IN THE COURT OF APPEALS 08/06/96

OF THE

STATE OF MISSISSIPPI

NO. 92-KA-00881 COA

ARTHUR LEE IVY

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT WALTER BAILEY

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ROGERS J. DRUHET, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: E. J. MITCHELL

NATURE OF THE CASE: CRIMINAL: SALE OF COCAINE

TRIAL COURT DISPOSITION: GUILTY VERDICT AND SENTENCED TO 25 YRS IN PRISON, CONSECUTIVELY WITH PRIOR SENTENCE

BEFORE THOMAS, P.J., KING, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Arthur Ivy was convicted of selling cocaine. He was sentenced to twenty-five years in prison, consecutively with a sentence stemming from a prior conviction. Ivy appeals his conviction, arguing only that a sentencing order of his accomplice who pleaded guilty was erroneously admitted in evidence. We affirm.

FACTS

Ivy was suspected by the Meridian Police Department of selling cocaine from his residence. A drug purchase was arranged with a confidential informant who was to make a purchase. A listening device was placed on the informant to allow the police to overhear the transaction. The police listened as Ivy told the informant that the cocaine would cost fifty dollars. Also present was an individual named Robert Brown, who acted as a middleman in the drug sale. Ivy handed the cocaine to Brown who, in turn, handed the drugs to the informant. The money for the purchase passed back to Ivy through Brown. Ivy was apparently under the mistaken impression that this scheme would preclude his prosecution for drug crimes.

At trial, evidence of these events was presented and the confidential informant positively identified Ivy as the person who had sold him cocaine. The jury returned a guilty verdict and Ivy was sentenced to twenty-five years in prison.

DISCUSSION

During the trial, Brown's involvement in the sale to the informant became central to the case. The prosecution responded to this by seeking to admit Brown's sentencing order that resulted from his prior guilty plea arising from the circumstances leading to Ivy's prosecution. Ivy objected based, in part, on due process considerations. After arguing his position before the court, Ivy concluded by asking that, if the sentencing order was to be admitted, Brown's guilty plea agreement be admitted as well. The trial court admitted the sentencing order in evidence and allowed the plea to be marked for identification and presented to the jury. We conclude that the admission of the order and the identification of the plea does not warrant reversal of Ivy's conviction.

The general rule in Mississippi is that "where two or more persons are jointly indicted for the same offense but are separately tried, a judgment of conviction against one of them is not competent evidence on the trial of the other because such plea of guilty or conviction is no evidence of guilt of the party being tried." *Buckley v. State*, 223 So. 2d 524, 528 (Miss. 1969) (citations omitted); *see Pickens v. State*, 129 Miss. 191, 91 So. 906 (1922). However, this general proscription against the admission of such evidence is inapplicable in the appropriate circumstances. This case is one in which the proscription does not affect Ivy's conviction.

The defense made the nature of Brown's participation in the drug transaction and his subsequent guilty plea a central part of its case. The defense made Brown's absence from trial an issue in the case. The defense had suggested to the jury that Brown was not held accountable for his criminal activities, while Ivy was vehemently prosecuted. There was even an effort by the defense to prove

that Brown was not present at the scene of the drug transaction to undermine the credibility of prosecution witnesses who said he was. Consequently, the defense can be viewed as having invited admission of evidence relating to the disposition of whatever charges may have been pending against Brown.

However, the prosecution sought only to introduce Brown's sentencing order in evidence. The sentencing order does not explain the basis for Brown's incarceration and did not indicate to the jury that the crime for which Brown was sentenced for drug crimes similar to those with which Ivy was charged. Without this explanation—an explanation that would lead the jury to think that Ivy was guilty because an accomplice had already been sentenced for his involvement in the scheme—the sentencing order is an innocuous addition to the evidence presented at trial and does not create a basis for reversal. *See Robinson v. State*, 465 So. 2d 1065, 1068 (Miss. 1985). As in *Robinson v. State*, it was not the sentencing order that indicated the crime to which Brown plead guilty. Instead, Ivy's counsel made the connection for the jury by insisting that, if the order was to be admitted, that Brown's plea agreement be marked for identification. *Id.* The plea agreement reveals that Brown was charged with participating in the same drug transaction that was at issue in the Ivy case. Thus, its evidentiary value is substantively different from that of the order. That value; however, was presented to the jury because of defense counsel's insistence, not at the request of the prosecution. Nevertheless, the agreement was presented, like the order, as evidence explaining why Brown was absent from the trial as a co-defendant and not to advance the impermissible inference that, because Brown had been sentenced for a related crime, Ivy was also guilty. *See generally White v. State*, 616 So. 2d 304, 305-09 (Miss. 1993).

Accordingly, we affirm.

THE JUDGMENT OF CONVICTION OF THE LAUDERDALE COUNTY CIRCUIT COURT OF SALE OF COCAINE AND SENTENCE OF TWENTY-FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVELY TO SENTENCE PREVIOUSLY IMPOSED IN NO. 168-90 AND ORDER TO PAY A FINE OF FOUR THOUSAND DOLLARS ($4,000.00), IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LAUDERDALE COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.