IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY SESSION, 1999

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9809-CC-00429**
	)	
Appellee,	)	
	)	
	)	**WAYNE COUNTY**
VS.	)	
	)	**HON. WILLIAM B. CAIN**
WILLIAM D. WARE and	)	**JUDGE**
VIRGINIA WARE,	)	
Appellant.	)	**(Direct Appeal)**

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

In February of 1995, the Wayne County Grand Jury indicted Appellants William D. Ware and Virginia Ware for manufacture of marijuana and also indicted Mr. Ware for manufacture of LSD. Appellants subsequently filed a motion to suppress all evidence that was seized from their property and from an adjoining neighbor's property by the police on September 29 and 30, 1994.[1] The trial court conducted a hearing on the motion to suppress on July 3, 1996. Appellants then filed a supplemental motion to suppress on July 12, 1996. By letter dated August 14, 1996, the trial court denied the motion to suppress. On August 15, 1996, Appellants asked the trial court to address the search of the adjoining neighbor's property where the LSD was found. The trial court subsequently entered an order on March 4, 1997, that denied the motion to suppress in its entirety. Appellants pled guilty to the above charges on August 13, 1997. That same day, the trial court sentenced Mr. Ware to a term of eight years for the LSD conviction, with one year of confinement followed by seven years of probation. The trial court also sentenced Ms. Ware to two years of probation for the marijuana conviction. After a sentencing hearing on October 9, 1997, the trial court sentenced Mr. Ware to a term of two years for the marijuana conviction, with seven months of confinement followed by one year and five months of probation. Both Appellants challenge their convictions and Mr. Ware challenges his sentence for the marijuana conviction, raising the following issues:

> 1) whether the helicopter surveillance of their property from an altitude of 300 feet violated Appellants' constitutional rights;
> 2) whether the search warrant was tainted by an earlier warrantless entry onto Appellants' property;

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[1]This motion does not appear in the record.

3) whether the search of an adjoining neighbor's property violated Appellants' rights; and
4) whether the trial court should have imposed full probation for the sentence for Mr. Ware's marijuana conviction.

After a review of the record, we affirm the judgment of the trial court.

I. FACTS

Around noon on September 29, 1994, Trooper Dennis Peevehouse of the Tennessee Highway Patrol and Agent Jim Lawson of the Tennessee Alcoholic Beverage Commission were flying in a helicopter over rural Wayne County in a search for marijuana. While they were flying above Appellant's property at an altitude of approximately 900 feet, Peevehouse saw rows of plants that were covered by a white cheesecloth-type material. At one end of a row, Peevehouse saw that part of the cloth had blown back and exposed what he recognized through training and experience as a marijuana plant. Lawson could also see what he recognized as marijuana plants touching the cheesecloth.

After spotting the marijuana, Peevehouse followed standard procedure and took the helicopter down to an altitude of 300 feet so that he could confirm his observation. Peevehouse and Lawson then radioed some officers that were on the ground several miles away and directed them to Appellants' property. The officers on the ground arrived at Appellants' property approximately ten minutes later and parked in both driveways leading to the residence.

When the officers arrived at Appellants' residence, they followed standard procedure and some officers moved to surround the house while others

approached the residence to request consent for a search. When Agent Bond Tubbs went toward the back of the residence on the left, he observed a marijuana patch covered with cheesecloth. Tubbs did not touch the cloth or move it, but he could see through it and could recognize the marijuana plants growing underneath. Tubbs then reported on the radio that he had seen marijuana.

When some other officers approached the residence, they encountered Appellants' daughter, Summer Ware, who was leaving the residence in what appeared to be a hurry. The officers then identified themselves, and Summer stated that her mother was at home. The officers then allowed Summer to enter the residence to secure a dog, and they then asked her to open the door. She complied, and the officers entered the residence.

Upon entering the residence, the officers encountered Ms. Ware and they asked her for consent to search. Ms. Ware refused and told the officers to leave the property. The officers then secured the scene by blocking all exits to the residence and checking the other rooms for any other individuals who might be in the home. Shortly thereafter, the officers located Mr. Ware walking down the road. The officers then arrested both Appellants and Summer Ware.

Lawson and Agent Barry Callahan then prepared an affidavit based on the observations of Peevehouse and took the affidavit to a magistrate to obtain a search warrant. When they returned, the officers began a search of Appellants' residence, outbuildings, and the surrounding gardens and fields.

