

**IN THE COURT OF APPEALS 12/29/95**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 94-KA-00593 COA**

**VICTOR XADRIAN LOVE 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. FRANK A. RUSSELL

COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT(S): DAVID L. WALKER

ATTORNEY(S) FOR APPELLEE(S): OFFICE OF THE ATTORNEY GENERAL

BY: JOLENE M. LOWRY

DISTRICT ATTORNEY: SAMUEL M. REEDY; ROWLAND H. GEDDIE, JR.

NATURE OF THE CASE: SALE OF A CONTROLLED SUBSTANCE - CRACK COCAINE

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO TWELVE (12) YEARS  
IN A FACILITY TO BE DESIGNATED BY THE MISSISSIPPI DEPARTMENT OF  
CORRECTIONS, SIX (6) YEARS SUSPENDED PENDING GOOD BEHAVIOR, AND TO PAY  
\$1,000 FINE, COURT COSTS, \$110 TO TUPELO CRIME LAB, AND \$120 TO TUPELO VICE  
NARCOTICS UNIT

BEFORE BRIDGES, P.J., COLEMAN AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Victor Xadrian Love was convicted of the sale of crack cocaine and sentenced to twelve years, with six years suspended pending good behavior, in a facility to be designated by the Mississippi Department of Corrections. The trial court denied Love's motion for a new trial or, in the alternative, a JNOV. Love argues three issues on appeal: (1) that the trial court erred in denying his motion to dismiss for failure to provide him with a speedy trial; (2) that the trial court erred in overruling his objection to introducing into evidence the identification of the audiotaped conversation of the drug transaction between Larry Jackson, the informant, Darin Yates, a police officer, and himself, particularly since Jackson was not present at trial and Love was precluded from cross-examining Jackson; and (3) that the jury verdict was against the overwhelming weight and legal sufficiency of the evidence. Finding no merit to any of these issues, we affirm.

## FACTS

This case is based on conflicting testimony between Love and the prosecution. Love testified that he had bought three rocks of crack for \$30 at the insistence of Jackson. He stated that he bought it to try for the first time and because Jackson told him it would help his career as a professional writer. Love said that he tried to find Jackson so he could show Love how to smoke it. He told his cousin, Cynthia Freeman, to tell Jackson that he needed to see him. He testified that, later that day, Jackson and another man, who was Yates posing as Jackson's "cousin," came to his apartment. Love stated that he told Jackson and his "cousin" that he did not sell drugs, but that he sold three rocks to Yates for \$60 only after Jackson's persistent encouragement. Love stated that selling drugs had never crossed his mind prior to that incident.

The state presented a different version of events. Jackson, Yates, and Freeman visited Love at his apartment so Yates could buy crack cocaine. Yates's version of the sale indicated Love's experience in selling drugs, rather than his inexperience. Yates carried a body microphone that audiotaped the transaction. The jury convicted Love of the sale of crack cocaine. The court sentenced him to twelve years, with 6 years suspended pending good behavior, in a facility to be designated by the Mississippi Department of Corrections. Love appeals his conviction.

## ARGUMENT AND DISCUSSION OF THE LAW

### I. DID THE TRIAL COURT ERR IN DENYING LOVE'S MOTION TO DISMISS FOR FAILURE TO PROVIDE LOVE WITH HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL?

Love contends that his constitutional right to a speedy trial has been violated and that the indictment should therefore be dismissed. He argues that his rights have been violated based upon a review of the speedy trial factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

The Mississippi Supreme Court has held that a defendant's constitutional rights to a speedy trial must be considered under the four factors enunciated by the United States Supreme Court in *Barker*: (1) length of the delay; (2) reason for the delay; (3) whether the defendant asserted his/her right to a

speedy trial; and (4) whether the defendant was prejudiced by the delay. *McGhee v. State*, 657 So. 2d 799, 801 (Miss. 1995). No one factor is dispositive of this issue, and the totality of the circumstances must be considered. *Id.* (citation omitted); *see also Perry v. State*, 637 So. 2d 871, 874 (Miss. 1994); *Polk v. State*, 612 So. 2d 381, 385-86 (Miss. 1992).

#### (1) LENGTH OF THE DELAY

The relevant time, for constitutional rights purposes, begins to run from the date of arrest. *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989). From Love's arrest on September 11, 1992, until trial on June 15, 1994, slightly over twenty-one months elapsed. The court has said that "any delay of eight (8) months or longer is presumptively prejudicial." *Id.* Therefore, this factor favors Love. Here, the delay is sufficient to require the *Barker* balancing test and consideration of its other factors. *McGhee*, 657 So. 2d at 801 (citation omitted).

