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RENDERED: SEPTEMBER 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2000-SC-0435-MR

ROBERT ANDERSON — APPELLANT

V.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
1999-CR-0194

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Robert Anderson was convicted of one count of manufacturing methamphetamine in violation of KRS 218A.1432 and was sentenced to twenty years in prison. Anderson raises a number of issues on appeal including the constitutionality of KRS 218A.1432. For the reasons set forth below, we affirm his conviction but reverse his sentence and remand for a new sentencing hearing.

Facts and Procedural History

Anderson's downfall began with the putative purchase of a van from one Richard D'Avignon. After taking possession of the van, Anderson failed to transfer the title of the van to his name. This failure so worried D'Avignon, who feared that he might be held responsible should Anderson have an accident with the van, that D'Avignon went to the County Clerk's office and "junked" the van's title. See KRS 186A.520 (setting

forth the procedure for obtaining a salvage title). Subsequently, Anderson contacted D'Avignon regarding the title. D'Avignon informed Anderson that he would obtain a new certificate of title ("un-junk" the title), if Anderson would agree to pay him an additional $100.00. Anderson responded somewhat ambivalently that they would get it all worked out.

D'Avignon tried for some time to get the title situation straightened out to his satisfaction, but found it difficult to contact Anderson. Eventually, D'Avignon decided to take matters into his own hands and repossess the van because of Anderson's failure to correct the problems with the van's title. Upon receiving information from a friend as to the van's location in an apartment complex parking lot, D'Avignon contacted the local police and informed them of his intent to take possession of the van. Additionally, he asked the police to send an officer to meet him at the van's location.

Detective Mike Perkins arrived on the scene before D'Avignon. After locating the van, he ran a check on the van's plates and discovered that the plates were registered to a red Corvette that was titled in Anderson's name. Having learned Anderson's address from the check on the van's license plate, Detective Perkins then went to Anderson's apartment and knocked on the door. After receiving no response to his knock, Detective Perkins placed a piece of tape across the interstice between the rear door and the doorjamb, in order to determine whether the door was opened in his absence. Detective Perkins then went to a local restaurant to wait for D'Avignon.

Before D'Avignon arrived, Detective Perkins saw Anderson pull into the restaurant parking lot driving a red Corvette. According to Detective Perkins, Anderson observed the presence of police at the restaurant and sped off. Detective Perkins

briefly gave chase but soon lost sight of Anderson and returned to the van. D'Avignon arrived soon after these events.

D'Avignon showed Detective Perkins the title to the van, which stated that D'Avignon was the owner. D'Avignon then asked Detective Perkins to search the van in order to verify its contents. D'Avignon feared that the van might contain contraband, and he wanted proof to disavow his ownership of any illegal items. Before searching the van, Detective Perkins called the County Attorney to seek advice as to whether D'Avignon had the authority to consent to the search. The County Attorney advised Detective Perkins that it was okay to search the van pursuant to D'Avignon's consent.

The van was moved to another location where the light was better. The search of the van uncovered items that are used in the manufacture of methamphetamine: twenty-nine cans of ether; a large quantity of ephedrine; plastic tubing; a pizza pan, the holes in which made it ideal for drying; starting fluid; and other miscellaneous items. After the search, Detective Perkins was informed by officers on the scene that Anderson had responded to a knock on his door and had consented to having his apartment searched. Detective Perkins instructed the officers not to enter the apartment and to wait for his arrival. When Detective Perkins returned to Anderson's apartment, he discovered that the tape on the door had moved. The search of Anderson's apartment revealed additional items used in the manufacture of methamphetamine: cans of Liquid Fire, more starter fluid, iodized salt, empty blister packs of sudaphedrine, and lithium batteries. Upon this evidence, Anderson was arrested, indicted, tried, and convicted of manufacturing methamphetamine in violation of KRS 218A.1432.

Issues

I. Search of the Van

Anderson argues that the trial court erred in denying his motion to suppress the evidence obtained during the search of the van on grounds that the search violated his Fourth Amendment rights. We disagree.

