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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: SEPTEMBER 20, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000627-MR

BRIAN K. DAMRELL — APPELLANT

V.

ON APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
NO. 10-CR-00131

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Brian K. Damrell, was convicted by a jury of operating an ATV on the public roadway and fleeing or evading police in the second degree. In a bifurcated proceeding, he was also convicted of manufacturing methamphetamine, second or subsequent offense. Appellant was sentenced to twenty (20) years in prison. He now brings this appeal as a matter of right, raising four issues for our consideration. Ky. Const. § 110(2)(b).

For the following reasons, we affirm the trial verdict and final judgment.

Enhancement of manufacturing methamphetamine offense as a second or subsequent offense

Appellant was initially indicted in the Rockcastle Circuit Court for manufacturing methamphetamine, first offense; possession of methamphetamine; operating an ATV upon a public highway; and fleeing or evading police in the second degree. The possession of methamphetamine

charge was dismissed upon motion of the Commonwealth. Appellant had previously been convicted under KRS 218A.1415 for complicity to possess a controlled substance, first degree, and under KRS 218A.1422 for possession of marijuana. As a result, the charge of manufacturing methamphetamine, first offense, was amended to second or subsequent offense.

Appellant argues that it was improper to allow his prior convictions for possession charges to enhance a manufacturing charge. He contends that because possession offenses cannot be used to enhance trafficking offenses under KRS 218A, they should also not be allowed to enhance manufacturing offenses.

In this case, Appellant was charged under KRS 218A.1431. A current offense charged under this chapter may be enhanced by a previous conviction that is also under this chapter:

> "Second or subsequent offense" means that for the purposes of this chapter an offense is considered as a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter, or under any statute of the United States, or of any state relating to substances classified as controlled substances or counterfeit substances, *except that a prior conviction for a nontrafficking offense shall be treated as a prior offense only when the subsequent offense is a nontrafficking offense.* For the purposes of this section, a conviction voided under KRS 218A.275 or 218A.276 shall not constitute a conviction under this chapter.

KRS 218A.010(41) (emphasis added).

However, where the current charge is for a non-trafficking offense, it may be enhanced only by a prior conviction that is also for a non-trafficking offense. *Id.*

As the trial court correctly noted, manufacturing is not included in the definition of trafficking under KRS 218A.1431(3). Under that definition, *traffic* means to "distribute, dispense, sell, transfer, or possess with intent to distribute, dispense, or sell methamphetamine." Since manufacturing is a non-trafficking offense under KRS 218A.1431 and Appellant's prior possession offenses were non-trafficking, then both the current and prior convictions were for non-trafficking offenses, making enhancement proper under KRS 218A.010(41).

Appellant makes several additional arguments regarding apparent inconsistencies within KRS 218A. Specifically, he points to the last sentence of KRS 218A.010(41), which prohibits convictions for possession offenses that have been voided under KRS 218A.275(8) or KRS 218A.276(8) from serving as prior offenses. He argues that subsequent offenses should not be enhanced by prior convictions that are eligible to be voided, but for various reasons have not been. In support, he contends that H.B. 463 evidences a legislative intent to lessen penalties for marijuana related offenses, and that we should resolve this issue in his favor under the rule of lenity. While we acknowledge that the possible results under this section of KRS 218A, as highlighted by Appellant, seem illogical, there is simply no ambiguity in this statute. "Appellant's reasoning would require this Court to add additional language to the statute.

This we will not do." *Jackson v. Commonwealth*, 319 S.W.3d 347, 351 (Ky. 2010). Accordingly, there was no error by the trial court.

Chain of Custody of Methamphetamine

At trial, Trooper Scotty Pennington testified that he observed Appellant operating an ATV on a public roadway, and that a black bag containing several items fell from the ATV while it was being driven by Appellant. Many of the items found in the bag were known to be used in the manufacturing of methamphetamine, including a mason jar that Trooper Pennington identified as a "one-step meth lab." Trooper Pennington then took a sample from the jar to the Kentucky State Police (KSP) lab later that day and delivered it to KSP lab technician Beverly Wagoner.

