STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2004
v	No. 246219 Wayne Circuit Court
WINDER MCAFEE, Defendant-Appellant.	LC No. 02-000223

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession of a controlled substance (heroin) in an amount less than 25 grams, MCL 333.7403(2)(a)(v), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced to two to four years' imprisonment for the heroin conviction and to a five-month term for the marijuana conviction. Defendant appeals as of right, arguing that he was denied his Fifth Amendment right prohibiting compelled self-incrimination by the admission of an answer to a routine booking question, and specifically defendant's response regarding his address, that was also unfairly prejudicial. He further argues that the police violated his Fourth Amendment right against unreasonable searches and seizures, along with violating MCL 780.656, when they failed to comply with the knock-and-announce requirement before forcibly entering the home where the drugs were found. We disagree and affirm.

I. Basic Facts

This case arises out of the execution of a search warrant issued for a home in Detroit. The search warrant was executed by five police officers who arrived at the home in a "raid" van. The search warrant authorized the seizure of illegal controlled substances and contraband, any evidence of ownership, occupancy, and possession, and it identified a 5'8," 150-pound, 24-year-old black male as selling drugs from the home. Police officer testimony conceded that the description did not fit defendant, who was in his forties. During the execution of the warrant, police found defendant sleeping on a bed in a bedroom of the home. An officer had to announce his presence twice, when entering the bedroom in which defendant was found, before defendant was awakened. According to police, it appeared that someone had been living or staying in the bedroom for some time. Police found a shoebox near defendant's feet that was filled with a zip lock bag of marijuana, three knotted clear plastic bags of marijuana, sixty folded foil packets of heroin, and $468 in cash. An elderly man, elderly female, and another female were also present

in the home at the time of the raid. Police did not find any evidence pertaining to the ownership of the home. Aside from defendant's presence, police did not find any physical evidence, such as a driver's license, that indicated that defendant was residing at the home. Police chose not to pursue determining whether there were identifiable fingerprints on the shoebox and contents in light of defendant's close proximity to the evidence.

Defendant was charged with possession with intent to deliver both marijuana and heroin, but the jury found him guilty of the lesser included offenses of simple possession of marijuana and heroin. Defendant argued at trial that, although he was under the influence of drugs when the police raided the home, which explained the police difficulty in arousing defendant from the bed, the contents of the shoebox did not belong to him and were not in his possession. The defense pointed to the individual described in the search warrant as the drug dealer who probably possessed the illegal drugs. Circumstances regarding the police entry into the home and defendant's booking and interrogation will be discussed below in the context of the appellate issues presented.

II. Custodial Interrogation, Routine Booking Questions, and *Miranda*[1]

Defendant first argues that he was denied his Fifth Amendment right prohibiting compelled self-incrimination by the admission of his answer to a routine booking question, and specifically defendant's response regarding his address, which was the address of the home where the drugs were found by police. Defendant contends that the prosecutor used the evidence, in violation of *Miranda*, to assist in proving that defendant had possession of the heroin and marijuana. Defendant further maintains that the questioning, although labeled as simply being part of constructing the *Miranda* interrogation record, was a deliberate attempt to elicit incriminating evidence.

Defendant did not raise this issue below; therefore, our review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

Miranda warnings need only be given in cases involving custodial interrogations. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). A custodial interrogation means questioning by law enforcement officers after a person has been taken into custody. *Id.* Volunteered statements of any kind are admissible and not barred by the Fifth Amendment. *Id.* The *Anderson* panel further explained:

> Interrogation, for purposes of *Miranda*, refers to express questioning or its functional equivalent. In other words, interrogation refers to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. [*Id.* at 532-533 (citation omitted).]

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Officer Gerry Johnson testified that he arrested defendant and spoke with him about thirty minutes after the warrant was executed. Defendant was advised of his constitutional rights, read aloud his constitutional rights from a standard rights form, acknowledged understanding his rights, and he initialed the constitutional rights form after each statement of a particular right. Defendant admitted that he was in the bedroom of the home when police entered the residence, that there were drugs at the residence, that the drugs were marijuana and heroin, and that drugs were being sold from the home. Defendant did not state that he owned, controlled, or possessed the drugs, nor did defendant state that he was selling drugs from the home. In fact, defendant was not asked these questions. Officer Johnson testified that defendant was not threatened and no promises were made in return for the waiver of defendant's constitutional rights. In regard to the particular issue presented, officer Johnson testified:

> *Q*. Okay, now, on the interrogation record itself, did he at anytime indicate to you where it was that he lived?
>
> *A*. Uh, yes, he did.
>
> *Q*. What address did he tell you he lived at?
>
> *A*. Uh, he gave the address, the 5733 Loughton [address where warrant was executed and drugs found].
>
> *Q*. Now, did you have uh, an oral discussion with him first?
>
> *A*. Uh, no, just uh, before I got to interrogation, our oral discussion was basically on the back of this . . . interrogation record. I asked what's his mother's name, father's name.

