IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
OCTOBER SESSION, 1995

STATE OF TENNESSEE,	)	
	)	No. 03C01-9503-CR-00059
Appellee	)	
	)	SULLIVAN COUNTY
vs.	)	
	)	Hon. R. JERRY BECK, Judge
DEANDRADE PHILLIPS,	)	
	)	(Sale of Cocaine in excess of ½ gram)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Deandrade "DeeDee" Phillips, appeals as of right from the judgment of conviction and the sentence entered by the Criminal Court of Sullivan County. On July 14, 1994, the appellant was found guilty by a jury of one count of sale of cocaine in excess of one-half gram, a class B felony. On August 29, 1994, the trial court sentenced the appellant to ten years in the state penitentiary as a range I, standard offender. The appellant now seeks our review of the conviction and sentence challenging (1) the sufficiency of the evidence and (2) the sentence imposed by the trial court.

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

I. Factual Background

On January 12, 1994, the Second Judicial Drug Task Force conducted an undercover drug operation at the Riverview housing complex in Kingsport. The participating law enforcement officers included Agents Todd Harrison and Tommy Archer. Also present was an informant, Jody Johnson.[1] In preparation for the "buy" transaction, Agent Harrison was "wired" with a body transmitter, which permitted the recording of the anticipated transaction. Additionally, Harrison was furnished three hundred dollars which were marked for the purchase of drugs. Finally, the informant, Johnson, was subjected to a cursory search to detect the presence of any contraband.[2] Harrison and Johnson then

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[1]The record indicates that Jody Johnson was paid sixty dollars for her participation in the buy operation.

[2]The search of Ms. Johnson was limited due to the fact that no female officers were present. The testimony revealed that Johnson was wearing black

proceeded towards the Riverview housing complex in Johnson's vehicle.

After arriving in the Riverview area, Johnson observed Raymond "RayRay" Bell, the appellant's co-defendant, and pulled the car to the curb. When Bell approached Johnson's vehicle, Johnson "asked [him] if DeeDee [the appellant] was doing anything." Bell responded affirmatively and Johnson motioned to the appellant to come down to her car. Bell asked Johnson what she wanted. Johnson turned to Harrison, and Harrison responded "[A] couple of 'G's'."[3]

Bell then approached Harrison and stated, "I've got a nice piece . . . but me and my fellow here are trying to do things together. . . . It is a nice piece. . . . You can use it up or you can make you some money off of it. . . . I've got to have three hundred and seventy-five dollars for it."[4] Harrison replied that he only had three hundred dollars. Bell informed Harrison that he would cut him a three hundred dollar piece. The appellant asked Johnson to step out of the car so they could talk. Harrison testified at trial that the appellant, Bell, and Johnson walked away from the car, towards a building, but remained within his sight at all times. Harrison added that, at this point in the transaction, he saw the appellant's and Bell's hands meeting. Johnson testified that, during this time, the appellant pulled out a "bag of dope" and told Bell to get him something on which to put it. Bell tore off a portion of a paper grocery bag which he found lying on the ground. The appellant then poured some cocaine onto it. They then walked back to Johnson's car. Bell approached Harrison and asked to see the money. Harrison, likewise, asked to see the cocaine. Bell opened the paper to reveal

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leggings, a t-shirt, and a trench-like coat. Agent Harrison testified that the pockets of Johnson's trench coat were searched, but, otherwise, only a visual search was completed.

[3]The term "G" is the street term for a gram of cocaine.

[4]Harrison testified that "'a nice piece' means a nice quantity of cocaine."

"some white powder in it." Harrison gave Bell three hundred dollars, and Bell gave Harrison the cocaine. During this exchange, the appellant was standing on the sidewalk observing the transaction. As Harrison and Johnson left the area, they observed Bell approach the appellant and saw their hands come together. However, neither Harrison nor Johnson could tell whether anything was exchanged.

As noted earlier, Agent Harrison and Jody Johnson testified at trial as to the events of the "buy" transaction. Additionally, the recorded conversation of the drug transaction was played for the jury, corroborating Harrison's and Johnson's testimony.[5] Neither the appellant or his co-defendant, Bell, presented any proof in defense.

II. Sufficiency of the Evidence

The appellant asserts that "the entire case against the appellant is based on the testimony of [Jody Johnson] a convicted shoplifter and 'recovering' cocaine addict who admits having traded drugs for sex and who was paid by the State for her participation in this drug buy." Specifically, the appellant submits that, "because of the total lack of credibility of Jody Johnson, and the material inconsistencies between her testimony and that of Agent Harrison, the proof in this cause falls short of establishing the defendant's guilt beyond a reasonable doubt."

Initially, a defendant is cloaked with the presumption of innocence. However, a jury conviction removes this presumption of innocence and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of

[5]The portion of the conversation attributed to the appellant was inaudible.

demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). 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. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). It is the appellate court's duty to affirm the conviction if the evidence viewed under these standards was sufficient for any rational trier of fact to have found the essential elements of the offenses beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); Tenn. R. App. P. 13(e).

The jury found the appellant guilty of possession of cocaine over one-half gram with intent to sell in violation of Tenn. Code Ann. § 39-17-417(a)(4), -(c)(1) (1994 Supp.). In order to convict under this statute, the State must prove that the defendant knowingly possessed a controlled substance, to wit: cocaine, with the intent to sell that controlled substance. Id. The facts in this case demonstrate that the appellant, acting with the requisite culpability, jointly possessed cocaine with the intent to sell.

