IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY SESSION, 1998

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9708-CC-00334**
	)	
Appellee,	)	
	)	
	)	**WILLIAMSON COUNTY**
VS.	)	
	)	**HON. DONALD P. HARRIS**
BRIAN S. ROBERSON,	)	**JUDGE**
	)	
Appellant.	)	**(Direct Appeal - Sale of Cocaine)**

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

On April 10, 1997, a Williamson County jury convicted Appellant Bryan Roberson of the sale of .5 grams or more of cocaine. After a sentencing hearing on May 23, 1997, the trial court sentenced Appellant as a Range I standard offender to a term of eight and one-half years. Appellant challenges both his conviction and his sentence, raising the following issues:

> 1) whether the trial court erred when it failed to compel the State to disclose any agreements it had with its confidential informant;
> 2) whether the trial court erred when it allowed the prosecutor to comment on the audio tape of a drug transaction during his opening statement;
> 3) whether the trial court erred when it allowed a witness for the State to narrate the transaction on the audio tape;
> 4) whether the evidence was sufficient to support Appellant's conviction; and
> 5) whether the trial court properly sentenced Appellant.

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

I. FACTS

Agent Joey Kimball of the 21st Judicial District Drug Task Force testified that on December 18, 1995, he and Agent Bill Trousdale met with a confidential informant, James "Hacksaw" Armstrong, who had made arrangements to purchase cocaine from an individual named Damon Baugh. After some initial discussions about the planned transaction, Kimball and Trousdale searched Armstrong to make sure that he was not carrying any money or drugs. Kimball then placed a wire transmitter on Armstrong and gave him $175.00 to purchase the cocaine. Kimball then drove Armstrong to within walking distance of the place where he was supposed to meet Baugh.

Kimball testified that he had made a tape recording of the events that occurred on the evening of December 18, 1995. After Kimball identified the audio tape and testified that the tape was difficult to understand at times due to static interference, the tape was played in the presence of the jury and Kimball was allowed to repeat what was said on the tape at various intervals.

Kimball explained that when Baugh failed to arrive at the scheduled time, Armstrong went to Appellant's apartment. After a portion of the tape was played, Kimball identified the voices of Armstrong and Appellant. Kimball then testified that when Appellant asked what Armstrong wanted, Armstrong stated that he wanted a "sixteenth." Kimball then testified that after a brief conversation, Armstrong told Appellant that he wanted an "eighth."

Kimball testified that after Armstrong left Appellant's apartment, Armstrong gave Kimball a large rock of cocaine and $25.00. Kimball then searched Armstrong and discovered that Armstrong had concealed two smaller rocks of crack cocaine in his wallet. Kimball testified that he filed charges against Armstrong for concealing the crack cocaine in his wallet.

Armstrong testified that he was currently incarcerated for possession of cocaine. Armstrong stated that although he had agreed to be an informant in the hope that doing so would lead to the dismissal of some charges in an unrelated case, no deal had been made in exchange for his testimony.

After listening to a portion of the audio tape, Armstrong identified his own voice as well as that of Appellant. Armstrong then testified that he originally told

Appellant that he wanted to buy a "sixteenth," but when he saw the large amount of drugs that Appellant had in his apartment, he asked for an "eight-ball." Armstrong testified that he then paid Appellant $150.00 for a rock of crack cocaine.

Armstrong admitted that he broke off two pieces from the rock of crack cocaine that he had purchased from Appellant. Armstrong stated that he had concealed the two smaller rocks in his wallet because he did not think that he would be searched again and he would be able to sell the crack cocaine at a later time.

II. AGREEMENT WITH THE CONFIDENTIAL INFORMANT

Appellant contends that he is entitled to a new trial because the trial court denied his motion to compel the State to disclose any agreements it had with its confidential informant. We disagree.

In Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States Supreme Court held that the prosecution has a constitutional duty to furnish the accused with exculpatory evidence pertaining to either the accused's guilt or innocence and the potential punishment that may be imposed. Failure to reveal exculpatory evidence violates due process where the evidence is material either to guilt or punishment, irrespective of good faith or bad faith of the prosecution. Id. 373 U.S. at 87, 83 S. Ct. at 1196–97. The prosecution must also disclose evidence which may be used by the defense to impeach a witness.

Giglio v. United States, 405 U.S. 150, 154–55, 92 S. Ct. 763, 766, 31 L .Ed. 2d 104 (1972); Workman v. State, 868 S.W.2d 705, 709 (Tenn. Crim. App. 1993).

Before a reviewing court may find a due process violation under Brady, all of the following four prerequisites must be satisfied:

> 1) The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
> 2) The State must have suppressed the information;
> 3) The information must have been favorable to the accused; and
> 4) The information must have been material.

