IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9602-CC-00057**
	)	
Appellee,	)	
	)	
	)	**OVERTON COUNTY**
VS.	)	
	)	**HON. JOHN TURNBULL**
NORMAN G. COPELAND,	)	**JUDGE**
	)	
Appellant.	)	(Felony Drugs)

ON APPEAL FROM THE JUDGMENT OF THE CRIMINAL COURT OF OVERTON COUNTY

FOR THE APPELLANT:

ONNIE L. WINEBARGER
Attorney for the Appellant

JOHN H. LITTLE
Attorney for the Appellant
P.O. Box 397
Livingston, TN 38570

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

MICHAEL J. FAHEY, II
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243

BILL GIBSON
District Attorney General

OWEN G. BURNETT
Assistant District Attorney General
P.O. Box 706
Livingston, TN 38570

OPINION FILED _____

CONVICTION AFFIRMED; SENTENCE MODIFIED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal as of right pursuant to Rule 3, Tennessee Rules of Appellate Procedure. The Defendant, Norman Copeland, was convicted by an Overton County jury of possession of more than .5 grams of cocaine with intent to sell or deliver.[1] The jury imposed a fine of one hundred thousand dollars ($100,000.00). He was sentenced as a Range II, multiple offender to eighteen years and six months imprisonment in the Department of Correction. The Defendant appeals both his conviction and sentence, raising the following issues: (1)That the trial court erred by failing to suppress all the evidence as listed on a search warrant return; (2) that the trial court erred in not suppressing evidence seized pursuant to an invalid capias; (3) that the trial court erred (a) by imposing a sentence of eighteen years and six months rather than the presumptive minimum of twelve years, and (b) in finding the Defendant ineligible for community corrections; and (4) that improper comments made by the prosecution during closing arguments require a reversal of his conviction. After carefully considering the above contentions, we affirm the judgment of the trial court, but modify the sentence.

On June 4, 1994, officers with the Livingston Police Department executed a criminal capias issued for an indictment against the Defendant issued on June 3, 1994. The indictment was submitted as part of a drug roundup and the capias, issued by the criminal court clerk, ordered the arrest of the Defendant pursuant to Rule 9, Tennessee Rules of Criminal Procedure. Officers Bates, Anderson

[1]Tenn. Code Ann. § 39-17-417(a)(4).

and Allred, under the direction of Sergeant Rick Brown of the Livingston Police Department arrived at the Defendant's home at approximately 10:00 a.m. Sergeant Brown was also accompanied by Captain Greg Phillips of the Overton County Sheriff's Department. Sergeant Brown knocked on the front door and heard voices and movement within the house. He knocked again, identifying himself, and then Ronald Harris opened the door. The Defendant was seated in a recliner in the living room. Harris sat down on the couch. Sergeant Brown told the Defendant about the criminal capias. The other officers made a protective sweep of the house. Sergeant Brown did a pat-down search of the Defendant, discovering twenty-three (23) half-ounce packets of cocaine in the pocket of the dress shirt he was wearing. Sergeant Brown confiscated the packets. Harris went outside and talked with the other officers.

Sergeant Brown advised the Defendant of his Miranda rights and requested a consent to search, but the Defendant refused. He complained of feeling sick and wanted a drink of water. Sergeant Brown followed him to the kitchen sink while the Defendant got a glass of water. They returned to the living room, but he stated he still felt sick and wanted more water. When they went back into the kitchen, the Defendant grabbed a towel on the kitchen table and flipped it over to more fully cover some items on the table. Later, he again complained of feeling ill and wanted to return to the kitchen. With Sergeant Brown following him, the Defendant grabbed a bowl from the table and ran towards the sink in an apparent attempt to dump the bowl. Sergeant Brown grabbed the Defendant's hands around the bowl and physically forced him to put the bowl back on the table. The bowl was filled with a white powder that the Sergeant believed to be cocaine. He also observed a sifter in the bowl and

electronic scales on the table. He took the Defendant back into the living room and handcuffed him. Sergeant Brown left the bowl with the white powder on the table. The Defendant was transported to jail by Officer Anderson, who signed the return on the capias.

