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RENDERED: MARCH 19, 2009

NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2007-SC-000671-MR

**FINAL**

DATE 4/9/09 Kelley Klaben DC.

JOSEPH D. HARRIS

APPELLANT

V.

ON APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, JUDGE  
NO. 07-CR-00066

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Joseph Harris appeals as a matter of right from an August 15, 2007 Judgment of the Muhlenberg Circuit Court convicting him of manufacturing methamphetamine and of second-degree escape. The jury also found that Harris is a first-degree persistent felony offender (PFO). In accord with the jury's recommendation, the trial court sentenced Harris to consecutive terms of imprisonment of twenty and ten years, respectively, for the PFO-enhanced offenses. The Commonwealth alleged that on the evening of March 6, 2007, the Powderly Chief of Police, Wade Griggs, apprehended Harris and Douglas Edwards in possession of certain chemicals and equipment used in the manufacture of methamphetamine with the intent to manufacture, and that as the arrest was proceeding Harris fled from Chief Griggs's custody. Harris contends that the Commonwealth failed to prove either of the substantive

charges and that his trial was tainted when the Commonwealth was permitted to cross-examine one of the defense witnesses, Edwards, with respect to a collateral matter. Finding no error, we affirm.

### **RELEVANT FACTS**

Chief Griggs was the Commonwealth's principal witness, and he testified that at about 7:00 pm on March 6, 2007, as he drove past Douglas Edwards's residence on Hillside Drive in Powderly, he detected a strong chemical odor, an odor his training and experience led him to associate with the illegal manufacture of methamphetamine or "meth." Chief Griggs was familiar with Edwards, as the two men are cousins. He stopped at the Edwards residence to investigate; met Edwards outside carrying a bag of trash to a burn-barrel; obtained Edwards's permission to enter the residence; and upon entering, although Edwards had said that no one else was present, found Harris at the kitchen sink washing a mason jar. Griggs testified that the chemical smell inside the residence was very strong suggesting the presence or recent presence of a meth lab. He ordered Edwards and Harris to sit in the living room where he found a loaded handgun partially concealed between sofa cushions and, after securing the gun, made a quick search of the residence.

In the kitchen he found a blender, the beaker of which contained a white, powdery residue which later proved to contain pseudoephedrine; a pan containing more than 100 tablets of what proved to be pseudoephedrine cold medicine; a damp coffee filter that smelled strongly of ether; a partially consumed four-pound container of rock salt; a container of table salt; and

some hypodermic syringes. He found the door to one of the back bedrooms sealed with tape and plastic sheeting, and inside that room he found partially-used cans of starting fluid and Liquid Fire, a plastic bottle cap with a hole drilled through it, plastic tubing, and a candle warmer. All of these items, Griggs testified, with the exception of the syringes, were commonly used in the illegal production of meth.

Having made these discoveries, Griggs testified that he informed Edwards and Harris that he was charging them with manufacturing meth and read them their Miranda rights. He admitted that he did not handcuff the men or use the words “under arrest,” but he testified that his assertion of custody on the manufacturing charge was clear. At some point, either before or after Griggs recited the Miranda warnings, Harris complained that the smell was bothering his lungs and requested permission to go outside. Griggs then took the men out onto the front porch, from which, a few minutes later, Harris ran away. Griggs testified that before Harris had run more than twenty-five or thirty feet, he, Griggs, yelled after him to stop, that he was under arrest. Harris was apprehended later that night at the residence of one of his friends.

The Commonwealth’s proof also included testimony by both a forensic chemist and the director of the Pennyroyal Narcotics Task Force, Cheyenne Albro. The chemist established the presence of pseudoephedrine on the blender and the amount (more than nine grams) of pseudoephedrine present in the seized pills. Albro testified as an expert in methamphetamine interdiction and explained in detail what role all of the items seized from Edwards’s

residence play in the meth manufacturing process. He also explained how as innocent-seeming an act as washing out a mason jar could be a vital part of meth production, for a jar can be reused at different stages of the process, and it is crucial to keep one stage from contaminating another.

