

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

FINAL

2006-SC-000104-MR

DATE 11-26-07 E.H.A. Grouniff, D.C.

DAVID NICHOLS

APPELLANT

V.

ON APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
NO. 05-CR-000077

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, David Nichols, was convicted by a Grayson Circuit Court jury of manufacturing methamphetamine enhanced by possession of a firearm and possession of anhydrous ammonia in an unapproved container with the intent to manufacture. For these crimes, Appellant was sentenced to fifty years imprisonment. He now appeals to this Court as a matter of right. Ky. Const. §110(2)(b).

Appellant asserts two main arguments on appeal: 1) that the trial court erred by not granting him a directed verdict of acquittal and 2) that the admission of evidence showing Appellant's prior bad acts was error because it was overly prejudicial and not probative of the charges. For the reasons set forth herein, we affirm Appellant's convictions.

On or about April 30, 2005, police officers with the Grayson County Sheriff's Department executed a search warrant on property owned by Appellant. The search warrant was issued after Deputy Sheriff Matt Darst smelled ether, a substance commonly associated with manufacturing methamphetamine, while driving past Appellant's property. The police had also previously received numerous anonymous tips regarding Appellant's potential methamphetamine manufacturing operation.

During the search, officers seized multiple items including a jar of hydrochloric acid, a punched starter fluid can, a gas mask, acetone, valves, funnels, plastic tubing, drain opener, salt, blister packages of pseudoephedrine, and various automobile solvents. A large unapproved tank of anhydrous ammonia was also found and destroyed by the police. Appellant's trailer where most of the items were found smelled strongly of ether. At trial Deputy Darst testified that all of the items found in the search could be used to manufacture methamphetamine. Further, a burn pile, which Deputy Darst testified was commonly used by methamphetamine manufacturers to dispose of chemicals and other byproducts, was located on the property.

At trial, Appellant testified that the items found in his house were used to repair automobiles and make a special type of chrome polish that he would sell to truck drivers. Appellant also presented several witnesses who testified that there was no heavy smell of ether in his trailer. Additionally, Appellant cites to the fact that no actual ephedrine or methamphetamine was found during the search.

I. The denial of the directed verdict motion was appropriate

At the close of the Commonwealth's case and again at the end of all of the evidence, Appellant moved for a directed verdict of acquittal on the charges against him. Appellant argued that the Commonwealth failed to prove that he intended to manufacture methamphetamine. See KRS 218A.1432(1) ("A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully: (a) manufactures methamphetamine; or (b) possesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.")¹ Appellant further argued that he could not be guilty of possessing anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine because he did not know the tank was on his property and that he never intended to manufacture methamphetamine. See KRS 250.991(2) ("Any person who knowingly possesses anhydrous ammonia in a container other than an approved container in violation of KRS 250.489 . . . with the intent to manufacture methamphetamine in violation of KRS 218A.1432, [is guilty of a] Class B felony for the first offense and a Class A felony for each subsequent offense."). Appellant ultimately argued that the items found in the search were common household materials and that without finding any trace of a controlled substance the court could not infer that he intended to manufacture methamphetamine.

A trial court's decision regarding a directed verdict motion is reviewed under the standard articulated in Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991):

¹ From the jury instructions used it appears that the pre-June 2005 version of KRS 218A.1432 was used in this case.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony. On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Id. at 187 (citations omitted).

Using this standard, the trial court properly denied the motion for directed verdict. Intent to manufacture methamphetamine can be inferred from the circumstances surrounding the search and a jury has wide latitude in inferring intent from the evidence. Anastasi v. Commonwealth, 754 S.W.2d 860, 862 (Ky. 1988). Our current statutory scheme defines intent to manufacture methamphetamine as:

any evidence which demonstrates a person's conscious objective to manufacture a controlled substance or methamphetamine. Such evidence includes but is not limited to statements and a chemical substance's usage, quantity, manner of storage, or proximity to other chemical substances or equipment used to manufacture a controlled substance or methamphetamine.

KRS 218A.010(15). In fact, we have previously held that a person may be convicted of manufacturing methamphetamine if he is in possession of several of the materials necessary to manufacture methamphetamine in suspicious or unnatural quantities. See Matheney v. Commonwealth, 191 S.W.3d 599, 604 (Ky. 2006) (construing the language of the pre-June 2005 version of KRS 218A.1432(1)(b) to allow for a conviction when a person has the requisite scienter and two or more of the materials necessary to make methamphetamine).

In this matter, the jury found that Appellant was in possession of *all* of the requisite materials necessary to manufacture methamphetamine. The evidence also indicates that these materials were in relatively close proximity to each other, being found either in Appellant's trailer or on land surrounding the trailer. In light of these facts, it certainly would not be unreasonable for a juror to find Appellant had intent to manufacture methamphetamine. See KRS 218A.010(15). Further, while Appellant claims to have no knowledge of the anhydrous ammonia in the unapproved container, it would not have been unreasonable for a juror to believe Appellant had knowledge or at least constructive possession. The trial court's denial of the motion for directed verdict of acquittal was therefore proper.

II. The admission of evidence regarding Appellant's prior bad act involving methamphetamine was not error

During trial, the Commonwealth attempted to introduce evidence showing that Appellant previously pled guilty to unlawful distribution of a methamphetamine precursor in the first degree in Hardin County. The guilty plea stemmed from Appellant's purchase of a large quantity of Sudafed for another individual to use in the manufacturing of methamphetamine on or about November 2, 2003. The Commonwealth hoped to introduce evidence of this guilty plea to show Appellant's intent to manufacture methamphetamine. The trial judge ultimately decided to allow evidence of the actual purchase of the Sudafed but disallow any mention of the guilty plea because at the time Appellant was appealing that case to this Court. The trial judge made this decision because he believed that the Commonwealth could establish through Appellant's prior actions that his presence at the trailer was for the purpose of manufacturing

methamphetamine. The trial judge believed this was important because he felt Appellant's only real defense to these charges was claiming that he was not at the trailer for the purpose of manufacturing methamphetamine.

Appellant now argues that the admission of this evidence was error because it is irrelevant and overly prejudicial. Appellant further argues that the evidence does not reflect a similar crime, has no connection to the crime alleged, and is too remote from this matter to be admissible. See O'Bryan v. Commonwealth, 634 S.W.2d 153, 156-157 (Ky. 1982). Admission of this evidence is governed by KRE 404(b) which states that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, such evidence may be admissible: "1) [i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or 2) if so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party." Id.

Here the evidence regarding Appellant's assistance of a methamphetamine manufacturer was admissible to prove his motive, intent, and plan to personally manufacture methamphetamine. See Hayes v. Commonwealth, 175 S.W.3d 574, 588 (Ky. 2005). Appellant's prior act shows that Appellant has been involved with the methamphetamine trade and that he is familiar with the manufacturing process. The evidence also helps establish Appellant's motive by refuting his claim that the seized materials were being used to create chrome polish. The previous crime is similar enough to the present

alleged act to support an inference of intent to manufacture methamphetamine. Additionally, the fact that the prior act occurred several years ago did not make it too remote to be relevant at trial. See United States v. Rush, 240 F.3d 729, 731 (8th Cir. 2001) (holding that a drug conviction from 1987 was not too remote to be relevant). Thus, there is no error here.

For the reasons set forth herein, the judgment and sentence of the Grayson Circuit Court is affirmed.

All sitting. All concur.

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