

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 1999-KA-01726-COA**

JOHNNY CAIN LOTT

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF TRIAL COURT JUDGMENT: 10/15/1999

TRIAL JUDGE: HON. ROBERT G. EVANS

COURT FROM WHICH APPEALED: SIMPSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: DANIEL DEWAYNE WARE

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: EDDIE H. BOWEN

NATURE OF THE CASE: CRIMINAL - FELONY

TRIAL COURT DISPOSITION: COUNT I - TRANSFER OF MORPHINE WITHIN 1500 FEET OF A PUBLIC PARK; AND COUNT II - TRANSFER OF HYDROCODONE WITHIN 1500 FEET OF A PUBLIC PARK SENTENCED TO SERVE AS TO COUNT I - A TERM OF 10 YEARS IN MDOC, AS TO COUNT II - A TERM OF 10 YEARS IN MDOC, SENTENCES TO RUN CONCURRENTLY.

DISPOSITION: AFFIRMED - 10/16/01

MOTION FOR REHEARING FILED:

CERTIORARI FILED:

MANDATE ISSUED: 11/27/2001

BEFORE KING, P.J., LEE, AND CHANDLER, JJ.

CHANDLER, J., FOR THE COURT:

¶1. Johnnie Cain Lott was convicted in the Circuit Court of Simpson County of two counts of transferring morphine and hydrocodone, Schedule II controlled substances, within 1500 feet of a public park. Lott was sentenced to ten years imprisonment on each count. The trial judge ordered the sentences to run concurrently. Lott cites the following issue on appeal:

WHETHER THE CIRCUIT COURT ERRED IN DENYING LOTT'S MOTION FOR A DIRECTED VERDICT.

Finding no merit, we affirm.

FACTS

¶2. On April 22, 1998, L.C. Cheeks, a narcotics agent, and Lewis Young, a confidential informant, drove to McNair Springs Park to meet Johnnie Cain Lott. Young, who was acquainted with Lott, arranged the meeting so Agent Cheeks could obtain evidence that Lott was engaged in the practice of selling illegal prescription drugs.

¶3. When they arrived at the park, Agent Cheeks and Young remained in the car while Lott and Lott's wife drove along beside them. Young introduced Lott to Agent Cheeks, and Agent Cheeks told Lott that he wanted to buy some morphine tablets. Lott told Agent Cheeks that he only had two morphine tablets, but said he had some lorcet tablets "to get rid of." Agent Cheeks purchased the morphine tablets from Lott for \$130. Young then told Lott that Agent Cheeks had an additional \$300 to spend and wanted to buy more drugs. Lott said he would contact his source in one hour and instructed Agent Cheeks and Young to call him after that time to let him know which drugs they wanted to buy. At this point the conversation ended. Agent Cheeks nor Young had any further conversations with Lott. An audiotape of the above transaction was introduced into evidence.

¶4. At trial, Lott claimed that he was entrapped. He testified that he and Young were close acquaintances and that he had previously sold drugs for Young. Lott also testified that he had performed odd jobs for Young and that Young gave him cocaine as payment. Lott argued that Young supplied the drugs sold to Agent Cheeks. He testified that Young instructed him not to divulge the source of the drugs to Agent Cheeks because Agent Cheeks would expect a special price if he knew Young was the supplier because the two men were old friends.

¶5. Lott's mother and a friend testified on his behalf. Both admitted that Lott used drugs, but denied having any knowledge that Lott sold drugs. On cross-examination, Lott admitted he had been indicted on two other charges for selling illegal drugs. Agent Cheeks testified that he saw Lott at another illegal drug transaction and that he observed Lott at a house during a drug raid.

LAW AND ANALYSIS

DID THE CIRCUIT COURT ERR IN DENYING LOTT'S MOTION FOR A DIRECTED VERDICT?

¶6. Lott argues that the trial judge erroneously denied his motion for a directed verdict because Lott presented undisputed evidence of entrapment. Lott contends that the State did not rebut his testimony that Young supplied him with the drugs sold to Agent Cheeks. Lott also argues that the State did not establish that he had a predisposition to commit the offense. Lott claims that this was a classic "supply and buy" scenario which has been condemned by the Mississippi courts because it constitutes entrapment.

