IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1996 SESSION

FILED

March 25, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	No. 03C01-9511-CC-00355
	)	
Appellee	)	
	)	BLOUNT COUNTY
V.	)	
	)	HON. D. KELLY THOMAS, JR.,
LARRY STEVE WILSON,	)	JUDGE
	)	
Appellant.	)	(Sale of Cocaine)
	)	
	)	

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Larry Steve Wilson, appeals as of right his conviction in the Circuit Court of Blount County of one count of the sale of less than .5 grams of cocaine. He was sentenced by the trial court to six (6) years in the penitentiary as a Range II multiple offender and was fined $10,000 by the jury for this Class C felony.

Appellant initially raised two issues on appeal: the sufficiency of the convicting evidence and the trial court's denial of probation. Upon motion of the appellant, this Court granted him leave to file an amended brief which attacked the validity of the indictment for failing to specify the requisite *mens rea*. We find that the indictment is sufficient and that there is no reversible error in the record. Appellant's conviction and sentence are affirmed.

On September 9, 1994, Candi Haggard contacted the appellant inquiring about the purchase of cocaine. Due to prior transactions with appellant, she knew that he regularly bought cocaine for other people. During the conversation, she asked the appellant if "he could do anything for [her]." She testified this meant she wanted to buy some cocaine. Appellant told her to come by his home when she got off work that day.

After work, Haggard went to appellant's house. She told appellant that she wanted a gram of cocaine and gave him $100 to purchase it. He asked her to drive him a distance of a few miles so that he could get the cocaine. Haggard drove appellant to a trailer not far from his home. He instructed her to wait for him and he got into a car with another person. About twenty minutes later, he returned to her car and produced the cocaine. When she complained that he had given her less than a gram, he explained that he had already taken out a small portion for his own use, purportedly as compensation for getting her the cocaine. Haggard then drove appellant back to his home.

Haggard testified that she was working undercover for the Blount Metro Narcotics Unit during this purchase of cocaine. At trial, she stated that she had been arrested earlier on a drug charge and, in order to avoid prosecution, she agreed to work undercover with the Narcotics Unit. The purchase from appellant was the first time that she had provided assistance to authorities. During the deal, Haggard was wired with a transmitter which recorded the transaction. This recording was played at trial. The jury convicted appellant of the sale of less than .5 grams of cocaine and assessed a fine of $10,000. He was later sentenced to six (6) years in the Department of Correction, the minimum term of confinement as a Range II offender.

Appellant argues that the indictment was invalid because it failed to allege that the sale of cocaine was done "knowingly."[1] He argues that the omission of the requisite *mens rea* is a fatal flaw in the indictment, thereby depriving the trial court of jurisdiction over the charge. Relying on this Court's opinions in State v. Roger Dale Hill, Sr., No. 01C01-9508-CC-00267 (Tenn. Crim. App. at Nashville, June 20, 1996), perm. to appeal pending, and State v. Nathaniel White, No. 03C01-9408-CR-00277 (Tenn. Crim. App. at Knoxville, June 7, 1995), he urges the reversal of the conviction and dismissal of the indictment. We believe the indictment is valid.

The legislature requires that an indictment "state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended." Tenn. Code Ann. §40-13-202 (1990). Our supreme court has said that an indictment must: (1) inform the defendant of the specific charges, (2) enable the trial court to enter an appropriate judgment and sentence; and (3) protect the defendant against

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[1]This issue was not raised at the trial level which generally constitutes waiver. Tenn. R. App. P. 3(e). However, a lawful indictment is a prerequisite to jurisdiction and it is irrelevant whether the issue was raised at the trial level. See State v. Trusty, 919 S.W.2d 305, 309-10 (Tenn. 1996) (a prosecution cannot proceed without an indictment that sufficiently informs the accused of the essential elements of the offense) and State v. Marshall, 870 S.W.2d 532, 537 (Tenn. Crim. App. 1993). Therefore, we will address the issue on the merits.

double jeopardy. State v. Trusty, 919 S.W.2d 305, 309 (Tenn. 1996). The indictment in appellant's case satisfies these requirements.

The indictment charging appellant stated as follows:

> "THE GRAND JURORS of Blount County, Tennessee, duly empaneled and sworn, upon their oath, present that LARRY STEVE WILSON, Alias, on SEPTEMBER 9, 1994, in Blount County, Tennessee, did unlawfully sell a controlled substance, to-wit: Cocaine, as classified in Section 39-17-408, in violation of Tennessee Code Annotated, Section 39-17-417(c)(2), all of which is against the peace and dignity of the State of Tennessee."

