

IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00790 COA

RANDY BRASSELL A/K/A

RANDY ANDERSON BRASSELL 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 CLEVELAND BAKER

COURT FROM WHICH APPEALED: PANOLA COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT: DAVID L. WALKER

JOHN DAVID WEDDLE

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: MICHAEL HORAN

NATURE OF THE CASE: CRIMINAL-FELONY

TRIAL COURT DISPOSITION: SALE OF A CONTROLLED SUBSTANCE, TO-WIT
COCAINE: SENTENCED TO SERVE 20 YRS IN THE MDOC WITH LAST 8 YRS
SUSPENDED, LEAVING 12 YRS TO SERVE; \$2500 FINE

MANDATE ISSUED: 9/30/97

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

SOUTHWICK, J., FOR THE COURT:

Randy Brassell was convicted in the Circuit Court of Panola County of sale of a controlled substance. He was sentenced to twenty years with the last eight years suspended, and he was ordered to pay a fine of \$2500. Brassell appeals, arguing that the trial court erred in admitting into evidence a tape recorded telephone conversation, that the court erred in denying his motion for a new trial, and that the court erred in denying his request for a peremptory instruction. Finding no reversible error, we affirm.

FACTS

On or about August 1, 1994, Narcotics Agent Kathleen Hoyt told David Smith, a confidential informant, to attempt to buy some crack cocaine. Smith paged Randy Brassell. Randy's brother, Hicks Brassell, returned the page. In a tape recorded telephone conversation, Smith told Hicks that he had someone who wanted to buy an eight ball of cocaine. Hicks told Smith that he had some and that it was okay "to come down," meaning to come to his house.

Smith and Agent Hoyt went to the home of the two brothers. Smith told Randy Brassell, who was standing in the yard, that he had someone who "wanted to spend a hundred dollars." Randy, having never seen Agent Hoyt, did not want to sell the cocaine in front of her. Randy gave a package to his brother, who walked around to the side of the house and gave it to Smith. The package was later identified as cocaine.

The grand jury indicted Randy Brassell on two counts: Count I was for conspiracy to sell a controlled substance, and Count II was for sale of a controlled substance. At a trial in Panola County, the court directed a verdict for the defendant on Count I, and Count II was submitted to the jury. The jury found Randy Brassell guilty of sale of a controlled substance.

DISCUSSION

I. *Hearsay*

At trial, an audio tape was introduced into evidence under the mistaken belief that it contained a telephone conversation between Smith, the informant, and Randy Brassell, the defendant. When the defendant realized that the voice actually belonged to his brother, Hicks Brassell, he objected to its admission. He argued that the tape's admission denied his constitutional right to cross-examine a witness against him, in that Hicks was not available to testify at trial and be cross-examined. In fact, Hicks was a fugitive at the time of trial.

Upon review of the tape and its transcript, we do not find that the use of the conversation at trial invoked hearsay principles. A statement cannot be hearsay if it was not offered to prove the truth of the matter asserted. M.R.E. 801(c). If the significance of a statement is simply that it was made, then the statement is not hearsay. *Gayten v. State*, 595 So. 2d 409, 414 (Miss. 1992). The tape was offered to prove that the telephone conversation took place. This brief conversation explained to the jury why the undercover officer and the informant went to purchase cocaine. Whether anyone on the tape intended to sell cocaine is irrelevant. What was relevant is that Hicks Brassell, not his brother, the defendant Randy Brassell, said that the informant and the undercover policewoman could come to him to make the purchase. The informant testified without objection to the same information as on the tape -- that the call was made, that the undercover policewoman agreed to pay \$100, and that Hicks Brassell said that the two could come see him to make the purchase.

The question of whose voice was on the tape, the defendant's or his brother's, was clear to the jury after David Smith testified that it was Hicks Brassell and not Randy Brassell on the tape.

The tape was admissible.

II. Entrapment

Brassell argues that the judge erred in denying his motion for a new trial for the following reasons. He first argues that he made a prima facie case of entrapment, and the State failed to prove a predisposition to sell drugs. From that Brassell argues that the evidence was such that a reasonable and fair minded juror could only have found him not guilty.

There is no need to prove that a defendant had previously been convicted of selling drugs in order to rebut a defense of no predisposition. Were that true, then no drug dealer could ever be convicted since such a rule would bar ever convicting them the first time. Here, the confidential informant testified that he had worked in the past as a runner for Randy Brassell and his brother Hicks. The evidence showed that Randy Brassell looked inside Hoyt's blouse for a body microphone, which is something the witness stated that drug dealers routinely do and shows a predisposition to sell drugs. There was sufficient evidence for the jury to find that Randy Brassell gave the cocaine to Hicks to sell to Smith.

There was ample evidence of predisposition and of guilt. There was no error in overruling the motion for new trial.

III. Directed verdict on sale

Brassell argues that the judge should have granted a peremptory instruction on Count II, the sale charge. In measuring the sufficiency of the evidence on a motion for a directed verdict or a request for peremptory instruction, the trial judge is required to accept as true all the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant. If under this standard sufficient evidence exists, the motion for directed verdict and request for peremptory instruction should be overruled. *Hart v. State*, 637 So. 2d 1329, 1340 (Miss. 1994).

The evidence, when viewed in a light most favorable to the State, showed that Randy Brassell had drugs on his person when the agent and informant arrived at his house and that he gave the drugs to his brother who walked around the side of the house and gave them to the informant. We find there was sufficient evidence to deny defendant's request for a peremptory instruction.

THE JUDGMENT OF THE CIRCUIT COURT OF PANOLA COUNTY OF CONVICTION OF SALE OF A CONTROLLED SUBSTANCE AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF

CORRECTIONS, WITH THE LAST EIGHT YEARS SUSPENDED AND FINE OF \$2500, IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

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

MCMILLIN, P.J., NOT PARTICIPATING.