

IN THE COURT OF APPEALS

7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 96-KA-00167 COA

LEE JOEL PERRYMAN A/K/A "RANDY PERRYMAN" 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. JOHN LESLIE HATCHER

COURT FROM WHICH APPEALED: COAHOMA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: RICHARD B. LEWIS

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL BY: JEAN SMITH
VAUGHAN

DISTRICT ATTORNEY: LAWRENCE Y. MELLEN

NATURE OF THE CASE: SALE OF A CONTROLLED SUBSTANCE

TRIAL COURT DISPOSITION: SALE OF A CONTROLLED SUBSTANCE, TO-WIT COCAINE: SENTENCED TO 20 YRS IN THE MDOC 5 YRS SUSPENSION OF THIS SENTENCE TO COMMENCE AFTER SERVED 15 YRS IN THE MDOC

MANDATE ISSUED: 8/19/97

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

THOMAS, P.J., FOR THE COURT:

Lee Joel Perryman appeals his conviction of sale of a controlled substance, to-wit cocaine, raising the following issue as error:

I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR DIRECTED VERDICT AND SUBSEQUENT MOTION FOR JUDGMENT NON OBSTANTE VERDICTO OR ALTERNATIVELY FOR A

NEW TRIAL SINCE THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE.

Finding no error, we affirm.

FACTS

On May 3, 1995, Lee Joel Perryman sold \$20.00 worth of crack cocaine to an undercover police officer, Nathaniel Washington. Officer Washington was given the \$20.00 to make the buy, and he was wired with a body mike. Officer Washington was searched prior to the purchase and immediately after the purchase. His vehicle was also searched before and after the purchase. He was assisted in his cocaine purchase by backup narcotics officers, Donald Wood and Billy Joe Haley.

Officer Washington testified that, although he did not know Lee Perryman, he was given a physical description and was told to look for either Lee Perryman or his brother, Luther, to make a purchase. Washington knew Luther Perryman from church, but was unfamiliar with Lee Perryman. Officer Washington was given a description of Lee Perryman to assist him. The description of Lee Perryman was that he was tall, weighing around 300 pounds, light in color, and had wild, unkempt hair.

Officer Washington proceeded to the Perryman residence around 8:00 p.m. He parked across the street underneath a light. Officer Washington got out of his vehicle, went to the Perryman home, and asked for Luther Perryman. When he was told Luther was not at home, Officer Washington started to walk back to his truck. At this time, he saw a man who fit the description given to him of Lee Perryman. Officer Washington asked Lee Perryman if his brother was home. Lee Perryman told Officer Washington that Luther Perryman was on another street. Officer Washington told Lee Perryman that he wanted to buy \$20.00 worth of crack cocaine so he could be with a girl. Lee Perryman went into his home and returned with the drugs, and Officer Washington gave Lee Perryman the money. Officer Washington returned to his vehicle and placed the crack cocaine in a

gum wrapper. He then drove to the undercover backup location and turned the drugs over to narcotics officers.

At trial, Officer Washington identified Lee Perryman as the man from whom he had purchased the cocaine. A tape of the transaction was entered into evidence by the State, and a transcription of the conversation was provided to the jury when the tape was played in court. J.C. Smiley, assistant director of the Mississippi Crime Laboratory, identified the white, rock-like substance which Officer Washington had purchased from Lee Perryman as crack cocaine.

Officer Donald Wood was a backup for Officer Washington on the night of the purchase. Officer Wood testified that he parked near the Perryman home and was standing 35-40 yards from the area where the sale occurred. Officer Wood saw the exchange of money and drugs, but he was unable to hear the conversation. After the exchange, Officer Wood left the scene and proceeded to the prearranged meeting spot. Officer Wood checked Officer Washington's person and his vehicle both before and after the drug purchase. At trial, Officer Wood identified Lee Perryman as the person from whom Officer Washington had purchased the drugs. Officer Wood had prior contact and was familiar with Lee Perryman.

Officer Billy Joe Haley was the State's final witness. Officer Haley was in charge of the surveillance. Officer Haley was parked in an alley and did not observe the actual exchange. However, he listened to the transmitter and recognized Lee Perryman's voice. Officer Haley previously had conversations with Lee Perryman and had known him for about four years. Officer Haley took the drugs from Officer Washington and field tested them. The results of the field test were not admitted into court.

At this time, the State rested and the defendant moved for a directed verdict. This motion was denied by the trial judge.

Thereafter, Perryman called his mother, Idella Perryman. Mrs. Perryman testified that Lee Perryman left on April 30, 1995 for a trip to St. Louis, Missouri, and was, therefore, not in town on the night of May 3, 1995. She stated that Lee Perryman went to St. Louis to visit his girlfriend. She also testified that she was sitting inside the house on May 3, 1995, when Officer Washington made the drug purchase. She stated that she was unaware of Officer Washington's presence at her home on May 3, and would have heard him if, in fact, he was present at the home.