The "threshold question in every suppression case is the existence of a reasonable expectation of privacy in the area searched." United States v. Bellina, 665 F.2d 1335, 1339 (4th Cir. 1981) (internal quotation marks omitted). The defendant bears the burden of showing that he or she had a reasonable expectation of privacy. Rawlings v. Kentucky, 448 U.S. 98, 104, 100 S. Ct. 2556, 2561, 65 L. Ed. 2d 633, 641 (1980). Unless the defendant meets this burden, he or she has no standing to challenge the introduction of evidence obtained pursuant to the search in question. Id. at 106, 100 S. Ct. at 2562, 65 L. Ed. 2d at 642. Further, the search itself must have been performed under the color of law, because "a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and . . . such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully." Walter v. United States, 447 U.S. 649, 656, 100 S. Ct. 2395, 2401, 65 L. Ed. 2d 410, 417 (1980). Thus, the first question we must answer is whether Anderson had standing to challenge the admissibility of the evidence obtained as a result of a search of the van. Under the facts of this case, we believe that Anderson did have standing.

First, we conclude that the search was the result of state action. A number of cases hold that a search of a vehicle done by a private party in conjunction with a repossession is not state action. See, e.g., United States v. Coleman, 628 F.2d 961

(6th Cir. 1980); State v. Lee, 628 A.2d 1318 (Conn. App. 1993), cert. denied, 510 U.S. 1202 , 114 S. Ct. 1319 , 127 L. Ed. 2d 668 (1994). Under these cases, the mere presence of police officers during the repossession or inventory of the items of the car does not transform the search into state action. Coleman, 628 F.2d at 964. But in this case, the police at the scene actually conducted the search of the van at D'Avignon's request. We believe that this official involvement precludes the conclusion that the search of the van was a private search. See Arkansas v. Sanders, 442 U.S. 753, 757, 99 S. Ct. 2586, 2589, 61 L. Ed. 2d 235, 240 (1979) (the determination of Fourth Amendment rights often turns on apparently small factual distinctions between cases). We now turn to the question of Anderson's expectation of privacy.

Whether a person has a constitutionally protected reasonable expectation of privacy involves the two inquiries of whether the individual manifested a subjective expectation of privacy in the object of the challenged search, and whether society is willing to recognize that expectation as reasonable. California v. Ciraolo, 476 U.S. 207, 211, 106 S. Ct. 1809, 1811, 90 L. Ed. 2d 210, 215 (1986). We assume that Anderson had a subjective expectation of privacy in the van in light of his use of the van, his claim of ownership, and the fact that he kept the van's doors locked. The reasonableness of that expectation, however, turns in large part on D'Avignon's right to repossess the van.

If D'Avignon had the lawful right to repossess the van, Anderson would have no legitimate expectation of privacy in the vehicle. United States v. Weiss, 11 M.J. 651, 652 (AFCMR, 1981); cf. United States v. Allen, 106 F.3d 695, 699 (6th Cir. 1997), cert. denied, 520 U.S. 1281, 117 S. Ct. 2467, 138 L. Ed. 2d 223 (1997) (a hotel guest generally has no legitimate expectation of privacy in hotel room or the room's contents after the conclusion of the agreed rental period). On the other hand, if D'Avignon did

not have the right to repossess the van, then Anderson retained at least some expectation of privacy in the van and its contents. See United States v. Knoll, 16 F.3d 1313, 1320 (2nd Cir. 1994), cert. denied sub nom, Gleave v. United States, 513 U.S. 1015 , 115 S. Ct. 574, 130 L. Ed. 2d 490 (1994).

At issue in Knoll was whether the trial court should have suppressed the contents of files and audiotapes that were stolen from an attorney's office. Knoll, 16 F.3d at 1319. The trial court concluded that there could be no Fourth Amendment violation because the search via the burglary was purely private and not the result of state action. Id. On appeal, the Knoll Court agreed that the initial search was private and, therefore, the appellant had no standing to challenge the admissibility of any evidence uncovered through private action. Id. But it concluded that this did not dispose of the question of whether the documents in closed containers and the contents of the audiotapes taken during the burglary were procured pursuant to state action. Id. at 1320.

As the Knoll Court saw it,

> the critical issue is the point in time when the object of the search has been completed. If the object has been realized, the government cannot later become a party to it. By the same token, it may not expand the scope of an ongoing private search unless it has an independent right to do so.

Knoll, 16 F.3d at 1320. Thus, the Knoll Court concluded that, if the contents of the files and audiotapes (1) were not readily apparent from the exterior, and (2) had not been discovered pursuant to a private search before the files and the audiotapes themselves were turned over to the government, then (3) the defendant retained a legitimate expectation of privacy in the contents of the files and audiotapes, which would have allowed him to challenge their admissibility. Id. The situation here is similar.

