IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1997 SESSION

FILED

February 26, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**NO. 01C01-9602-CC-00052**
Appellee,	)	
	)	**RUTHERFORD COUNTY**
VS.	)	
	)	**HON. J. S. DANIEL,**
PAMELA JEAN RANKINS,	)	**JUDGE**
	)	
Appellant.	)	(Possession of Cocaine with Intent
	)	to Deliver)

FOR THE APPELLANT:

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Murfreesboro, TN 37130-3530

FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

JERRY L. SMITH,
JUDGE

O P I N I O N

Appellant, Pamela Jean Rankins, was found guilty by a Rutherford County Circuit Court jury of possession with intent to sell or deliver cocaine over 0.5 grams. As a Range I, Standard Offender Appellant was sentenced to eight (8) years and six (6) months in the Department of Correction. Appellant raises the following issues on appeal:[1]

1) whether the evidence was sufficient to support her conviction;

2) whether the trial court erred in permitting the arresting police officer to testify about statements made by a confidential informant;

3) whether the trial court erred in failing to give an instruction on chain of custody;

4) whether Appellant received effective assistance of counsel; and

5) whether the sentence imposed was appropriate.

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

FACTS

On September 21, 1994, Murfreesboro police officer Terry Spence and fellow officers were conducting a "round up" of several individuals who had been investigated during an undercover drug operation. While making arrests, Officer Spence received information from a confidential informant that Appellant was recently seen on Green Valley Road giving a female forty (40) to sixty (60) rocks of cocaine. The female was described as wearing blue shorts, a Mickey Mouse t-shirt, and possessing a fluorescent green beeper. Officer Spence proceeded to Green Valley Road and located Karen Duncan who was wearing what the informant described. Upon questioning, Duncan claimed that Appellant had asked her to hold

[1]Although failure to establish venue was raised as an issue in Appellant's brief, that issue was withdrawn at oral argument. Venue was clearly proven in the trial.

a package, but Duncan had given it to Zona Odom.

Officer Spence then accompanied Duncan to Odom's residence. Odom immediately handed the cocaine to Officer Spence and stated the cocaine belonged to Appellant. The package was found to contain two (2) smaller packages, one of which tested positive for 2.9 grams of cocaine and one of which weighed .3 grams and tested negative for cocaine. At this point, Odom called Appellant who confirmed that the package did not belong to Odom or Duncan. Officer Spence recorded this conversation.

At trial Appellant testified that she believed the substance she possessed and delivered was cocaine, but it belonged to and she was holding it for Wayne Marable. Such a person was never found by the authorities and did not testify at trial.

SUFFICIENCY OF THE EVIDENCE

A.

Appellant argues that the evidence presented at trial was insufficient to support her conviction for possession with intent to sell or deliver cocaine. 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). A jury verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). On appeal, the state is entitled to the strongest legitimate view of the evidence and all legitimate or reasonable inferences which may be drawn therefrom. Id. This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the defendant demonstrates that the facts contained in the record and the inferences which may be drawn therefrom are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996). Accordingly, 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 offense beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789, 61 L. Ed.2d 560 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994).

B.

At trial, the Appellant testified that she accepted a package from Marable which she assumed to be cocaine. According to the defense theory, however, Marable must have actually given Appellant .3 grams of a substance that tested negative for cocaine, and Odom altered the package by adding 2.9 grams of cocaine.

Appellant argues that someone apparently altered the contents of Appellant's package. Duncan did testify that Odom told her that Odom placed her brother's cocaine in the package before she turned it over to the police; however, Odom denied altering the package and denied making such a statement. Appellant testified that what she possessed was not as large as the package given to the police. Although Duncan testified that the package given to the police did not appear to be the exact package given to her, what Appellant gave her was larger than .3 grams.

C.

It was the jury's prerogative to believe or disbelieve the Appellant and other witnesses. Viewing the evidence in a light favorable to the state as we are required to do, there is more than sufficient evidence to show that Appellant knowingly possessed 2.9 grams of cocaine with the intent to sell or deliver it.

This issue is without merit.

III. STATEMENTS OF CONFIDENTIAL INFORMANT

A.

