

**IN THE SUPREME COURT OF MISSISSIPPI
NO. 94-KA-00667-SCT**

***TONY WEATHERSBY a/k/a ANTONIO RAY
WEATHERSBY a/k/a "LOC"***

v.

STATE OF MISSISSIPPI

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

DATE OF JUDGMENT:	06/23/94
TRIAL JUDGE:	HON. R. I. PRICHARD III
COURT FROM WHICH APPEALED:	MARION COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOHN EDWARD JACKSON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL
	BY: DEWITT ALLRED III
DISTRICT ATTORNEY	RICHARD DOUGLASS
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 5/29/97
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	6/19/97

BEFORE SULLIVAN, P.J., PITTMAN AND BANKS, JJ.

PITTMAN, JUSTICE, FOR THE COURT:

STATEMENT OF THE CASE

The Appellant, Tony Weathersby a/k/a Antonio Ray Weathersby, was indicted in the Circuit Court of Marion County and charged with the sale of cocaine. On June 14, 1994, Weathersby was found guilty by a jury of his peers and was sentenced on June 23, 1994. The Honorable R. I. Prichard, III, Circuit Judge, sentenced Weathersby to a term of twenty-five years of imprisonment. Also on June 23, 1994, the court denied Weathersby's post-trial motion for j.n.o.v. or, in the alternative, a new trial. After retaining the services of a new attorney, Weathersby filed the appeal at hand.

STATEMENT OF THE ISSUES

I. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION TO REVEAL THE IDENTITY OF THE CONFIDENTIAL INFORMANT?

II. DID THE TRIAL COURT ERR IN DENYING THE MOTION FOR J.N.O.V.?

III. DID THE TRIAL COURT ERR BY DENYING THE MOTION FOR A NEW TRIAL?

STATEMENT OF THE FACTS

In January of 1994, Pearl River Basin Narcotics Task Force Agent Joey Turnage was in charge of an undercover operation targeting narcotics trafficking in the Sandy Hook area of southern Marion County. One of the individuals targeted by this operation was Tony Weathersby. Agent Jeff Wheat, an undercover officer, testified that he and a confidential informant drove to a house in the Sandy Hook community where they expected to find Tony Weathersby. The confidential informant got out of the car and knocked on the door of the house. Tony Weathersby came out of the house and approached the car with the confidential informant. Agent Wheat then exited the car and walked to the car's rear where he made the alleged cocaine purchase from Tony Weathersby. Prior to the alleged transaction, the confidential informant entered the car on the passenger's side and began to eat some food that he had purchased on the way to Sandy Hook. Wheat also testified that at the time of the transaction, he and Weathersby were approximately ten feet behind the car, and at no time did he notice the informant observing the transaction. Weathersby claims that he did not sell the drugs in question and was not in the Sandy Hook area at the time of the transaction.

ANALYSIS

I. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S MOTION TO REVEAL THE IDENTITY OF THE CONFIDENTIAL INFORMANT?

Weathersby filed a motion to reveal the identity of the confidential informant which was heard by the court on the day prior to trial. The trial judge denied the motion to reveal the identity of the confidential informant based on *Bradley v. State*, 562 So. 2d 1276, 1279-1280 (Miss. 1990), where this Court held that an informant is a material witness and the prosecution must identify him as such only if the informant is a participant in the crime or an eyewitness to the offense. In *Bradley*, the informant was not required to testify at trial because, although the informant introduced the agent to the defendant at the time of the transaction, the agent had pre-arranged with the informant for the informant not to witness the sale, and the informant, in fact, did not witness the transaction that constituted the offense. *Id.* at 1279. In the present case, the State contends that the situations are identical. The State points to the uncontradicted testimony of Agent Jeff Wheat. Agent Wheat testified that the informant knocked on the door of the house where Weathersby was thought to be located, that the informant returned to the car with Weathersby, and that at no time did he witness the informant observing the drug transaction. After considering the testimony of Agent Wheat at the

pre-trial hearing, the trial judge made a finding of fact that the informant was neither a participant nor an eyewitness to the transaction in question.

Weathersby argues that the ruling in *Bradley* does not apply to this case because the informant was both a witness and a participant to the transaction. He contends that the confidential informant had every opportunity to view the alleged transaction from his position in the car and that any reasonable person would take advantage of this opportunity. In support, Weathersby cites *Hemphill v. State*, 313 So. 2d 25, 25 (Miss. 1975), where the Court required the disclosure of the identity of the confidential informant who arranged drug purchases by an undercover agent, accompanied agent to the place of the sale, was present at the time of the sale, and left the scene with the agent. Weathersby also contends that the confidential informant's role in the transaction rose above the limited participation allowed by *Bradley*. Weathersby argues that by making the initial contact with the drug dealer, by pre-arranging the drug deal, and by facilitating the transaction, the informant's status became that of a participant in the transaction rather than that of a bystander. Furthermore, by claiming that he was not at the crime scene, Weathersby asserts that the informant is the only person, other than Agent Wheat, who can corroborate his defense. Therefore, the informant's identity must be revealed in order to allow the defense the opportunity to prove its alibi.