If D'Avignon did not have the legal right to repossess the van, his possession of it at the time it was searched was unlawful, and Anderson had standing to challenge any evidence uncovered in a search that was the product of state action. The question of whether D'Avignon had the legal right to repossess the van cannot, and probably should not, be determined from the record before us. For the purpose of this appeal, we assume that D'Avignon did not have the legal right to repossess the van and reach the merits of Anderson's argument that the search of the van violated his Fourth Amendment rights.

No warrant was issued to search D'Avignon's van. "All searches without a valid search warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant." Gallman v. Commonwealth, Ky., 578 S.W.2d 47, 48 (1979). To meet its burden of showing that the search in question falls within an exception, the Commonwealth argues that D'Avignon had actual authority to consent to the search, and, thus, the search was lawful and the trial court correctly denied Anderson's motion to suppress. Consent to search, of course, is one of the main exceptions to the warrant requirement of the Fourth Amendment. Cook v. Commonwealth, Ky., 826 S.W.2d 329, 331 (1992). This exception encompasses the consent of third parties as to areas under common control or access with the person challenging the legality of the search. See Colbert v. Commonwealth, Ky., 43 S.W.3d 777, 780-81 (2001), cert. denied, 534 U.S. 964 , 122 S. Ct. 375 , 151 L. Ed. 2d 285 (2001). In the alternative, the Commonwealth argues that the search was lawful under the apparent-authority-to-consent exception. See id. at 784.

The Commonwealth's primary argument that D'Avignon had actual authority to consent to the search of the van is contrary to our assumption that D'Avignon was not in legal possession of the van. Therefore, we reject this argument and turn to the question of whether the police reasonably relied on D'Avignon's apparent authority to consent to the search.

In Illinois v. Rodriguez, 497 U.S. 177, 179, 110 S. Ct. 2793, 2796, 111 L. Ed. 2d 148, 155 (1990), the U.S. Supreme Court addressed the issue of "[w]hether a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of entry, reasonably believe to possess the common authority over the premises, but who in fact does not do so." The Court held that the absence of actual authority to consent to the search did not automatically render the search illegal:

> Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably. The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.

Id. at 186, 110 S. Ct. at 2800, 111 L. Ed. 2d at 160.

Thus, the constitutional validity of a warrantless search that is based on the consent of a third party who has the apparent (but not the actual) authority to consent to the search, turns on whether the officials executing the search were reasonable in their belief that they, in fact, had the proper consent to conduct the search. This inquiry, like

> other factual determinations bearing upon search and seizure . . . must be judged against an objective standard: would the facts available to the officer at the moment . . .

> warrant a man of reasonable caution in the belief that the consenting party had authority over the premises? If not, then warrantless entry without further inquiry is unlawful unless the authority actually exists. But if so, the search is valid.

Rodriguez, 497 U.S. at 188-89, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161. Under the facts of this case, we hold that the officers conducting the search were reasonable in their belief that D'Avignon had the authority to consent to the search.

Self-help repossession of an "automobile in a peaceable manner without force, violence, breach of the peace, etc." is not unlawful. C.I.T. Corp. v. Short, 273 Ky. 190, 115 S.W.2d 899 (1938). But of course, the repossessor must have the legal right to make the repossession. D'Avignon's basis for repossessing the van was not made clear at the suppression hearing. D'Avignon, however, did have the title to the van in his name and a key to the vehicle. Thus, it seems that D'Avignon did have a colorable claim to repossess the van at the time that he consented to its search. Further, the police officers at the scene phoned the County Attorney prior to searching the van to ascertain whether D'Avignon had the authority to consent to the search. Based on these facts, we believe that the police were reasonable in their belief that D'Avignon had the actual authority to consent to the search. Therefore, we affirm the trial court's denial of Anderson's motion to suppress the search.

II. Vagueness

Anderson argues that KRS 218A.1432 is void for vagueness because § (1)(b) of the statute fails to give sufficient notice as to the conduct made unlawful and because it allows for arbitrary prosecution. We disagree.

