

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00190 COA

HOWARD RAY TILLIS

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. MARCUS D. GORDON

COURT FROM WHICH APPEALED: SCOTT COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

P. SHAWN HARRIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR. DISTRICT ATTORNEY: TURNER, KEN,

NATURE OF THE CASE: CRIMINAL: SALE OF A CONTROLLED SUBSTANCE

TRIAL COURT DISPOSITION: SALE OF COCAINE & SECOND OFFENDER: SENTENCED TO SERVE A TERM OF 25 YRS WITH THE MDOC & PAY A FINE OF \$10,000.00 WITH THIS SENTENCE TO RUN CONSECUTIVELY TO THE SENTENCE ON #4391

MANDATE ISSUED: 6/10/97

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

KING, J., FOR THE COURT:

Howard Ray Tillis was convicted in the Circuit Court of Scott County of the sale of cocaine, a controlled substance. Aggrieved, Tillis now appeals his conviction alleging the following two points of error: (1) the lower court erred in failing to grant a mistrial; and (2) the lower court erred in failing to grant a statement of admonition to the jury. Finding Tillis's arguments to be without merit, we affirm his conviction and sentence.

FACTS

On August 11, 1994, Howard Ray Tillis and Ray Charles Harper sold cocaine to a confidential informant and Agent Lewis Hawkins, an undercover narcotics agent. Tillis gave the confidential informant the drugs, and Harper received the money from Officer Lewis. Subsequently, both Tillis and Harper were charged and indicted for the sale of a controlled substance. They were brought to trial as co-defendants. During the jury voir-dire, the State indicated that it planned to show that Tillis and Harper were partners in the criminal activity and acted pursuant to a common plan.

On direct examination of Agent Hawkins, the prosecutor asked if he had seen the two defendants on any other occasions. Agent Hawkins stated, "Mr. Harper, yes. I made a second subsequent purchase from him at a later date." Harper's attorney objected and moved the court for a mistrial. The judge asked both attorney's into his chambers for argument on the issue of mistrial. Harper's counsel argued that Agent Hawkins had introduced evidence of another crime committed by Harper, which had no connection to the charged offense. Tillis's counsel did not make an objection nor did he move for a mistrial. After returning to the courtroom, the judge sustained the objection and granted the mistrial for Harper. The court informed the jury that Harper was no longer a defendant and that the case would proceed as the State of Mississippi versus Tillis.

The State continued with its case against Tillis, after which Tillis went forward with his defense. When both sides rested, the judge asked for motions, and Tillis's counsel asked, "Is it proper to move for a mistrial at this time, too, since I didn't do it before?" The judge asked, "Mistrial for what?" Tillis's counsel argued that because the State had portrayed the two defendants as working in concert in the drug transaction, Tillis was prejudiced by Agent Hawkins's testimony concerning the subsequent purchase of drugs from Harper. The court denied the motion for mistrial and submitted the case to the jury. The jury found Tillis guilty, and the court sentenced him to twenty-five years in the custody of the Mississippi Department of Corrections.

A.

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL TO HOWARD RAY TILLIS.

Tillis claims that the trial court erred in failing to grant his motion for a mistrial since it granted his co-defendant, Harper, a mistrial due the agent's testimony of other crimes. He contends that because the State portrayed him and Harper as partners in the drug transaction, testimony that Harper sold drugs in a subsequent transaction was prejudicial not only to Harper, but to him as well. Tillis

believes the court's denial of his motion for a mistrial prevented him from receiving a fair trial.

Our review of the record indicates that Tillis failed to make both a contemporaneous objection and a motion for a mistrial when the agent offered testimony of Harper's subsequent sale of drugs. Tillis's counsel was quiet when Harper's counsel objected and moved for a mistrial. Even in the judge's chambers, Tillis's counsel failed to raise an objection or join Harper's counsel in moving for a mistrial. It was not until the close of both the State's and Tillis's cases that his counsel asked the court if he was too late to make the motion. The failure to make a contemporaneous objection during trial bars this Court from reviewing a claimed error on appeal. *Temple v. State*, 498 So. 2d 379, 381 (Miss. 1986).

Notwithstanding the procedural bar, Tillis's claim that he was prejudiced because the agent testified that he made a subsequent drug buy from Harper is without merit. The agent specifically stated that of the two defendants, Harper was the one with whom he had subsequent dealings. This was a separate drug transaction from the one for which Tillis was being tried, and the agent, in no way, linked him to this later sale. Therefore, even if Tillis's counsel had not sat silently, we do not find evidence of substantial and irreparable prejudice, which would have foreclosed his right to a fair and impartial trial.

B.

THE TRIAL COURT ERRED IN FAILING TO GRANT A STATEMENT OF ADMONITION TO THE JURY.

Tillis continues to assign error to the trial court alleging that it should have admonished the jury to disregard Agent Hawkins's statement concerning Harper, particularly since Harper was granted a mistrial and removed as a defendant. Our review of the record does not reveal such an error. Instead, we see that just as Tillis's counsel remained silent during Agent Hawkins's testimony and failed to move for a mistrial, he also sat silent when the court made its announcement concerning Harpers removal from the case. However, Tillis now seeks to complain that the court committed error, but it was the duty of his counsel to request an admonition from the judge. *Clanton v. State*, 279 So. 2d 599, 602 (Miss. 1973). In the absence of such a request and any accompanying unusual circumstances, this Court will not find error. *May v. State*, 460 So. 2d 778, 783 (Miss. 1984). Therefore, we affirm the judgment of the circuit court.

THE JUDGMENT OF THE CIRCUIT COURT OF SCOTT COUNTY OF CONVICTION OF THE SALE OF A CONTROLLED SUBSTANCE AND SENTENCE TO TWENTY-FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS PURSUANT TO 41-29-147 OF THE MISSISSIPPI CODE ANNOTATED PROVIDING FOR ENHANCED PUNISHMENT AND ORDER TO PAY A FINE OF \$10,000.00, IS AFFIRMED. SENTENCE IMPOSED SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. ALL COSTS OF THIS APPEAL ARE TAXED TO SCOTT COUNTY.

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