Officers secured the house while Sergeant Brown and Officer Burnett left to obtain a search warrant. Judge Steve Daniels issued the search warrant at approximately 1:30 p.m. The officers returned to the house with a drug dog, but the search yielded no new evidence of drugs. The cocaine confiscated during the arrest, including the packets found in the Defendant's pocket and in the bowl on the table, was listed on the search warrant as inventory. Subsequent testing revealed that the powder was cocaine and the packets measured 10.8 grams with 41.6% purity. The cocaine in the bowl totaled 55.4 grams and was 61.3% pure. The Defendant maintained that the drugs found in his pocket and in the kitchen were the result of a "set-up," even alluding to police involvement.

The Defendant was charged with possession of cocaine with intent to sell or deliver. He was found guilty by a jury verdict, fined $100,000, and was sentenced to eighteen and one-half years. It is from this conviction and sentence that the Defendant appeals.

I.

In his first issue, the Defendant argues that the trial court erred by not suppressing all of the evidence obtained pursuant to a subsequently invalid search warrant. Sergeant Brown was in the Defendant's home to execute a

capias. He conducted a pat-down search which yielded twenty-three packets of cocaine. Sergeant Brown kept the packets. Sergeant Brown followed the Defendant as he went into the kitchen three times to get a drink of water. On the third occasion, the Defendant lunged for a bowl containing cocaine and attempted to dump it in the sink. Sergeant Brown physically restrained the Defendant by grabbing the bowl and forcing the Defendant to put it on the kitchen table. Sergeant Brown moved the Defendant from the kitchen to the living room and restrained him with handcuffs. With the bowl still on the table, the officers left to obtain a search warrant. Listed on the items to be seized were the packets of cocaine as well as the bowl and accompanying paraphernalia. A written inventory was returned pursuant to Rule 41(d), Tennessee Rules of Criminal Procedure. The cocaine packets and the cocaine in the bowl were listed as inventory on the search warrant.

The Defendant filed a motion to suppress the evidence obtained from the search warrant. In a hearing on December 13, 1994, the trial court found that the search warrant was invalid and suppressed all items seized as a result of that warrant. However, the court found that the packets and the bowl were seized incident to a lawful arrest on the capias and thus, were admissible as evidence. At a subsequent hearing on the Defendant's supplemental motion to suppress challenging the validity of the capias and the items seized, the trial court again ruled that the cocaine evidence was admissible.

In this appeal, the Defendant charges that because the packets and the cocaine in the bowl were listed on the return of the search warrant that was subsequently determined to be invalid, those items should have been

suppressed. The Fourth Amendment to the Constitution of the United States provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated.” Article 1, Section 7 of the Constitution of Tennessee guarantees that the people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures. Accordingly, both the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Tennessee Constitution prohibit "unreasonable" searches and seizures. The State may not invade the personal constitutional right of an individual except under the most exigent circumstances. State v. Bartram, 925 S.W.2d 227, 229, (Tenn. 1996). A warrantless search is per se unreasonable, unless it falls into one of the narrowly defined and carefully drawn exceptions to the warrant requirement, i.e., searches incident to a lawful arrest, those made by consent, in the "hot pursuit" of a fleeing criminal, "stop and frisk" searches, and those based on probable cause in the presence of exigent circumstances. State v. Shaw, 603 S.W.2d 741, 742 (Tenn. Crim. App.1980).

The trial court ruled the evidence was admissible because the search was incident to a lawful arrest. The scope of such searches is limited to "search of the arrestee's person and the area 'within his immediate control' ", i.e., the area from within which he might gain possession of a weapon or destructible evidence, the so-called "grab area". Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969); State v. McMahan, 650 S.W.2d 383, 386 (Tenn. Crim. App. 1983). Furthermore, “[t]he ‘plain view’ exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence when it is discovered in a place where the officer

has a right to be." Washington v. Chrisman, 455 U.S. 5, 5-6, 102 S.Ct. 812, 816, 70 L.Ed.2d 778 (1982); Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); State v. Byerley, 635 S.W.2d 511, 513 (Tenn. 1982). An officer may also monitor the activities of an arrestee to maintain custody over the individual. Chrisman, 455 U.S. at 6-7, 102 S.Ct. at 816-17. If evidence is in plain view while an officer has a lawful right to be in that area, such as when maintaining custodial authority over an arrested person, that evidence may be seized without offending the Fourth Amendment reasonableness requirement.

