

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1997 SESSION

<p><b>FILED</b></p> <p><b>September 1, 1998</b></p> <p><b>Cecil Crowson, Jr.</b> Appellate Court Clerk</p>
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STATE OF TENNESSEE, )  
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                   Appellee, )  
 )  
 v. )  
 )  
 BRANDON WILSON, )  
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 )

No. 03C01-9609-CC-00352

Blount County

Honorable D. Kelly Thomas, Jr., Judge

(Six counts of delivery of one-half gram or more of cocaine, one count of possession of less than one-half gram of cocaine with the intent to sell or deliver, and one count of delivery of less than one-half gram of cocaine)

For the Appellant:

Raymond Mack Garner  
 District Public Defender  
                   and  
 George H. Waters  
                   and  
 Roland Cowden  
 Assistant Public Defenders  
 419 High Street  
 Maryville, TN 37804-4912

For the Appellee:

John Knox Walkup  
 Attorney General of Tennessee  
                   and  
 Marvin E. Clements, Jr.  
 Assistant Attorney General of Tennessee  
 450 James Robertson Parkway  
 Nashville, TN 37243-0493

Michael L. Flynn  
 District Attorney General  
                   and  
 Philip Morton  
 Assistant District Attorney General  
 Blount County Courthouse  
 37804-5906

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

CONVICTIONS FOR DELIVERY OF COCAINE VACATED AND DISMISSED;  
CONVICTION FOR POSSESSION WITH INTENT TO SELL OR DELIVER LESS THAN  
ONE-HALF GRAM OF COCAINE VACATED AND CASE REMANDED

Joseph M. Tipton  
Judge

## OPINION

The defendant, Brandon Wilson, appeals as of right from his convictions in the Blount County Circuit Court upon guilty pleas for six counts of delivering one-half gram or more of cocaine, a Class B felony, one count of possessing less than one-half gram of cocaine with the intent to sell or deliver, a Class C felony, and one count of delivering less than one-half gram of cocaine, a Class C felony. For each of the Class B felonies, the defendant was sentenced as a Range I, standard offender to ten years in the custody of the Department of Correction and was fined two thousand dollars. The trial court sentenced the defendant as a Range II, multiple offender to six years in the custody of the Department of Correction for each of the Class C felonies and fined the defendant three thousand dollars and two thousand dollars, respectively. The sentences are to be served concurrently.

On appeal, the defendant contends that:

- (1) the indictments do not allege the essential culpable mental state, "knowingly," as required by T.C.A. § 39-17-417;
- (2) the trial court abused its discretion by denying the defendant's motion for a mental evaluation, thereby denying the defendant due process of law by making its competency determination without the benefit of an evaluation;
- (3) the trial court erred by concluding that the defendant was competent to stand trial;
- (4) the trial court erred by accepting the defendant's guilty pleas because the defendant was incompetent and did not enter knowing and understood pleas; and
- (5) the trial court erred by sentencing the defendant because he was incompetent.

We hold that the indictments in the cocaine delivery cases fail to allege offenses and that those convictions must be reversed and the charges dismissed. We reverse the conviction for possessing less than one-half gram of cocaine with the intent to sell or deliver and remand the case to the trial court, because the record fails to establish that

the defendant entered knowing and intelligent guilty pleas pursuant to Tennessee case law, procedural rule and constitutional requirements.

### I. SUFFICIENCY OF THE INDICTMENTS

In his first issue, the defendant challenges the sufficiency of the indictments. He claims that the indictments are void because they fail to allege the requisite mental state of “knowingly” as required by T.C.A. § 39-17-417(c). The defendant concedes that he failed to raise the issue in the proceedings below, but he argues that the waiver rule does not apply when the indictment fails to assert an essential element of the offense. The state contends that the issue has been waived by the defendant’s failure to raise the issue before trial as required by Rule 12(b)(2), Tenn. R. Crim. P. Alternatively, the state asserts that the indictment correctly charges the offenses.

As a general proposition, defenses and objections based on defects in the indictment must be raised before trial. Tenn. R. Crim. P. 12(b)(2); State v. Randolph, 692 S.W.2d 37, 40 (Tenn. Crim. App. 1985). If the defendant fails to raise the issue before trial, the issue is deemed to be waived. Tenn. R. Crim. P. 12(f); see Rhoden v. State, 816 S.W.2d 56, 61 (Tenn. Crim. App. 1991).

