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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

MODIFIED: SEPTEMBER 20, 2007
RENDERED: JUNE 21, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000320-MR

FINAL
DATE 9-20-07 [illegible]

MICHAEL KEITH BUTTREY APPELLANT

V.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY ALLEN LAY, JUDGE
NO. 03-CR-000079-002

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Michael Keith Buttrey, was convicted by a Laurel County jury of multiple felonies and sentenced to twenty-six years in prison. He now raises six issues on appeal. Finding no reversible error, Appellant's conviction and sentence are affirmed.

I. Background

On January 9, 2003, Kentucky State Police Trooper Ritchie Baxter noticed a car with an expired registration. Trooper Baxter pulled in behind the car, which had its left turn signal on. The driver turned off the signal and pulled into the parking lot of a nearby store. Trooper Baxter activated his emergency lights and pulled in behind the car. The driver, William Jeff McNew, exited the car and walked back to the trooper's car. Two other people, McNew's young son and Appellant, remained in the car as the trooper and McNew stood talking near the police cruiser.

After talking with McNew briefly, Trooper Baxter approached the car, opened the driver door, and asked Appellant, who was sitting in the front passenger seat, for his identification. According to the trooper's testimony at trial, he immediately detected a chemical odor in the car. Trooper Baxter then began a sobriety test on McNew, and pressed McNew as to whether there was anything in the car that "[he] needed to know about." McNew eventually informed him that there might be a "cook" in the car. At this point the child began to exit the car from the rear driver-side door toward McNew and Trooper Baxter. Almost immediately the Appellant opened his door and exited the car. Trooper Baxter got the child out of the car, and ordered Appellant to keep his hands on the vehicle's roof. As the trooper continued his interview with McNew, Appellant failed to adhere to the trooper's instructions to keep his hands on top of the car and acted "restless." Trooper Baxter then attempted to handcuff Appellant. Before the trooper could restrain him, Appellant ran away, leaving Trooper Baxter at the scene with McNew, the child, and the vehicles. Appellant was not taken into custody that night.

When Trooper Baxter returned to the vehicles, he handcuffed McNew and took the child into protective custody. Trooper Baxter then searched Appellant's jacket, which had been abandoned during the escape, and then searched the passenger area of the Toyota.

The record reveals that extensive evidence of possession, use, and manufacturing of methamphetamine was discovered in the car and in Appellant's jacket, which contained two cell phones, a bag of rock salt, and aluminum foil. At trial, Trooper Jason O'Bannon testified as to the usefulness of these items in the manufacturing of methamphetamine—the cell phones because their batteries may contain lithium, which is used in the second stage of the manufacturing, and the aluminum foil and rock salt for

their usefulness in the third stage. Also, nearly all of the methamphetamine related evidence obtained from the car was found in the front passenger area of the car. This evidence included a "generator,"[1] drain cleaner, scales, paper towels, coffee filters, starter fluid, a video cassette case containing aluminum foil, and rock salt. A small mint canister containing three bags of methamphetamine was found under the driver's seat. McNew had a small bag of methamphetamine in his pocket.

A small water cooler containing a mixture that tested positive for ammonia was also found in the car. Both troopers testified that the cooler was an active methamphetamine lab, or "cook." The lab was in the process of producing methamphetamine and had already produced some unknown amount of methamphetamine.

Appellant was indicted for crimes stemming from the traffic stop and arrested on April 18, 2003. Prior to trial, he fled the jurisdiction to Morgan County, Indiana where he was arrested on other charges. From Indiana, he voluntarily waived extradition to Kentucky. On November 20, 2003, Trooper Baxter and Trooper Don Wilson went to Indiana to transport Appellant back to Laurel County for trial. Appellant made several incriminating statements during the five-hour trip.

According to Trooper Baxter, although neither of the troopers advised the Appellant of his Miranda rights, they also did not attempt to take any statements from him. Trooper Baxter testified that Appellant was "talkative" and that he first joined a conversation with the troopers regarding the best route from the jail to the interstate.

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[1] Trooper Baxter identified an object in one of the photo exhibits as a "generator" without further explanation to the jury. This identification took place during the same sequence in which Trooper Baxter was testifying to all photographs entered into evidence, and commenting on the significance of the items portrayed in the photographs.

The only questions the troopers asked Appellant during the drive were how he was so familiar with the Morgan County, Indiana area, and how he had broken his leg, which was in a cast at the time of the transportation. Trooper Baxter testified that Appellant volunteered a statement identifying where he had hidden after escaping on the night of the traffic stop, and that the Appellant made further incriminating statements involving methamphetamine later during the drive.

