IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1994 SESSION

FILED

**September30, 1996**

**Cecil Crowson, Jr.**
**Appellate Court Clerk**

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| STATE OF TENNESSEE, | ) | |
| | ) | No. 02C01-9212-CR-00294 |
| Appellee, | ) | |
| | ) | Shelby County |
| vs. | ) | |
| | ) | Hon. Arthur T. Bennett, Judge |
| DOCK BATTLES, | ) | |
| | ) | (Possession of Cocaine with |
| Appellant. | ) | Intent to Deliver) |

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OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
Judge

**O P I N I O N**

The defendant, Dock Battles, appeals as of right from his conviction for possession of cocaine with the intent to deliver, a Class B felony. He received a ten-year sentence in the Department of Correction as a Range one standard offender. The defendant presents the following issues for our review:

> (1) whether the trial court erred in admitting evidence tainted by an unlawful arrest;
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> (2) whether the defendant was denied the effective assistance of counsel during a suppression hearing;
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> (3) whether the trial court erred in denying the defendant's request for a hearing pursuant to Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978);
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> (4) whether the trial court should have required the prosecution to disclose the identity of a confidential informant and whether the defendant was denied the right to confrontation at the suppression hearing;
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> (5) whether the trial court erred in denying the defendant's motion for an investigator;
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> (6) whether the defendant was subjected to double jeopardy;
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> (7) whether the trial court erred in failing to instruct on lesser included offenses;
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> (8) whether the prosecutor's closing argument was improper;
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> (9) whether there was sufficient evidence of the amount of cocaine;
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> (10) whether the trial court erred in allowing a law enforcement officer to testify as to the street value of cocaine;
>
> (11) whether the defendant was denied effective appellate review; and
>
> (12) whether the trial court erred in sentencing the defendant as a Class B felon;

We disagree with the defendant's contentions and affirm the judgment of the trial court.

I

The defendant's initial issues relate to his arrest and the suppression hearing at which he was represented by an assistant public defender.[1] At the hearing, Randy McCalman, a narcotics officer with the Shelby County Sheriff's Department, testified that he received information from an informant regarding a cocaine transaction in Shelby County, Tennessee. He said that he had used the informant over ten times and that the informant had proven to be reliable and had provided him with information that had led to other arrests. McCalman testified that the informant told him he could buy one-half ounce of powdered cocaine and one-half ounce of crack cocaine from a person known as "Rico" at a Circle K convenience store at 12:00 p.m. on March 10, 1990.

McCalman said that he and other officers met with the informant and followed him to the Circle K. They searched the informant and his vehicle to ensure that he was not in possession of any drugs and outfitted him with a wire transmitter so they could monitor any conversations. The informant telephoned "Rico" to arrange the meeting. Although "Rico" initially wanted to meet at a different location, at McCalman's direction the informant called "Rico" back and told him that the meeting had to occur at the Circle K because he was having car trouble. "Rico" agreed. McCalman recalled that the informant was to give officers a prearranged "take down" sign when he saw drugs in the defendant's possession.

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[1]We note preliminarily that the defendant proceeded pro se at the majority of the proceedings in the trial court, as well as on appeal. The record indicates that the defendant's retained counsel was permitted to withdraw due to conflicts with the defendant. The trial court appointed an assistant public defender, who was subsequently relieved as counsel on the defendant's motion. At each stage of the proceedings, the trial judge inquired into the defendant's desire to proceed pro se and determined that the defendant competently and intelligently waived his right to counsel. See Tenn. R. Crim. P. 44(a). Although the written waiver mandated in Rule 44 is not in the record, the trial judge observed on the record that the defendant "refused" to sign a waiver. Likewise, the trial court's written order relieving counsel bears the notation, "defendant refuses to sign." The defendant has not alleged any issues on appeal regarding his waiver of counsel.