However, Rule 12(b)(2) expressly states that jurisdictional defects or the failure to charge an offense “shall be noticed by the court at any time during the pendency of the proceedings . . . .” If the indictment does not charge an offense, Rule 34, Tenn. R. Crim. P., permits an arrest of judgment if “filed within thirty days of the date [of] the order of sentence . . . .” Moreover, our rules require that we determine “whether the trial and appellate court have jurisdiction over the subject matter,” even though the issue might not have been presented as a ground for relief. T.R.A.P. 13(b); see State v. Seagraves, 837 S.W.2d 615, 617-18 (Tenn. Crim. App. 1992).

Likewise, the entry of a valid guilty plea constitutes an admission of all facts alleged and a waiver of procedural and constitutional defects in the proceedings that occurred before the entry of the plea. On the other hand, this court has concluded that a waiver rule “does not apply when the indictment fails to assert an essential element of the offense. In that circumstance, no offense has been charged. In consequence, subsequent proceedings are a nullity.” State v. Perkinson, 867 S.W.2d 1, 6 (Tenn. Crim. App. 1992).

Although the defendants in Perkinson did not plead guilty, we believe that the reasoning applies equally to the situation in which a defendant pleads guilty to an indictment that does not allege an offense. A lawful accusation is a jurisdictional element without which there can be no prosecution. State v. Hughes, 212 Tenn. 644, 649, 371 S.W.2d 445, 447 (Tenn. 1963). “Conviction upon a charge not made would be a sheer denial of due process.” De Jonge v. Oregon, 299 U.S. 353, 362, 57 S. Ct. 255, 259 (1937).

Accordingly, we are not prevented from reviewing this issue on appeal when the defendant failed to raise the issue in a pretrial motion. Nor are we prevented from reviewing the issue when the defendant did not raise the issue in his motion for new trial. Rule 3(e), T.R.A.P., provides that:

no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties, or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial.

(Emphasis added). Because the issue relating to the sufficiency of the indictment would involve dismissing charges and not a new trial, we may properly review it. State v. Sowder, 826 S.W.2d 924, 926 (Tenn. Crim. App. 1991); State v. Davis, 748 S.W.2d 206, 207 (Tenn. Crim. App. 1987); see also State v. Keel, 882 S.W.2d 410, 416 (Tenn.

Crim. App. 1994). Also, this type of issue is plain error on the face of the record. See Tenn. R. Crim. P. 52(b).

The single-count indictments numbered C-9081 through -9086 allege that the defendant “did unlawfully deliver a controlled substance, . . . Cocaine, . . . in violation of Tennessee Code Annotated, Section 39-17-417(c)(1), all of which is against the peace and dignity of the State of Tennessee.” Indictment numbered C-9087 is identical to those numbered C-9081 through C-9086 except that it charges the defendant with the unlawful delivery of less than one-half gram of cocaine, a violation of T.C.A. § 39-17-417(c)(2). Indictment number C-8439 contains three counts. Count one alleges that the defendant “did unlawfully possess with intent to sell or deliver a controlled substance, . . . Cocaine . . . in an amount less than twenty-six (26) grams, in violation of Tennessee Code Annotated, Section 39-17-417, all of which is against the peace and dignity of the State of Tennessee.” Counts two and three similarly charge the defendant, except count two states that the defendant “did unlawfully sell” cocaine and count three states that the defendant “did unlawfully deliver” cocaine.

The defendant entered guilty pleas to the offenses. The trial court merged counts one through three in indictment number C-8439. Ultimately, the defendant was convicted of six counts of delivering one-half gram or more of cocaine, one count of possessing less than one-half gram of cocaine with the intent to sell or deliver, and one count of delivering less than one-half gram of cocaine.

Pursuant to T.C.A. § 39-17-417(a) a person commits an offense if he or she knowingly (1) manufactures a controlled substance, (2) delivers a controlled substance, (3) sells a controlled substance, or (4) possesses a controlled substance with the intent to manufacture, deliver or sell it. The defendant argues that because the indictments do not specify that he knowingly delivered cocaine or knowingly possessed

it with the intent to sell or deliver, they fail to state offenses. The state responds that the indictments comply with applicable statutory and case law requirements.

