

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

NO. 2007-CA-002475-MR

JAMES S. BROOKS

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT  
HONORABLE STEPHEN A. HAYDEN, JUDGE  
ACTION NO. 04-CR-00205

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

CAPERTON, JUDGE: Appellant, James S. Brooks (Brooks), appeals the November 14, 2007, order of the Henderson Circuit Court denying his motion to vacate the judgment sentencing Brooks to thirty years for manufacturing methamphetamine, trafficking in methamphetamine, and possession of drug

paraphernalia. After a review of the record and the arguments of the parties, we affirm.

Brooks was convicted in Henderson Circuit Court after a trial by a jury of manufacturing methamphetamine, trafficking in methamphetamine, and possession of drug paraphernalia, and was acquitted on charges of possession of cocaine and criminal littering. Brooks's arrest followed police discovery of a methamphetamine lab in his residence. Brooks tried to prove that others were living in his residence at the time and that he had no involvement with the lab. Nevertheless, a jury convicted Brooks on the aforementioned charges, and he was sentenced to twenty years for the manufacturing conviction and ten years for the trafficking conviction, the sentences to run consecutively for a total of thirty years. A twelve-month sentence was imposed for the possession conviction to run concurrently with the thirty-year sentence.

Brooks appealed his conviction to the Kentucky Supreme Court as a matter of right. On appeal to the Supreme Court, Brooks argued that his convictions for manufacturing and trafficking violated double jeopardy principles; that there was insufficient evidence to instruct the jury on first-degree trafficking; and that he was prejudiced by improper comments made in the Commonwealth's closing argument. In addition, Brooks argued error in the trial court's evidentiary rulings admitting ledgers of drug transactions and evidence of other crimes or bad acts. After reviewing these issues, the Supreme Court ultimately affirmed the trial court on all grounds.

Thereafter, Brooks filed a motion to vacate his sentence pursuant to RCr 11.42, alleging that counsel was ineffective for failing to object to the jury instructions, for failing to make a *Batson* objection, and in failing to object to his conviction and sentences on double jeopardy grounds. Brooks also asserted cumulative error. The court below summarily denied Brooks's motion in the aforementioned November 14, 2007, order, finding, pursuant to *Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993), that as the merits of the motion could be determined from the record, no evidentiary hearing was necessary. It is from that denial that Brooks now appeals to this Court, asserting that the court below erred in denying his claims on these issues, and that it erred in refusing to hold an evidentiary hearing pursuant to his request.

We note at the outset that to prevail on a claim of ineffective assistance of counsel, a criminal defendant must meet the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, he must show that counsel's performance was deficient, which is to say that he must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Secondly, he must show that the deficient performance prejudiced the defense by showing that counsel's errors were so serious as to deprive the defendant of a fair trial.

On the issue of whether an evidentiary hearing is required, we note that RCr 11.42 requires an evidentiary hearing only if the answer raises a material issue of fact that cannot be determined on the face of the record. *Bowling v.*

*Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998). Thus, if the record refutes the claims of error, there is no need for an evidentiary hearing, nor is a hearing necessary where the allegations, even if true, would be insufficient to invalidate the conviction. *Id.* Indeed, as explained by this Court in *Brewster v. Commonwealth*, 723 S.W.2d 863, 865 (Ky. App. 1986):

In making its decision on *actual* prejudice, the trial court obviously may and should consider the totality of the evidence presented to the trier of fact. If this may be accomplished from a review of the record, the defendant is not entitled to an evidentiary hearing.

We review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

*Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing [5 Am.Jur.2d Appellate Review § 695 \(1995\)](#)). We review this matter in light of the foregoing.

As his first basis for appeal, Brooks argues that counsel provided ineffective assistance in failing to object to the jury instruction on manufacturing methamphetamine, which provided as follows:

You will find the defendant, James S. Brooks, 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 March 26, 2004,

A. He knowingly manufactured methamphetamine

Or

B. He knowingly had in his possession with the intent to manufacture methamphetamine all of the chemicals or all of the equipment necessary for its manufacture.

Brooks asserts that there was no evidence to support a conviction for manufacturing methamphetamine under KRS 218A.1432(1)(b), and that the instruction as written violated his right to a unanimous verdict. Particularly, Brooks argues that there was no proof presented that he knowingly possessed all of the equipment or chemicals to manufacture methamphetamine, and that his attorney failed to object to the second portion of the instruction for that reason. Brooks argues that because he did not possess anhydrous ammonia at the time of his arrest, there was insufficient evidence to support the second portion of the jury instruction, thereby violating his right to a unanimous verdict.

