

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 98-KA-00131-COA**

LARRY LEE

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 01/08/1998
TRIAL JUDGE: HON. L. BRELAND HILBURN J
COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: SANFORD E. KNOTT
ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: W. GLENN WATTS
DISTRICT ATTORNEY: ED PETERS
NATURE OF THE CASE: CRIMINAL - FELONY
TRIAL COURT DISPOSITION: 01/08/1998: C/S SALE COCAINE: SENTENCE TO SERVE
A TERM OF 3 YEARS IN THE CUSTODY OF THE MDOC
DISPOSITION: AFFIRMED - 5/4/99
MOTION FOR REHEARING FILED: 5/13/99
CERTIORARI FILED:
MANDATE ISSUED: 7/20/99

BEFORE BRIDGES, C.J., COLEMAN, AND IRVING, JJ.

BRIDGES, C.J., FOR THE COURT:

¶1. Larry Lee was convicted in the Circuit Court of Hinds County of possession of cocaine and was sentenced to a term of three years in the custody of the Mississippi Department of Corrections. Aggrieved, Lee argues on appeal that the trial court erred in denying his motion for directed verdict based upon the undisputed evidence that a confidential informant supplied the drugs that were later purchased by law enforcement, and that he was entrapped as a matter of law. Finding no merit to the issue raised, we affirm the judgment and sentence of the trial court.

FACTS

¶2. On or around September 19, 1996, Detective Wallace Jones, an undercover narcotics agent, accompanied by a confidential informant, went to Utica, Mississippi to purchase \$1200 worth of crack

cocaine from Larry Lee. Jones was wired with a body transmitter which allowed a surveillance team to listen to the conversation. Jones testified that he and the informant drove onto a dirt road and a gray Chevy pickup truck pulled up. Jones stated that when Lee gave him the bag of cocaine, he handed him the \$1200. However, Lee testified that the informant walked up to his pickup truck, received the package containing crack cocaine, and Jones paid \$1200 for it.⁽⁴⁾ Lee stated that Jones attempted to pay him, but that he directed that the money be given to Wilson. The package was later field tested and determined to be crack cocaine. Lee was then indicted and charged with the sale of cocaine pursuant to Miss. Code Ann. § 41-29-139. The jury was given instructions for the sale of cocaine, possession of cocaine, and was instructed on the issue of entrapment. Lee was convicted of possession of cocaine and sentenced to serve three years in the Mississippi Department of Corrections. Lee's motion for judgment notwithstanding the verdict was denied, and he has now perfected this appeal.

ARGUMENT AND DISCUSSION OF LAW

¶3. Lee argues on appeal that the trial court erroneously denied his motion for a directed verdict since there was undisputed evidence of entrapment. Lee contends that the State failed to rebut or impeach his testimony concerning the confidential informant's role in supplying the drugs even though the informant was available to testify. Furthermore, Lee argues that there was no showing that he had a predisposition to commit the offense. Lee contends that this was a classic reverse/sale operation that should be reversed since the supreme court has repeatedly held that a reverse/sale operation embraces all the elements and requirements for entrapment.

¶4. The State argues that Lee's testimony was contradicted by the testimony of Officer Jones, and that the officer's testimony along with the tape recorded playing of the transaction, created a conflict in the evidence that the jury was responsible for resolving. The State contends that Lee admitted to having the cocaine that he stated he gave to Wilson, and that this alone was sufficient in supporting his conviction. The State argues that Lee's testimony was merely an effort at using his own testimony to establish entrapment, and this made the issue of entrapment a jury question. The State contends that the jury was properly instructed, and that there was evidence of Lee's predisposition to sell and possess cocaine based upon the testimony and the admissions he made on cross-examination. We agree.

¶5. Lee's post trial motion challenged the legal sufficiency of the evidence. In reviewing the legal sufficiency of the evidence, our authority to disturb the jury's verdict is quite limited. *Clayton v. State*, 652 So. 2d 720, 724 (Miss.1995). We consider the evidence in the light most consistent with the verdict. *Id.* The prosecution must be given the benefit of "all favorable inferences that may reasonably be drawn from the evidence." *Id.* We may not reverse unless one or more of the elements of the offense charged is such that reasonable and fair minded jurors could only find the accused not guilty. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). We review the ruling on the last occasion the challenge was made; in this case, the motion for judgment notwithstanding the verdict.

