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**NOT TO BE PUBLISHED OPINION**

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RENDERED: JANUARY 22, 2009  
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2006-SC-000764-MR

FINAL

DATE 2/12/09 Kelly Klabeck  
APPELLANT

RANDALL TILFORD MILLER

V.

ON APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN R. GRISE, JUDGE  
NO. 06-CR-00055-001

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING IN PART AND REVERSING AND REMANDING IN PART

Randall Miller appeals his convictions for manufacturing methamphetamine, possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine, possession of a controlled substance (methamphetamine), and possession of drug paraphernalia. We reverse the conviction for possession of a controlled substance (methamphetamine) on the ground of double jeopardy and vacate his sentence on that count; we affirm Miller's remaining convictions.

## I. FACTUAL AND PROCEDURAL HISTORY.

On June 29, 2004, Kentucky State Police Trooper Brad Bowles was dispatched to the area of the residence of Randall Miller and Anita Parker to look into a complaint of a strong chemical odor. Upon arrival, Trooper Bowles noticed a chemical odor emanating from an outbuilding and a trash can. Trooper Bowles examined the trashcan and discovered a fuel container and several starter fluid cans, both considered precursors of methamphetamine production.

Additional troopers arrived at the scene and approached the house. Although lights were on in the house, no one responded when the officers knocked on the door. A note was attached to the front door of the residence. Signed by Randall and Anita, the note instructed visitors to use the side door.

The troopers entered the outbuilding<sup>1</sup> and discovered a recently active methamphetamine lab, equipped with tools and materials necessary to produce methamphetamine. Within this methamphetamine lab, the officers discovered anhydrous ammonia in an unapproved container, as well as a finished cook of methamphetamine. The troopers also discovered motion-sensor lights and security cameras around the residence.

Trooper Bowles left the scene to procure a search warrant. While the remaining officers were securing the scene, a vehicle drove past the residence. It matched a description given to the officers of the vehicle normally driven by Anita Parker. Troopers pulled over the vehicle within a mile of the residence.

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<sup>1</sup> Miller does not challenge the propriety of the troopers' entry into the outbuilding.

The officers were able to identify the driver as Anita Parker and the passenger as Randall Miller. The keychain from the ignition of Parker's vehicle held a key to the outbuilding. This keychain had both Anita Parker and Randall Miller's names and phone number written on a tag.

The couple was returned to the residence and informed of the search warrant. Miller questioned why the lights were on in his house, and argued that the lights had been off when he and Parker had left the residence the day before. However, there were no signs of forced entry; and Miller testified at trial that he had had no prior break-ins. When questioned about the contents of the outbuilding, Miller replied that there was a freezer, some boxes, and chairs. Miller testified at trial that he kept the outbuilding unlocked unless he brought his boss's tools home. He also testified that his key to the outbuilding had disappeared prior to the methamphetamine lab discovery.

Upon entering the residence, the troopers discovered a pipe made from a light bulb, a baggie of methamphetamine, television monitors hooked to security cameras, and a police scanner. Inside the vehicle, the police discovered night vision goggles.

A jury convicted Miller of manufacturing methamphetamine, possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine, possession of a controlled substance (methamphetamine), and possession of drug paraphernalia. Miller was

sentenced to thirty-five years' imprisonment for his convictions. He appeals as a matter of right.<sup>2</sup>

## II. ANALYSIS.

Miller raises four issues on appeal: (1) the trial court erred when it denied his motion for a directed verdict, (2) his convictions for possession for anhydrous ammonia in an unapproved container and manufacturing methamphetamine violate double jeopardy, (3) his convictions of manufacturing methamphetamine and possession of methamphetamine violate double jeopardy, and (4) the trial court erred in allowing Trooper Bowles to testify that night vision goggles are commonly used during thefts of anhydrous ammonia.

We reverse and remand on the third issue: we agree with Miller that his convictions for manufacturing methamphetamine and possession of methamphetamine violate double jeopardy. We find no merit in the remaining claims of error.

### A. Motion for a Directed Verdict was Properly Denied.

Miller contends that the trial court erred by failing to direct a verdict on his behalf. He maintains that the Commonwealth did not sufficiently show that he did, in fact, possess the drugs and paraphernalia, or that he was aware of the methamphetamine lab that was in the outbuilding. In order to convict Miller, the jury was required to find that he acted *knowingly* as defined in Kentucky Revised Statutes (KRS) 501.020(2). On appellate review, the test of a

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<sup>2</sup> Ky.Const. § 110(2)(b).

directed verdict is, “if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then [is] the defendant entitled to a directed verdict of acquittal”.<sup>3</sup>

Direct evidence is not required to support a conviction for illegal possession of a controlled substance; “proof of actual knowledge can be by circumstantial evidence.”<sup>4</sup> Constructive possession has been held to be sufficient to uphold a conviction for illegal possession of controlled substances.<sup>5</sup>

Miller’s testimony that he lost his keys was countered by the Commonwealth’s introduction of the keychain that had both Anita Parker’s and Randall Miller’s names and phone number written on it to show that he shared possession of Parker’s keys to the outbuilding, where the lab was discovered, along with the keys to the house, where drugs and paraphernalia were found. We believe the trial court properly denied Miller’s motion for directed verdict. The trial court properly submitted the case to the jury to decide the factual dispute whether Miller possessed the methamphetamine, the drug paraphernalia, and the anhydrous ammonia in an unapproved container. Under these facts, we conclude that the jury’s verdict was reasonable.

