

IN THE COURT OF APPEALS 09/03/96

OF THE

STATE OF MISSISSIPP

NO. 93-KA-00211 COA

FLOYD RASH

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLE

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. ELZY JONATHAN SMITH, JR.

COURT FROM WHICH APPEALED: COAHOMA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

RICHARD B. LEWIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: LAWRENCE MELLON

NATURE OF THE CASE: CRIMINAL: CONTROLLED SUBSTANCE SALE

TRIAL COURT DISPOSITION: SENTENCED TO SERVE EIGHTEEN (18) YEARS IN MDOC
AND FINE OF \$5,000.00

BEFORE BRIDGES, P.J., BARBER, AND MCMILLIN, JJ.

PER CURIAM:

On July 9, 1992, Officer Donald Wood and Sergeant Walter Thomas of the Clarksdale Police Department took part in an undercover drug operation, the purpose of which was to purchase cocaine. A cooperating individual, James Stowers, was wired with a "body microphone" and was given twenty dollars (\$20.00) in photocopied money. Stowers was taken in an unmarked vehicle to Riverside and Madison Streets. Stowers walked toward the "Club Paradise" where he ran into the Defendant, Floyd Rash. Officer Wood observed Stowers and Rash talking for several minutes and then exchange "a substance" for money. Stowers then left the area, walked back to Riverside and Madison, where he met the officers involved in the operation and gave them a rock of crack cocaine. Sergeant Thomas and Stowers also testified to these facts. Rash was convicted of the sale of cocaine and appeals to this Court, arguing that his conviction was against the overwhelming weight of the evidence, and that the trial court erred in refusing to amend a jury instruction. He also argues that he was merely a conduit to the sale because he did not actually keep the \$20.00. Finding his arguments to be without merit, we affirm the judgment of the lower court.

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER THE LOWER COURT ERRED IN FAILING TO GRANT A MOTION FOR JNOV, DIRECTED VERDICT, OR MOTION FOR A NEW TRIAL.

Rash maintains that the lower court committed reversible error when it denied his motion for a JNOV or a new trial. He also argues that the verdict was against the overwhelming weight of the evidence.

Appeals from an overruled JNOV motion are viewed by this Court in a light most favorable to the State. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). Any credible evidence consistent with guilt must be accepted as true. *McClain*, 625 So. 2d at 778. A challenge to the sufficiency of the evidence can result in a reversal only where the evidence, with respect to one or more of the elements of the offense charged, is such that reasonable and fair-minded jurors could only find the accused not guilty. *Id.* at 778.

On the other hand, where the defendant contends that a new trial should have been granted because the jury verdict was against the weight of the evidence, the standard of review is as follows:

[T]he challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion. Procedurally such challenge necessarily invokes [Mississippi Uniform Criminal Rule of Circuit Court Practice] 5.16. 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.

Id. at 781. All matters concerning the weight and credibility of the evidence are resolved by the jury. *Id.*

The Supreme Court of Mississippi eloquently condensed the above standard stating:

[O]nce the jury has returned a verdict of guilty in a criminal case, we are not at liberty to direct that the defendant be discharged short of a conclusion on our part from that the evidence, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could find beyond a reasonable doubt that the defendant was guilty.

Williams v. State, 463 So. 2d 1064, 1068 (Miss. 1985).

Keeping in mind the above standards, we find no merit in this appeal. It was well within the province of the jury to believe the testimonies of Officer Woods, Sergeant Thomas, and Stowers. Further, that Rash argues he was merely a conduit of another seller is legally inconsequential. A defendant is guilty of the sale of a controlled substance even if the proof shows that he was acting as an agent of the seller. *Messer v. State*, 483 So. 2d 338, 340 (Miss. 1986). Accordingly, this issue is without merit.

II. WHETHER THE LOWER COURT ERRED IN REFUSING TO AMEND INSTRUCTIONS-1.

Rash next argues that the court committed reversible error in refusing to amend Instruction S-1 to include the remuneration of \$20.00. Instruction S-1 stated:

The defendant, Floyd Rash, has been charged with the crime of the sale of a controlled substance.

If you find from the evidence in this case beyond a reasonable doubt that:

- 1) the defendant had cocaine, a controlled substance, and
- 2) on July 9, 1992, the defendant, Floyd Rash, knowingly or intentionally sold, transferred, delivered or distributed said controlled substance to James Stowers, then you shall find the defendant guilty as charged.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt, then you shall find the defendant not guilty.

The Mississippi Supreme Court has held that if jury instructions adequately inform a jury of the law, then there is no error. *Hornburger v. State*, 650 So. 2d 510, 515 (Miss. 1995); *Gray v. State*, 487 So. 2d 1304, 1308 (Miss. 1986); *Roberts v. State*, 458 So. 2d 719, 721 (Miss. 1984). We find that this instruction adequately informed the jury of the law and find no merit in this argument.

THE JUDGMENT OF THE COAHOMA COUNTY CIRCUIT COURT OF CONVICTION OF SALE OF A CONTROLLED SUBSTANCE (COCAINE) AND SENTENCE OF EIGHTEEN (18) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF \$5,000 IS AFFIRMED. SENTENCE SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. COAHOMA COUNTY IS TAXED WITH ALL COSTS OF THIS APPEAL.

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