IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1994 SESSION



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| STATE OF TENNESSEE, | * | C.C.A. # 03C01-9403-CR-00088 |
| APPELLEE, | * | WASHINGTON COUNTY |
| VS. | * | Hon. Lynn W. Brown, Judge |
| MARK MOORE, a/k/a "Nick", | * | (Possession With Intent) |
| APPELLANT. | * | |

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OPINION FILED: _____

AFFIRMED

Gary R. Wade, Judge

## OPINION

The defendant, Mark Moore, appeals from his conviction for possession of crack cocaine, a Schedule II drug, with intent to resell. The trial court imposed a Range I sentence of twenty-five years.

In addition to his challenge to the sufficiency of the evidence, the defendant presents the following issues for review:

> (1) whether the trial court erred in denying defense counsel's motion for a continuance;
>
> (2) whether the trial court erred in ruling that a state witness was not an accomplice as a matter of law;
>
> (3) whether the defendant received ineffective assistance of counsel at his sentencing hearing; and
>
> (4) whether the trial court erred in imposing the maximum sentence.

We affirm both the conviction and sentence.

During the summer of 1991, Stan Cookenour, a Johnson County police officer and Assistant Director of the First Judicial District Drug Task Force, led an extensive undercover drug investigation in Johnson County. During a search of property leased by the defendant's girlfriend, Cynthia Feggans, Officer Cookenour discovered approximately 2400 "rocks" of crack cocaine, valued at $50 each.

The defendant had been under surveillance for several months prior to his arrest. Over that period, Officer

Cookenour had seen the defendant in at least seven different vehicles, most of which had out of state license plates. The defendant had changed residences frequently during that time but often spent the night with Feggans, either at her home or at various local motels.

After being arrested for possession with intent to sell, the defendant told Officer Cookenour that he was not the "big man," but acknowledged that he was involved in the Johnson City operation. He claimed that Feggans, "Bones" Rodney, Delroy Trowers, and Wayne Yorrick acted as his assistants. The defendant informed Officer Cookenour that he usually received the cocaine in powder form and that he and the others then rented a motel room to cook, cut, and wrap the powder into crack cocaine "rocks." The defendant explained that his "slingers" actually sold the drugs. Upon receipt of the sale proceeds, the defendant would then send cash payments ranging from $5,000 to $10,000 to Dean Stone, the operation's ringleader, in New York. The defendant also informed the officer of three separate locations in the Johnson City area where drugs were routinely hidden. He mentioned that Trowers was responsible for keeping the drugs "stashed."

The defendant admitted that he had skimmed $9,000 "off the top" and had used the money to make a down payment on an Acura automobile. He further acknowledged that some $13,000, found in a room at the Fairfield Inn registered to Trowers, was his. The defendant expressed his surprise at the amount of information that Officer Cookenour had already

obtained. He asked the officer whether the cocaine had been found and also wanted to know if he would be prosecuted for the crime.

David Holloway, a TBI forensic chemist, tested the packets seized by Officer Cookenour. He determined the weight of the substance to be 313.3 grams and confirmed that it was cocaine. While Dr. Holloway performed a chemical analysis on only twenty-four randomly chosen "rocks," he believed that each was cocaine; all 2400 had a waxy surface and were consistent in color and size.

Feggans testified that she was fully aware of the defendant's drug activities but never participated in his business. She admitted that she sometimes accompanied the defendant to and from his supplier in New York and sometimes used the drugs but she contended that she never engaged in any sales. Feggans had seen where the defendant kept the drugs hidden and had often accompanied him to the post office when he sent his sale proceeds to New York. She acknowledged that she had made the down payment on the automobile but asserted that she had done so for the sole benefit of the defendant. Feggans conceded that she had originally told authorities that the money had come from Delroy Trowers, but later retracted the statement, explaining that she had been trying to protect the defendant by "pointing the finger" elsewhere. Feggans related that she had received threatening letters from the defendant telling her what to say at trial.