On the record before us, defendant has not established a plain error affecting his substantial rights. We initially note that the record is not entirely clear in regard to whether defendant had already been informed of his constitutional rights at the time he provided his address, or whether the information was provided before the rights were enunciated. It appears, however, that defendant may have provided his address as a preliminary step in preparing the interrogation record prior to the reading of defendant's rights. Proceeding with this assumption, we fail to see the prejudice where defendant immediately thereafter was informed of and waived his constitutional rights and responded to questioning.

Further, the evidence constitutes routine booking information that need not be suppressed. One of the important cases on this issue is *Pennsylvania v Muniz*, 496 US 582; 110 S Ct 2638; 110 L Ed 2d 528 (1990). In *Muniz*, four Justices held that police questions regarding the defendant's name, address, height, weight, eye color, date of birth, and current age were not required to be suppressed, even though the defendant had not been given his *Miranda* warnings, and despite the fact that the questions were asked while the defendant was in custody; they were of a routine booking nature and were not intended to elicit incriminating information for investigatory purposes. *Id.* at 600-602. Four other Justices found that booking questions are not testimonial in nature and thus do not warrant application of the Fifth Amendment privilege. *Id.* at 608.

Turning to the case at bar, the question regarding defendant's address and residence was of a routine booking nature, and the record does not reflect that the question was posed as part of a deliberate attempt to elicit incriminating information. Thus, the Fifth Amendment and *Miranda* are not implicated. We also note that Sergeant Michael Brown testified that defendant informed him that he resided at the home where the drugs were found. The record, however, does not reveal the context in which that information was provided. Finally, assuming that the evidence was inadmissible, we highly question the prejudicial effect of the evidence on the jury, where defendant was found sleeping on a bed in the home with the drugs by his feet, which would lead most reasonable persons to conclude that he lived at the location and that he possessed the drugs. We note that defendant never argued at trial that he did not reside at the location.

With respect to defendant's argument that the evidence concerning his address was inadmissible under MRE 401-403 analysis, the argument lacks merit. Defendant's address was relevant and probative on the issue of possession, MRE 401, and it cannot be said that the probative value was substantially outweighed by the danger of unfair prejudice, MRE 403. Relevant evidence is inherently prejudicial and damaging to some extent, and unfair prejudice does not mean damaging evidence. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212; 539 NW2d 504 (1995). It was not inequitable to defendant for the prosecutor to introduce the "address" evidence, nor was there a danger that the evidence would be given undue weight. *Id.* at 75-76. There was no plain error affecting defendant's substantial rights. Reversal is not warranted.

III. Knock and Announce

Defendant next argues that the police violated his Fourth Amendment right against unreasonable searches and seizures, along with violating MCL 780.656, when they failed to comply with the knock-and-announce requirement before forcibly entering the home where the drugs were found. Defendant contends that, while the police announced their presence, it was not established that they knocked on the door. Defendant further argues that the police waited only seconds before entering the home after announcement, which was not a reasonable period of time, and there were no exigent circumstances excusing strict compliance with the law.

Defendant did not raise this issue below; therefore, once again, our review is for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764, 774.

The Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry. *Richards v Wisconsin*, 520 US 385, 387; 117 S Ct 1416; 137 L Ed 2d 615 (1997). The knock-and-announce requirement forms a part of the reasonableness inquiry under the Fourth Amendment. *People v Fetterley*, 229 Mich App 511, 520-521; 583 NW2d 199 (1998). A "no-knock" entry is justified when the police have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or when it would inhibit the effective investigation of a crime by, for example, allowing the destruction of evidence. *Richards, supra* at 394.

MCL 780.656 provides:

> The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.

The knock-and-announce statute requires the police to proclaim their presence and purpose in a manner reasonably calculated to provide notice to the occupants under the circumstances. *People v Ortiz (After Second Remand)*, 224 Mich App 468, 479; 569 NW2d 653 (1997), rev'd on other grounds 456 Mich 945; 605 NW2d 666 (1998). It is not necessary that the occupants of the dwelling actually hear the police announcement. *Id.* "Factors that indicate whether an officer's announcement was reasonably calculated to provide notice under the circumstances include whether the announcement was made with sufficient volume for an average person inside to hear and the time between the announcement and a subsequent forcible entry." *Id.* (citations omitted).

Refusal of admittance is not limited to affirmative denials. *People v Slater,* 151 Mich App 432, 437; 390 NW2d 260 (1986). In fact, refusal of admittance will rarely be affirmative and oftentimes is present only by implication. *Id.* at 439, quoting *McClure v United States,* 332 F2d 19, 22 (CA 9, 1964). There are no set rules with respect to how long police must wait before entering a dwelling, but the circumstances should be such as to convince a reasonable man that permission to enter has been refused. *Slater, supra* at 439, quoting *McClure, supra* at 22. Police must allow a reasonable time for occupants to answer the door following announcement. *Fetterley, supra* at 521.