¶6. In the present case, Lee argues that he had proven a case of entrapment as his defense. Lee contends that when the trial court judge was presented with unimpeached, unrebutted testimony that the informant supplied cocaine to him which the law enforcement officer later purchased from him, he should have been acquitted by reason of entrapment.

¶7. Our law on entrapment is well-settled. It has been defined as "the act of inducing or leading a person to commit a crime not originally contemplated by him, for the purpose of trapping him for the offense." *Walls*

v. State, 672 So. 2d 1227, 1229 (Miss. 1996). The defense of entrapment is affirmative and must be proved by the defendant. *Id.* Before the defense can be raised, the defendant is required to show evidence of government inducement to commit the criminal act, and a lack of a predisposition to engage in the criminal act before contact with the government agents. *Id.* A defendant is considered predisposed if he is "ready and willing to commit the crimes such as are charged in the indictment, whenever opportunity was afforded." *Moore v. State*, 534 So. 2d 557, 559 (Miss. 1988). If the accused is found to be predisposed, the defense of entrapment must fail. *Id.* Therefore, since Lee specifically testified that he had no predisposition to commit the crime with which he was charged, the trial court was obliged to submit the entrapment issue to the jury through proper instructions. This was done.

¶8. In his brief, Lee cites to *Pulliam v. State*, 592 So. 2d 24 (Miss. 1991), in which the Mississippi Supreme Court condemned the so-called "supply and buy" controlled substance transactions in which law enforcement officers both provide the accused with the controlled substance which they want him to sell and then provide him or her with the opportunity to sell it. In *Pulliam*, the court wrote:

In the drug enforcement area, we encounter from time to time an egregious form of entrapment wherein persons acting for the state both "supply the controlled substance to the accused" and then "buy" it from him. In a long line of cases, we have made clear that we regard this a form of official misconduct which must be condemned and that, in the absence of a substantial showing of the defendant's predisposition for drug trafficking, the courts must acquit.

Pulliam, 592 So. 2d at 26. In the *Pulliam* opinion, the Mississippi Supreme Court referred to *Gamble v. State*, 543 So. 2d 184, 185 (Miss. 1989), another "supply and buy" case, in which that court reversed the conviction of the appellant because the informant had given the appellant the marijuana which he later sold to a Mississippi Bureau of Narcotics undercover agent. Included in the *Pulliam* opinion was the following quote from the *Gamble* opinion:

Had the state rebutted the testimony of appellant [here Pulliam] by calling the [sic] McKee [here Self] or by some other credible evidence, the lower court properly would have declined to sustain the motion for directed verdict. However, where the evidence stands uncontradicted, undisputed and unimpeached, even though the jury may have not believed the appellant, that testimony stands and makes out the defense. In cases such as this, prosecutors must have rebuttal evidence at hand to refute such testimony.

Pulliam, 592 So. 2d at 27 (quoting *Gamble*, 543 So. 2d at 185). The court focused on "*Gamble's* teaching that the defendant is entitled to discharge only where the evidence [of the accused's entrapment] stands uncontradicted, undisputed, and unimpeached" by a "supply and buy" tactic. It is this Court's finding that in this case Lee's "supply and buy" claim was rebutted, disputed, and impeached. Deciding who was negotiating least with the truth was the jury's task. As the Mississippi Supreme Court observed in *Gandy v. State*:

Jurors are permitted, indeed have a duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject, the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into findings of fact sufficient to support their verdict. That

resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution.

Id. at 1045.

¶9. In the case at bar, Lee's testimony was contradicted and disputed by the testimony of Jones as well as by Lee's own admissions made on cross-examination. The State also presented a tape made of the transaction which was played for the jury and corroborated Jones's testimony. In addition, Lee testified to transferring the cocaine "for a little change." We agree with the State that Lee was predisposed to this crime in order to make some money for his efforts, and that Lee also admitted to having considered transferring the cocaine more than once.

¶10. It is clear that the jury chose to believe the testimony of the State's witnesses over Lee's testimony. Based on the above, and accepting all credible evidence consistent with Lee's guilt as true, this Court finds that there was sufficient evidence to support the jury's finding that Lee was not entrapped by the State.

¶11. THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY OF CONVICTION OF POSSESSION OF COCAINE AND SENTENCE OF THREE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

McMILLIN, C.J., DIAZ, LEE, AND THOMAS, JJ., CONCUR.