Since its decision in *Bradley*, the Court clarified the requirements needed to force the State to reveal the identity of an informant in *Esparaza v. State*, 595 So. 2d 418, 424 (Miss. 1992). The State need not disclose an informant's identity unless the informant will be a witness at trial or was an eyewitness to the offense, or if failure to disclose would violate a constitutional right of the defendant. *Id.*, at 424; *see also* Miss. Unif. Crim. R. of Cir. Ct. Prac. 4.06(b)(2) (1988). Failure to reveal the informant's identity violates no constitutional rights of the defendant. Although Weathersby asserts the right to confront his accuser, the informant has accused him of nothing and has made no statement to Weathersby's detriment, rather the State has made the accusation of misconduct. Since the informant did not testify in the trial, the only question before the Court is whether the informant was a witness to the criminal act itself.

The trial judge found as a matter of fact that the informant was neither a witness to nor a participant in the criminal transaction. The trial court's findings of fact are entitled to the same deference as a jury verdict. *Jenkins v. State*, 607 So. 2d 1137, 1138 (Miss. 1992). Therefore, the judge's finding should not be overturned unless manifestly wrong. *Id.*, at 1138. There is no evidence in the record to support a reversal of the trial court's decision. The cases cited by Weathersby involve informants who were present during the drug transaction and were compelled to testify by the court. *Hemphill*, 313 So. 2d at 25; *Barrett v. State*, 482 So. 2d 239, 239-240 (Miss. 1986). Therefore, those cases are irrelevant unless there is some showing that the confidential informant was a witness to the drug sale. Weathersby argues that the informant had an opportunity to view the transaction either by turning around or by looking in the car's rear view mirror. This Court has never created a presumption that any person near a crime scene with a limited opportunity to view a particular crime must be considered a witness and must be compelled to testify. As suggested by the State, this situation is very similar to the facts in *Bradley*. The undercover agent pre-arranged with the informant to leave the room when the time came for the drug deal. *Bradley*, 562 So. 2d at 1278. In the present case, Agents Wheat and Turnage pre-arranged with the informant to re-enter the car and to not witness the transaction because they knew that an informant who participates in or witnesses the crime would be forced to testify and reveal his identity.

In the pre-trial hearing on the motion to produce the confidential informant, there was no evidence of any kind introduced to directly contradict the testimony of Agent Wheat, to impeach his credibility or to link him with a conspiracy to "frame" Tony Weathersby. This Court has held that the uncorroborated testimony of an undercover agent is sufficient to secure a narcotics conviction. *Doby v. State*, 532 So. 2d 584, 590-591, (Miss. 1988).

Therefore, the trial court acted properly in denying the defendant's motion to reveal the identity of the confidential informant, and this Court finds the issue to be without merit.

II. DID THE TRIAL COURT ERR IN DENYING THE MOTION FOR J.N.O.V.?

Weathersby challenged the legal sufficiency of the evidence in a post-trial motion for j.n.o.v. The trial judge denied this motion finding it without merit. For this Court to overturn a trial judge's rejection of a motion for j.n.o.v., the evidence, considered in the light most favorable to the State, must be such that only a verdict of not guilty may be found by a reasonable and fair-minded jury. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). All evidence must be considered, not just that evidence that is favorable to the State. *Stringer v. State*, 557 So. 2d 796, 797 (Miss. 1990). The prosecution is given the benefit of all favorable inferences that may be drawn from the evidence, and matters regarding the weight and credibility of the evidence are left to the jury. *McClain*, 625 So. 2d at 778. Weathersby's arguments do not meet the standard required to reverse the trial court's decision.

The defendant did not prove that a reasonable jury, weighing the evidence presented, could only find the defendant not guilty. Therefore, the Court finds this issue to be without merit.

III. DID THE TRIAL COURT ERR BY DENYING THE MOTION FOR A NEW TRIAL?

Weathersby's final claim is that the jury verdict was against the weight of the evidence, and a new trial should be granted. He filed a motion for a new trial after the verdict was handed down, and this motion was denied by the trial judge. A new trial should only be granted if it is in the interest of justice or if the verdict is so contrary to the overwhelming weight of the evidence that to let it stand would be to sanction unconscionable injustice. *Roberts v. State*, 582 So. 2d 423, 424 (Miss. 1991). The ruling of the trial judge should only be reversed if there is a showing that the trial judge abused his discretion. *Veal v. State*, 585 So. 2d 693, 695 (Miss. 1991). As suggested by the State, there is merely a conflict in testimony between the State's witnesses and the defense's witnesses. There is no showing of abuse of discretion, of unconscionable injustice, or of a verdict contrary to the weight of the evidence.

This issue is also without merit for lack of any showing of abuse of discretion by the trial judge.

CONCLUSION

This case is a classic example of the informant privilege that the courts created to protect the identity of informants in order to secure their assistance in making arrests. Since the facts of this case did not fall into any of the exceptions which require the informant to testify, there is no reason to reveal his identity and force him to testify. The trial court conducted itself properly and there is no reason to set aside the verdict. The Court finds all issues raised by the Appellant to be without merit.

and affirms the decision of the lower court.

CONVICTION OF SALE OF CONTROLLED SUBSTANCE, SCHEDULE II (COCAINE) AND SENTENCE TO TWENTY-FIVE (25) YEARS IN THE CUSTODY OF MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH SAID SENTENCE TO COMMENCE ON JUNE 23, 1994, AND RUN FOR TWENTY-FIVE (25) YEARS FROM AND AFTER SAID DATE, AND TO TERMINATE ON JUNE 23, 2019, AFFIRMED.

PRATHER AND SULLIVAN, P.JJ., BANKS, McRAE, ROBERTS, SMITH AND MILLS, JJ., CONCUR. LEE, C.J., CONCURS IN RESULT ONLY.