Harris and Edwards were both indicted for manufacturing methamphetamine, and in April 2007 Edwards pled guilty to that charge. Harris, however, denied knowing anything about Edwards's meth making and presented a wrong-place-at-the-wrong-time defense. He claimed that several days before this incident Edwards had asked him to repair some damaged water pipes and that he had been at Edwards's residence that night to make some preliminary measurements. Testifying on Harris's behalf, Edwards acknowledged that he had indeed intended to use the items Chief Griggs seized to manufacture methamphetamine, but he claimed that the wrongdoing was his alone, that Harris had not been involved. He confirmed Harris's claim about the pipes, and insisted that Harris had arrived at his residence no more than five or ten minutes before Chief Griggs.

Against these claims, Griggs testified that he interviewed Edwards at the police station not long after his arrest and that Edwards had admitted that Harris was involved in the manufacturing, at least to the extent of pouring some ether into a jar. The Commonwealth was also permitted to cross-examine Edwards and to present Griggs's testimony on rebuttal concerning the fact that Griggs had stopped Edwards's vehicle at about 5:20 that evening for a traffic violation and that Edwards and Harris had been in the car together. Harris

contends that the Commonwealth's proof failed to establish either his intent to manufacture methamphetamine or his arrest prior to his flight. We disagree.

### **ANALYSIS**

#### **I. Harris Was Not Entitled To A Directed Verdict.**

As the parties correctly note, upon a motion for a 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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citation omitted).

#### **A. The Trial Court Did Not Err By Refusing to Direct a Verdict of Acquittal on the Manufacturing Charge.**

Harris contends, first, that the Commonwealth failed to prove all of the elements of manufacturing methamphetamine. That crime is defined by KRS 218A.1432, which provides in pertinent part that a person is guilty of such manufacturing when

he knowingly and unlawfully . . . (b) with intent to manufacture methamphetamine possesses two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine.

Insisting that “it is not illegal to wash a mason jar,” Harris contends that the Commonwealth failed to prove intent. Construing the evidence in favor of the Commonwealth, as we must, we may begin by noting that criminal intent may be inferred not simply from the defendant’s acts, here Harris’s pouring ether into a jar, according to Edwards’s post-arrest statement, and his washing a jar, as observed by Chief Griggs, but also from the surrounding circumstances. Pate v. Commonwealth, 243 S.W.3d 327 (Ky. 2007); Davenport v. Commonwealth, 177 S.W.3d 763 (Ky. 2005). The surrounding circumstances included Edwards’s admission that he, at least, intended to manufacture meth; his statement that Harris helped; his testimony that he and Harris had been good friends for ten years; the fact that washing a mason jar has nothing to do with measuring water pipes but can be, according to Director Albro, an important act in the manufacturing process; the overwhelming odor in Edwards’s home, which would surely have aroused Harris’s curiosity if he did not already know how it arose; the fact that Edwards and Harris were together earlier in the day although Edwards at first claimed otherwise, and the fact that Harris fled after Chief Griggs charged him with manufacturing. These are all circumstances tending to belie Harris’s water-pipe defense, and together they more than permit a reasonable inference that Harris shared Edwards’s intent to manufacture methamphetamine. The trial court did not err, in sum, when it denied Harris’s motion for directed verdict on the manufacturing charge.

**B. The Trial Court Did Not Err when it Refused to Direct a Verdict of Acquittal on the Escape Charge.**

Nor did the court err by refusing to direct a verdict of acquittal on the second-degree escape charge. That offense is defined by KRS 520.030, which provides in pertinent part that a person is guilty of escape in the second degree

when . . . being charged with or convicted of a felony, he escapes from custody.

“Custody” for the purposes of this case means “restraint by a public servant pursuant to a lawful arrest.” KRS 520.010. Harris contends that the Commonwealth failed to prove that he was under arrest when he fled. Again, for present purposes,

[a]n arrest is made by placing the person being arrested in restraint, or by his submission to the custody of the person making the arrest. The submission shall be in the actual presence of the arrester.