Specifically, Trooper Baxter testified that Appellant stated that he and another friend who was not involved in this case were among the first people to cook methamphetamine in Laurel County, that they had taught all the "cooks" in Laurel County how to manufacture methamphetamine in about 1998 or 1999, and that many of the current cooks did not know how to safely do it and would "blow themselves up." Finally, Appellant told the troopers that although his friend had been arrested for manufacturing methamphetamine several times before, he had not been incarcerated for his crimes. Trooper Baxter maintained that throughout all conversations Appellant simply volunteered such incriminating statements without being prompted, and that neither of the troopers attempted to elicit any statements about Appellant's case or other prior acts or offenses.

Prior to trial, Appellant filed a motion to suppress these statements based on two alternate theories. Both theories were rejected by the trial judge at a suppression hearing, and Trooper Baxter was thus permitted to testify regarding these statements at trial.

Appellant was convicted by a Laurel County jury of three felonies and one misdemeanor: manufacturing methamphetamine, possession of a controlled substance in the first degree, wanton endangerment in the first degree, and resisting arrest. The

circuit court ran his felony sentences (twenty years, one year, and five years, respectively) consecutively for a total of twenty-six years.

Appellant appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

Appellant raises six issues, four of which are presented in a pro se brief: (1) that the use of his out of court statements violated his Miranda rights; (2) that admission of the out of court statements violated KRE 404 and 403; (3) that the jury instructions allowing for alternate theories of guilt as to the count of manufacturing methamphetamine denied his right to a unanimous verdict; (4) that the circuit judge erred in denying his motion for a directed verdict; (5) that the circuit judge erred in denying his motion for a separate trial; and (6) that the jury instructions violated his right to a presumption of innocence.

A. The Out-of-Court Statements and Miranda

Appellant first claims that his statements to the troopers during the trip from Indiana should have been excluded because the troopers failed to warn him of his constitutional rights to remain silent and to have counsel present during questioning under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 1624, 16 L. Ed. 2d 694 (1966). This duty to warn, however, does not attach absent custodial interrogation. Id. at 467-68, 86 S. Ct. at 1624. In this case, the Commonwealth concedes that Appellant was in custody, leaving interrogation as the key issue.

As the Commonwealth points out, both this Court and the United States Supreme Court define interrogation

> to include "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect . . .

focus[ing] primarily on the perceptions of the suspect rather than the intent of the police."

Wells v. Commonwealth, 892 S.W.2d 299, 302 (Ky. 1995) (quoting Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed.2d 297 (1980)). Thus, the Court must look to evidence of the words and actions of the troopers from the perspective of the Appellant.

Here, the only evidence offered was Trooper Baxter's testimony, which was not refuted in stating that the troopers made no efforts to question or to take any statements from Appellant. On cross-examination, Appellant's counsel challenged only whether the trooper had considered the likelihood that Appellant would make incriminating statements during the long drive absent proper warnings. Trooper Baxter testified that he had not considered it.

Appellant provided no alternate version of events, and gave no evidence that he made the objectionable statements in reaction to questions or actions of the troopers. For example, Appellant does not assert that the transporting state troopers attempted to question him, to bait him into talking, to appeal to his conscience or emotions, or to use any other method to elicit incriminating responses from him. Appellant instead relied solely on the hope that the trial judge would disbelieve Trooper Baxter and agree that "it would be unreasonable" for the troopers not to foresee, absent Miranda warnings, that Appellant would make a potentially incriminating statement during this five-hour drive. Without more, the circumstances of the drive's duration cannot be characterized as anything other than normally attendant to a transport for extradition.

The standard of review as to this claim of error requires the Court to uphold the trial judge's ruling absent an abuse of discretion. Here the trial judge's decision not to suppress the statements is substantially supported by the evidence and did not

constitute an abuse of discretion. The only testimony offered to the judge was that of Trooper Baxter. This testimony directly supported the judge's finding that the statements were voluntary and not the result of interrogation as defined by Wells v. Commonwealth and Rhode Island v. Innis. Appellant fully exercised his right to cross-examine this witness, and did not refute the testimony. Finally, given the trial judge's advantage in gauging the veracity of the witness's testimony, the Court has no reason to doubt the judge's conclusion in this case.

The trial court did not err in refusing Appellant's statements as violating Miranda.

