

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER 1995 SESSION

STATE OF TENNESSEE,	)	
	)	NO. 02C01-9503-CC-00055
Appellee	)	
	)	WEAKLEY COUNTY
v.	)	
	)	Hon. David G. Hayes, Judge
GERALD GREER,	)	
	)	(selling a controlled substance)
Appellant	)	

For the Appellant:

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For the Appellee:

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and  
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OPINION FILED \_\_\_\_\_

REVERSED

John K. Byers  
Senior Judge

**OPINION**

The defendant was convicted of selling less than five grams of cocaine. He was sentenced to serve three years with three months to be served in the county jail and the remainder of the time the defendant was to be on probation.

The following issues are raised on appeal:

- I. Whether the trial court abused its discretion in not permitting the defendant to cross-examine witness Edwards about whether a reduction in criminal charges against her was related to her cooperating with the State in this case.
- II. Whether the trial court erred in permitting the State to present to the jury a written transcription of a tape recording that was entered into evidence.
- III. Whether the trial court abused its discretion in permitting the State to impeach the defendant's credibility by questioning him about a prior criminal conviction.
- IV. Whether the trial court properly sentenced the defendant.

We have examined the entire record in this case and find no error was committed by the trial judge as averred by the appellant on issues II, III, and IV. We find, however, the trial judge was in error as alleged in issue I, and we find this error requires a reversal of the judgment in this case for reasons hereinafter stated.

The convicting evidence in this case was given by a female undercover agent who was paid on a case-by-case basis for "making cases." The agent was previously addicted to the use of cocaine and used it at least once after the date of the alleged crime in this case. The agent was indicted on seven felonies involving worthless checks. Prior to the trial of the case the indictment was reduced to a single misdemeanor charge to which the agent pled guilty.

The agent testified that she bought cocaine from the defendant on February 24, 1993. The agent was wired with a transmitter, and the conversation during the

transaction was recorded. The tape was introduced for the jury's consideration at trial. The agent is the only witness who identified the defendant as the person who sold her cocaine. Only she testified the male voice on the tape was the defendant.

The defendant testified he did not sell the agent cocaine and denied that his voice was on the tape.

The case is a one-on-one scenario. The verdict of the jury could only turn on the credibility of the two witnesses. To convict the defendant, the jury had to accept the credibility of the agent as being greater than that of the defendant.

The defendant wished to cross-examine the agent about the circumstances surrounding the reduction in the charges against her. The trial judge would not permit that. So far as we can tell from the record, this was based upon the statement to the court by the Attorney General that no reduction in charges was made as an inducement to obtain the agent's testimony in this case.

The State concedes it was error for the trial judge not to allow the defendant to cross-examine the agent while she was on the stand concerning the reduction in the charges against her. The concession is proper in view of the analysis in *Bouchard v. State*, 554 S.W.2d 654 (Tenn. Crim. App. 1977). and cases thereafter. The State insists, however, that the defendant has waived this complaint because he made no offer of proof on whether any favorable treatment was accorded the agent.

The refusal to allow this cross-examination is a constitutional violation of the defendant's right to confrontation under the Fourteenth and Sixth Amendments to the U.S. Constitution and under Articles 1 and 9 of the Constitution of Tennessee. *State v. Howell*, 868 S.W.2d 238, 252 (Tenn. 1993). In this stance, we do not apply a waiver rule to this issue.

The State further insists the error in the case is harmless. Because the error is of constitutional magnitude, we must find it harmless beyond a reasonable doubt to affirm the judgment. In this case the agent is the only witness who testified the

defendant committed the crime. If there was other cogent evidence of guilt, a harmless error beyond a reasonable doubt application might be proper. Where, as here, the conviction must rise or fall on the credibility of the agent, we are unable to say the error is harmless beyond a reasonable doubt.

We reverse the judgment of the trial court and remand the case for a new trial.

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John K. Byers, Senior Judge

CONCUR:

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Joseph B. Jones, Judge

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Joseph M. Tipton, Judge