The proper form of an indictment is set forth under T.C.A. § 40-13-202. It states:

The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, 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 . . . .

In State v. Hill, 954 S.W.2d 725 (Tenn. 1997), our supreme court stated the following:

As for constitutional requirements, the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9 of the Tennessee Constitution guarantee to the accused the right to be informed of the nature and the cause of the accusation. Generally stated, an indictment is valid if it provides sufficient information (1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy.

Id. at 727 (citations omitted). “When the indictment fails to fully state the crime, all subsequent proceedings are void.” Perkinson, 867 S.W.2d at 5.

In Hill, our supreme court addressed the validity of an indictment that failed to allege the requisite culpable mental state. The court stated the following:

We hold that for offenses which neither expressly require nor plainly dispense with the requirement for a culpable mental state, an indictment which fails to allege such mental state will be sufficient to support prosecution and conviction for that offense so long as

(1) the language of the indictment is sufficient to meet the constitutional requirements of notice to the accused of the charge against which the accused must defend, adequate basis for entry of a proper judgment, and protection from double jeopardy;

(2) the form of the indictment meets the requirements of Tenn. Code Ann. § 40-13-202; and

(3) the mental state can logically inferred from the conduct alleged.

954 S.W.2d at 726-27. The court also noted, “In modern practice, it is unnecessary to charge guilty knowledge unless it is included in the statutory definition of the offense.” Id. at 729. This means that the fact that the “knowing” mens rea is specifically stated in T.C.A. § 39-17-417 should require that it be included as an alleged element in an indictment charging either delivery or sale of a controlled substance, or, at least, words of similar import should be used.

The state asserts, though, that each indictment’s specific reference to the violated statute should constitute a sufficient allegation of the mental state required for the offense. However, the state’s position was rejected by this court in State v. Marshall, 870 S.W.2d 532 (Tenn. Crim. App. 1993), which held that Tennessee law required an indictment to contain factual allegations relating to all the essential elements of an offense, including the requisite culpable mental state. Id. at 537.

The state also asserts that the use of the word “unlawfully” sufficiently gave the defendant notice of the offenses charged. The state acknowledges that this court held in State v. Nathaniel White, No. 03C01-9408-CR-00277, Sullivan County, slip op. at 5 (Tenn. Crim. App. June 7, 1995), that the inclusion of the term “unlawfully” is not an adequate substitute for alleging in an indictment for simple possession the requisite mens rea of knowing. The indictment in White alleged that the defendant “did unlawfully possess a controlled substance as classified by the Tennessee Drug Control Act, . . . approximately .6 grams of Marijuana, a Schedule IV controlled substance, in violation of T.C.A. § 39-17-418 . . . .” Slip op. at 4. This court held that the failure to specify the requisite mental element of “knowing” resulted in the indictment being invalid and the trial court lacking jurisdiction to convict the defendant of simple possession. Id. at 4-5. The court stated, “‘Unlawfully’ does not, in the ordinary use of the term, connote mental culpability. One cannot logically infer that an accused acting

‘unlawfully’ necessarily acts ‘knowingly.’” Id. The state urges this court not to follow the holding in White. We believe that White properly analyzes the issue, and we likewise conclude that the use of the term “unlawfully” in an indictment does not satisfy the requirement that the statutorily required mens rea be alleged in the indictment.

With respect to indictment number C-8439, the defendant concedes that count one of the indictment alleges conduct from which the requisite mental state of knowing can logically be inferred. In Marshall, this court held that an indictment alleging that the defendant “did possess, with intent to sell” necessarily implied that the defendant’s conduct was knowing. 870 S.W.2d at 536. However, the defendant argues that Marshall does not apply to this case because the counts were merged into count two of the indictment which alleges that the defendant “did unlawfully sell . . . cocaine . . . .”