State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995). In Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995), the United States Supreme Court stated that in determining whether information is material, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

Appellant's claim that a Brady violation occurred in this case must fail because there is no evidence in the record that the State suppressed any information that was favorable to Appellant. First, there is absolutely no evidence that the State ever made any agreement with Armstrong in return for his testimony. In fact, the only evidence in the record about any such agreement is the testimony of Armstrong in which he specifically denied that the State had made any deals with him in return for his testimony. Second, the State did not attempt to conceal the fact that Armstrong had agreed to be an informant because he hoped that charges against him would be dropped if he did so. Indeed, the State elicited testimony from Kimball on direct examination that

Armstrong had agreed to be an informant because he hoped to obtain "consideration" for the charges in the other case. Further, the State also elicited testimony from Armstrong that he agreed to become a confidential informant because he hoped that the charges against him would be dropped if he did so.

Although Appellant complains that this evidence was not disclosed to him prior to trial, he has failed to show that he could or would have done anything differently if this information had been disclosed before trial.[1] Appellant's only claim is that if he had known about this information before trial, he "may have been able to locate witnesses to testify about [Armstrong's] lack of truthfulness or dishonesty in other matters." Not only is this mere speculation insufficient to establish prejudice, it is unlikely that any such testimony would have had any effect on the jury's view of Armstrong's credibility. Indeed, the jury already knew that Armstrong had used illegal drugs in the past, that he was currently incarcerated for drug possession, and that he had attempted to steal crack cocaine from the Drug Task Force during the incident at issue here.

In short, we hold that no Brady violation occurred in this case because the State did not suppress any evidence that was favorable to Appellant. This issue has no merit.

[1]Indeed, the record indicates that Appellant's counsel vigorously cross-examined Armstrong on both his motives for becoming an informant and his motives for testifying in court.

III. OPENING STATEMENT

Appellant contends that the trial court erred when it allowed the prosecutor to comment on the audio tape during his opening statement. Specifically, Appellant claims that the trial court committed reversible error when it allowed the prosecutor to state that when he played the tape, the jury "would hear a drug deal go down." We disagree.

Under Tennessee law, all parties have the right in a jury trial to "make an opening statement to the court and the jury setting forth their respective contentions, views of the facts and theories of the lawsuit." Tenn. Code Ann. § 20-9-301 (1994). Thus, the trial court properly allowed the prosecutor to state that in his view, the evidence on the audio tape showed that a drug transaction had taken place. Further, even if this statement was improper, it was clearly harmless error because Appellant was not prejudiced by it. See Tenn. R. App. P. 36(b). First, the prosecutor's statement was supported by the testimony of Armstrong that the audio tape was a recording of a transaction in which he purchased crack cocaine from Appellant for $150.00. Second, the trial court instructed the jury that the statements of counsel were not evidence and they were to disregard any statements that were not supported by the evidence. Indeed, Appellant does not even argue that he was prejudiced by this statement, rather, he argues that he "may have been prejudiced" by it. This issue has no merit.

IV. NARRATION OF THE AUDIO TAPE

Appellant contends that the trial court erred when it allowed Agent Kimball to narrate various portions of the audio tape. We disagree.

The record indicates that during the direct examination of Agent Kimball, the prosecutor asked Kimball to play the tape and then repeat what was being said on the tape. Appellant objected, and the trial court ruled that Kimball could repeat what was being said on the tape, but the jury would determine whether Kimball was accurate. The trial court also ruled that although Kimball could repeat what was being said, he could not give an interpretation of what he thought the speakers meant. We conclude that the trial court's ruling was proper. In State v. Morris, 666 S.W.2d 471 (Tenn. Crim. App. 1983), this Court held that a trial court properly admitted the testimony of an undercover agent in which he narrated an audio tape of a drug transaction as it was played to the jury. Specifically, this Court held that the narration was properly admitted because the quality of the tape was poor, the narration was done for clarification of the jurors, and the defendant had failed to show how he was prejudiced by the narration. Id. at 473. Similarly, the quality of the tape in this case was also poor and the narration of the tape served to clarify what was being said for the jurors. Although Agent Kimball was not an actual participant in the recorded conversation, as was the agent in Morris, Kimball testified that he had listened to the entire conversation as he was recording it and he had been able to hear the voices more clearly on his radio receiver than they sounded on the tape. Finally, Appellant has not shown that he was prejudiced by Kimball's narration. Therefore, this issue has no merit.

