# *IMPORTANT NOTICE*

## *NOT TO BE PUBLISHED OPINION*

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: FEBRUARY 19, 2004
NOT TO BE PUBLISHED

FINAL
DATE 8-26-04 ELIA Grant D.C.

# Supreme Court of Kentucky

2002-SC-0026-MR & 2003-SC-0068-TG

JERRY MARSHALL — APPELLANT

V.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
2001-CR-0066

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

VACATING IN CASE NO. 2002-SC-0026-MR
AND
AFFIRMING IN CASE NO. 2003-SC-0068-TG

Marshall appeals from a judgment based on a jury verdict that convicted him of manufacturing methamphetamine and being a second-degree persistent felony offender in case No. 2002-SC-0026-MR. He was sentenced to a total of thirty years in prison. Marshall also appeals in 2003-SC-0068-TG from an order denying his *pro se* motion for relief pursuant to CR 60.02. We have combined these two appeals in order to render one opinion.

The questions presented are whether the prosecutor improperly commented on the evidence; whether the jury instruction on manufacturing methamphetamine was erroneous; whether the trial judge correctly refused to answer a question posed by the jury; whether the motion to suppress should have been granted; whether Marshall was entitled to an instruction on attempt to manufacture methamphetamine; whether bad act

evidence was improperly admitted, and whether the trial judge properly denied Marshall's *pro se* CR 60.02 motion.

Marshall was indicted for manufacturing methamphetamine and being a second-degree persistent felony offender. A jury convicted him of both charges and he was sentenced to twenty years on the drug charge, which was enhanced to thirty years because of the persistent felony offense. Following his conviction, Marshall filed a *pro se* CR 60.02 motion that alleged fraud and perjured testimony by the officers regarding whether the items in his truck were in plain view. The circuit judge denied the motion without appointment of counsel or a hearing. These appeals followed.

Closing Argument/Jury Instruction

Marshall argues that the Commonwealth misstated the law in closing argument by telling the jury that it only needed to find he possessed one of the chemicals in order to convict him of manufacturing methamphetamine. He also contends the trial judge erred by instructing the jury that it could convict him on the drug charge by finding that he had possessed "ether and/or lithium batteries and/or ephedrine pills."

The evidence found during the search of the car driven by Marshall consisted of ephedrine, lithium batteries and starting fluid (ether). There was, however, no anhydrous ammonia recovered, an essential ingredient for making methamphetamine. In Kotila v. Commonwealth, Ky., 114 S.W.3d 226 (2003), a majority of this Court held that KRS 218A.1432(1)(b) permitted a conviction only when the defendant possessed all, rather than any, of the chemicals or equipment necessary to manufacture methamphetamine.

Here, because Marshall did not possess all of the chemicals or equipment, he was entitled to a directed verdict on this charge. It necessarily follows that the

Commonwealth misstated the law in its closing argument and that the jury instruction was erroneous. We must observe that neither the Commonwealth nor the trial judge had the benefit of our decision in Kotila, supra, which was rendered more than a year after Marshall's trial. However, pursuant to Kotila, we must vacate Marshall's conviction. Because we are vacating the conviction, it is unnecessary to address the remaining issues raised in this appeal.

CR 60.02

We have carefully reviewed the record and conclude that the trial judge did not abuse his discretion in denying the CR 60.02 motion. Marshall alleged in the 60.02 motion that the officers lied 21 times about items in his truck being in plain view. Although he did not present any evidence or testify at trial, he did testify at the suppression hearing and denied that anything was in plain view. Considering our decision to vacate the judgment of conviction, we find it unnecessary to discuss this issue further.

Therefore, in 2002-SC-26-MR, the judgment of conviction is vacated. In 2003-SC-68-TG, the order of the trial judge denying the CR 60.02 motion by Marshall is affirmed.

Lambert, C.J., Cooper, Johnstone, Stumbo and Wintersheimer, JJ., concur. Keller, J., concurs in part and dissents in part by separate opinion and is joined by Graves, J.

