IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1996 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 02C01-9504-CC-00115
Appellee,	*	MADISON COUNTY
VS.	*	Hon. Whit LaFon, Judge
JOHNNY M. HENNING,	*	(Possession of Cocaine With Intent to Sell and Deliver and Possession
Appellant.	*	of Drug Paraphernalia)

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OPINION FILED:_____

JUDGMENT AFFIRMED; REMANDED FOR RESENTENCING

GARY R. WADE, JUDGE

OPINION

The defendant, Johnny M. Henning, was convicted of possession of cocaine with intent to sell, possession of cocaine with intent to deliver, and possession of drug paraphernalia. The trial court merged into a single conviction the possession with intent to sell with the possession of cocaine with intent to deliver. A sentence of twelve years for the felony and an eleven-month, twenty-nine day sentence for the misdemeanor were ordered to be served concurrently.

Although a number of issues have been raised in a rather unconventional fashion, the grounds presented for review can be adequately summarized as follows:

> (1) whether the trial court erred by overruling a motion to suppress;
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> (2) whether the trial court erred by limiting the cross-examination of a state witness;
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> (3) whether the trial court erroneously instructed the jury on the subject of fines;
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> (4) whether forfeiture proceedings should have been joined in this indictment or otherwise barred criminal prosecution on double jeopardy grounds; and
>
> (5) whether the felony sentence was Range I or Range II.

We find no reversible error and affirm the judgment of the trial court. The cause is remanded, however, for resentencing.

On October 21, 1993, drug task force officers for the Twenty-Sixth Judicial District executed a search warrant at the residence of the defendant. During several hours of surveillance prior to the search, Officer Mark Caldwell of the Madison County Sheriff's Department observed what he believed to be several drug

transactions involving individuals who had parked their cars near the defendant's residence. On each occasion, the defendant went to individuals in cars for what appeared to be some kind of exchange. Afterward, Officer Caldwell secured a search warrant, returned to the defendant's residence, and observed what he believed to be another transaction with a driver of a pickup truck. About two hours later, when the defendant appeared to be making another exchange with the driver of a different vehicle, Officer Caldwell, who had seen the defendant take something from a concrete block at the side of his residence, intervened. Upon seeing the officer, the defendant ran to his residence and Officer Caldwell, who had followed close behind, caught up just inside the door. At that point, the officer announced that he was an officer and that he had a search warrant. As he did so, the defendant attempted to kick something under the couch which, upon lab analysis, was found to contain .9 grams of cocaine base. Officer Glenn Penny, who assisted in the execution of the search, found Mannitol, an agent used for cutting cocaine, and a set of scales at the side of the house.

The affidavit to the search warrant, signed by Capt. Thomas A. Coleman provided, in pertinent part, as follows:

> [That there is] probable cause ... that Johnny Henning is ... in possession of ... illegal narcotics, crack cocaine[,] pictures, ledgers, tapes, or records of drug sales or records of proceeds therefrom ....
>
> [The a]ffiant has been provided information by a reliable informant whose reliability has been established by providing information which has resulted in several arrest[s] in the past. Said informant was in the company of a subject who stated the intention to obtain crack cocaine and did go to the above described residence and did enter the described residence and did display crack cocaine obtained within the residence. Investigators with the drug task force did observe five transactions of a type believed to be drug sales. The resident of the dwelling, Mr. Henning[,] has two prior arrest[s] for possession of drugs with intent to s[ell], and a vehicle seizure for possession of drugs. These transactions were observed

> within the last [six] hours and the informant has been on the property within the last 72 hours.
>
> Affiant therefore asks that a warrant issue to search ... Johnny Henning and the premises [for] illegal narcotics crack cocaine.

At the hearing on the motion for new trial, the defendant testified that officers took approximately $540.00 in cash. He claimed that he had attended a forfeiture hearing that, while not involving the cash, did include a television and other personal property. The defendant testified that all of the personal property had been returned to him but that the cash had not.

I

Initially, the defendant generally complains that the search warrant was inadequate. He insists that the affidavit failed to establish the credibility of the informant and the reliability of the information provided and that the assertions in the affidavit were conclusory; that the term "illegal narcotics" was insufficient and that there were inadequate directions as to the articles to be seized; that the warrant was general in nature; that the written affidavit portion of the affidavit was not properly attached to the search warrant; and, among other things, that the executing officers failed to give him an opportunity to surrender his privacy before forcible entry of his residence.

