

IN THE COURT OF APPEALS 12/29/95
OF THE
STATE OF MISSISSIPPI
NO. 93-KA-00024 COA

RICKY GREEN

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. JOHN B. TONEY

COURT FROM WHICH APPEALED: MADISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MELVIN B. COOPER

ATTORNEY FOR APPELLEE:

W. GLENN WATTS

DISTRICT ATTORNEY: JOHN KITCHENS

NATURE OF THE CASE: CRIMINAL-SALE OF COCAINE

TRIAL COURT DISPOSITION: DEFENDANT CONVICTED AND SENTENCED TO FOUR
YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND
PAY COURT COSTS AND ASSESSMENTS

BEFORE THOMAS, P.J., BARBER, DIAZ, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

This is an appeal from the Circuit Court of Madison County. Ricky Green was tried and convicted of the sale of cocaine. Feeling aggrieved, Green perfected an appeal to this Court. Although Green formulated only two issues in his brief, effectively he sets out three issues in his argument: (1) the verdict is against the overwhelming weight of the evidence, (2) the evidence is not legally sufficient to support the conviction, and (3) the in-court identification of Green made by the undercover agent was impermissibly admitted due to a suggestive pre-trial identification. Finding no error, we affirm.

I.

FACTS

On April 5, 1991, Frazial Williams, a Mississippi Bureau of Narcotics (MBN) undercover agent, was requested by Canton-area narcotics officers to conduct a sting operation in locations suspected of drug trafficking. Williams was fitted with a body microphone and transmitter for surveillance. About 8:45 that night, Williams drove an unmarked car to the parking lot of the Cameron Street Grocery in Canton. Surveillance and narcotics officers, James Marlett and Jimmy Saxton, followed Williams and parked a couple of blocks away, but close enough to hear conversations over the "body mike."

Williams testified that a young, black male approached the car, came up to the driver's side window, and asked Williams what he was looking for. Williams replied, "I want to buy forty." In response, the black male reached into his pocket and handed Williams two rocks of crack cocaine for which Williams paid him \$40.00 in official state funds.

Immediately after the transaction was over, Williams, via the body mike, gave the surveillance officers a physical description of the seller. He described a thin, black male, approximately eighteen or nineteen years old, wearing a black cap, a black T-shirt, and white shorts. Within two minutes, the officers drove through the area and observed a black male fitting the description given by Williams. Officer Marlett identified the suspect as being Ricky Green. Green was not arrested at that time in order that Williams could continue to make undercover drug buys in the area. Green was subsequently arrested on June 27, 1992.

II.

SUFFICIENCY OF THE EVIDENCE

Here we are considering whether or not the record evidence is sufficient to support a conviction for the sale of cocaine. The Mississippi Supreme Court provides the standard for reviewing a sufficiency of the evidence question:

[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 [Green'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 . . . 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).

A review of the record reveals that the evidence shows that a young, black male wearing a black cap, a black T-shirt, and white shorts sold two rocks of crack cocaine to MBN agent Frazial Williams on April 5, 1991. Within two minutes of the sale, Officer Marlett saw the black male in the vicinity fitting that description and immediately identified him as Ricky Green. At trial, Williams identified Green as the man who sold him cocaine that night. Marlett also identified Green as the man he saw in the area fitting the description that Williams gave. We find that there was, in fact, sufficient evidence to sustain the conviction; therefore, this issue has no merit.

III.

THE WEIGHT OF THE EVIDENCE

Green next argues that the verdict of the jury was against the overwhelming weight of the evidence. The issue of whether or not a verdict is against the overwhelming weight of the evidence is first presented to the trial court via a motion for a new trial. *Wetz v. State*, 503 So. 2d 803, 812 (Miss. 1987). Such a motion for new trial is within the sound discretion of the trial court and should only be granted when the trial court is "convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice." *Wetz*, 503 So. 2d at 812 (citations omitted). In our review, we must accept as true the evidence favorable to the State and reverse only if we find that the trial court has abused its discretion in denying the motion. *Smith v. State*, 646 So. 2d 538, 542 (Miss. 1994)

Green makes several arguments concerning the unreliability of the in-court identifications of both Williams and Marlett. However, the jury is the sole judge of the credibility of the witnesses and the weight to which each witness' testimony is given. *Odom v. Roberts*, 606 So. 2d 114, 118 (Miss. 1992). Accepting as true the evidence favorable to the State, we do not find that the trial court abused its discretion in denying Green's new trial motion.

IV.

IMPROPER IN-COURT IDENTIFICATION

In his brief, Green sets out his second issue as an argument against the in-court identification of Green by Williams and Marlett. However, the majority of that argument deals with issues of weight and sufficiency of the evidence, which we have already dealt with. The only part of that argument that properly addresses the issue of improper in-court identification revolves around agent Williams. Green notes that over eighteen months had passed since the date of the crime before the case came on for trial. Williams testified that he had to refresh his memory of the events of April 5, 1991, by

looking at his notes and the arrest file. In this file, there was a picture of Green after he was arrested. Green argues that this pretrial viewing of his picture by Williams was so suggestive as to lead to Williams' misidentification of Green at trial.

In *York v. State*, 413 So. 2d 1372 (Miss. 1982), the Mississippi Supreme Court discussed at length the ills of both in-court and out-of-court identifications. The Court held that the decisions in Mississippi have been guided primarily by *Neil v. Biggers*, 409 U.S. 188 (1972). *York*, 413 So. 2d at 1380. The *Biggers* Court held that it was permissible to allow an in-court identification in the wake of a suggestive out-of-court identification, *unless* the pretrial procedure produced "a very substantial likelihood of irreparable misidentification." *York*, 413 So. 2d at 1381 (quoting *Biggers*, 409 U.S. at 198)(emphasis added). The Mississippi Supreme Court has also adhered to the "*Biggers* factors" in determining the likelihood of a misidentification. *York*, 413 So. 2d at 1381 n.10. These factors include:

[T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Biggers, 409 U.S. at 199.

Williams had sufficient opportunity to view Green, because Green came right up to the driver's window of Williams' car. Williams was able to see Green face-to-face at a very close distance, and although it was night, there was a street light in the parking lot where Williams was parked. Because of the focus of Williams' activities on the night in question, it is reasonable to assume that his degree of attention to Green's physical characteristics would have been higher than would normally be expected in a brief chance encounter. There is nothing in the record to suggest that anything detracted from Williams' attention on Green at the time of the sale. Williams' prior description of Green was detailed and accurate. Williams indicated at trial that he was certain that Ricky Green was the man who sold him cocaine on April 5, 1991. The only negative factor is the length of time between the crime and the in-court confrontation. Nevertheless, we find that this passage of time, in and of itself, is not enough render Williams' in-court identification of Green sufficiently suspect as to require its exclusion. Therefore, under the rationale and factors in *Biggers* and *York*, the trial court did not err in allowing Williams' in-court identification to be admitted.

Finding no merit in any of Green's issues on appeal, we affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF MADISON COUNTY OF THE CONVICTION OF THE SALE OF COCAINE AND SENTENCE OF FOUR (4) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS OF THE APPEAL ARE ASSESSED TO MADISON COUNTY.

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