

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-002172-MR

DAVID RAY BUCK

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT  
HONORABLE EDDIE C. LOVELACE, JUDGE  
INDICTMENT NO. 05-CR-00013

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART AND REVERSING IN PART

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BEFORE: BARBER, JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.<sup>1</sup>  
PAISLEY, SENIOR JUDGE: David Ray Buck appeals from a judgment of conviction entered by the Monroe Circuit Court. After a jury trial, Buck was convicted of carrying a concealed deadly weapon; possession of a controlled substance in the first degree, methamphetamine; tampering with physical evidence; criminal conspiracy to manufacture methamphetamine; trafficking in a controlled substance in the first degree, methamphetamine and hindering prosecution in the second degree. On appeal, Buck argues that he was prejudiced by the Commonwealth when it failed

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<sup>1</sup> Senior Judges Joseph R. Huddleston and Lewis G. Paisley and sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

to produce a witness statement; that the trial court erred when it denied his motion for a directed verdict regarding the trafficking charge; that the Commonwealth engaged in prosecutorial misconduct during closing argument; that the evidence was insufficient to sustain his conviction for criminal conspiracy to manufacture methamphetamine and that double jeopardy precluded his conviction for both possession of methamphetamine and trafficking in methamphetamine. Finding that double jeopardy precluded Buck from being convicted of both trafficking and possession, we affirm in part, reverse in part and remand.

On January 22, 2005, Kentucky State Trooper Robert Maxwell contacted Eddie Murphy, a detective with the Commonwealth Attorney's Office for the 40<sup>th</sup> judicial district. Trooper Maxwell stated that Clint Rowe, an escaped drug dealer, was hiding at the home of David Ray Buck in Monroe County. Detective Murphy met with Trooper Maxwell and numerous other law enforcement agents and proceeded to Buck's home. When the officers arrived at Buck's residence, they found Buck in his vehicle driving along his driveway in an attempt to leave. Following behind Buck was a red pickup truck driven by Ricky Turner. Clint Rowe was a passenger in Turner's truck. As the police arrived, Rowe fled, but Trooper Maxwell apprehended Rowe sometime later.

Upon seeing the police, Buck returned to his house. Detective Murphy frisked Buck and found a set of brass knuckles on his person. The detective then arrested Buck for carrying a concealed deadly weapon. Detective Murphy and the other officers also noticed a strong chemical odor, often associated with the manufacturing of methamphetamine, emanating from a small trailer beside Buck's house. Because of the cold weather, Buck asked if he could wait inside his house. The detective agreed and asked Buck for permission to search his car and his home. Buck consented. Later, when Buck thought no one was looking, he threw a large Ziploc ® bag behind a wood pile. Detective Murphy retrieved the bag, which contained about one ounce of white powder. The detective field-tested the substance which indicated the presence of methamphetamine. Afterward, the detective did a thorough search of Buck's person and found an empty baggie, several twist ties and \$4,235.00 in cash. In the search of Buck's home, the police found two blender bowls containing a white substance. During the search of the remainder of Buck's property, the police found a white Dodge pickup truck, which contained all the necessary equipment to manufacture methamphetamine.

The police charged Buck, Rowe and Turner with various offenses. On February 23, 2005, a Monroe County Grand Jury indicted Buck and charged him with carrying a concealed deadly

weapon; hindering prosecution or apprehension in the second degree; manufacturing methamphetamine; trafficking in a controlled substance in the first degree, methamphetamine; criminal conspiracy to manufacture methamphetamine; tampering with physical evidence; possession of a controlled substance in the first degree, methamphetamine; and possession of drug paraphernalia. On July 22, 2005, Buck proceeded to trial, and the jury convicted him of carrying a concealed deadly weapon; possession of a controlled substance in the first degree, methamphetamine; tampering with physical evidence; criminal conspiracy to manufacture methamphetamine; trafficking in a controlled substance in the first degree, methamphetamine and hindering prosecution in the second degree. Since there were irregularities with the jury sentencing process, the trial court, after considering a pre-sentence investigative report, sentenced Buck to a total of fifteen years in prison. Alleging numerous errors, Buck seeks review from this Court.

**COMMONWEALTH'S FAILURE TO COMPLY WITH THE KENTUCKY RULES OF CRIMINAL PROCEDURE**

To better understand Buck's appellate arguments, we must briefly revisit the facts. Two days before trial, the Commonwealth entered into an agreement with Ricky Turner to secure Turner's testimony against Buck. In exchange for his testimony, the Commonwealth granted Turner immunity and

dismissed all charges against Turner except for a hindering prosecution charge. The prosecutor contacted Buck's trial attorney and informed him that Turner would be testifying for the Commonwealth. However, the prosecutor did not produce a written or taped witness statement of Turner as required by Kentucky Rules of Criminal Procedure (RCr) 7.26.

