

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000957-MR

NATHON C. DONAHOO

APPELLANT

v. APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 02-CR-00038

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Nathon C. Donahoo brings this appeal from an April 2, 2004, Opinion and Order of the McLean Circuit Court denying his motion under Ky. R. Civ. P. (CR) 60.02(e) & (f) to vacate his conviction upon a plea of guilty to manufacturing methamphetamine. We affirm.

In September 2002, appellant entered a plea of guilty to the offense of manufacturing methamphetamine by manufacturing or possessing the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine

(Kentucky Revised Statutes (KRS) 218A.1432) and possession of drug paraphernalia (KRS 218A.500). He was sentenced to a total of five years' imprisonment.

Appellant subsequently filed a motion to vacate judgment pursuant to CR 60.02(e) & (f). Therein, appellant relied upon the recent Supreme Court decision in Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003), cert. denied, 540 U.S. 1198 (2004).¹ Appellant alleged that he did not possess all of the equipment or all of the chemicals required to manufacture methamphetamine and, thus, could not have been convicted of manufacturing methamphetamine under the holding of Kotila. The circuit court rejected appellant's argument and entered an order denying his CR 60.02 motion. This appeal follows.

Appellant contends the circuit court committed error by denying his CR 60.02(e) & (f) motion to vacate his conviction for manufacturing methamphetamine. CR 60.02(e) & (f) states as follows:

(e) [T]he judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

¹ We observe that Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003), cert. denied, 540 U.S. 1198 (2004) was superceded in the 2005 General Assembly by amendment to Kentucky Revised Statutes 218A.1432(1)(b).

In Kotila, the Supreme Court concluded that "KRS 218A.1432(1)(b) applies only when a defendant possesses *all* of the chemicals *or all* of the equipment necessary to manufacture methamphetamine." Id. at 240-241. Appellant argues that he did not possess all of the chemicals or all of the equipment necessary to manufacture methamphetamine and, thus, his conviction for manufacturing methamphetamine is void.

Relief under CR 60.02 is available only under extraordinary situations and only when such relief is not available by direct appeal or under Ky. R. Crim. P. 11.42. Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983). Appellant argues that he is entitled to this extraordinary relief because he did not possess the requisite items necessary to have been convicted of manufacturing methamphetamine under KRS 218A.1432. Appellant essentially challenges the sufficiency of the Commonwealth's evidence to convict him upon manufacturing methamphetamine.

The record reflects that appellant entered a plea of guilty to manufacturing methamphetamine. It is well-established that by entering a guilty plea a defendant waives the right to attack the sufficiency of evidence and all other defenses, except that the indictment does not charge a crime. Taylor v. Commonwealth, 724 S.W.2d 223 (Ky.App. 1986).

The indictment in this case charged in relevant part:

Count 1: Committed the offense of manufacturing methamphetamine by manufacturing methamphetamine or possessing the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.

Under Count 1 of the indictment, appellant was charged with "possessing the chemicals or equipment for the manufacture of methamphetamine" Appellant was not specifically indicted for only possessing some of the equipment or chemicals; rather, the indictment charged him generally with possessing the chemicals or equipment necessary to manufacture methamphetamine. We believe the above language of the indictment was sufficient to have charged appellant with the offense of manufacturing methamphetamine under Kotila.

Moreover, appellant's attack upon the sufficiency of the evidence is precluded by entry of his guilty plea. Accordingly, we believe the circuit court properly denied appellant's CR 60.02 motion to vacate his conviction for manufacturing methamphetamine.

For the foregoing reasons, the Opinion and Order of the McLean Circuit Court is affirmed.

MINTON, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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