Here, officer Michael Panackia initially testified that, when he arrived at the home and went to the door of the home, he announced his "purpose and presence," but he was unsure and did not remember whether anyone knocked on the door. Later officer Panackia answered affirmatively when asked "when you get to the front of the location, you knock, and you go in?" Subsequently, on cross-examination by defense counsel, officer Panackia testified in greater detail regarding the entry.

> *Q*. And you run up to the front door, correct?
>
> *A*. Yes.
>
> *Q*. And you knock and announce your presence, or someone does, right?
>
> *A*. Right, that's correct, that's right.
>
> *Q*. Okay, and, and, you have to knock and announce it loudly, right?
>
> *A*. Right.

Q. And, and you do so, so that the folks inside would know that the police are there, right?

A. That's correct.

Q. Okay, and you're supposed to give, what's considered to be a reasonable period of time, for the folks in the house to get to the door, correct?

A. Correct, that's right.

Q. And, and that's kind of a judgment call, because you have [to take] into consideration the size of the house don't you?

A. That's correct.

Q. And this is a big house, it's a single family dwelling, but it's two stories isn't it[?]

A. Right.

Q. Okay. So, you announce presence and purpose, correct?

A. Correct.

Q. Waited a reasonable period of time?

A. Right.

Q. Any idea how long that would have been in this circumstance?

A. Umm, seconds.[2] I was ordered again, by my officer in charge [to] enter the dwelling.

Q. Sure. Now, when you say this, you don't say this, you, you, you yell presence and purpose, correct? Police, search warrant?

A. In a loud voice, yes.

Q. Right, so the folks inside can hear, right?

A. That's correct.

Q. So that they know you're the police, right?

[2] A review of the entire record fails to reveal whether the wait was two seconds, twenty seconds, sixty seconds, or how many seconds expired between announcement and entry.

A. Correct.

Q. For your safety, correct?

A. Right.

Q. Okay, and then you enter the house, right?

A. That's correct.

Q. Now, you didn't have to knock the door down this time did you?

A. No.

Q. All right, and so as you're entering the house, and you go upstairs, your [sic] yelling, "police," all the time, correct?

A. Uh, not constantly, I'm yelling, I say it, I don't know how many times I said it when I was in that house, but --

Officer Keith Marshall testified that "presence and purpose" were announced when police entered the dwelling, although he did not personally make the announcement.

On the record before us, we conclude that the police sufficiently complied with the constitutional and statutory requirements, as set forth above, in regard to their entry into the home. The manner of entry was reasonable and authority and purpose were announced. There was no plain error affecting defendant's substantial rights. Regardless, assuming that the requirements were not satisfied and that there was a failure to knock and the time between announcement and entry was unreasonable, exclusion of the evidence was not warranted.

In *People v Vasquez (After Remand)*, 461 Mich 235, 241-242; 602 NW2d 376 (1999), our Supreme Court stated:

> In light of our recent decision in *People v Stevens*, 460 Mich 626; 597 NW2d 53 (1999), we need not decide whether the police violated the constitutional and statutory knock-and-announce requirement under the circumstances of this case. Even if such a violation occurred, suppression of the evidence is not the appropriate remedy.
>
> Discussing the nature and basis of the suppression rule in this context, we cautioned in *Stevens* that the U.S. Supreme Court has made it "quite clear . . . that there has to be a causal relationship between the violation and the seizing of the evidence to warrant the sanction of suppression." 460 Mich 639. We also observed that "[t]he exclusionary rule is not meant to put the prosecution in a worse position than if the police officers' improper conduct had not occurred, but, rather, it is to prevent the prosecutor from being in a better position because of that conduct." 460 Mich 640-641.

> For these and other reasons, including the absence of a legislative intent to apply the exclusionary rule to evidence seized in violation of the statute, 460 Mich 645, this Court found the remedy of suppression unavailable. A key element of the analysis, in both the constitutional and statutory contexts, was the inevitability of discovery. The "knock and announce" principles do not control the execution of a valid search warrant – they only delay entry for a brief period. 460 Mich 642, 645-646. [Alteration and omission in original.]

Considering that defendant was apparently in a deep sleep and did not awake until an officer twice announced his presence *in the bedroom itself*, the discovery of the drugs pursuant to a valid search warrant was inevitable and any alleged failure to knock or await a reasonable time before entering was insignificant in relation to the discovery of the evidence. The prosecutor was not placed in a better position, assuming police misconduct. The exclusionary rule is inapplicable, and defendant fails to establish plain error affecting his substantial rights.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White