

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002253-MR

ANITA KAY PARKER

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 06-CR-00055

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

HENRY, SENIOR JUDGE: Anita Parker and a co-defendant, Randall Miller, were tried before a jury. She was found guilty of manufacturing methamphetamine, possession of anhydrous ammonia in an unapproved container, possession of a controlled substance – methamphetamine and possession of drug paraphernalia. She was sentenced to serve fifteen years and brings four issues to our attention on appeal.

Parker first argues that the trial court erred when it failed to grant her motion for a directed verdict. She then contends that her conviction for both possession

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of anhydrous ammonia in an unapproved container and manufacturing methamphetamine violates the principles of double jeopardy. Similarly, she argues that her conviction for both manufacturing methamphetamine and possession of methamphetamine violates the principles of double jeopardy. Finally, she claims that reversible error occurred when the trial court allowed testimony that anhydrous ammonia is often stolen and that night vision goggles are commonly used to accomplish that theft.

Kentucky State Police Trooper Brad Bowles was dispatched to a residential area shortly after midnight on June 29, 2004 to investigate a report of a strong chemical odor. Upon his arrival at the residence he noticed an obvious chemical odor he described as a combination of anhydrous ammonia and ether. He determined the smell was coming from two sources; an outbuilding located approximately twenty-five yards from the residence and also a roll-a-way trash can. He examined the trash can and observed a Coleman fuel container and several starting fluid cans. Both of these items are known precursors associated with methamphetamine production.

Troopers then approached the house. Although the lights were on, no one responded when they knocked on the door. A note was attached to the front door instructing visitors to go to the side door. It was signed by "Randall and Anita". A trooper who was certified to dismantle methamphetamine labs arrived on the scene and confirmed that the odor coming from the outbuilding did indeed indicate the presence of a lab. The troopers entered the outbuilding and discovered a recently active methamphetamine production lab.

The police secured the scene and took steps to obtain a search warrant in order to enter the house. As they waited, a vehicle matching the description of the

vehicle normally driven by Parker drove past the residence pulling a lawn mower on a trailer. Because of all of the police cars, Parker did not pull into the driveway but continued down the road. Police stopped the vehicle about half a mile down the road. Parker was driving and the passenger was Randall Miller. The pair was returned to the residence and informed of the search warrant. Miller produced a key to the residence and on entry, the police discovered television monitors that were hooked up to security cameras pointed at the driveway. They additionally discovered a light bulb that had been converted into a pipe used to ingest drugs and a small baggy that contained what tests later confirmed was methamphetamine.

Miller asked why lights were on in the home, stating they had been off when he and Parker had left earlier in the afternoon. When questioned about the contents of the outbuilding, he stated it contained a freezer, some boxes and some chairs. The set of keys in Parker's vehicle's ignition included a key for the locked outbuilding along with a tag listing both Parker and Miller's names.

Parker first argues that the trial court erred when it failed to grant her motion for a directed verdict. When ruling on a motion for a directed verdict, the trial court must assume that the evidence put forth by the Commonwealth is true, and must draw all fair and reasonable inferences from that evidence in a light most favorable to the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). “[T]he test for a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt.” *Id.*

On cross-examination, Parker's counsel elicited testimony from Trooper Bowles that there have been instances where methamphetamine labs were found on property where the owner had no knowledge the lab was present. Her argument

primarily was that she was gone the day the police found the lab and someone else was involved with the drugs. In order to convict Parker, the jury was required to find that she acted “knowingly” as defined in Kentucky Revised Statutes (KRS) 501.020(2); *see also* KRS 218A.015. Parker’s argument was that she had no knowledge of the drugs.

Constructive possession has been held to be sufficient to uphold a conviction for illegal possession of controlled substances. In *Clay v. Commonwealth*, 867 S.W.2d 200 (Ky.App. 1993), Clay claimed ownership of some of the drugs found in her apartment but denied knowledge and possession of other drugs found in the kitchen and bathroom. We upheld the trial court’s denial of a motion for directed verdict because it was Clay’s apartment and she used the kitchen and bathroom where the drugs were located. *Id.* at 202-203. In this case the Commonwealth introduced substantial evidence tending to prove Parker’s constructive possession of the substances and her knowledge of their presence in her residence. She had possession of the keys to the shed where the lab was discovered along with keys to the house where drugs and paraphernalia were present. “[T]he term ‘possession’ need not always be actual physical possession and . . . a defendant may be shown to have had constructive possession by establishing that the contraband involved was subject to his dominion and control.” *Rupard v. Commonwealth*, 475 S.W.2d 473, 475 (Ky. 1971). There was sufficient evidence for a reasonable jury to conclude that Parker had knowledge and constructive possession of the lab, drugs and paraphernalia. Denial of the motion for a directed verdict was appropriate.