Moreover, the appellant's argument rests on the lack of Jody Johnson's credibility. A guilty verdict, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves any conflicts in the evidence favorably to the State's theory. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). The credibility of witnesses at trial is determined by the trier of fact, not this court. State v. Creasy, 885 S.W.2d 829, 831 (Tenn. Crim. App. 1994) (emphasis added) (citing Cabbage, 571 S.W.2d at 835) . The jury has the authority, as the trier of fact, to believe or disbelieve the testimony of any witness. In the case *sub judice*, the jury chose to accredit the testimony of Johnson by their verdict.

Therefore, the appellant has failed to show that the evidence presented was insufficient for any rational trier of fact to find the essential elements of this offense beyond a reasonable doubt. Tenn. R. App. P. 13(e). Accordingly, this issue is without merit.

III. Sentencing

The appellant, in his final issue, contends that the sentence imposed by the trial court is excessive. Review, by this court, of the length, range, or manner of service of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d)(1990). This presumption only applies, however, if the record demonstrates that the trial court properly considered relevant sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the case before us, the trial court properly considered the relevant sentencing principles, thus, the presumption applies.

In making our review, this court must consider the evidence heard at trial and at sentencing, the presentence report, the arguments of counsel, the nature and characteristics of the offense, any mitigating and enhancement factors, the defendant's statements, and the defendant's potential for rehabilitation. Tenn. Code Ann. §§ 40-35-102, -103(5), -210(b)(1990); see also State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993) (citation omitted). The burden is now on the appellant to show that the sentence imposed was excessive. Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(d).

The appellant contends that the trial court, in violation of Tenn. Code Ann. § 40-35-210(e) (1990), failed to properly apply enhancing and mitigating factors. Determination of the length of a sentence for a felony conviction begins with Tenn. Code Ann. § 40-35-210(c) (1990), which instructs the sentencing court that "[t]he presumptive sentence shall be the minimum sentence in the range if

there are no enhancement or mitigating factors." If there are enhancement and mitigating factors, the court must start at the minimum sentence in the range, enhance the sentence in accordance with the enhancement factors, and reduce the sentence in accordance with the mitigating factors. Tenn. Code Ann. § 40-35-210(e). In the present case, the trial court found the presence of two statutory enhancement factors: (1) the defendant has previous convictions in addition to those required to establish the range of punishment; and (2) the instant offense was committed while the defendant was on probation. See Tenn. Code Ann. § 40-35-114(1), -114(13)(C) (1994 Supp.). With respect to mitigating factors, the trial court found that the appellant's conduct neither caused nor threatened serious bodily injury. See Tenn. Code Ann. § 40-35-113(1) (1990). The appellant argues that, instead of following Tenn. Code Ann. § 40-35-210(e), the trial court "gave all the weight to the enhancing factors and no weight at all to the mitigating factors" because the court stated that "the enhancing factors outweigh the mitigating factors." Based upon these findings, the trial court sentenced the appellant to ten years as a range I offender of a class B felony.

Upon completion of our *de novo* review, we conclude that two enhancement factors, Tenn. Code Ann. §§40-35-114(1),[6] -114(13)(C),[7] and one mitigating factor, Tenn. Code Ann. § 40-35-113(1), are present. The appellant was convicted of a class B felony, and the parties stipulated that the appellant is a range I offender. Thus, the sentence range for the appellant is eight to twelve years. The court imposed a mid-range sentence of ten years for the offense.

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[6]With respect to enhancement factor 40-35-114(1), we note that the pre-sentence report indicates the presence of fifteen prior convictions. Although fourteen of these prior offenses are misdemeanors, five of these convictions are drug-related. Moreover, the report reveals five juvenile convictions.

[7]Regarding enhancement factor 40-35-114(13)(C), we note that this offense was committed while the appellant was on "determinate release probation" from a two year sentence for attempting to sell cocaine.

We find the length of this sentence to be justified, given the enhancement and mitigating factors present.

The weight afforded an enhancement or mitigating factor is left to the trial court's discretion, so long as the court complies with the purposes and principles of the 1989 Sentencing Act, and the court's findings are adequately supported by the record. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim App. 1995) (citing Sentencing Commission Comments, Tenn. Code Ann. § 40-35-210; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see Ashby, 823 S.W.2d at 169). Moreover, the supreme court, in Moss, 727 S.W.2d at 238, specifically stated that:

> [T]he Act does not attribute any particular value vis-a-vis how many years should be added or subtracted based on the presence of any of these factors. . . . The weight to be afforded mitigating and enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstance of the case involved.

The trial court placed on the record those factors that it found to be applicable to the appellant's case. The court also discussed its specific findings of fact to which it applied the relevant sentencing principles in order to arrive at the sentence. Id. Therefore, we conclude that the sentence of ten years imposed by the trial court is not excessive under the guidelines of the 1989 Act.

IV. Conclusion

After a review of the record before us, we conclude that the evidence is sufficient to convict the appellant of possession of over one-half gram of cocaine. Furthermore, because the record demonstrates that the trial court correctly considered and applied relevant sentencing principles, we conclude that the sentence imposed by the trial court is appropriate. Accordingly, the judgment of

the trial court is affirmed.

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David G. Hayes, Judge

CONCUR:

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John H. Peay, Judge

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Joseph M. Tipton, Judge