A short time later a car dropped the defendant off in the street next to the Circle K parking lot, and the defendant approached the informant. The informant talked to the defendant, gave the "take down" signal, and walked into the Circle K. McCalman recalled approaching the defendant and seeing something in his hand. He identified himself as a police officer and ordered the defendant to put up his hands. The defendant then turned and put his hand under the open hood of the informant's pickup truck. Officers handcuffed the defendant and looked under the hood of the truck where they found a bag of powdered cocaine and a bag of crack cocaine. An affidavit of complaint was later sworn by Officer McCalman that stated:

> On 3-10-90 at approx. 12 noon, officers received information from a reliable informant that a m/b known as "Ricco" would sell & deliver to him approx. ½ ounce of cocaine and a number of rock [sic] at Winch. & Knight Rd. on the Circle K lot. The "Ricco" subject arrived, the take-down signal was given[,] the subject delivered 7.8 grms. [] of powder cocaine and 2.3 grms. [] of crack cocaine. Subject was advised of his rights, arrested, and transported to the C.J.C.

McCalman did not recall being told how the informant in this instance knew cocaine could be obtained from the defendant. Although he believed that the informant said something to the defendant at the scene about the drugs before the take down signal was given, he could not recall exactly what was said.[2] McCalman also acknowledged that he did not notice any other violations of the law occurring between the informant and defendant in the parking lot and that he did not observe any transaction taking place.

The defendant also testified during the suppression hearing. He insisted that Officer McCalman was in fact the informant, and not a law enforcement

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[2]McCalman's testimony was more precise at trial. He testified that the informant asked the defendant whether he "had the stuff" and that the defendant replied that he did not have the amount that was ordered but then named a price.

officer. He further claimed that he had smoked cocaine with McCalman the night before the offense.

**A**

The defendant contends that the cocaine was obtained as a result of an unlawful arrest. In particular, he questions Officer McCalman's reliance on the confidential informant, as well as the informant's basis of knowledge. The trial court held that the defendant's arrest was based upon probable cause. We agree.

Pursuant to T.C.A. § 40-7-103(a), officers may make a warrantless arrest when they have probable cause to believe that the arrestee has committed or is committing a felony. See State v. Marshall, 870 S.W.2d 532, 539 (Tenn. Crim. App.), app. denied, (Tenn. 1993); State v. Tays, 836 S.W.2d 596, 599 (Tenn. Crim. App. 1992). Probable cause to arrest would exist if, at the moment the arrest was made, the officers had "facts and circumstances within their knowledge and of which they had reasonably trustworthy information [which] were sufficient to warrant a prudent [person] in believing that the [arrestee] had committed . . . an offense." Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 225 (1964); State v. Melson, 638 S.W.2d 342, 350 (Tenn. 1982), cert. denied, 459 U.S. 1137 (1983). It is a question of probabilities not technicalities. See State v. Jefferson, 529 S.W.2d 674, 689 (Tenn. 1975).

If the information possessed by the officers is not of their personal knowledge but is received from an informant, probable cause under Article 1, § 7 of the Tennessee Constitution requires that the officers must know that (a) the informant has a basis for his information that a person was involved in criminal conduct and that (b) the informant is credible or his information is reliable. State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989); see State v. Moon, 841 S.W.2d 336, 338 (Tenn. Crim. App.

1992). However, any deficiency in the informant's information under this two-prong test may be overcome by independent police corroboration. Jacumin, 778 S.W.2d at 436.

In this case, when the informant gave police the "take down" signal, the police were sufficiently advised of his basis of knowledge. According to the officers' instructions, the informant was to signal when he saw drugs in the defendant's possession. The basis of the informant's knowledge was his observation of drugs on the defendant's person at the scene. See, e.g., State v. Marshall, 870 S.W.2d at 539 (informant's personal observation satisfied basis of knowledge prong).