¶7. Our entrapment law is well settled. Entrapment is "the act of inducing or leading a person to commit a crime not originally contemplated by him, for the purpose of trapping him for the offense." *Walls v. State*, 672 So. 2d 1227, 1229 (Miss. 1996). Entrapment is an affirmative defense which the defendant must prove. Before the defendant may raise the defense, he must show evidence that the government induced him to commit the criminal act, and that he was not predisposed to engage in the criminal act before contact with the government agents. *Id.* A defendant is considered predisposed if he is "ready and willing to commit the crimes such as are charged in the indictment, whenever opportunity was afforded." *Moore v. State*, 534

So.2d 557, 559 (Miss. 1988). If the accused is predisposed to committing the criminal act, his defense will fail. *Id.*

¶8. When a defendant alleges that the law enforcement officers supplied the drugs used in the drug transaction, prosecutors must have rebuttal evidence at hand to refute such testimony. *Pulliam v. State*, 592 So. 2d 24, 27 (quoting *Gamble v. State*, 543 So. 2d 184, 185 (Miss. 1989)). The State successfully rebutted Lott's "supply and buy" claim. Lott's claim that the confidential informant was also the supplier is contradicted by the testimony of Agent Cheeks and the audio-tape of the transaction. Lott clearly told the confidential informant and Agent Cheeks that he would "have to call his source," which strongly implies that his source was not present at the transaction. The State also offered evidence to show that Lott was predisposed to this crime. Specifically, Agent Cheeks testified that he saw Lott at another drug transaction and at a house raid. Lott also admitted on the stand that he had been indicted for two other drug sales.

¶9. Sufficiency questions are raised in motions for directed verdict and in JNOV motions. *McClain v State*, 625 So. 2d 774, 778 (Miss. 1993). Where a defendant moves for JNOV or a directed verdict, the trial court considers all of the credible evidence consistent with the defendant's guilt, giving the prosecution the benefit of all favorable inferences that may be reasonably drawn from this evidence. *Id.* This Court is authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence is such that reasonable and fair minded jurors could not find the accused guilty. *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987). Accepting all credible evidence consistent with Lott's guilt as true, we find there was sufficient evidence to support the conviction and Lott did not establish the defense of entrapment.

¶10. THE JUDGMENT OF THE SIMPSON COUNTY CIRCUIT COURT OF CONVICTION OF COUNT I TRANSFER OF MORPHINE WITHIN 1,500 FEET OF A PUBLIC PARK AND SENTENCE OF TEN YEARS; COUNT II TRANSFER OF HYDROCODONE WITHIN 1,500 FEET OF A PUBLIC PARK AND SENTENCE OF TEN YEARS, ALL TO BE SERVED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH SENTENCES TO RUN CONCURRENTLY IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

McMILLIN, C.J., KING, P.J., BRIDGES, LEE, AND MYERS, JJ., CONCUR. IRVING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY SOUTHWICK, P.J., AND THOMAS, J. BRANTLEY, J., NOT PARTICIPATING.

IRVING, J., DISSENTING:

¶11. With due respect for the majority, I must respectfully dissent from its finding that the State successfully met its burden to rebut Lott's testimony that the drugs he was convicted of selling were supplied by the confidential informant, Lewis Young, who did not testify in this case. It necessarily follows, that I believe the trial court committed reversible error when it denied Lott's motion for a directed verdict and that the majority perpetuates the error by affirming the decision of the trial court.

¶12. Lott testified that he was a drug addict who, from time to time, did odd jobs for Young in order to support his drug habit. According to Lott's testimony, Young, a convicted drug dealer, sometimes paid him in cash for the odd jobs, while at other times he would pay him with drugs, specifically cocaine.

¶13. Lott testified that Young provided him with the drugs to sell to Agent Cheeks. Lott further testified that Young gave specific instructions to him regarding how to handle the sale to Cheeks. The record contains the following relevant testimony on this point:

Q. Okay. Now, let me ask you about Mr. Young. Did he [Young] ever ask you to deal drugs for him?

A. Not as far as the cocaine he didn't, but he asked me to sell the narcotics he had. He said because if the people -- the guy, I take it, was L. C. Cheeks was supposedly a guy he went to school with is what he told me and that if he knew they was [sic] his drugs, he wouldn't be able to get top dollar for them and to not mention anything about cocaine or crack cocaine around him.