Two days later at the trial, when the prosecutor called Turner to the stand, Buck's attorney objected and argued that Turner should be excluded from testifying since the Commonwealth had failed to comply with RCr 7.26. The prosecutor explained that he had not had time to comply with the rule, and he produced Turner's witness statement for Buck's attorney to examine if he so wished. The trial court decided that Turner could testify but offered Buck and his attorney an opportunity to examine Turner's statement before Turner testified. Buck accepted the trial court's offer, and he and his trial counsel briefly left the courtroom and examined Turner's statement.

After Buck had examined Turner's statement, Turner proceeded to testify. Upon direct examination, Turner stated that he had observed Clint Rowe manufacture methamphetamine inside the small trailer located on Buck's property. He further testified that he observed Buck in close proximity to Rowe when Rowe manufactured methamphetamine. According to Turner, Rowe manufactured two or three batches of methamphetamine at Buck's

residence. Upon cross-examination, Turner relayed that he had observed Rowe manufacture methamphetamine at Buck's residence even though Buck was absent. Turner also testified that Buck did not manufacture methamphetamine, did not participate in the manufacturing of methamphetamine and did not use methamphetamine.

On appeal, Buck points out that, according to RCr 7.26 and Jencks v. U.S., 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103 (1956), a criminal defendant has the right to examine witness statements at least forty-eight hours prior to trial. According to Buck, such an examination gives a criminal defendant the opportunity to discovery possible inconsistencies between the prior statement and the latter testimony. In addition, relying on Beaty v. Commonwealth, 125 S.W.3d 196 (Ky. 2003), Buck argues that if the Commonwealth violates RCr 7.26, such a violation will constitute reversible error if some prejudice to the defendant resulted from the Commonwealth's failure to comply with the rule. According to Buck, a criminal defendant suffers prejudice if the error resulted in denying the defendant access to information which, if he had received in a timely manner, would have enabled him to contradict the witness, impeach the witness or establish some other fact that might have, within reason, altered the verdict. Hicks v. Commonwealth, 805 S.W.2d 144 (Ky. 1991).

In his brief, Buck avers that Turner's testimony contained exculpatory evidence, *i.e.*, that Buck neither made nor used methamphetamine, and he insists that the Commonwealth's failure to comply with RCr 7.26 hindered his ability to fully explore this exculpatory evidence and prejudiced him.

The relevant portion of RCr 7.26 reads:

Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

This rule is often referred to as the "forty-eight hour rule." When we review a trial court's decision to deny a criminal defendant's motion to preclude testimony based on the Commonwealth's violation of the forty-eight hour rule, we will not disturb the trial court's decision absent an abuse of discretion. Beaty v. Commonwealth, supra at 202. Additionally, even if the Commonwealth has violated RCr 7.26, such a violation is not grounds for automatic reversal. Gosser v. Commonwealth, 31 S.W.3d 897, 905 (Ky. 2000). In order to gain reversal, the criminal defendant must show that he was prejudiced by the Commonwealth's tardiness. Beaty v. Commonwealth, supra. If the

defendant fails to show such prejudice, then we will deem the Commonwealth's violation to be harmless error. Gosser v. Commonwealth, supra.

In the present case, Buck claims that the Commonwealth's tardiness prevented him from fully exploring the exculpatory statements made by Turner during cross-examination. However, Buck does not explain how he was prevented from exploring this exculpatory evidence, and does not explain how he was prejudiced. Before Turner testified, Buck and his trial counsel reviewed Turner's statement, and, during Turner's testimony, Buck raised no further objections. On appeal, Buck has failed to show that he was prejudiced by the Commonwealth's violation of RCr 7.26; thus, we find that the Commonwealth's violation was nothing more than harmless error. Given that the error was harmless, the trial court did not abuse its discretion when it denied Buck's motion *in limine* to exclude Turner's testimony.

#### **SUFFICIENCY OF THE EVIDENCE REGARDING TRAFFICKING**

After the close of the Commonwealth's case-in-chief, Buck moved for a directed verdict regarding the charge of trafficking in methamphetamine. The trial court denied the motion, and, according to Buck, it noted that there was not a tremendous amount of evidence to support the charge. However, the trial court noted that there was evidence of a baggie, twist



ties, a large sum of money, and evidence of two sets of scales. Buck avers that one set of scales was found on Turner and the other set was found on Rowe. According to Buck, this is evidence of complicity to traffic, not evidence of trafficking itself. Since Buck was charged with trafficking, not complicity to traffic, he argues that the trial court could not rely on the scales in denying his motion for directed verdict since such evidence was irrelevant to the trafficking charge.