With respect to the informant's veracity, McCalman testified that he had used the informant more than ten times and that the informant had proven to be reliable and had provided him with information that had led to other arrests. McCalman's observations at the scene further corroborated the informant's veracity. See, e.g., State v. Ballard, 836 S.W.2d 560 (Tenn. 1992); Marshall, at 540. At McCalman's request, the informant called "Rico" and told him that the drug transaction had to take place at the Circle K because he was having trouble with his truck. The informant then opened the hood of his truck, and a short time later McCalman saw the defendant exit a car in the street next to the Circle K parking lot and approach the informant. He then saw the informant signal, verifying that the defendant had drugs. As he approached the defendant, McCalman noticed that the defendant had something in his hand, and when he ordered the defendant to raise his hands, he saw the defendant put his hand under the hood of the truck.

Based on McCalman's observations and on the information he received from the informant, we conclude that he had probable cause to believe the defendant had cocaine in his possession. The cocaine seized is not the fruit of an illegal arrest regardless of whether it was incident to the defendant's arrest, see Chimel

v. California, 395 U.S. 752, 89 S. Ct. 2034 (1989); New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860 (1981) or abandoned before his arrest. See California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547 (1991). The exigencies of the circumstances allowed the officers to proceed as they did without the benefit of a warrant.

**B**

Next, the defendant contends that he was denied the effective assistance of counsel during the suppression hearing. He contends that counsel (a) failed to incorporate the affidavit of complaint in the motion to suppress, (b) failed to "brief" issues to be argued during the hearing, (c) failed to object to hearsay testimony, and (d) improperly allowed the court to hear the motion to suppress simultaneously with certain other motions. The state contends that the defendant has not shown that he is entitled to relief. We agree.

In Tennessee, the accused has a constitutional right to the effective assistance of counsel at all critical stages of a criminal prosecution. Tenn. Const. art. 1, § 9; Powell v. Alabama, 287 U.S. 45, 52 (1932); McKeldin v. State, 516 S.W.2d 82, 86 (Tenn. 1974). A claim of ineffective assistance of counsel requires a defendant to show that counsel's performance was deficient and that the deficiency undermined confidence in the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984); see Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

The defendant has failed to show that his counsel was ineffective in his efforts to have the evidence suppressed. Counsel filed a motion to suppress on August 4, 1992, and an amended motion to suppress on September 24, 1992. The motions clearly set forth allegations of an unlawful arrest and subsequent seizure. Although the motions do not refer specifically to the affidavit of complaint, the transcript

of the suppression hearing indicates that the contents of the affidavit were read into evidence and that the affidavit itself was introduced as an exhibit for identification. It was, therefore, before the trial court in making its ruling. We can find no deficiency in counsel's performance with respect to the suppression motions.

Similarly, counsel was not deficient for failing to object to hearsay testimony during the hearing. First, we must note that the defendant's brief does not cite to the record in this regard. See T.R.A.P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b). In any event, our court has held that hearsay evidence is generally admissible in a suppression hearing to show probable cause to search or arrest. State v. Woods, 806 S.W.2d at 212; State v. Hill, 638 S.W.2d 827, 830 (Tenn. Crim. App. 1982). Finally, the decision to hear the motions to suppress evidence, to disclose the identity of the informant and to disclose impeachment evidence pertaining to the informant in the same proceeding was within the discretion of the trial court. Counsel was not deficient in this regard, and, in fact, the transcript vividly discloses his vigorous representation in support of the motions. The defendant's claim that he was denied the effective assistance of counsel is without merit.

**C**

The defendant contends that the trial court erred in denying his motion for an evidentiary hearing pursuant to Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978). The motion, which was filed pro se after the suppression hearing had been held, alleged that Officer McCalman intentionally and recklessly made numerous false statements, or material omissions, in swearing an affidavit of complaint. The state argues that the trial court properly denied a Franks hearing because the issues raised were heard and decided in the suppression hearing.

In Franks v. Delaware, the United States Supreme Court held that an attack on a facially valid search warrant requires a defendant to make "allegations of deliberate falsehood or of reckless disregard for truth, and those allegations must be accompanied by an offer of proof." Id. at 171, 98 S. Ct. at 2684. In this regard, "[a]ffidavits or sworn or otherwise reliable statements of witnesses should be furnished or their absence satisfactorily explained." Id.