The search of Appellants' property also included a search of a building owned by Appellants' neighbor, Jeff Morgan, who allowed Appellants to use the building in return for watching the building while he was gone.

During the search of Appellants' property and Morgan's building, the officers found numerous items associated with the cultivation of marijuana, $990.75 in coins, twenty-two firearms, a video camera, two videotapes showing marijuana cultivation, assorted gold and silver coins, silver bars, 153 marijuana plants, and a container with LSD in it.

II. HELICOPTER SURVEILLANCE

Appellants contend that the helicopter surveillance of their property from an altitude of 300 feet violated their constitutional right to be protected from unreasonable searches.[2] We disagree.

The United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. The Tennessee Constitution similarly provides "[t]hat the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures . . . ." Tenn. Const. art I, § 7. The touchstone of unreasonable search and seizure analysis is "whether a person has a 'constitutionally protected reasonable expectation of privacy.'" State v. Bowling, 867 S.W.2d 338, 341 (Tenn. Crim.

[2]Appellants have not challenged the constitutionality of the helicopter surveillance of their property from an altitude of 900 feet.

App. 1993) (quoting California v. Ciraolo, 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986)). This determination involves a two-part inquiry. First, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? Bowling, 867 S.W.2d at 341 (citing Ciraolo, 476 U.S. at 211, 106 S.Ct. at 1811). In this case, there is no real dispute that Appellants had manifested a subjective expectation of privacy in the property viewed from the helicopter. Thus, the determinative question is whether that expectation of privacy is one that society is willing to recognize as reasonable.

In Ciraolo, the United States Supreme Court held that it was unreasonable for the defendant to expect that marijuana growing in his fenced-in back yard was protected by the Fourth Amendment from aerial observation at an altitude of 1,000 feet. 476 U.S. at 213–15, 106 S.Ct. at 1813–14. The Court emphasized that the observations by the officers took place within public navigable air space in a physically non-intrusive manner. Id., 476 U.S. at 213, 106 S.Ct. at 1813. The Tennessee Supreme Court has held that the Tennessee Constitution provides no greater protection in these circumstances than was stated by the Court in Ciraolo. State v. Prier, 725 S.W.2d 667, 671 (Tenn. 1987).

In Florida v. Riley, the United States Supreme Court relied on Ciraolo and held that it was unreasonable for the defendant to expect that the marijuana growing in his partially open-roofed greenhouse was constitutionally protected from police observation by helicopter flying at an altitude of 400 feet. 488 U.S. 445, 450–51, 109 S.Ct. 693, 697, 102 L.Ed.2d 835 (1989). The four-Justice plurality stated that

> it is of obvious importance that the helicopter in this case was not violating the law, and there is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude. Neither is there any intimation here that the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury. In these circumstances, there was no violation of the Fourth Amendment.

Id., 488 U.S. at 451–52, 109 S.Ct. at 697.[3]

We conclude that under Ciraolo and Riley, Appellants had no reasonable expectation that the marijuana on their property was protected from observation by the police from a helicopter flying at an altitude of 300 feet. First, the police were operating the helicopter at a permissible altitude.[4] Second, there is nothing in the record to suggest that helicopter overflights at 300 feet are sufficiently rare in rural Wayne County so as to support Appellants' theory that they reasonably believed that their property would not be observed by helicopter. In fact, Ms. Ware testified at the suppression hearing that before the helicopter observation at issue here, she had already received notice from Champion Paper Company that helicopters would be in the area to spray during August and September. Further, Ms. Ware testified that part of the reason the marijuana was covered with cheesecloth was because in addition to the Champion helicopters, there might be "marijuana helicopter[s]" in the area. Third, there is no evidence in the

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[3]In a separate concurring opinion, Justice O'Connor stated that the key inquiry is not the altitude of the aircraft, it is the reasonableness of the expectation of privacy. Riley, 488 U.S. at 454, 109 S.Ct. at 699 (O'Connor, J., concurring). Justice O'Connor then stated that because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above and because the defendant had failed to introduce any evidence to the contrary, the defendant's expectation that his property was protected from aerial observation from an altitude of 400 feet was not reasonable. Id., 488 U.S. at 455, 109 S.Ct. at 699 (O'Connor, J., concurring).

