IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JULY 1996 SESSION

FILED

October 31, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 02C01-9512-CC-00381**
Appellee,	)	
	)	**DYER COUNTY**
VS.	)	
	)	**HON. JOE G. RILEY,**
TROY ANDERSON,	)	**JUDGE**
	)	
Appellant.	)	(Sale of Marijuana)

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was charged in an indictment returned October 10, 1994, with the sale of marijuana weighing over one-half ounce. He was first tried on January 26, 1995, but the jury was unable to reach a verdict. A mistrial was declared, and the defendant was subsequently tried again. He was found guilty at a jury trial on April 25, 1995. The trial court sentenced him as a range one standard offender to one year and two months with the Department of Correction, and imposed a fine of two thousand dollars ($2000). In this appeal as of right, the defendant raises the following seven issues:

> (1) whether he was denied his right to a speedy trial;
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> (2) whether the trial court erred in refusing to suppress a tape recording of the alleged drug transaction;
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> (3) whether the trial court erred in denying the defendant's request for a change of venue;
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> (4) whether the trial court erred in refusing to exclude the testimony of the officer who allegedly witnessed the drug transaction;
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> (5) whether the trial court erred in failing to dismiss the indictment due to the State's alleged failure to disclose exculpatory evidence;
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> (6) whether the trial court abused its discretion by denying alternative sentencing; and
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> (7) whether he was denied due process of law when the jury deliberated only ten minutes before returning with a verdict.

We find that the defendant's issues on appeal lack merit. His conviction and sentence are therefore affirmed.

The alleged offense in the present case arose from an undercover operation. Dennis Davis was arrested for DUI and drug charges shortly before July 8, 1992. As a result, he agreed to cooperate in undercover work. He met Ronnie Shirley,

an officer with the Tennessee Highway Patrol, on July 8, 1992, for the purpose of completing a drug transaction near an apartment complex and bar known as South Fork. Davis and Shirley arrived in the vicinity of South Fork in the early evening hours. Shirley searched Davis to ensure that the latter did not possess narcotics. Shirley then gave Davis one hundred twenty dollars ($120) for the purchase of drugs and placed a micro-cassette recorder in Davis' boot. They then proceeded to South Fork.

Once they had arrived at South Fork, Davis exited the vehicle and approached an apartment which he believed was inhabited by Donald Bradford. He knocked at the door, but there was no answer. Davis then saw the defendant, whom he knew, and stated his intention to purchase three one-quarter ounce bags of marijuana. The defendant replied that he had an ounce of marijuana. They began to walk toward a residence in the complex. Officer Shirley lost sight of them for five to ten seconds as they walked, but moved the vehicle to allow him to see them again. Davis and the defendant stopped beside a tree adjacent to the residence, and the defendant lowered a plastic bag from the tree. Davis walked back to the vehicle to request more money to complete the transaction. Shirley gave Davis an additional twenty dollars ($20), and Davis returned to the defendant. Davis gave the defendant the one hundred forty dollars ($140) and received the plastic bag in exchange.

Davis came back to the vehicle, and Shirley drove away from the scene. Shortly thereafter, Shirley searched Davis again and retrieved a plastic bag containing a green, leafy substance. Shirley also took the cassette recorder from Davis' boot. Aside from the five to ten second period when Davis and the defendant were walking toward the residence, Shirley testified that he had witnessed the entire transaction. Both Shirley and Davis testified that they had not seen any other individuals in the area during the entire time of the transaction.

The State introduced the tape recording of the transaction as evidence at trial. The State also offered the testimony of Kay Sherriff, a forensic scientist with the Tennessee Bureau of Investigation, who stated that the green, leafy substance in the plastic bag was 0.9 ounces of marijuana.

On cross-examination, Davis admitted that he had multiple prior convictions. Davis also testified that Jack Cunningham, an officer with the Tennessee Highway Patrol, had told him that the DUI and drug charges from late June and early July of 1992 would be dropped if he cooperated with an undercover operation. Davis testified further, however, that the district attorney general's office had made no promises regarding his undercover work. Davis stated that he had not yet been to court for those charges. With regard to the alleged drug transaction, Davis testified that Shirley could not have seen the location of the exchange from the place where they had originally parked. Davis also stated that he was not sure whether the vehicle was still parked at the same location where he had first exited when he returned after making the drug purchase.

