IN THE COURT OF APPEALS

7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00204 COA

ANTHONY JOSEPH PETERS 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. JERRY OWEN TERRY, SR.

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: F. HOLT MONTGOMERY

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: TRANSFER OF A CONTROLLED SUBSTANCE AS HABITUAL OFFENDER; 30 YEARS

MOTION FOR REHEARING FILED:9/4/97

MANDATE ISSUED: 8/19/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

HERRING, J., FOR THE COURT:

Anthony Joseph Peters was indicted and convicted of the transfer of a controlled substance in violation of section 41-29-139 of the Mississippi Code of 1972, as amended, and was classified as a habitual offender pursuant to the provisions of section 99-19-81 of the Mississippi Code of 1972, as amended. He was sentenced to serve a term of thirty years in the custody of the Mississippi Department of Corrections. Peters now appeals to this Court and seeks a reversal of the conviction assigning the following as reversible errors committed by the trial court:

I. THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO SUPPRESS EVIDENCE THAT WAS NOT PROPERLY AUTHENTICATED AND IN WHICH THE CHAIN OF CUSTODY WAS NOT PROPERLY ESTABLISHED.

II. THE LOWER COURT ERRED IN REFUSING JURY INSTRUCTION D-2 DEFINING THE TERM "PREDISPOSITION."

After a thorough review of the record and applicable law, we find no reversible error and affirm the judgment of the trial court.

THE FACTS

John Mitchell was a member of the Ocean Springs, Mississippi, Police Department and on June 24, 1992, was acting as an undercover agent for the Harrison County multi-jurisdictional narcotics unit. Prior to that date he had been a police officer with Ocean Springs for four years and had previously served in the Marine Corps as a military policeman for eleven years. At approximately 12:00 noon on June 24, 1992, Mitchell met the Appellant, Anthony Joseph Peters.

According to Mitchell, Peters confronted him and asked if Peters could help him purchase "some dope." Peters told Mitchell to meet him later at a local car wash, and he would contact individuals who could sell the cocaine which Mitchell requested. At this point, Mitchell contacted representatives of a local multi-jurisdictional narcotics task force and was given the sum of forty dollars ($40.00) to

pay for the cocaine which he was to purchase through Peters. In addition, he was outfitted with body wires so that other agents could listen to his conversations with Peters. Thereafter, Mitchell proceeded in his vehicle to the carwash where he met Peters. When a maroon vehicle down the street flashed its headlights, Peters got in Mitchell's automobile, and both vehicles then drove to the trailer park. At this location, the individuals in the maroon vehicle gave two rocks of crack cocaine to Peters, who in turn gave them to Mitchell for the sum of forty dollars. Mitchell remained in his vehicle at all times during the transaction, which lasted all of five minutes. Three other narcotic agents, including Officer Mike Hall of the Gulfport Police Department, were watching and monitoring the transaction from about two hundred feet away.

After the transaction had been concluded, Mitchell drove away and transferred the cocaine to Mike Hall, who sealed the cocaine in a plastic container and then later transferred it to Officer Richardo Dedeaux, another member of the task force, for delivery to the Mississippi crime laboratory for analysis. Hall placed his initials and the case number on the sealed bag of cocaine prior to delivering it to Dedeaux on July 8, 1992. Dedeaux testified that he took the cocaine to the crime laboratory on August 8, 1992. However, Timothy Gross, the laboratory forensic chemist who analyzed the drugs, testified that he began his analysis on July 14, 1992. Gross also testified that the controlled substance which he examined was cocaine.

Anthony Peters testified on his own behalf. He admitted helping Mitchell purchase cocaine but contended that Mitchell solicited his aid in purchasing the drugs on the day in question. In fact, according to Peters, he received no payment for the assistance he gave to Mitchell in purchasing the cocaine. He further stated that the meeting with the people in the maroon car was not prearranged. Nevertheless, Peters was convicted of the illegal sale of cocaine by jury verdict rendered on December 13, 1994.

ANALYSIS OF THE ISSUES RAISED BY PETERS

I. DID THE LOWER COURT ABUSE ITS DISCRETION IN FAILING TO SUPPRESS THE COCAINE AND IN FAILING TO DISALLOW ITS ENTRY INTO EVIDENCE, SINCE ITS CHAIN OF CUSTODY WAS NOT PROPERLY ESTABLISHED AND SINCE THE EVIDENCE WAS NOT PROPERLY AUTHENTICATED?

Peters contends that the trial court incorrectly and prejudicially allowed the labeled bag of cocaine to be admitted into evidence by the State, thereby preventing him from receiving a fair trial. The basis for this contention is that substantial evidence was presented to infer that someone had tampered with the substance or "rocks" originally purchased by Mitchell, or that the cocaine presented at trial was not in fact the same substance purchased by Mitchell on June 24, 1992. Thus, Peters contends that the chain of custody of the evidence, from the date the substance was purchased by Mitchell to the date it was introduced into evidence two years later,[(1)]

was broken or never established. Therefore, the cocaine admitted into evidence was never properly authenticated. The suspicious evidence referred to by Peters included the fact that Officer Dedeaux testified that he took the labeled and sealed bag of cocaine to the crime laboratory on August 8, 1992, although Timothy Gross, the forensic scientist from the crime laboratory, testified that he began testing the cocaine ultimately introduced into evidence on July 14, 1994. Peters also contends

that the fact that the cocaine found in the evidence bag at the trial in 1994 was in powdered form is a further indication that the original evidence had been tampered with, since Mitchell had purchased two rocks of crack cocaine in 1992.