The Defendant contends that, because the packets and the cocaine in the bowl were listed on the return of the search warrant that was found to be invalid, the trial court erred in not suppressing those items. However, we cannot agree that a subsequently invalidated search warrant should preclude the State from admitting evidence as a result of a search and a seizure conducted incident to a lawful arrest. Regarding the packets obtained in the search of the Defendant's person, the search was conducted pursuant to his arrest. A search of his person was clearly warranted to prevent the destruction of evidence. State v. Harrison, 756 S.W.2d 716, 717 (Tenn. Crim. App. 1988). We also find that the packets were seized when the officer took them and kept them. Although the packets were listed on the search warrant as inventory, Sergeant Brown had a lawful right to search the Defendant and seize any evidence before the search warrant was issued. The trial court properly admitted the cocaine packets as incident to a lawful arrest.

The trial court also properly admitted the bowl of cocaine, although we find it was admissible as contraband in plain view. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S.112, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). Seizure of an object in plain view does not constitute a search implicating Fourth Amendment privacy interests. Byerley, 635 S.W.2d at 513; Armour v. Totty, 486 S.W.2d 537, 539 (Tenn. 1972).

In Armour the court set out the necessary requirements for such a seizure in Tennessee: (1) The object must be in plain view, (2) the viewer must have the right to be in that position for the view, (3) the seized object must be discovered inadvertently or exigent circumstances must exist where the seizure is not based on a valid warrant, and (4) the incriminating nature of the object must be apparent from such viewing, i.e., there must be probable cause to believe that the object is evidence of crime, contraband or otherwise subject to seizure. See Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 1153-54 (1987). We note that since then, the United States Supreme Court has dispensed with the inadvertent discovery requirement. Horton v. California, 110 S.Ct. 2301 (1990).

First, it is apparent that the bowl was seized when Sergeant Brown grabbed it, rather than when the officers returned with the search warrant. Although it is not a seizure in the orthodox manner of actually taking the bowl away at that point, Sergeant Brown interfered with the Defendant's possessory interests after stopping him from destroying the evidence, forcing him to put down the bowl, and securing the Defendant in handcuffs away from the bowl. This, we

feel, is essentially a seizure. Also, the bowl of white powder was in plain view after the Defendant grabbed the bowl and headed for the sink. The officer had a lawful right to follow the Defendant as he went into the kitchen for the purposes of maintaining the integrity of the arrest and to prevent the destruction of evidence. There were clearly exigent circumstances to justify the seizure of the bowl when the officer observed the Defendant trying to dump the white powder. Finally, probable cause existed that the powder was indeed contraband, particularly after the packets had been discovered on the Defendant's person. Under this "plain view" exception, the officer lawfully seized the bowl. Accordingly, the trial court did not err in failing to suppress the bowl of cocaine.

However, the Defendant claims that the capias itself was invalid, therefore nullifying the otherwise lawful arrest and the evidence flowing from it. He argues two grounds. First, he cites Rule 9(a), Tennessee Rules of Criminal Procedure, which states: "After the return of an indictment or presentment by the grand jury, the clerk shall issue a capias or a criminal summons for each defendant named in the indictment or presentment who is not in actual custody, or who has not been released on recognizance or on bail, or whose undertaking of bail has been declared forfeited." The Defendant argues that, because he was already out on an appearance bond issued on an indictment presented on February 22, 1994, the clerk did not have authority to issue a capias and the resulting arrest was unlawful. However, the capias that was executed on June 4, 1994 was issued as a result of new indictments presented on June 3, 1994. The arrest on June 6, 1994 was from the capias for the new charges.

The State counters that Rule 9(a) only applies to a capias issued when a defendant is out on bond for the same offense as that in the new capias. We agree that the restrictions in 9(a) refer to a second arrest on a capias for the same offense. In that case, the clerk does not have authority to issue a new capias, it is only valid by order of the trial court. See Russell v. State, 134 Tenn. 640, 185 S.W. 693 (1915); Poteete v. State, 68 Tenn. 261, 40 Am. R. 90 (1878). Here, the capias was issued by the clerk on a new indictment and was valid, regardless of whether the Defendant was on an appearance bond for a previous indictment.