Under the United States and Kentucky Constitutions, a penal statute must define an offense with sufficient definiteness to enable an ordinary person to understand what

conduct is prohibited and it must do so in a manner that does not encourage discriminatory enforcement. See Kolender v. Lawson, 461 U.S. 352, 357-58, 103 S. Ct. 1855, 1858-859, 75 L. Ed. 2d. 903, 909 (1983); Musselman v. Commonwealth, Ky., 705 S.W.2d 476, 478 (1986). Further, except where First Amendment rights are involved, a vagueness challenge is decided on a case-by-case basis. United States v. Hofstatter, 8 F.3d 316, 321 (6th Cir.1993), cert. denied, 510 U.S. 1131, 114 S. Ct. 1101, 127 L. Ed. 2d 413 (1994). In other words, in a case not touching on First Amendment rights, a defendant must challenge the statute as applied to him or her. In light of our recent decision in Kotila v. Commonwealth, Ky., __S.W.3d__ (2003), we hold that KRS 218A.1432 is not unconstitutionally vague as applied to Anderson.

KRS 218A.1432(1)(b) provides that a "person is guilty of manufacturing methamphetamine when he knowingly and unlawfully . . . [p]ossesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine." In Kotila, we held that KRS 218A.1432(1)(b) requires proof that a defendant had possession of either all of the chemicals or all of the equipment necessary for the manufacture of methamphetamine with the intent to manufacture methamphetamine before the defendant can be found guilty of violating the statute. Kotila, ___S.W.3d at ___. Thus, a person cannot be prosecuted for possessing some, but not all, of the chemicals or all the equipment necessary to manufacture methamphetamine. The additional requirement that the chemicals or the equipment must be possessed with intent to manufacture methamphetamine helps to further prevent the statute from being unconstitutionally vague. See, e.g., Hofstatter, 8 F.3d at 322.

The police officers arresting Anderson found him in possession of all the equipment necessary to manufacture methamphetamine and all of the necessary chemicals except anhydrous ammonia. Further, he had possession of a large quantity of some of the necessary chemicals, including twenty-nine cans of starting fluid (a good source of ether), over two thousand individual capsules of sudaphedrine, and twenty-six lithium batteries, from which the intent to manufacture methamphetamine can be inferred. See discussion of intent to manufacture, infra. Detective Perkins testified that Anderson was arrested because of the combination of chemicals and equipment found in his possession and the large quantity of some of these items. Under these facts, we conclude that Anderson was on sufficient notice that his conduct was illegal and that he was not the victim of arbitrary enforcement, even if the police were proceeding under the mistaken theory that prosecution under KRS 218A.1432 did not require proof of possession of all the chemicals or all of the equipment used to manufacture methamphetamine. Cf. Sheriff, Washoe County v. Burdog, 59 P.3d 484, 487 (Nev. 2002), cert. denied, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (2003), in which the Nevada Supreme Court held that a statute that penalized possession of chemicals used in the manufacture of methamphetamine was unconstitutionally vague on its face because the statute did not include an element of intent to manufacture. Therefore, we hold that KRS 218A.1432(1)(b) is constitutional as applied to Anderson.

III. Directed Verdict

Anderson argues that the trial court erred in denying his motion for a directed verdict on grounds that the Commonwealth failed to introduce evidence that he intended to manufacture methamphetamine. We disagree.

As noted above, Anderson was found in possession of all of the equipment necessary to manufacture methamphetamine and all of the necessary chemicals except anhydrous ammonia. Further, he had possession of an abnormally large amount of antihistamine tablets and cans of starter fluid. Intent to manufacture can be inferred from a large and unusual quantity of the chemicals necessary to manufacture methamphetamine. Cf. United States v. Faymore, 736 F.2d 328, 333 (6th Cir. 1984), cert. denied, 469 U.S. 868, 105 S. Ct. 213, 83 L. Ed. 2d 143 (1984) (intent to distribute illegal drugs can be inferred from possession of a large quantity of the drugs). Thus, the trial court did not err in denying the motion for a directed verdict on grounds that the Commonwealth failed to produce sufficient evidence of intent to manufacture methamphetamine.

IV. Failure to Instruct on Possession of Drug Paraphernalia

Next, Anderson argues that the trial court erred in not instructing on the whole law of the case in violation of RCr 9.54. Specifically, he argues that he was entitled to an instruction on possession of drug paraphernalia, which is a Class A misdemeanor for a first offense, because the evidence at trial supported giving an instruction on this charge. We disagree.