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<sup>3</sup> Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

<sup>4</sup> See Love v. Commonwealth, 55 S.W.3d 816, 825 (Ky. 2001).

<sup>5</sup> See Rupard v. Commonwealth, 475 S.W.2d 473, 475 (Ky. 1971)

B. Miller's Convictions of Possession of Anhydrous Ammonia in an Unapproved Container and Manufacturing Methamphetamine Do Not Violate Double Jeopardy.

Miller contends that his convictions for possession of anhydrous ammonia in an unapproved container and manufacturing methamphetamine violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 13 of the Kentucky Constitution. The applicable double jeopardy rule, set out in Blockburger v. United States,<sup>6</sup> provides: “[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”<sup>7</sup> This Court fully embraces the Blockburger test.<sup>8</sup> The Kentucky General Assembly codified the Blockburger analysis in KRS 505.020,<sup>9</sup> and subsection (1)(a) of that statute prohibits double jeopardy by barring conviction of more than one offense where one offense is included in the other.

KRS 250.489(1) prohibits “any person to knowingly possess anhydrous ammonia in any container other than an approved container.”

KRS 218A.1432(1) sets forth that a person is guilty of manufacturing methamphetamine when he knowingly and unlawfully manufactures

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<sup>6</sup> 284 U.S. 299 (1932).

<sup>7</sup> 284 U.S. at 304.

<sup>8</sup> See Commonwealth v. Burge, 947 S.W.2d 805, 811 (Ky. 1996).

<sup>9</sup> See, e.g., Dixon v. Commonwealth, 263 S.W.3d 583, 588 (Ky. 2008) (recognizing KRS 505.020 as “a legislative codification of the Blockburger test.”).

methamphetamine or possesses at least two of the chemicals or items of equipment with the intent to manufacture methamphetamine.<sup>10</sup>

Because both offenses require proof of an element not required by the other, there is no violation of double jeopardy. Simply put, KRS 250.489(1) prohibits possession of anhydrous ammonia in an unapproved container. KRS 218A.1432(1) makes no reference to a container. Moreover, KRS 218A.1432(1) requires possession of chemicals or equipment and also requires proof of intent to manufacture methamphetamine. KRS 250.489(1) does not require proof of such intent. Further, it is not absolutely necessary to possess anhydrous ammonia to manufacture methamphetamine because anhydrous ammonia is only one of a number of precursors used to produce methamphetamine.<sup>11</sup> Therefore, Miller's convictions of manufacturing methamphetamine and possession of anhydrous ammonia in an unapproved container do not violate KRS 505.020 or double jeopardy constitutional proscriptions.

C. Miller's Convictions of Manufacturing Methamphetamine and Possession of Methamphetamine Violate Double Jeopardy.

Miller contends that his convictions for manufacturing methamphetamine and possession of methamphetamine violate double

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<sup>10</sup> KRS 218A.1432 was amended after Miller's arrest, but these amendments do not affect our analysis.

<sup>11</sup> See, e.g., Commonwealth v. Hayward, 49 S.W.3d 674, 675-76 (Ky. 2001) (setting forth expert testimony as to one form of manufacturing methamphetamine without any mention of anhydrous ammonia).



jeopardy. This alleged error was unpreserved, but we address it because the allegation is that of double jeopardy.<sup>12</sup>

This Court addressed whether simultaneous convictions for manufacturing methamphetamine and possession of methamphetamine violate double jeopardy in Beaty v. Commonwealth.<sup>13</sup> In Beaty, we reasoned that a defendant is “properly convicted of both possessing methamphetamine and manufacturing methamphetamine per KRS 505.020(1) if the methamphetamine that [the defendant is] convicted of possessing [is] not the same methamphetamine that [the defendant is] convicted of manufacturing.”<sup>14</sup> In Beaty, this Court could not determine from the jury’s verdict whether the methamphetamine that the defendant was convicted of possessing was the same methamphetamine that he was convicted of manufacturing. We concluded that the instructions should have been worded in such a way as to require the jury to establish that two distinct items of methamphetamine were involved in the two separate offenses when reaching the verdict.<sup>15</sup> Such a change in the instructions would clearly establish that the drugs the defendant was charged with manufacturing were different from the drugs he was charged

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<sup>12</sup> Sherley v. Commonwealth, 558 S.W.2d 615, 618 (Ky. 1977), *overruled on other grounds by Dixon*, 263 S.W.3d at 593 (“failure to preserve [an] issue for appellate review should not result in permitting a double jeopardy conviction to stand”).