Initially, an affidavit is an indispensable prerequisite to the issuance of any search warrant. Tenn. Code Ann. § 40-6-103; State ex rel. Blackburn v. Fox, 292 S.W.2d 21, 23 (Tenn. 1956). It must establish probable cause. Tenn. Code Ann. § 40-6-104; Tenn. R. Crim. P. 41(c). Probable cause has been generally defined as a reasonable ground for suspicion, supported by circumstances indicative of an illegal act. See Lea v. State, 181 S.W.2d 351, 352 (Tenn. 1944).

Also, fundamental to the issuance of a search warrant is the requirement that the issuing magistrate make an independent determination that probable cause exists. See State v. Moon, 841 S.W.2d 336, 337 (Tenn. Crim. App. 1992). Because the magistrate must make an independent determination, it is imperative that the affidavit contain more than conclusory allegations. "'Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police.'" Moon, 841 S.W.2d at 338 (quoting United States v. Ventresca, 380 U.S. 102, 108-09 (1965)).

The general rule is that if the information in the affidavit is supplied by a confidential informant, the adequacy of the affidavit is measured by a two-pronged test:

> (1) whether the affidavit contains the basis of the informant's knowledge (the "basis of knowledge prong"); and
>
> (2) whether the affidavit includes a factual allegation that the informant is credible or the information is reliable (the "veracity prong").

State v. Jacumin, 778 S.W.2d 430, 432, 436 (Tenn. 1989)(relying upon Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969)).

In Aguilar, the United States Supreme Court held that a search warrant was improvidently issued by the magistrate because the affidavit did not contain any underlying circumstances indicative of illegal activity or any facts disclosing the credibility of the informant or the reliability of the information given. 378 U.S. at 114. Although the United States Supreme Court no longer employs the Aguilar-Spinelli test, our supreme court has determined that the test, "if not applied hypertechnically, provide[s] a more appropriate structure for probable cause inquiries incident to the

issuance of a search warrant ... [and] is more in keeping with the specific requirement of Article I, Section 7 of the Tennessee Constitution ...." Jacumin, 778 S.W.2d at 436.

A conclusory allegation of the informant's reliability is insufficient to satisfy the veracity prong. Spinelli, 393 U.S. at 416. "It disallows any evaluation by the magistrate and requires that the magistrate accept the affiant's conclusions not only that the prior information was credible but also that it was relevant and indicative of reliability. By its nature, such an allegation voids the magisterial function." State v. Stephen Udzinski, Jr., No. 01C01-9212-CC-00380, slip op. at 8 (Tenn. Crim. App., at Nashville, Nov. 18, 1993). Thus, the affidavit must include the specific underlying circumstances which establish the reliability of the confidential informant.

In Moon, this court found an affidavit to be inadequate when the informant, who claimed to have seen marijuana on the premises to be searched, was described only as a "reliable" person who "'has given information against his penal [interest] and ... has given information that affiant has checked and found to be correct.'" 841 S.W.2d at 339. Similarly, in State v. Landon Gaw & State v. Ronald Wayne Nail, No. 01C01-9410-CC-00351, slip op. at 2, 6 (Tenn. Crim. App., at Nashville, Oct. 26, 1995), this court held an affidavit which merely stated that the "informant has provided accurate and reliable information in the past to Officer Winfree" failed to establish the veracity of the informant.

The affidavit here is similar to the affidavits in Moon and Gaw. It contains nothing more than a conclusory allegation of the informant's veracity: "a reliable informant whose reliability has been established by providing information

which has resulted in several arrest[s] in the past." In our view, that allegation, standing alone, fails to adequately establish the veracity of the informant under the guidelines first established in Aguilar and Spinelli. The kind, quality, and nature of the information previously given by the informant was not provided to the issuing magistrate.

The failure to establish the veracity of the confidential informant, however, is not necessarily fatal to the affidavit. The ruling in Jacumin provides that "independent police corroboration could make up deficiencies in either prong" of the Aguilar-Spinelli test. Jacumin, 778 S.W.2d at 436; see Spinelli, 303 U.S. at 414-15. Thus we must consider whether the police corroboration alleged in this affidavit is sufficient to satisfy the veracity prong of Jacumin.