Ms. Wagoner testified that she received the sample from Trooper Pennington on that date and put it in her locker, to which only she had access. She then tested the sample the following month and found it to contain methamphetamine. Ms. Wagoner also testified that the "received by" line on the KSP 41 chain of custody form pertaining to the methamphetamine sample did not contain a signature. She further testified that she does not always receive or sign a KSP 41 form with a test sample, but that she is required to have a KSP 26 form. She then presented a KSP 26 form that was allegedly complete and properly signed. However, pursuant to RCr 7.24, the trial court suppressed the form due to the Commonwealth's failure to provide it to the defense prior to trial.

Appellant argues that a sufficient chain of custody was not established to introduce the evidence of the methamphetamine at trial. However, "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in any material respect.'" *Rabovsky v. Commonwealth,* 973 S.W.2d 6, 8 (Ky. 1998) (citing *United States v. Cardenas,* 864 F.2d 1528, 1532 (10th Cir.1989)). *See also Thomas v. Commonwealth,* 153 S.W.3d 772, 779-81 (Ky. 2004). The testimony of both Trooper Pennington and Ms. Wagoner were sufficient to establish a reasonable probability that the sample had not been altered. The defects in the documentation go to the weight of the evidence rather than the admissibility. *Rabovsky* at 8. The testimony that the sample taken from Trooper Pennington and given to Ms. Wagoner was the same as that tested was not sufficiently challenged so as to lead to its exclusion. The trial court did not abuse its discretion. *Grundy v. Commonwealth,* 25 S.W.3d 76, 80 (Ky. 2000).

Destruction of Evidence

The physical evidence found by Trooper Pennington relating to the manufacturing of methamphetamine was destroyed prior to trial. Appellant argues that the destruction of this evidence denied him the opportunity to conduct his own independent testing. As a result, he claims he was prevented from being able to challenge the credibility of both the evidence and the Commonwealth's expert witnesses.

Appellant contends that the destruction of the evidence violated his Due Process right to confrontation and his right to present a meaningful defense. However, "absent a showing of bad faith, the Due Process Clause is not implicated by 'the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.'" *Estep v. Commonwealth*, 64 S.W.3d 805, 809-10 (Ky. 2002) (quoting *Collins v. Commonwealth,* 951 S.W.2d 569, 572 (Ky. 1997)). *See also Arizona v. Youngblood,* 488 U.S. 51, 58 (1988). Here, there was nothing to suggest that the evidence was destroyed in bad faith. Further, there was no indication that the destroyed evidence would have exculpated Appellant anymore than it would have implicated him. Accordingly, Appellant's due process rights were not violated.

Denial of motion for a directed verdict

Appellant moved for a directed verdict of acquittal as to all charges at the conclusion of the Commonwealth's proof, as well as the conclusion of all the proof. On appeal, he specifically contends that the trial court should have granted his motion because there was no evidence connecting him to the incident other than the testimony of Trooper Pennington.

Trooper Pennington testified at trial that, while transporting three prisoners, he observed Appellant operating an ATV on the roadway. Trooper Pennington stated that he was certain Appellant was driving the ATV. On the other hand, the three prisoners accompanying Trooper Pennington testified that they could not positively identify Appellant as the operator of the ATV.

There was also testimony from Appellant's girlfriend, Jennifer Short, and his brother, Kelvin Damrell, that Appellant was with them at the time of the incident.

Even with the alleged alibi testimony and the uncertainty of the prisoners' identification of Appellant as the driver of the ATV, Appellant is only entitled to a directed verdict of acquittal "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Based on Trooper Pennington's positive identification of Appellant and the results of the lab tests, we cannot say that it was clearly unreasonable for a jury to find Appellant guilty. Thus, the trial court did not err in denying Appellant's motion for a directed verdict.

For the above-mentioned reasons, the judgment of the Rockcastle Circuit Court is hereby affirmed.

All sitting. All concur.

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