IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. # O1CO1-9412-CR-00411
Appellee,	*	DAVIDSON COUNTY
VS.	*	Honorable Seth Norman, Judge
SAMUEL MYRON CARTER, JR.,	*	(Sale of a Controlled Substance)
Appellant.	*	

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OPINION FILED: _____

AFFIRMED AND REMANDED

GARY R. WADE, JUDGE

OPINION

The defendant, Samuel Myron Carter, Jr., was convicted of two counts of selling .5 grams or more of cocaine. The trial court imposed consecutive, sixteen-year sentences on each count for an effective sentence of 32 years as a Range II, multiple offender. The sentences were also ordered to be served consecutively to an unrelated conviction for which the defendant had already been incarcerated.

In this appeal of right, the defendant presents the following issues for review:

> (1) whether the trial court erred by allowing a witness to testify who was not listed on the indictment or otherwise identified in advance of trial as a potential state witness;
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> (2) whether the trial court erred by considering the defendant's prior out-of-state criminal record in sentencing; and
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> (3) whether the trial court erred by imposing consecutive sentences.

We affirm the judgment; because the trial court failed to determine the statutory basis for consecutive sentencing, the cause is remanded for consideration on that issue.

The defendant sold cocaine to Samuel Owens, Jr., a confidential police informant, on two separate dates in 1992. On each occasion, the informant paged the defendant from a phone in the police department. When the defendant returned the calls, the conversations setting up the location of the cocaine sale were recorded. Allen Mitchell, a vice officer

with the Metropolitan Police Department, testified that he searched Owens before each buy and Owens was always in his sight during the transactions. Owens wore a recording device, was given the money to purchase the cocaine, and was paid cash for his services on each occurrence. While Officer Mitchell did not actually see the defendant make the two sales, Owens positively identified the defendant at trial as the seller of the cocaine.

The first transaction took place at a Pizza Hut in Davidson County on July 1, 1992. The defendant, who was driving a gray Cadillac, had a passenger in the vehicle. Owens testified that he gave the money to the defendant and that the passenger handed him the cocaine. Afterwards, Owens gave Officer Mitchell the cocaine. Audio tapes of the phone call and the actual transaction were played for the jury. TBI forensic scientist Sean Burch testified that the transaction involved 12 grams of cocaine.

The second purchase occurred on July 6, 1992, at a McDonald's in Davidson County. The defendant was alone in the Cadillac. Police had followed the vehicle as it was driven from the defendant's residence to the place of the sale. Owens testified that he bought cocaine from the defendant and then turned the cocaine over to Officer Mitchell. The audio tapes of the phone call and the sale were played for the jury. Burch testified that the second purchase involved 13 grams of cocaine.

The defendant offered no proof at trial.

I

The defendant claims that the trial court erred by allowing the confidential informant to testify. The defendant argues that he was prejudiced by the state's failure to list Owens on the indictment as required by Tenn. Code Ann. § 40-17-106. The record does not contain a copy of the defendant's discovery request or the state's response; the hearing on the motion, however, included references to the fact that the state responded to the defendant's request for a list of witnesses by referring to the indictment. The confidential informant was not listed there. This statute provides as follows:

> [I]t is the duty of the district attorney general to endorse on each indictment or presentment, at the term at which the same is found, the names of such witnesses as he intends shall be summoned in the cause, and sign his name thereto.

Tenn. Code Ann. § 40-17-106.

It is well settled in Tennessee that this provision is directive, rather than mandatory. State v. Hutchison, 898 S.W.2d 161, 170 (Tenn. 1994), cert. denied, ____ U.S. ____, 116 S. Ct. 137 (1995); State v. Harris, 839 S.W.2d 54, 69 (Tenn. 1992), cert. denied, 507 U.S. 954 (1993); State v. Street, 768 S.W.2d 703, 711 (Tenn. Crim. App. 1988); State v. Crabtree, 655 S.W.2d 173, 177 (Tenn. Crim. App. 1983); Thomas v. State, 3 Tenn. Crim. App. 589, 596-97, 465 S.W.2d 887, 889-90 (1970). The purpose of this section is to limit the possibility of surprise and to provide the defendant a basis

upon which to prepare a theory of defense against his accusers. State v. Melson, 638 S.W.2d 342, 364 (Tenn. 1982), cert. denied, 459 U.S. 1137 (1983); State v. Street, 768 S.W.2d at 710-11; State v. Roberson, 644 S.W.2d 696, 699 (Tenn. Crim. App. 1982). The failure to list or provide the names of witnesses neither disqualifies the witness nor entitles the defendant to relief, unless prejudice can be shown. State v. Hutchison, 898 S.W.2d at 170; State v. Harris, 839 S.W.2d at 69; State v. Roberson, 644 S.W.2d at 699. "In this context, it is not the prejudice which resulted from the witnesses testimony but the prejudice which resulted from the defendant's lack of notice which is relevant...." State v. Jesse Eugene Harris, No. 88-188-III (Tenn. Crim. App., at Nashville, June 7, 1989), perm. to appeal denied, (Tenn. 1989).