In Moon, this court first addressed the issue of how much police corroboration is needed to support a general assertion of reliability. The question was framed as follows: "'Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's tests without independent corroboration?'" Moon, 841 S.W.2d at 340 (quoting Spinelli, 393 U.S. at 414-15). In Moon, the court found the affidavit to be inadequate due to a conclusory allegation of corroboration, unaccompanied by any underlying facts:

> ["]Certainly, more than the corroboration of a few minor elements of the story is necessary, especially if those elements involve non-suspect behavior. It is equally certain, though, that the police need not corroborate every detail of an informant's report to establish sufficient evidence of his veracity." ... [I]t is not necessary that the events observed by the police supply probable cause by themselves or that they point unequivocally in the direction of guilt. It is sufficient that they are 'unusual and inviting explanation,' though 'as consistent with innocent as with criminal activity.' Thus, when an untested informant says that he has seen horse race

> bets taken at a steel plant and then passed through the fence to defendant, police observation of packages being passed to the defendant on several occasions 'was sufficient to establish the reliability of the informer in this instance.' Similarly, where an informer said narcotics were being sold in a certain record shop and that he had purchased narcotics and seen others there, this was adequately corroborated by a half hour surveillance of the shop resulting in 'personal observation of known narcotic addicts entering the premises, speaking with a clerk, going to the rear of the store and then exiting with no apparent purchase.'["]

Moon, 841 S.W.2d at 341 (emphasis added) (quoting United States v. Bush, 647 F.2d 357, 363 (3rd Cir. 1981) and 1 Wayne R. LaFave, Search and Seizure § 3.3(f), at 683 (2d ed. 1978)).

In State v. Marshall, 870 S.W.2d 532 (Tenn. Crim. App. 1993), this court reviewed a warrantless arrest where probable cause was based on an anonymous informant's tip and police corroboration. The defendant argued the arrest was illegal because the officer did not have a basis for determining the reliability of the informant. The police officers saw the defendant "approaching cars, leaning inside windows, and going back and forth from his shirt and pants pocket while leaning into cars ... for 30 to 45 minutes." Marshall, 870 S.W.2d at 536. The officer also observed one instance of a currency exchange. That, this court ruled, corroborated the tip and established probable cause.

While the affidavit here contains nothing more than a conclusory attestment of the reliability of the informant, police had seen "five transactions of what appeared to be drug sales." Police learned that the defendant had two prior arrests for drug violations and vehicle seizure. That officers knew of the prior arrests and seizure, that they had placed his residence under surveillance for six hours within three days of the report by the informant, and that they had observed actions by the defendant consistent with the sale of illegal drugs, does provide the

very kind of corroboration envisioned by the ruling in Jacumin.

In order to meet state constitutional standards, a warrant's affidavit must contain facts which establish probable cause to search. Moon, 841 S.W.2d at 341. In our view, the officers' observations, coupled with the information supplied by the confidential informant, met that test; the acts officers observed firsthand implied that the defendant was delivering cocaine and adequately corroborated that tip. If the affidavit contained allegations that six different vehicles had made brief visits to the defendant's house for short periods and left after being attended to by the defendant, as was developed in trial testimony, that would have clearly supported an inference that the drivers were there for "business" reasons, such as the purchase or delivery of illegal drugs. If that information had been supplied to the magistrate in the affidavit, our decision might have been easier.

In Jacumin, the fact that one vehicle registered to a known drug dealer and a second vehicle, believed to have been driven by someone suspected of being involved in illegal drugs, had been seen at the defendant's house was inadequate to satisfy the basis of knowledge prong. 778 S.W.2d at 436. Those facts were similar to those in Spinelli. In State v. Billy Jerome McMillin and Donna Day McMillin, No. 03C01-9110-CR-00322 (Tenn. Crim. App., at Knoxville, Sept. 18, 1992), this court held that police who observed the defendant being visited by several known addicts where each of the visits lasted for no longer than fifteen minutes provided the kind of corroboration that "marginally satisfied the veracity prong." McMillin, slip op. at 3. The facts here are more closely aligned to McMillin.

The defendant attacks the validity of the warrant in several other ways. We will attempt to address each of the questions presented.