The defendant testified in his own behalf at trial. He stated that someone had knocked on his door on the evening of July 8, 1992. He answered the door, and the individual at the door asked for "Don." Another individual was walking around behind the person at the door. Since one of the defendant's children was crying, the defendant closed the door. The defendant contends that the tape recording introduced by the State supports his testimony. On cross-examination, the defendant stated that he could not identify the individual who had been at his door as either Dennis Davis or Officer Shirley. Moreover, the defendant also admitted that he was unsure if the incidents about which he testified had occurred on July 8, 1992.

In his first issue, the defendant argues that he was denied his right to a

speedy trial. The record reveals that there was a delay between the commission of the offense and indictment as well as between indictment and trial. The defendant refers to the entire period between the commission of the offense and his trial when framing his speedy trial issue. It is well-established, however, that no speedy trial problem arises until after formal accusation, either by arrest or grand jury action. See, e.g., United States v. Lovasco, 431 U.S. 783 (1977); United States v. Marion, 404 U.S. 307, 313-20 (1971); State v. Baker, 614 S.W.2d 352, 353 (Tenn. 1981); State v. Walton, 673 S.W.2d 166, 170 (Tenn. Crim. App. 1984). A delay between the commission of the offense and formal accusation is properly addressed through a statute of limitations claim or a due process claim. See Baker, 614 S.W.2d at 354 (citing Lovasco, 431 U.S. at 789-90; Marion, 404 U.S. 321-22). Accordingly, the defendant improperly frames his speedy trial issue as covering the entire period between commission of the offense and trial. We will therefore address the delay between the offense and the trial as two distinct issues, one involving due process guarantees and the other involving speedy trial guarantees.

To aid our resolution of the due process and speedy trial problems, we will first review the relevant events which occurred between the commission of the offense and the defendant's conviction for that offense. The offense allegedly occurred on July 8, 1992. The defendant was first indicted in October of 1993, approximately sixteen months after the offense. In June of 1994, approximately eight months after indictment, the prosecution of the defendant was terminated by entry of a nolle prosequi order. The prosecution was dismissed without prejudice, apparently by agreement with the defendant. The defendant was indicted again on October 10, 1994. He was tried on January 25, 1995, but the jury was unable to reach a verdict. A mistrial was declared, and the case was set for trial again. On April 25, 1995, the defendant was tried and convicted.

We will first consider the delay between the commission of the offense and formal accusation by indictment. The record reveals that this period of delay was approximately sixteen months. Given that the Tennessee Highway Patrol set up the drug transaction at issue as part of an undercover operation, the record also reveals that the State was aware of the offense from the time of its commission. To prevail on a claim that the pre-indictment period of delay violated due process, the defendant bears the burden of establishing that there was a delay, that he suffered actual prejudice as a direct and proximate result of the delay, and that the State caused the delay in order to gain a tactical advantage over or to harass the defendant. See State v. Dykes, 803 S.W.2d 250, 256 (Tenn. Crim. App. 1990); Baker, 614 S.W.2d at 354.

From the record before us, we find that the defendant has established that there was a sixteen month pre-indictment period of delay. The defendant, however, has utterly failed to establish any actual prejudice stemming from that delay. The defendant filed a motion to dismiss the indictment based on a speedy trial violation, as well as a host of other pre-trial motions, on November 30, 1994. The trial court conducted a hearing on these motions on January 9, 1995. Apparently the defendant testified at that hearing in an effort to demonstrate prejudice for the purpose of his speedy trial motion. The transcript from that hearing was not made a part of the record on appeal. As a result, there is no proof in the record establishing any prejudice to the defendant arising from the pre-indictment period of delay. It is the defendant's duty to have prepared an adequate record in order to allow a meaningful review on appeal. See T.R.A.P. 24(b); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983); State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). When no evidence is preserved in the record for review, we are precluded from considering the issue. See Roberts, 755 S.W.2d at 836.

