

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00523 COA

CHARLES FREDERICK APPLEWHITE

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. ANDREW C. BAKER

COURT FROM WHICH APPEALED: TATE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DAVID CLAY VANDERBURG

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS, JR. DISTRICT ATTORNEY: ROBERT J. KELLY

NATURE OF THE CASE: CRIMINAL

TRIAL COURT DISPOSITION: POSSESSION OF COCAINE WITH INTENT TO DELIVER,
SENTENCE 20 YRS WITH 8 YRS SUSPENDED; POSSESSION OF MARIJUANA, PAY \$250
FINE; PAY \$1,000 FINE & COURT COSTS

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

McMILLIN, P.J., FOR THE COURT:

Charles Frederick Applewhite, convicted by a jury in the Circuit Court of Tate County of possession

of cocaine with intent to deliver and possession of less than an ounce of marijuana, has appealed the cocaine-related conviction. He challenges both the weight and sufficiency of the evidence in support of the guilty verdict.

Applewhite and two companions, all traveling in Applewhite's vehicle though Applewhite was not driving, were stopped for a speeding violation. The arresting officer, upon approaching the vehicle, detected the odor of alcohol and observed an open container of beer in plain view. Applewhite had a paper bag at his feet containing two cans of beer and several packets of one-inch square plastic bags. Applewhite consented to a search of his person and his vehicle. The initial personal search of Applewhite did not produce any incriminating material, however, as Applewhite walked back towards his automobile, a small plastic bag fell from his person containing a substance that, upon inspection, appeared to be cocaine. Applewhite was arrested and subjected to a further, more thorough, search incident to his arrest. This search revealed another bag containing approximately forty rocks of crack cocaine secreted on his person. Applewhite gave a statement in which he admitted going to Memphis and purchasing about \$1,000.00 worth of drugs.

Applewhite first challenges the sufficiency of the evidence to support his conviction on the cocaine charge. Actually, he only advances the proposition that the proof on the issue of intent to distribute was insufficient, apparently hoping for a reduction of his conviction to simple possession. Proof of a defendant's intent may be, and often must be, based upon reasonable inferences drawn from circumstantial evidence. *Jowers v. State*, 593 So. 2d 46, 47 (Miss. 1992). This Court concludes that the combination of the quantity of crack cocaine discovered on Applewhite's person, the unexplained possession of a supply of small bags commonly used in the sale of crack cocaine, and the defendant's own incriminating statements concerning his sizeable investment in illicit drugs was sufficient evidence for the jury to draw a reasonable inference of an intention to distribute. The jury was given a lesser-included-offense instruction on simple possession, but elected to convict him of the greater crime. Viewing the evidence in the light most favorable to the verdict, we do not conclude that the evidence was such that reasonable and fairminded jurors could only find in favor of the defendant on the issue of intent to distribute. *See McClain v. State*, 625 So. 2d 774 (Miss. 1993).

Applewhite alternatively claims that the court erred when it denied his motion for a new trial. "A new trial should be granted only when the jury's verdict so contradicts 'the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice.'" *Pierre v. State*, 607 So. 2d 43, 54 (Miss. 1992). This Court will reverse the trial court's denial of a motion for a new trial only if the trial court abused its discretion. *Id.* We have earlier recounted the incriminating evidence presented against Applewhite. This evidence was not substantially impeached or contradicted. We cannot conclude, based on our review, that the verdict was so against the overwhelming weight of the evidence that Applewhite should have a new trial.

There being no merit to either issue raised in this appeal, we affirm the conviction.

THE JUDGMENT OF THE CIRCUIT COURT OF TATE COUNTY OF CONVICTION OF COUNT II OF POSSESSION OF COCAINE WITH INTENT TO DELIVER AND SENTENCE OF TWENTY YEARS WITH EIGHT YEARS SUSPENDED; COUNT III OF POSSESSION OF MARIJUANA LESS THAN ONE OUNCE AND FINE OF \$250 AND ORDER TO PAY ADDITIONAL FINE OF \$1,000 IS AFFIRMED. COSTS OF THIS

APPEAL ARE ASSESSED TO TATE COUNTY.

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