A basic rule of statutory construction is that, between two statutes that cover the same subject matter, a specific statute controls a more general statute. Heady v. Commonwealth, Ky., 597 S.W.2d 613 (1980). "This is especially true where the special act is later in point of time." Morton v. Auburndale Realty Co., Ky., 340 S.W.2d 445, 446 (1960). A comparison of the drug paraphernalia statute (KRS 218A.500) and the methamphetamine manufacturing statute (KRS 218A.1432) demonstrates that they

cover the same subject matter in that they criminalize the same conduct and mental state when applied to the facts of this case.

KRS 218A.1432(1)(b) (methamphetamine manufacturing) – which was enacted in 1998, 1998 Ky. Acts, ch. 606 § 59 -- provides:

> A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully . . . [p]ossesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.

KRS 218A.500(2) (possession of drug paraphernalia) -- which was enacted in 1982, 1982 Ky. Acts, ch. 413 § 2, and last amended in 1992, 1992 Ky. Acts, ch. 441 § 8 -- provides in pertinent part:

> It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia for the purpose of . . . manufacturing . . . a controlled substance in violation of this chapter.

The definition of "drug paraphernalia" includes "all equipment, products and materials of any kind which are used, intended for use, or designed for use in . . . manufacturing . . . a controlled substance in violation of this chapter." KRS 218A.510(1). Further, methamphetamine is a controlled substance within the meaning of KRS Chapter 218A. KRS 218A.010(4). Finally, both statutes require proof of intent to manufacture. Thus, both statutes apply to the Commonwealth's proof in this case: evidence of the equipment and chemicals used in the manufacture of methamphetamine in sufficient and unusually large quantities to infer intent to manufacture methamphetamine.

By enacting KRS 218A.1432, the General Assembly has singled out the manufacture of methamphetamine as particularly evil. This reflects the inherent

dangers of manufacturing methamphetamine.[1] In contrast, KRS 218A.500 generally addresses, inter alia, the problems and dangers of manufacturing all controlled substances. Because the methamphetamine manufacturing statute is more specific and was enacted subsequent to the enactment of the drug paraphernalia statute, the methamphetamine manufacturing statute is controlling. Consequently, we hold that the trial court did not err in refusing to instruct on possession of drug paraphernalia.

V. Computer Printout

Anderson argues that the trial court erred in allowing a deputy circuit clerk to testify in the penalty phase as to Anderson's misdemeanor convictions. Specifically, he argues that the clerk erroneously testified that he had been convicted of second-degree assault, child abuse. We agree.

KRS 532.055 permits the Commonwealth to introduce a convicted defendant's prior criminal convictions in the penalty phase of a trial. In Hall v. Commonwealth, Ky., 817 S.W.2d 228 (1991), we held that these may be introduced through a certified Kentucky State Police computer printout. Id. at 229. While, a computer printout of conviction is subject to a hearsay challenge, this is usually overcome by meeting the requirement of the records-of-regularly-conducted-activity exception to the hearsay rule set forth in KRE 803(6). Robinson v. Commonwealth, Ky., 926 S.W.2d 853, 854

[1]"In addition to the dangers of methamphetamine abuse, the manufacturing process presents its own hazards. The production of methamphetamine requires the use of hazardous chemicals. Many of these chemicals are corrosive or flammable. The vapors that are created in the chemical reaction attack mucous membranes, skin, eyes and the respiratory tract. Some chemicals react dangerously with water and some can cause fire or explosion. . . . [Further, m]ethamphetamine manufacturing results in a great deal of hazardous waste. The manufacture of one pound of methamphetamine results in six pounds of waste. This waste includes corrosive liquids, acid vapors, heavy metals, solvents and other harmful materials that can cause disfigurement or death when contact is made with skin or breathed into the lungs. Lab operators almost always dump this waste illegally in ways that severely damage the environment. National parks and other preserved sites have been adversely affected." U.S. Drug Enforcement Agency Fact Sheet, http://www.usdoj.gov/dea/pubs/pressrel/methfact01.html (accessed on October 25, 2002.)