Furthermore, even if we were to find that the defendant had demonstrated

prejudice arising from the pre-indictment delay, the defendant has failed to establish that the State caused the delay in order to gain a tactical advantage over or to harass him. In fact, from the sparse record before us, it appears that the delay between the offense and the indictment of the defendant was due to an effort to preserve the secrecy of the continuing undercover operations conducted by the Tennessee Highway Patrol. There is no proof that the State delayed indicting the defendant for purposes of either harassment or gaining a tactical advantage. Thus, the defendant has failed to carry his burden of demonstrating that the pre-indictment period of delay violated his due process rights.

We will now consider whether the period of delay between the defendant's indictment and his trial constitutes a violation of his right to a speedy trial. Both federal and state constitutions and our statutes guarantee criminal defendants a speedy trial. U.S. Const. amend. VI; Tenn. Const. art. I, § 9; T.C.A. § 40-14-101. In Barker v. Wingo, 407 U.S. 514 (1972), the United States Supreme Court set out a balancing test to be used in determining whether a defendant's right to a speedy trial had been violated. Our Supreme Court has adopted this test. See Baker, 614 S.W.2d at 355; State v. Bishop, 493 S.W.2d 81, 84 (Tenn. 1973). If the defendant was in fact denied a speedy trial, then his or her conviction must be reversed and the charges dismissed. See Bishop, 493 S.W.2d at 83. In conducting the balancing test mandated by Barker, we are required to examine the conduct of both the prosecution and the defendant, looking especially to four factors: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his or her right to a speedy trial, and (4) whether the defendant was prejudiced by the delay. See Bishop, 493 S.W.2d at 84.

In considering the first factor, the length of the delay, a careful review of the significant events between indictment and trial is necessary in the present case. The

defendant was first indicted in October of 1993. In June of 1994, that indictment was nolle prosequi with the agreement of the defendant. It appears that the principal reason for the dismissal without prejudice of that indictment was the fact that a material witness for the prosecution was unavailable. Shortly after that witness became available, the defendant was re-indicted on October 10, 1994. The defendant filed a number of pre-trial motions on November 30, 1994, including a motion to dismiss the indictment for violation of speedy trial rights. The trial court conducted a hearing on the motions on January 9, 1995, and subsequently denied the motion to dismiss. The defendant was first tried on January 25, 1995. The jury was unable to reach a verdict, and a mistrial was declared on January 26, 1995. The defendant was then tried again and convicted on April 25, 1995.

The apparent length of time between the defendant's first indictment and the trial which resulted in his conviction is approximately eighteen months. It is clear, however, that the case at bar proceeded from indictment to trial in an unusual manner. As a result, certain intervening circumstances make the period between indictment and trial seem longer than it truly is. The record does not reveal any unreasonable delays given the unusual progress of this case from indictment to trial and conviction. In fact, it is doubtful that the period of delay in the present case is sufficient to trigger further speedy trial analysis. See Barker, 407 U.S. at 530-31. In any event, the period of delay is not presumptively prejudicial given that our Supreme Court has held that a two year delay alone does not establish a speedy trial violation in the absence of prejudice. See Bishop, 493 S.W.2d at 85.

We turn now to the second Barker factor, the reasons for the delay. There appear to be two principal reasons for the delay in this case. First, the October 1993 indictment was nolle prosequi because a material witness was unavailable. Shortly after

the witness became available, the defendant was re-indicted and his case was set for trial. Second, the jury was unable to reach a verdict in the defendant's first trial. The case was then immediately set for another trial, which resulted in the defendant's conviction. Thus, although there were delays, the defendant's case proceeded in a reasonable manner. Certainly the reasons for the delays do not weigh in favor of a finding of a speedy trial violation.

The third Barker factor asks whether the defendant asserted his right to a speedy trial. The record reveals that the defendant did not assert his right to a speedy trial at any time during the eight months between his first indictment and the State's decision to nolle prosequi. On October 10, 1994, the defendant was re-indicted. He filed a pre-trial motion to dismiss based on a speedy trial violation on November 30, 1994. We find, therefore, that the defendant did assert, albeit belatedly, his right to a speedy trial.

