

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLINTON COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	CASE NOS. CA2010-12-021
	:	CA2010-12-022
	:	
- vs -	:	<u>OPINION</u>
	:	2/6/2012
	:	
ANGELO W. COLLINS,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS  
Case No. CRI2010-5106

Richard W. Moyer, Clinton County Prosecuting Attorney, Andrew McCoy, 103 East Main Street, Wilmington, Ohio 45177, for plaintiff-appellee

Craig A. Newburger, 477 Forest Edge Drive, South Lebanon, Ohio 45065, for defendant-appellant

**HENDRICKSON, P.J.**

{¶ 1} Defendant-appellant, Angelo Collins, appeals his conviction and sentence in the Clinton County Court of Common Pleas after a jury found him guilty of three drug-related felony offenses.

{¶ 2} On September 30, 2009, Detective Doug Eastes of the Clinton County Sheriff's Office and another law enforcement officer went to appellant's residence. Both appellant and

his live-in girlfriend, Mary Walker, were present. After obtaining their consent, Detective Eastes searched the house. During the search, Detective Eastes found a "guttled out tire gauge" containing methamphetamine residue locked in a safe, a digital scale bearing methamphetamine residue hidden in a cuckoo clock, several pen shafts with methamphetamine residue, and 20 loose pseudoephedrine pills hidden in an opaque beer stein in a hutch. The pills were in a bag and had been removed from their blister packs. At the scene, both appellant and Walker told the detective they had sinus problems. In the house, the detective also found marijuana, marijuana pipes, pills, including amphetamine pills and a single yellow tablet, and burnt foil. The yellow tablet was tested and came back as methamphetamine in a pill form.

{¶ 3} In the backyard, Detective Eastes found a burn pile containing charred battery casings stripped of their lithium strips, burnt foil, and a "gas generator bottle cap" with a tube in it. The detective testified that a generator cap is a plastic cap from a soda bottle; a tube is inserted in the cap through a hole; the modified cap is then used on a bottle during methamphetamine production to generate hydrochloride gas.

{¶ 4} Detective Eastes testified that during the search, appellant and Walker were both very nervous. Appellant was also jittery and agitated. Upon discovery of the items in the burn pile, appellant became angry and protested he was set up. Before the search, appellant told the detective there were no methamphetamine or methamphetamine-related items in his residence, and that he had not used methamphetamine in a long time.

{¶ 5} As a result of the search, appellant was charged with drug-related felony offenses in two separate indictments. On April 26, 2010, a Clinton County Grand Jury first returned a seven-count indictment charging appellant with, inter alia, illegal manufacture of methamphetamine (Count Three) in violation of R.C. 2925.04(A), a felony of the second degree, and aggravated possession of methamphetamine (Count Five) in violation of R.C.

2925.11(A), a felony of the fifth degree. Shortly before trial, the state dismissed three of the seven counts (Counts One, Two, and Seven) by nolle prosequi. During trial, the state dismissed two additional counts (Counts Four and Six).

{¶ 6} On October 18, 2010, a Clinton County Grand Jury returned a second indictment charging appellant with one count of illegal assembly or possession of chemicals for the manufacture of methamphetamine in violation of R.C. 2925.041(A), a felony of the third degree.

{¶ 7} On November 3, 2010, following a jury trial during which the detective testified on behalf of the state, appellant was found guilty of illegal manufacture of methamphetamine, illegal assembly or possession of chemicals for the manufacture of methamphetamine, and aggravated possession of methamphetamine. On December 1, 2010, the trial court sentenced appellant to the following terms of imprisonment: three years on the manufacture charge, two years on the possession of chemicals charge, and nine months on the methamphetamine possession charge, all to be served concurrently with one another, for a total of three years.

{¶ 8} Appellant appeals, raising two assignments of error.

{¶ 9} Assignment of Error No. 1:

{¶ 10} THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW AND/OR GOES AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO SUSTAIN APPELLANT'S CONVICTION FOR ILLEGAL MANUFACTURE OF DRUGS, ORC 2925.04(A), A FELONY OF THE SECOND DEGREE.

{¶ 11} Appellant argues his conviction for illegal manufacture of methamphetamine is supported by insufficient evidence and is against the manifest weight of the evidence given Detective Eastes' confusing, prejudicial, and speculative testimony.

