IN THE COURT OF APPEALS

8/12/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-01076 COA

DONNELL THAMES 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 LOUIS GOZA, JR.

COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: ROSS R. BARNETT, JR.

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: JOHN KITCHENS

NATURE OF THE CASE: CRIMINAL (FELONY)

TRIAL COURT DISPOSITION: CONVICTED OF POSSESSION OF A CONTROLLED SUBSTANCES WITH INTENT TO DISTRIBUTE AS HABITUAL OFFENDER; SENTENCED TO LIFE IN MDOC WITHOUT PROBATION OR PAROLE

CERTIORARI FILED: 10/29/97

MANDATE ISSUED: 2/23/98

BEFORE McMILLIN, P.J., COLEMAN, AND PAYNE, JJ.

McMILLIN, P.J., FOR THE COURT:

Donnell Thames was convicted of possession of cocaine with intent to distribute by a Rankin County Circuit Court jury. In a subsequent non-jury proceeding, he was adjudged to be a habitual offender under section 99-19-83 of the Mississippi Code and sentenced to life in prison without the possibility of parole. He appeals the conviction and judgment of sentence to this Court assigning four errors. This Court affirms both the conviction and the adjudication of Thames's status as a habitual offender.

I.

Facts

Thames was arrested for possession of a plastic bag containing thirty-two rocks of crack cocaine. One officer testifying at trial indicated that this quantity of drugs was substantially in excess of the amount normally held by crack cocaine users for their own personal consumption. He testified that, in fact, a number of the rocks were larger in size than those normally encountered as what he referred to as "street corner rocks" -- apparently a euphemism for the size of rocks typically sold to the ultimate user -- and that the quantity had the potential to produce as many as 128 rocks suitable for sale to drug users.

Thames testified in his own defense, admitting possession of the drugs, but claiming that the drugs were for his own use. He claimed to have recently won $2,000 at bingo and stated that he used the bulk of the winnings to pay for some repair parts for his girlfriend's automobile and $300 of the money to buy the bag of drugs, leaving him with less than $20 in his possession at the time of his arrest. He characterized the quantity as a "double-up," explaining that a purchaser having the cash to buy in quantity can obtain a substantially higher quantity of drugs for the same amount of money.

II.

The Sufficiency of the Evidence on Intent

Thames claims that the trial court erred in denying his motion for directed verdict as to the greater crime of possession with intent to distribute due to the insufficiency of the evidence establishing his intent. He cites such cases as *Miller v. State,* 634 So. 2d 127 (Miss. 1994) and *Murray v. State,* 642 So. 2d 921 (Miss. 1994), that deal with the question of whether quantity of drugs alone can be sufficient to establish an intent to sell.

The supreme court has, by its own admission, experienced some difficulty in dealing with this issue. *See Jones v. State,* 635 So. 2d 884, 889-890 (Miss. 1994). The difficulty lies in determining, under principles of law, what inferences the jury could reasonably draw from evidence pertaining to quantity of drugs alone. There appear to be two basic propositions at work. At one end of the spectrum is the idea that when the quantity of drugs is not inconsistent with an amount that might reasonably be expected to be the supply of a user of the drug, there is no basis, short of speculation, to conclude that the possessor had any intent to sell or distribute the drugs in his possession. *Coyne v. State,* 484 So. 2d 1018, 1021 (Miss. 1986) (citing *Bryant v. State,* 427 So. 2d 131, 132-33 (Miss. 1983)). In those circumstances, the court has suggested the necessity of other evidence, such as a history of drug dealing, to permit conviction of the greater crime of possession with intent to sell. *See Stringer v. State,* 557 So. 2d 796, 797 (Miss. 1990). On the other hand, the court has recognized that when dealing with large quantities of drugs, proof of quantity alone is sufficient to permit the jury to reasonably infer that the possessor had some use in mind for the drugs other than his own consumption. *Jones,* 635 So. 2d at 888; *Boches v. State,* 506 So. 2d 254, 260 (Miss. 1987).

In this case, the State presented no proof in its case-in-chief related to intent other than quantity. The police officer's testimony aided the jury in putting the proper perspective on the quantity involved, but did not add any additional facts indicating an intent to distribute. Nevertheless, we conclude that the quantity of drugs involved, which according to testimony by a police officer with some experience in enforcing narcotics laws was enough to provide as many as 128 salable rocks of crack cocaine, was sufficient to permit the jury to reasonably infer that Thames possessed the drugs for purposes other than his own consumption under cases such as *Boches v. State,* 506 So. 2d 254, 260 (Miss. 1987). Certainly, as the quantity of drugs decreases, a point is reached where an intention to deal in drugs cannot be inferred with sufficient certainty to support a conviction of the greater crime. It would be mere speculation to suggest, in this case, where that point might lie. Each case presented to us for decision must be decided on its own facts in conformity with established case law. All we conclude in this case is that the quantity of drugs involved, when the jury was made aware of the potential number of separate drug transactions represented by that quantity, was sufficient to make a jury issue on intent to distribute.

In his defense, Thames attempted to explain the circumstances of his larger-than-normal quantity; however, we conclude that this only properly framed a contested issue of fact to be resolved by the jury. Thames's unsubstantiated story of his recent good fortune at bingo was not so credible as to require the jury to accept it as true. The jury's verdict indicates that it rejected Thames's assertions. At best, this decision by the jury created an issue concerning Thames's right to a new trial on a claim

that his conviction was against the weight of the evidence. He makes no such argument in this appeal, and we decline to analyze the issue on our own motion.

III.