Here, the warrant authorized a search for "crack cocaine, illegal narcotics, pictures, records, ledgers, tapes or items that tend to memorialize drug sales and proceeds therefrom." The defendant contends that is too general. Article I, § 7 of our state constitution prohibits general warrants. In consequence, a description of the property "'must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized.'" State v. Meeks, 867 S.W.2d 361, 367 (Tenn. Crim. App. 1993)(quoting United States v. Cook, 657 F.2d 730, 733 (5th Cir. 1981)). In State v. Meadows, 745 S.W.2d 886, 891 (Tenn. Crim. App. 1987), this court upheld a warrant authorizing the seizure of "'any letters, papers, records, materials, or other property which pertain to drug sales.'" We are unable to distinguish Meadows from this case. This warrant is not too general. The property to be taken is sufficiently specific. See Meeks, 867 S.W.2d at 367.

The validity of a search warrant depends not only upon its compliance with constitutional safeguards but also upon conformity with state statutes and the criminal rules. See Tenn. Code Ann. §§ 40-6-103, -104; Tenn. R. Crim. P. 41. The affidavit portion of the warrant must be retained in order to accommodate a subsequent review of the probable cause determination. In State v. Smith, 836 S.W.2d 137, 141 (Tenn. Crim. App. 1992), however, this court ruled that "no statute or rule requires an affidavit upon which a search warrant is issued to be attached or otherwise kept with the warrant. Rule 41(c) [Tenn. R. Crim. P.] contains mandatory record and filing requirements for warrants, but not for affidavits." In this state, an affidavit is not considered a part of the search warrant. Minton v. State, 212 S.W.2d 373 (Tenn. 1948). That the affidavit here was not attached to the warrant nor made a part of the official records of the general sessions court in Madison County was, in our view, inconsequential. That the magistrate maintained a copy of the affidavit is sufficient. Here, there was a printed reference on the search warrant to the affidavit

made by Capt. Thomas Coleman; when the affidavit is not attached, a reference is required. Smith, 836 S.W.2d at 141. In our view, either a handwritten, typewritten, or printed reference is adequate. See Commonwealth v. Jordan, 492 N.E.2d 351 (Mass. 1986).

Finally, the defendant contends that the police did not comply with the requirements for the execution of a search warrant as set forth in Tenn. R. Crim. P. 41. The rule provides that "[i]f after notice of his authority and purpose [he] is not granted admittance, or in the absence of anyone with authority to grant admittance, a peace officer with a search warrant may break open any door or window of a building or vehicle, or any part thereof...." Tenn. R. Crim. P. 41(e). Absent exigent circumstances, the occupant of a residence that is to be searched must be given a reasonable opportunity to surrender his privacy voluntarily. State v. Lee, 836 S.W.2d 126, 128 (Tenn. Crim. App. 1991).

The state concedes that the record on the issue was not adequately developed in the suppression hearing. It does, however, argue that while only the defendant (who testified that the armed officer who barged into his residence never announced that he had a search warrant) gave evidence at the suppression hearing, the proof developed at trial established that Officer Caldwell had made a valid, warrantless arrest. The state insists that there were exigent circumstances warranting entry into the home and thereby excusing compliance with the knock and announce requirement.

The state also submits that Caldwell was in pursuit of the defendant and, therefore, the defendant's arrest inside his residence met constitutional guidelines. See Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984). In Welsh, an

arrest made "in hot pursuit" was one of the exigent circumstances that would make an otherwise unconstitutional arrest a valid one. In Lee, this court explained the purposes behind the rule:

> First, to provide protection from violence, assuring the safety and security of both occupants and the entering officers.... Second, it protects the precious interest of privacy summed up in the ancient adage that a man's house is his castle.... Finally, it protects against the needless destruction of private property.

Lee, 836 S.W.2d at 128 (quoting United States v. Merino, 701 F.2d 815, 817 (9th Cir. 1983)).

If an officer executing a warrant observes indications of flight or destruction of evidence, there are exigencies excusing the "knock and announce rule." State v. Fletcher, 789 S.W.2d 565 (Tenn. Crim. App. 1990). The testimony here was that Officer Caldwell, while in hiding only a short distance away, saw the defendant making another transaction just outside the house when he decided to execute the warrant. When the defendant fled into the residence, Officer Caldwell, announcing he was a police officer, "shoved him on in ... and grabbed him ... [until] the others showed up." Meanwhile, the defendant tried to kick some crack cocaine under a couch.