On cross-examination, Feggans conceded that she had at times been extremely angry with the defendant and had written him some particularly nasty letters. She explained that he had been unfaithful to her and had moved out of her residence. Feggans claimed that she still loved the defendant and had tried to protect him, but felt that she had been victimized. By the time of this trial, Feggans was also in jail. She had charges pending against her for possession of the same cocaine for which the defendant was being tried in this case.

Wayne Yorrick, who also testified for the state, acknowledged being one of the defendant's drug distributors and money collectors. His testimony closely tracked that given by Feggans, with whom he admitted having a single, prior sexual encounter, except in one regard: according to Yorrick, Feggans was heavily involved in the drug operation.

The defendant, whose wife and child live in New York, testified in his own behalf. He acknowledged his extra-marital relationship with Feggans who, he claimed, had asked him to assist in the Johnson City drug operation. He testified that he accepted her offer because he had no job at the time and because he had known Yorrick from high school.

The defendant admitted that he had gone on two "drug runs" to New York and had sent money to Stone but insisted that he had no control over the drugs. He claimed he had a fear of illegal drugs and would not live where drugs were

present. The defendant explained that Feggans did not keep drugs at her apartment when he moved into her residence; when she did so later, he claimed to have packed up his things and left. The defendant described Feggans as a "crazy crack addict" by the time of his departure. He claimed that after he left, he went to a local motel and Feggans continued to visit him--in an apparent attempt to rekindle the relationship. The defendant contended that Feggans and Yorrick were also dealing in heroine and marijuana.

The defendant adamantly denied having known of the 2400 rocks of cocaine found at Feggans' residence and disputed her claim that he gave her money to make the down payment on the Acura automobile. He intimated that Stone intended it as a reward for Feggans' work in the Johnson City drug operations.

The defendant accused Officer Cookenour of misrepresenting the content of his pretrial statement. He denied having made incriminating remarks and suggested that police had a tape recording of the conversation because it would confirm that the officer had lied. The defendant read from notes he claimed to have made a couple of days after the interview.

The claim that the evidence is insufficient to support the conviction for possession of over 300 grams of cocaine is based upon the fact that Dr. Holloway only tested a random sample of the 2400 "rocks" of cocaine. In determining

whether the evidence was sufficient, we are guided by a few well-established principles.

On appeal, the state is entitled to the strongest legitimate view of the evidence and all inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing 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. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e).

The argument of the defendant here is the same as one made in State v. Selph, 625 S.W.2d 285 (Tenn. Crim. App. 1981). In Selph, this court held that the convicting evidence was sufficient even though a sampling of only five of some five thousand Quaalude tablets was tested. Id. at 286. In our view, the evidence here was even more compelling than that given in Selph. Dr. Holloway testified that while he did not test each individual "rock" of cocaine for verification that they contained illegal drugs, he did unwrap each one and examine their similarities in appearance with those he had tested. He concluded that each of the rocks, both tested and

untested, had a waxy surface and were consistent in color and size. All of those randomly tested contained the illegal drugs. Under these circumstances, we find the evidence sufficient.

**I**

Next, the defendant asserts that the trial court erred in denying his motion for a continuance. In addition to the crime at issue here, the defendant was charged in a separate indictment with the illegal sale of cocaine. Although the trial court appointed different counsel for each charge, the trials were set on the same date. The defendant argues that each of his attorneys appeared on the appointed date under the impression that the sale of cocaine charge, rather than the possession with intent charge, would be first. Because this charge was called to be tried first instead, the defendant claims his counsel was not adequately prepared, thereby depriving him of the effective assistance of counsel.

Again, the law is well settled. The grant or denial of a continuance rests within the sound discretion of the trial court. Its determination will not be overturned unless there is "a clear showing of an abuse of discretion, to the prejudice of the defendant." Woods v. State, 552 S.W.2d 782, 784 (Tenn. Crim. App. 1977); Frazier v. State, 3 Tenn. Crim. App. 696, 702, 466 S.W.2d 535, 537 (1970).