In this case, the trial court entered a judgment of conviction for indictment number C-8439 merging the three counts. Although the judgment describes the offense as “sale of cocaine,” the transcript of the guilty plea reflects that the trial court intended to enter a judgment for possession of less than one-half gram of cocaine with the intent to sell or deliver. When there is a conflict between the court’s minutes and the transcript of the proceeding, the transcript controls. State v. Moore, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991). Therefore, the intended judgment in this case was one for possession of less than one-half gram of cocaine with the intent to sell or deliver it. As count one of the indictment is identical to the indictment in Marshall, Marshall controls. Thus, we hold that the indictment sufficiently alleges the necessary elements required for a conviction for possession of one-half gram of cocaine with the intent to sell. Similarly, count two of the indictment sufficiently alleges the necessary elements regarding the sale of cocaine, particularly that it be a knowing sale. A sale involves a bargained-for offer and acceptance. See State v. William (Slim) Alexander, No. 01C01-



9302-CR-00063, Davidson County, slip op. at 4 (Tenn. Crim. App. Mar. 24, 1994). In this sense, the allegation of a “sale” necessarily includes an awareness of the substance and the transaction that would show, at least, knowledge.

On the other hand, count three of indictment number C-8439 alleges the unlawful delivery of cocaine in terms similar to the allegations in indictments number C-9081 through C-9087, thereby failing to allege that the delivery was a knowing one. The term “deliver” is defined as “the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.” T.C.A. § 39-17-402(6). This definition does not necessarily include a mental state. Thus, alleging that the defendant delivered cocaine does not necessarily imply that it was a knowing delivery. As a result of the omission of the requisite mental state, count three of indictment number C-8439 and indictments number C-9081 through C-9087 fail to state an offense. The defendant’s convictions for delivery of cocaine must be vacated and the charges alleging the delivery of cocaine must be dismissed.

## II. COMPETENCY AND ENTRY OF GUILTY PLEAS

Next, the defendant contends that the trial court abused its discretion by denying his request for a mental evaluation. He argues that as a result of the denial, his due process rights were violated. The defendant also asserts that the trial court improperly determined that he was competent to stand trial and competent to plead guilty and improperly accepted the defendant's guilty pleas. The defendant argues that his guilty pleas were not knowing, voluntary and intelligent because he was not competent to enter the pleas. The defendant also argues that the trial court improperly sentenced the defendant because he was incompetent. The state responds that the trial court correctly determined that the defendant was competent for purposes of the guilty plea and the sentencing.

An initial concern is that the defendant is seeking to appeal issues of his competency and the trial court's refusal to order a mental evaluation after he has entered guilty pleas that were accepted by the trial court. An appeal is not permitted after a guilty plea except under quite limited circumstances, dealing with certified questions of law that are dispositive of the case, with review of the sentences imposed, or with errors apparent from the record that were not waived as a matter of law by the entry of the guilty plea or otherwise waived. T.R.A.P. 3(b); Tenn. R. Crim. P. 37b). However, these limitations presuppose that the guilty plea was validly entered. The entry of a guilty plea does not constitute a waiver of a claim on direct appeal that the plea was not knowingly, voluntarily and intelligently made under constitutional and procedural rule requirements. See State v. Frazier, 784 S.W.2d 927 (Tenn. 1990); State v. Mackey, 553 S.W.2d 337, 339-42 (Tenn. 1977).

In this respect, the issue of competency to enter a valid plea involves the question of a defendant's mental capacity to understand the proceedings, including their consequences. See Godinez v. Moran, 509 U.S. 389, 401 n.12, 113 S. Ct. 2680,

2687-88 n.12 (1993). Thus, it also bears directly on the validity of the guilty pleas and may be the subject of a direct appeal review. See, e.g., State v. Bishop, 679 P.2d 1054, 1058 (Ariz. 1984) (rejecting “bootstrapping argument that a plea of guilty can act as a waiver of an invalid determination of competency to enter that very plea”).

On August 30, 1995, one day before the defendant’s trial was scheduled to begin, the defendant filed a motion for a mental evaluation. The motion alleges that defense counsel had tried to explain in detail the nature of the sentencing factors in a proposed plea agreement, but the defendant was unable to comprehend or make rational decisions regarding the offer. It states that the defendant was unable to provide even minimal assistance to his counsel in preparing his defense. It also states that the defendant believes that he is represented by new counsel though no counsel exists and that the defendant had been ill-advised by relatives. The defendant also filed a motion requesting a mental evaluation for sentencing purposes.