We now consider the fourth and most important Barker factor, whether the defendant was prejudiced by the delay. Bishop suggested the following three possible types of prejudice: (1) undue and oppressive incarceration; (2) anxiety accompanying public accusation; and (3) impairment of the ability to prepare a defense. See Bishop, 493 S.W.2d at 85. Since the defendant was not incarcerated prior to trial, the first type of prejudice is inapplicable to the present case. With regard to the other two types of prejudice from Bishop, we are again faced with the problem of a deficient record on appeal. As we stated above, the defendant apparently testified at a hearing on his pre-trial motion to dismiss concerning the prejudice he believed he had suffered as a result of the delay between the commission of the offense and his trial. The transcript of that hearing is not, however, a part of the record on appeal. The defendant bears the burden of preparing an adequate record in order to allow meaningful appellate review. See T.R.A.P. 24(b); Bunch, 646 S.W.2d at 160; Roberts, 755 S.W.2d at 836. From the record

before us, we simply cannot conclude that the delay between the defendant's indictment and his trial violated his right to a speedy trial. The defendant's first issue is therefore without merit.

In his second issue, the defendant contends that the trial court erred in failing to suppress the tape recording of the alleged drug transaction because portions of the recording are inaudible. The defendant concedes that it is well-established in Tennessee that the audibility of a tape recording goes to its weight and not to its admissibility. See State v. Beasley, 699 S.W.2d 565, 569 (Tenn. Crim. App. 1985); State v. Harris, 637 S.W.2d 896, 898 (Tenn. Crim. App. 1982). The defendant, however, argues that at some point, if the tape recording is so inaudible that it is not helpful to the trier of fact, the recording should be excluded under Tenn. R. Evid. 401. Likewise, the defendant argues that, if the inaudible portions of the recording are crucial to a fair understanding of the conversation recorded, the recording should be excluded under Tenn. R. Evid. 403. See Neil P. Cohen et. al., Tennessee Law of Evidence § 401.12, at n.126 (2nd ed. 1990).

Regardless of whether we find the defendant's argument persuasive, there is no proof in the record that the tape recording at issue merits exclusion under either Tenn. R. Evid. 401 or 403. In fact, the defendant points to only one inaudible portion of the recording in his argument. From the record before us, we cannot conclude either that the recording is so inaudible that the recording is not helpful to the trier of fact, or that the inaudible portions are so crucial that the recording does not convey a fair understanding of the transaction recorded. It is within the discretion of the trial court to determine whether to admit such evidence, and that discretion will not be disturbed absent abuse. See State v. Elrod, 721 S.W.2d 820, 823 (Tenn. Crim. App. 1986). We find no abuse of discretion in the case at bar. The defendant's second issue is therefore without merit.

In his third issue, the defendant contends that the trial court erred in denying his motion for a change of venue. The defendant asserts by affidavit attached to his pre-trial motion for a change of venue that he could not be tried in Dyer county by an impartial jury due to extensive pre-trial publicity. The defendant further contends that because he was charged with the sale of narcotics, which necessarily carries "instant notoriety and disdain," he could not be tried by an impartial jury in Dyer county.

Venue may be changed "if it appears to the court that, due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had." Tenn. R. Crim. P. 21(a). The decision as to whether to change venue rests within the discretion of the trial court, and the decision will not be reversed on appeal absent a clear abuse of discretion. See State v. Melson, 638 S.W.2d 342, 360 (Tenn. 1982). To reverse a conviction on the basis of an improper denial of a request to change venue, the defendant must demonstrate that the jurors who actually heard his case were biased or prejudiced against him. See State v. Evans, 838 S.W.2d 185, 192 (Tenn. 1992) (citing State v. Burton, 751 S.W.2d 440 (Tenn. Crim. App. 1988)).

Although the defendant contends that the pre-trial publicity was so extensive as to render a fair trial impossible, the record demonstrates otherwise. In fact, the transcript of the voir dire proceeding reveals that none of the jurors knew anything about the defendant personally or anything about the case. In short, there is nothing in the record to indicate that any juror would have rendered a verdict based on anything other than the evidence presented at trial. Thus, we find that the trial judge did not abuse his discretion in denying the defendant's request for a change of venue. The defendant's third issue is therefore without merit.