While Buck expresses his assignment of error in terms of relevancy, in actuality, he is questioning the sufficiency of the evidence. In a criminal trial, when a trial court considers a motion for directed verdict, the trial court must draw from the evidence all fair and reasonable inferences in favor of the Commonwealth. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). The trial court may not direct a verdict in the defendant's favor if the evidence is sufficient to induce a reasonable juror to believe that the defendant is guilty beyond a reasonable doubt. Id. Furthermore, the trial court must assume that the evidence presented by the Commonwealth is true, although it must reserve the questions of credibility and weight for the jury. Id. When we review the denial of a directed verdict, we must consider whether, given the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. Id.

A review of the record reveals that on January 22, 2005, Buck possessed large amounts of cash; he was unemployed; he possessed a baggie and several twist ties; he possessed a Ziploc ® bag that contained a quantity of methamphetamine; he was armed with brass knuckles; he gave shelter to Rowe and allowed Rowe to manufacture methamphetamine on his property; and he attempted to flee upon learning that the police were en route to his home. Given the evidence as a whole, the jury acted reasonably when it convicted Buck of trafficking in methamphetamine. Id. The trial court did not err when it denied Buck's motion for directed verdict. Furthermore, even if the evidence regarding the two sets of scales was irrelevant as Buck claims, it is well settled that a lower court's decision will be upheld if it reached the correct conclusion for the wrong reason. Jarvis v. Commonwealth, 960 S.W.2d 466, 469 (Ky. 1998).

#### **PROSECUTORIAL MISCONDUCT**

During the penalty phase of Buck's trial, the prosecutor, in his closing argument, asked the jury to sentence Buck to at least twenty years in prison. The prosecutor stated, "And I again leave that in your good hands because, as I say, you're the conscious of this community and what you say will not stop here today, but just take these and consider what was done in this case, consider what we're dealing with here." According

to Buck, this statement is prohibited by King v. Commonwealth, 253 Ky. 775, 70 S.W.2d 667 (Ky. 1934) because, by using the "conscious of the community" language, the prosecutor asked the jury to make a sentence recommendation, not based on the evidence, but based on the need to send a message to other future criminals. Buck did not object to this language so he argues that the prosecutor's statement to the jury constituted a manifest injustice that rose to the level of palpable error.

Palpable error is an irregularity that affects the substantial rights of a party and will result in manifest injustice to the party if not addressed by an appellate court. Schoenbachler v. Commonwealth, 95 S.W.3d 830, 837 (Ky. 2003). In other words, after considering the whole case, if the appellate court does not believe that there is a substantial possibility that the result would have been any different then the irregularity will be held non-prejudicial. Id. Since we believe that there was no substantial possibility that the result of Buck's trial would have been different absent the prosecutor's remarks, we hold this irregularity to be non-prejudicial and decline to address the merits of Buck's assignment of error.

**SUFFICIENCY OF THE EVIDENCE REGARDING CRIMINAL CONSPIRACY TO  
MANUFACTURE METHAMPHETAMINE**

According to Buck, the Commonwealth dismissed any charges against Turner that involved methamphetamine, so Buck argues that the Commonwealth could not use Turner to establish a criminal conspiracy. In addition, Buck points out that Rowe did not testify; therefore, Buck argues that there was no direct proof of a conspiracy between Buck and Rowe. Based on this, Buck reasons that the Commonwealth did not present sufficient evidence to support the criminal conspiracy charge.

In the alternative, Buck calls to our attention the fact that Detective Murphy testified that Buck possessed all the necessary chemicals, save one, to manufacture methamphetamine. Also, Buck points out that most of the equipment used to manufacture methamphetamine was found in a white Dodge pickup truck that Rowe had been driving, so Buck concludes that he did not possess all the necessary equipment to manufacture methamphetamine, even though all the equipment was found on his property. Buck concludes that the Commonwealth failed to produce sufficient evidence to support the underlying charge of manufacturing methamphetamine. Without sufficient evidence to support the underlying charge, Buck argues that he could not have been convicted of criminal conspiracy.

As we stated earlier, when we review the denial of a directed verdict, we must consider whether, given the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. Commonwealth v. Benham, supra.