Here, there was no search warrant to challenge. Further, the defendant's attempt to apply Franks to the warrantless arrest merely reiterated the grounds of his previous motions to suppress. The Franks motion contained conclusory assertions that McCalman lacked probable cause to make the warrantless arrest because the informant was not named, the informant was not shown to be reliable, and there was no basis for the informant's knowledge. The identical issues were resolved adversely to the defendant during the suppression hearing. Merely calling the same motion by a different name did not warrant an evidentiary hearing.

**D**

The defendant also contends that he was denied the right to confrontation because the trial court refused to order the prosecution to disclose the informant's identity. The state argues that defendant's claim is not supported by the record.

Generally, "[t]he state's privilege to withhold the identity of an informant yields when the defendant can show that the informant was a witness or a participant in the crime and thus, a material witness . . . ." State v. Ash, 729 S.W.2d 275, 278 (Tenn. Crim. App. 1986), app. denied, (Tenn. 1987) (citations omitted). See Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623 (1957); State v. Brown, 823 S.W.2d 576, 587 (Tenn. Crim. App. 1991); Roberts v. State, 489 S.W.2d 263, 264

(Tenn. Crim. App.), cert. denied, (Tenn. 1972). In Roviaro, the Court noted that disclosure is necessary when "relevant and helpful to the defense of the accused, or . . . essential to a fair determination of a cause . . . ." 353 U.S. at 57-58. In this case, the testimony at the suppression hearing warranted a clear inference that the informant participated in and was a material witness to the crime. In fact, the informant arranged the meeting with the defendant, met with the defendant in the parking lot, and presumably saw the narcotics in the defendant's possession. See, e.g., State v. Brown, 823 S.W.2d at 586-87.

The record, however, fails to support the defendant's claim of error. First, we must observe that the defendant's sworn testimony during the suppression hearing was that Officer McCalman was the informant. Officer McCalman denied the allegation. The trial court discredited the defendant's testimony. We further note that the defendant testified that he was with the informant on the night before the offense, an implicit admission that he was aware of the informant's identity.

In any event, the transcript of the suppression hearing reveals that the trial court did not rule on the motion because the prosecution agreed to reveal the name of the informant to defense counsel. During the motion for a new trial hearing, defense counsel, who by that time was present only as "elbow" counsel, advised the court that the prosecution had in fact supplied the name of the informant and that he, in turn, had given the name to the defendant. The defendant has shown nothing to the contrary in the hearing on the motion for new trial or on appeal. In short, he has failed to substantiate his arguments and is not entitled to relief on this issue.

**II**

The defendant contends that the trial court erred in denying his request for the appointment of an investigator. He alleges that he was unable to check

the criminal records of witnesses, to take statements from witnesses, to make pictures of the scene, to obtain an independent analysis of the drugs, or to discern the whereabouts of the informant. The state contends that the defendant was not entitled to the services of an investigator because he rejected the court's appointment of the public defender's office.

We disagree with the state's contention that one who rejects the appointment of a public defender in favor of exercising his or her constitutional right to self-representation is automatically disqualified from receiving expert or investigative services upon a sufficient showing of need. Nonetheless, the record fails to support the defendant's claim that such a need was present in this case.

Our courts have consistently held that there is no statutory right to expert or investigative services for indigent persons in non-capital proceedings. See, e.g., State v. Williams, 657 S.W.2d 405, 411 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984). The statute in question, T.C.A. § 40-14-207(b), specifically refers to capital cases. See State v. Chapman, 724 S.W.2d 378, 380 (Tenn. Crim. App.), app. denied, (Tenn. 1986). Nonetheless, where the need for services touches upon a due process concern, a trial court may order such services, even in non-capital cases. See State v. Barnett, 909 S.W.2d 423, 428 (Tenn. 1995); State v. Edwards, 868 S.W.2d 682, 696-98 (Tenn. Crim. App.), app. denied, (Tenn. 1993); State v. Harris, 866 S.W.2d 583, 585 (Tenn. Crim. App. 1992), app. denied, (Tenn. 1993). To obtain expert or investigative services, a defendant must demonstrate a "particularized need." The determination as to the sufficiency of the showing lies within the discretion of the trial court. State v. Evans, 838 S.W.2d 185, 192 (Tenn. 1992), cert. denied, 510 U.S. 1064 (1994) (Trial court did not abuse its discretion in denying investigative services.).