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COMMONWEALTH OF KENTUCKY — APPELLEE

**OPINION BY JUSTICE KELLER**

CONCURRING IN PART AND DISSENTING IN PART

I concur in the majority opinion to the extent that it affirms the trial court's denial of CR 60.02 relief in 2003-SC-0068-TG. In addition, I agree with the "meat" of the majority opinion's analysis as to Appellant's first allegation of error in 2002-SC-0026-MR, his matter-of-right appeal, i.e., that Appellant's Manufacturing Methamphetamine conviction cannot stand in light of Kotila v. Commonwealth,[1] in which this Court "construe[d] [KRS 218A.1432(1)(b)'s use of] 'the chemicals or equipment' to mean all of the chemicals or all of the equipment necessary to manufacture methamphetamine."[2] I thus agree with the majority's conclusions that the wording of the trial court's jury instruction on Manufacturing Methamphetamine was prejudicially erroneous, that the Commonwealth further compounded the instructional error when it misstated the applicable law during its closing argument to the jury, and, in fact, that the trial court

[1] Ky., 114 S.W.3d 226 (2003).

[2] Id. at 237.

should not have instructed the jury on the offense of Manufacturing Methamphetamine at all because the evidence was insufficient to support a verdict for that crime.[3] I dissent, however, from the majority's ultimate holding in Appellant's matter-of-right appeal, which simply vacates Appellant's Manufacturing Methamphetamine conviction without remanding this case to the trial court for further proceedings. While the majority provides no explanation for its holding in this regard, I can only assume that it rests on one (1) of two (2) possible erroneous premises, i.e., either a view that Appellant was entitled to a complete acquittal when the Commonwealth failed to prove a prima facie case for the indicted offense of Manufacturing Methamphetamine or a belief that constitutional double jeopardy principles prohibit Appellant's retrial for lesser-included offenses after an appellate finding that the evidence was insufficient to support his Manufacturing Methamphetamine conviction. A directed verdict of complete acquittal would have been improper in this case, however, for the reason that the evidence justified lesser-included offense instructions on both Criminal Attempt to Manufacture Methamphetamine and Possession of Drug Paraphernalia. Further, this Court's reversal (or vacating) of Appellant's Manufacturing Methamphetamine conviction on grounds of evidentiary insufficiency creates no double jeopardy bar to Appellant's retrial for the lesser-included offenses that were supported by the evidence. Therefore, having reviewed Appellant's remaining allegations of error (and determined that Appellant's third and fifth allegations of error lack merit and his second allegation is moot), I vote to reverse Appellant's Manufacturing Methamphetamine conviction and

[3] Stated otherwise, the trial court should have granted a directed verdict in Appellant's favor as to the charge of Manufacturing Methamphetamine. See infra notes 5 and 6 and surrounding text. The majority opinion phrases this as "because Marshall did not possess all of the chemicals or equipment, he was entitled to a directed verdict on this charge." Slip Op. at 2 (emphasis added).

remand the indictment to the trial court to allow the Commonwealth to prosecute Appellant for those lesser-included offenses at a new trial.

Count one of the indictment against Appellant read:

> On or about February 25, 2001, in McCracken County, Kentucky, the above named defendant, Jerry A. Marshall, committed the offense of manufacturing methamphetamine when he possessed the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine, against the peace and dignity of the Commonwealth of Kentucky.

With the benefit of hindsight (in the form of this Court's holding in Kotila), it is clear that Appellant – who possessed some of the chemicals necessary to manufacture methamphetamine, i.e. Sudafed (which contained ephedrine, a methamphetamine precursor), starter fluid (which contains ether), and lithium batteries, but not all of the necessary chemicals – was "overcharged" with an offense that the Commonwealth could not prove at trial. Appellant does not escape criminal liability for his conduct, however, simply because the Commonwealth was unable to prove the elements of the indicted offense. KRS 505.020(2) provides that:

> A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:
> (a) It is established by proof of the same or less than all of the facts required to establish the commission of the offense charged; or
> (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein . . . .[4]

[4] KRS 505.020(2). See also Official Commentary to KRS 505.020 (Banks/Baldwin 1974) ("[Subsection (2)] provide[s] . . . the circumstances under which conviction of an offense not expressly named in the charging instrument is appropriate.").