The issue is close on the knock and announce rule. Obviously, the state would be in a better position if Officer Caldwell had made an announcement that he had a search warrant before he entered the residence. Yet a police officer may make a warrantless arrest "on a charge made, upon reasonable cause, of the commission of a felony...." Tenn. Code Ann. § 40-30-103(a)(4). There is no distinction between reasonable cause and probable cause. The latter has been defined as follows:

> [W]hether at that moment the facts and circumstances

> within their knowledge and of which they had reasonably trustworthy information was sufficient to warrant a prudent man in believing that the petitioner had committed ... an offense.

Beck v. Ohio, 379 U.S. 89, 91 (1964).

The affidavit for the search warrant, significant first-hand corroboration of the informant's tip, and an "up-close" observation of the last of what appeared to be cocaine sales provided Officer Caldwell with probable cause to arrest. That the officer had observed a felony gave statutory authority to pursue and arrest the fleeing defendant. The formality of a "knock and announce" would have been superfluous at the point the officer entered the residence, although he did so once inside. In our view, the arrest was made in hot pursuit; exigencies were present to excuse formal compliance before entry and this supported the execution of the search warrant.

II

Next, the defendant contends that the trial court erred by disallowing questions of Officer Caldwell inquiring why he had been transferred from the drug task force. During a jury-out hearing, Caldwell related that he had heard his transfer was due to his support of the losing candidate in the election for sheriff. The state stipulated that the sheriff had publicly denied that Officer Caldwell had been transferred for political purposes. The trial court denied the proposed line of questioning on the basis that it was not relevant to the officer's credibility.

The trial court offered to announce to the jury that Officer Caldwell contended that his transfer was political and that the sheriff contended that it was not. Defense counsel stated that was satisfactory "except for the fact that I think it's a jury question [as to whether or not he was transferred from a political standpoint]."

We acknowledge that the right to cross-examination is fundamental. The denial of this right to apprise the accused of a fair trial is "constitutional error of the first magnitude." State v. Hill, 598 S.W.2d 815, 819 (Tenn. Crim. App. 1980). Yet the propriety, scope, manner and control of the cross-examination of witnesses is subject to the reasonable discretion of the trial court. Tenn. R. Evid. 611(a); Coffey v. State, 216 S.W.2d 702 (Tenn. 1948). Appellate courts may not disturb discretionary limits on cross-examination absent clear and plain abuse. State v. Johnson, 670 S.W.2d 634 (Tenn. Crim. App. 1984). The materiality of the issues raised by cross-examination is the paramount consideration in the determination of prejudicial error. Matters relating to guilt, innocence, or credibility are always material. See Tenn. R. Evid. 611(b); Hayes v. State, 172 S.W. 296 (Tenn. 1914).

No other evidence was offered at the trial on this issue. The transfer of Officer Caldwell obviously had little to do with this case. Its bearing on his credibility would have been minimal. In our view, the trial court did not abuse its discretion by excluding further questions about the nature of the transfer.

III

The defendant next contends that the jury instructions as to fines violated Article I, §§ 6, 9, and 14, and Article VII, § 14 of the Tennessee Constitution. This challenge is directed toward the instruction that the fine for possession of cocaine with intent to sell or deliver be "in an amount not less than $2,000 but not more than $100,000" and for possession of drug paraphernalia "not less than $250 or more than $2,500." See Tenn. Code Ann. § 39-17-417(c)(1), -428.

Article I, § 16 precludes "excessive fines." Article I, § 9 guarantees,

among other things, an impartial jury; and Article I, § 6 provides "[t]hat the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors." Our constitution prohibits fines over $50.00 unless approved by the jury. Tenn. Const. art. VI, § 14. While the trial court may impose the fine, it shall not exceed that fixed by the jury. See State v. Bryant, 805 S.W.2d 762 (Tenn. 1991). There are no exceptions to these requirements unless the defendant waives his constitutional protection of his right to a trial by jury. State v. Durso, 645 S.W.2d 753 (Tenn. 1983).

Here, the trial court gave instructions to the jury on the possible range of fines. The ranges charged were in compliance with the legislative mandate. It is, of course, well settled that the power to declare the appropriate punishment for a crime falls within the authority of the legislature. Woods v. State, 169 S.W. 558 (Tenn. 1914).

The defendant has offered no explanation as to why these fines, both of which fall within the legislative range, are excessive or otherwise violate his right to trial by jury. We find no fault with either the instructions or the fines imposed.

