

IN THE COURT OF APPEALS 10/3/95

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00743 COA

ROBERT LEE PERRY

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. ANDREW C. BAKER

COURT FROM WHICH APPEALED: PANOLA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WILLIAM J. CLAYTON

DAVID J. WALKER

ATTORNEY FOR APPELLEE:

ATTORNEY GENERAL'S OFFICE

BY: DEIRDRE MCCRORY

NATURE OF THE CASE: SALE OF COCAINE

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO SERVE TWELVE
YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH
THE LAST FIVE YEARS SUSPENDED PENDING DEFENDANT'S FUTURE GOOD
BEHAVIOR.

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

THOMAS, P.J., FOR THE COURT:

Robert Lee Perry was convicted of the sale of cocaine to a confidential informant working for the Panola/Tate County Narcotics Task Force. Aggrieved by the verdict of the jury, Perry appeals alleging as error that the verdict was against the overwhelming weight of the evidence. Finding no error, we affirm.

FACTS

Clay Bradshaw, who admittedly used crack cocaine in the past, was working undercover as a confidential informer for agents Ricky Presson and Carl Powell with the Panola/Tate County Task Force. Bradshaw was searched for drugs, money, and weapons and then fitted with a body transmitter and thereafter went to King's Cafe in Batesville with two twenty dollar bills previously photocopied in order to make a drug buy. Presson and Powell followed Bradshaw and overheard a drug buy via Bradshaw's body transmitter but did not actually see the transaction.

Bradshaw testified that when he arrived at King's Cafe, "I held my hand out the window and a gentleman came up and I bought some cocaine from him." Bradshaw added that he asked this person "if it was good and he said 'yes.'" After Bradshaw "held up two fingers," the man gave him "two rocks" and took \$40 from Bradshaw. Bradshaw testified that he obtained a clear view of the seller, who was "[l]ess than two feet" from him.

At the Task Force Office, Bradshaw "looked through some pictures that they had" and identified the person from whom he had purchased the crack cocaine. Powell then drove Bradshaw back to King's Cafe, where Bradshaw pointed out the seller. At trial, Bradshaw identified this person as the defendant, Robert Perry.

Powell testified that when Perry was arrested, Powell "found \$20.00 of buy money in his pocket."

The substance in question was identified as crack cocaine.

Perry testified that on the night in question, he drank beer and shot craps outside King's Cafe. When he saw Powell drive by, he went inside the cafe. Approximately an hour later, Powell returned and arrested him. He stated that he was so addicted to crack cocaine at that point in his life, if he had had two rocks of that substance, he would have smoked them.

In rebuttal, the state called Powell to refute Perry's suggestion that the officers photocopied Perry's money after he was arrested. Powell testified unequivocally that the "buy money" was photocopied before the transaction.

LAW

I. WHETHER THE VERDICT OF THE JURY OF GUILTY OF SELLING A CONTROLLED

SUBSTANCE WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1983), our supreme court made the following statements concerning challenges to the weight of the evidence:

[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 *Miss. Unif. Crim.R. of Cir. Ct. Prac. 516*. 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 to the State. *Wetz [v. State]*, 503 So. 2d 803 (Miss. 1987)] at 807-08.

....

The jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed.

In *Griffin v. State*, 607 So. 2d 1197, 1201 (Miss. 1992), the Court stated the scope of review of the claim at issue as follows:

In *Burge v. State*, 472 So. 2d 392 (Miss. 1985), this Court stated that all evidence, even that which does not support the State's case, must be considered in the light most favorable to the State. *Id.* at 396. *See also May v. State*, 460 So. 2d 778, 781 (Miss. 1984). "[T]his court must accept as true the evidence which supports the verdict." *Spikes v. State*, 302 So. 2d 250, 251 (Miss. 1974). The State must be given benefit of all reasonable inferences that may reasonably be drawn from the evidence. *Glass v. State*, 278 So. 2d 384, 386 (Miss. 1973).

Also, the court said:

No formula dictates the manner in which jurors resolve conflicting testimony into findings of fact sufficient to support the verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict.

532 So. 2d at 604 quoting *Gandy v. State*, 373 So. 2d 1042, 1045 (Miss. 1979).

Perry acknowledges our limited scope of review but argues that Bradshaw's identification was so tainted as to require reversal under *Ashford v. State*, 583 So. 2d 1279 (Miss. 1991). Perry's reliance on *Ashford* is misplaced. *Ashford* involved another drug sale case involving a confidential witness as the state's only witness to the actual events. In reversing, our supreme court reasoned:

Major discrepancies between the description the informant gave immediately after the sale-- and stood by the trial-- and the defendant's undeniable physical appearance generate a reasonable doubt which no fair-minded juror could ignore.

. . . .

The discrepancy in Murray's description generates considerable doubt. This is particularly so in that Murray describes the seller as being smaller than himself, while in fact Ashford was a much larger person both in terms of height and weight. This discrepancy, coupled with the absence of the sort of evidence we customarily encounter in cases of this sort-- the corroborating testimony of a professionally trained narcotics agent plus physical evidence in the form of marked MBN funds-- can only yield a reasonable doubt of Ashford's guilt.

Ashford, 583 So. 2d at 1280, 1282.

Unlike *Ashford* there were no major discrepancies here between Bradshaw's description of Perry after the sale versus Perry's actual appearance. Coupled with that is the fact Perry was found in possession of one of the two previously photocopied twenty dollar bills.

The evidence here was sufficient to support the jury's verdict, and we are not at liberty to disturb the same.

THE JUDGMENT OF CONVICTION IN THE PANOLA COUNTY CIRCUIT COURT OF THE SALE OF COCAINE AND SENTENCE TO TWELVE YEARS WITH THE LAST FIVE YEARS BEING SUSPENDED PENDING DEFENDANT'S FUTURE GOOD BEHAVIOR IS AFFIRMED. COSTS ARE TAXED TO PANOLA COUNTY.

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