The next day after the jury had been selected but before it was sworn, the trial court conducted a hearing on the defendant’s motion for a mental evaluation. At the hearing, the defendant was the only witness to testify. The thirty-nine-year-old defendant testified that he had been examined by a psychiatrist approximately eight years earlier. He stated that he had lived with his mother all his life. He said that he took special education classes while attending school but that he stopped attending school in the fourth grade. The defendant stated that he could not read or write and could barely write his name. He also said that he could not count or tell time. He testified that he did not know the minimum age for a driver’s license and that he could not drive. The defendant stated that there were eleven months in a year. He testified that he received disability benefits and that his mother paid his bills.

The defendant testified that he understood that he had been charged with possession of cocaine, but he claimed that he did not know the range of penalties for the offenses. The defendant said that he remembered discussing extensively a plea agreement with defense counsel and appearing in court approximately three weeks earlier for the purposes of entering guilty pleas. He stated that he chose not to enter guilty pleas at that time because he was confused and scared. He believed that the plea offer was for eight or nine years, but he did not know how many charges were involved in the plea. He said that he did not understand how he could receive a longer sentence if each case was tried separately and that he only understood that he would be placed in jail. He stated that he did not understand big words and knew nothing about the legal system. The defendant believed that he could not make a decision regarding whether he should enter pleas or go to trial.

When questioned by the trial court, the defendant testified that he knew what cocaine was, that he was charged with selling cocaine, and that it was illegal to sell cocaine. The defendant initially stated that he did not know what a jury or a trial was but then testified that he understood that the jury would decide whether he was guilty of possessing cocaine and “[g]iving his friends some cocaine.” The defendant said that he believed that his constitutional rights had been violated because there were no African-American jurors. The defendant also mentioned the entrapment defense to defense counsel.

Concerning his relationship with defense counsel, the defendant testified that he was scared of defense counsel and that he became confused when defense counsel met with the district attorney and the judge. He said that he initially believed defense counsel was working with the district attorney because they were often together. He acknowledged that he misunderstood the reasons for defense counsel’s meetings with the district attorney. The defendant testified that he tried to hire a new

attorney and that he became angry at defense counsel because he believed that defense counsel was interfering with his attempts to hire another attorney. The defendant could not remember defense counsel's name.

On cross-examination, the defendant acknowledged that he had pled guilty to cocaine-related offenses three years earlier, but he could not remember how long he was imprisoned. The defendant asserted that he did not sell cocaine and that he was forced to plead guilty. He claimed that he did not know what was meant by an entrapment defense. On redirect examination, the defendant stated that his attorney in the earlier cases had told him his best option was to plead guilty, but he said that he did not understand what a guilty plea meant or that the result of the plea would be that he would serve time in jail.

The trial court then questioned the defendant again. The defendant testified that defense counsel told him that he should plead guilty. He recognized that he had earlier signed a plea agreement involving the offenses and had appeared in court to enter pleas on August 10, 1995, but he changed his mind after talking to his friends and family. The defendant believed that he had "messed up" the agreement. He acknowledged that defense counsel told him that he could receive a longer sentence if he went to trial and the jury found him guilty. The defendant stated that he knew that twenty years was greater than ten and that he understood that he was in trouble.

In support of his motion, the defendant introduced a report of an intellectual evaluation of the defendant on July 18, 1986, prepared by a clinical psychologist. It states that the defendant's thought processes were understandable and that he was able to provide a fairly adequate social history. It reflects that the defendant denied visual or auditory hallucinations and that he had some homicidal

thoughts towards his estranged wife but no suicidal thoughts. The defendant also did not report having any phobias. The report describes the defendant as cooperative and needing little extra assistance in fully understanding task directions. The report states that the defendant was fairly alert and well-oriented in that he knew his birthday, age, and present year, although he was not aware of the month or the name of the president.

The report also states that the defendant dropped out of school at the age of sixteen following an automobile accident. The defendant denied having any form of psychiatric difficulty. The report reflects that the defendant reported having a driver's license but that he did not drive because he did not have a car. It also states that the defendant had a full scale IQ of 54, placing him in the mild mental retardation range.

At the conclusion of the hearing, the trial court found the defendant to be competent to stand trial and refused to grant the defendant's request for a mental evaluation. The trial court acknowledged that the defendant suffered from mental retardation, was not very intelligent, and could not manage his affairs. The trial court also found that the defendant had trouble remembering events that occurred at the time of the offense. However, it determined that the defendant's condition had not changed since the evaluation in 1986, and the results of the evaluation showed that the defendant's thought processes were understandable and that the defendant was capable of providing his background.