And, it is black-letter law that a "trial court should not direct a verdict of acquittal where the evidence is sufficient to convict the defendant of a lesser offense than that charged in the indictment."[5] Instead, "where the state fails to demonstrate a prima facie case on the crime charged, but does so on a lesser included offense, the trial court [should] direct a verdict of acquittal on the crime charged and submit the evidence to the trier of fact for consideration of the lesser included offense."[6] In this case, Appellant was not entitled to a complete acquittal under count one of the indictment because the evidence supported lesser-included offense instructions on both Criminal Attempt to Manufacture Methamphetamine under KRS 506.010 and KRS 218A.1432(1)(b) and Possession of Drug Paraphernalia under KRS 218A.500.[7]

In fact, Appellant's brief's fourth allegation of error is that "the trial court erred to Marshall's substantial detriment by failing to instruct the jury on attempt to manufacture methamphetamine," a lesser-included offense that Appellant argues was "merited on

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[5] 75A AM. JUR. 2D *Trial* § 1044 (1991). See also Baker v. Commonwealth, Ky., 973 S.W.2d 54, 55 (1998) ("Appellant moved for a directed verdict at the close of the Commonwealth's case, alleging insufficiency of the evidence. This motion was properly denied by the trial court as appellant was not entitled to a complete acquittal of all charges in the indictment and all lesser included offenses." (emphasis added)); Campbell v. Commonwealth, Ky., 564 S.W.2d 528, 530 (1978) ("A motion for directed verdict of acquittal should only be made (or granted) when the defendant is entitled to a complete acquittal – *i.e.*, when, looking at the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, *under any possible theory*, of any of the crimes charged in the indictment or of any lesser included offenses." (italicized emphasis in original, underlined emphasis added)).

[6] 75A AM. JUR. 2D *Trial* § 1044 (1991).

[7] Although the offense of Possession of a Methamphetamine Precursor under KRS 218A.1437 would also appear to fit the facts of this case, Appellant was indicted for conduct that occurred in February 2001 and KRS 218A.1437, which was not effective until July 15, 2002, is thus "not applicable to this case because it was created after the conduct for which Appellant was indicted occurred." Kotila, 114 S.W.3d at 246.

these fact[s]." For reasons that I explained in depth in my separate opinion in Kotila,[8] I believe that Criminal Attempt to Manufacture Methamphetamine is a lesser-included offense to Manufacturing Methamphetamine under KRS 218A.1432(1)(b). And, on the evidence presented in this case, I agree with Appellant's contention that a jury could have found beyond a reasonable doubt that his accumulation of chemicals to manufacture methamphetamine constituted a substantial step in a course of conduct planned to culminate in Manufacturing Methamphetamine as defined in KRS 218A.1432(1)(b).

Additionally, under KRS 218A.500, possession of any chemical or item of equipment used in the manufacture of methamphetamine can be considered Possession of Drug Paraphernalia depending upon the circumstances of the possession or intended use:

> As used in this section and KRS 218A.510:
> (1) "Drug paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter. . . .
> . . . .
> (2) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packing, repacking, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the

[8] Kotila, 114 S.W.3d at 250-256 (Keller, J., concurring in part and dissenting in part).

human body 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.[9]

As such, because a jury could have found beyond a reasonable doubt that Appellant possessed chemicals, which constituted less than all of the chemicals necessary to manufacture methamphetamine, with the intent to manufacture methamphetamine,[10]

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[9] KRS 218A.500 (emphasis added). See also KRS 218A.510 (outlining factors to consider in determining whether an object is drug paraphernalia).

