IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY 1999 SESSION

STATE OF TENNESSEE,	*	No. 01C01-9810-CR-00392 **M1998-00628-CCA-R3-CD**
Appellee	*	DAVIDSON COUNTY
V.	*	Hon. J. Randall Wyatt, Jr., Judge
EDWARD P. HARRIS	*	(Sale of Less than .5 Grams of Cocaine)
Appellant.	*	

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OPINION FILED:

AFFIRMED

NORMA MCGEE OGLE, JUDGE

OPINION

The appellant, Edward P. Harris, was convicted in the Davidson County Criminal Court of the sale of less than .5 grams of cocaine. The trial court imposed a sentence of six years incarceration in the Tennessee Department of Correction. On appeal, the appellant contends that the trial court erroneously failed to instruct the jury concerning the offense of casual exchange of a controlled substance. Following a thorough review of the record and the parties' briefs, we affirm the judgment of the trial court.

I. Factual Background

On June 25, 1997, Sergeant Melvin S. Brown and Officer Kristen Vanderkooi, officers employed by the Crime Suppression Unit of the Nashville Metropolitan Police Department, were working undercover in the area surrounding the James Casey Homes subsidized housing development. The police had received numerous complaints concerning the sale of illegal drugs in that area. Accordingly, the officers were driving through the area in an unmarked van, posing as potential buyers.

At approximately 10:00 p.m., as the officers drove down Sylvan Street, a street adjacent to the housing development, they heard a whistle and immediately observed the thirty-six year old appellant. The officers did not observe anyone else in the vicinity and, accordingly, stopped the van. The appellant then approached and asked Officer Vanderkooi "what [she] was looking for." She replied that she was looking for "a twenty of ready" or twenty dollars worth of crack cocaine. Officer Brown testified at the appellant's trial that, on the streets of Nashville, twenty dollars ($20.00) worth of crack cocaine equals approximately .1 grams of the drug.

The appellant indicated to Officer Vanderkooi that he could obtain the requested amount of crack cocaine, instructed the officers to wait, and walked toward a nearby intersection of Sylvan Street and South 7th Street. Despite the appellant's instructions, the officers followed the appellant to the intersection and observed him turn onto 7th Street, cross the street, and approach a teenage boy on a bicycle. An exchange occurred between the two men, whereupon the appellant returned to the officers' van with a rock of crack cocaine weighing .08 grams. The appellant gave the

crack cocaine to Officer Vanderkooi, who paid the appellant twenty dollars in return. Immediately thereafter, a "Takedown Unit" arrived and arrested both the appellant and the juvenile.

The police did not recover any further drugs or money from the appellant. However, the juvenile was carrying eighty dollars ($80.00) in addition to two plastic bags, each containing ten dollars worth of marijuana. Officer Vanderkooi testified that marijuana is commonly packaged in this way for the purpose of retail. Moreover, Officer Brown testified that the joint participation by the appellant and the juvenile in the sale of the cocaine was consistent with a common method employed by street vendors of illegal drugs in Nashville.

Upon the conclusion of the State's presentation of proof and upon the appellant's decision to forego the presentation of any proof, the trial court instructed the jury on the offense of sale of less than .5 grams of cocaine and, alternatively, on the offense of delivery of less than .5 grams of cocaine. Additionally, with respect to each offense, the trial court instructed the jury on criminal responsibility for the conduct of another and criminal responsibility for facilitation of a felony. The trial court refused the appellant's request that it instruct the jury on the offense of casual exchange of a controlled substance. Following deliberation, the jury found the appellant guilty of sale of less than .5 grams of cocaine.

II. Analysis

The sole issue raised by the appellant is whether the trial court erred in refusing to instruct the jury on the offense of casual exchange of a controlled substance. Initially, it is undisputed that the casual exchange of a controlled substance is a lesser included offense of sale of a controlled substance, the controlled substance in this case being cocaine. Nevertheless, in light of our supreme court's recent decision in State v. Burns, No. 02S01-9806-CC-00058, 1999 WL 1006315 (Tenn. at Jackson, November 8, 1999)(publication pending), we will address this preliminary question. In Burns, No. 02S01-9806-CC-00058, 1999 WL 1006315, at *12, the court set forth the following definition of a lesser included offense:

> An offense is a lesser included offense if:
>
> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
>
> (b) it fails to meet the definition in part (a) only in the respect that it

> contains a statutory element or elements establishing:
>
> > (1) a different mental state indicating a lesser kind of culpability; and/or
> >
> > (2) a less serious harm or risk of harm to the same person, property or public interest; . . . .