The Defendant also argues that the capias was not executed properly because Sergeant Brown served the capias and another officer's signature was on the return. Rule 9(c) of the Tennessee Rules of Criminal Procedure provides that "[t]he officer executing a warrant shall make return thereof to the magistrate or clerk or other officer before whom the defendant is brought pursuant to Rule 5." Here, Sergeant Brown testified that he executed the capias. The signature on the return was Officer Anderson's, who brought the Defendant to the police station. The Defendant claims that this resulted in an improper execution. However, Sergeant Brown testified that Officer Anderson accompanied him when he went to the Defendant's home and that he was present when the Defendant answered the door and was informed of the capias and the arrest. Therefore, Officer Anderson was just as much an "officer executing a warrant" as Sergeant Brown. This issue is without merit.

Accordingly, we find that the trial court properly found the evidence that was obtained from the lawful arrest of the Defendant to be admissible.

II.

As his next issue, the Defendant charges that the assistant district attorney made three improper comments during his closing argument that require the verdict be reversed. Assuming that the assistant district attorney's statements were improper, they must be such that they prejudiced the outcome of the trial.

The Defendant first contends that the prosecutor improperly referred to the him as a drug dealer with the following comment: "We know he's a convicted drug dealer, apparently there's been some money that's been made from that drug dealing in the past. By his own pleas of guilty he's been convicted three times of selling controlled substances." Defense counsel made no objection and no curative instructions were proffered by the trial judge. We note that an appellant ordinarily may not complain about allegedly improper argument in the absence of a contemporaneous objection at trial. State v. Byerley, 658 S.W.2d 134, 139 (Tenn. Crim. App. 1983); State v. Sutton, 562 S.W.2d 820, 825 (Tenn.1978). In the second instance, the prosecutor stated that "[t]he bad guys are not the police officers in this case, the bad guy is this convicted drug dealer who's sitting over there who had 6 grams--." Defense counsel objected at this point and the trial court issued the following curative instructions:

> [Y]ou may not consider in determining whether or not the defendant is guilty of this offense whether or not he's ever been convicted. Certain convictions have been admitted to to[sic] your hearing for the purpose of, number one, of impeaching possible intent. But the fact that a person has been convicted prior to that time can have no bearing on your verdict and it would be a violation of your oath to consider that.

Finally, the Defendant challenges the assistant district attorney's statements made at the conclusion of his closing argument.

> [T]hat's 167 people in Overton County that Mr. Copeland could sell cocaine to and a lot of those people could be young people, ladies and gentlemen. In fact, there was enough cocaine in that house and on Mr. Copeland's person that he could have gotten every graduating member of the Livingston Academy hooked on cocaine.

Defense counsel objected and the trial court issued this curative instruction:

> [T]he law provides that the possession of cocaine with the intent to resell is against the law. You must consider this case on its own merits, and the law has proscribed that conduct, they've said you can't do that. So that last argument was improper and I'll ask you to disregard that.

Our review consists of considering five factors to determine whether the prosecutor's statements affected the verdict. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976); State v. Davis, 872 S.W.2d 950, 953-54 (Tenn. Crim. App 1993). These are: (1) the conduct complained of viewed in the context and in light of the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecution; (3) the intent of the prosecutor in making the improper statement; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength and weakness of the case. Judge, 539 S.W.2d at 344.

We have considered the preceding factors in the context of this case. In this instance, the trial judge, upon the objections of defense counsel, issued curative instructions to the jury clearly stating that the comments were improper The prompt instruction of a trial judge generally cures any error unless the error is so prejudicial that it is more probable than not that it affected the judgment. State v. Philpott, 882 S.W.2d 394 (Tenn. Crim. App. 1994); State v. Tyler, 598 S.W.2d 798, 802 (Tenn. Crim. App. 1980). The Defendant argues that the prosecutor's purpose in making these statements was to inflame the jury, and this

may very well have been the case. However, the record does not demonstrate that the State maintained a pattern of such improper comments throughout the trial. Moreover, the case against the Defendant for this offense, regardless of any improper comments, was extremely strong. In light of the overwhelming evidence in this case, we find that the statements could not have prejudiced the Defendant. This issue is without merit.

