

ORIGINAL

IN THE SUPREME COURT OF OHIO

NO. 13-1134

STATE OF OHIO)	
Plaintiff-Appellee)	
)	CA 98813
)	
vs.)	CASE NO. CR-560184
)	
MARC GRASSO)	
Defendant-Appellant)	
)	

MEMORANDUM IN RESPONSE TO JURISDICTION

FOR PLAINTIFF-APPELLEE:

TIMOTHY J. McGINTY
CUYAHOGA COUNTY PROSECUTOR

KRISTEN L. SOBIESKI (0071523)
Assistant Prosecuting Attorney
The Justice Center – 9th Fl.
1200 Ontario Street
Cleveland, OH 44113
216.443.7800

FOR DEFENDANT-APPELLANT:

PAUL MANCINO, JR.
Attorney at Law
75 Public Square, Suite 1016
Cleveland, OH 44113-2098

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

In a unanimous decision, the Eighth District Court of Appeals affirmed Defendant-Appellant Marc Grasso's multiple convictions for drug and arson offenses. Ohio law relevant to this case is well established and was properly applied by the appellate court. No substantial constitutional question and no matter of public or great general interest is presented, therefore, this Court should deny leave and dismiss this appeal.

STATEMENT OF THE CASE AND FACTS

The Eighth District has summarized the case and facts as follows:

In 2012, Grasso was charged with five counts of aggravated arson and one count each of illegal manufacture of drugs, assembly or possession of chemicals for the purpose of manufacturing drugs, and drug possession. The matter proceeded to a bench trial, at which the following pertinent evidence was presented.

Grasso lived with his girlfriend, codefendant Candace Needs, in the basement of a Maple Heights home. The house was owned by Needs's grandparents, James Hargrove and Juanita Zicarelli. Hargrove was 93 years old at the time of the incident, confined to a wheelchair, and needed oxygen to facilitate his breathing. Zicarelli used oxygen at night. They lived on the main floor of the house with their son, Rick Faucett.

The basement was equipped with a bedroom, bathroom, and kitchen. Neither of the grandparents ever went into the basement; Needs would do her grandparents' laundry for them and bring it upstairs so they did not have to go downstairs.

On February 23, 2012, Grasso and Needs were in the basement with a friend, Nicole Kubinski. The grandparents and Faucett were also home. There was an explosion in the basement and the house caught on fire. All six people in the home were able to escape. Grasso suffered burns on his hands and Needs sought medical attention for burns to the trunk of her body and foot.

The entire Maple Heights Fire Department ("M.H.F.D.") responded to the fire. Members of the Maple Heights Police Department and the Bedford Fire Department also responded. M.H.F.D. Lieutenant Vytautas Kavaliunas testified he arrived on the scene and noted smoke coming from the side door of the house, which led to the basement. Black smoke was pouring out of the eaves of the roof and there was heavy smoke in the first floor of the home.

Lieutenant Kavaliunas testified that the fire originated in the basement, which made the fire "inherently dangerous" because of the lack of ventilation. According to Lieutenant Kavaliunas, he would expect that anyone in the basement at the time of the fire would suffer burns and damage to the face and nose from smoke inhalation. He further testified that it would only take a breath or two for someone in the home at the time of the fire to succumb to the effects of the carbon monoxide; the potential harm to a person with breathing difficulties was even greater.

The firefighters noted that the stairwell going into the basement was extensively burned and the fire had accelerated into the first floor of the home and up into the attic. Lieutenant Kavaliunas testified he first became suspicious of the cause of the fire when he noticed that it appeared to originate in two different areas of the basement – in the kitchen and near a bed. The M.H.F.D. contacted the State Fire Marshal's office to investigate.

Brian Peterman, a state fire marshal, responded to the scene the next morning and immediately noticed several items in the basement that, to him, were indicative of a methamphetamine lab, or "meth" lab. He opined that the fire started when someone was making, or "cooking," methamphetamine.

Peterman agreed that the fire originated in two places. He testified that someone tried to carry the container being used to make the drug into another area of the basement, which is how the second fire started, catching the mattress on fire. This movement of the container, according to Peterman, would burn a person's hands.