[4]While Federal Aviation Administration regulations generally prohibit the flying of fixed-wing-aircraft below certain altitudes, helicopters may be operated lower than the minimum altitudes "if the operation is conducted without hazard to persons or property on the surface." 14 CFR § 91.119 (1994).

record that the police helicopter interfered with Appellants' use of their property. Finally, there is no evidence in the record that the helicopter surveillance at an altitude of 300 feet caused any undue noise, or any wind, dust, or threat of injury. Under these circumstances, we conclude that the helicopter surveillance at 300 feet did not violate Appellants' rights under the Fourth Amendment or under Article I, Section 7.[5] This issue is meritless.

III. SEARCH WARRANT

Appellants contend that the search warrant that was obtained for their property was tainted by the prior warrantless entry onto their property by the police. We disagree.

A. Warrantless Entry

Initially, we note that the warrantless entry of Appellants' property was improper.[6] Unless it falls within a specifically established and well-delineated exception, a search conducted without a warrant is per se unreasonable. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973) (citations omitted). One of these exceptions is "[a] warrantless search

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[5]We note that the only authority Appellants cite for the proposition that the helicopter surveillance at 300 feet was unconstitutional is the unpublished Sixth Circuit opinion of United States v. Saltzman, 992 F.2d 1218, 1993 WL 100082 (6th Cir. 1993). However, that case is distinguishable because the court found that the helicopter had flown at an altitude of 125 to 150 feet and had disturbed both the defendant's family and the surrounding neighbors. Id., 1993 WL 100082, at *3.

[6]There is no dispute that the part of Appellants' property that contained the growing marijuana plants was "curtilage" rather than "open field." In State v. Jennette, the Tennessee Supreme Court held that police officers do not need a warrant to enter an open field and seize marijuana that they have observed by lawful helicopter surveillance (emphasis supplied). 706 S.W.2d 614, 618–21 (Tenn. 1986). However, the supreme court held in State v. Prier, that absent exigent circumstances, police officers must have a warrant in order to enter curtilage and seize marijuana that they have observed by lawful helicopter surveillance. 725 S.W.2d 667, 671–72 (Tenn. 1987).

conducted pursuant to probable cause and exigent circumstances." State v. Moore, 949 S.W.2d 704, 706 (Tenn. Crim. App. 1997). However, "[t]he burden is on the State to show that exigent circumstances ma[d]e the search imperative." State v. Yeargan, 958 S.W.2d 626, 641 (Tenn. 1997).

It is clear that the police had probable cause to believe that there was marijuana on Appellants' property. Trooper Peevehouse testified at the suppression hearing that while he was at an altitude of 900 feet, he saw an uncovered plant which he recognized through training and experience as a marijuana plant. Peevehouse then went down to an altitude of 300 feet and confirmed that what he had seen was marijuana. Because Peevehouse had observed what he knew through training an experience to be marijuana, it is clear that the initial entry was supported by probable cause.

However, it is also clear that the State failed to meet its burden of showing that the initial entry was due to exigent circumstances. First, there is no evidence in the record that there was a danger that the evidence would be destroyed before a warrant could be obtained. Peevehouse testified that he never saw anyone who would have been in the position to destroy the marijuana plants he had observed. Agent Lawson also testified that he had not seen anyone attempt to destroy evidence and he had no reason to believe that anyone was about to destroy the evidence. As this Court has previously stated, generalized fears that someone may destroy evidence is insufficient to establish the existence of exigent circumstances. State v. Curtis, 964 S.W.2d 604, 610–11 (Tenn. Crim. App. 1997). Second, the record does not indicate that the initial entry was necessary for officer safety. Agent Callahan testified that, as the leader of the

officers who initially entered the property, he had not received any information that Appellants were armed and dangerous. In addition, Agent Lawson also testified that he had received no information that Appellants had any weapons. Further, it is obvious that there could have been no threat to officer safety as long as the officers remained off of Appellants' property. Thus, we agree with Appellants that the initial entry of their property was an unreasonable search under the Fourth Amendment and Article I, Section 7.

B. Impermissible Taint

Although we agree with Appellants that the initial entry of their property was unlawful, we disagree that the warrant was tainted by the entry.