MR. FORTENBERRY: Judge, I would object to the relevance and any hearsay.

THE COURT: Well, avoid the hearsay, but I think its relevant enough.

BY MR. WARE:

Q. Okay. Mr. Lott, let's talk about the alleged offense we are talking about today. All right. Do you remember when the alleged transaction took place on April 22nd, 1998?

A. Yes, sir.

Q. Okay. Where had you been that day?

A. Me and my wife -- we had both been to Lewis -- I believe it was the Exxon station and he said that his friend -- because he had done got my younger brother, the one in the wheelchair and his step brother, he had done got them to do it a time or two. And he said Cain --

MR. FORTENBERRY: Object to hearsay.

THE COURT: I'm going to let him answer that since it involves the C.I. Go ahead.

A. He said -- he said, "Here's you a chance to make you some cocaine." He said, "I need you to do this for me. That way we can stay slick on all of our stuff." And I said, "Well, what is it you want to do?" And he had the two morphines and the fourteen Lorcet 10s, and he said, "I'll call you in a little bit and tell you where to meet me at. I'll have the guy with me who's wanting to buy them."

Q. What happened next?

A. Me and my wife -- I forget if it was at my brother's house or my house -- but anyway, went home, because we stayed, you know, in both places. And he called, which wasn't too much longer after we had met him, and said to meet him at McNair Springs at 4:30.

Q. With what?

A. With the pills that he had brought and said not to take less than \$130.00 for them and that after the transaction was made, he would come back by the house and bring us our cocaine and pick the money up, which he did.

* * * *

Q. Now, why was Lewis saying you need to make the transfer instead of him since he was right there in the truck?

A. He was saying that his friend he went to school with -- because that's what I knowed [sic] him as. Mr. Cheeks -- I knowed [sic] him as really a guy that Lewis went to school with in Yazoo City and that if he knew they were Lewis' or coming from Lewis that he would want Lewis to give them to him at a cheaper price.

Q. All right. Did you get the money from Mr. Cheeks?

A. Yeah.

Q. What did you do with the money?

A. I held it until Lewis come pick it up.

Q. So, did you ever financially benefit from it?

A. No.

Q. You never kept any of the money?

A. No.

Q. Well, what would Lewis do for you for doing all of this stuff?

A. It was usually fifty to a hundred dollars' worth of crack, rock cocaine.

¶14. Clearly this testimony by Lott established, unless rebutted by the State, that the drugs he sold to Agent Cheeks were supplied to him by confidential informant Lewis Young. The majority finds that the State successfully rebutted Lott's assertion that the drugs were supplied by the confidential informant. This is what the majority says:

The State successfully rebutted Lott's "supply and buy" claim. Lott's claim that the confidential informant was also the supplier is contradicted by the testimony of Agent Cheeks and the audio tape of the transaction. Lott clearly told the confidential informant and Agent Cheeks that he would "have to call his source," which strongly implies that his source was not present at the transaction. The State also offered evidence to show that Lott was predisposed to this crime.

Majority Opinion at page 4.

¶15. I agree with the majority that evidence of Lott's predisposition to sell drugs was presented to the jury. However, in my judgment, there is no basis in the record of this case to find or conclude that Lott's story as to the source of the drugs was rebutted by the State; neither Agent Cheeks nor Officer Crawford did, or could, rebut Lott's story. That had to be done by the confidential informant who did not testify during the trial. The majority reads far too much into Lott's recorded statement that he had to call his source. Given Lott's testimony at trial, it does not follow that this recorded statement was a reference to someone other than Lewis Young.

¶16. There is ample authority in this State that in "supply and buy" cases, the State's failure to rebut the defendant's testimony that the contraband was supplied by an agent of the State entitles the defendant to a directed verdict. *Bosarge v. State*, 594 So. 2d 1143, 1146 (Miss. 1991); *Gamble v. State*, 543 So. 2d 184, 185 (Miss. 1989); *Jones v. State*, 285 So. 2d 152, 158-60 (Miss. 1973). Therefore, because the State failed to rebut Lott's testimony that the contraband was supplied to him by Lewis Young, a convicted drug dealer and confidential informant for the State, I would reverse and render Lott's conviction.

SOUTHWICK, P.J., AND THOMAS, J., JOIN THIS SEPARATE OPINION.