IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH 1996 SESSION

STATE OF TENNESSEE Appellee, V. **DANNY W. SOLOMON** Appellant,	)C.C.A. No. 03C01-9511-CC-00375)) Greene County)) Hon. Ben K. Wexler, Judge))(Certified Question of Law)

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OPINION FILED: _____

AFFIRMED

CHARLES LEE,
Special Judge

O P I N I O N

This appeal presents a certified question of law under Tennessee Rule of Criminal Procedure 37(b)(2)(i). The Defendant's certified question is whether the trial court erred in failing to dismiss the second count of an indictment because it did not allege the court of first conviction. The Defendant pleaded guilty to D.U.I. and reserved this issue for appeal. He received a sentence of eleven (11) months and twenty-nine (29) days of which forty-five were to be served in the county jail. We affirm the judgment of the trial court.

The defendant was indicted by the Greene County Grand Jury in a two count indictment. The first count alleged Driving Under the Influence of an Intoxicant in violation of T.C.A. § 55-10-401. The second count of the indictment purported to notify the defendant that he would be tried as a second offender alleging the defendant had previously been convicted of a prior offense of Driving Under the Influence of an Intoxicant "On March 17, 1986 in Greene County, Tennessee".

The defendant filed a motion to dismiss the second count of the indictment because it did not allege the court in which the prior offense occurred. The trial court denied the motion.

The state now insists the defendant's appeal should be dismissed in that the issue raised herein is not dispositive of the case.

The Tennessee Supreme Court set out the requirements which must be met for an issue to be certified for appeal in State v. Preston, 759 S.W.2d 647 (Tenn. 1988). The court said:

> The final order or judgment from which the time begins to run to pursue a T.R.A.P. 3 appeal must contain a statement of the dispositive certified question of law reserved by defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved. For example, where questions of law involve the validity of searches and the admissibility of statements and confessions, etc., the reasons relied upon by defendant in the trial court at the suppression hearing must be identified in the statement of the certified question of law and review by the appellate courts will be limited to those passed upon by the trial judge and stated in the certified question, absent a constitutional requirement otherwise. Without an explicit statement of the certified question, neither the defendant, the State nor the trial judge can make a meaningful determination of whether the issue sought to be reviewed is dispositive of the case. . . . Also, the order must state that the certified question was expressly reserved as part of a plea agreement, that the State and the trial judge consented to the reservation and that the State and the trial judge are of the opinion that the question is dispositive of the issue. Of course, the burden is on defendant to see that these prerequisites are in the final order and that the record brought to the appellate courts contains all of the proceedings below that bear upon whether the certified question of law is dispositive and the merits of the question certified.
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> Id. at 650 .

The state insists that should this court agree with the defendant, "[T]he defendant could be tried on his current DUI; or the district attorney general could withdraw and/or amend the indictment to conform to the orders of this Court". Therefore, it would follow that the question presented by the defendant would not dispose of

the case. See, State of Tennessee vs. Virginia Brown, Davidson County, C.C.A. No. 85-217-III, Opinion filed March 25, 1986, at Nashville. However, this Court notes that this opportunity was presented to the state at the time of the defendant's filing his motion to dismiss and for whatever reasons the state elected to proceed on the merits.[1] To follow the procedure now insisted upon by the state would place the defendant in a procedural revolving door.

We therefore choose to address the issue on the merits but not as posed by the parties. The certified question as posed by the parties reads:

> On October 2, 1995, the defendant filed a motion to dismiss count two (the enhancement count) of the indictment for failure of the second count to allege the Court of first conviction as required by Frost v. State, 330 S.W.2d 303. Should the trial court have granted the motion? (emphasis added)

The broad question "Should the trial court have granted the motion?" does not comport to the form of Tennessee Rule of Criminal Procedure 37(b)(2)(i) or the dictates of State v. Preston, Supra. Preston requires final orders clearly identify the scope and the limits of the legal issues in order to assure that appellate courts exercise their proper function of reviewing final judgments of trial courts. We therefore limit our review to the following question:

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[1] We note the issues before us seem to represent a case of form's triumph over substance. Either party could have avoided this appeal. The state could have moved to amend the indictment so as to have removed any questions or the defendant could have filed a bill of particulars. From this record the defendant certainly can not claim that he had insufficient notice of the state's allegations. In either case needless litigation could have been avoided.

Is an indictment which notifies the defendant of the state's intention to seek enhanced punishment defective on its face if it fails to specifically identify the Court of conviction of the previous offense.

T.C.A. § 40-13-202 requires an indictment to "state the facts constituting the offense in ordinary and concise language . . . in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment. . . ." It is well settled that an indictment is sufficient if it (1) gives notice of the offense with which the defendant is charged; (2) enables the court to enter a proper judgment, and (3) describes the offense so as to allow the accused to raise a plea of former jeopardy. State v. Davis, 748 S.W.2d 207 (Tenn. Crim. App. 1987); see also Hagner v. United States, 285 U.S. 427 (1932). Therefore, it is not necessary that an indictment follow a specific form or contain specific language. We therefore hold that the mere failure of an indictment seeking enhanced punishment to allege by name the prior convicting court does not in and of itself render the indictment defective, if it otherwise comports with the tenets above.

We note that the form of the certified question before us does not ask us to determine if the indictment in this case is sufficient and we limit our opinion only to the question as posed. Because of the form of the certified question, the defendant has not been victorious. However, the State should not rely on this opinion as approving its procedure or the form of its indictments. More accommodation at the trial level makes for fewer appeals.

For the foregoing reasons, we affirm the judgement of the trial court.

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Charles Lee, Special Judge

CONCUR:

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Paul G. Summers, Judge

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Joseph M. Tipton, Judge