IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00812 COA

JOHNNY BALDWIN, SR. 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. ISADORE W. PATRICK JR.

COURT FROM WHICH APPEALED: WARREN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: FRANK JOSEPH CAMPBELL

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: G. GILMORE MARTIN

NATURE OF THE CASE: CRIMINAL - POSSESSION OF COCAINE

TRIAL COURT DISPOSITION: POSSESSION OF COCAINE: SENTENCED TO SERVE 3 YRS IN THE MDOC; DEFENDANT IS TO PAY A FINE OF $5,000 PRIOR TO RELEASE FROM INCARCERATION

MANDATE ISSUED: 8/5/97

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Baldwin was found guilty of possession of cocaine. He appeals arguing that the name of a confidential informant should have been produced in discovery, and a jury instruction was necessary that required the State to prove Baldwin's "knowing" possession. We find no error and affirm.

FACTS

A warrant was issued for the search of Baldwin's home. Baldwin was not present when the search took place. A significant amount of cocaine and several guns were found in his locked bedroom. The search warrant had been obtained as a result of information gained from a drug transaction between Baldwin and a confidential informant that was made earlier that day. Baldwin filed a motion in limine seeking to exclude any reference to the sale because of the State's failure to disclose the name of the confidential informant during discovery. The State claimed that it did not intend to call the informant as a witness because he was a poor potential witness and had been threatened by Baldwin's family. In fact, the informant was shot soon after trial. The trial court did not rule on the motion immediately, but said it was going to "hold that in abeyance" until after the jury was selected. This issue came up again when the State called its first witness, Deputy Sheriff Martis Comans. Comans testified that "Roy Redditt is the one that obtained the search warrant, and he had made a buy off of him [Baldwin] ." Defense counsel objected and asked for a mistrial stating that allowing this testimony without timely disclosing the identity of the confidential informant who made the buy was prejudicial.

DISCUSSION

1. Was the failure timely to produce the name of the confidential informant a discovery violation warranting a mistrial?

Baldwin argues that the trial court should have granted a mistrial after testimony was elicited from witnesses regarding a sale made to a confidential informant whose name had not been produced in discovery. In *Turner v. State*, 501 So. 2d 350, 351-52 (Miss. 1987), the supreme court stated: "[O]ur familiar criminal discovery rule, Rule 4.06(b)(2), Miss.Unif.Crim.R.Cir.Ct.Prac., requires disclosure of the identity of an informant where the informant is an eyewitness to the event or events constituting the charge against the defendant." However, the supreme court has recognized that "an

accused is not automatically entitled to disclosure of the identity of a confidential informant." *Dowbak v. State*, 666 So. 2d 1377, 1384 (Miss. 1996), citing *Middlebrook v. State*, 555 So.2d 1009 (Miss.1990). Rule 4.06(b)(2) provides:

(b) The court may deny disclosure authorized by subsection (a) if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

The following shall not be subject to disclosure:

(2) Informants. Disclosure of an informant's identity shall not be required unless the confidential informant is to be produced at a hearing or trial or a failure to disclose his or her identity will infringe the constitutional rights of the accused or unless the informant was an eyewitness to the event or events constituting the charge against the defendant.

Thus, the rule requires disclosure when the informant was an eyewitness to, or a participant in the crime. *Dowbak*, 666 So. 2d at 1384. Baldwin argues that "if the sale was part of the res gestae and admissible evidence, then certainly [the confidential informant] was a known material witness whose testimony was required to be timely discovered. . . ." The State argues that it did not disclose the name of the confidential informant because he was not going to be called.

Notwithstanding the State's intentions not to use the testimony, the trial court required disclosure of the name of the informant and ordered the State to make the informant available to the defense counsel for questioning. When there is a discovery violation that becomes apparent at trial, circuit court rules provide that the court may grant the defense a reasonable opportunity to interview the new witness. If the defense claims prejudice and requests a continuance or mistrial, the court is to grant a continuance or exclude the evidence. URCCC 9.04. That is what in effect occurred here, except that the State says it never intended to use the informant.

Baldwin asserts that failure to receive the informant's name during pre-trial discovery and the references to a drug sale that came through other witnesses entitled him to a new trial. Baldwin was presented with an opportunity to question the informant. He chose not to call the informant to the stand. The alleged harm is that, since Baldwin was charged with intent to distribute cocaine, he needed to question the informant whose testimony was necessary to prove distribution. The jury only convicted Baldwin of possession, not with intent to distribute. The evidence to convict of possession was acquired through a search of Baldwin's home, not from testimony of the informant. Any damage caused by other witnesses' reference to a drug sale was not sufficiently prejudicial to cause a conviction for distribution. The issue is moot.

2. Was a jury instruction on knowledge of presence of cocaine omitted?

Baldwin argues that jury instruction S-3 was "fatally incomplete." That instruction reads:

The Court instructs the Jury that the possession referred to in the Indictment need not be actual possession, but can be constructive possession. Constructive possession may be shown by establishing that the substance involved was subject to the Defendant's dominion or control."

Baldwin argues that this instruction is defective because it did not require that the "Defendant was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it."

Instructions are to be read as a whole, and not in isolation. *Starcher v. Byrne*, 687 So. 2d 737 (Miss. 1997). Another instruction given to the jury required that the State prove that Baldwin "wilfully, knowingly and feloniously" possessed the cocaine. Thus the requirement of knowledge was presented to the jury. No error in denying Baldwin's alternative instruction resulted.

THE JUDGMENT OF THE CIRCUIT COURT OF WARREN COUNTY OF CONVICTION OF POSSESSION OF COCAINE, A THREE YEAR SENTENCE IN THE

CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AND A FINE OF $5,000 PRIOR TO RELEASE FROM CUSTODY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO WARREN COUNTY.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.