IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER SESSION, 1996

FILED

July 16, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 02C01-9501-CC-00029**
	)	
Appellee,	)	
	)	
	)	**HARDIN COUNTY**
VS.	)	
	)	**HON. C. CREED MCGINLEY**
ALBERT DEWAYNN PORTER,	)	**JUDGE**
	)	
Appellant.	)	**(Direct Appeal)**

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

A Hardin County Circuit Court jury found Appellant Albert Dewaynn Porter guilty of selling cocaine in excess of 0.5 grams. As a Range I standard offender, he received a sentence of ten years in the Tennessee Department of Correction. In this direct appeal, Appellant presents the following issues for review: (1) whether the evidence presented at trial is legally sufficient to sustain a conviction; (2) whether the trial court erred in refusing to give a procuring agent jury instruction; (3) whether the prosecution's use of a peremptory challenge to dismiss a black prospective juror was racially motivated; and (4) whether the sentence is excessive.

After a review of the record, we affirm the judgment of the trial court.

I. FACTUAL BACKGROUND

As accredited by the jury's verdict, the proof shows that, on September 30, 1994, Karla Abbott, an undercover operative for the 24th Judicial Drug Task Force, and Bobby Wicker, an informant, picked up Appellant at a pre-arranged location for the purpose of acquiring crack cocaine. The three of them proceeded by car to the Hunter Hills apartment complex. En route, they discussed the impending drug purchase. Once inside one of the apartments, Ms. Abbott gave Appellant $250. Appellant took the money and proceeded to another apartment across the street. Soon thereafter, Appellant returned and explained that he could not get the cocaine from the other apartment until certain individuals left. Eventually, Appellant and an individual from the other apartment identified only as "Dee" exchanged the money and the cocaine in view of Ms. Abbott and Mr. Wicker. Appellant then gave the cocaine to Ms. Abbott, and, at Appellant's request, all three took "a hit." Afterwards, Ms. Abbott and Mr. Wicker returned Appellant to where they had picked him up.

A Hardin County Grand Jury indicted Appellant on one count of selling a controlled substance in violation of Tennessee Code Annotated Section 39-17-417(a)(3) and on one count of delivering a controlled substance in violation of Tennessee Code Annotated Section 39-17-417(a)(2). On August 7, 1995, Appellant was tried before a Hardin County Circuit Court jury. At the conclusion of the trial, the jury found Appellant guilty of selling cocaine. Following a sentencing hearing on September 7, 1995, the trial court imposed a mid-range sentence of ten years.

II. SUFFICIENCY OF THE EVIDENCE

Appellant first alleges that the evidence presented at trial is legally insufficient to support his conviction. Citing State v. Baldwin, 867 S.W.2d 358 (Tenn. Crim. App. 1993), Appellant argues that the evidence supported only simple possession or casual exchange.

When an appeal challenges the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, 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, 318 (1979); State v. Evans, 838 S.W.2d 185, 190-91 (Tenn. 1992); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This Court will not reweigh the evidence, re-evaluate the evidence, or substitute its evidentiary inferences for those reached by the jury. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995). Furthermore, in a criminal trial, great weight is given to the result reached by the jury. State v. Johnson, 910 S.W.2d 897, 899 (Tenn. Crim. App. 1995).

Once approved by the trial court, a jury verdict accredits the witnesses presented by the State and resolves all conflicts in favor of the State. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). The credibility of witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). A jury's guilty verdict removes the presumption of innocence enjoyed by the defendant at trial and raises a presumption of guilt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant then bears the burden of overcoming this presumption of guilt on appeal. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991).