III.

In his final issue, the Defendant contends that the trial court erred in imposing a sentence of eighteen years, six months. 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 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).

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).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The Defendant was charged with and convicted of the Class B felony of possession of over .5 grams of cocaine with intent to sell or deliver. Tenn. Code Ann. § 39-17-417(a)(4). The Defendant was sentenced as a Range II, multiple offender based on two previous felony convictions pursuant to Tennessee Code Annotated section 40-35-106(a)(1), which carries a sentence range of twelve (12) to twenty (20) years. Without enhancement or mitigating factors, a defendant is entitled to the presumptive minimum sentence of twelve (12) years. Tenn. Code Ann. § 40-35-210(c) (Supp. 1996). He does not contest the propriety of the trial court's sentencing him as a multiple offender, but argues that the trial judge misapplied the enhancement factors contained in Tennessee Code Annotated section 40-35-114 and that the eighteen-and-a-half year sentence is excessive. Because we find that the trial court misapplied two enhancement factors, we review the sentence on this appeal de novo without the presumption of correctness.

The presentence report states that the Defendant was a 54 year-old male who completed high school. He lived alone in his house near Livingston. His former wife and one son live in Livingston and another son had not contacted him in four years. The Defendant had maintained a variety of jobs over the years until

he became disabled in 1990. His most recent employment was a sign business, which he owned. He was receiving a monthly SSI payment of $458.00 at the time the report was prepared. He was disabled due to a number of health problems, including alcohol hepatitis, pancreatitis, metabolic acidosis, diabetes, orthopedic problems, hypertension and headaches. He was on a number of medications for these maladies. The Defendant also reported that he began drinking when he was in the Navy, but developed a severe drinking problem after his divorce in 1987.

The Defendant has a string of drug convictions. In 1990, he was convicted of three drug offenses, the possession and sale of Schedule III drugs, dihydrocodeinone, Schedule VI drugs, marijuana, and Schedule IV drugs, diazepam. He was fined and was placed on probation. He complied satisfactorily with the conditions of his probation and was discharged on June 16, 1993. He was arrested and indicted on drug sale charges in February, 1994 and June, 1994. He was also arrested for cocaine possession in October, 1994. Captain Tim Emerton testified that he had received a report that the Defendant was "back in business again," but he observed no activity at the Defendant's home.

The Defendant testified at the sentencing hearing regarding his chronic health problems. He also testified about his assets, stating that he owned a life-estate in his house, a converted garage, and owned a 1988 Chevrolet car. He testified that he did not have a history of violent behavior. The Defendant also admitted a game and fish conviction dated September 7, 1993, involving the payment of a fine, for drinking alcoholic beverages in a state natural area.

The trial court classified the Defendant as a Range II, multiple offender based on two convictions for sale of diazepam, a Schedule III controlled substance and a D felony, and the sale of dihydrocodeinone, a Schedule IV controlled substance, also a D felony. See Tenn. Code Ann. § 39-17-417(a)(3), (d) and (e). The trial court also considered several enhancement and mitigating factors in setting the sentence above the presumptive minimum of twelve (12) years. First, the trial judge applied enhancement factor number (1), that "[t]he defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range." Tenn. Code Ann. § 40-35-114(1). The convictions used to enhance the sentence were the 1990 sale of a Schedule VI drug, marijuana, a Class E felony and the game and fish conviction, although this was afforded little weight. The trial judge also used a conviction the Defendant admitted occurred some twenty years prior, and evidence of other criminal behavior. The Defendant argues that the trial court inappropriately considered his other arrests as evidence of criminal behavior and cites State v. Marshall, 870 S.W.2d 532, 541-42 (Tenn. Crim. App. 1993) for the proposition that "[an] arrest or charge is not considered evidence of the commission of a crime." Id. We agree with the Defendant's contention, but this does not invalidate the use of enhancement factor (1) in this case. The trial judge clearly considered the Defendant's prior felony conviction, the game and fish conviction and the older conviction. These are sufficient to support the application of enhancement factor (1).