In reviewing the claims made by Brooks in this regard, the trial court found that in the matter *sub judice*, there was support for the theory that Brooks actually manufactured methamphetamine, and evidence to support a finding that he had all of the chemicals and equipment to do so, aside from anhydrous ammonia.<sup>1</sup> With respect to the anhydrous ammonia, the court concluded that although the police did not find the ammonia in their search, it could be inferred from the aforementioned circumstantial evidence that Brooks had all necessary chemicals, and that he intended to manufacture methamphetamine using same. *See Pate v. Commonwealth*, 134 S.W.3d 593 (Ky. 2004), and *Varble v. Commonwealth*, 125 S.W.3d 246 (Ky. 2004).

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<sup>1</sup> These materials included methamphetamine found in a syringe in the bedroom, methamphetamine residue, and “meth cake,” a byproduct of the manufacturing process. Evidence also existed that Brooks had all of the other chemicals and equipment necessary to manufacture methamphetamine, including glass jars, tubing, and bottles converted into hydrochloride gas generators, a gas mask, empty blister packs of ephedrine pills, bottles of starter fluid, liquid fire, and stripped lithium batteries.

In particular, the court noted that the police testified that applying hydrochloride gas to convert the methamphetamine into soluble form was the final stage for manufacturing the drug, and that the presence of several hydrochloride generators in the home, along with all of the other chemicals mentioned, indicated that someone had possessed all of the chemicals together at one point. The court correctly stated that our law only requires that all chemicals or equipment be possessed simultaneously at a point in time, not that they all be in the defendant's possession at the time of the arrest. *See Varble*, at 254.

Accordingly, on the basis of the foregoing, the trial court found that the evidence presented in the case was sufficient to support a finding of guilt with respect to the second portion of the instruction. Thus, in addressing this issue, the trial court found that the instruction was not inappropriate, stating that where multiple theories of guilt are included in jury instructions, juror unanimity is not violated where the evidence supports a conviction under both theories pursuant to *Wells v. Commonwealth*, 561 S.W.2d 85, 97 (Ky. 1978).

In reviewing the trial court's findings on this issue, we simply cannot find that the trial court abused its discretion in determining that both portions of the instruction were supported by the evidence. The record undisputedly reveals that at the time Brooks was arrested, police located all of the materials and equipment necessary to manufacture methamphetamine inside his home, with the exception of anhydrous ammonia. As our Supreme Court held in *Varble*:

[W]here a defendant was found in possession of all of the other chemicals necessary to manufacture methamphetamine and there was sufficient evidence to base a belief that the defendant had possessed anhydrous ammonia at the same time, then it was for the jury to decide whether he possessed those same chemicals at the same time that he possessed the anhydrous ammonia. We stated: “The requirement is that the chemicals or equipment be possessed simultaneously, not that they be possessed at the time of the arrest.”

*See Pate, supra* at 599, citing *Varble, supra* at 254.

Having reviewed the record, we agree with the trial court that the evidence gathered in this case, and in particular the presence of hydrochloride generators, was of a sufficient nature to allow the jury to infer that Brooks had also, at one time, simultaneously possessed anhydrous ammonia. Accordingly, we find that the trial court did not abuse its discretion in concluding that the evidence could have supported either portion of the instruction, and we affirm.

As his second basis for appeal, Brooks argues that the trial court erred in denying his claim that counsel was ineffective in failing to make an objection to the racial makeup of the jury pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), which held that the Equal Protection Clause forbids prosecutors from exercising preemptory challenges solely on a racial basis. In the matter *sub judice*, there were three African-Americans on the panel of thirty-one, two of whom were removed through preemptory challenges. The third juror was a member of the final panel, but was struck as an alternate at the end of the trial.

In denying Brooks's motion on this issue, the trial court stated that pursuant to controlling precedent, including *Strickland, supra*, a strong presumption existed that counsel's decision as to trial strategy was made by utilizing reasonable professional judgment. In so finding, the court noted that counsel's decision not to object to the final panel could well have been reasonable trial strategy, and noted that in any event, the third African-American juror was removed by lot, and not by any discriminatory conduct which would violate the *Batson* rule. Regardless, the court held that even if an error had occurred, it could not conclude that any such error was so serious as to make the result of the trial unreliable.