{¶ 12} Whether the evidence presented is legally sufficient to sustain a verdict is a

question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). An appellate court, in reviewing the sufficiency of the evidence supporting a criminal conviction, examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Layne*, 12th Dist. No. CA2009-07-043, 2010-Ohio-2308, ¶ 23. After examining the evidence in a light most favorable to the prosecution, the appellate court must then determine if "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 13} Unlike a sufficiency of the evidence challenge, a manifest weight challenge concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other. *Layne* at ¶ 24. An appellate court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *Id.* Under a manifest weight challenge, the question is whether, in resolving conflicts in the evidence the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *Id.* This discretionary power is to be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *Id.*

{¶ 14} Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. *State v. Wilson*, 12th Dist. No. CA2006-01-007, 2007-Ohio-2298, ¶ 35. As a result, a determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. *State v. Rodriguez*, 12th Dist. No. CA2008-07-162, 2009-Ohio-4460, ¶ 62.

{¶ 15} Appellant was convicted of illegal manufacture of methamphetamine, in

violation of R.C. 2925.04(A), which states: "No person shall knowingly \* \* \* manufacture or otherwise engage in any part of the production of a controlled substance." Methamphetamine is a Scheduled II controlled substance. R.C. 3719.41(C)(2). R.C. 2925.01(J) defines "manufacture" in relevant part as:

to process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production.

{¶ 16} As stated earlier, a search of appellant's residence yielded a gutted out tire gauge, a digital scale (both items had methamphetamine residue), a yellow tablet that came back as methamphetamine in a pill form, battery casings with their lithium strips removed, a gas generator bottle cap with a tube in it, and 20 loose pseudoephedrine pills.

{¶ 17} Pseudoephedrine is a decongestant ingredient in many over-the-counter medications used for the treatment of colds and nasal congestion. Detective Eastes testified that pseudoephedrine is the key ingredient in the manufacture of methamphetamine. In fact, one cannot manufacture methamphetamine without pseudoephedrine. Similarly, the detective testified that lithium is a precursor metal used in the manufacture of methamphetamine. The detective also testified that "meth cooks" typically hide the pseudoephedrine pills in their possession; there is no reason to remove lithium strips from a battery other than to use them to make methamphetamine; and while 20 pseudoephedrine pills would not generate a large amount of methamphetamine, "addicts will cook whatever they have just to get a fix."

{¶ 18} With regard to the tire gauge and generator cap, Detective Eastes testified that both items are indicative of methamphetamine manufacturing because they are commonly used in the production of methamphetamine. A gutted out tire gauge can also be used to smoke methamphetamine. According to the detective, the manufacture of

methamphetamine involves several steps; methamphetamine is the only drug one can make at home from start to finish; however, it is not unusual for "meth cooks" to execute different steps of the manufacture in different locations; and "meth cooks" will "try to get rid of all the evidence of the manufacture by burning the equipment and waste" in a burn pile. Charred, stripped lithium batteries and a generator cap were found in a burn pile in appellant's backyard. The detective also described how methamphetamine is manufactured and explained how a generator cap is used in the process.

{¶ 19} The yellow tablet found in appellant's house which tested as methamphetamine in a pill form appears to be an oddity. Detective Eastes testified being unfamiliar with "any legitimate use of methamphetamine in pill form." He further testified, "I don't believe methamphetamine is actually in a pill form." When the trial court later inquired about the yellow tablet, outside of the jury's presence, both the state and defense counsel admitted they had never heard of a methamphetamine pill before. The state simply knew appellant had such a pill at his house.

{¶ 20} The record clearly shows that appellant had various ingredients and implements commonly used in the manufacture of methamphetamine on his property. Specifically, he had hidden pseudoephedrine pills and charred, stripped lithium batteries; he also had a generator cap which was found in the burn pile. Other items, such as the tire gauge and the digital scale, had methamphetamine residue.

{¶ 21} After a thorough review of the record, we cannot say that the jury lost its way in finding appellant guilty of illegal manufacture of methamphetamine, and thus, find that appellant's conviction is not against the manifest weight of the evidence. Our determination that appellant's conviction is supported by the weight of the evidence is also dispositive of the issue of sufficiency. *Rodriguez*, 2009-Ohio-4460 at ¶ 62. Appellant's first assignment of error is overruled.

{¶ 22} Assignment of Error No. 2:

{¶ 23} THE TRIAL COURT ERRED WHEN IT IMPOSED SEPARATE CONVICTIONS AND PRISON SENTENCES FOR: ILLEGAL MANUFACTURE OF DRUGS, ORC 2925.04(A), A FELONY OF THE SECOND DEGREE; ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS, ORC 2925.041(A), A FELONY OF THE THIRD DEGREE; AND AGGRAVATED POSSESSION OF DRUGS, ORC 2925.11(A), A FELONY OF THE FIFTH DEGREE.