#### (2) REASON FOR THE DELAY

Delays not attributable to Love shall be counted against the state, unless the latter can provide good cause. *Vickery v. State*, 535 So. 2d 1371, 1377 (Miss. 1988). Moreover, negligence in causing delay is weighed against the state, although not heavily. *Perry v. State*, 637 So. 2d 871, 875 (Miss. 1994). The record here reveals no deliberate action or inaction to delay bringing Love to trial, nor does it indicate any negligence by the state. However, the only reason given by the state for any delays was that the police were unable to make the arrest and serve the *caus* on Love. We believe that the state has failed to provide evidence of good cause for the delays. This factor weighs against the state, albeit lightly since the state did show *some* cause for the delays.

#### (3) ASSERTION OF RIGHT TO A SPEEDY TRIAL

The state, not a defendant, bears the burden of bringing that defendant to trial in a speedy manner. *McGhee*, 657 So. 2d at 804 (citations omitted). By asserting his right to a speedy trial, a defendant gains more points under this *Barker* prong than if no request had been filed. *Jaco v. State*, 574 So. 2d 625, 632 (Miss. 1990). We believe this factor weighs slightly in favor of Love. However, this slight favor is negated by the fact that the bulk of the total delay occurred *prior* to Love's demand for speedy trial. The actual trial was held only two months and four days later.

#### (4) PREJUDICE TO THE DEFENDANT

This *Barker* factor involves two concepts: (1) actual prejudice to the defendant and the ability to defend his case; and (2) interference with a defendant's liberty interests, such as pretrial incarceration, loss of job or financial resources, family, or friends, reputation damage, and anxiety. *Perry*, 637 So. 2d at 876; *see also Polk*, 612 So. 2d at 386.

In the present case, Love contends that his defense was adversely affected because Larry Jackson was not available for trial. Although the state told Love five days prior to trial that Jackson would testify, Love himself failed to subpoena him. If Jackson's absence hindered Love's defense, it was Love's fault for not assuring his presence. Love also contends that he was prejudiced because he was out on bond and restricted to this state and, therefore, missed a writing career opportunity in Georgia. He also argued that he was forced to live with the anxiety of being charged with a felony.

However, Love has failed to prove any actual prejudice based on the delay. The fact that he was out on bond and charged with a felony *might* have affected his daily activities, but those effects were the result of his own conduct and not any delay in bringing him to trial. Moreover, Love was out on bond for most of the delay period because he was out of jail soon after his arrest. Love fails in his argument that the delay either diminished his defense or strengthened the state's case. This lack of prejudice factor weighs heavily against Love.

#### **BARKER FACTORS CONCLUSION**

Although the delay was presumptively prejudicial, we conclude that Love was not denied his constitutional right to a speedy trial. Based on the facts of this case, the totality of the circumstances, and the complete lack of prejudice to Love, the balance of the *Barker* factors falls squarely on the side of no denial of Love's speedy-trial rights.

#### **II. DID THE TRIAL COURT ERR BY ADMITTING INTO EVIDENCE AN AUDIOTAPE OF THE DRUG TRANSACTION WHERE THE CONFIDENTIAL INFORMANT WAS NOT PRESENT TO TESTIFY?**

Love argues that his objection to the introduction into evidence of the audiotaped drug transaction should have been sustained. He contends that, because Jackson's voice was on the tape, he should have had the opportunity to cross-examine Jackson at trial. Love argues that the state has failed to provide good faith evidence of its attempts to locate Jackson for trial. He finally argues that the state notified him, five days prior to trial, that Jackson would testify. He requests a new trial based on this argument.

The Mississippi Supreme Court has held that, if the circumstances dictate, the state must in good faith disclose all information in its possession regarding the identity of an informant, including that of location. *Stromas v. State*, 618 So. 2d 116, 121 (Miss. 1993) (citing *Copeland v. State*, 423 So. 2d 1333, 1335 (Miss. 1982)). The state has a duty to disclose in good faith any information it has regarding a confidential informant's whereabouts. *Id.* "The State's offer of information is presumed to be in good faith, and it is incumbent on [the defendant] to show it is otherwise." *Id.*

Here, the record indicates that the state provided evidence showing its good faith to locate Jackson up until trial. Officers Yates and Ronnie Trice testified regarding what was said on the tape and the process of audiotaping this drug transaction. Trice also testified about the state's efforts to locate Jackson. Moreover, the result is intuitive that the state provided all information it had on Jackson to Love and withheld nothing. Under *Stromas*, once the state showed good faith in trying to locate Jackson, it was incumbent upon Love to show the state's lack of good faith. Love has failed to show any lack of good faith and, therefore, that his defense was impaired. The trial court did not abuse its discretion in allowing the audiotape into evidence.

