IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE 1995 SESSION

STATE OF TENNESSEE,	)	NO. 02C01-9502-CC-00038
	)	
Appellee	)	MADISON COUNTY
	)	
V.	)	Hon. F. Lloyd Tatum
	)	Judge
ROBERT LEE MOORE,	)	
	)	(Possession of Cocaine With
	)	Intent to Sell; Sentencing)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

This is an appeal as of right by the appellant, Robert Lee Moore, from a judgment of the Madison County Circuit Court approving a jury verdict finding him guilty of possession with the intent to sell or deliver more than one-half gram of cocaine.

The appellant presents two issues for our consideration in this appeal. First, he contends that the evidence was insufficient for the jury to find him guilty beyond a reasonable doubt of intent to sell or deliver more than one-half gram of cocaine. Second, the appellant contends that the trial court erred when it sentenced him to thirty (30) years in prison as a career offender pursuant to Tennessee Code Annotated section 40-35-108.

We affirm the judgment of the trial court.

On August 27, 1992, the Jackson, Tennessee, Police Department, in conjunction with the 26th Judicial Drug Task Force, executed several search warrants and bar checks in Jackson, Tennessee. In executing one such bar check, Jackson Police Officers William H. Bancroft, Jr. and Patrick Willis arrived at the Hale Street Disco, located at the corner of Hale and Elm Streets in Jackson.

As the unmarked van pulled to a stop in front of the Hale Street Disco and as officers Bancroft and Willis exited the vehicle, they both observed the appellant drop a cigarette pack to the ground. The cigarette pack was immediately retrieved and identified as a Salem cigarette pack containing what the officers believed to be crack cocaine.

Forensic chemist, Lisa Mays, testified at the trial that she analyzed the seized substance within the cigarette pack and determined that the substance was cocaine base or, or as it is more commonly known, crack cocaine, weighing 7.9 grams.

Following his arrest and transport to the Jackson Police Department for booking, the defendant was thoroughly searched and found to be in possession of two hundred thirty-nine dollars ($239.00) in cash, and a pager or "beeper." The appellant testified that the two hundred thirty-nine dollars ($239.00) was money he had collected

at the door of the Hale Street Disco in his capacity as its bouncer/doorman. He further testified that he carried the beeper so his brother-in-law, who ran a janitorial service, could contact him in the event he needed the appellant to assist him with janitorial work.

The appellant denied that he dropped a cigarette pack upon the officers' arrival at the scene and further denied that he was ever in possession of crack cocaine on the evening of his arrest.

SUFFICIENCY OF THE EVIDENCE

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). We do not reweigh or reevaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

The appellant, as the challenger of the sufficiency of the proof, has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in this case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict

rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

Tennessee Code Annotated section 39-17-417 (a) (4) provides, in pertinent part, that it is an offense to "[p]ossess a controlled substance with intent to manufacture, deliver or sell such controlled substance." The statute also provides that where the controlled substance is cocaine in an amount equal to or greater than point five (.5) grams, the offense is a Class B felony. Tenn. Code Ann. § 39-17-417 (c) (1) (1994 Supp.)

Further, Tennessee Code Annotated section 39-17-419 provides that:

> It may be inferred from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing. (emphasis added).

Viewed in the light most favorable to the State, the proof established that the appellant was in possession of 7.9 grams of crack cocaine at the time of his arrest. The officers both testified that the cigarette pack contained one "large" rock of crack cocaine and several smaller rocks. Both officers testified that the large rock of crack cocaine could not have been smoked in a conventional crack cocaine pipe. The cash which the appellant had on his person and the pager which he carried on the evening of his arrest, although clearly not criminal offenses in and of themselves, when coupled with the possession of what the officers testified was considerably more than one (1) pipeful of crack cocaine was sufficient evidence for the jury to conclude that the appellant was guilty of knowingly possessing crack cocaine with the intent to sell or deliver crack cocaine. Accordingly, we hold that the evidence was sufficient to support the jury's verdict of guilt beyond a reasonable doubt.

SENTENCING

Appellant's second contention is that his sentence was excessive and was imposed in violation of the Sentencing Reform Act of 1989.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with the presumption that the determinations made by the trial court are correct. Tenn Code Ann. § 40-35-401 (d) (1990 Repl.). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W. 2d 166, 169 (Tenn. 1991).

In sentencing a person convicted of a criminal offense the trial court is to take into consideration (1) the evidence, if any, received at the trial and at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors in sections 40-35-113 and 40-35-114; and (6) any statement the defendant wishes to make in his own behalf about sentencing. Tenn. Code Ann. §40-35-210(b) (1990 Repl.).

The appellant was convicted of a Class B felony. Tennessee Code Annotated section 40-35-108 (a) (1) provides that a person convicted of a Class A, B or C offense may be sentenced as a career offender if he or she has a combination of six or more prior Class A, B, or C felony convictions. The appellant has three aggravated assault convictions, all Class C felonies, and three convictions for Class B felonies which resulted from three separate sales of cocaine. The appellant's contention is that two of the prior felony convictions for the sale of cocaine resulted from two episodes of criminal conduct that occurred within twenty-four hours of each other, and thus Tennessee Code Annotated section 40-35-108 (b) (4) required the trial court to treat these two convictions as one conviction for the purpose of determining whether he could be sentenced as a career offender. We disagree.

After a careful review of the record we are satisfied that the sentence imposed by the trial court was proper. As a preliminary matter we note that the appellant failed to object to the two (2) sale of cocaine convictions being treated as two (2) separate convictions for purposes of his being declared a career offender during the sentencing hearing. This was so even though the State had filed a Notice of Request for Enhanced Punishment which listed the cocaine convictions well before the start of the trial. Additionally, although the appellant made a general objection to the sentence in his amended motion for a new trial, he merely stated that the sentence was unreasonable and "imposed capriciously and improperly." The appellant failed to state in his motion that the basis of his objection to the sentence was the so-called "twenty-four hour merger rule" of Tennessee Code Annotated section 40-35-108 (b) (4). Accordingly, pursuant to Tennessee Rule of Appellate Procedure 3(e), this issue has been waived. Additionally, although it appears that there was a hearing on the motion, the record on appeal does not include a transcript of the hearing. Where, because of the omission of a transcript, the record on appeal is incomplete, we have no record before us to support the appellant's claim of trial court error. Under such circumstances, this court presumes that the actions of the trial court were correct. See State v. Matthews, 805 S.W.2d 776, 784 (Tenn. Crim. App. 1990); State v. Locke, 771 S.W. 2d 132, 138 (Tenn. Crim. App. 1988).

Notwithstanding the foregoing, we hold that the trial court correctly sentenced the appellant as a career offender pursuant to Tennessee Code Annotated 40-35-108 (a) (1). The State submitted certified copies of the appellant's three (3) prior Class C felonies and the appellant's three (3) prior Class B felonies. Although the record reveals that two of the convictions for sale of cocaine were for offenses which occurred on two consecutive days, there was no evidence in the record to suggest that the two offenses occurred within a twenty-four hour period of each other. Moreover, there is no evidence in the record that the two cocaine offenses were

committed as part of a “single course of conduct” as required by the statute. Tenn Code Ann. 40-35-108 (b) (4). This issue is therefore without merit.

Accordingly the judgment of the trial court is affirmed.

WILLIAM M. BARKER, JUDGE

CONCUR BY:

PAUL G. SUMMERS, JUDGE

MARY BETH LEIBOWITZ, SPECIAL JUDGE