[10] I would observe that the jury in this case actually did make these findings in its verdict, which found Appellant guilty of Manufacturing Methamphetamine under an instruction that was, for all practical purposes, actually a Possession of Drug Paraphernalia instruction in that it required a finding "[t]hat Jerry Marshall possessed ether and/or lithium batteries and/or ephedrine pills with the intent to manufacture methamphetamine." Cf. 1 COOPER, KENTUCKY INSTRUCTIONS TO JURIES § 9.34A (4th ed. 1999) (an instruction that defines the substantive elements of Possession of Drug Paraphernalia as: "[t]hat . . . the Defendant [used] [possessed with the intent to use] _____ (ID drug paraphernalia" and "[t]hat he did so with the intent to _____ (method) [*e.g.*, (use it to) inhale _____ (ID substance) into his body]."). Accordingly, if not for the possibility that Appellant could be convicted upon retrial of Criminal Attempt to Manufacture Methamphetamine, the appropriate holding in this case would appear to be a reversal of Appellant's Manufacturing Methamphetamine conviction and a remand of the indictment to the trial court for entry of a judgment of conviction for Possession of Drug Paraphernalia and for resentencing on that lesser-included offense. See Rutledge v. United States, 517 U.S. 292, 306, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996) ("[F]ederal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser-included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense. This Court has noted the use of such a practice with approval."); Morris v. Matthews, 475 U.S. 237, 246, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986) ("In cases like this, therefore, where it is clear that the jury necessarily found that the defendant's conduct satisfies the elements of the lesser included offense, it would be incongruous always to order yet another trial[.]"); United States v. Skipper, 74 F.3d 608 (5th Cir. 1996) (reversing and vacating conviction of possession with intent to distribute, but remanding the case to the district court with instructions to enter a judgment of guilt of simple possession and to sentence the appellant for that offense); Dickenson v. Israel, 644 F.2d 308 (7th Cir. 1981) (denying habeas relief to petitioner-appellant whose armed robbery conviction was reversed, but remanded for entry of conviction and sentencing on simple robbery by the Wisconsin Supreme Court); Shields v. State, 722 So.2d 584 (Miss. 1998) (conviction for

Appellant could also have been found guilty of Possession of Drug Paraphernalia under this indictment.

Because the majority opinion is silent as to its rationale for simply vacating Appellant's conviction without remanding it for further proceedings, it appears that a few words may be appropriate regarding the double jeopardy implications of our determination that the Commonwealth failed to prove a prima facie case of Manufacturing Methamphetamine. Those few words are these: there are no double jeopardy implications relevant to the retrial of the lesser included offenses in this case. Certainly, a verdict of acquittal is a bar to a subsequent conviction for the same offense,[11] and, as such, "[t]he proscription against double jeopardy precludes retrial of the same offense after a directed verdict of acquittal[,]"[12] or an appellate determination

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aggravated assault reduced to simple assault by Mississippi Supreme Court under "direct remand rule"); Id. at 585-586 (collecting cases). In Commonwealth v. Bivins, Ky., 740 S.W.2d 954 (1987), however, this Court placed Kentucky in "a distinct minority of courts," Shields, 722 So.2d at 586, when it stated – in dicta and without any citation to authority – that "[a] reviewing court has no authority to reduce the sentence to a lesser included offense. If it reverses for insufficient evidence to prove the principal charge it must remand for trial of the lesser offense." Bivins, 740 S.W.2d at 956. See also White v. Commonwealth, Ky., 770 S.W.2d 222, 224 (1989) (holding – again without citation – that remanding for entry of judgment as to Second-Degree PFO status after the jury's verdict as to First-Degree PFO was set aside on grounds of evidentiary insufficiency would abrogate a defendant's statutory right to trial by jury as to PFO status). In my view, the Bivins dicta, which, like the White holding, has never been cited for that proposition in any published Kentucky decision, is incorrect and should be expressly overruled. This Court may remand a case for entry of a judgment of conviction on a lesser included offense in the exercise of its constitutional appellate jurisdiction. See KY. CONST. § 110(2)(a); Copley v. Craft, Ky., 341 S.W.2d 70, 72 (1960) ("[A]ppellate jurisdiction is the power and authority to review, revise, correct or affirm the decisions of an inferior court, and, more particularly, to exercise the same judicial power which has been executed in the court of original jurisdiction." (emphasis added and citations omitted)).