There are four culpable mental states in Tennessee: intentional, knowing, reckless, and criminal negligence. Tenn. Code Ann. §39-11-302 (1991). Although the indictment here does not explicitly state one of these culpable mental states, it does refer to the statute defining the offense. In pertinent part, the statute orders that "it is an offense for a defendant to *knowingly* sell a controlled substance." Tenn. Code Ann. §39-17-417(a)(3) (Supp. 1995) (emphasis added). The very words of the statute include the requisite mental element. Therefore, the reference to the statute implicitly incorporates the *mens rea* in the charging instrument. The requisite mental element is present in this indictment.

The indictment was sufficient in all other aspects as well. The indictment stated the charges against the appellant in common and ordinary language and a person of common understanding would know what was intended. See Tenn. Code Ann. §40-13-202 (1990). The indictment informed appellant of the specific charges against him. Trusty, 919 S.W.2d at 309. It is difficult to imagine a more specific reference than the very statute that makes the conduct an offense. Also, the indictment in no way hindered the trial court from entering the proper judgment against appellant. Id. Finally, the indictment provided the appellant with double jeopardy protection. Id. This issue has no merit.

Appellant next contends that the evidence was insufficient to convict him for the sale of cocaine. He alleges that the circumstances surrounding the offense were

more like a casual exchange. See Tenn. Code Ann. §39-17-418 (Supp. 1995). We disagree and find the evidence sufficient to support his conviction for the sale of cocaine.

In our review, we must consider the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record, as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). We further note that a guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

The jury was instructed on the offense of casual exchange in the charge given by the trial court and was free to convict appellant on this lesser offense. However, they rejected this offense in favor of a conviction for the sale of cocaine. We do not disturb such a verdict unless the facts are insufficient as a matter of law for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). We decline to disturb the jury's verdict because the facts were sufficient to allow a rational trier of fact to find the essential elements of the offense. Candi Haggard, the informant, testified in detail at appellant's trial about the transaction. In addition, the recording of this drug deal was played for the jury. The evidence, in the light most favorable to the State, was sufficient for the jury to find that the appellant knowingly sold the cocaine to Haggard.

Furthermore, the circumstances of this offense connote much more than a casual exchange. A transaction cannot be considered a casual exchange if there was a design or previous plan to make the exchange. Loveday v. State, 546 S.W.2d 822,

827 (Tenn. Crim. App. 1976). The testimony of Haggard indicated that she called appellant earlier in the day and inquired about getting some cocaine. He instructed her to come by his house. Thus, the telephone conversation evidences a previous plan to obtain the cocaine and this prohibits a determination that this was only a casual exchange. This issue has no merit.

Appellant also argues that the trial court should not have ordered service of his sentence in the Department of Correction, but rather he should have been given probation. This argument is without merit.

It is our duty to conduct a de novo review of appellant's sentence with a presumption of correctness. Tenn. Code Ann. §40-35-401(d) (1990). This presumption, however, is conditioned upon an 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 this review, we must follow certain procedures as set forth in the statute and consider the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

Tenn. Code Ann. §40-35-210 (Supp. 1995).

The presumption of correctness fails in this instance because the trial court did not follow the general principles of the sentencing act. However, our de novo review reveals that appellant is not a proper candidate for probation. At the time of this offense, appellant was on parole for two convictions of drug offenses. He had been paroled after serving only nine (9) months of a five (5) year sentence. Less than one (1) year later, appellant violated his parole when he committed the present crime.

We are aware that it was the intent of the legislature to encourage alternatives to incarceration. Tenn. Code Ann. §40-35-102 (Supp. 1995). We are also aware of

the eligibility for probation of all defendants sentenced to eight (8) years or less. Tenn. Code Ann. §40-35-303 (Supp. 1995). However, mere eligibility does not automatically entitle a defendant to this alternative. Tenn. Code Ann. §40-35-303 Sentencing Commission Comments (Supp. 1995) and State v. Fletcher, 805 S.W.2d 785, 787 (Tenn. Crim. App. 1991). There is an intent to incarcerate those defendants where measures less restrictive than confinement have frequently or recently been applied unsuccessfully. See Tenn. Code Ann. §40-35-103(1)(C) (1990). This intent applies equally to defendants evincing failure of past efforts at rehabilitation. See Tenn. Code Ann. §40-35-102(5) (Supp.1995). It is apparent from the commission of this crime that the past efforts at rehabilitation have failed. The commission of the instant crime evinces that a measure less restrictive than confinement, namely parole, was applied unsuccessfully to the defendant. Appellant is not a proper candidate for probation and the sentence of confinement is proper.

Finding that the indictment in appellant's case was valid and that the other issues he raised are without merit, we affirm appellant's conviction and sentence.

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William M. Barker, Judge

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John H. Peay, Judge

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David G. Hayes, Judge