

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JULY 1998 SESSION

<p><b>FILED</b></p> <p><b>October 12, 1998</b></p> <p><b>Cecil Crowson, Jr.</b> Appellate Court Clerk</p>
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STATE OF TENNESSEE, )

Appellee, )

v. )

BILLY BIVENS, )

Appellant. )

No. 03C01--9711-CR-00497

McMinn County

Honorable Earle G. Murphy, Judge

(Official Misconduct; Assault)

**CONCURRING OPINION**

I concur in the majority opinion. I also note the fact that the defendant's brief states that the motion for new trial was denied on May 30, 1997, the date that the judgments of conviction were entered. However, the record on appeal does not contain any record of such a denial. If the motion was in fact denied, it is unfortunate that counsel for the defendant did not heed the state's brief and supplement the record.

On the other hand, it is also unfortunate that the state did not file a motion to dismiss the appeal separate and apart from its brief. Given the court's and appellate court clerk's case handling procedures, if the state had filed such a motion, the problem in this case would have been resolved long before any scheduling and assignment of the case for decision. Motions should not be made part of an appellate brief.

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Joseph M. Tipton, Judge