KRS 506.040 sets forth the elements of criminal conspiracy. According to the commentary to KRS 506.040, to prove criminal conspiracy, the Commonwealth must show that a person intended to combine or agree with one or more persons to commit an unlawful act and that one of the conspirators performed an overt act in furtherance of the conspiratorial agreement. In addition, the Commonwealth may establish the existence of a criminal conspiracy based upon the actions and conduct of the conspirators, or based upon facts and circumstances which, when considered separately, are not sufficient to establish a conspiracy, but when connected and examined as a whole are sufficient to establish a criminal conspiracy. Chapman v. Commonwealth, 294 Ky. 631, 172 S.W.2d 228, 231 (Ky. 1943).

According to Turner's testimony, Buck had allowed Rowe to use the trailer beside Buck's house to manufacture methamphetamine, and Turner testified that he observed Buck in close proximity to Rowe while Rowe manufactured methamphetamine. In addition, Turner relayed that Rowe had manufactured two or three batches of methamphetamine at Buck's residence. From this

evidence, the jury could easily infer that, by sheltering Rowe and allowing him to manufacture methamphetamine on his property, Buck had intentionally entered into an agreement with Rowe to commit an unlawful act, the manufacturing of methamphetamine; thus, the evidence supports the first element of criminal conspiracy. Regarding the second element of criminal conspiracy, the jury could easily infer that one of the conspirators, Rowe, performed an overt act, the manufacturing of methamphetamine, in furtherance of the conspiratorial agreement. Considering the evidence as a whole, the jury acted reasonably when it convicted Buck of criminal conspiracy to manufacture methamphetamine. See Commonwealth v. Benham, supra.

In the alternative, Buck insists that the evidence could not support the underlying charge of manufacturing methamphetamine because he did not possess all the chemicals or all the equipment necessary to manufacture methamphetamine. However, this argument is not well taken for two reasons. First, Buck was charged and convicted of criminal conspiracy to manufacture methamphetamine. The Commonwealth had to prove the elements of criminal conspiracy, not the elements of the underlying charge, manufacturing methamphetamine. Second, Detective Murphy testified unequivocally that he had found all the equipment necessary to manufacture methamphetamine on Buck's property. Since the equipment was on Buck's property, he was in

constructive possession of it, thus, satisfying the requirements set forth in Kotila v. Commonwealth, 114 S.W.3d 226 (Ky. 2003).

**DOUBLE JEOPARDY PROHIBITS THE POSSESSION CONVICTION AND THE TRAFFICKING CONVICTION SINCE BOTH WERE BASED ON THE SAME EVIDENCE**

Buck argues that the possession conviction and the trafficking conviction were based on the same evidence, the fact that a bag of methamphetamine was found at his residence. Thus, Buck concludes that possession was a lesser included offense of trafficking since "it cannot be said that each requires an element that the other does not." So, relying on Blockburger v. U.S., 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), Buck argues that double jeopardy prohibited the jury from convicting him of both possession and trafficking.

According to Commonwealth v. Burge, Ky., 947 S.W.2d 805, 811 (1996), when addressing questions concerning double jeopardy, we rely upon the analysis found in Blockburger v. U.S., supra. Double jeopardy does not prohibit the Commonwealth from charging an accused with two crimes arising out of the same course of conduct as long as each statute requires proof of an additional element which the other does not.

The elements of trafficking in a controlled substance in the first degree, methamphetamine are set forth in KRS 218A.1412. The relevant portion of the statute reads, "A person is guilty of trafficking in a controlled substance in the first

degree when he knowingly and unlawfully traffics in . . . a controlled substance that contains any quantity of methamphetamine[.]” On the other hand, the elements for possession of a controlled substance in the first degree, methamphetamine are set forth in KRS 218A.1415. The relevant portion of that statute reads, “A person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possess . . . a controlled substance that contains any quantity of methamphetamine[.]” Comparing these two statutes, one can easily see that the trafficking statute encompasses all the elements of the possession statute.

While the Commonwealth may contend that the trafficking charge and the possession charge did not arise out of the same course of conduct, the record simply does not support that contention. As we stated previously, the evidence was sufficient to support the trafficking charge, and, by extension, was sufficient to support the possession charge. However, possession does not require proof of an additional element that is not found in trafficking. Thus, we agree with Buck that possession was merely a lesser included offense of trafficking. By allowing the possession charge to stand, the trial court violated the holding of Blockburger v. U.S., supra. Since double jeopardy prohibited Buck from being convicted of both trafficking and possession, we reverse that part of the



judgment of conviction regarding possession and remand this case to the trial court for re-sentencing. The remainder of the judgment of conviction is affirmed.

ALL CONCUR.

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