Clifton Perryman, a nephew, was next to testify. He testified that he was in St. Louis on April 30, 1995, and saw Lee Perryman in St. Louis. Clifton Perryman returned to Mississippi the following day by bus, but was unable to produce proof of his trip to Mississippi on the bus.

Lela Ann Perryman, the defendant's sister, testified she also was in St. Louis and saw her brother at his girlfriend's house in St. Louis. She further testified that Lee Perryman remained in St. Louis until a couple of days before she left to go home on May 11, 1995. She also testified that Lee Perryman sold a car on May 3, 1995 in St. Louis and had used the money to bond a friend out of jail on the 10th of May.

John Ratliff testified that he had driven Perryman to St. Louis to see his girlfriend around the end of April, 1995. He testified that he and Lee Perryman were still in St. Louis on May 3, 1995, because Ratliff was arrested on May 5th or 6th of 1995, and bonded out the 6th or 7th day of May.

Lucy Perryman, another sister of Lee Perryman, testified that she was outside the house on May 3, 1995, when Officer Washington came to the house. She stated that Officer Washington asked for the drugs, and it was her cousin, Robert Gaither, who gave the drugs to Officer Washington. She testified that Lee Perryman was not in town at the time of the drug sale.

Lee Perryman testified on his own behalf and stated that he was in St. Louis on May 3, 1995, visiting his girlfriend. He asserted that he had sold a car on May 3, 1995, and had a receipt for the sale of the car. The receipt was entered into evidence, however; it was a faxed copy of a handwritten note with no date, model or vehicle identification number.

ANALYSIS

I.

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR DIRECTED VERDICT AND SUBSEQUENT MOTION FOR JUDGMENT NON OBSTANTE VERDICTO OR ALTERNATIVELY FOR A NEW TRIAL SINCE THE VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE.

Perryman argues that the circuit court erred in denying his motion for directed verdict at the close of the State's case. Since Perryman put on proof after the State rested, his challenge to the sufficiency of the evidence must be considered in light of "the evidence before the court . . . on the last occasion when the sufficiency of the evidence was challenged before the trial court." *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993); *Wetz v. State*, 503 So. 2d 803, 807-08 n.3 (Miss. 1987). "A defendant waives the appeal of an overruled motion for a directed verdict made at the end of the state's case when the defendant chooses to go forward with its case." *Esparaza v. State*, 595 So. 2d 418, 426 (Miss. 1992) (citing *Wetz*, 503 So. 2d at 808). Put another way, the motion for a directed verdict is a procedural vehicle[] for challenging the sufficiency of the case for the prosecution. . . . When the sufficiency of the evidence is challenged on appeal, this Court properly should review the Circuit Court's ruling on the last occasion when the sufficiency of the evidence was challenged before the trial court. Here, of course, that was when the Circuit Court overruled the motion for a new trial. . . .

Wetz, 503 So. 2d at 807-08 n.3.

Since Perryman went forth with his case, he is procedurally barred from raising the denial of his directed verdict at the end of the State's case. However, like a motion for a directed verdict, a JNOV challenges the sufficiency of the evidence supporting a guilty verdict. *Butler v. State*, 544 So. 2d 816, 819 (Miss. 1989). Since Perryman did move for a JNOV, we review the evidence on the last

occasion when Perryman challenged the sufficiency of the evidence before the trial court, at the time of his motion for JNOV. *McClain*, 625 So. 2d at 778; *Wetz*, 503 So. 2d at 807-08.

Perryman argues that the lower court should have granted his motion because all the evidence

presented on his behalf shows he was in St. Louis on May 3, 1995, and that Officer Washington bought the drugs from another individual. Perryman asserts that Officer Washington had a very general description of Perryman, and that Officer Washington purchased the drugs from Robert Gaither. What Perryman fails to recall is that Officer Washington identified Perryman in court as the man from whom he purchased the drugs. Perryman was also identified in court by Officer Wood, Officer Washington's backup, as the person who sold the drugs to Officer Washington. Also, Officer Haley, being familiar with Perryman, identified Perryman's voice as the one he heard over the transmitter during the drug transaction.

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). Based on the record before us, there was sufficient evidence to support the jury's verdict; this assignment of error is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF COAHOMA COUNTY OF CONVICTION OF SALE OF A CONTROLLED SUBSTANCE AND SENTENCE OF TWENTY (20) YEARS WITH FIVE (5) YEARS SUSPENDED IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF FIVE THOUSAND DOLLARS (\$5,000) AND FORFEITURE OF HIS DRIVER'S LICENSE FOR SIX MONTHS IS AFFIRMED. THE SENTENCE IMPOSED IN THIS CAUSE SHALL RUN CONSECUTIVE TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED. ALL COSTS OF THIS APPEAL ARE TAXED TO COAHOMA COUNTY.

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