In his fourth issue, the defendant contends that the trial court erred in failing to exclude the testimony of Officer Ronnie Shirley. The defendant asserts that the district attorney general told defense counsel that Officer Shirley could positively identify the defendant because, during an interview at the district attorney general's office, Shirley was shown a photograph purporting to be the defendant and indicated that the person in the photograph was the individual who had sold the plastic bag of marijuana to Dennis Davis. The defendant argues further that Shirley was unable to view the transaction clearly from his location in the vehicle, thereby amplifying the improper nature of Shirley's identification of the defendant from a single photograph during the interview at the district attorney general's office.

We recognize that Tennessee courts do not approve of photographic line-ups consisting of only one picture designated as the accused. See State v. Tyson, 603 S.W.2d 748, 753 (Tenn. Crim. App. 1980). In this case, however, the trial court did not err in allowing Officer Shirley to testify regarding the transaction and to identify the defendant as the individual who had sold the marijuana. The record reveals that, according to the undercover operation plan, Dennis Davis was going to attempt to purchase drugs from an individual named Donald Bradford. There was no mention of the defendant prior to their arrival at South Fork. As Shirley and Davis drove up to South Fork, they saw the defendant walking nearby, and Shirley said to Davis, "Is that Troy?" Given that Shirley and Davis intended to purchase drugs from Donald Bradford, this statement indicates that Officer Shirley knew the identity of the defendant well before the interview at the district attorney general's office. Moreover, contrary to the defendant's assertion, the record demonstrates that Officer Shirley clearly witnessed virtually the entire transaction between Davis and the defendant. Shirley testified that he lost sight of Davis and the defendant for five to ten seconds as they walked toward a residence. Shirley regained sight of them by moving the vehicle to obtain an unobstructed view.

Davis testified that Shirley could not have seen the location of the exchange of money for marijuana from the location where he originally parked. This statement is consistent with Shirley's testimony that he lost sight of Davis and the defendant momentarily. Davis testified further that he was unsure as to whether the vehicle was in the same location when he returned after making the purchase. Thus, the record indicates that Shirley had an adequate opportunity to view the defendant during the drug transaction and that Shirley knew the identity of the defendant at that time. From these circumstances, we can only conclude that the trial court did not err in allowing the testimony of Officer Shirley at trial. The defendant's fourth issue is therefore without merit.

In his fifth issue, the defendant contends that the trial court erred in failing to dismiss the indictment due to the State's failure to disclose exculpatory evidence. More specifically, the defendant states that the district attorney general did not inform him that an officer of the Tennessee Highway Patrol had promised consideration of Dennis Davis' cooperation in the prosecution of the defendant with regard to DUI and drug charges pending against Davis. As a result, the defendant argues that he was deprived of due process and a fair trial, citing primarily Brady v. Maryland, 373 U.S. 83 (1963).

In Brady, the United States Supreme Court held that the State has a duty to furnish the accused with any exculpatory evidence pertaining either to guilt or innocence or to possible punishment upon conviction. See Brady, 373 U.S. at 87. Exculpatory evidence under Brady includes witness statements which are material and favorable to the accused. See, e.g., McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988), cert. denied, 489 U.S. 1033 (1989); State v. Goodman, 643 S.W.2d 375, 379-80 (Tenn. Crim. App. 1982). Moreover, exculpatory evidence under Brady includes information which can be used only for impeachment purposes. See United States v. Bagley, 473 U.S. 667, 676 (1985). See also Giglio v. United States, 405 U.S. 150 (1972); Napue v.

Illinois, 360 U.S. 264 (1959). Moreover, a defendant has the right to explore on cross-examination any promises of leniency or other favorable treatment offered to a witness. See State v. Spurlock, 874 S.W.2d 602, 617 (Tenn. Crim. App. 1993); State v. Norris, 684 S.W.2d 650, 654 (Tenn. Crim. App. 1984).