On the same day as the competency hearing, the defendant entered guilty pleas for the offenses charged. Subsequently, the trial court ordered a mental evaluation of the defendant for sentencing purposes.

At the sentencing hearing, the defendant testified that he had recently been hospitalized on two occasions to obtain psychiatric treatment. He said that he had been hearing voices and seeing little men, and he stated that he wanted to hurt himself. The defendant testified that he had been having the hallucinations for approximately one year. He stated that he had received medication for the hallucinations, but that he had not been given the medication while in jail. The defendant also testified that he had been addicted to cocaine.

The defendant said that he did not remember several things, including the name of his doctor or lawyer. The defendant testified that he remembered being confused about defense counsel's involvement with the district attorney, but he said that he now knew that defense counsel was trying to help him. Though the defendant acknowledged that the charges against him related to possession of cocaine, he stated that he did not remember signing a request for the acceptance of guilty pleas and that he did not remember entering guilty pleas to more than one charge. The defendant also did not remember meeting with the probation officer for the preparation of the presentence report. The defendant admitted that he found buyers in exchange for cocaine for his personal use. He said that on one occasion, Randy Myers gave him twenty dollars and asked the defendant to get him cocaine, and the defendant purchased cocaine for Myers from a person named Harry in Blount County.

The defendant's sister also testified regarding the defendant's limitations mentally. She said that the defendant was a slow learner and that he could not read. The defendant's sister testified that the defendant's mother manages the defendant's income. She stated that she had taken the defendant for treatment for his drug addiction in 1995.

The results of the new psychological evaluation were introduced. The report reflects that the defendant had received psychiatric treatment and took anti-psychotic medication. It states that the defendant had a full scale IQ of 50, placing him in the moderately mentally retarded range. It also states that the defendant reported that he had been depressed and had visual and auditory hallucinations that told him to hurt himself. The report also states that the defendant had some difficulty understanding directions and that he spoke in a childlike manner.

The trial court ordered that the defendant serve concurrent Range I sentences of ten years incarceration for each of the Class B felonies and Range II sentences of six years for each of the Class C felonies. The trial court considered the defendant's mental condition in mitigation to an extent. The judgments of conviction reflect that the trial court recommended that the defendant serve his sentences in the special needs facility of the Department of Correction.

### **A**

The defendant complains that the trial court erroneously denied him a mental evaluation. He also challenges the trial court's determination that he was competent for the purposes of entering guilty pleas and being sentenced.

Pursuant to T.C.A. § 33-7-301(a), it is within the trial court's discretion to order a mental examination when a person charged with a criminal offense is believed to be incompetent to stand trial. State v. Lane, 689 S.W.2d 202, 204 (Tenn. Crim. App. 1984). The trial court's decision will not be reversed absent a showing that the trial court abused its discretion.

The standard for determining whether a defendant is competent to stand trial is set forth in Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788 (1960):



[T]he “test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as a factual understanding of the proceedings against him.”

Id. at 402, 80 S. Ct. at 789 (adopting the Solicitor General’s suggested standard). The Dusky standard has been adopted in Tennessee. State v. Black, 815 S.W.2d 166, 174 (Tenn. 1991); Benton, 759 S.W.2d at 429; Mackey v. State, 537 S.W.2d 704, 707 (Tenn. Crim. App. 1975). In Mackey, this court stated that:

Both Tennessee decisions and the federal constitution prohibit the trial of a defendant whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense.

537 S.W.2d at 707 (citations omitted).

The standard is the same for determining the competency of the accused to plead guilty. Godinez v. Moran, 509 U.S. 389, 399, 113 S. Ct. 2680, 2686 (1993); State v. Berndt, 733 S.W.2d 119, 123 (Tenn. Crim. App. 1987). The burden is on the defendant to establish his incompetence by a preponderance of the evidence. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). On appeal, the trial court’s findings are conclusive unless the evidence preponderates otherwise. Id.

