

**IN THE COURT OF APPEALS 03/25/97**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-01048 COA**

**MAURICE JOHNSON**

**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. GRAY EVANS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF LEFLORE COUNTY

ATTORNEY FOR APPELLANT:

RICHARD A. SMITH

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

NATURE OF THE CASE: CRIMINAL - SALE OF COCAINE

TRIAL COURT DISPOSITION: FOUND GUILTY AND SENTENCED TO THIRTY YEARS IN  
THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE THOMAS, P.J., PAYNE, AND SOUTHWICK, JJ.

## SOUTHWICK, J., FOR THE COURT:

The appellant, Maurice Johnson, was convicted after a jury trial for the sale of cocaine. He argues on appeal that the trial court erred: (1) in not allowing him to ask leading questions during the direct examination of a police officer; (2) in denying his motion to hear two audio tapes before ruling on the admissibility of the tapes; (3) in restricting his attempted impeachment of an informant's prior bad acts; (4) in allowing in-court identification testimony without testing for pre-trial tainting; (5) in implementing sentencing guidelines and abolishing plea bargaining without supreme court approval; and (6) in denying his proposed jury instruction. Finding all of Johnson's issues without merit, we affirm.

## FACTS

On April 13, 1992, after a pre-buy meeting with a Mississippi Bureau of Narcotics agent and a Greenwood police officer, a confidential informant traveled to Maurice Johnson's home. While the agents were parked a short distance away, Johnson walked to the passenger side of the informant's automobile and entered the car. The informant's automobile "made the block" and returned to Johnson's residence. During the drive and while the agents monitored the automobile, Johnson sold one-eighth of an ounce of cocaine to the informant.

## DISCUSSION

### *1. Leading questions by appellant on direct examination*

After the State rested, the appellant called the police officer to the stand to ask about the pre-buy meeting. The State objected to the leading nature of the questions. Johnson's attorney made no argument at trial regarding the legal justification or the factual necessity of leading this witness. On appeal Johnson claims that the search at the pre-buy meeting bore directly upon whether the informant could have planted evidence in his car to frame Johnson for the informant's own benefit. He also argues that Rule 611 of the Mississippi Rules of Evidence gives him express authority to lead any witness "identified with an adverse party."

While a party may lead any witness "identified with an adverse party," Miss. R. Evid. 611(c), the party calling the witness is responsible for invoking the "identified with an adverse party" prong of Rule 611(c). *Harris v. Buxton T.V., Inc.*, 460 So. 2d 828, 833 (Miss. 1984). The informant in this case indeed may have been "identified with an adverse party," but Johnson failed to assert his position at trial. The supreme court has held that "a trial court is not put in error unless it had an opportunity to pass on the question." *Oates v. State*, 421 So. 2d 1025, 1030 (Miss. 1982) (*citing Boutwell v. State*, 165 Miss. 16, 143 So. 479 (1932)). Since Johnson failed to provide the trial court with an opportunity to consider his position, his argument is waived.

### *2. Denial of motion to determine quality of tape recordings*

The appellant claims that the trial court had a duty to listen to the audio tapes of the drug sale *in camera* to determine if they were audible, relevant, and authentic. In fact, the tapes were audible. Johnson's argument focuses on the risk of having a possibly flawed tape played for the jury, and the

inability of correcting prejudice that then results. In this case, the concerns were not realized. The supreme court has held that a tape recording of a drug sale with only marginal probative value outweighed the prejudice from its inaudibility. *Middlebrook v. State*, 555 So. 2d 1009, 1013 (Miss. 1990). Furthermore, the trial judge has broad discretion over the admissibility of evidence and will only be reversed for an abuse of discretion.

In this case, Johnson speculates over what "might have gone wrong." Under *Middlebrook*, even a serious audibility problem does not compel exclusion of the tape. Even though the tape did not have the defects Johnson argues that it could have had, Johnson wants us to reverse because the trial judge did not know that to be so prior to ruling on admissibility. Risks that were not realized do not require reversal.

### *3. Attempted impeachment of the informant by prior bad acts*

The appellant argues that the trial court erred in denying him an opportunity to cross-examine the informant about his purchase of a car by fraudulent means. He also claims that the trial court incorrectly ruled his attempts to use a car salesman to impeach the informant's veracity as irrelevant and immaterial.

"Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility . . . may not be proved by *extrinsic evidence*." Miss. R. Evid. 608(b) (emphasis added). Testimony from the car salesman would have been extrinsic evidence.

