

FOR PUBLICATION
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December 22, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

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4 IN THE SUPREME COURT OF TENNESSEE
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6 AT JACKSON
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11 STATE OF TENNESSEE, ()
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13 Plaintiff-Appellee, (Henry County
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15 (Hon. C. Creed McGinley, Judge
16 ()
17 v. (S. Ct. No. 02S01-9607-CC-00068
18 ()
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20 ()
21 DAVID WILLARD PHIPPS, JR., ()
22 ()
23 Defendant-Appellant. ()
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28 CONCURRING OPINION
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32 I concur in the decision to remand the case to the
33 trial court with instructions; however, I would impose a more
34 precise standard for determining if the presumption of
35 vindictiveness has been overcome.
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37 The majority states that the presumption of
38 vindictiveness "may be overcome by clear and convincing evidence
39 which demonstrates that the prosecutor's decision was motivated
40 by legitimate purpose," and further, "the State must proffer fact
41 specific, legitimate, on-the-record explanations for its conduct
42 which dispel the appearance of vindictiveness." Majority
43 opinion, p. 20. Consequently, the proof presented by the State

1 must show a legitimate, as opposed to specious, purpose for the
2 increased punishment which will dispel the appearance, as opposed
3 to the reality, of vindictiveness. This standard would not be
4 met with proof which showed only that the prosecutor acted in
5 good faith. It is the "fear of vindictiveness" which may chill a
6 defendant's exercise of the right to appeal or collaterally
7 attack the first conviction. Blackledge v. Perry, 417 U.S. 21,
8 94 S. Ct. 2098, 2102 (1974). As stated in In Re Bower, 700 P.2d
9 1269, 1277 (Cal. 1985), "[t]he presumption is not based on the
10 subjective state of mind of the individual prosecutor and does
11 not imply that he or she individually harbors an improper
12 motive."

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14 In my view, this high standard cannot be met with
15 evidence of facts or information which was reasonably available
16 to the prosecutor when the original charge was made. I would
17 apply the rule adopted by the California Supreme Court in In Re
18 Bower:

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20 In order to rebut the presumption of
21 vindictiveness, the prosecution must
22 demonstrate that (1) the increase in charge
23 was justified by some objective change in
24 circumstances or in the state of the
25 evidence which legitimately influenced the
26 charging process and (2) that the new
27 information could not reasonably have been
28 discovered at the time the prosecution
29 exercised its discretion to bring the
30 original charge.

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32 Id.
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1 I am authorized to state that Justice Birch joins in
2 this Concurring Opinion.

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Reid, J.