#### **III. WAS THE JURY VERDICT AGAINST THE OVERWHELMING WEIGHT AND LEGAL SUFFICIENCY OF THE EVIDENCE SO THAT THE TRIAL COURT ERRED IN DENYING LOVE'S MOTION FOR JNOV OR NEW TRIAL?**

Love argues that he was entrapped into committing the sale and that there exists no evidence of his predisposition to commit the crime. He argues that the jury verdict of guilty was against the overwhelming weight and sufficiency of the evidence.

Entrapment is the act of inducing one to commit a crime not originally contemplated so that he or she is trapped into its commission and prosecuted for it. *Bush v. State*, 585 So. 2d 1262, 1264 (Miss. 1991) (citations omitted). If the crime was already in the mind of the defendant (he or she was predisposed) and the inducement was simply an opportunity to commit what was already in mind, then entrapment is no defense. *Id.* (citations omitted). The defendant must show a prima facie case of entrapment before the state has the burden of showing a predisposition for committing the crime. *Id.* (citations omitted). A defendant is generally out of luck on appeal where a jury is instructed on entrapment and it resolves the issue against the defendant. *Id.* (citation omitted).

In the present case, Love's affirmative defense was entrapment. The state, through the audiotape and officers' testimony, showed that Love was predisposed to selling crack and that this particular occasion indicated that Love was not a novice at selling drugs. The evidence showed that Love voluntarily sold crack to Yates. The state's evidence clearly contradicted Love's version of the transaction. Additionally, the court properly instructed the jury on the entrapment defense. The jury rejected Love's defense and convicted him.

Love challenged the legal sufficiency of the evidence against him in his motion for JNOV. The Mississippi Supreme Court has stated, in reviewing an overruled motion for JNOV, that the standard of review shall be:

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Love's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

*McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993) (citations omitted).

In the present case, the evidence was legally sufficient to find that Love voluntarily sold crack cocaine to Yates. The state's witnesses testified regarding the transaction, the audiotape confirmed their testimony, and the substance tested positive as crack cocaine. The evidence consistent with the guilty verdict must be accepted as true. *Id.* Considering the elements of the crime along with all the evidence in the light most favorable to the verdict, the evidence is not such that reasonable jurors could only find Love not guilty. Here, the evidence was legally sufficient to support the finding and

jury verdict that Love was not entrapped and did sell crack cocaine to Yates. Moreover, it was also sufficient to support the trial court's denial of Love's motion for JNOV.

Love argues that the jury verdict was against the overwhelming weight of the evidence and requests a new trial. The Mississippi Supreme Court has held that "[t]he 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." *McClain*, 625 So. 2d at 781 (citations omitted); *see also Burrell v. State*, 613 So. 2d 1186, 1192 (Miss. 1993) (witness credibility and weight of conflicting testimony is left to the jury); *Kelly v. State*, 553 So. 2d 517, 522 (Miss. 1989) (witness credibility issues are to be left solely to the province of the jury). Furthermore, "the challenge to the weight of the evidence via motion for a new trial implicates the trial court's sound discretion." *McClain*, 625 So. 2d at 781 (citing *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987)). The decision to grant a new trial "rest[s] in the sound discretion of the trial court, and the motion [for a new trial based on the weight of the evidence] should not be granted except to prevent an unconscionable injustice." *Id.* This Court will reverse only for abuse of discretion, and on review will accept as true all evidence favorable to the state. *Id.*

Here, the jury heard the witnesses for and the evidence presented by both the state and the defense. The jury was within its power to weigh the evidence and the credibility of the witnesses' testimony and to convict Love. The trial court did not abuse its discretion by refusing to grant Love a new trial based on the weight of the evidence. The jury verdict was not so contrary to the overwhelming weight of the evidence that, to allow it to stand, would have been to promote an unconscionable injustice. The trial court properly denied Love's motion for a new trial.

#### CONCLUSION

Finding no error in the trial below, we affirm the jury's verdict and the trial court's sentence.

**THE JUDGMENT OF THE CIRCUIT COURT OF LEE COUNTY OF CONVICTION OF THE SALE OF A CONTROLLED SUBSTANCE AND SENTENCE TO TWELVE (12) YEARS IN A FACILITY TO BE DESIGNATED BY THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, SIX (6) YEARS SUSPENDED PENDING GOOD BEHAVIOR, AND TO PAY \$1,000 FINE, COURT COSTS, \$110 TO TUPELO CRIME LAB, AND \$120 TO TUPELO VICE NARCOTICS UNIT, IS AFFIRMED. COSTS ARE TAXED TO APPELLANT.**

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