Appellant also challenges the admission of Officer Spence's testimony regarding information given to him by a confidential informant. At trial Officer Spence testified that a confidential informant told him that Appellant had delivered between forty (40) and sixty (60) rocks of cocaine on Green Valley Road to a female wearing a white Mickey Mouse t-shirt, blue shorts and possessing a fluorescent green beeper. Defense counsel's objection was overruled, and the trial court instructed the jury that this information "cannot be considered for its truthfulness but can be considered as a source of knowledge on the part of the officer for whatever he did do."

B.

Hearsay is a statement offered in evidence to prove the truth of the matter asserted. Tenn. R. Evid. 801(c). Since the informant's tip to the officer was not introduced for its truth, but rather to explain why the officer proceeded to find Duncan, the testimony was not hearsay. State v. Miller, 737 S.W.2d 556, 558-59 (Tenn. Crim. App. 1987).

Nevertheless, the danger of unfair prejudice from the admission of such evidence can sometimes be staggering depending upon the facts. For this reason this Court has found similar evidence to be in violation of Tenn. R. Evid. 403 since its probative value was outweighed by its prejudicial effect. State v. Brown, 915 S.W.2d 3, 6-7 (Tenn. Crim. App. 1995). Such evidence can also be irrelevant if the motive of the officer is not an issue. *See* Tenn. R. Evid. 402.

The detailed and incriminating tip as related in the officer's testimony would ordinarily present a difficult issue; however, the Appellant's own testimony confirmed that she delivered a package of what she thought was cocaine to Duncan on Green Valley Road. Accordingly, if there was error in the admission of the informant's tip, it was clearly harmless. Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b).

IV. CHAIN OF CUSTODY

Appellant challenges the failure of the trial judge to charge the jury on chain of custody. Since defense counsel failed to request such a charge, this issue is waived. Tenn. R. App. P. 36(a); State v. Foster, 755 S.W.2d 846, 848 (Tenn. Crim. App. 1988).

Even if this issue were not waived, it lacks merit. Establishing chain of custody is a condition precedent to the introduction of certain kinds of tangible evidence, such as drugs. State v. Baldwin, 867 S.W.2d 358, 361 (Tenn. Crim. App. 1993). The resolution of the question of whether a sufficient chain of custody has been established is addressed to the sound discretion of the trial judge, and his or her decision will not be reversed absent a clear mistake. Id.

The chain of custody relating to the handling of the drugs was clearly established at trial; therefore, the drugs were properly admitted into evidence. It was for the jury to determine, as an element of the offense, whether the Appellant possessed cocaine at the time it was delivered to Duncan. The jury resolved this issue through its guilty verdict. No special jury charge was needed.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant contends she was deprived of effective assistance of counsel at her trial. She challenges several of trial counsel's decisions, all of which relate to the failure of counsel to object to allegedly inadmissible, prejudicial testimony.

A.

This Court reviews a claim of ineffective assistance of counsel under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975) and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The petitioner has the burden to prove that (1) the attorney's performance was deficient, and (2) the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2064;

Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). In the event there is no showing of prejudice, the court need not even determine whether counsel's performance was deficient. Strickland v. Washington, 466 U.S. at 697, 104 S.Ct. at 2069.

B.

Appellant complains trial counsel was deficient in failing to object to the following:

1. testimony of Officer Spence regarding Appellant's statement that she thought the substance given to her was cocaine;

2. testimony regarding the street value of cocaine;

3. testimony regarding the effects of cocaine;

4. testimony concerning the sale of cocaine on the streets;

5. testimony depicting the area as a high crime area;

6. testimony of Officer Spence regarding statements of accomplices;

7. testimony bolstering the credibility of Odom prior to any attack on her credibility;

8. testimony of Officer Spence regarding statements of Odom that the cocaine belonged to Appellant;

9. testimony of Officer Spence that one side of town calls the other side of town to advise them that the police are present;

10. testimony regarding unruly persons outside Appellant's apartment at the time of her arrest; and

11. testimony of Officer Spence on redirect as that testimony went beyond the scope of the cross-examination.

C.

Appellant's statement that she believed the substance was cocaine was highly relevant to show that she "knowingly" possessed cocaine, an element of the offense. Tenn. Code Ann. § 39-17-417(a). Counsel was not deficient in failing to object.

