

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
NOVEMBER 1997 SESSION

**FILED**  
**January 12, 1998**  
**Cecil Crowson, Jr.**  
Appellate Court Clerk

STATE OF TENNESSEE, )  
 )  
 APPELLEE, )  
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 v. )  
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 ROBERT L. HARDY, )  
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 )  
 APPELLANT. )

No. 03-C-01-9703-CR-00098  
Sullivan County  
R. Jerry Beck, Judge  
(Sale of Cocaine)

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OPINION FILED: \_\_\_\_\_

AFFIRMED

Joe B. Jones, Presiding Judge

# OPINION

The sole issue presented for review is whether the State of Tennessee was barred pursuant to Rule 8(a), Tennessee Rules of Criminal Procedure, from prosecuting the appellant, Robert L. Hardy (defendant), because the state failed to join the offenses in this case with the offenses committed thirty days prior in time to the present offenses. The trial court ruled the offenses in this case were “not part of the same conduct or part of the same criminal episode,” and these offenses were not “known to the appropriate prosecuting authority” at the time the prior indictment was returned by the Sullivan County Grand Jury. After a thorough review of the record, the briefs submitted by the parties, and the law governing the issue presented for review, it is the opinion of this court that the judgment of the trial court should be affirmed.

The defendant pled guilty to and was convicted of three counts of sale of cocaine over .5 grams, Class B felonies. The trial court found the defendant was a multiple offender and imposed a Range II sentence of fifteen (15) years in the Department of Correction for each count. The trial court ordered that the sentences are to be served concurrently for an effective sentence of fifteen (15) years. Pursuant to Rule 37(b)(2), Tennessee Rules of Criminal Procedure, the defendant reserved the above issue as a certified question of law.

The defendant was arrested and prosecuted for four separate episodes of criminal conduct. In case number S35987, the defendant was indicted on April 11, 1994, for selling over .5 grams of cocaine on February 1, 1994. In case number S37386, the defendant was indicted on July 25, 1996 for a theft under \$500 that occurred on April 27, 1995. In case number S38436, the defendant was indicted on January 17, 1996, for two counts of possessing a controlled substance and two counts of possessing drug paraphernalia, all misdemeanor offenses, which occurred on October 13, 1995 and October 23, 1995. In the present case number S39176, the defendant was indicted on August 27, 1996, for three counts of selling cocaine over .5 grams. These offenses occurred November 21, 1995, November 27, 1995, and November 30, 1995.

On January 18, 1996, the defendant entered pleas of guilty to the offenses alleged

in indictments numbers S35987, S37836, and S38436. The trial court found the indictment in this case, S39176, had not been returned by the Sullivan County Grand Jury when the defendant entered the pleas of guilty on January 18, 1996. The present indictment was returned more than seven months after the entry of the pleas.

The defendant filed a motion to dismiss the present indictment, or, in the alternative, to sever the three counts and try each count separately. The motion alleged the state was barred from prosecuting these cases because they were not joined with the October offenses contained in indictment number 38436 as mandated by Rule 8(a), Tennessee Rules of Criminal Procedure. The trial court denied the motion. In an excellent and complete written order, the trial court found the following:

(a) The offenses charged in [indictment number] S39,176 were not part of the same conduct or part of the same criminal episode of the offenses which occurred in [indictment numbers] S35,987, S37,836, and S38,436.

(b) The offenses [alleged] in [indictment number] S39,176 were not known to the appropriate prosecuting authority as required by Rule 8(a) of the Tennessee Rules of Criminal Procedure at the time the defendant 's [guilty] pleas in S35,987, S37,836, and S38,436 . . . [were] entered . . . on January 18, 1996.

The determination of the issue presented for review hinges upon the verbiage contained in Rule 8(a), Tennessee Rules of Criminal Procedure. This rule provides in part:

(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.

The defendant concedes the offenses alleged in the present indictment did not involve the same conduct as the October offenses. He argues the November offenses were part of the same criminal episode as the October offenses because the November offenses occurred approximately thirty days after the October offenses. He claims that all of the officers involved were Kingsport police officers, and by virtue of this fact the November

offenses were known to the officers prior to the return of the indictment for the October offenses.

Based upon the evidence introduced during the course of the evidentiary hearing, the trial court found that the defendant was arrested by a Kingsport uniform police officer for the October offenses. The Drug Task Force for the Second Judicial Circuit, which investigated the November crimes and arrested the defendant, was not aware of the October investigation and arrest by the Kingsport uniform police officer when the indictment for these offenses was returned by the grand jury. Furthermore, the assistant district attorney general was not aware of the November offenses when the indictment was returned charging the October misdemeanor offenses. Conversely, the Kingsport uniform police officer was not aware of the November investigation and arrest made by the Drug Task Force.

When a trial court conducts an evidentiary hearing on the merits of a pretrial motion, the trial court, as the trier of fact, is entrusted with the responsibility of determining the credibility of the witnesses, determining the weight and value of the evidence presented by the parties, and the resolution of any conflicts which may arise in the evidence. Thus, this court will not interfere with the findings of fact made by the trial court unless the evidence contained in the record preponderates against the court's findings. In this case, the record supports the findings of fact made by the trial court.

Both parties cite State v. Dunning, 762 S.W.2d 142 (Tenn. Crim. App.), per. app. denied (Tenn. 1988), to support their respective positions. This court is of the opinion that Dunning is dispositive of the issue presented for review.

In Dunning, the accused was indicted by the Shelby County Grand Jury on September 10, 1986 for the sale of cocaine to officers of the Memphis Police Department's Organized Crime Strike Force. The offense was alleged to have occurred on or about March 10, 1986. He entered a plea of guilty in this case.

Dunning was indicted on December 10, 1986, for the offenses of selling cocaine, possession of cocaine with intent to sell, and possession of cocaine with intent to deliver the substance. The offenses were alleged to have occurred on March 6, 1986 and March 11, 1986. The Metro Narcotics Bureau investigated these offenses.

The evidence established that the Organized Crime Strike Force and the Metro Narcotics Bureau, separate and distinct agencies, were unaware of each other's investigation of Dunning. The Metro Narcotics Bureau did not submit the two offenses it investigated until two months after Dunning had entered the plea of guilty to the offense developed and prosecuted by the Organized Crime Strike Force.

This court held in Dunning (a) the crimes were not based on the "same conduct" as the phrase is used in Rule 8(a), Tennessee Rules of Criminal Procedure, and (b) the two Memphis Police Department agencies, which constituted "the appropriate prosecuting official[s]," were not aware of their respective investigations of the same person. Moreover, it is obvious the District Attorney General's Office did not learn of the Metro Narcotics Bureau investigation until two months after Dunning had entered a plea of guilty to the offense developed by the Organized Crime Strike Force. In short, this court held the state was not barred from prosecuting the cases developed by the Metro Narcotics Bureau.

The defendant's reliance upon State v. Gilliam, 901 S.W.2d 385 (Tenn. Crim. App. 1995), is misplaced. Gilliam is clearly distinguishable upon the facts as well as the legal issue presented for review.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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CURWOOD WITT, JUDGE