IRVING DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING AND SOUTHWICK, P.JJ., AND COLEMAN AND PAYNE, JJ.

IRVING, J., DISSENTING:

¶12. I respectfully dissent from the majority's affirmance of Lee's conviction and sentence because in my opinion, he presented un-rebutted testimony that the cocaine was supplied by a confidential informant and this testimony was not unreasonable or improbable on its face. The sole issue presented by Lee, taken

verbatim from his brief, is: WHETHER THE TRIAL COURT ERRED IN NOT FINDING THAT LARRY LEE WAS ENTRAPPED AS A MATTER OF LAW GIVEN HIS UNCONTRADICTED TESTIMONY THAT THE CONFIDENTIAL INFORMANT SUPPLIED TO HIM DRUGS THAT WERE LATER PURCHASED BY LAW ENFORCEMENT.

¶13. Entrapment is a defense which must be affirmatively asserted by the accused. In so doing, the accused usually admits⁽²⁾ he committed the acts constituting the crime for which he is charged but alleges that he was induced by an agent of the State to commit the offense, and in some drug cases, as here, that the contraband was in fact supplied by the State or an agent of the State. See *Sylar v. State*, 340 So. 2d 10 (Miss. 1976) .

¶14. Lee testified that the confidential informant, Vernell Wilson, supplied the cocaine that Lee was convicted of possessing.⁽³⁾ The confidential informant did not testify, and none of the State's witnesses contradicted Lee's assertion that the contraband had been supplied by Vernell Wilson, the confidential informant.

¶15. Our cases seem to be split on the consequence which flow from un-rebutted evidence that the contraband, which is the subject of the crime, was supplied by law enforcement or an agent of law enforcement. See *Jones v. State*, 285 So. 2d 152 (Miss. 1973) and *Gamble v. State* 543 So. 2d 185 (Miss. 1989) holding that entrapment exists as a matter of law and that the accused is entitled to a directed verdict; *Tanner v. State*, 566 So. 2d 1246 (Miss 1990) acknowledging the teaching of *Jones* and *Gamble* but asserting that predisposition to commit the offense robs the defendant of protection from prosecution; *Bosarge v. State*, 594 So. 2d 1143 (Miss. 1991) affirming that in supply-and-buy cases a defendant is entitled to a directed verdict upon his un-rebutted testimony that the contraband was supplied by a drug agent or confidential informant. While there is still some confusion in our law as to the consequences which attach, in supply-and-buy entrapment cases, to un-rebutted testimony that an agent of the state supplied the contraband, it appears that *Tanner* and *Bosarge*, both decided after *Gamble*, either resurrect or keep alive the long established rule that where entrapment is the defense, predisposition to commit the offense is an issue for jury consideration.

¶16. The majority accepts the State's argument that (1) Lee's admission of having the cocaine that he gave to Wilson, the confidential informant, is sufficient to sustain Lee's conviction of possession of cocaine (2) Lee's testimony was contradicted by the testimony of Officer Wallace Jones and the tape of the recorded transaction (3) predisposition was shown by the admissions made by Lee on cross-examination (4) the jury was properly instructed on entrapment and resolved the issue against Lee.

¶17. The argument that possession of cocaine given to a defendant by an agent of the State is sufficient to convict a defendant of possession, without proof of predisposition by the defendant to possess same, is without undergirding in all of the entrapment cases mentioned, *supra*, and is clearly absurd. In this case Lee admitted he gave the cocaine to Wilson but he also testified uncontradicted that the cocaine had been given to him earlier that day by Wilson.

¶18. The argument that Lee's testimony was contradicted by Officer Wallace Jones and the tape of the recorded transaction misses the point. Officer Jones contradicted Lee's testimony, not about the original source of the cocaine, but about whether, at the time of the sale, the cocaine was passed directly to Officer Jones and payment therefor to Lee as testified by Jones, or to Vernell Wilson and payment therefor, as testified by Lee. This contradiction is of no moment as long as the original source of the cocaine was the

paid confidential informant, Vernell Wilson. See *Sylar, supra*, where the defendant was supplied with a package of marijuana by an undercover agent that the defendant later delivered to another undercover agent at the request of the first agent. In reversing the defendant's conviction for sale of the marijuana, our Supreme Court held that the defendant was made a "mere conduit". In *Sylar*, the payment for the marijuana was given to the defendant but returned by him to the first agent. Here Lee testified that the agent offered to give him \$1,200 in payment for the cocaine but that he told the agent to give it to Wilson and that he, Lee, did not accept the money, a fact contradicted by Officer Jones. However, none of the supply-and-buy entrapment cases turn on who actually received the money for government supplied contraband.