Rule 16, Tenn. R. Crim. P., neither requires nor authorizes pretrial discovery of the names and addresses of the State's witnesses. State v. Harris, 839 S.W.2d at 69; State v. Martin, 634 S.W.2d 639, 643 (Tenn. Crim. App. 1982). The decision whether to allow a witness to testify in these circumstances is within the sound discretion of the trial court. McBee v. State, 213 Tenn. 15, 26-27, 372 S.W.2d 173, 179 (1963), cert. denied, 377 U.S. 955 (1964); State v. Underwood, 669 S.W.2d 700, 703 (Tenn. Crim. App. 1984). Where there is no surprise, prejudice, or disadvantage, the trial court may admit testimony of witnesses even though their names were omitted from the indictment. State v. Craft, 743 S.W.2d 203, 204 (Tenn. Crim. App. 1987); State v. Martin, 634 S.W.2d

at 643.

"When additional witnesses are added to the list of those the state intends to call and the defendant contends he has not had sufficient opportunity to interview such witnesses, the trial court must determine whether a continuance is required in order that the defendant will not be unfairly prejudiced." State v. Crabtree, 655 S.W.2d at 177. "[W]hen defense counsel was or should have been aware of the possibility of a witness testifying and when the substance of the testimony was available to the defense, Tennessee courts have not hesitated to admit the testimony." State v. Leonard Lebron Ross, No. 03CO1-9404-CR-00153 (Tenn. Crim. App., at Knoxville, June 15, 1995)(citing numerous cases), perm. to appeal granted and remanded on other grounds, (Tenn. 1995).

The issue here is a troublesome one. The record demonstrates that the state failed to act in accordance with the statute by disclosing the name of the confidential informant. In consequence, the defendant could not be certain as to the identity of his primary accuser. That does not mean, however, that the defendant suffered unfair prejudice due to the lack of notice. The transcript of the hearing on the motion to disqualify the witness establishes that the defense knew that a confidential informant was involved in the drug sales. The record shows that the informant had actually known the defendant for about twenty years by the time of trial. The state claimed to have informed defense counsel in

advance of trial "[w]e have got a confidential informant" and that he was "going to testify." Through its own investigation, the defense learned about Owens; counsel had a copy of Owens' driver's license and a defense investigator had actually questioned Owens the week before the trial. Owens, however, refused to cooperate with the investigator.

In a jury-out hearing, Owens acknowledged he had been questioned by the investigator but denied that a driver's license photograph, which was actually that of his father, was his. Owens did admit that the birth date on the license was his and not that of his father. Owens stated that the investigator claimed that he "worked with Bobby Brown Investigations" but "wouldn't show me any" identification. Owens claimed that he refused to cooperate and denied any knowledge of the upcoming trial when the investigator developed "an attitude". See Cook v. State, 3 Tenn. Crim. App. 685, 466 S.W.2d 530 (1971)(the fact that a witness refuses to talk with the defense is immaterial on such an issue because there is no right to question a witness pretrial).

Even if these facts do not excuse the lack of notice to the defense, they do shed light on the issue of prejudice. The trial court heard all of the pertinent testimony and ruled that it was "absolutely apparent" that the defense was aware of the confidential informant and would not be unfairly prejudiced by the lack of official notice. Unless the evidence in the record requires a different result, we must

defer to the findings of the trial judge. An order of continuance is the usual remedy and would have perhaps been warranted in these circumstances. Yet the defendant sought only the disqualification of the witness. A reasonable inference is that the defendant could not have been better prepared for the substance of Owens' testimony no matter how much additional time had been granted. Moreover, the failure on the part of the confidential informant to cooperate in the defense investigation could have served as a basis for effective cross-examination. While we believe the state should have provided the information in advance of the trial, we yield to the trial court's conclusion that the defense failed to establish any unfair prejudice due to the lack of advance notice. We cannot conclude that the trial court abused its discretionary authority in making that assessment.

