

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-001842-MR

TERRY MILLS

APPELLANT

v. APPEAL FROM McCracken Circuit Court
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 02-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: In July 2002, Terry Mills pled guilty in McCracken Circuit Court to, among other charges, manufacturing methamphetamine in violation of KRS 218A.1432(1)(b). He was sentenced as a first-degree persistent felon to twenty years in prison.¹ At the time, KRS 218A.1432(1)(b) outlawed "knowingly and unlawfully . . . possess[ing] the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine." In June 2003, in Kotila v.

¹ KRS 532.080.

Commonwealth,² our Supreme Court held that 1432(1)(b)'s "possesses the chemicals or equipment" element required the Commonwealth to prove that the defendant possessed not merely some but either all the chemicals or all the equipment necessary to manufacture methamphetamine.³ In June 2004, Mills, who at the time of his arrest had possessed several but not all of the methamphetamine-making chemicals, moved pro se for relief under CR 60.02. He claimed that his guilty plea was not knowing and voluntary because counsel and the trial court misinformed him as to the nature of the alleged manufacturing crime, both having led him to believe, as was then widely accepted, that he might be convicted for possessing fewer than all of the chemicals. The trial court summarily denied Mills's motion by order entered July 27, 2004, and it is from that denial that Mills has appealed. We affirm.

As Mills correctly notes, his guilty plea "is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'"⁴ It may not be deemed "intelligent," moreover,

² 114 S.W.3d 226 (Ky. 2003).

³ Kotila has since been superseded by statute. In 2005, the General Assembly amended KRS 218A.1432(1)(b) to outlaw possession of two or more of the chemicals or pieces of equipment for manufacturing the drug.

⁴ Bousley v. United States, 523 U.S. 614, 618, 118 S.Ct. 1604, 1609, 140 L.Ed.2d 828 (1998).

unless he first received "real notice of the true nature of the charge against him."⁵ If Mills was indeed led to believe that he could be prosecuted for conduct our Supreme Court has ruled was not criminal—the possession of only some of the methamphetamine ingredients—then arguably he did not receive the real notice the Constitution requires for a valid guilty plea.

We need not reach the merits of Mills's claim, however, for, as the United States Supreme Court explained in Bousley v. United States,⁶ upon which Mills relies, collateral relief from a guilty plea on this ground is available only if the movant can justify his failure to raise the issue in the trial court or upon direct appeal or if he can establish his "actual innocence." Mills can do neither.

The only reason Mills offers for failing to raise the issue sooner is the alleged unexpectedness of the Kotila holding, but the Bousley Court rejected that excuse where the appellate decision did not change but merely clarified existing law and the basis for the decision was "reasonably available to counsel."⁷ Kotila did not change the law. And there is nothing about the Supreme Court's straight-forward grammatical analysis

⁵ *Id.* at 618, 1609 (citation and internal quotation marks omitted).

⁶ *supra*.

⁷ *Id.* at 622, 1611.

of the statute in Kotila that was not reasonably available to counsel. Nor can Mills claim actual innocence. Shortly after his arrest he gave a statement to the police in which he admitted having "cooked meth" for the preceding two months.

Not surprisingly in light of this last point, Mills also contends that his statement to the police and the evidence seized from his person and his van should be suppressed because they stemmed from an illegal search and seizure. It is well established, however, that CR 60.02 does not provide a separate avenue of appeal to be pursued in addition to other remedies, such as suppression motions and appeals from conditional guilty pleas.⁸ Mills's waiver of those other remedies and his unconditional guilty plea preclude his challenges under CR 60.02 to the constitutionality of his arrest and the admissibility of the resulting evidence.⁹

Because Mills has not justified his failure to appeal from his assertedly involuntary guilty plea and because he cannot claim actual innocence, we agree with the trial court that he is not entitled to the extraordinary remedy he seeks. Accordingly, we affirm the July 27, 2004, order of the McCracken Circuit Court.

ALL CONCUR.

⁸ McQueen v. Commonwealth, 948 S.W.2d 415 (Ky. 1997).

⁹ Thompson v. Commonwealth, 147 S.W.3d 22 (Ky. 2004).

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