B. Appellant's Out-of-Court Statements and KRE 404 and 403

Appellant next contends that Trooper Baxter's testimony about the statements Appellant made during extradition should have been excluded based on KRE 404's prohibition on the introduction of evidence of other bad acts, and on KRE 403's balancing requirement. He claims that because the statements referenced only prior experience in manufacturing methamphetamine and knowledge of other illegal activity—and not the specific instances of activity alleged in his indictment—the jury likely used this evidence to infer his propensity to manufacture drugs and for no other purpose.

This case is similar to Walker v. Commonwealth, 52 S.W.3d 533 (Ky. 2001), which involved a defense that the accused was merely present during the commission of the crime and did not act with the mental state statutorily required for a finding of guilt. This Court held that the evidence of prior bad acts was admissible since it tended to disprove the "mere presence" defense offered:

> "When a defendant raises the issue of mental state, whether by a 'mere presence' defense that specifically challenges the mental element of the government's case or by means of a general denial that forces the government to prove every element of its case, prior bad act evidence is admissible because mental state is a material issue. . . .

. . . .

> . . . "Because [the] 'mere presence' defense raises the issues of intent and knowledge, admission of . . . prior bad act evidence [is] not relevant solely to a propensity inference, and [is] therefore proper under Rule 404(b)."

Walker v. Commonwealth, 52 S.W.3d 533, 536 (Ky. 2001) (alterations and omissions in original) (quoting United States v. Thomas, 58 F.3d 1318, 1322-23 (8th Cir. 1995)). The rule adopted in Walker is directly applicable in this case. The Commonwealth had to prove who was responsible for the manufacturing of methamphetamine as charged in the indictment—Appellant, McNew, or both. Appellant claimed that McNew was solely responsible for the finished methamphetamine and the working methamphetamine lab in the car, and that he was merely a guest. As did the defendant in Walker, Appellant thereby raised the "mere presence" defense, challenging the Commonwealth to prove his knowledge and intent as to the crimes charged. As in Walker, evidence otherwise excluded by KRE 404(b) is thus admissible if it is relevant to prove something other than a propensity to commit a crime, namely intent and knowledge, so long as the evidence survives KRE 403's balancing requirement.

Appellant challenges the relevance of the statements in question based on the fact that they do not refer directly to the specific charges in the indictment. The circuit judge agreed with the Commonwealth, however, that the statements were relevant to prove Appellant's knowledge and intent—both of which are material elements of Appellant's manufacturing charge. To be relevant for this purpose, Appellant's statements in question must make it more probable that Appellant knowingly manufactured methamphetamine or that he possessed the chemicals or equipment for

manufacture of methamphetamine with the intent to manufacture methamphetamine. Id.; see also KRE 401.

The relevance and probativeness of Appellant's statements as to his knowledge and intent are substantial. The statements clearly indicate Appellant's knowledge of the process and materials to manufacture methamphetamine given that he implicitly proclaimed himself an expert on the subject. As evidence of such knowledge, the statements combine with other independent evidence that items used in the methamphetamine manufacturing process were found in Appellant's jacket and elsewhere in the car, and that an active methamphetamine lab was found in the seat in which Appellant was sitting. When viewed in light of this evidence, probativeness of Appellant's statements as to his knowledge and expertise also creates a strong inference that he intended to use these materials for the purpose of manufacturing methamphetamine, since such knowledge and expertise is not common among persons who do not intend to manufacture methamphetamine.

In the same vein, the statements at least indirectly rebut Appellant's defense that he was merely present by demonstrating Appellant's knowledge that the chemicals and equipment (including the in-progress methamphetamine lab) are those that are used in the manufacture of methamphetamine, and that he had the intent to use these materials for this purpose in violation of KRS 218A.1432. Finally, the fact that these statements were voluntarily given by Appellant to law enforcement officers against his own interest lend significant trustworthiness to them since Appellant clearly had expertise in manufacturing methamphetamine and had no apparent motive to fabricate the statements. Thus, the probative value of the statements is buttressed by their trustworthiness.

Insofar as Appellant's statements of his own prior bad acts implicate him in this same type of offense, these statements are naturally prejudicial. Still, these statements were not intended by the Commonwealth to prove Appellant's propensity to commit this crime. Rather, as the trial judge found, the Commonwealth used these statements to prove Appellant's knowledge of the process and materials to manufacture methamphetamine and his intent to use the materials in his possession to that end. Although Appellant's analysis adequately demonstrates the danger of prejudice in this case, his analysis nonetheless skews the balancing required by KRE 403 by ignoring the most compelling components of the statements' probativeness.