We will first address Appellant's reliance on Baldwin. In Baldwin, this Court held that directing an undercover operative to where cocaine could be purchased and subsequently facilitating that purchase was insufficient to support a conviction for the sale of cocaine. Id. at 359-60. The Court further held that a "procuring agent" defense was available to defendants charged with the sale of a controlled substance. Id. at 360. However, the offense addressed in Baldwin predated the Tennessee Criminal Sentencing Reform Act of 1989. In State v. Greenwood, No. 01C01-9109-CR-00280, 1992 WL 50962, (Tenn. Crim. App. Mar. 19, 1992), a case postdating the 1989 Act, this Court held that even though the defendant served only as the "procuring agent," he remained, pursuant to Tennessee Code Annotated Section 39-11-402, criminally responsible for the sale of cocaine to the same extent as the individual who actually provided the substance. Id. at *2. Section 39-11-402 provides that a person is criminally responsible for another's actions if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense . . . ." Tenn. Code Ann. § 39-11-402(2). Here, Appellant directed Ms. Abbott and Mr. Wicker to the apartment complex where the drug transaction would take place. He then took the $250 and exchanged it for an 8-ball of cocaine. Clearly, as in

Greenwood, Appellant aided in the commission of this drug sale and injested some of the drugs himself. He is therefore criminally responsible for the sale.

We will now address Appellant's contention that his actions constituted only simple possession or casual exchange. Simple possession or casual exchange is codified at Tennessee Code Annotated Section 39-17-318. In State v. Humphrey, No. 01C01-9404-CR-00134, 1995 WL 50039 (Tenn. Crim. App. Feb. 8, 1995), this Court affirmed a trial court's refusal to give a casual exchange jury instruction where the trial court offered the following reasoning:

> A casual exchange is just what it means: casual, without design, sometimes among friends even, or where it occurs with a group of people who are doing drugs or drinking or whatever, and is exchanged, although money may be passed, but it is still rather casual.

Id. at *1. Furthermore, the offense of casual exchange anticipates a small amount of a controlled substance. State v. Horton, No. 01C01-9312-CR-00435, 1994 WL 548750, at *4 (Tenn. Crim. App. Oct. 6, 1994), perm. app. denied, (Tenn. Jan. 30, 1995). Both the manner in which Appellant arranged this drug transaction and the amount of cocaine involved preclude any consideration of this offense as simple possession or casual exchange. Thus, we find that, when viewed in a light most favorable to the State, the evidence presented at trial supports Appellant's conviction.

III. PROCURING AGENT JURY INSTRUCTION

Appellant next alleges that the trial court erred in refusing to give a procuring agent jury instruction. Appellant again cites Baldwin as the sole support for his position. As stated previously, the precedent set out in Greenwood controls. Whether Appellant actually sold the cocaine or simply acted as the procuring agent is irrelevant because, when analyzing offenses occurring after November 1, 1989, the criminal responsibility statute encompasses both forms of conduct. We thus find that the trial court's refusal to give the requested jury instruction was proper.

IV. PEREMPTORY CHALLENGE

Appellant also alleges that the prosecution's use of a peremptory challenge to dismiss a black prospective juror was racially motivated. In support of this allegation, Appellant points out that both he and the challenged prospective juror are black.

The exercise of a peremptory challenge for purely racial reasons violates the Equal Protection Clause of the Fourteenth Amendment. Batson v. Kentucky, 476 U.S. 79, 89 (1986); State v. Jones, 789 S.W.2d 545, 548 (Tenn. 1990). However, the dismissal of one or more black jurors, without more, is not unconstitutional. State v. Bell, 759 S.W.2d 651, 653 (Tenn. 1988). The defendant must present a prima facie case of racial discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Batson, 476 U.S. at 94. Once the defendant satisfactorily presents a prima facie case of discriminatory purpose, the burden shifts to the prosecution to provide a rational, race-neutral explanation for the exercise of the peremptory challenge. Id.

_____We do not believe that the State's peremptory removal of one African-American from the jury pool, standing alone, is sufficient to make out a prima facie case of discrimination. See State v. Brown, 915 S.W.2d 3, 8 (Tenn. Crim. App. 1995). Moreover, the State offered the following rational, race-neutral explanation for the exercise of its peremptory challenge: the prospective juror remained silent when asked if a family member had ever been arrested despite the fact that her son had been prosecuted for a probation violation by one of the State's attorneys. By demonstrating that its peremptory challenge was not exercised to further a discriminatory purpose, the State properly discharged its obligation under Batson. See State v. Bibbs, 806 S.W.2d 786, 789 (Tenn. Crim. App. 1991). Thus, we conclude that the trial court properly refused to grant a mistrial.