Next, the trial court applied enhancement factors (10) and (16). Factor (10) is applied when "[t]he defendant had no hesitation about committing a crime when the risk to human life was high" and factor (16) is applied when "[t]he crime

was committed under circumstances under which the potential for bodily injury to a victim was great." Tenn. Code Ann. § 40-35-114(10), (16). The Defendant argues that the trial court misapplied both factors. During the sentencing hearing, the State produced testimony from Captain Tim Emerton regarding the purity of the cocaine that was seized. The police seized 66.2 grams of cocaine. The 10.8 grams obtained from the packets found in the Defendant's pocket was 41.6% cocaine. The 55.4 grams of powder from the bowl was 61.3% cocaine. He testified that the cocaine in the bowl was in the process of being "stepped on" or combined with other nonactive substances to increase the amounts for retail sale. He also testified that the 61.3% percent purity, in particular, was higher than the average percentage of cocaine in street doses, which is around 30%.

The Defendant contends that the application of these factors was not appropriate. This Court has held that the inherent dangerous nature of cocaine is essentially an element of the offense and this is not sufficient to justify the application of enhancement factors (10) and (16). See State v. Keel, 882 S.W.2d 410, 420 (Tenn. Crim. App. 1994); State v. Marshall, 870 S.W.2d 532, 542 (Tenn. Crim. App. 1993). But see State v. Millbrooks, 819 S.W.2d 441 (Tenn. Crim. App. 1991), no perm. to appeal filed.

Controlled substances have been placed into schedules according to their respective potential for abuse and resulting dangers. In establishing this structure, the legislature has considered the inherent nature of various drugs by providing different punishments for the respective schedules. Cocaine has been designated as a Schedule II controlled substance and is in the category of drugs found to have a "high potential for abuse" which "may lead to severe psychic or

physical dependence." Tenn. Code Ann. § 39-17-407; see Keel , 882 S.W.2d at 420; Marshall, 870 S.W.2d at 542. The legislature has considered the seriousness of cocaine use and has determined that cocaine felonies with a quantity over .5 grams are to be treated as Class B felonies, rather than as the Class C felonies set for the rest of the Schedule II offenses. Tenn. Code Ann. § 39-17-417(c)(1)-(2). Furthermore, the legislature has established increased penalties when the amount of cocaine involved increases. If a violation occurs where twenty-six (26) grams or more cocaine is involved, it remains a Class B felony, but the maximum fine increases from $100,000 to $200,000. Tenn. Code Ann. § 39-17-417(i)(5). If three hundred (300) grams or more cocaine is involved, it becomes a Class A felony carrying a maximum fine of $500,000. Tenn. Code Ann. § 39-17-417(j)(5).

The State argues that, although the trial court acknowledged that cocaine offenses may not be enhanced based on the inherent nature of the drug, the particular facts of this case support the application of factors (10) and (16). Namely, the trial court enhanced the sentence based on “the quantity of cocaine in this particular case and the purity of the cocaine used in this particular case.” The State cites two unpublished cases for the proposition that it has been suggested that the purity or quantity of the cocaine could possibly be used to enhance a sentence. See State v. Michael S. Hurt, C.C.A. No. 01C01-9306-CC-00189, Marshall County (Tenn. Crim. App.,Nashville, Dec. 9, 1993); State v. Kenneth Bernard Nevels, C.C.A. No. 01C01-9112-CR-00381, Davidson County (Tenn. Crim. App., Nashville, Dec. 3, 1992). However, in neither of these cases did this Court actually apply the enhancement factors in question, and we are reluctant to do so absent clear legislative intent.

In support of its decision to enhance based on the quantity of cocaine seized, 66.2 grams, the court stated: “it’s many, many, many times the amount of cocaine that would have been necessary to find him guilty of this range of punishment and this range of offense.” Yet, the legislature has already addressed the severity of the offense based on the quantity involved. The Defendant was prosecuted for possession and sale of cocaine over .5 grams and was fined $100,000, or the maximum. The amount involved, 66.2 grams, was quite a bit more than was required to be convicted of that offense. We note, however, that the Defendant could have been prosecuted for possession of cocaine over 26 grams, to be subject to a $200,000 fine. See Tenn. Code Ann. § 39-17-417(i)(5). Thus, the quantity here cannot be used to justify an enhanced sentence because the amount involved is an element of the offense.

