IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-01253 COA

JAMES MACK KELLER **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

DATE OF JUDGMENT:	04/20/95
TRIAL JUDGE:	HON. LAMAR PICKARD
COURT FROM WHICH APPEALED:	CLAIBORNE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	SIM C. DULANEY
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BILLY L. GORE
DISTRICT ATTORNEY:	ALEXANDER MARTIN AND DIANE ROY
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE; SENTENCED TO 30 YEARS IN MDOC
DISPOSITION:	AFFIRMED - 1/27/98
MOTION FOR REHEARING FILED:	2/20/98
CERTIORARI FILED:	5/5/98
MANDATE ISSUED:	8/17/98

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

PAYNE, J., FOR THE COURT:

James Mack Keller was convicted of possession of cocaine with intent to distribute. The trial court sentenced Keller to serve a term of thirty years in the custody of the Mississippi Department of Corrections. Keller's motion for JNOV or, in the alternative, a new trial was denied. Finding no merit in Keller's arguments, we affirm the decision of the circuit court on all issues.

FACTS

On March 21, 1994, Dante Monroe and James Mack Keller were arrested for possession of nearly two pounds of cocaine following a stakeout at the mobile home of Monroe's aunt by the Claiborne County Sheriff's Department. Sheriff Frank Davis testified that his department conducted the stakeout because they had received a tip that two men were cooking dope behind the mobile home. Sheriff's Deputy Frederick Yarbrough testified that he observed Monroe and Keller exit the mobile home and get into Monroe's vehicle. Deputy Yarbrough testified that Keller was carrying a paper bag which he placed inside the car. Monroe and Keller then left the mobile home with Monroe driving. Sheriff's Deputy Dennis Thompson testified that he received a transmission that Monroe and Keller were headed in his direction. Deputy Thompson testified that when he met Monroe's car, he attempted to flag him down but that Monroe sped away. Deputy Thompson testified that before Monroe sped away, he saw Monroe reach into the back seat and retrieve a brown paper bag. A hot pursuit by Deputy Thompson in one car and Sheriff Davis and Narcotics Agent Carey Ellington in another car then ensued. The officers testified that they followed Monroe until he came to a stop at the entrance of the trailer park. The officers indicated that they observed Keller exit the car with a propane tank in one hand and a brown paper bag in the other hand. The officers testified that Keller dropped the propane tank in the street and began running into the woods. Thompson and Ellington pursued Keller into the woods and Sheriff Davis continued his pursuit of Monroe who sped away when Keller jumped out of the car. Thompson and Ellington testified that they observed Keller throw the bag to the ground. Thompson continued chasing Keller while Ellington stayed with the bag which later turned out to be nearly two pounds of cocaine. Shortly thereafter, Thompson apprehended Keller and placed him under arrest. Meanwhile, Sheriff Davis had chased Monroe into the city limits of Port Gibson where he subsequently arrested him.

The defense presented the testimony of Monroe, who had already entered a guilty plea. Monroe testified that the cocaine belonged to him and that Keller did not know that it was in the car. Keller testified in his own behalf and stated that he knew nothing about the cocaine. Keller stated that the first time he saw the cocaine was when Monroe retrieved it from the backseat during the police chase. Keller testified further that he jumped out of Monroe's vehicle because Monroe was driving crazy and he did not want to die in a crash. Keller testified that he never touched the bag of cocaine or the propane tank and that the object the officers saw in his hand when he exited the vehicle was his jacket.

After hearing the evidence, the jury returned a verdict of guilty of possession of cocaine with intent to distribute, and Keller was given the maximum sentence of thirty years to serve in the custody of the Mississippi Department of Corrections. Feeling aggrieved, Keller now files this appeal asserting three issues.

ANALYSIS

I. WHETHER THE STATE FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE CRIME, NAMELY, KELLER'S INTENT TO DELIVER OR DISTRIBUTE COCAINE.

Keller argues that the State failed to introduce any substantial evidence during the trial which supported its contention that Keller intended to deliver or sell the cocaine. Keller contends that the State's case created only a mere suspicion that Keller possessed cocaine with the intent to distribute

and that such evidence was insufficient to enable a jury to return a verdict of guilty for possession of cocaine with intent to distribute. Keller 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, 889-90 (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. ***Taylor v. State,* 656 So. 2d 104, 108 (Miss. 1995); *Boches v. State,* 506 So. 2d 254, 260 (Miss. 1987).**

In the present case, we must conclude whether 800 grams of cocaine (nearly two pounds) is a large enough quantity to conclude that Keller intended to distribute the drug. We think that it is. At trial, in addition to the quantity, the State offered the testimony of Sheriff Davis who testified that he received a tip that Keller and Monroe were cooking dope behind a mobile home. Acting on the tip, the sheriff's department not only observed Keller to be in possession of a large quantity of crack cocaine but they also saw him jump out of Monroe's car with a propane bottle. Sheriff Davis testified without objection that the cocaine Keller possessed had been changed from powder form to rock form and that he knew from having dealt with drug dealers that a propane bottle could be used to heat the cocaine in order to change it to rock form. Sheriff Davis further testified without objection that once he apprehended Monroe, he discovered a set of scales in Monroe's vehicle. Davis indicated that scales are commonly used by drug dealers to weigh the cocaine by grams. The sheriff's deputies also testified that the cocaine was packaged in individual packets which would be consistent with drug distribution. Finally, Keller's own witness, Dante Monroe, testified that the cocaine was meant for distribution. The fact that Monroe testified that Keller was an innocent party does not vindicate Keller. Obviously, the jury believed Monroe when he stated that the cocaine was meant for distribution. The jury, however, did not believe that Keller was an innocent bystander.