(1996). But in Hall, we were careful to note that "[i]n the present case, there is no dispute whatever as to the defendant's prior convictions; no issue, if you will, as to the contents of a writing." Hall, 817 S.W.2d at 230 (emphasis in original); see also Robinson, 926 S.W.2d at 854. Here, Anderson does take issue with the accuracy of the contents of the computer printout.

Second-degree assault is a Class C felony. KRS 508.020. Obviously, Anderson could not have been convicted of a felony in district court. KRS 24A.110. Therefore, evidence that Anderson had been convicted of second-degree assault should not have been admitted through the printout of Anderson's district court convictions.[2] The Commonwealth does not strenuously disagree; rather, it argues that the issue was not properly preserved. We believe that it was for the following reasons.

The video record in this case is quite poor, especially where objections are concerned. Most of the bench conferences in this case are completely inaudible. To overcome this problem, defense counsel filed a narrative statement under the authority of CR 75.13(1). The statement was approved by the trial court and entered into the record on January 29, 2001. The narrative statement includes two separate objections to the introduction of Anderson's misdemeanor convictions in district court.

The pertinent section from the narrative statement is contained in paragraph 12, which states:

> Defense objects to clerk reading convictions and charges from other counties without proper certified record. . . . Defense objected to Graves County Clerk testifying as to convictions in other counties from a computer printout. Defense argued that the computer printout was not a proper record of convictions from other counties. Judge denied objection. (92-F-134 was read as assault 2nd, child abuse—however, that is only how the computer adds

[2] There is no evidence in the record that Anderson had been previously convicted of any felonies prior to his present felony conviction.

> stuff, and it was amended to a misdemeanor and did not involve a child at all—you can tell from the penalty it was amended, but the original charge was read as a felony).

We read the part of the statement in parentheses as being the trial judge's reasoning in overruling the objection. Thus, the issue of whether the felony assault conviction should have been admitted through the deputy circuit clerk was clearly before the trial judge and properly preserved. The Commonwealth argues, in the alternative, that the error was harmless. We disagree.

The jury recommended that Anderson serve the maximum sentence of twenty years' imprisonment, and the trial judge followed the jury's recommendation. We cannot say that the erroneous information that Anderson had been convicted of second-degree assault, child abuse, did not play some part in the jury recommendation. Therefore, the error was not harmless and Anderson is entitled to a new sentencing hearing.

VI. Other Issues

Additionally, Anderson argues that the length of his sentence violates the Eighth Amendment to the United States Constitution and that the poor video record denied him effective assistance of appellate counsel. In light of the fact that the case is being remanded for a new sentencing hearing, the Eighth Amendment argument is not ripe for review. As for the second argument, claims of ineffective assistance of appellate counsel cannot be raised on appeal. Ineffective assistance of appellate counsel is not a cognizable issue in this jurisdiction. Lewis v. Commonwealth, Ky., 42 S.W.3d 605, 614 (2001).

Conclusion

For the reasons set forth above, we affirm Anderson's conviction for manufacturing methamphetamine in violation of KRS 218A.1432, but we reverse his sentence and remand this case for a new sentencing hearing consistent with this opinion.

Lambert, C.J.; Graves and Johnstone, JJ., concur. Wintersheimer, J., concurs in result only. Cooper, J., dissents by separate opinion, with Stumbo, J., joining that dissent. Keller, J., dissents and would reverse Appellant's conviction and remand the case to the trial court because the trial court erred by failing: (1) to suppress the evidence uncovered in the unconstitutional search of Appellant's van; and (2) to instruct the jury as to the lesser-included offense of Possession of Drug Paraphernalia.

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2000-SC-0435-MR

ROBERT ANDERSON — APPELLANT

V.

APPEAL FROM GRAVES CIRCUIT COURT
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1999-CR-0194

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE COOPER

The Commonwealth's expert testified that Appellant was in possession of all of the chemicals and equipment necessary to manufacture methamphetamine except anhydrous ammonia. Although he, unlike the expert in Kotila v. Commonwealth, Ky., ___ S.W.3d ____, (slip op., at 15) (2003), further testified that there were other chemicals that could be substituted for anhydrous ammonia in the manufacturing process, he did not identify those products or testify that any were found in Appellant's possession. Nevertheless, the evidence was sufficient to support a conviction of manufacturing methamphetamine under the equipment alternative of KRS 218A.1432(1)(b). Of course, the jury was not required to accept the expert's testimony that the equipment found in Appellant's possession constituted all of the equipment necessary to manufacture methamphetamine. Kotila, at ____ (slip op., at 28). Thus, Appellant requested and tendered an instruction on possession of drug paraphernalia

as a lesser included offense of manufacturing methamphetamine. The request was denied.