Although the exclusionary rule may operate to bar the admissibility of evidence directly or derivatively obtained from an unconstitutional search or seizure, it has long been recognized that evidence obtained by means genuinely independent of the constitutional violation is not subject to the exclusionary rule. See Wong Sun v. United States, 371 U.S. 471, 485–87, 83 S.Ct. 407, 416–17, 9 L.Ed.2d 441 (1963). "This 'independent source doctrine' rests upon the policy that 'while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied.'" State v. Clark, 844 S.W.2d 597, 600 (Tenn. 1992) (quoting Murray v. United States, 487 U.S. 533, 542, 108 S.Ct. 2529, 2535, 101 L.Ed.2d 472 (1988)). The Tennessee Supreme Court has stated that

> Pursuant to this doctrine, an unconstitutional entry does not compel exclusion of evidence found within a home if that evidence is subsequently discovered after execution of a valid warrant obtained on the basis of facts

> known entirely independent and separate from those discovered as a result of the illegal entry. Further, even "plain view" evidence observed during the warrantless entry will not be excluded so long as (1) the evidence is later discovered during a search pursuant to a valid warrant, (2) this valid warrant was obtained without reference to evidence uncovered during the illegal search, and (3) the government agents would have obtained the warrant even had they not made the illegal entry.
>
> In order for the subsequent warrant and search to be found genuinely independent of the prior unconstitutional entry, the . . . information obtained during the illegal entry may not have been presented to the issuing Magistrate.

Clark, 844 S.W.2d at 600 (citations omitted).

We conclude that the evidence found during the search was admissible because it was discovered after the execution of a valid warrant obtained on the basis of facts known entirely independent of the initial unlawful entry. The search warrant affidavit in this case set forth the following grounds for a warrant:

> affiant has received information from Tennessee Highway Patrol Trooper Dennis Peevyhouse [sic] that on September 29, 1994, he observed marijuana growing on the premises belonging to William Dean Ware located at Route # 4, Box 928, Waynesboro, Tennessee. The marijuana was approximately 100 feet from the house. Trooper Peevyhouse [sic] observed the marijuana while conducting an aerial search of Wayne County. Trooper Peevyhouse [sic] has been trained in the aerial detection of marijuana growing and has observed marijuana growing many times in the past that has lead [sic] to arrests and convictions. Furthermore, it has been the experience of your affiants that person [sic] who grow marijuana tend to keep marijuana, marijuana seeds, pictures and records in their residences.

In its letter of August 14, 1996, in which it denied the motion to suppress, the trial court found that the warrant in this case was supported by probable cause that resulted from the observations by helicopter. The trial court also found that the affidavit was based solely on the aerial observations. Although not

expressly stated, the trial court's ruling necessarily required a finding that the warrant was not tainted by the initial entry onto Appellants' property.[7]

It is clear from the express terms of the affidavit that the grounds for the warrant contained therein came entirely from the observations of Trooper Peevehouse and not from anything observed by officers on the ground. Although Appellants make much of the fact that Agent Tubbs reported to Peevehouse that he had observed marijuana when he made the warrantless entry onto Appellants' property, that fact is simply not a part of the affidavit. Thus, the magistrate who issued the warrant could not have considered anything observed by Tubbs or any of the other officers on the ground in deciding to issue the warrant. The affidavit stated that Peevehouse had special training and experience in spotting marijuana during aerial observations and that he had successfully detected marijuana from the air on many occasions. Furthermore, the affidavit stated that Peevehouse's information about the presence of marijuana on Appellants' property was based on his own direct, personal observations. Therefore, the affidavit, on its face, provides ample grounds for a neutral and detached magistrate to issue a warrant for Appellants' property.

Appellants' claim that Peevehouse's observations as recounted in the affidavit were not independent of the unlawful entry because Peevehouse directed Tubbs to enter the property and confirm his belief that he had seen marijuana. Essentially, Appellants contend that Peevehouse could not possibly have determined that marijuana was growing under the cheesecloth from an

[7]Indeed, in an order dated October 9, 1997, the trial court stated that it had previously found that the warrant was not based on information obtained from the warrantless entry.

altitude of 300 feet without the confirmation he received from Tubbs. However, Appellants' argument ignores the fact that Peevehouse expressly testified that he saw a marijuana plant that was not covered with cheesecloth and he was able to identify it as a marijuana plant by observing its color and texture and relying on his training and experience. It is true that Agent Callahan testified that he recalled that Peevehouse had directed Tubbs to the left of Appellants' residence to confirm the presence of marijuana. However, although Peevehouse testified that he told Tubbs that the marijuana was on the left, he specifically denied ever directing Tubbs to go to the spot to confirm the presence of marijuana. Further, although Tubbs testified that he had reported seeing marijuana, he specifically denied that he had been told to go to where the marijuana was or to confirm its presence. In addition, Agent Lawson also specifically denied that Tubbs had been directed by anyone to go to where Peevehouse had seen the marijuana. The trial court obviously resolved any conflicts in the evidence in favor of finding that Peevehouse was sure that he had seen marijuana and he did not need any confirmation. The evidence does not preponderate against this finding.