Given that (1) the content of Appellant's statements is relevant to the issue of Appellant's knowledge of possessing materials for the manufacture of methamphetamine and to the intent to use these materials for such unlawful purpose, (2) the probative value of the statements is so substantial in rebutting Appellant's asserted defense of "mere presence" and proving the material elements of knowledge and intent, and (3) the statements were knowingly and voluntarily given by Appellant against his interest, the trial judge did not abuse his discretion in determining that the prejudicial value of the statements did not substantially outweigh their probative value for the proper purpose of proving knowledge and intent.

C. Directed Verdict Motion

Appellant also claims in his brief that the circuit court committed reversible error when it overruled his motion for a directed verdict as to the charge of manufacturing methamphetamine. To succeed on this motion, this Court must find that it was clearly unreasonable for the jury to have found guilt in consideration of the evidence as a

whole. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983)).

Specifically, Appellant claims that the Commonwealth failed to prove that he had constructive possession of the equipment to manufacture methamphetamine. Appellant argues that the equipment was not in his dominion or control, but was found in the locked truck of the co-defendant's car; however, the trial record clearly demonstrated through the testimony of Trooper Baxter and by the video of the traffic stop, extensive evidence of manufacturing of methamphetamine was recovered from the passenger area of the car where Appellant was sitting or from Appellant's jacket pockets. In fact, Trooper Baxter discovered the active methamphetamine lab in the seat that had been occupied by Appellant before he exited the car. The co-defendant testified that Appellant brought the lab into the vehicle with him when he got in the car, and that Appellant had the lab sitting between his feet in the floorboard while they were traveling.

This is sufficient evidence to support a finding of guilt beyond a reasonable doubt that Appellant had manufactured methamphetamine, as well as ample evidence that Appellant possessed the equipment to manufacture methamphetamine with the intent to do so. Therefore, the Commonwealth necessarily met its burden to withstand the motion for a directed verdict, and the trial judge did not err in overruling Appellant's motion.

D. Other Claims of Error

Appellant claims that the circuit court committed reversible error by denying his pre-trial motion to be tried separately from his co-defendant. No such pre-trial motion appears in the record.

Appellant also claims that the jury instructions were erroneous in two ways: (1) they denied his constitutional right to a unanimous verdict because they allowed the jury to find him guilty of manufacturing methamphetamine on either of two theories of guilt, and (2) their use of "guilty of . . . if, and only if" undermined his right to a presumption of innocence and shifted the burden of proof to his defense. Again, the instructions issues were not objected to at trial, nor do any alternate proposed instructions appear in the record.

Because these alleged errors were not preserved for appellate review, the Court will reverse because of them only if they constitute palpable error under RCr 10.26. A palpable error is one that "affects the substantial rights of a party" and will result in "manifest injustice" if not considered by the court. Schoenbachler v. Commonwealth, 95 S.W.3d 830 (Ky. 2003) (citing RCr 10.26). Recently this Court clarified that the key emphasis in defining such a palpable error under RCr 10.26 is the concept of "manifest injustice." Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006). "[T]he required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." Id. Having reviewed Appellant's argument, the Court concludes that there was no manifest injustice. Therefore, the alleged errors cannot be considered palpable and are not grounds for reversal.

For the forgoing reasons, the judgment of the Laurel Circuit Court is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Shelly R. Fears
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601-1133

Michael Keith Buttrey
Blackburn Correctional Complex
3111 Spurr Road
Lexington, Kentucky 40511

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Samuel J. Floyd, Jr.
Assistant Attorney General
Office of Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204

Supreme Court of Kentucky

2005-SC-000320-MR

MICHAEL KEITH BUTTREY — APPELLANT

V.

ON APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY ALLEN LAY, JUDGE
NO. 03-CR-00079-002

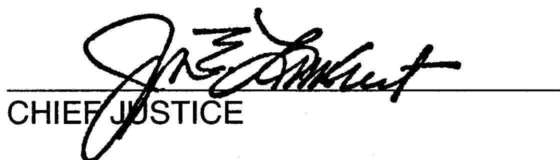
COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION ON THE COURT'S OWN MOTION

The petition for rehearing filed by Appellant, Michael Keith Buttrey, is hereby DENIED. The Opinion of the Court rendered on June 21, 2007, is hereby modified on its face by substitution of the attached pages 1 and 11 in lieu of the original page 1 and page 11. Said modification does not affect the holding.

Lambert, C.J.; Cunningham, Minton, Noble, Schroder, and Scott, JJ., concur. Abramson, J., not sitting.

ENTERED: September 20, 2007.



CHIEF JUSTICE