d 125, 127 (Ky. 1977), "left open the possibility that evidence of the plea [by a co-indictee] could be introduced to impeach the co-indictee." *Tipton*, 640 S.W.2d at 820.

> In any consideration of alleged prosecutorial misconduct . . . we must determine whether the conduct was of such an "egregious" nature as to deny the accused his constitutional right of due process of law. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). The required analysis, by an appellate court, must focus on the overall fairness of the trial, and not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

Slaughter v. Commonwealth, 744 S.W.2d 407, 411-12 (Ky. 1987). The prosecutor's remark was not of such an egregious nature as to undermine the overall fairness of Stanfill's trial.

Finally, Stanfill argues that his convictions for both the manufacture and possession of methamphetamine violate the constitutional stricture against double jeopardy. Specifically, he contends that the jury instructions failed

adequately to distinguish between the methamphetamine he was alleged to have manufactured and that which he was alleged to have possessed. Because this issue was not preserved for appeal, he requests review under the palpable error standard. *See* Kentucky Rules of Criminal Procedure (RCr) 10.26. The Commonwealth argues that an allegation of error concerning jury instructions is not reviewable under the palpable error standard. *See* RCr 9.54(2). In *Beaty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003), the Kentucky Supreme Court ruled that a potential double jeopardy violation could have been avoided by proper wording of the jury instructions. It reviewed the purported error, even though it was unpreserved, observing that "failure to preserve this issue for appellate review should not result in permitting a double jeopardy conviction to stand[.]" *Id.* at 210 (citing *Sherley v. Commonwealth*, 558 S.W.2d 615, 618 (Ky. 1977)).

The Commonwealth argues that the *Beaty* court improperly reviewed an instructional error as a potential double jeopardy violation, and has asked us to "clarify" the holding in *Beaty*. As Stanfill has pointed out, we are bound by Kentucky Supreme Court Rules (SCR) 1.030(8)(a) to follow the applicable precedents established by the Supreme Court. It is not within our purview to "clarify" *Beaty*. According to *Beaty*, a purported error in the jury instructions that implicates double jeopardy is reviewable under the palpable error standard.

In *Beaty*, the Kentucky Supreme Court held that possession of methamphetamine, KRS 218A.1415, was a lesser-included offense of manufacturing methamphetamine, KRS 218A.1432, for purposes of double

jeopardy. *Beatty*, 125 S.W.3d at 211. The Court explained that the key to determining whether the prohibition against double jeopardy had actually been violated was whether the manufacturing and possession convictions were predicated upon the same underlying facts. Convictions for both possession and manufacturing of methamphetamine would only be permissible "if the methamphetamine that he [the defendant] was convicted of possessing was not the same methamphetamine that he was convicted of manufacturing." *Id.* at 213. The dilemma in *Beaty* was that the jury instructions did not require the jury to make this distinction.

In Stanfill's case, the jury instructions mirrored those given in *Beaty*. The possession instruction stated as follows:

> You will find the Defendant guilty of First Degree Possession of a Controlled Substance under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about July 13, 2007 and before the finding of the Indictment herein, he had in his possession a quantity of methamphetamine;
>
> AND
>
> B. That he knew the substance so possessed by him was methamphetamine.

The manufacturing instruction stated as follows:

> You will find the Defendant guilty of Manufacturing Methamphetamine under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt that in this county on or about July 13, 2007 and before the finding of the Indictment herein

A. He knowingly manufactured methamphetamine;

OR

B. He knowingly had in his possession with the intent to manufacture methamphetamine;

1) Two or more of the following chemicals used in the manufacture of methamphetamine:

a.) anhydrous ammonia
b.) ether
c.) salt
d.) liquid fire
e.) lithium
f.) pseudoephedrine

OR

2) Two ore more of the items of equipment used in the manufacture of methamphetamine:

a.) tubing
b.) coffee filters
c.) generators
d.) tanks
e.) blender
f.) glass jars
g.) plastic bags

As in *Beaty*, "because Instruction Number 9 [the possession instruction] did not require the jury to distinguish between the two offenses, we cannot know that the jury convicted Appellant of possession of methamphetamine that was not a product of the manufacturing process for which he was also convicted under Instruction No. 8." *Id*. at 214. To avoid this situation, the *Beaty* court suggested adding the following proviso to the possession instruction:

> If you have found the Defendant guilty of manufacturing methamphetamine . . ., that the substance so possessed by him was not a product of the same manufacturing process for which you have found him guilty under that Instruction.

Id. at 213. Due to the absence of such an instruction in Stanfill's case, his convictions violated the ban on double jeopardy.

Generally, the remedy in this situation is "maintaining the more severe conviction and vacating the lesser offense." *Clark v. Commonwealth*, 267 S.W.3d 668, 678 (Ky. 2008). First-degree possession of a controlled substance is a Class D felony for which Stanfill received a sentence of five years; manufacturing methamphetamine is a Class B felony for which Stanfill received a sentence of fifteen years. His conviction for possession is therefore vacated.

Accordingly, Stanfill's convictions for possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, manufacturing methamphetamine, and use of drug paraphernalia are affirmed. The denial of his motion made pursuant to CR 60.02 is affirmed. His conviction for first-degree possession of a controlled substance is vacated.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Steven Buck
Assistant Public Advocate
Frankfort, Kentucky

BRIEFS FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David W. Barr
Assistant Attorney General
Frankfort, Kentucky