In short, we conclude that the warrant was issued based solely on the observations of Peevehouse that were completely independent of anything observed by the officers on the ground. In addition, because the warrant was obtained without any reference to evidence uncovered during the initial entry, because the evidence was subsequently discovered during the execution of a lawful warrant, and because the police would have obtained the warrant even if they had not made the initial entry, the trial court correctly concluded that all

evidence discovered during the search of Appellants' property was admissible. See Clark, 844 S.W.2d at 600. This issue has no merit.

IV. SEARCH OF MORGAN'S PROPERTY

Appellants contend that the trial court should have suppressed the evidence found in the building owned by Morgan because the building was not covered by the warrant. We disagree.

When challenging the reasonableness of a search or seizure, the defendant has the burden of first establishing a legitimate expectation of privacy in the place or property which is searched. Rawlings v. Kentucky, 448 U.S. 98, 104–05, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980). Although relevant to the standing inquiry, an ownership interest in the property searched is not a prerequisite to establishing a legitimate expectation of privacy because an individual may possess a legitimate expectation of privacy in another person's residence. State v. Turnbill, 640 S.W.2d 40, 45 (Tenn. Crim. App. 1982). This Court has held that the following seven factors are applicable to the standing inquiry:

> (1) property ownership;
> (2) whether the defendant has a possessory interest in the thing seized;
> (3) whether the defendant has a possessory interest in the place searched;
> (4) whether he has a right to exclude others from that place;
> (5) whether he has exhibited a subjective expectation that the place would remain free from governmental invasion;

(6) whether he took normal precautions to maintain his privacy; and
(7) whether he was legitimately on the premises.

State v. Oody, 823 S.W.2d 554, 560 (Tenn. Crim. App. 1991) (quoting United States v. Haydel, 649 F.2d 1152, 1154–55 (5th Cir.1981)).

In reviewing the applicable factors, we conclude that Appellants failed to establish that they had a reasonable expectation of privacy in Morgan's building. It is true that Appellants had a possessory interest in Morgan's building and they were legitimately entitled to use the building. Indeed, Ms. Ware testified that Morgan had given Appellants permission to use the building for storage in return for keeping the building in repair. It is also true that Appellants had manifested a subjective expectation that the building would remain free from governmental invasion and had taken normal precautions to maintain their privacy by keeping the building locked. However, we conclude that these factors are outweighed by the other factors which indicate that Appellants had no legitimate expectation of privacy in Morgan's building. First, it is undisputed that Morgan, and not Appellants, owned the building. In fact, Appellants did not have a lease or any other kind of written agreement that entitled them to use the property; their use was merely pursuant to a verbal agreement. Second, there is no indication in the record that Appellants ever claimed ownership of the property that was seized from Morgan's building. In fact, Ms. Ware specifically testified that she did not know who owned the marijuana growing equipment or the LSD that was found in the building. Third, and most importantly, there is no indication in the record that Appellants had the right to exclude others from Morgan's building. There is no indication that Appellants' agreement with Morgan gave them the exclusive right to use the building. Certainly, the record indicates that Morgan had a key

to the building and nothing indicates that he could not have used the building anytime he was in the area. Further, there is nothing in the record to indicate that Morgan could not have given his key to any number of people and also permitted them to use the building for storage. Under these circumstances, we conclude that Appellants did not have a legitimate expectation of privacy in Morgan's building. This issue is meritless.[8]

V. DENIAL OF FULL PROBATION

Mr. Ware contends that the trial court erred when it failed to impose full probation for the sentence for his marijuana conviction. We disagree.

Under Tennessee law, a defendant is eligible for probation if the sentence imposed is eight years or less and further, the trial court is required to consider probation as a sentencing alternative for eligible defendants. Tenn. Code Ann. § 40-35-303(a)–(b) (1997). However, even though probation must be automatically considered, "the defendant is not automatically entitled to probation as a matter of law." Tenn. Code Ann. § 40-35-303(b) (1997), Sentencing Commission Comments; State v. Hartley, 818 S.W.2d 370, 373 (Tenn. Crim. App. 1991). Indeed, a defendant seeking full probation bears the burden on

