

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00645 COA

RANDY GIBSON A/K/A TERRENCE RANDY GRIFFIN

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MARCUS D. GORDON

COURT FROM WHICH APPEALED: NESHOPA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JAMES M. MARS II

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR.

DISTRICT ATTORNEY: KEN TURNER

NATURE OF THE CASE: CRIMINAL: SALE OF CONTROLLED SUBSTANCE

TRIAL COURT DISPOSITION: SALE OF COCAINE: SENTENCE TO SERVE A TERM OF (8)

YRS IN MDOC AND PAY A FINE OF \$10,000.00

BEFORE FRAISER, C.J., DIAZ, AND KING, JJ.

PER CURIAM:

Gibson was convicted in the Circuit Court of Neshoba County for the sale of crack cocaine. At trial, Gibson denied selling the crack cocaine, and alleged that the State's witnesses gave an invalid identification of him as the offender. They testified that Gibson weighed between 220 and 240 pounds, and Gibson claimed to weigh at most 150 pounds. On appeal, Gibson contends that the trial court erred in overruling his motion to quash the jury panel. Gibson contended that because the panels contained a total of four blacks, that blacks had been necessarily systematically excluded. Gibson also contended that the verdict was against the overwhelming weight of the evidence, evidencing bias and prejudice against Gibson. We find Gibson's contentions to be without merit.

Upon making his motion to quash, Gibson alleged that of the four jury panels available there was a total of four blacks from which he could possibly choose. The following exchange occurred:

BY DEFENSE COUNSEL: . . . That according to the census and population of Neshoba County, Mississippi, the last census is 18.59% Black, in the county as a whole.

. . . .

THE COURT: . . . Accepting it being true that there are the number of jurors that you say there are, do you have any evidence to offer?

BY DEFENSE COUNSEL: With regard to the number of jurors?

THE COURT: No. I think that we can agree that the number you have given is a true accounting of the Blacks who are here today to be passed upon as prospective jurors. Do you have any additional testimony regarding your motion?

BY DEFENSE COUNSEL: No, sir, Your Honor.

While the court accepted the number of jurors available on the panels, as alleged by Gibson, the court did not accept as true any other allegations by him. "The general rule is that a motion is at issue without any further pleading, but the allegations thereof do not amount to any proof of the facts stated therein. It devolves upon the movant to support his motion by proof. It is also the rule that in

the absence of proof in support of a motion, the presumption in favor of the correctness of the action of the trial court must prevail. *Booker v. State*, 449 So. 2d 209, 221 (Miss. 1984) (citations omitted). In the present case, Gibson failed to introduce any evidence in support of his motion to quash the jury panels, and the action of the trial court is presumed correct.

Gibson also contends that the verdict of the jury was against the overwhelming weight of the evidence, and the verdict evidenced bias and prejudice against him. The standard of review for a challenge to the weight of the evidence, in a criminal case, can be found in *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993):

New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State.

Gibson claims that because the State's witnesses testified that he weighed between 220 and 240 pounds, the jury could not possibly have found that he was the offender and convicted him of selling cocaine. He provided a witness and testimony that he weighed at most 150 pounds during the time of the alleged drug sale. However, the State's eyewitnesses to the drug sale also provided two positive in-court identifications of Gibson. Giving the prosecution the benefit of all favorable inferences drawn from the witnesses testimony and the evidence presented, we find that reasonable jurors could find Gibson guilty of the sale of crack cocaine. Therefore, we affirm the conviction and sentence.

THE JUDGMENT OF CONVICTION OF THE CIRCUIT COURT OF NESHOPA COUNTY OF SALE OF COCAINE AND SENTENCE OF EIGHT YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND TO PAY A FINE OF \$10,000 IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO NESHOPA COUNTY.

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