KRS 218A.500 provides, inter alia, as follows:

As used in this section and KRS 218A.510:

(1) "Drug paraphernalia" means all equipment, products and materials of any kind which are used, [or] intended for use . . . in . . . manufacturing . . . a controlled substance in violation of this chapter. It includes, but is not limited to:

. . .

(h) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances;

. . .

(2) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia for the purpose of . . . manufacturing . . . a controlled substance in violation of this chapter.

. . .

(5) Any person who violates any provision of this section shall be guilty of a Class A misdemeanor for the first offense and a Class D felony for subsequent offenses.

(Emphasis added.)

KRS 218A.510 provides:

In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;
(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;
(3) The proximity of the object, in time and space, to a direct violation of KRS 218A.500(2), (3) or (4);
(4) The proximity of the object to controlled substances;
(5) The existence of any residue of controlled substances on the object;
(6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of KRS 218A.500(2), (3) or (4); the innocence of an owner, or of anyone in control of the object, as to a direct violation of KRS 218A.500(2), (3) or (4) shall not prevent a finding

that the object is intended for use, or designed for use as drug paraphernalia;

(7) Instructions, oral or written, provided with the object concerning its use;

(8) Descriptive materials accompanying the object which explain or depict its use;

(9) National and local advertising concerning its use;

(10) The manner in which the object is displayed for sale;

(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(12) Direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

(13) The existence and scope of legitimate uses for the object in the community;

(14) Expert testimony concerning its use.

Under these statutes, possession of any chemical or item of equipment used in the manufacture of methamphetamine can be considered possession of drug paraphernalia in violation of KRS 218A.500 depending upon the circumstances of the possession or intended use. Thus, when a defendant is charged under KRS 218A.1432(1)(b) with manufacturing methamphetamine by possessing all of the chemicals or equipment necessary to do so, but the jury could believe that the defendant possessed some, but less than all, of the necessary chemicals or equipment, the jury should be instructed on possession of drug paraphernalia as a lesser included offense. Swain v. Commonwealth, Ky., 887 S.W.2d 346, 348 (1994) (jury should be instructed on any lesser included offense supported by the evidence).

This issue was not raised in Kotila, supra, but it clearly completes the picture with respect to a charge of manufacturing methamphetamine, viz:

1. If the defendant was actually and knowingly manufacturing methamphetamine, the defendant is guilty of a Class B felony under KRS 218A.1432(1)(a).

2. If the defendant knowingly possessed all of the chemicals or equipment necessary to manufacture methamphetamine with the intent to manufacture methamphetamine, the defendant is guilty of a Class B felony under KRS 218A.1432(1)(b).

3. If the defendant knowingly possessed anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine, the defendant is guilty of a Class B felony under KRS 250.489(1) and KRS 250.991(2).

4. If the defendant, e.g., (a) knowingly attempted but failed to obtain possession of all of the chemicals or equipment necessary to manufacture methamphetamine with the intent to manufacture methamphetamine, or (b) knowingly possessed less than all of the chemicals or equipment necessary to manufacture methamphetamine but had already begun the manufacturing process, the defendant is guilty of a Class C felony, i.e., criminal attempt to manufacture methamphetamine, under KRS 506.010. Kotila, at ___ (slip op., at 33-34).

5. If the defendant knowingly possessed a methamphetamine precursor with the intent to manufacture methamphetamine, the defendant is guilty of a Class D felony under KRS 218A.1437.

6. If the defendant possessed chemicals or equipment (other than anhydrous ammonia in an unapproved container or a methamphetamine precursor) that constituted less than all of the chemicals or equipment necessary to manufacture methamphetamine with the intent to manufacture methamphetamine, the defendant is guilty of the Class A misdemeanor of possession of drug paraphernalia under KRS 218A.500.

Because I believe Appellant was entitled to the requested instruction on possession of drug paraphernalia as a lesser included offense of manufacturing methamphetamine, I would reverse Appellant's conviction and remand this case to the Graves Circuit Court for a new trial. Accordingly, I dissent.

Stumbo, J., joins this dissenting opinion.