IV

Next, the defendant contends that the civil forfeiture proceeding should have been joined with the indictment and, in a related issue, that the trial court should have dismissed the indictment on double jeopardy principles. The claim that there should have been a joinder is based upon Rule 8(a), Tenn. R. Crim. P., which requires that offenses arising out of the same course of conduct should be included in a single indictment:

> (a) **Mandatory Joinder of Offenses**. Two or more offenses shall be joined in the same indictment,

> presentment, or information, with each offense stated in a separate count, or consolidated pursuant to Rule 13 if the offenses are based upon the same conduct or arise from the same criminal episode and if such offenses are known to the appropriate prosecuting official at the time of the return of the indictment(s), presentment(s), or information(s) and if they are within the jurisdiction of a single court. A defendant shall not be subject to separate trials for multiple offenses falling within this subsection unless they are severed pursuant to Rule 14.

Tenn. R. Crim. P. 8(a).

The defendant's claim is based on his allegation that the police had seized cash and perhaps other personal property during its search of his residence. The only testimony in the record on this issue is that the defendant had gone to Memphis for a hearing, that his personal property had been returned, but that some $540.00 in cash had not.

Recently, the United States Supreme Court considered a similar double jeopardy claim. Holding that in rem forfeiture are neither "punishment" nor criminal for double jeopardy consideration, the court held in two separate actions that the forfeiture of property as a result of the civil complaint did not bar a subsequent criminal prosecution. United States v. Ursery and United States v. $405,089.23 in United States Currency, ____U.S. ____, 116 S. Ct. 2135 (1996). The ruling was based in great measure upon the rationale of Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931):

> [This] forfeiture proceeding ... is in rem. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is forfeited against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply.

So long as the forfeiture proceeding is civil or remedial in nature, not intended as an additional punishment, there is no constitutional protection. United States v. One Assortment of Eighty-Nine Firearms, 465 U.S. 354, 362 (1984). There is no distinction between the facts suggested here and the ruling in Ursery. Our state constitution provides no greater protection than that afforded by the double jeopardy clause of the United States Constitution. Thus, any forfeitures in this case did not qualify as punishment for criminal purposes.

Moreover, a civil forfeiture under Tenn. Code Ann. § 53-11-451 is not a criminal offense. Thus, the Rule 8 requirement of joinder is not applicable. As indicated, the record here is inadequate to establish that the forfeiture proceeding qualified as a criminal punishment and, thereby, should have been joined in a single indictment.

Finally, it is the duty of the appellant to prepare a record which conveys a fair, accurate, and complete account of what transpired in the trial court. State v. Hooper, 695 S.W.2d 530 (Tenn. Crim. App. 1985). The failure to do so creates a presumption that the trial court correctly ruled. State v. Jones, 623 S.W.2d 129 (Tenn. Crim. App. 1981).

V

Next, the defendant contends that the trial court improperly imposed a twelve-year sentence. The defendant insists that his three prior felony convictions all occurred within a twenty-four-hour period as a part of a single course of conduct. Tenn. Code Ann. § 40-35-106(b)(2) provides that "two or more felonies committed as a part of a single course of conduct within a period of twenty-four hours during which there was no substantial change in the nature of the criminal objective

constitutes one conviction...."

The state concedes that the trial court announced a minimum Range II sentence. The judgment, however, reflects a Range I, 30% classification. The state has asked for a remand in order for a clarification of the sentence.

Possession of cocaine with intent to sell is a Class B felony carrying an eight- to twelve-year sentence for Range I offenders. See Tenn. Code Ann. § 40-35-112(a)(2). If the defendant qualifies within Range II, the sentence is twelve to twenty years. See Tenn. Code Ann. § 40-35-112(b)(2).

In calculating the sentence for Class B, C, D, or E felony convictions, the presumptive sentence is the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). 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. The sentence may then be reduced within the range by any weight assigned to the mitigating factors present. Id.

Because of the conflict between the bench ruling and the judgment as to the applicable range, the cause is remanded for resentencing. See State v. Joseph A. Mills, Jr., No. 03C01-9506-CC-00177 (Tenn. Crim. App., at Knoxville, October 1, 1996). In imposing sentence, the trial court should consider the terms of Tenn. Code Ann. § 40-35-106, make any factual determinations necessary, and specify the range applicable. The appropriate sentence can then be imposed.

In summary, the judgment of conviction is affirmed; the cause is remanded for sentencing.

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Gary R. Wade, Judge

CONCUR:

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Joe B. Jones, Presiding Judge

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William M. Barker, Judge