Johnson was also barred from cross-examining the informant about his alleged fraudulent purchase of a car. Rule 608 states that specific instances of a witness's conduct

may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness . . .

M.R.E. 608 (b). This gives the trial judge broad discretion over whether or not an issue is probative of truthfulness for Rule 608(b) purposes. *Brent v. State*, 632 So. 2d 936, 943 (Miss. 1994). The court in *White v. State* found no "improper restraint" where the defense was attempting to impeach on a collateral matter. *White v. State*, 532 So. 2d 1207, 1217 (Miss. 1988). "A witness may only be impeached on a statement which embodies 'a fact substantive in its nature and relevant to the issue made in the case'." *Id.* (quoting *Williams v. State*, 73 Miss. 820, 824, 19 So. 826, 827 (1896)).

The trial judge was within his discretion to prohibit questions regarding whether this witness engaged in deceitful conduct in a totally unrelated purchase of an automobile.

### *4. Identification testimony without testing for pre-trial tainting*

At trial, just prior to a witness answering whether she knew Johnson, Johnson's attorney asked for a side-bar conference with the assistant district attorney and the court. The attorney requested that he be permitted to voir dire the witness on whether the identification was tainted by "any showups or otherwise anything that's been done between the time of the arrest until now. . ." There never was an objection to the identification, and in fact Johnson's attorney agreed that he did not want the assistant district attorney asking the witness why she knew Johnson. Prior to two other witnesses' identifying

Johnson, the defense counsel said words to the effect that he was making the "same objection as before." In fact, there was no objection on the first identification, just a brief conference at the bench.

There is no evidence and at best only after-trial speculation that there could have been a show-up at which time the police and certain individuals identified Johnson. In fact, these witnesses appeared to have known Johnson for reasons defense counsel did not want explained.

Speculation about an "improper show-up" cannot form the basis for reversal.

#### 5. *Sentencing guidelines*

Johnson argues that the Fourth Judicial District implemented sentencing guidelines and abolished plea bargaining without supreme court approval. He claims that these guidelines affected his decision to go to trial and subsequently his ultimate sentence. The basis of Johnson's argument starts with Rule 83 of the Mississippi Rules of Civil Procedure. It provides that all local rules and amendments must be approved by the Mississippi Supreme Court. Miss. R. Civ. 83. However, the guidelines used by the trial court in this case were merely suggested procedures or guidelines that were not binding on the trial judge. Nothing in the plain language of Rule 83 prevents the court from establishing guidelines in order to promote consistency. Therefore, as long as the guidelines suggest sentences within the statute and as long as the trial judge uses his own discretion to make independent decisions, they are not violative of Rule 83.

Regardless, Johnson made no objections to these sentencing guidelines during the trial or sentencing. The supreme court has stated that "[i]n the absence of a timely objection, the defendant is procedurally barred from asserting the alleged error on appeal." *Fleming v. State*, 604 So. 2d 280, 294 (Miss. 1992) (citing *Lambert v. State*, 518 So. 2d 621, 625 (Miss. 1987)). Furthermore, "[t]here is no constitutional right to plea bargain." *Allman v. State*, 571 So. 2d 244, 254 (Miss. 1990) (quoting *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977)).

#### 6. *"Mere suspicion" jury instruction*

Johnson claims that the trial court erroneously refused his jury instruction which in part stated: "no Jury should nor has the right to convict the Defendant, Maurice Johnson, of the crime of sale of cocaine upon mere suspicion." The appellant relies upon *Gandy v. State* for his proposition that the "mere suspicion" instruction should have been presented to the jury. *Gandy v. State*, 438 So. 2d 279, 284 (Miss. 1983). However, the supreme court in *Gandy* upheld the trial court's refusal to grant the "mere suspicion" instruction. *Id.* The court stated: "Taken as a whole, the instructions given the jury made it abundantly clear that the jury was not to base its verdict on suspicion or conjecture." *Id.* *Gandy* is not authority for reversal here.

The supreme court has also held that "all instructions are to be read together and if the jury is fully and fairly instructed by other instructions the refusal of any similar instruction does not constitute reversal error." *Laney v. State*, 486 So. 2d 1242, 1246 (Miss. 1986). That is what occurred here.

**THE JUDGMENT OF THE LEFLORE COUNTY CIRCUIT COURT OF CONVICTION OF SALE OF COCAINE AND SENTENCE TO SERVE 30 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS**

**APPEAL ARE TAXED TO APPELLANT.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING,  
AND PAYNE, JJ., CONCUR.**