V. SUFFICIENCY OF THE EVIDENCE

Appellant contends that the evidence was insufficient to support his conviction. We disagree. When an appellant challenges the sufficiency of the evidence, this Court is obliged to review that challenge according to certain well-settled principles. A verdict of guilty by the jury, approved by the trial judge, accredits the testimony of the State's witnesses and resolves all conflicts in the testimony in favor of the State. State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). Although an accused is originally cloaked with a presumption of innocence, a jury verdict removes this presumption and replaces it with one of guilt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with Appellant to demonstrate the insufficiency of the convicting evidence. Id. On appeal, "the [S]tate is entitled to the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Id. (citing State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)). Where the sufficiency of the evidence is contested on appeal, the relevant question for the reviewing court is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. Harris, 839 S.W.2d at 75; Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). In conducting our evaluation of the convicting evidence, this Court is precluded from reweighing or reconsidering the evidence. State v. Morgan, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, this Court may not substitute its own inferences "for those drawn by the trier of fact from circumstantial evidence." Id. at 779. The weight and credibility of the witnesses' testimony are matters

entrusted exclusively to the jury as the trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996).

Appellant was convicted of the sale of .5 grams or more of cocaine. See Tenn. Code Ann. § 39-17-417(a)(3), (c)(1) (1995) (stating that knowingly selling .5 or more grams of cocaine is a Class B felony). When viewed in the light most favorable to the State, the evidence in this case was clearly sufficient to establish that Appellant had committed this offense. Armstrong testified that he asked Appellant for an "eight-ball" of crack cocaine, that Appellant gave him the crack cocaine, and that Armstrong paid $150.00 to Appellant for the crack cocaine. Agent Kimball testified that when Armstrong returned from Appellant's apartment, Armstrong gave him a large rock of crack cocaine and Kimball found two smaller rocks that Armstrong had hidden in his wallet. Finally, Agent Glenn Everett of the Tennessee Bureau of Investigation testified that the substance obtained from Armstrong was 3.1 grams of crack cocaine. Appellant basically contends that this evidence was insufficient because the only evidence that Armstrong paid Appellant $150.00 for the crack cocaine came from Armstrong himself and Armstrong is simply not believable. However, matters relating to credibility of witnesses are for the jury to decide. Sheffield, 676 S.W.2d at 547; Brewer, 932 S.W.2d at 19. The jury obviously believed Armstrong's testimony. Thus, this issue has no merit.

VI. SENTENCING

Appellant contends that the trial court erred when it enhanced his sentence from eight years to eight and one-half years. Specifically, Appellant claims that the trial court erred when it found that no mitigating factors applied to his sentence. We disagree.

"When reviewing sentencing issues . . . including the granting or denial of probation and the length of sentence, the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (1997). "However, the presumption of correctness which accompanies the trial court's action 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 conducting our review, we must consider all the evidence, the presentence report, the sentencing principles, the enhancing and mitigating factors, arguments of counsel, the appellant's statements, the nature and character of the offense, and the appellant's potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103(5), -210(b) (1997 & Supp. 1998); Ashby, 823 S.W.2d at 169. "The defendant has the burden of demonstrating that the sentence is improper." Id. Because the record in this case indicates that the trial court properly considered the sentencing principles and all relevant facts and circumstances, our review is de novo with a presumption of correctness.

In enhancing Appellant's sentence to eight and one-half years, the trial court found that enhancement factor (1) applied because Appellant had a previous history of criminal convictions in addition to those necessary to establish the appropriate range. See Tenn. Code Ann. § 40-35-114(1) (1997). Appellant does not challenge the application of this factor and we conclude that it was properly applied.[2]

The trial court also found that none of the enumerated mitigating factors of Tennessee Code Annotated section 40-35-113 applied to Appellant's sentence. Appellant contends that the trial court should have applied mitigating factor (1), that Appellant's conduct neither caused nor threatened serious bodily injury. However, this Court has held that this factor is inapplicable in cases involving the sale of cocaine. State v. Keel, 882 S.W.2d 410, 422 (Tenn. Crim. App. 1994). Even if this factor had been applied, it would have been entitled to little weight. See State v. Hoyt Edward Carroll, No. 03C01-9607-CC-00254, 1997 WL 457490 at *4 (Tenn. Crim App., Knoxville, Aug. 12, 1997) (holding that in cases involving drugs, mitigating factor (1) is entitled to little weight). Thus, we conclude that an eight and one-half year sentence is entirely appropriate in this case.

Accordingly, the judgment of the trial court is AFFIRMED.

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JERRY L. SMITH, JUDGE

[2]The record indicates that Appellant has one previous conviction for resisting arrest and two previous convictions for disorderly conduct.

CONCUR:

_____
GARY R. WADE, PRESIDING JUDGE

_____
DAVID G. HAYES, JUDGE