With respect to Brooks's assertion that his counsel was ineffective for failing to make a *Batson* objection, the Commonwealth argues simply that trial by an all-white jury is not prima facie evidence of discrimination sufficient to require a *Batson* inquiry. *See Wells v. Commonwealth*, 892 S.W.2d 299 (Ky. 1995). Further, the Commonwealth directs this Court's attention to the fact that the record does not indicate which party struck which particular jurors, and that this further inhibits Brooks's ability to prove even a prima facie case of discrimination.

The Commonwealth also states that the fact that not all jurors were removed would further diminish any *Batson* claim, as Brooks would be required to show discriminatory intent in the face of evidence to the contrary. Accordingly, the Commonwealth asserts that, considering the strong presumption set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), that an attorney's decisions as to



trial strategy were made exercising reasonable professional judgment, the court below was correct in finding that insufficient evidence existed in the record to establish discriminatory intent of the nature necessary to violate *Batson*.

In reviewing the record, we note that the record does not reveal who struck which jurors, and that the parties concede this to be the case. The record is clear, however, that not all of the African-American jurors were removed by counsel, and indeed, that the final African-American juror was removed by lot. We are of the opinion that this evidence alone is sufficient for the trial court's finding, insofar as Brooks has not presented prima facie evidence of a nature sufficient to support his allegation of a *Batson* violation.

Certainly, *Batson* requires the defense to make a prima facie case of purposeful discrimination. Only then is the burden shifted to the prosecution to rebut such a claim. Included in this requirement is the need to show that the facts and circumstances of the selection raise an inference that the prosecutor used peremptory challenges to remove jurors on the basis of race. *See Wells, supra*, at 302.

In the matter *sub judice*, we believe that the trial court properly relied upon the record in determining that no prima facie evidence existed to support an allegation of a *Batson* violation. Therefore, we are also of the opinion that the trial court properly denied Brooks's claim that counsel was ineffective in failing to make such an objection. Having found that the trial court did not abuse its discretion in this regard, we affirm.

Finally, Brooks appeals the trial court's denial of his RCr 11.42 motion asserting that counsel failed to object to his conviction and sentence on grounds of double jeopardy. Specifically, Brooks argues that his convictions for both trafficking and manufacturing the same methamphetamine violate double jeopardy, and in the same vein, that counsel erred in failing to object to consecutive sentences being imposed for a single course of conduct, pursuant to KRS 505.020.

With respect to Brooks's double jeopardy claims involving both conviction and sentences, the Commonwealth states that on direct appeal, Brooks argued that he was subjected to double jeopardy upon trial for both manufacturing and trafficking in methamphetamine. That claim was admittedly unpreserved by counsel, but was nevertheless addressed by our Supreme Court, who found no double jeopardy violation. *See Brooks v. Commonwealth*, 217 S.W.3d 219 (Ky. 2007). The Commonwealth therefore argues that further review by this Court is both unwarranted and impossible, as the Supreme Court's holding is now the law of the case.

With this latter contention, we agree. In addressing Brooks's double jeopardy claims, our Kentucky Supreme Court held that convictions for both trafficking and manufacturing the same methamphetamine did not violate double jeopardy principles, as a conviction for trafficking in methamphetamine required a finding of intent to sell, in contrast to a conviction of manufacturing methamphetamine which does not require that element. *See Brooks, supra* at 222.

Clearly, as our Supreme Court had already reviewed Brooks's arguments on this issue and determined them to be without merit, the court below was without authority to determine that counsel erred in not arguing this very issue at trial. Accordingly, we affirm, and find that the trial court did not abuse its discretion in finding as it did, nor in finding that counsel was not ineffective in failing to object to the consecutive sentences issued as a result of these two separate offenses.

Finally, the Commonwealth asserts that Brooks's claim of cumulative error should fail, as in the face of the foregoing arguments, Brooks has failed to establish error on any issue. Having affirmed the trial court on the foregoing issues, we are compelled to affirm in this regard as well. Having so found, and having determined that the record amply supported the decisions of the trial court, we likewise cannot conclude that the trial court abused its discretion in declining to hold an evidentiary hearing on the RCr 11.42 motion filed by Brooks.

Wherefore, for the foregoing reasons, we hereby affirm the November 14, 2007, order of the Henderson Circuit Court, the Honorable Stephen A. Hayden, presiding.

DIXON, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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