Peterman opined that the fire was not an accident, because people who manufacture methamphetamine know they are creating a hazard that can cause fire.

Peterman further testified that there was no evidence the fire was caused by cooking food, the production of methamphetamine is very toxic, and the fire could have totally destroyed the house if the fire department had not responded so quickly.

Southeast Area Law Enforcement Bureau's ("SEALE") Detective Bill Gall secured a search warrant for the premises and arrived on the scene to collect evidence. Detective Gall took pictures and set about collecting evidence that, in his experience, is used to make methamphetamine. He observed and collected a melted plastic filter, coffee filters, glass jars, a measuring cup, a respirator, several plastic two-liter bottles, various paraphernalia used to ingest drugs, a can of Coleman fuel, plastic baggies, plastic tubing, a tourniquet, multiple packs of lithium batteries, multiple syringes, a can of acetone, containers of drain cleaner,

light bulbs modified into smoking devices, a digital scale, aluminum foil, and packets of cold medicine.

Detective Gall also recovered various items from the garage: several plastic bottles with tubing and waste product leftover from methamphetamine production, empty packs of pseudoephedrine, store receipts, coffee filters, plastic tubing, an envelope addressed to Grasso that contained spent lithium battery strips, and an empty Coleman fuel can.

Detective Gall testified that he recovered residue in some of the plastic baggies and suspected it was end-product methamphetamine. He field-tested the residue; the test came back positive for methamphetamine. He forwarded the baggies and additional objects for testing to the Ohio Bureau of Criminal Investigation ("BCI"). He then collected as much evidence as was safe but packaged the rest for destruction due to the hazardous nature of the material.

BCI special agent Gary Miller testified for the state as an expert in methamphetamine production. He opined that the methamphetamine process that caused the fire was the "one-pot" method, in which a single container is used. He identified other ingredients found in the basement and garage that are used to make methamphetamine: pseudoephedrine, cold packs, drain cleaner, acetone or fuel, and lithium batteries.

Miller explained the chemical process by which the drug is made. He described the bottles depicted in the photographs of the crime scene and explained how they were used as gas generators as part of the cooking process. Miller testified that one of the two-liter bottles showed residue from the cooking process, evidencing that methamphetamine had been produced at a previous time at this location.

Miller testified that a user can use methamphetamine by smoking, snorting, eating, or injecting the drug. If smoked, meth is usually smoked using a glass pipe, modified light bulbs or "foil canoes," such as those the police found in the basement of the Maple Heights house. If the user is injecting the drug, he or she would use a syringe and a "tie-off" or tourniquet, like that which was found in the basement.

Miller explained that because pseudoephedrine is an essential ingredient and because Ohio limits the amount a person can purchase, meth cooks often ask other people to buy pseudoephedrine for them; these straw buyers are referred to as "smurfs."

Miller testified that although each individual ingredient used to produce methamphetamine may have an "innocent" use, he determined that the basement lab was a meth lab based on the "LQC" rule, which stands for "Location, Quantity, Combination." Because all of the components needed to produce

methamphetamine, as well as inject and smoke the drug, were located in the basement in multiple quantities, the basement was both a meth lab and a place where the drug was used.

The grandmother testified that she had lived at the Maple Heights home for 30 years. On the night of the explosion, the grandmother was in bed with her breathing mask on when she heard a "big bang." Grasso ran up and yelled there was a fire. The grandmother ran outside. Grasso picked up the grandfather, carried him outside, and threw him on the ground.

Local CVS pharmacy manager Brian Boyle testified that he reviewed pharmacy records and discovered that, on January 6, 2012, Grasso purchased pseudoephedrine, an ingredient used in making methamphetamine. Kubinski, who was in the basement at the time of the explosion, and her sister, Jamie, also purchased pseudoephedrine on three separate days in January and February 2012.