{¶ 24} Appellant argues the trial court erred in sentencing him on illegal manufacture of drugs, illegal assembly or possession of chemicals for the manufacture of drugs, and aggravated possession of drugs because all three offenses are allied offenses of similar import under R.C. 2941.25 and *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. In support of his argument, appellant summarily asserts that "[his] three convictions grounded in possession and related manufacturing are exactly the types of crimes addressed by the [supreme] court in *Johnson*."

{¶ 25} R.C. 2941.25, Ohio's multiple-count statute, prohibits the imposition of multiple punishments for the same criminal conduct and provides that:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 26} In *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court established a new two-part test for determining whether offenses are allied offenses of similar import under R.C. 2941.25 (thereby overruling *State v. Rance*, 85 Ohio St.3d 632

[1999]). The first inquiry focuses on "whether it is possible to commit one offense *and* commit the other with the same conduct." (Emphasis sic.) *Id.* at ¶ 48. It is not necessary that the commission of one offense will always result in the commission of the other. *Id.* Rather, the question is whether it is possible for both offenses to be committed by the same conduct. *Id.* Conversely, if the commission of one offense will never result in the commission of the other, the offenses will not merge. *Id.* at ¶ 51.

{¶ 27} If it is possible to commit both offenses with the same conduct, the court must next determine whether the offenses were in fact committed by a single act, performed with a single state of mind. *Id.* ¶ 49. If so, the offenses are allied offenses of similar import and must be merged. *Id.* at ¶ 50. On the other hand, if the offenses are committed separately or with a separate animus, the offenses will not merge. *Id.* at ¶ 51.

{¶ 28} Applying the *Johnson* analysis, we first determine whether it is possible for all three offenses to be committed with the same conduct.

{¶ 29} Appellant was charged with illegal assembly or possession of chemicals for the manufacture of methamphetamine in violation of R.C. 2925.041(A). The statute prohibits anyone from knowingly assembling or possessing one of more chemicals that may be used to manufacture a schedule II controlled substance with the intent to manufacture a Schedule II controlled substance.

{¶ 30} Appellant was also charged with violating R.C. 2925.04(A) (illegal manufacture of methamphetamine), which states in relevant part: "No person shall knowingly \* \* \* manufacture or otherwise engage in any part of the production of a controlled substance."

{¶ 31} Finally, appellant was charged with possession of methamphetamine in violation of R.C. 2925.11(A), which states: "No person shall knowingly obtain, possess, or use a controlled substance." As stated earlier, methamphetamine is a Schedule II controlled substance. R.C. 3719.41(C)(2).



{¶ 32} With regard to methamphetamine possession and illegal assembly or possession of chemicals for the manufacture of methamphetamine, we find it is not possible to commit both offenses with the same conduct. One can knowingly obtain, possess, or use methamphetamine without assembling or possessing the chemicals needed to manufacture methamphetamine. Likewise, someone who knowingly assembles or possesses one or more chemicals does not obtain, possess, or use methamphetamine. In other words, commission of one offense will never result in the commission of the other offense. Methamphetamine possession and illegal assembly or possession of chemicals for the manufacture of methamphetamine are therefore not allied offenses of similar import.

{¶ 33} By contrast, with regard to illegal assembly or possession of chemicals for the manufacture of methamphetamine and illegal manufacture of methamphetamine, we find it is possible to commit both offenses with the same conduct. Under both R.C. 2925.041(A) and 2925.04(A), "the operable issue is the possession of chemicals for the manufacture of drugs or otherwise engaging in any part of the production of drugs." *State v. Stevenson*, 5th Dist. No. 09CA16, 2010-Ohio-2060, ¶ 31 (a pre-*Johnson* decision). "[I]n any circumstances in which an offender has illegally manufactured methamphetamine, he or she, by necessary implication, will have possessed the chemicals to effectuate the production of the drug." *State v. Miller*, 11th Dist. No. 2009-P-0090, 2011-Ohio-1161, ¶ 56.

{¶ 34} Finally, with regard to methamphetamine possession and illegal manufacture of methamphetamine, we also find it is possible to commit both offenses with the same conduct. In any circumstances in which an offender has illegally manufactured methamphetamine, ending up with the controlled substance itself, the offender necessarily obtained or possessed methamphetamine.

