IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 02C01-9508-CC-00247**
	)	
Appellee,	)	
	)	
	)	**HARDIN COUNTY**
VS.	)	
	)	**HON. C. CREED MCGINLEY**
JEROME DIXON,	)	**JUDGE**
	)	
Appellant.	)	(Possession of Cocaine with
	)	Intent to Sell)

ON APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF HARDIN COUNTY

FOR THE APPELLANT:

DANIEL L. SMITH
614 Main Street
Savannah, TN 38372

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

CLINT T. MORGAN
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0485

ROBERT RADFORD
District Attorney General

JOHN OVERTON
Assistant District Attorney General
Hardin County Courthouse
Savannah, TN 38372

OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Jerome Dixon, appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. He was convicted by jury verdict of possession of more than .5 grams of cocaine with intent to sell or deliver. He was sentenced as a Range II offender and ordered to serve sixteen years in confinement. The Defendant argues in this appeal that the evidence was not sufficient to support the conviction and that the trial court improperly sentenced him. We affirm the judgment of the trial court.

On the evening of March 30, 1994, Marie Nichols stopped Brian Huggins, a member of the Drug Task Force in Hardin County, and told him about certain drug sales happening in her neighborhood. She specifically named the Defendant as one of the people selling drugs. Huggins asked her if she could purchase some drugs from the Defendant, and she agreed to do so. Huggins gave her forty-five dollars in cash and recorded the serial numbers from the bills.

Nichols took the money and drove over to an old school where the Defendant was and attempted to buy crack cocaine from him. She testified that he took the money and then searched through a pill bottle containing crack cocaine in an effort to find a piece of the drug worth the amount she was purchasing. Nichols testified that she did not actually see the cocaine in the pill bottle.

Sergeant Victor Cherry and Officer Tim Cunningham testified that they participated in the arrest of the Defendant. The officers followed and watched Marie Nichols with instructions to give her a couple of minutes to purchase the drug, then move in and make the arrests. Cunningham testified that he saw one person outside of the vehicle, and that as the officers approached, he saw the Defendant go down beside the car and appear to throw something. Sergeant Cherry also testified that as he moved in to make the arrest, he saw the Defendant squat down and throw his hands out as if he were throwing something away. Neither officer actually saw anything in the Defendant's hand. The officers searched the area close to where the Defendant squatted and threw his hands out and found a pill bottle containing several "rocks," that were later determined by a TBI forensic scientist to be 2.5 grams of rock cocaine.

The Defendant testified that on the evening prior to his arrest, he was picked up by two friends, Edward Lowery and Herman McClain. They bought some beer, drove to the projects and parked. Marie Nichols came up to the car, and the Defendant got out. He testified that they were talking when Calvin Jones walked over to them. He said that the police then drove up, and he bent down to put his beer on the ground. Officer Cherry took the Defendant's wallet and some money from the Defendant's front pocket. He testified that the money was that which Marie Nichols had been holding. He said that when the police arrived, she got agitated and dropped the money on the car; the Defendant said he then grabbed it and put it in his pocket.

The Defendant denied that he possessed or tried to sell any cocaine, and he denied that Nichols even spoke to him about cocaine. He said that when

someone shouted “police,” he walked to the rear of the car and put his beer bottle down because “I’d be in violation for me to get caught with a beer.” Edward Lowery testified that he did not see any cocaine or hear any discussions about it. Calvin Jones testified that the Defendant did not throw anything, nor did he ever squat down beside the car.

The serial numbers on the money taken from the Defendant’s pocket had the same serial numbers recorded from the “buy money” Huggins had given Nichols. The forty-five dollars taken from the Defendant were also in the same denomination as that which Huggins gave to Nichols. An additional $155.00 was taken from the Defendant’s wallet. The market value of the crack cocaine taken from the pill bottle was estimated to be between five and seven hundred dollars.

The Defendant first argues that the evidence is insufficient to sustain a guilty verdict of possession of cocaine with intent to sell or deliver. When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing the evidence in the light most favorable to the prosecution, 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, 319 (1979). Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987). Nor may this court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. 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 inferences therefrom. Cabbage, 571 S.W.2d at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

In reviewing the evidence in the light most favorable to the State, we conclude that the circumstantial evidence supports the jury's finding that the Defendant possessed cocaine with intent to sell or deliver. Marie Nichols testified that she asked the Defendant for the cocaine. Both police officers testified that the Defendant appeared to have thrown something away as they approached. After searching the immediate area in which he appeared to have thrown something, they found a pill bottle containing the substance later determined to be rock cocaine. When arrested, the Defendant had in his pocket the marked bills given Nichols to make the drug purchase.

The jury obviously accredited the testimony of the State's witnesses. In reviewing the record in the light most favorable to the State, we conclude that the evidence does support the Defendant's conviction of possession of cocaine with the intent to sell or deliver.

The Defendant next contends that the trial court erred in using statutory enhancement factor (1), that he had a previous history of criminal convictions or behavior beyond that needed to establish the range. Tenn. Code Ann. § 40-35-114(1). The Defendant specifically contends that the court placed too much emphasis on the misdemeanor convictions and that these convictions were not of significant weight to justify the sixteen-year sentence imposed by the trial court.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption 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).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

The presentence report reflects that the Defendant had two prior felony convictions and six misdemeanor convictions. The trial court used the two felony convictions to classify the Defendant as a Range II offender, and the six misdemeanor convictions formed the basis for enhancement factor (1).

The State correctly asserts that misdemeanor convictions may be used to support a finding of enhancement factor (1). The statute provides that the trial judge may look to see if a defendant has a previous history of "criminal convictions or criminal behavior." Tenn. Code Ann. § 40-35-114(1). Thus, there are no prohibitions against using prior misdemeanors to enhance a sentence, nor must the trial judge only consider prior convictions.

The Defendant asserts that the trial court placed too much weight on enhancement factor (1), resulting in a sentence of excessive length. In sentencing the Defendant, the trial court noted that he had two prior felony drug offenses, and accordingly classified him as a Range II offender. The sentencing range for a Range II offender convicted of this Class B felony is between twelve and twenty years in the Department of Correction. The court found three applicable enhancing factors and one possible mitigating factor. Based on these findings, the court sentenced the Defendant to sixteen years.

A trial judge has a certain amount of discretion in setting an appropriate sentence, and when the judge follows the sentencing procedures, his determination is clothed in a presumption of correctness. In reviewing the record, we cannot conclude that the trial court erred or abused his discretion in setting the Defendant's sentence at sixteen years.

The judgment of the trial court is, therefore, affirmed.

_____
DAVID H. WELLES, JUDGE

CONCUR:

_____
JOSEPH M. TIPTON, JUDGE

_____
JERRY L. SMITH, JUDGE