

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00324 COA

JOHNNIE MAE THOMAS

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. LOMAS LAMAR PICKARD

COURT FROM WHICH APPEALED: JEFFERSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GEORGE F. WEST, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: ALEXANDER MARTIN

NATURE OF THE CASE: SALE OF COCAINE

TRIAL COURT DISPOSITION: SALE OF COCAINE: SENTENCED TO 30 YEARS

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

PER CURIAM:

Johnnie Mae Thomas appeals her conviction of the sale of cocaine, raising the following issues as error:

I. WHETHER THE COURT ERRED IN NOT GRANTING A DIRECTED VERDICT FOR THE DEFENSE IN THAT THE STATE'S CASE WAS UNCORROBORATED AND RESTS ON THE TESTIMONY OF ONE WITNESS?

II. WHETHER OR NOT THIS COURT SHOULD REVERSE BECAUSE JOHNNIE MAE THOMAS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL?

Finding no error, we affirm.

FACTS

On January 5, 1994, Kenneth Anderson (Anderson), an undercover agent with the Mississippi Bureau of Narcotics, went to the home of Johnnie Mae Thomas (Thomas). Anderson told Thomas that he wanted to buy "two 20's," which were two twenty-dollar (\$20.00) rocks of crack cocaine. Thomas left the room and returned with two rocks of crack cocaine. In exchange, Anderson paid Thomas forty-dollars (\$40.00).

ANALYSIS

I.

WHETHER THE COURT ERRED IN NOT GRANTING A DIRECTED VERDICT FOR THE DEFENSE IN THAT THE STATE'S CASE WAS UNCORROBORATED AND RESTS ON THE TESTIMONY OF ONE WITNESS?

Although Thomas states that the trial court erred in not granting her directed verdict as the first issue, she argues in her submitted brief that the trial court also erred in denying her motions for a JNOV and new trial. Motions for a directed verdict and a JNOV challenge the sufficiency of the evidence supporting a guilty verdict. *Butler v. State*, 544 So. 2d 816 (Miss. 1989). We review the evidence on the last occasion when the Defendant challenged the sufficiency of the evidence before the trial court, at the time of Thomas's motion for JNOV. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987).

A motion for a new trial challenges the weight of the evidence rather than its sufficiency. *Butler*, 544 So. 2d at 819. New trial decisions rest in the sound discretion of the trial court, and the trial court

should not grant the motion except to prevent an unconscionable injustice. *Jones v. State*, 635 So. 2d 884, 887 (Miss. 1994) (citations omitted); *McClain*, 625 So. 2d at 781 (citation omitted). On review we accept as true all evidence favorable to the State, and we give the State the benefit of all reasonable inferences that may reasonably be drawn from the evidence. *Id.*; *Griffin v. State*, 607 So. 2d 1197, 1201 (Miss. 1992). The Court will reverse such a ruling only for an abuse of discretion. *McClain*, 625 So. 2d at 781.

Thomas argues that the lower court should have granted her motions because the confidential informant was not present to testify. The confidential informant set up the "buy," but did not witness the actual sale. Anderson, the undercover narcotics' officer, was the only person to testify and he made a positive and unequivocal in court identification of Thomas. The Mississippi Supreme Court has stated before that a defendant may be found guilty based on the uncorroborated testimony of a single witness. *Doby v. State*, 532 So. 2d 584, 591 (Miss. 1988) (citing *Ragland v. State*, 403 So. 2d 146 (Miss. 1981); *Clanton v. State*, 279 So. 2d 599 (Miss. 1973); *Holt v. State*, 186 Miss. 727, 191 So. 673 (1939)). "A jury may accept the testimony of some witnesses and reject that of others." *Doby*, 532 So. 2d at 591. "[T]he strength or weakness of testimony is not measured by the number of witnesses produced by a particular party." *Id.* (citing *Groseclose v. State*, 440 So. 2d 297 (Miss. 1983); *Bond v. State*, 249 Miss. 352, 162 So. 2d 510 (1964); *Spiers v. State*, 231 Miss. 307, 94 So. 2d 803 (1957)). The lower court has the discretionary authority to set aside the jury's verdict and order a new trial only where the court is "convinced that the verdict is so contrary to the weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice." *Roberts v. State*, 582 So. 2d 423, 424 (Miss. 1991) (citations omitted). Because there was sufficient evidence to support the jury verdict, this assignment of error is without merit.

II.

WHETHER OR NOT THIS COURT SHOULD REVERSE BECAUSE JOHNNIE MAE THOMAS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL?

Thomas cites many reasons why her counsel was ineffective. The Mississippi Supreme Court adopted the *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984), standard for evaluating ineffective assistance of counsel claims. *Eakes v. State*, 665 So. 2d 852, 872 (Miss. 1995). A defendant has to show that her attorney's performance was deficient, and that the deficiency was so substantial as to deprive the defendant of a fair trial. *Eakes*, 665 So. 2d at 872. It is required that the defendant prove both elements. *Brown v. State*, 626 So. 2d 114, 115 (Miss. 1993); *Wilcher v. State*, 479 So. 2d 710, 713 (Miss. 1985), *cert. denied*, 475 U.S. 1098 (1986). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. "[T]here is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. To overcome the presumption, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . .'"

Schmitt v. State, 560 So. 2d 148, 154 (Miss. 1990) (quoting *Strickland*, 466 U.S. at 691).

Thomas claims that her trial counsel rendered ineffective assistance because he failed to meet with her before trial, failed to prepare, and failed to call witnesses who could have presented her side of the

case and testify about her reputation, her whereabouts, and the confidential informant. Thomas does not argue or provide evidence about what facts her witnesses would have testified to about the confidential informant, who did not testify and give evidence against her. She also does not argue what her witnesses would testify to about her side of the case, her whereabouts, or her reputation. Essentially, Thomas does not meet her burden.

Assuming that the Court is unable to conclude from the record on appeal that defendant's trial counsel was constitutionally ineffective, the Court should then proceed to decide the other issues in the case. Should the case be reversed on other grounds, the ineffectiveness issue, of course, would become moot. On the other hand, if the Court should otherwise affirm, it should do so without prejudice to the defendant's right to raise the ineffective assistance of counsel issue via appropriate post-conviction proceedings.

Read v. State, 430 So. 2d 832, 841 (Miss. 1983).

After an examination of the record on appeal, this Court concludes that Thomas did not show that her counsel was constitutionally ineffective. In so holding, Thomas has the "right to raise the ineffective assistance claim via appropriate post-convictions proceedings." *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990) (citing *Read*, 430 So. 2d at 841).

THE JUDGMENT OF THE JEFFERSON COUNTY CIRCUIT COURT OF THE CONVICTION OF THE SALE OF COCAINE AND SENTENCE OF THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS ARE ASSESSED TO JEFFERSON COUNTY.

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