Here, the defendant failed to make a showing of a particularized need for an investigator prior to trial. In a motion entitled “Forma Pauperis Proceedings," the defendant simply alleged that he would require the investigative services of the public defender's office. We recognize that the defendant elected to proceed pro se in this cause. However, no specific reasons in support of the request were either set forth in the motion or related to the trial court in any pre-trial hearings. Moreover, the defendant failed to establish that the denial of an investigator had a prejudicial effect on his defense. The record indicates that he was supplied with discovery and that he has not shown that evidence or information favorable to his defense was available had he had the services of an investigator. See, e.g., State v. Evans, 838 S.W.2d at 192.

**III**

The defendant argues that it was a violation of double jeopardy principles to indict him for one count of possession with the intent to sell and one count of possession with intent to deliver because the underlying facts revealed only a single possession. The state asserts that double jeopardy was not violated because the jury's conviction for count two, intent to deliver, resulted in an acquittal on count one, intent to sell. We agree.

In State v. Johnson, 765 S.W.2d 780, 782 (Tenn. Crim. App. 1988), app. denied, (Tenn. 1989), cited by both parties, defendant was convicted of both intent to sell and intent to deliver. Our court held that because the facts of that case showed only one possession, dual convictions violated double jeopardy principles. See also, State v. Beard, 818 S.W.2d 376, 378-79 (Tenn. Crim. App.), app. denied, (Tenn. 1991). By contrast, in the present case the jury was instructed that it could convict the defendant of only one of the charged offenses; accordingly, it convicted the defendant of count two. Its silence with regard to count one is an acquittal of that offense. See

State v. Arnold, 637 S.W.2d 891, 895 (Tenn. Crim. App. 1982). Thus, the defendant was not convicted of multiple offenses for a single possession, nor was he subjected to successive prosecutions. He is entitled to no relief on this ground.

**IV**

The defendant contends that the trial court erred in failing to instruct on the lesser included offenses to count one, possession with intent to sell. Although the trial court has a mandatory duty to instruct on lesser included offenses raised by the evidence, the defendant has not shown what, if any, offenses were in fact raised by the evidence in this case. See T.C.A. § 40-18-110(a); State v. Trusty, 919 S.W.2d 305, 311 (Tenn. 1996). Courts are not obliged to instruct on lesser included offenses when the evidence does not support an inference of guilt on those charges. See State v. Mellons, 557 S.W.2d 497, 499 (Tenn. 1977); State v. Davis, 649 S.W.2d 12, 14 (Tenn. Crim. App. 1982), app. denied, (Tenn. 1983). In any event, the defendant refers only to count one on this issue; as noted, the jury acquitted the defendant of count one. He is, therefore, not entitled to relief on this ground.

**V**

The defendant claims that the prosecutor committed reversible error in making the following remarks during his closing argument:

> [T]he term confidential informant you've been hearing, was somebody that these officers had dealt with in the past. Somebody had given them information like this in the past, and although a lot of people don't like the term confidential informant, don't like the connotation . . . of somebody being an informant, or a snitch, if you will. Unfortunately, in the society that we live in, and unfortunately in the war that is on going [sic] in the world of drugs, that [is] one of the only

> ways that the officers have of making these arrest [sic].
>
> People like [ the defendant] aren't going to voluntarily come forward to the officers and say, 'I'm a drug seller', so unfortunately they have to use these individuals. And yes, some of these people are motivated, they get paid for it, there are other reasons why people turn informant. I don't know.