To prevail on a claim that the State failed to disclose exculpatory evidence under Brady and its progeny, the defendant must establish that (1) he or she made a proper request for the production of evidence, unless the evidence is obviously exculpatory in nature when viewed by the prosecution, (2) the State suppressed the evidence, (3) the evidence was material, and (4) the evidence was favorable to the defendant. See Spurlock, 874 S.W.2d at 609. The defendant bears the burden of demonstrating the elements of this claim by a preponderance of the evidence. See Smith v. State, 757 S.W.2d 14, 19 (Tenn. Crim. App. 1988).

In the case at bar, the record reveals that the defendant filed a motion requesting disclosure of impeaching information, including any promises of favorable treatment offered to any witness on behalf of the State, on November 30, 1994. The trial court conducted a hearing on this motion and several others on January 9, 1995, and granted the motion for disclosure of exculpatory evidence including any agreements by the State with witnesses. As a result, in a letter dated January 11, 1995, the district attorney general advised the defendant that his office had made no promises regarding favorable treatment to Dennis Davis for his cooperation in the case. The district attorney general, however, further advised the defendant that there were charges still pending against Davis from approximately June of 1992. He explained the situation to the defendant as follows:

> Apparently Mr. Davis was arrested by Trooper Frank McLin on or about June 27, 1992 for charges of DUI, Possession of Marijuana for Resale, Violation of Registration

> Law, and Possession of Drug Paraphernalia. As you are aware, this was prior to my taking office on September 1, 1992. After Mr. Davis' arrest the investigation of these charges was apparently turned over to the CID Division of the Tennessee Highway Patrol and the hearing on these charges was continued. I do not know if any agreement was reached between CID and Mr. Davis concerning these charges or if the Attorney General's Office was contacted concerning these charges. I was never made aware of these charges after taking office on September 1st and was not aware of the undercover drug operation involving Mr. Davis until we were supplied with files and requests for indictments in 1993.
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> I have not spoken to Jack Cunningham, the CID Agent who was investigating these charges, nor have I talked to Mr. Davis concerning these charges, but I have spoken to Frank McLin and the charges are still pending. Trooper McLin advises me that he has made no promises to Mr. Davis. . . . I am enclosing copies of the citations that are presently pending in connection with this matter.

From this detailed explanation provided by the district attorney general, it is clear that the defendant was made aware of the charges still pending against Dennis Davis.

In fact, the defendant thoroughly cross-examined Davis regarding the charges against him which were still pending and the alleged promise of Officer Cunningham to drop the charges in exchange for cooperation in the undercover operation. The defendant obviously made the jury aware of the alleged promise for favorable treatment by Officer Cunningham. As is apparent from the verdict of guilt, the jury did not consider this information as detracting from the evidence against the defendant. From the record before us, we can only conclude that any error by the prosecution in disclosing impeaching information was harmless. The defendant's fifth issue is therefore without merit.

In his sixth issue, the defendant contends that the trial court abused its discretion in denying alternative sentencing. The record reveals that the trial court sentenced the defendant as a range one standard offender to one year and two months with the Department of Correction. The defendant claims that he met all of the eligibility

criteria for probation or community corrections and that he is not a serious offender for which incarceration is deemed appropriate.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

T.C.A. § 40-35-103 sets out sentencing considerations which are guidelines for determining whether or not a defendant should be incarcerated. These include the need "to protect society by restraining a defendant who has a long history of criminal conduct," the need "to avoid depreciating the seriousness of the offense," the determination that "confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses," or the determination that "measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." T.C.A. § 40-35-103(1).

In determining the specific sentence and the possible combination of sentencing alternatives, the court shall consider the following: (1) any evidence from the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and the arguments concerning sentencing alternatives, (4) the nature and characteristics of the offense, (5) information offered by the State or the defendant concerning enhancing and mitigating factors as found in T.C.A. §§ 40-35-113 and -114, and (6) the defendant's statements in his or her own behalf concerning sentencing. T.C.A.

§ 40-35-210(b). In addition, the legislature established certain sentencing principles which include the following:

> (5) In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration; and
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> (6) A defendant who does not fall within the parameters of subdivision (5) and is an especially mitigated or standard offender convicted of a Class C, D or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.

T.C.A. § 40-35-102.