Here, defense counsel did move for a continuance but it is clear that he did so only at the insistence of the

defendant. Even though it appears that the defendant and his other counsel both believed that the sale charge would be tried first, there is no indication in the record that defense counsel in this case was not prepared to proceed. Because both cases were listed on the docket to be tried, the defendant and each of his attorneys had the responsibility to prepare in advance. There is no hint that the defendant was prejudiced by the ruling to proceed on this charge first. Thus, we find that the trial court did not abuse its discretion by denying the defendant's request for a continuance.

**II**

Next, the defendant asserts that the trial court erroneously concluded that Feggans was not an accomplice as a matter of law. The defendant claims that Feggans testimony was not adequately corroborated and that, had the trial court properly ruled, he would have been entitled to an acquittal.

Upon evaluating the evidence, the trial court found that whether Feggans was an accomplice presented a question of fact to be resolved by the jury. It then carefully and quite fully instructed the jury on how to make that determination.

Again, the law is well settled. A defendant cannot be convicted upon the uncorroborated testimony of accomplices. Sherrill v. State, 204 Tenn. 427, 433-35, 321 S.W.2d 811, 814-15 (1959); Prince v. State, 529 S.W.2d 729, 732 (Tenn. Crim. App. 1975). An accomplice is defined as a person who

knowingly, voluntarily, and with common intent with the principal offers to unite in the commission of a crime. Clapp v. State, 94 Tenn. 186, 194-95 30 S.W. 214, 216 (1895); Letner v. State, 512 S.W.2d 643, 647 (Tenn. Crim. App. 1974).

When the facts are clear and undisputed, it is for the trial court to determine as a matter of law whether a witness is an accomplice. Conner v. State, 531 S.W.2d 119, 123 (Tenn. Crim. App. 1975). When the facts are in dispute, as here, or susceptible to an inference that a witness may or may not be an accomplice, the issue is one of fact for the jury. Ripley v. State, 189 Tenn. 681, 687, 227 S.W.2d 26, 29 (1950); Abbott v. State, 508 S.W.2d 801, 802 (Tenn. Crim. App. 1974).

The rule is that there must be some fact testified to which is entirely independent of an accomplice's testimony; that fact, taken by itself, must lead to an inference that a crime has been committed and that the defendant is responsible therefor. State v. Fowler, 213 Tenn. 239, 245-46, 373 S.W.2d 460, 463 (1963). This requirement is met if the corroborative evidence fairly and legitimately tends to connect the accused with the commission of the crime charged. Marshall v. State, 497 S.W.2d 761, 765 (Tenn. Crim. App. 1973). Only slight circumstances are required to furnish the necessary corroboration. Garton v. State, 206 Tenn. 79, 91, 332 S.W.2d 169, 175 (1960). To be corroborative, the evidence need not be adequate in and of itself to convict. See Conner v. State, 531 S.W.2d 119 (Tenn. Crim. App. 1975).

If a witness is deemed to be an accomplice, either as a matter of law or by factual determination, whether their testimony has been sufficiently corroborated is a function entrusted to the jury as the trier of fact. Stanley v. State, 189 Tenn. 110, 116, 222 S.W.2d 384, 386 (1949). If, however, there is no corroborative testimony, it is the court's duty to set aside the jury conviction. Sherrill v. State, 321 S.W.2d at 816.

While Feggans' testimony at trial and her pretrial statements contained inconsistencies which suggested her involvement in the drug operation, she consistently maintained that she had not participated in the operation. She claimed that her extensive knowledge of this cocaine operation resulted only from her status as the defendant's girlfriend. Feggans also claimed that, while she too had been charged with "possession with intent to sell" the same cocaine at issue here, she had not been promised leniency by the state in exchange for her testimony. Despite strong evidence that Feggans was indeed the defendant's accomplice, it was not so overwhelming as to require the court to declare her an accomplice as a matter of law. Thus, the trial court properly left the decision to the jury.

Even if the trial court erred in failing to declare Feggans an accomplice as a matter of law, we would have found the error harmless. Officer Cookenour had been tracking the defendant's activities for several months. There was testimony that, after his arrest, the defendant confessed to

his leadership role in the Johnson City cocaine operation. Thus, the jury had ample corroboration that the defendant was guilty of the crime even if the jury had determined that both Feggans and Yorrick were his accomplices.