Parker next argues her convictions were in violation of the principles of double jeopardy. “The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to

determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932); see also *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996), cert. denied, 522 U.S. 971, 118 S.Ct. 422, 139 L.Ed.2d 323 (1997).

Manufacturing methamphetamine is distinct from possession of anhydrous ammonia in an improper container. It is unlawful “for any person to knowingly possess anhydrous ammonia in any container other than an approved container.” KRS 250.489(1). A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully “[m]anufactures methamphetamine or [p]ossesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.” KRS 218A.1432. In the first statute, the prohibited act is possession of anhydrous ammonia in an unapproved container. The second statute makes no reference to a container. The manufacturing statute, in addition to proof of possession of the chemicals or equipment, requires proof of intent to manufacture methamphetamine. The possession of anhydrous ammonia statute requires no such proof of intent. The proof in this case established that a jury could reasonably believe that Parker had possession of the chemicals used to process methamphetamine along with the equipment for a lab, and anhydrous ammonia in a propane tank of the type used with an outdoor gas grill. Possession of each of these items constituted a distinct violation of a statute. Each statute has a separate and distinct fact to be proven and each is a separate crime. We find no violation of double jeopardy principles as it relates to the manufacturing and possession of anhydrous ammonia charges.

Partial reversal (as to the possession charge) is required by KRS 505.020 and *Beatty v. Commonwealth*, 125 S.W.3d 196 (Ky. 2003). As in *Beatty*, it could not be determined from the record whether “the methamphetamine that [Parker] was convicted of possessing was . . . the same methamphetamine that [s]he was convicted of manufacturing.” *Id.* at 213. The *Beatty* court suggested an additional jury instruction to make it clear that any possession charge was not a result of possessing drugs directly resulting from the manufacturing process that was also a charged crime. *Id.* The instructions given in this case did not require the jury to distinguish between the drugs found in the house and any drugs associated with the production process in the shed. *Beatty* held that in order to avoid the constitutional prohibition of double jeopardy (as well as insufficiency of evidence and denial of a unanimous verdict) in prosecutions for both possessing and manufacturing the same type of drug, the instructions must make it clear that the drugs the defendant is charged with possessing are different from the drugs he is charged with manufacturing. *Id.* at 213-214; *see also Miller v. Commonwealth*, 77 S.W.3d 566, 576 (Ky. 2002). Pursuant to those requirements, we reverse the conviction for possession of a controlled substance and the associated five-year sentence imposed.

Parker’s final argument involves the testimony of a Trooper that anhydrous ammonia is usually stolen and that from his experience, those thefts usually occur at night and some people use night vision goggles to accomplish that theft. Police discovered night vision goggles in the vehicle driven by Parker when she was arrested. Over objection, the trial court allowed this testimony as relevant and that it had some significant probative value. We agree.

Evidence is relevant if it has a tendency to make the existence of any fact of consequence to the issues before the court more or less probable. Kentucky Rules of Evidence (KRE) 401. “A trial judge's decision with respect to relevancy of evidence . . . is reviewed under an abuse of discretion standard.” *Love v. Commonwealth*, 55 S.W.3d 816 (Ky. 2001). The test is whether the court’s decision was “arbitrary, unreasonable, unfair or unsupported by sound legal principles.” *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004) (internal citation and quotation omitted).

Parker denied any link to the anhydrous ammonia found on the property. It was reasonable to link the night vision goggles found in the vehicle to possession of anhydrous ammonia. That testimony was relevant as it provided some evidence linking Parker to the anhydrous ammonia. It is within the sound discretion of the trial judge to determine whether the probative value of evidence is outweighed by its possible prejudicial effect. *Rake v. Commonwealth*, 450 S.W.2d 527, 528 (Ky. 1970). We do not believe that it was an abuse of the trial court’s discretion to allow the testimony. We find no error.

The judgment of the Warren County Circuit Court convicting Parker for possession of a controlled substance is reversed, and the accompanying sentence is vacated. In all other respects the judgment is affirmed, and this case is remanded to that court for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roy Alyette Durham II
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky