

IN THE COURT OF APPEALS 12/29/95
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00117 COA

ERIC THOMPSON

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. R. I. PRICHARD, III

COURT FROM WHICH APPEALED: PEARL RIVER COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

THOMAS E. SCHWARTZ

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: RICHARD DOUGLASS

BY: CLAIBORNE McDONALD, IV

NATURE OF THE CASE: CRIMINAL: SALE OF COCAINE

TRIAL COURT DISPOSITION: JURY VERDICT OF GUILTY AND SENTENCED TO SERVE
TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF
CORRECTIONS

BEFORE BRIDGES, P.J., DIAZ, KING, AND SOUTHWICK, JJ.

DIAZ, J., FOR THE COURT:

Eric Thompson was convicted for the sale of cocaine in the Circuit Court of Pearl River County. He was then sentenced to serve twenty years in the custody of the Mississippi Department of Corrections. Feeling aggrieved, Thompson appeals to this Court arguing that the trial court erred in allowing testimony by Officer Jeff Wheat about the custom and practice of drug dealers in the City of Picayune and other parts of the country. Thompson also argues that the trial court should have granted a motion to quash the jury venire since it did not represent a fair cross-section of Pearl River County. Finally, Thompson argues that the verdict was against the overwhelming weight of the evidence. Finding no error, we affirm the conviction and sentence.

FACTS

On January 21, 1993 Officers Jeff Wheat and James Jones of the Picayune Police Department were working undercover. They were disguised and traveling in an unmarked vehicle when they entered a high crime area of the City of Picayune in an attempt to purchase illegal drugs.

Shortly after 9:00 p.m. the Officers were stopped by a man standing next to Nixon Street waving his arms. Officer Wheat stopped the vehicle, and the man approached the passenger side where Officer Jones was sitting. Both Officers identified Thompson as the man who approached the vehicle. Officer Wheat asked Thompson if he could purchase rock cocaine. Thompson responded by saying "Yes, hold up. . . ." Thompson then shouted down the street, "Hey, Freddie." At that point, another individual, identified as Freddie Causey, approached Thompson. The Officers then observed Thompson as he opened his left hand and gave to Causey what appeared to be a white rock. Causey approached Wheat's side of the vehicle and dropped the rock into Wheat's hand. Wheat then handed Causey two \$10.00 bills which had been issued to him by the Picayune Police Department for this purpose. Causey took the money and handed it to Thompson. Thompson placed the money in his jacket and walked away.

Wheat handed the rock to Jones who placed it in an evidence bag. The rock was tested at the crime lab and was positively identified as cocaine. This entire incident was captured on audio and video tape which was admitted into evidence and viewed by the jury.

DISCUSSION OF THE ISSUES ON APPEAL

THE QUESTION OF RELEVANCY

During the trial, the State called Officer Wheat to testify. Wheat detailed his education and training in the area of narcotics during his basic training at the academy in Harrison County, and his training by the Metro Dade Police Department in Miami, Florida, and the United States Army Military Narcotics

Counter-Intelligence School. On direct examination, Wheat was allowed to describe the custom and practice of drug dealers in Picayune and other areas of the country. Basically, he testified that it was common for drug dealers to use another person to make the actual transfer of drugs and money in a drug deal, so that there would be no direct contact between the dealer and the buyer. According to Wheat's testimony, this is done in an attempt to avoid prosecution if the buyer happens to be an undercover agent.

Thompson objected to this line of questioning on the grounds of relevancy to his case. The court allowed this testimony and stated:

I will overrule the objection, because of his expertise and training and the schools he has been to, I believe he is qualified to make commentaries on normal practices and procedures that he could be looking for to be used in a particular area to alert him to a narcotics sale or transaction or so forth.

The decision to allow this testimony into evidence on the basis of its relevancy was within the discretion of the trial judge. The supreme court has held that relevancy and admissibility of evidence are within the discretion of the trial court and reversal may be had only where that discretion has been abused. *Wade v. State*, 583 So. 2d 965, 967 (Miss. 1991); *see also Shamblin v. State*, 601 So. 2d 407, 413 (Miss. 1992); *Roberson v. State*, 595 So. 2d 1310, 1315 (Miss. 1992).

Here, the decision to allow the testimony was not an abuse of discretion by the trial court, and this assignment of error has no merit.

THE VENIRE

Following voir dire and before jury selection, Thompson made a motion to quash the entire jury panel. He based his motion upon the fact that of the fifty-one jurors impaneled, only one potential juror was black. Thompson further argues that the jury fails to reflect the racial makeup of Pearl River County which is between sixteen and eighteen percent black. Thompson, who is black, argues that he was denied a jury of his peers.

In Mississippi, proportional representation of the races on a jury is not required. What is required is that county officials must see to it that juries are selected, in fact and in good faith, without regard to race. *Dorsey v. State*, 243 So. 2d 550, 552 (Miss. 1971).

In the case of *Taylor v. Louisiana*, the United States Supreme Court held that there is no requirement that the petit jury actually chosen must mirror the community and reflect the various distinctive groups in the population. Holding that the petit jury must be drawn from a source fairly representative of the community the Court said:

Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

Taylor v. Louisiana, 419 U.S. 522, 538, 95 S. Ct. 693, 42 L. Ed. 2d 690, 703 (1975) (citations omitted). In the instant case, Thompson does not allege that the procedure used for selecting juries in Pearl River County is discriminatory or systematically excludes distinctive groups in the community.

After making the motion to quash, the following transpired:

BY THE COURT:

For the record, Mr. Schwartz apprised the Court that he would make this motion, and the Court, to give him ample time if there was any problem with the method or manner in which the Jury Commission accomplished their task pursuant to the statute, or any problem with the method or manner in which the jury box was filled from the jury wheel, or any problem with the method or manner in which the Circuit Clerk drew the jurors who were summoned to be here this week, for Mr. Schwartz to have whatever time he needed to make those examinations. And of course, Mr. Schwartz being one of the two Public Defenders for Pearl River County, has continuously been involved with the manner and method in which juries are composed, beginning with the Clerk furnishing to the Election Commission the entire list of qualified electors and then the Jury Commission doing their function under the statute.

Mr. Schwartz, it is my understanding that from your examination that there is nothing in the procedure used either by the Jury Commission, the private citizen who drew from the wheel to the box, or in the manner or method in which the Clerk drew the jury that the Defense would controvert it as being contrary to the statute; is that correct?

BY MR. SCHWARTZ:

No, sir. I have no proof or allegation that there was any wrongdoing or any violation of any statutory procedure. My objection goes to the mathematical makeup of the jury, Your Honor.

....

BY THE COURT:

I just want to be sure that the record is clear where the Supreme Court won't be in doubt as to whether or not the procedure used was analyzed by defense counsel and satisfies defense counsel that the proper procedure was used; the objection is just being that even though the proper procedure was used, it resulted in 50 out of 51 jurors being white, but it still was done totally randomly as anticipated by the law.

BY MR. SCHWARTZ:

Yes, sir.

BY THE COURT:

Based on that, the Court will overrule the motion to suppress the panel, as I know of no requirement that the Clerk would just have to continuously keep drawing jurors to ensure a makeup of 13 to 14 percent black jurors as opposed to white jurors. And also we have had certain jurors who were actually drawn for this week excused, some of them could have been black.

Thompson does not provide any evidence that the method of the selection of jurors was flawed, or in any way contrary to statutory guidelines, or is in any way unconstitutional. In fact, Thompson does not question the selection process. His objection goes to the result of the selection process. Because there is no guarantee to proportional representation of distinctive groups within the community on the jury, this assignment of error must fail.

THE WEIGHT OF THE EVIDENCE

Thompson argues that a witness on his behalf, Freddie Causey, testified that he sold the drugs to Officer Wheat and that Thompson had nothing to do with the transaction. Therefore, Thompson argues that his conviction is contrary to the overwhelming weight of the evidence.

Our scope of review on appeal is limited, has been stated many times, and need not be restated here. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *McFee v. State*, 511 So. 2d 130, 133-34 (Miss. 1987); *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987). Suffice it to say that in addition to the eyewitness testimony of the two undercover officers, the jury was also presented with audio and video tapes of the transaction. The jury is free to believe or disbelieve any testimony that it hears and attach such weight as it sees fit. *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983). On appeal,

the jury's verdict will not be disturbed unless it shocks the conscience of the Court to such an extent that to affirm the verdict would be to sanction an unconscionable injustice. *Flowers v. State*, 601 So. 2d 828, 833 (Miss. 1992). Taken in the light most favorable to the verdict, a reasonable juror could have found that Thompson was guilty beyond a reasonable doubt. Therefore, this assignment of error must also fail.

CONCLUSION

Based upon a review of the record, this Court finds that the assignments of error raised by Thompson are without merit. Therefore, there is no sufficient basis to disturb the jury verdict finding Thompson guilty for the sale of a controlled substance. We therefore affirm his conviction and sentence.

THE JUDGMENT OF THE PEARL RIVER COUNTY CIRCUIT COURT OF CONVICTION OF THE SALE OF A CONTROLLED SUBSTANCE AND THE SENTENCE OF A TERM OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. THE COSTS OF THIS APPEAL ARE TAXED TO PEARL RIVER COUNTY.

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