¶19. The majority's acceptance of the State's argument that predisposition was shown in this case by the admissions made by Lee on cross-examination begs the question. Succinctly stated, Lee testified that (1) Vernell Wilson, the confidential informant, told him that Wilson had some cocaine he wanted to sell but did not want Wilson's relatives to know that Wilson was doing this (2) Wilson asked him to take the cocaine and give it to someone who would call for it (3) that approximately a week prior to the date of the sale [or transfer according to Lee], Wilson had asked him several times to deliver some cocaine for him and that one time he agreed but changed his mind (4) on the day of the sale [or transfer] Vernell Wilson came by and brought the cocaine and then left to go pick up Wilson's cousin who actually turned out to be Officer Jones (5) Wilson stayed gone so long that he (Lee) went over to Lee's girlfriend's house and started cutting grass (6) Wilson finally returned with Officer Jones and Lee and Wilson had a conversation out of earshot of Officer Jones, in which conversation Lee offered to give the cocaine to Jones at that time but that Wilson told him to come on down the road and make the transaction so as to make it look good. The majority's reliance on Lee's admission--that approximately a week prior to the actual sale or transfer, he initially acceded to Wilson's entreaties to sell some cocaine but later changed his mind--as evidence of predisposition is misplaced because entrapment, in my opinion, begins when the State sets in motion a scheme to trap the unwary innocent. A valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in criminal conduct. *Matthews v. United States* 485 U.S. 58, 108 S. Ct. 883 (1988). Clearly the inducement must necessarily begin when the effort to do so commences. When Wilson went to Lee approximately a week before the transaction actually occurred, Wilson was then and there acting in his capacity as a paid confidential informant for the State for the purpose of inducing Lee to commit the act ultimately committed by Lee, albeit a week later. There is nothing in this record to indicate that Lee was trafficking in drugs or cocaine before the entreaties from Wilson to do so, and the fact that he vacillated during the inducement period cannot be accepted as evidence of predisposition. Stated another way, in my opinion, the relevant period for consideration of predisposition in this case is what the state knew or reasonably suspected of Lee's actions relative to drug activities prior to the commencement of Wilson's entreaties which are contended to be the nuclei of the inducement.

¶20. Finally, the fact that Lee testified that he eventually agreed to do the transaction to "make a little change" provides, in my opinion, no comfort zone for the majority's conclusion that Lee was not entitled to a directed verdict. If he was not predisposed "to make a little change" before he was induced to do so, the fact that he made a little change after being induced to do so is no bar to a valid entrapment defense.

¶21. Given these facts, it appears obvious to me that this case falls squarely within the teaching of *Gamble*, 543 So. 2d at 185, that "where the evidence stands uncontradicted, undisputed and un-impeached, even though the jury may not have believed the appellant, that testimony stands and makes out the defense. In cases such as this, prosecutors must have rebuttal evidence at hand to refute such testimony." The record

compels the following factual conclusions: (1) the State had no information or reasonable suspicion that Lee was engaged in cocaine or drug trafficking before the commencement of the inducement effort by Wilson (2) Lee's testimony was uncontradicted that the cocaine he gave to Officer Jones was supplied by Wilson, an admitted confidential informant (3) there was no pre-entrapment acts or activities of Lee indicating that he was indeed involved in cocaine or other drug trafficking, whether known to the State or not. For these reasons, I would reverse and render.

KING AND SOUTHWICK, P.JJ., COLEMAN AND PAYNE, JJ., JOIN THIS SEPARATE WRITTEN OPINION.

1. Lee testified that Wilson, the informant, told him that he had a cousin that sold drugs coming to town, and since Wilson did not want his cousin to know that he also sold drugs, he asked Lee if he would sell them to the cousin if he supplied them. Lee stated that he agreed to deliver the drugs to the cousin as a favor to Wilson.
2. In *Hopson v. State*, 625 So. 2d 395 (Miss. 1993), our supreme court abolished the long established requirement that the accused had to admit the offense with which he was charged in order to have an entrapment instruction submitted to the jury.
3. Lee was indicted and tried for sale of cocaine, but was convicted of the lesser included offense of possession of cocaine.