V. SENTENCING

Finally, Appellant alleges that his sentence is excessive. Specifically, he argues that the trial court erred in determining the length of his sentence by failing to apply mitigating factor (1): his criminal conduct neither caused nor threatened serious bodily injury. See Tenn. Code Ann. § 40-35-113(1).

When an appeal challenges the length, range, or manner of service of a sentence, this Court conducts a de novo review with a presumption that the determination of the trial court was correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption of correctness is "conditioned upon the affirmative showing that the trial court in the record considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the event that the record fails to demonstrate such consideration, review of the sentence is purely de novo. Id. If appellate review reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this Court must affirm the sentence. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In conducting a review, this Court must consider the evidence, the presentence report, the sentencing principles, the arguments of counsel, the nature and character of the offense, mitigating and enhancement factors, any statements made by the defendant, and the potential for rehabilitation or treatment. State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The defendant bears the burden of showing the impropriety of the sentence imposed. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993).

We note initially, and Appellant concedes, that, because the record demonstrates that the trial court adequately considered the sentencing principles and all relevant facts and circumstances, our review of Appellant's sentence will be de novo with a presumption of correctness.

Appellant was convicted of the sale of cocaine in excess of 0.5 grams, a Class B felony. See Tenn. Code Ann. § 39-17-417(c)(1). As a Range I standard offender convicted of a Class B felony, Appellant's statutory sentencing range was eight to twelve years. See id. § 40-35-112(a)(2). The trial court found the following enhancement factors applicable to the offense:

> (1) the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
>
> (2) the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community; and
>
> (3) the felony was committed while the defendant was on probation.

Id. § 40-35-114(1), (8), (13)(C). The trial court found no mitigating factors. Based on the foregoing, the trial court imposed a mid-range sentence of ten years.

In the absence of enhancement and mitigating factors, the presumptive length of sentence for a Class B, C, D, and E felony is the minimum sentence in the statutory range while the presumptive length of sentence for a Class A felony is the midpoint in the statutory range. Tenn. Code Ann. § 40-35-210(c). Where one or more enhancement factors apply but no mitigating factors exist, the trial court may sentence above the presumptive sentence but still within the range. Id. § 40-35-210(d). Where both enhancement and mitigating factors apply, the trial court must start at the minimum sentence, enhance the sentence within the range as appropriate to the enhancement factors, and then reduce the sentence within the range as appropriate to the mitigating factors. Id. § 40-35-210(e). The weight afforded an enhancement or mitigating factor is left to the discretion of the trial court so long as the trial court complies with the purposes and principles of the Tennessee Criminal Sentencing Reform Act of 1989 and its findings are supported by the record. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995).

With regard to Appellant's mitigation argument, this Court has repeatedly denied application of mitigating factor (1) to drug offenses. See, e.g., State v. Leach, No 01C01-9601-CC-00008, 1997 WL 230158, at *3 (Tenn. Crim. App. May 7, 1997); State v. Gardner, No. 01C01-9302-CR-00060, 1993 WL 311539, at *2 (Tenn. Crim. App. Aug. 12, 1993), perm. app. denied, (Tenn. Nov. 29, 1993); Arwood v. State, No. 335, 1991 WL 73957, at *4 (Tenn. Crim. App. May 9, 1991). Given the magnitude and severity of cocaine abuse in our state and counties, we are still of the opinion that application of mitigating factor (1) is inappropriate in cases of this type. Upon de novo review and in accord with the presumption of correctness, we find Appellant's sentence justified and reasonable.

Accordingly, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE

CONCUR:

_____
JOE B. JONES, PRESIDING JUDGE

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JOSEPH M.TIPTON, JUDGE