<sup>13</sup> 125 S.W.3d 196 (Ky. 2003).

<sup>14</sup> *Id.* at 213.

<sup>15</sup> *Id.* (“To avoid double jeopardy, the instruction should also have contained the following or a similar proviso: . . . . If you have found the Defendant guilty of manufacturing methamphetamine under Instruction No. 8, that the substance so possessed by him was not a product of the same manufacturing process for which you have found him guilty under that Instruction.”).

with possessing. This distinguishing instruction was necessary to “protect[] [a defendant’s] right to be free of double jeopardy.”<sup>16</sup>

In this case, two units of methamphetamine were discovered: the cook of methamphetamine was discovered in the outbuilding, and a baggie of methamphetamine was discovered in the house. The instructions did not require the jury to distinguish between the drugs found in the house and drugs associated with the outbuilding. The instruction for manufacturing methamphetamine read:

You will find the defendant guilty of Manufacturing Methamphetamine under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt that in this county on or about the 28<sup>th</sup> day of June, 2004, and before the finding of the indictment herein, Randall Miller knowingly manufactured methamphetamine.

The instruction for first-degree possession of a controlled substance read:

You will find the defendant guilty of First-Degree Possession of a Controlled Substance under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 28<sup>th</sup> day of June, 2004, and before the finding of the indictment herein, Randall Miller had in his possession a quantity of methamphetamine; AND

B. That he knew the substance so possessed by him was methamphetamine.

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<sup>16</sup> *Id.* at 214.

Like the instructions in Beaty, the jury instructions in this case were general and did not provide that the jury must find that Miller manufactured and possessed two different units of methamphetamine. As in Beaty, there should have been an additional provision in the instructions to ensure that Miller was convicted of possessing a separate quantity of methamphetamine from the methamphetamine he was convicted of manufacturing. Because of this omission in the instructions, we also cannot say that Miller was free from a constitutional violation of double jeopardy. Therefore, we reverse Miller's conviction for possession of methamphetamine and remand.<sup>17</sup>

D. The Trial Court Properly Allowed the Night Vision Goggle Testimony.

Police discovered night vision goggles in Anita Parker's car. At trial, Trooper Bowles testified that anhydrous ammonia is usually stolen from farm service stores. He also testified that from his experience, many of these thieves use night vision goggles to accomplish the theft. Over objection, the trial court allowed the testimony, ruling that the testimony was relevant and had significant probative value.

Kentucky Rules of Evidence (KRE) 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "A trial judge's decision with respect to relevancy of

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<sup>17</sup> We reverse the possession of methamphetamine conviction since we generally vacate the less serious conviction in these situations. Clark v. Commonwealth, 267 S.W.3d 668, 678 (Ky. 2008).

evidence . . . is reviewed under an abuse of discretion standard.”<sup>18</sup> The test is whether the court’s decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.”<sup>19</sup>

KRE 403 provides that “evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, or needless presentation of cumulative evidence.” Whether the probative value of evidence is outweighed by its possible prejudicial effect is within the sound discretion of the trial judge.<sup>20</sup>

Miller contends that the testimony was not relevant and was highly prejudicial. However, we agree with the trial court that the testimony was relevant because there was an issue whether Miller had any connection to the anhydrous ammonia. The testimony that night vision goggles are often used to accomplish theft of anhydrous ammonia could raise a reasonable inference to tie him and Parker to the acquisition of the anhydrous ammonia. And we observe no abuse of discretion by the trial court in determining that the probative value of evidence was not outweighed by its possible prejudicial effect so as to warrant exclusion under KRE 403. Therefore, the trial judge did not err in allowing the Commonwealth to offer the night vision goggle testimony.

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<sup>18</sup> Love, 55 S.W.3d at 822.

<sup>19</sup> Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

<sup>20</sup> See Rake v. Commonwealth, 450 S.W.2d 527, 528 (Ky. 1970).

### III. CONCLUSION.

For the foregoing reasons, we affirm the judgment of the trial court convicting the Appellant of possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine, manufacturing methamphetamine, and possession of drug paraphernalia. But we reverse Appellant's conviction for possession of a controlled substance (methamphetamine). We remand for further proceedings consistent with this opinion.

All sitting. Minton, C.J.; Abramson, Cunningham, Noble, Schroder, and Scott, JJ., concur. Venters, J., concurs in result only and would conclude that the night vision goggles and the detective's suspicion as to their use were not admissible. The testimony linking the goggles to unrelated burglaries was mere speculation; but considering the entire case, the error was harmless.

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