Based on the quantity of cocaine in Keller's possession coupled with the propane bottle, the scales, and Monroe's testimony that the cocaine was meant for distribution, we find that there was sufficient evidence for the jury to determine that Keller intended to distribute the cocaine.

II. WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED SHERIFF FRANK DAVIS AND NARCOTICS OFFICER CAREY ELLINGTON TO GIVE THEIR OPINION ON THE VALUE, NORMAL STREET USAGE, AND THE AMOUNT OF THE DRUG USED FOR NORMAL CONSUMPTION WITHOUT FIRST

REQUIRING THE STATE TO TENDER THE SHERIFF AND THE NARCOTICS OFFICER AS EXPERT WITNESSES.

Keller argues that the trial court erred when it permitted Sheriff Davis and Narcotics Agent Ellington to give an opinion concerning the amount of cocaine normally consumed for personal use and the street value of various denominations of cocaine. Keller contends that the testimony elicited from the officers was in the form of an expert opinion and therefore was not admissible prior to the officers being qualified as experts in the field of drug usage. Keller requests that this Court reverse and remand his case on the grounds that Davis and Ellington were permitted to testify as experts without being qualified as required by Mississippi Rule of Evidence 702. Keller relies on ***Sample v. State*, 643 So. 2d 524 (Miss. 1994),** to support his argument for reversal.

We agree that both Sheriff Davis and agent Ellington should have been proffered as experts and therefore qualified as such before being asked to give an opinion based on their law enforcement experience. ***See Seal v. Miller*, 605 So. 2d 240, 244 (Miss. 1992)** (holding that calling on a police officer to respond to a question based on his experience as an officer investigating accidents is by definition not a lay opinion). In regard to Sheriff Davis's testimony about the quantity normally used for personal consumption, we find the testimony to be harmless error in light of the fact that Keller was found to be in possession of 800 grams of cocaine and a propane bottle, that a set of scales was found in the vehicle he occupied just prior to his attempt to flee from the police, and that Monroe, the man with whom Keller had spent the morning, conclusively testified that the cocaine was indeed meant for distribution. Whether Keller shared Monroe's intent to distribute the cocaine was properly left to the jury, and we do not believe Sheriff Davis's opinion testimony had any significant impact on the jury's finding of guilt in this matter.

We note further that Keller's reliance on *Sample* is misplaced. While the *Sample* court found that it was error to permit a police officer to testify based on his experience and training, the court did not reverse on those grounds. ***Sample*, 643 So. 2d at 528-29**. Instead, the court reversed due to the erroneous admission of inadmissible hearsay and simply instructed the lower court on retrial to follow the procedures dictated by M.R.E. 702 when offering opinion testimony by a police officer. ***Id.*** Thus, it cannot be argued that *Sample* mandates reversal in this instance.

As for Keller's complaint about Ellington's testimony regarding the purity of the cocaine, the State correctly points out that the prosecutor withdrew the question before Ellington had a chance to answer. Thus, we cannot find error for testimony never given. However, had Ellington been permitted to answer the prosecutor's question regarding the purity of the cocaine we would have found such testimony to also be harmless in light of the evidence against Keller in this case.

We therefore find Keller's argument to be without merit.

III. WHETHER THE SENTENCE EXHIBITED BIAS AND PREJUDICE AGAINST THE DEFENDANT IN THAT THE TRIAL COURT FOLLOWED AN INFLEXIBLE PRACTICE OF IMPOSING THE MAXIMUM SENTENCE UPON INDIVIDUALS CONVICTED FOR THE SALE OF DRUGS OR POSSESSION OF DRUGS WITH INTENT TO SELL OR DISTRIBUTE.

Keller argues that because he is a first offender, his sentence of thirty years was cruel and unusual.

Keller contends that the court's policy of imposing maximum sentences on drug offenders represents an inflexible practice in sentencing drug offenders which contradicts the judicially approved policy in favor of individualizing sentences.

We find no merit in this argument. Very simply, Keller was sentenced within the statutory guideline set forth in **Miss. Code Ann. § 41-29-139(b)(1) (Rev. 1993)**. Section 41-29-139(b)(1) provides for a maximum sentence of thirty years and a maximum fine of $1,000,000. Keller was sentenced to the maximum of thirty years and a fine was not imposed. The Mississippi Supreme Court has long held that the imposition of a sentence is within the discretion of the trial court, ***Green v. State*, 631 So. 2d 167, 176 (Miss. 1994),** and no sentence will be disturbed that is within the statutory maximum. ***Edwards v. State*, 615 So. 2d 590, 598 (Miss. 1993)**. Where a sentence does not exceed the statutory limits, it does not constitute cruel and inhuman treatment. ***Adams v. State*, 410 So. 2d 1332, 1334 (Miss. 1982).**

THE JUDGMENT OF THE CIRCUIT COURT OF CLAIBORNE COUNTY OF CONVICTION OF POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE AND SENTENCE OF THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

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