Numerous decisions have been rendered by the Mississippi Supreme Court in regard to chain of custody objections to the admissibility of physical evidence. Generally,

[p]hysical objects which are relevant and for which the chain of custody is not broken or which are otherwise identified with certainty are admissible in evidence. Matters regarding the chain of custody of evidence are largely within the discretion of the trial court, and absent an abuse of discretion, this Court will not reverse.

Wilson v. State, 574 So. 2d 1324, 1334 (Miss. 1991) (quoting *Evans v. State*, 499 So. 2d 781, 783 (Miss. 1986)) (other citations omitted). Where a chain of custody arises, the trial court "should inquire whether there is any indication or reasonable inference of *probable* tampering with or substitution of the evidence." *Doby v. State*, 532 So. 2d 584, 588 (Miss. 1988) (emphasis added). Moreover, even where there is a "break" in the chain of custody, the ruling of a trial court advising a jury to consider physical evidence will not be overturned unless the judicial discretion of the court has been abused to the extent that the defendant's right to a fair trial has been prejudiced. Where there is no indication of probable tampering or substitution of evidence, there can be no abuse of discretion by the trial judge in allowing physical evidence to be admitted. *Lambert v. State*, 462 So. 2d 308, 312 (Miss. 1984).

In the case *sub judice*, the evidence showed that Officer Mike Hall sealed the cocaine into an evidence bag and marked the bag with his initials and the case number. This was done on June 24, 1992. Officer Dedeaux testified that he received the evidence from Hall on the eighth day of the month following the date of the transaction, or July 8, 1992. Timothy Gross said he began his analysis of the evidence on July 14, 1992. The evidence bag presented in court was marked with Mike Hall's initials and the case number. Thus, the only discrepancy or possible break in the chain of custody was the fact that Officer Dedeaux stated that he did not deliver the evidence to the crime laboratory until August 8, 1992, instead of July 8, 1992. The trial court resolved this discrepancy in favor of the State and allowed the cocaine into evidence. We cannot say that the trial court abused its discretion in doing so. Furthermore, the fact that the cocaine was in a crushed condition at the time of Timothy Gross' examination of the evidence on July 14, 1992, is not an indication of probable tampering or substitution of evidence, but only evidence of the fact that the cocaine had decomposed between June 24 and July 14, 1992. Moreover, Peters testified that he knew that he was transferring cocaine to Mitchell on June 24, 1992. This assignment of error has no merit.

II. DID THE TRIAL COURT ERR IN REFUSING TO GRANT INSTRUCTION D-2, WHICH ATTEMPTED TO DEFINE THE TERM "PREDISPOSITION?"

At the close of the trial, Peters requested the trial court to grant a jury instruction dealing with his defense of entrapment. The trial court responded to this request by granting Instruction D-1, which stated:

"Entrapment" means inducing or leading a person to commit a crime not originally planned by that person.

Evidence has been presented that Defendant, Anthony Joseph Peters, was induced by law enforcement officers or their agents to commit the crime. For you to find the Defendant, Anthony Joseph Peters, guilty, the State must prove to your satisfaction beyond a reasonable doubt that the Defendant, Anthony Joseph Peters, was ready and willing to commit the crime of transfer of a controlled substance whenever opportunity was afforded, then it is your sworn duty to return a verdict of not guilty.

Peters asserts that the trial court's refusal to grant instruction D-2 was in error.

The Mississippi Supreme Court has ruled consistently that when a defendant claims entrapment as a defense, evidence concerning the defendant's predisposition or the State's inducement to commit a crime is always relevant. *Moore v. State*, 534 So. 2d 557, 560 (Miss. 1988). A defendant is considered predisposed:

if he is "ready and willing to commit the crimes such as are charged in the indictment, whenever opportunity was afforded." If the accused is found to be predisposed, the defense of entrapment must fail.

Moore, 534 So. 2d at 559. Therefore, since Peters specifically testified that he had no predisposition to commit the crime with which he was charged, the trial court was obliged to submit the entrapment issue to the jury through proper instructions.

Where a party offers evidence sufficient that a rational jury might find for him on the particular issue, that party as of right is entitled to have the court instruct the jury on that issue and submit the issue to the jury for its decision.

King v. State, 530 So. 2d 1356, 1359 (Miss. 1988); *Langston v. Kidder*, 670 So. 2d 1, 5 (Miss. 1995). However, trial courts are under no obligation to grant cumulative instructions. *Nicholson on Behalf of Gollot, Deceased v. State*, 672 So. 2d 744, 752 (Miss. 1996). If jury instruction D-1 adequately informed the jury in regard to the defense of entrapment raised by Peters, the trial court was within its right to refuse instruction D-2. *See also Gossett v. State* 660 So. 2d 1285, 1295 (Miss. 1995). We hold that jury instruction D-1 adequately instructed the jury on the entrapment defense advanced by Peters, and that the trial court committed no error in refusing instruction D-2.[(2)]

THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY OF CONVICTION OF THE TRANSFER OF A CONTROLLED SUBSTANCE AND SENTENCE OF THIRTY YEARS AS A HABITUAL OFFENDER IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.

1. The cocaine was admitted into evidence on December 13, 1994.

2. The State also argued that Peters voiced no objection to the refusal of instruction D-2 and therefore failed to preserve this issue on appeal. We find this assertion by the State to be without merit.