Apparently, the defendant's contention is that the argument was not supported by the evidence because it implied that the informant took part in the transaction for monetary benefit and that the informant was not present to testify.

In reviewing a claim of prosecutorial misconduct in closing argument we are guided by such factors as the intent of the prosecutor, the facts and circumstances of the case, the strength or weakness of the evidence, and the curative measures, if any, undertaken by the trial court in response to the prosecutor's conduct. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976). Here, the facts and the Judge factors weigh against the defendant's arguments. It is not clear how the argument, even if interpreted as the defendant suggests, would have prejudiced the defendant. Moreover, the defendant made no contemporaneous objection to the argument. He is not entitled to relief on this issue. See T.R.A.P. 36(a).

**VI**

The defendant argues that the prosecution failed to prove the nature and weight of the substances seized by law enforcement officers. As noted by the state, the defendant's contentions are not supported by the record. An expert witness testified that samples of the substances seized by officers tested positive for powdered cocaine and crack cocaine. Additionally, two law enforcement officers testified that there were 7.8 grams of powdered cocaine and 2.3 grams of crack cocaine. The defendant did not object to the officers' testimony. He cannot now

complain of its admissibility. See, e.g., State v. Rhoden, 739 S.W.2d 6, 11 (Tenn. Crim. App.), app. denied, (Tenn. 1987).

**VII**

The defendant contends that the trial court erred in allowing Officer A.E. Moore to testify as to the street value of crack cocaine in Shelby County, Tennessee. He argues that such testimony was irrelevant and unduly prejudicial.[3] The state argues that the defendant failed to object properly and that, in any event, the evidence was properly admitted.

Moore testified that he had been employed with the Shelby County Sheriff's Department, Narcotics Division, for six years. He related his various training in the field of narcotics and his familiarity with the street values of drugs from his law enforcement experience in Shelby County. He described the difference between powdered and crack cocaine and testified as to how much crack cocaine could be obtained from a gram of powdered cocaine. Moore also testified that .2 to .4 grams of crack is worth $20.

The state contended that the evidence was admissible in light of the defendant's opening remarks in which he claimed to be a drug addict who went to the scene to purchase crack. The state, in effect, sought to demonstrate that it would be unusual for an addict to be involved in a transaction with the large amounts of powdered and crack cocaine involved in this case.

[3] At trial, the defendant intimated that he was not aware Lt. Moore would be called as he was not listed on the indictment. Although this ground was abandoned on appeal, we note that the statute requiring names of witnesses on the indictment is directory only. See, e.g., State v. Crabtree, 655 S.W.2d 173 (Tenn. Crim. App. 1983); State v. Gilbert, 612 S.W.2d 188 (Tenn. Crim. App. 1980), app. denied, (Tenn. 1981) (interpreting T.C.A. § 40-17-106).

We note that the defendant was indicted for possession with intent to sell and possession with intent to deliver. We have previously held that testimony regarding the street value of narcotics is admissible in such cases as it is probative of the elements of the offense. State v. Matthews, 805 S.W.2d 776, 782 (Tenn. Crim. App.), app. denied, (Tenn. 1990). See State v. Brown, 823 S.W.2d at 578; State v. Reginald T. Smith, No. 02C01-9204-CR-00097, Shelby Co. (Tenn. Crim. App. Feb. 17, 1993); United States v. Solis, 923 F.2d 548, 550 (7th Cir. 1991). The defendant is not entitled to relief on this ground.

**VIII**

The defendant argues that he was denied "appellate review" of certain issues due to the trial court's failure to comply with Tenn. R. Crim. P. 12(e) which states that "[w]here factual issues are involved in determining a motion, the court shall state its essential findings on the record." The defendant specifically refers to his motions to suppress, to require disclosure of the informant, to require a bill of particulars, and to conduct a Franks hearing. Although trial courts must comply with Rule 12(e), we disagree with the defendant that the trial court's actions, or inactions, with respect to these issues have denied him appellate review.