In this case, it is at least arguable that the statutory elements of casual exchange are included within the statutory elements of sale of cocaine.

A defendant commits the offense of sale of cocaine when he knowingly *sells* the cocaine. Tenn. Code Ann. § 39-17-417(a)(3)(1996). A sale occurs when there is "a bargained for offer and acceptance, and an actual or constructive transfer or delivery of the [drugs]." State v. Wilkerson, No. 03C01-9708-CR-00336, 1998 WL 379980, at *3 (Tenn. Crim. App. at Knoxville, July 9, 1998). In contrast, a defendant commits the offense of casual exchange of cocaine when he knowingly and *casually exchanges* the cocaine. Tenn. Code Ann. § 39-17-418(a)(1997).[1] Black's Law Dictionary 562 (6th ed. 1990) notes that the "criterion in determining whether a transaction is a sale or an exchange is whether there is a determination of value of things exchanged, and if no price is set for either property it is an 'exchange.'" But cf. State v. Helton, 507 S.W.2d 117, 121 (Tenn. 1974). Of course, the involvement of money does not preclude the finding of an exchange rather than a sale. State v. Carey, 914 S.W.2d 93, 96 (Tenn. Crim. App. 1995). However, under Tenn. Code Ann. § 39-17-418(a), any transfer or delivery of the drugs must be done casually, i.e., without design or any prior plan. Carey, 914 S.W.2d at 96; Loveday v. State, 546 S.W.2d 822, 827 (Tenn. Crim. App. 1976). Webster's Third International Dictionary 349 (1993) further defines "casual" as

> subject to or produced as a result of chance . . . without design: not resulting from a plan . . . occurring . . . by chance or without calculated intent . . . without specific motivation, special interest, or constant purpose . . . without foresight, plan or method . . . .

See also Black's Law Dictionary at 218. In short, one could posit that a casual exchange is simply the transfer of drugs without the characteristics of bargaining, pecuniary motive, and design typical of a sale. Thus, a common example of a casual exchange is the spontaneous passing of a small amount of drugs at a party. State v. Copeland, 983 S.W.2d 703, 708 (Tenn. Crim. App. 1998). In any event, whether the offense of casual exchange requires the absence of elements implicit in a sale or

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[1] We note in passing that T.P.I. Crim. No. 31.05 suggests that the requisite mens rea for casual exchange is intentionally, knowingly, or recklessly. However, this court only recently affirmed that the offenses of possessio exchange of a controlled substance under Tenn. Code Ann. § 39-17-418 (a) require a mens rea of knowingly. Thornton, No. 03C01-9811-CC-00384, 1999 WL 907552, at *11 (Tenn. Crim. App. at Knoxville, October 19, 19

something more, we believe that any additional elements merely establish "a less serious harm . . . to the same . . . public interest . . . ." Burns, No. 02S01-9806-CC-00058, 1999 WL 1006315, at *12. Accordingly, we conclude that the offense of casual exchange of cocaine remains a lesser included offense of the sale of cocaine.

That having been said, in Burns, No. 02S01-9806-CC-00058, 1999 WL 1006315, at *14, our supreme court also set forth the appropriate analysis for determining when a trial court should charge a lesser included offense:

> First, the trial court must determine whether any evidence exists that reasonable minds could accept as to the lesser-included offense. In making this determination, the trial court must view the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser included offense.

Applying this standard, we conclude that the offense of casual exchange does not contemplate the type of transaction established by the evidence in this case. According to the record, there existed no prior relationship between the appellant and the officers. Moreover, the record is devoid of evidence reflecting anything other than a pecuniary motive for the transfer of the cocaine. The amount of cocaine and the price were clearly established prior to any transaction. Indeed, although the initial encounter between the appellant and the officers was arguably spontaneous, once Officer Vanderkooi indicated that she wished to purchase a twenty dollar ($20.00) rock of crack cocaine, the appellant planned the ensuing sale and conducted the sale accordingly. In short, the evidence in the record reflects nothing less than the sale of cocaine. See State v. Moore, No. 02C01-9705-CR-00180, 1997 WL 703343, at *1 (Tenn. Crim. App. at Jackson, November 13, 1997). The appellant's contention is without merit.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court.

Norma McGee Ogle, Judge

CONCUR:

Jerry L. Smith

Thomas T. Woodall