[8]We note that this Court held that evidence discovered under similar circumstances was admissible in State v. Brewer, 640 S.W.2d 33 (Tenn. Crim. App. 1982). In Brewer, the officers who were executing a search warrant for the defendants' property wandered over an indistinct property line and discovered a marijuana patch and a partially constructed house that contained marijuana. This Court held that the search was reasonable under the circumstances because the officers had not strayed far from the defendants' property and further, the defendants had failed to establish a privacy interest in their neighbor's property. Id. at 34–35. Similarly, Agent Lawson testified that even though a local officer had expressed the opinion that the building was not owned by Appellants, Lawson believed that it was part of their property or at least was connected with it because it was connected to one of Appellants' marijuana patches by a "well-worn path" that had marijuana cultivating equipment and cut marijuana stalks scattered along its entire length. **(II 123-24)** Thus, we conclude that, as was the search in Brewer, Lawson's search of Morgan's building was likewise reasonable under the circumstances.

appeal of showing that the sentence actually imposed is improper and that full probation will be in both the best interest of the defendant and the public. State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995). When determining suitability for probation, the sentencing court considers the following factors: (1) the nature and circumstances of the criminal conduct involved; (2) the defendant's potential or lack of potential for rehabilitation, including the risk that, during the period of probation, the defendant will commit another crime; (3) whether a sentence of full probation would unduly depreciate the seriousness of the offense; and (4) whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes. Tenn. Code Ann. §§ 40-35-210(b)(4), 40-35-103(5), 40-35-103(1)(B) (1997 & Supp. 1998); State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997); Bingham, 910 S.W.2d at 456.

As a Range I standard offender convicted of a Class E felony and sentenced to two years, Mr. Ware was presumed to be a favorable candidate to receive an alternative sentence for his marijuana conviction. Tenn. Code Ann. § 40-35-102(5)–(6) (1997). Indeed, Mr. Ware received an alternative sentence of seven months of confinement followed by one year and five months of probation. However, Mr. Ware contends that the trial court should have imposed probation for the entire two year period of his sentence.

The record indicates that in imposing the sentence for Mr. Ware's marijuana conviction, the trial court considered the fact that Mr. Ware had no previous record of criminal convictions and that manufacture of marijuana is not a violent crime. However, the trial court concluded that these factors were

outweighed by other considerations. The trial court noted that the evidence presented during the sentencing hearing indicated that Mr. Ware had been involved in the manufacture and sale of marijuana for at least five years before he was caught. The trial court also noted that Mr. Ware's operation was well-planned and sophisticated and that Mr. Ware had supported himself, his wife, and their two children with the proceeds of his marijuana growing operation. Thus, the trial court concluded that full probation was not appropriate because the seriousness of the offense would be depreciated if the sentence did not include some period of confinement.

We conclude that the trial court properly denied full probation based on the seriousness of the offense. The general rule is that "[i]n order to deny an alternative sentence based on the seriousness of the offense, 'the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree,' and the nature of the offense must outweigh all factors favoring a sentence other than confinement." Bingham, 910 S.W.2d at 455. We conclude that the circumstances of Mr. Ware's offense do not meet this standard. However, this Court has recognized that although the circumstances of the offense may not be sufficient in themselves to completely deny alternative sentencing, they may still be sufficient to deny full probation. See id. at 456. This is the case here. The photographs, videotapes, and documents seized from Appellants' home indicate that Mr. Ware was engaged in a well-organized marijuana growing and selling operation from at least 1989 until his arrest in 1994. Indeed, the record indicates that Mr. Ware had developed a fairly refined system for "cloning" and raising marijuana plants that were a cross between "M-39" and "Skunk #1" types of

marijuana. In fact, Agent Callahan testified that Mr. Ware had the most sophisticated operation that he had ever seen and Callahan estimated that Mr. Ware had made up to $100,000 in one year through the marijuana operation. Further, the record indicates that Appellants had 153 marijuana plants on their property when it was searched on September 29 and 30, 1994. Under these circumstances, we agree with the trial court that some period of confinement was necessary in order to avoid depreciating the seriousness of the offense.

In short, Mr. Ware has simply failed to meet his burden of showing that the sentence actually imposed is improper and that full probation will be in both his own best interest and in the best interest of the public. See id. Therefore, we conclude that a sentence of seven months of confinement followed by one year and five months of probation is entirely appropriate in this case. This issue has no merit.

Accordingly, the judgment of the trial court is AFFIRMED.

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JERRY L. SMITH, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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DAVID H. WELLES, JUDGE