The trial court overruled the motion to suppress and stated its findings on the record in this regard. We have fully reviewed the ruling. The trial court did not rule or state findings relative to the motion to disclose the informant's identity because the prosecution agreed to reveal the information to the defendant's then counsel of record. The record further reflects that the trial court denied the Franks motion by written order on November 5, 1992. The order states the trial court's conclusion that the issues raised by the motion had been raised and determined during the suppression hearing conducted on September 24, 1992. Our review of the issue, as reflected above, compelled us to reach the same conclusion.

Finally, the motion for a bill of particulars was filed by the defendant pro se at a time in which he had counsel of record, i.e., April 26, 1991. Because a defendant may not proceed pro se while simultaneously represented by counsel, the trial court was not obligated to address the motion at that time. The defendant made no subsequent effort to refile or renew the motion. We note that the defendant's main contention in the motion was that the indictment did not contain sufficient information for him to ascertain what offenses were charged. To the contrary, the indictments set forth the elements of the offense and included citations to the statutes in question. See State v. Marshall, 870 S.W.2d at 536-37. Moreover, the defendant failed to demonstrate during the motion for new trial hearing how his defense may have been impaired from any lack of particulars. We conclude, therefore, that the record does not warrant relief on these grounds.

**IX**

The defendant, in his final issue, challenges his sentence as a Class B felon. He claims that T.C.A. § 39-17-417(a) does not prescribe a penalty for the amount of cocaine that was involved in this case and that, therefore, he should be sentenced as a Class E felon pursuant to T.C.A. § 39-11-113. The latter statute provides that "[e]very person who is convicted of a felony, the punishment for which is not otherwise prescribed by a statute of this state, shall be sentenced for a Class E felony." Id. The defendant further argues that his ten-year sentence is cruel and unusual in that he has never been convicted of a drug related offense and that T.C.A. § 39-17-417 is unconstitutionally vague and arbitrary. The state contends that the defendant was properly sentenced. We agree.

The defendant was convicted of knowingly possessing a controlled substance with the intent to deliver. T.C.A. § 39-17-417(a)(4). An offense under this provision that involves more than .5 grams of cocaine is a Class B felony. T.C.A. § 39-

17-417(c)(1). The provision providing for Class E sentencing simply has no application in this case. Moreover, T.C.A. § 39-17-417 is clear in its terms and is not unconstitutionally vague.

In Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983), the United States Supreme Court said that a statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminating enforcement." See State v. Ash, 729 S.W.2d at 280. The statutory provisions in question set forth the elements of the prohibited conduct, delivering cocaine, and the penalty for a violation of the statute. We conclude that they are not unconstitutionally vague.

The defendant was sentenced as a Range one, standard Class C felon, for which the applicable range of punishment is eight to twelve years. See T.C.A. § 40-35-101. The trial court enhanced the sentence to ten years based on the defendant's substantial record of prior criminal behavior and convictions.[4] Although the defendant has not specifically challenged the manner in which the court arrived at the sentence, we have reviewed it under the proper standards of review and conclude that no error exists in the sentencing and that a sentence of ten years, as properly calculated under the Sentencing Act of 1989, is not cruel and unusual punishment for this offense and this offender. Cf. State v. Hinsley, 627 S.W.2d 351 (Tenn. 1982).

**X**

Although not noted by either party, the judgment form in the record indicates that the defendant was convicted of possession with intent to sell. In fact, as

[4]According to the presentence report, the defendant's prior criminal history includes convictions for shoplifting, driving under the influence, possession of drugs, malicious mischief, attempt to commit a felony, credit card fraud, forging checks, and petit larceny. See T.C.A. § 40-35-114(1).

previously noted, the defendant was convicted of possession with intent to deliver. The jury's verdict with regard to the latter offense, count two in the indictment, is clearly reflected in the transcript of the proceedings. Both offenses are Class B felonies, and as we have discussed, the trial court properly enhanced the length of the sentence based on the defendant's criminal history.

**CONCLUSION**

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

(Not participating)
Penny J. White, Judge

David H. Welles, Judge