

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1996 SESSION

<p>FILED</p> <p>January 28, 1997</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

STATE OF TENNESSEE,)	C.C.A. NO. 03C01-9602-CC-00078
)	
Appellee)	BRADLEY COUNTY
)	
v.)	HON. MAYO L. MASHBURN,
)	JUDGE
JAMES E. MOOREHEAD,)	
)	sale or delivery of more than 0.5 oz.
Appellant)	but less than 10 lbs. of marijuana

For the Appellant:

For the Appellee:

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OPINION FILED _____

AFFIRMED

JOHN K. BYERS
SENIOR JUDGE

OPINION

The defendant was found guilty of the sale or delivery of more than 0.5 ounces but less than 10 pounds of marijuana. He was fined \$4,000.00 and sentenced to serve six years as a persistent offender.

The defendant says the evidence is insufficient to support the verdict and also says the trial court erred when it charged the jury that the minimum amount of time that could be served in prison for the felony was three months.

We affirm the judgment of the trial court.

The defendant was arrested after making the sale in this case to an informant, a former felon. At the time of the offense, both the defendant and Bradham worked for A & M Cab Company.

The informant asked the defendant to get him between 0.5 ounce and an ounce of marijuana, implying that it was for his uncle. The arranged price was \$160, which the state's witnesses testified was an average street price for that amount of marijuana. The sale was to take place at the Holiday Hill Motel, where Bradham was living at the time.

The defendant sold the informant 24.1 grams of marijuana for the sum of \$160 on October 26, 1994 outside Bradham's motel room. Officers Brent Clayton and Bobby Queen were in Bradham's motel room. Sergeant Gary Hicks listened from his vehicle parked behind the motel, while he recorded the conversation via a transmitter taped to a chair on which Bradham was sitting, just outside the door to the motel room. The cassette tape, a transcript of the recorded conversations and a bag of marijuana were admitted into evidence.

A jury verdict approved by the trial judge accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State's theory. *State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983); *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

A finding of guilt against the defendant removes the presumption of

innocence and raises a presumption of guilt on appeal. *Grace*, 493 S.W.2d at 476. It is the defendant who must overcome this presumption of guilt and carry the burden of demonstrating that the evidence is insufficient. *Williams*, 657 S.W.2d at 410; *State v. Brown*, 551 S.W.2d 329, 330 (Tenn. 1977).

Appellant argues that the evidence is sufficient only to show a casual exchange between friends. At trial, he offered the testimony of Christine Gilchrist, a fellow co-worker of the defendant and Mr. Bradham. She testified that the defendant was always nice to Mr. Bradham and that their relationship was fine; she had never noticed any tension between them. Mr. Bradham testified that the defendant had twice helped Mr. Bradham get his job with A & M Cab Company back after he had been fired. He also testified that Mr. Moorehead had picked him up and taken him to work once.

A casual exchange is one that occurs without design or a previous plan to make the exchange. *Loveday v. State*, 546 S.W.2d 822, 827 (Tenn. Crim. App. 1976). All the facts and circumstances must be considered in determining whether a transfer is a casual exchange. *State v. Helton*, 507 S.W.2d 117, 121 (Tenn. 1974). In this case, the amount, price and place of exchange were all arranged prior to the actual transaction. We find this was not a casual exchange.

The defendant challenges the trial court's jury instruction that a person sentenced to imprisonment for the offense of sale or delivery of more than 0.5 ounce and less than 10 pounds would have to serve a minimum of three months before becoming eligible for release. The sentence range varies from one to six years. In the defendant's case, an enhancement notice had been filed by the district attorney, and the defendant was not eligible for a release within three months.

In *State v. Lawson*, 695 S.W.2d 202, 204 (Tenn. Crim. App. 1985), this Court held that the trial judge did not err in instructing the jury as to the complete range of punishment available for the offense charged, rather than the range of punishment available for the defendant due to his status as a Range II offender.

We hold that the trial court did not err in his instruction that the minimum time

of imprisonment before release eligibility for the offense charged was three months, rather than giving the modified minimum time of imprisonment based on enhancement factors that had yet to be proven in a sentencing hearing.

We affirm the trial court's judgment and assess the costs to the appellant.

John K. Byers, Senior Judge

CONCUR:

Joseph B. Jones, Presiding Judge

Paul G. Summers, Judge