In jailhouse recordings, Grasso admitted he lived at the Maple Heights home, had been burned in the fire, what happened was his fault, and he was sorry for hurting Needs's grandfather. He stated, "Tell [the grandfather] I'm sorry I injured him" and "It's my * * * fault. I shoulda just stuck to selling weed. None of us would be in any trouble." During a call to Needs, he told her to go try and recover any leftover batteries and that she did not deserve to go to jail because she did not do anything wrong. During one call he talked about one of their "smurf runs."

The trial court convicted Grasso of all charges. The court ordered a psychiatric mitigation report and a presentence investigation report. At the sentencing hearing, the trial court merged the drug charges and the state elected to proceed to sentencing on the illegal manufacture of drugs count. The trial court sentenced Grasso to seven years in prison for the drug conviction to run consecutive to three years for the aggravated arson counts. The trial court ordered the aggravated arson counts to run concurrent to each other, for a total sentence of ten years in prison.

State v. Grasso, Cuyahoga App. No. 98813 8th Dist., 2013-Ohio-1894, ¶ 2-4.

Defendant moved the appellate court to reconsider its decision. On June 5, 2013, reconsideration was denied. Presently, Defendant seeks jurisdiction in this Honorable Court. For the reasons that follow, the State of Ohio requests jurisdiction be denied and the appeal dismissed.

LAW AND ARGUMENT

State's response to Defendant's Propositions of Law:

The defendant has neither been deprived of due process nor the effective assistance of counsel and his convictions and sentence are proper.

The appellate court found, “there was sufficient evidence to support that Grasso knowingly engaged in an activity that would probably cause a fire, i.e., producing methamphetamine. Not only were the ingredients used in cooking the drug highly flammable, but part of the process in making the drug is to create an actual fire inside a plastic bottle. Moreover, there were multiple vessels found in the basement and garage that evidenced that prior batches of methamphetamine had been produced in the basement of the house.” *State v. Grasso*, Cuyahoga App. No. 98813 8th Dist., 2013-Ohio-1894, ¶ 40. The Eighth District properly concluded that Defendant had knowledge that producing methamphetamine could probably result in a fire or explosion, so his convictions in the trial court are valid and no due process violations occurred.

Moreover, Defendant's sentence was justified in that the trial court plainly found this to be a very serious case. The police and fire marshal recovered all of the ingredients necessary to make methamphetamine from the basement and garage of the home. It should come as a surprise to no one that meth labs can and do explode. See, R.C. § 2933.33(A). Yet Defendant was operating his meth lab in the basement of an elderly couple's home—a home in the City of Maple Heights, Ohio that is located in very close proximity to neighboring houses where more completely innocent people live. Defendant (who never gave the court or counsel any indication that a competency evaluation would be even remotely appropriate) admitted that he sustained burns on his hands. As demonstrated by his conduct, Defendant poses a very grave risk to the public.

Finally, defendant cannot prove that his trial counsel performed deficiently.

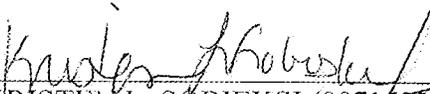
The unanimous decision of the Eighth District Court of Appeals does not call for further review by this Supreme Court. No substantial constitutional question and no matter of public or great general interest is presented. Accordingly, this Court should deny leave and dismiss this appeal.

CONCLUSION

No substantial constitutional question and no matter of great general interest is presented in this case. Wherefore, the State of Ohio requests this Honorable Court deny leave and dismiss this appeal.

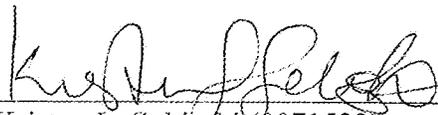
Respectfully submitted,

TIMOTHY J. MCGINTY
CUYAHOGA COUNTY PROSECUTOR


KRISTEN L. SOBIEKSI (0071523)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113
216.443.7800

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum Opposing Jurisdiction has been sent, via regular U.S. Mail, this 7th day of August 2013 to the following counsel for Defendant-Appellant: PAUL MANCINO, JR., 75 Public Square, Suite 1016, Cleveland, OH 44113-2098.


Kristen L. Sobieski (0071523)
Assistant Prosecuting Attorney