

IN THE COURT OF APPEALS 01/14/97
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00998 COA

MARTIN RIOS GARCIA

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. BILL JONES

COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GEORGE S. SHADDOCK

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEY: DALE HARKEY

NATURE OF THE CASE: CRIMINAL - POSSESSION WITH INTENT TO DISTRIBUTE

TRIAL COURT DISPOSITION: FOUND GUILTY OF POSSESSION WITH INTENT TO
DISTRIBUTE AND SENTENCED TO FIFTEEN YEARS

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

SOUTHWICK, J., FOR THE COURT:

Martin Garcia was found guilty of possession of more than one kilogram of marijuana with intent to distribute. He appeals arguing that the trial court erred in allowing rebuttal testimony by an officer who was not qualified as an expert to establish the value of the marijuana; that the trial court erred in refusing his requested jury instruction on abandonment; that the placing of the seized marijuana on defendant's counsel table was prejudicial; and, that the verdict was against the overwhelming weight of the evidence. Finding these arguments without merit, we affirm.

FACTS

Garcia was stopped on Interstate 10 in Jackson County for driving a truck with a burned out license tag light. After pulling the truck over, Lieutenant Terry Bulloch noticed a strong pine odor. He requested permission to search the truck. Garcia consented by signing a consent to search form. Lt. Bulloch called for assistance. Another officer, accompanied by a K-9 dog, came to his assistance. The officers found twenty-five packages of marijuana in the truck.

Garcia admits most of the elements of the offense, but claims that he was a victim of circumstance. His testimony was that he needed someone who would give him a ride to the Texas-Mexican border to pick up his sister and her two children, who had been visiting relatives in Mexico. He testified that a man by the name of Roynosa finally agreed to give him a ride to the Texas-Mexican border and that he was not told until after he arrived in Mexico that he would have to drive a truck back to Florida. He knew that the truck would contain ten to twenty pounds of marijuana. Garcia was also told that there would be two men following him to a certain point in Florida where he was to leave the truck. Garcia agreed to that arrangement. His sister and her children were in the truck with Garcia when it was stopped.

DISCUSSION

Garcia first alleges that a police officer improperly was allowed in rebuttal to testify regarding the value of the marijuana, allegedly to respond to the defense issue that Garcia had no intent to distribute. At trial, his attorney objected that the testimony was not relevant. On appeal he adds that the testimony was outside the scope of proper redirect testimony, that it was prejudicial, and that the officer was not qualified as an expert. Any grounds other than that raised with the trial court is waived. *Fleming v. State*, 604 So. 2d 280, 292 (Miss. 1992).

Addressing the relevancy issue, we point out that a trial court has broad discretion in determining the relevance of evidence. *Stromas v. State*, 618 So. 2d 116, 119 (Miss. 1993). The value of the marijuana, much like the quantity, is relevant to whether there was an intent to distribute. *Guilbeau v. State*, 502 So. 2d 639, 642 (Miss. 1987) (intent inferred from quantity). Even if this is seen as evidence that more properly should have been presented in the State's case-in-chief, the supreme court has held that the trial judge has broad discretion in permitting such evidence to be introduced in

rebuttal. *Pierre v. State*, 364 So. 2d 1127, 1128 (Miss. 1978).

There was no error in admitting this evidence.

Garcia wanted an instruction that would permit the jury to conclude that he had abandoned the criminal enterprise. No instruction should be given on a theory of the case unless there is evidence to support it. *Murphy v. State*, 566 So. 2d 1201, 1206 (Miss. 1990). Garcia testified that he never wished to enter this scheme. However, there was absolutely no evidence that Garcia began the criminal enterprise, and then at some stage decided to abandon it. A member of a conspiracy, for example, cannot be held to have abandoned the scheme "except by unequivocal affirmative conduct." *James v. State*, 481 So. 2d 805, 809 (Miss. 1985). No such conduct, unequivocal or not, is alleged to have occurred here. If Garcia merely changed his mind along the way on Interstate 10, and took no action to try to halt the enterprise, that is not evidence of abandonment.

During trial, the bags of marijuana were placed on defendant's table. No objection was made at the time, but a strenuous objection is raised on appeal. It would have been a simple matter to raise the issue with the trial court. We will not put in error, if error there would have been, a trial judge who was not called upon to rule on the matter. *Crenshaw v. State*, 520 So. 2d 131, 135 (Miss. 1988).

Finally, Garcia argues that the verdict was contrary to the overwhelming weight of the evidence. Garcia testified that he was aware that he was transporting ten to twenty pounds of marijuana. He also admits that he intended to deliver these drugs to a certain point in order for the two men following him to take control of the truck. Garcia was indicted for "knowingly, wilfully, unlawfully and feloniously, possessing more than one kilogram of Marijuana, a Schedule I Controlled Substance, with the intent to distribute the said controlled substance." By Garcia's own admission, he is guilty of this crime. He explained to the jury his alleged reasons for engaging in the scheme, but such reasons did not exonerate him. Factual disputes are for the jury to resolve, and there were not many factual disputes in this case.

We affirm.

THE JUDGMENT OF THE JACKSON COUNTY CIRCUIT COURT OF CONVICTION OF POSSESSION OF MORE THAN ONE KILOGRAM OF MARIJUANA WITH INTENT TO DISTRIBUTE AND SENTENCE OF FIFTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND \$5,000 FINE IS AFFIRMED. ALL COSTS ARE ASSESSED TO THE APPELLANT.

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