**III**

Next, the defendant asserts that he was deprived of the effective assistance of counsel at his sentencing hearing, and thus received a greater sentence than was warranted. He claims that counsel failed to consult with him between the trial and the sentencing hearing, thereby denying him his right to call favorable witnesses, such as his wife, his sister, and his parents.

In order for the defendant to be granted relief on grounds of ineffective assistance of counsel, he must establish that the advice given or the services rendered were not within the range of competence demanded of attorneys in criminal cases and that, but for his counsel's deficient performance, the results of his trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975).

At the hearing on his motion for a new trial, the defendant maintained that several witnesses would have testified about his positive work history, support of his family, and lack of prior criminal behavior. He claims, however, that defense counsel deprived him of the opportunity to call those witnesses by failing to adequately communicate

with him prior to the sentencing hearing. We note, however, that the defendant presented neither affidavits nor live testimony of any of these potential witnesses. See Shephard v. State, 533 S.W.2d 335 (Tenn. Crim. App. 1975)(refusing to overturn conviction when no supporting affidavits or testimony presented). In consequence, we have no way of determining whether the defendant might have been prejudiced by any lack of preparation on the part of his counsel.

During the hearing on the motion for new trial, defense counsel offered his entire, unabridged file to the defendant. The defendant refused this offer. By failing to take advantage of that opportunity or otherwise establish how or why his sentence should have been less, the defendant has failed to provide a sufficient record for appellate review. Thus, we must presume that the trial court correctly found that counsel effectively represented the defendant. See State v. Hammons, 737 S.W.2d 549, 552 (Tenn. Crim. App. 1987); Tenn. R. App. P. 24.

**IV**

As his final issue, the defendant claims that the Range I, 24-year sentence imposed by the trial court, the maximum possible, was excessive. The trial court applied two enhancement factors, with which he does not take issue: (1) that the defendant had a previous history of criminal convictions; and (2) that he was the leader in the commission of this crime. See Tenn. Code Ann. § 40-35-114(1) and (2).

He does, however, argue that two mitigating factors should have been applied: (1) the defendant "assisted the authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed the offenses"; and (2) the defendant's conduct was "motivated by a desire to provide necessities for his family or himself." Tenn. Code Ann. § 40-35-113(7) and (9).

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 a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). 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). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 862

(Tenn. Crim. App. 1987).

The defendant argues that his pretrial statement, which provided the names and whereabouts of others involved in the operation, demonstrated that he had assisted law enforcement officers in the investigation. The trial court refused to credit the defendant with assisting the police, concluding that the record was devoid of any evidence that this information was either reliable or useful. The burden of proving applicable mitigating factors rests upon the defendant. See Tenn. Code Ann. § 40-35-401(d).

Granting that any pretrial statement, and certainly one that "names names," is probably helpful in an investigation, there are nonetheless several reasons the defendant did not qualify "as assisting ... in uncovering offenses" or "in detecting or apprehending other persons." In our assessment, the statement was entirely self-serving and largely untruthful. While authorities may have benefitted by certain of the information provided, they already had most of that information and, at trial, the defendant claimed the officer had been untruthful in his recollections of the interview. Under these circumstances, the factor was properly rejected.

Moreover, there is not a shred of evidence that the defendant was motivated by a desire to provide for either himself or his family the necessities of life. In fact, the defendant used a $3,000 income tax return refund to get

started in the drug business. While the defendant did not divorce his wife, he left her and their child in New York while he engaged in an extra-marital relationship in Johnson City.

In our view, the enhancement factors warrant considerable weight. The claimed mitigators warrant none. The sentence imposed, therefore, is presumptively correct. We yield to that presumption and thus, approve of the sentence.

Accordingly, the judgment and sentence are affirmed.

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Gary R. Wade, Judge

CONCUR:

_____
John H. Peay, Judge

_____
David G. Hayes, Judge