Based upon the record before us, we do not believe that the trial court abused its discretion by denying the defendant’s motion for a mental evaluation. First, we note that the motion was not filed until the day before trial and the hearing did not occur until the day of trial after the jury was selected. The record indicates that the defendant’s counsel had concerns about the defendant’s mental condition far in advance of the trial date, but he did not seek an evaluation earlier. We believe that the trial court would have been justified in denying the request as untimely.

In any event, the evidence presented at the competency hearing did not necessarily justify further evaluation for competency purposes. In this respect, the record justifies the trial court's determination that the defendant's mental status exhibited during the hearing reflected that his status had not changed since the 1986 intellectual evaluation.<sup>1</sup>

As for the defendant's mental condition, we do not believe that the evidence preponderates against the trial court's determination that the defendant was competent. The intellectual evaluation submitted by the defendant reflects that the defendant was mildly mentally retarded and had thought processes that were understandable. The trial court was entitled to rely upon these results and the defendant's testimony, which indicated a basic understanding of the legal proceedings, the ability to consult with counsel, and the ability to assist in defense preparation.

## **B**

The defendant asserts that his guilty pleas were not knowingly, voluntarily and understandingly entered. He relies upon his claim of incompetence and also asserts that the guilty plea procedure violated Rule 11, Tenn. R. Crim. P., and his constitutional rights under Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). See also State v. Mackey, 553 S.W.2d 337 (Tenn. 1977). We agree that the guilty plea proceeding did not sufficiently comply with constitutional and procedural requirements.

When a defendant pleads guilty, he or she simultaneously waives several constitutional rights, including the right against compulsory self-incrimination, the right to a jury trial, and the right to confront and cross-examine witnesses. Boykin, 395 U.S. at 243, 89 S. Ct. at 1712; Mackey, 553 S.W.2d at 339-40. Waiver, though, will not be

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<sup>1</sup>Over the state's objection, the trial court allowed the defendant to submit the evaluation report without calling the psychologist who examined the defendant. For the purposes of the competency hearing, the report was hearsay.

presumed from a silent record. Boykin, 395 U.S. at 242, 89 S. Ct. at 1712. Thus, the record must affirmatively show that the waiver of those rights was voluntarily, knowingly and understandingly made.

Also, in Mackey, our supreme court applied stricter requirements than in Boykin for accepting a guilty plea. Most of them were made part of Rule 11, Tenn. R. Crim. P., as follows:

**(c) Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that he or she understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he or she has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, and the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross examine witnesses against him or her, and the right against compelled self-incrimination; and

(4) that if the defendant pleads guilty or nolo contendere there will not be a further trial of any kind except as to sentence so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) that if the defendant pleads guilty or nolo contendere, the court may ask the defendant questions about the offense to which he or she has pleaded, and if the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against the defendant in a prosecution for perjury or false statement.

**(d) Insuring That the Plea Is Voluntary.** The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior

discussions between the district attorney general and the defendant or the defendant's attorney.

. . . .

**(f) Determining Accuracy of Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

The Advisory Commission Comments to the rule note that Mackey also requires advice to a defendant "if applicable, that a different or additional punishment may result by reason of his prior conviction or other factors which may be established in the present action," and that "upon the sentencing hearing, evidence of any prior convictions may be presented to the judge or jury for their consideration on determining punishment." 553 S.W.2d at 341. Moreover, in State v. McClintock, 732 S.W.2d 268, 273 (Tenn. 1987), the supreme court added the requirement that the defendant be advised of and understand the fact that the judgment of conviction resulting from his guilty plea may be used to enhance the punishment for any offense committed later.

As the Comments note, Rule 11 is substantially the same as the federal rule. In this respect, as noted in the Comments to the Tennessee rule and in McCarthy v. United States, 394 U.S. 459, 465, 89 S. Ct. 1166, 1170 (1969), each rule is designed to insure that guilty pleas are constitutionally entered in terms of being voluntarily and understandingly made and to insure that a complete record is made at the time of the plea of the factors relevant to the constitutional determinations. Thus, the procedures that are required not only afford fairness and justice to defendants in the plea process, but they produce finality in criminal proceedings by discouraging, limiting, and enabling more expeditious disposition of collateral attacks upon guilty pleas.