As to all other testimony attacked by Appellant, we find the failure to object did not prejudice Appellant. Appellant testified that she received and delivered to Duncan what Appellant assumed to be cocaine. Duncan testified she received the package from Appellant and did not alter it prior to delivering it to Odom. Odom testified she received the package from Duncan and did not alter it prior to giving it to the officer. In light of this trial testimony, we fail to see how any of the questioned testimony prejudiced Appellant. Finding no prejudice, we need not determine whether counsel was deficient in failing to object. Strickland v. Washington, 466 U.S. at 697, 104 S.Ct. at 2069.

VI. SENTENCING

Finally, Appellant questions "whether there was sufficient evidence to support the sentence imposed in this case." Upon conviction of possession of cocaine over 0.5 grams with intent to sell or deliver, Appellant was sentenced to a term of eight (8) years and six (6) months in the Department of Correction.

A.

The evidence at the sentencing hearing revealed that Appellant had a prior conviction for simple possession of marijuana and was on probation for that offense when the present offense was committed.[2] The trial court found one enhancement factor, that Appellant had a prior conviction (Tenn. Code Ann. § 40-35-114(1)), and no mitigating factors. The trial court enhanced the minimum eight-year sentence an additional six (6) months and, noting that Appellant was on probation for a drug offense when the present drug offense was committed, denied alternative sentencing.

[2]Appellant on an earlier occasion had been placed on judicial diversion after pleading guilty to simple possession of marijuana. Her period of diversion expired one month prior to the commission of the other marijuana offense.

B.

This Court's review of the sentence imposed by the trial court is *de novo* with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court fails to comply with the statutory directives, there is no presumption of correctness and our review is *de novo*. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997).

If no mitigating or enhancement factors for sentencing are present, Tenn. Code Ann. § 40-35-210(c) provides that the presumptive sentence shall be the minimum sentence within the applicable range. *See* State v. Fletcher, 805 S.W.2d 785 (Tenn. Crim. App. 1991). However, if such factors do exist, a trial court should start at the minimum sentence, enhance the minimum sentence within the range for enhancement factors and then reduce the sentence within the range for the mitigating factors. Tenn. Code Ann. § 40-35-210(e). No particular weight for each factor is prescribed by the statute, as the weight given to each factor is left to the discretion of the trial court as long as its findings are supported by the record. State v. Moss, 727 S.W.2d 229 (Tenn. 1986); State v. Santiago, 914 S.W.2d 116 (Tenn. Crim. App. 1995); *see* Tenn. Code Ann. § 40-35-210 Sentencing Commission Comments. Nevertheless, should there be no mitigating factors, but enhancement factors are present, a trial court may set the sentence above the minimum within the range. Tenn. Code Ann. § 40-35-210(d); *see* Manning v. State, 883 S.W.2d 635 (Tenn. Crim. App. 1994).

C.

We conclude the trial court, having properly found the presence of an enhancement factor, was well within its discretion by enhancing the sentence six (6) months above the minimum.

D.

Appellant also contends that the trial court erred in failing to impose an alternative sentence. The Tennessee Criminal Sentencing Reform Act of 1989

recognizes the limited capacity of state prisons and mandates that "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts of rehabilitation shall be given first priority regarding sentencing involving incarceration." Tenn. Code Ann. § 40-35-102(5). A defendant who is an especially mitigated or standard offender of a Class C, D, or E felony is "presumed to be a favorable candidate for sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6).

E.

Because Appellant was convicted of a Class B felony, she is not presumed to be a favorable candidate for an alternative sentence. Furthermore, she is not eligible for probation since her sentence exceeds eight (8) years. Tenn. Code Ann. § 40-35-303(a). Given that Appellant was on probation for a drug related offense at the time she committed the present offense, measures less restrictive than confinement have proven unsuccessful. *See* Tenn. Code Ann. § 40-35-103(1)(C). We find the trial court did not abuse its discretion in denying community corrections.

CONCLUSION

Finding no error, we AFFIRM the judgment of the trial court.

_____
JERRY L. SMITH, JUDGE

CONCUR:

_____
DAVID H. WELLES, JUDGE

_____
JOE G. RILEY, JUDGE