After reviewing the statutes set out above, it is obvious that the intent of the legislature is to encourage alternatives to incarceration in cases where defendants are sentenced as standard or mitigated offenders convicted of C, D, or E felonies. However, it is also clear that there is an intent to incarcerate those defendants whose criminal histories indicate a clear disregard for the laws and morals of society and a failure of past efforts to rehabilitate.

In the present case, the State concedes that the defendant has met the general statutory eligibility requirements for probation or community corrections. See T.C.A. § 40-35-303(a); T.C.A. § 40-36-106(a). Mere eligibility, of course, does not end the inquiry. Instead, the defendant still bears the burden of establishing that he is a suitable candidate for alternative sentencing. See T.C.A. § 40-35-303(b); State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). Militating against alternative sentencing are circumstances indicating that measures less restrictive than confinement have recently been applied unsuccessfully to the defendant or that confinement is necessary

either to protect society from a defendant with a long history of criminal conduct or to avoid depreciating the seriousness of the offense. See T.C.A. § 40-35-103(1); Ashby, 823 S.W.2d at 169.

In the present case, the trial court denied alternative sentencing for a number of reasons. The court noted that the defendant had a history of criminal conduct, including felony convictions from 1972 and several misdemeanors dating from 1975 through 1987. The court noted further that those individuals convicted of selling narcotics were generally incarcerated and that the State had made a showing of a need for deterrence. In addition, the trial court found that measures less restrictive than confinement had recently been applied to the defendant for his misdemeanors without success. As a result, the court found that the defendant's potential for rehabilitation was poor. Finally, the trial court stated that confinement was necessary in this case to avoid depreciating the seriousness of the offense. For all of the above reasons, the trial judge concluded that granting an alternative sentence would not serve the ends of justice, and he therefore denied the defendant's request.

From a review of the entire record, we find that the trial court properly considered the relevant sentencing principles and all relevant facts and circumstances. We can only conclude that the trial court did not abuse its discretion in denying alternative sentencing. The defendant has failed to carry his burden of demonstrating that his sentence was improper. His sixth issue is therefore without merit.

In his seventh issue, the defendant contends that he was denied due process because the jury deliberated only ten minutes before returning its verdict. He asserts that proper deliberation requires that the jury analyze, discuss and weigh the evidence together in the secrecy of the jury room, citing Rushing v. State, 565 S.W.2d

893, 895 (Tenn. Crim. App. 1977). The defendant points to testimony from one of the jurors after the conclusion of the case that the jury retired to deliberate, selected a foreman, and took an initial vote as to whether the defendant was guilty or not guilty. All of the jurors stated that they believed the defendant to be guilty, so the foreman completed the verdict form without further debate. They then returned to open court and announced the verdict. The defendant argues that these circumstances indicate that the jury did not properly deliberate within the meaning of "deliberation" set forth in Rushing.

We believe that the defendant misconstrues the language of Rushing. Rushing involved a challenge to the fact that the jury was allowed to separate and go to their respective homes overnight after being unable to reach a verdict on the first evening of deliberation. See Rushing, 565 S.W.2d at 895. The defendant there argued that once the jury had begun deliberation, neither the court nor the attorneys could allow them to separate. See Rushing, 565 S.W.2d at 895. The Rushing court rejected that argument and ruled that deliberation required that the jury decide the case in the jury room, but not that the jury be prevented from separating should they be unable to reach a verdict after deliberating into the night. See Rushing, 565 S.W.2d at 895.

From the record before us, we find no evidence that the jury was influenced improperly or that their verdict was based on passion or prejudice. While it is true that the jury retired for only ten minutes before returning a verdict, we will not impose an arbitrary minimum time period for which the jury must deliberate. The record contains ample evidence, including the testimony of two eyewitnesses, to support the jury verdict. The defendant testified in his own behalf at trial, but the jury rejected his testimony, as was their prerogative. See State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). In short, we find nothing improper about the method in which the jury chose to resolve this case once it had retired to deliberate. The defendant's seventh issue is therefore without

merit.

For the reasons set out in the discussion above, we find that the defendant's seven issues on appeal all lack merit. His conviction and sentence are therefore affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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DAVID H. WELLES, Judge

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CORNELIA A. CLARK, Special Judge