Constitutional Attack on the Indictment

Thames claims that the indictment, insofar as it alleged him to be a habitual offender, was fatally defective for its failure to conclude with the statement that his alleged offenses were "against the peace and dignity of the State" as required by section 169 of the Mississippi Constitution. *See* Miss. Const. art. VI, § 169. The details of Thames's previous convictions were apparently contained on a separate sheet marked Exhibit A and incorporated into the indictment by reference. We say "apparently" because the attachment to the indictment is not a part of the record now before us.

Thames relies on the case of *McNeal v. State*, 658 So. 2d 1345, 1350 (Miss. 1995), which held that the failure to include this constitutionally mandated language at the end of the separate sheet setting forth McNeal's previous convictions was a fatal defect to his being sentenced as a habitual offender.

However, the record in this case shows that an order dated September 13, 1995 -- the day trial began -- was entered in the record permitting the State, without objection, to amend Exhibit A to conclude with the language "Against the Peace and Dignity of the State of Mississippi." That this procedure was adequate to avoid the error found in *McNeal* can be seen from the later case of *Brandau v. State*, 662 So. 2d 1051 (Miss. 1995). In that case, the supreme court found the omission of the necessary language was a formal defect curable by amendment or subject to waiver for failure to demur to the indictment. *Brandau*, 662 So. 2d at 1055. The order in the court papers directing an amendment is sufficient to cure the omission, and this issue is without merit.

IV.

A Second Attack on the Indictment Form

Thames also argues that the indictment exhibit was defective for its failure to contain the dates of the judgments for his prior convictions as required by the procedural rule then in effect --Uniform Criminal Rule of Circuit Court Practice 6.04. We are handicapped in considering this argument by the absence of a copy of the indictment exhibit. The omission of this document from the record is not explained. It clearly should have been included since Thames designated "all pleadings" as a part of the record in this appeal. We interpret the record to indicate that it was available throughout the trial, since the record includes the order we previously referred to permitting the document to be amended. Defense counsel certainly must have had access to a copy of the exhibit when preparing Thames's appeal; otherwise, he would be unaware of this alleged defect in the instrument. There are procedures

for correcting the record when omissions such as this occur, and Thames has failed to avail himself of those procedures to provide this Court with the necessary material to address the merits of his appeal. *See* M.R.A.P. 10.

The omission of the dates of judgment of previous convictions, though a technical violation of the above-cited procedural rule, is not fatally defective to an adjudication of habitual offender status if the indictment supplies sufficient information to afford the defendant access to the date of the judgment. *Benson v. State*, 551 So. 2d 188, 196 (Miss. 1989). In *Benson,* the information included the jurisdiction and cause number of the previous convictions. The supreme court held this information sufficient, in view of the fact that court records are open, to permit the defendant to determine the dates of the prior judgments should that be essential to his defense against an attempt to sentence him as a recidivist. *Benson,* 551 So. 2d at 196.

By the omission of Exhibit A in this case, we are precluded, initially, from adjudicating that the dates were omitted. Secondly, assuming the omission to be a fact, we are precluded from reviewing the information in the exhibit to determine if it supplied sufficient data to overcome a technical rule violation under the *Benson* decision.

The difficulty of our task is further magnified by the absence of a record of the hearing before the trial court regarding sentencing under the habitual offender statute. Neither was there a post-trial motion requesting the trial court to reconsider its judgment of sentence based upon any alleged improprieties at that hearing. The judgment of sentence itself recites the details of Thames's prior convictions with sufficient detail to support sentencing under the habitual offender statute, and we can only assume, in the absence of any indication to the contrary, that the State presented sufficient evidence to support such an adjudication and that the evidence was not contradictory to the allegations of Exhibit A to the indictment.

Were there some indication that the absence of Exhibit A was somehow chargeable to the State and that Thames had done everything within reason to make the exhibit, or some suitable substitute therefor, a part of this record, we might be inclined to view this issue in a different light. However, (a) where all parties had access to the instrument throughout the trial, and (b) where the defendant had sufficient access to the instrument while preparing his appeal to assert as a matter of fact that it omitted information he claimed necessary to enhanced sentencing, and (c) where the instrument, though designated as a part of the record, is omitted from the record for unexplained reasons, and (d) where the defendant makes no effort to correct this defect in the record, this Court is not inclined to permit the defendant to profit from the document's absence.

We find any allegations of defects on the face of Exhibit A to be procedurally barred.

V.

Instruction on Intent

Thames claims reversible error occurred when the trial court failed to *sua sponte* instruct the jury on

the meaning of the phrase "intent to sell." He cites no authority for this proposition other than a passage from a legal encyclopedia discussing jury instructions in general. We find this issue to be without merit. The jury is expected to bring its collective knowledge and wisdom to bear on the case presented to it for resolution. We, as human beings, communicate through words. In a court of law, as elsewhere, words are expected to be received and understood in their ordinary and accepted meaning. Though there may be some words or phrases that, through custom and usage in the judicial system, become terms of art that require special instruction to non-lawyer jurors, we do not conclude that a phrase such as "intent to sell" is one of them. The phrase is made up of words used extensively in the day-to-day commerce of our society, and its meaning in the criminal charge is no different than in that commerce. Were a juror, in a casual conversation during a pause in deliberations, to remark that he intended to sell his present automobile soon, we doubt that this would give rise to a pause in the conversation as the remaining jurors puzzled over the meaning of the statement. For the same reason, we doubt that the jury would have been enlightened by hearing a discourse on the meaning of the phrase "intent to sell" that would, of necessity, have relied heavily upon a common dictionary.

After due consideration of the issues raised on appeal, this Court has determined that the conviction and judgment of sentence should be affirmed.

THE JUDGMENT OF THE RANKIN COUNTY CIRCUIT COURT OF CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER AND SENTENCE TO LIFE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AS A HABITUAL OFFENDER IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT, DONNELL THAMES.

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