Given these goals, Tennessee requires substantial compliance with the procedural requirements. This means that if a plea is attacked on direct appeal and the

record does not affirmatively show at a minimum substantial compliance with the requirements, the burden is upon the state to demonstrate that the error is harmless. If the state does not carry this burden, then the judgment of conviction must be set aside. See State v. Neal, 810 S.W.2d 131, 139 (Tenn. 1991).

In the present case, the defendant entered his guilty pleas on the same day as the competency hearing. The record reflects that the trial court was confronted with a person who had been previously diagnosed as moderately retarded. The guilty plea transcript also reflects that the defendant exhibited slow understanding of the events that were occurring.

To its credit, the trial court was deliberate and patient in its colloquy with the defendant, taking pains to insure that the defendant understood what was being discussed. It insured that the defendant understood his right to a jury trial and the ramifications of his waiving the right and that the defendant's waiver of the right to a jury trial was knowing and voluntary. Also, the trial court explained to the defendant that he had the right not to incriminate himself and no one could force him to talk at a trial. It also verified that the defendant was satisfied with his counsel's representation.

The trial court also explained the nature of the charges and the minimum and maximum sentencing service times for the Class B felonies, although it mistakenly referred to the Class C felony cases as carrying a range of six to ten years, not three to six years. Also, it did not advise the defendant of the range of fines or the fact that mandatory minimum fines were involved. In any event, the defendant understood that the state was agreeing to have all the sentences run concurrently, and that the actual sentences would be set at a sentencing hearing after the trial court heard evidence from both sides. The trial court also determined from the defendant that no one had threatened him or forced him into pleading guilty. Likewise, it obtained a general

agreement from the state's and the defendant's counsel that the state's witnesses would say that the defendant delivered, sold, or possessed cocaine according to the allegations of each case.

Unfortunately, though, the trial court did not discuss with the defendant the nature of the right against self-incrimination and its waiver as they related to the guilty plea hearing. See State v. Montgomery, 840 S.W.2d 900, 903 (Tenn. 1992) (issue of valid waiver of right against self-incrimination relates to the guilty plea hearing as well as the jury trial that is being waived by the defendant.) Also, and most importantly, the trial court did not explain to or question the defendant about his right to confront and cross-examine any witnesses against him. We note that the record on appeal contains a document purportedly signed by the defendant that is titled both a REQUEST FOR ACCEPTANCE OF PLEA OF GUILTY and a PETITION TO WAIVE TRIAL BY JURY AND TO WAIVE AN APPEAL. However, we do not believe that this document suffices or otherwise reflects harmless error under the particular circumstances in this case. The defendant's counsel refused to sign the document because of his professed belief that the defendant was incompetent. Counsel told the trial court that he doubted that the defendant was able to understand all that was going on relative to the proceedings. The trial court did not question the defendant about his understanding of the document. We do not view the document as a reliable replacement to a personal colloquy between the trial court and the defendant regarding his right to confront and cross-examine witnesses against him.

Moreover, the trial court failed to advise the defendant of or to determine that he understood the fact that the eight felony convictions resulting from his guilty pleas could be used to enhance his punishment for any offense that he might commit later. These circumstances reflect material omissions in the required colloquy between the trial court and the defendant. The burden lies with the state to show that the

omissions were harmless. However, the state does not address in its brief the deficiencies in the guilty plea hearing or the appropriate consequences to flow therefrom. Thus, the defendant's convictions upon guilty pleas are vacated.

In the event that the defendant seeks to enter guilty pleas upon remand, in the context of his impaired mental condition, it will be incumbent upon the trial court to follow the procedural and constitutional guidelines applying to the entry of valid guilty pleas in painstaking fashion. Also, it would be preferable for the trial court to state for the record that it accepts the guilty pleas if it concludes that they were, in fact, voluntarily, knowingly, and understandingly entered.

In consideration of the foregoing, the judgments of conviction in case numbers C-9081 through C-9087 are vacated and the cases are dismissed. The judgment of conviction in case number C-8439 is vacated, count three is dismissed, and the case is remanded to the trial court for further proceedings.

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Joseph M. Tipton, Judge

CONCUR:

See Below<sup>2</sup>  
Joe B. Jones, Presiding Judge

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Curwood Witt, Judge

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<sup>2</sup> Judge Joe B. Jones died May 1, 1998, and did not participate in this opinion. We acknowledge his faithful service to this court, both as a member of the court and as its Presiding Judge.