II

The defendant next claims (1) that the trial court should not have considered his prior, out-of-state criminal record for sentencing and (2) that the trial court erred by imposing consecutive sentences.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review 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); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for a felony conviction, the presumptive sentence is the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). But see 1995 Tenn. Pub. Acts ch. 493 (amending the statute for offenses occurring on or after July 1, 1995, to make the presumptive sentence in a Class A felony the midpoint in the range). If there are enhancement factors but no mitigating factors, the trial court may set the sentence above the minimum. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence may then be reduced within

the range by any weight assigned to the mitigating factors present. Id.

Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case, our supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution:

> [C]onsecutive sentences should not be routinely imposed ... and ... the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary language. Tenn. Code Ann. § 40-35-115. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria[1] exist:

> (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;

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[1]The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

> (2) The defendant is an offender whose record of criminal activity is extensive;
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> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

In Gray, our supreme court had ruled that before consecutive sentencing could be imposed upon the dangerous offender, as now defined by subsection (b)(4) in the statute, other conditions must be present: (a) that the crimes involved aggravating circumstances; (b) that consecutive sentences are a necessary means to protect the public from the defendant; and (c) that the term reasonably relates to the severity of the offenses.

More recently, in State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995), our high court reaffirmed those principles, holding that consecutive sentences cannot be required of the dangerous offender "unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant." The Wilkerson decision, which modified somewhat the strict, factual guidelines for consecutive sentencing adopted in State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), described sentencing as "a human process that neither can nor should be reduced to a set of fixed and mechanical rules." Wilkerson, 905 S.W.2d at 938 (footnote omitted).

The appellant, however, has the burden to prepare a record on appeal that presents a complete and accurate account of what transpired in the trial court with respect to the issues on appeal. Tenn. R. App. P. 24(b). The failure to do so generally results in a waiver of such issues and a presumption that the ruling of the trial court was correct. See, e.g., State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991); State v. Draper, 800 S.W.2d 489, 493 (Tenn. Crim. App. 1990).

The defendant challenges the trial court's determination that he was a Range II, multiple offender. The defendant does not challenge the validity of his prior convictions. He does argue, however, that there was no statutory method for the trial court to determine the

Tennessee classification of the out-of-state convictions for range enhancement purposes. See Tenn. Code Ann. § 40-35-106(a)(1) (requiring a minimum of two but not more than four prior class A, B, C, or D felony convictions for Range II classification on a Class B felony).

Here, we are handicapped in our review by the defendant's failure to include the copies of the out-of-state convictions contained in the trial court record and relied upon at the sentencing hearing. Technically, the issue has been waived by the omission. At the hearing, the trial court noted that one of the prior convictions was a class B felony out of Tennessee. The court then found that one of the previous offenses out of Florida was for felony possession of cocaine and that under Tennessee law there is no similar felony offense which is graded at less than a class C felony. See Tenn. Code Ann. § 39-17-417 (possession with intent). Thus, the trial court determined that these two prior offenses were sufficient to establish the range. While we note that simple possession of cocaine in Tennessee may be classified as a class A misdemeanor or a class E felony, we cannot determine on the record before us that the trial court erred in comparing the out-of-state felony offense with the Tennessee statutes. Accordingly, we defer to the trial court's determination on the issue.

The defendant also challenged the trial court's finding that he had a previous history of criminal convictions or behavior in addition to that necessary to establish the

range. See Tenn. Code Ann. § 40-35-114(1). The presentence report, however, supports the trial court's application of this factor.

The trial court also properly ordered the sentences imposed to be consecutive to the sentence for which the defendant was on parole at the time these offenses occurred. Tenn. R. Crim. P. 32(c)(3)(A). Neither the judgment form nor the transcript of the sentencing hearing, however, expressly indicates why the two sentences at issue here were ordered to be consecutive. The state argued that the sentences should be consecutive because the presentence report established that the defendant had an extensive criminal history and that he had supported himself by selling cocaine. The trial court later stated that it was "adopt[ing] the enhancement factors as set out in the pre-sentence report in making the judgment"; the report, however, did not include any reference to the issue of consecutive sentencing or to the factors which may support such a sentence. There must be a statutory basis for consecutive sentencing. See Tenn. Code Ann. § 40-35-115(b). Thus, a remand to the trial court for the limited purpose of determining the basis for consecutive sentencing is in order. If none exists, the law requires a concurrent sentence.

Accordingly, the judgment is affirmed; the cause is remanded to the trial court on the consecutive sentencing issue.

Gary R. Wade, Judge

CONCUR:

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David H. Welles, Judge

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Robert E. Corlew, III, Special Judge