The trial court also found that the purity of the cocaine could be used to apply factors (10) and (16). Again, the schedules for certain drugs, including cocaine, have been established while considering the inherent dangerous nature of the drugs. Cocaine is in Schedule II because it has a "high potential for abuse" which "may lead to severe psychic or physical dependence." Tenn. Code Ann. § 39-17-407. The description of coca-derived drugs includes a number of different forms they may take.[2] There is no schedule dividing offenses based on the purity of the drug, such as whether its been “stepped-on” or is of street strength. This implies that even cocaine that is one-hundred percent pure,

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[2] The relevant portion of Schedule II reads:
Coca leaves (DEA Drug Code No. 9040) and any salt, compound, derivative or preparation of coca leaves (including cocaine (DEA Drug Code No. 9041) and ecgonine (DEA Drug Code No. 9180) and their salts, isomers, derivatives and salts of isomers and derivatives), and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine;
Tenn. Code Ann. § 39-17-408(b)(4).

because of its inherent attributes, belongs in Schedule II. Moreover, the legislature has determined the appropriate punishment for offenses in Schedule II. Therefore, we must conclude that purity of the cocaine cannot be used to enhance the sentence through factors (10) and (16).

The Defendant also notes that the trial court inappropriately considered as a factor, his lack of remorse. We agree that this is not contained within the statutory enhancement factors. However, the court considered that the Defendant was a threat to the community and applied this in relation to factors (10) and (16) which we have already found are not applicable. The trial court found no mitigating factors and we agree that none are applicable in this case. Considering only enhancement factor (1), that the Defendant has a prior history of criminal convictions, and based on our de novo review, we modify the sentence to fifteen years.

The Defendant also argues that the trial court erred by failing to sentence him to community corrections. The Community Corrections Act allows certain eligible offenders to participate in community-based alternatives to incarceration. Tenn. Code Ann. § 40-36-103. A defendant must first be a suitable candidate for alternative sentencing. If so, a defendant is then eligible for participation in a community corrections program if he also satisfies several minimum eligibility criteria set forth at Tennessee Code Annotated section 40-36-106(a).

However, even though an offender meets the requirements of eligibility, the law does not provide that the offender is automatically entitled to such relief. State v. Grandberry, 803 S.W.2d 706, 707 (Tenn. Crim. App. 1990); State v.

Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). Rather, the statute provides that the criteria shall be interpreted as minimum standards to guide a trial court's determination of whether that offender is suitable for community corrections. Tenn. Code Ann. § 40-36-106(d).

In the case at bar, the trial court found that the Defendant did not meet the minimum requirements for community corrections. With this we cannot agree. It appears that the Defendant did, in fact, satisfy the basic requirements for alternative sentencing. Yet, this does not foreclose the possibility of incarceration. See Tenn. Code Ann. § 40-35-103; State v. Mencer, 798 S.W.2d 543, 549 (Tenn. Crim. App. 1990). The trial court retains that discretion. It is clear that the trial judge was concerned with the danger to the community that was evident through the Defendant's drug sales. Also, it is evident that the Defendant maintained at trial that he was somehow set-up with the drugs, about which the court commented during the sentencing hearing:

> [T]he risk to the safety of the community I think in this case is enhanced by this defendant's maintaining one of the most bald-faced lies that I've ever heard produced in open court in this county. . . . For you to get on the witness stand and swear before what you swore and stick by it today indicates to the Court a willingness to commit perjury and indicates a disregard for the sanctity of the oath, and people who are willing to disregard the oath . . . should be considered with reference to the dangerousness of this defendant to the community and the offense to this community. I've seen no evidence of any remorse on this defendant's part, but a steadfast maintenance that the police officers planted and set this stuff on him . . . .

Clearly, the court was concerned with depreciating the seriousness of the offense and found the potential for rehabilitation to be slight. Although we recognize that the Defendant has a myriad of health concerns, we believe he may be cared for adequately and appropriately within the Department of Correction.

We find that the trial court did not abuse its discretion in denying community corrections.

Accordingly, the conviction is affirmed, but the sentence is modified to fifteen years. This case is remanded to the trial court solely for the entry of a judgment conforming with this opinion.

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DAVID H. WELLES, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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JERRY L. SMITH, JUDGE