KRS 431.025(2). Although Chief Griggs admitted that he did not physically restrain Harris, he testified that he informed Edwards and Harris that he was charging them with manufacturing methamphetamine, that he rebuffed Edwards’s pleas that they not be arrested, and that he read them their Miranda rights. Chief Griggs and Harris both testified that Harris asked Chief Griggs for permission to leave the house because his lungs were burning, and thus, in Chief Griggs’s presence, he indicated that he, himself, realized that he was in custody and submitted to it. This testimony, in other words, permitted a reasonable juror to find that Harris escaped after he had been charged with



and arrested for manufacturing methamphetamine, and thus was sufficient evidence to overcome Harris's motion for directed verdict on the escape charge.

## **II. The Commonwealth Did Not Improperly Cross-Examine Edwards.**

Finally, Harris contends that his trial was rendered unfair when the trial court permitted the Commonwealth to cross-examine Edwards with respect to a collateral matter. As noted above, Edwards testified that Harris could not have been involved in the illegal activities at Edwards's house the night they were arrested because Harris had arrived at the house only minutes before Chief Griggs. On cross-examination, the Commonwealth, referring to the traffic stop earlier that evening when Chief Griggs had seen Edwards and Harris together in Edwards's car, asked, "Isn't it true that you and Mr. Harris were out before that night running around accumulating products to make meth?" Harris objected on the ground that the traffic violation was an inadmissible prior bad act. Overruling the objection, the trial court indicated that Edwards's testimony had made the fact that the two men were together earlier admissible. On appeal, Harris contends that having been in a vehicle with Edwards about an hour-and-a-half before Chief Griggs found them together at Edwards's house was an irrelevant, collateral fact concerning which the Commonwealth should not have been permitted to inquire. He cites the general rule against impeachment on collateral facts, Metcalf v. Commonwealth, 158 S.W.3d 740 (Ky. 2005), and notes that "[a]lthough a witness in a criminal case may be impeached by contradictory evidence, 'such evidence is not admissible for that purpose unless it pertains to a material

matter.” Chumbler v. Commonwealth, 905 S.W.2d 488, 495-96 (Ky. 1995) (quoting from Nugent v. Commonwealth, 639 S.W.2d 761, 764 (Ky. 1982)).

The simple response to Harris’s contention, as the trial court observed, is that the length of time the men spent together that evening *was* a material matter to which the traffic-stop evidence was relevant. It tended both to show that the men had been together a significant length of time, long enough for Harris to be involved in the manufacturing, and to cast doubt on the veracity of Edwards’s contrary testimony. Cf. Ernst v. Commonwealth, 160 S.W.3d 744, 762 (Ky. 2005) (“Evidence of collateral criminal conduct is admissible for the purpose of rebutting a material contention of the defendant.”).

On appeal, Harris also complains about the form of the Commonwealth’s question, contending that there was no evidence that he and Edwards were “running around accumulating” meth-making products, and that by suggesting otherwise the question was inflammatory. Although it is true that neither party is “at liberty to present unsupported theories in the guise of cross-examination and invite the jury to speculate as to some cause other than one supported by the evidence,” Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997), here there was evidence both that Edwards and Harris had been found in conjunction with an accumulation of meth-making chemicals and equipment and also that not long before that the two men were riding together, facts which brought the purpose of their earlier errand within the scope of legitimate cross-examination.

## **CONCLUSION**

In sum, the Commonwealth adequately proved both that Harris shared Edwards's admitted intent to manufacture methamphetamine and that Chief Griggs arrested Harris for that crime, rendering Harris's subsequent flight an escape. That proof was not tainted by evidence of Edwards's traffic violation, since the violation evidence bore meaningfully on the issue of Harris's participation in the manufacturing and on Edwards's credibility. Accordingly, we affirm the August 15, 2007 Judgment of the Muhlenberg Circuit Court.

All sitting. All concur.

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