{¶ 35} We next determine whether appellant in fact committed the offenses of illegal manufacture of methamphetamine and illegal assembly or possession of chemicals by way

of a single act, performed with a single state of mind, or whether he had separate animus for each offense. *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, at ¶ 49. Likewise, we determine whether appellant in fact committed the offenses of methamphetamine possession and illegal manufacture of methamphetamine by way of a single act, performed with a single state of mind, or whether he had separate animus for each offense. *Id.*

{¶ 36} We note at the outset that although appellant filed a request for a bill of particulars, the state never filed one. Further, while appellant asserts the offenses are allied offenses of similar import, he fails to explain how and/or why.

{¶ 37} Given Detective Eastes' testimony at trial and the lack of a bill of particulars, the evidence in support of the illegal assembly or possession of chemicals charge includes both the 20 loose pseudoephedrine pills found in the house and the charred, stripped lithium batteries found in the burn pile. The evidence in support of the illegal manufacture of methamphetamine includes the stripped lithium batteries and the generator cap. Finally, the evidence in support of the possession of methamphetamine charge includes the digital scale, the tire gauge, and the pen shafts which all had methamphetamine residue. It also includes, arguably, the "methamphetamine pill."

{¶ 38} The state argues that the offenses of illegal manufacture of methamphetamine and illegal assembly or possession of chemicals were committed with a separate animus because, as indicated by the discovery of the burn pile, "[t]here was no active lab. The act of manufacturing had already taken place prior to the day of search. Yet officers also discovered Appellant's cache of pseudo [sic] tablets which Appellant was possessing on the day of the search."

{¶ 39} We would agree with the state if the only chemical found on appellant's property were the 20 loose pseudoephedrine pills. Clearly, those pills were not used to manufacture methamphetamine. However, as noted above, the evidence in support of the

illegal assembly or possession of chemicals charge did not solely consist of the pseudoephedrine pills. Charred, stripped lithium batteries were also found on the property. The fact that the batteries were stripped of their lithium component and found charred in the burn pile shows that lithium, a chemical, had been used to manufacture methamphetamine and that appellant had tried to burn evidence of his manufacture of methamphetamine. See *State v. Blevins*, 4th Dist. No. 10CA3353, 2011-Ohio-3367 (there was evidence that defendant had constructive possession of, inter alia, lithium, a chemical that may be used to manufacture methamphetamine). In other words, the evidence shows that appellant possessed lithium which he used to manufacture methamphetamine.

{¶ 40} The offenses of illegal manufacture of methamphetamine and illegal assembly or possession of chemicals are therefore allied offenses of similar import and must be merged. *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, at ¶ 50; *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 26 (allied offenses of similar import must be merged at sentencing). The trial court's failure to merge illegal manufacture of methamphetamine (Count Three) and illegal assembly or possession of chemicals (single count) at sentencing and its imposition of individual sentences for both offenses constitutes plain error. *Underwood* at ¶ 26, 31.

{¶ 41} Likewise, we find that the offenses of illegal manufacture of methamphetamine and possession of methamphetamine were allied offenses of similar import. Once again, the discovery of charred, stripped lithium batteries on appellant's property shows that lithium had been used to manufacture methamphetamine and that appellant had tried to burn evidence of his manufacture of methamphetamine. Methamphetamine residue found on a digital scale, a tire gauge, and pen shafts shows that appellant obtained, possessed, and/or used methamphetamine. The offenses must therefore be merged. *Id.* at ¶ 26. The trial court's failure to merge illegal manufacture of methamphetamine (Count Three) and possession of

methamphetamine (Count Five) at sentencing and its imposition of individual sentences for both offenses constitutes plain error. *Id.* at ¶ 26, 31.

{¶ 42} In light of the trial court's failure to merge at sentencing illegal manufacture of methamphetamine (Count Three) and illegal assembly or possession of chemicals (single count) on one hand, and illegal manufacture of methamphetamine (Count Three) and possession of methamphetamine (Count Five) on the other hand, the judgment of the trial court imposing individual sentences for these offenses is reversed and the matter is remanded for resentencing. Pursuant to *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, the state retains the right to elect which allied offense of similar import to pursue at sentencing following a remand to the trial court, and the trial court is bound by the state's election. *Id.* at ¶ 20, 24; *State v. Clay*, 12th Dist. No. CA2011-02-004, 2011-Ohio-5086, ¶ 27.

{¶ 43} Appellant's second assignment of error is well-taken and sustained.

{¶ 44} Judgment reversed as to sentencing only and remanded for resentencing. In all other respects, the trial court's judgment is affirmed.

RINGLAND and PIPER, JJ., concur.