[11] United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed 300 (1896).

[12] Kotila, 114 S.W.3d at 236 n.1 (citing Commonwealth v. Mullins, Ky., 405 S.W.2d 28, 30 (1966) and Commonwealth v. Ramey, 279 Ky. 810, 132 S.W.2d 342, 344 (1939)). See also Smalis v. Pennsylvania, 476 U.S. 140, 106 S.Ct. 1745, 90

that the evidence is insufficient to support the jury's verdict.[13] By the same token, a conviction for a lesser-included offense constitutes an implicit acquittal as to greater offenses and thus bars a subsequent prosecution for a greater offense.[14] However, "the concept of acquittal by implication climbs up the ladder, not down[,]"[15] and an appellate determination that the evidence is insufficient to support a verdict on a greater offense does not constitute a double jeopardy bar to subsequent prosecution for lesser-included offenses that were supported by the evidence.[16] Because the evidence introduced at trial warranted instructions as to Criminal Attempt to Manufacture Methamphetamine and Possession of Drug Paraphernalia, the Commonwealth is not barred from prosecuting those offenses upon remand.

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L.Ed.2d 116 (1986); Hudson v. Louisiana, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981); Sanabria v. United States, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977); Fong Foo v. United States, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962); Gill v. Commonwealth, Ky., 648 S.W.2d 846 (1982).

[13] Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). See also Davis v. Commonwealth, Ky., 899 S.W.2d 487, 490 (1995), overruled on other grounds by, Merriweather v. Commonwealth, Ky., 99 S.W.3d 448 (2003); Perkins v. Commonwealth, Ky. App., 694 S.W.2d 721, 722 (1985); Coomer v. Commonwealth, Ky. App., 694 S.W.2d 471, 472 (1985); McIntosh v. Commonwealth, Ky. App., 582 S.W.2d 54, 58 (1979). Cf. Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

[14] Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). See also Brown v. Ohio, 432 U.S. 161, 87 S.Ct. 2221, 53 L,Ed.2d 187 (1977).

[15] McGinnis v. Wine, Ky., 959 S.W.2d 437, 439 (1998).

[16] Shute v. Texas, 117 F.3d 233 (5th Cir. 1997); Anderson v. Mullin, 327 F.3d 1148 (10th Cir. 2003); Beverly v. Jones, 854 F.2d 412 (11th Cir. 1988); White v. Commonwealth, 770 S.W.2d at 223 ("Here there was insufficient evidence of PFO I but sufficient evidence and a finding of guilt on all the elements of PFO II. Therefore, a retrial would not be barred by double jeopardy."). McGinnis, 959 S.W.2d at 440. Cf. Commonwealth v. Ray, Ky. App., 982 S.W.2d 671 (1998).

I recognize that, if given the opportunity, the Commonwealth might elect not to prosecute Appellant for the lesser-included offenses at a new trial. However, I believe that decision should be made by the Executive Branch authorities that are responsible for prosecution of criminal offenses, not by this Court. Accordingly, I would reverse Appellant's Manufacturing Methamphetamine conviction and remand the indictment to the trial court for further proceedings, which could include prosecution for the lesser-included offenses of Criminal Attempt to Manufacture Methamphetamine and Possession of Drug Paraphernalia.

Graves, J., joins this opinion concurring in part and dissenting in part.