STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 6, 2005
v	No. 255264 Oakland Circuit Court
LISA MARIE WERTH, Defendant-Appellant.	LC No. 03-191111-FH

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of marijuana, MCL 333.7403(2)(d),[1] and was sentenced to 120 days in jail and to an eighteen-month period of probation. She appeals as of right, contending: (1) that the police did not have a legal right to enter the premises; (2) that the search of the duffle bag in the bathroom exceeded the scope of the warrantless entry; and (3) that the police violated the knock and announce statute. We affirm.

Facts

This case arises from the warrantless search of Aaron Willing's apartment. Police officer Robert Barker responded to a dispatch to the apartment to investigate possible domestic violence. Officer Barker was familiar with the apartment as a result of prior dispatches to Willing's apartments. As Officer Barker approached the apartment he heard a man and a woman yelling loudly at each other. He recognized the male voice as Aaron Willing, and had a good idea that the female voice was defendant's. Although Officer Barker could not discern the words, the voices were raised in anger. The voices quieted after Officer Barker approached the door and knocked loudly. Officer Barker pounded on the door with his fist and called to Willing to open the door. Deputies Vida and Kvalick arrived and, after consultation with Officer Barker, they agreed that they should enter the apartment to determine whether anyone inside was hurt.

Officer Barker used his baton to break a pane of glass next to the door handle of the locked door. He reached inside and unlocked the only door to the apartment. Officer Barker and

[1] Defendant was charged with the felony of possession with intent to deliver marijuana, MCL 333.7402(d)(iii), and convicted of the lesser offense of possession of marijuana.

the deputies proceeded up a flight of stairs to the apartment. While still three or four steps from the top of the stairs Officer Barker saw that Willing had blood on his face and hands. Officer Barker also noticed one woman and five or six men sitting on two couches in the living room. Willing began yelling at Officer Barker, denying that he had been in any kind of fight or altercation.

Officer Barker feared that defendant might be injured and asked Willing where defendant was. A deputy opened the bedroom door and informed Officer Barker that defendant was in the bedroom. When Officer Barker first looked in the bedroom from approximately three feet from the bedroom door he noticed what appeared to be loose marijuana on a dresser. Once inside the bedroom, he saw defendant lying on the bed, almost in a fetal position, with tears coming from her eyes, her face red, and her nose a little bit runny. Officer Barker asked defendant if she was okay or needed help. Defendant stated that she did not want to talk to Officer Barker and that she needed to go to the bathroom. Defendant got up from the side of the bed nearest the dresser and went to the bathroom, which was right around the corner from the bedroom door. Defendant closed the bathroom door and locked it. Officer Barker stood outside the bathroom door and never heard the toilet flush or water running. Defendant came out of the bathroom after two or three minutes, and no other person went into the bathroom.

Meanwhile, the deputies questioned the other persons in the apartment about what had happened and inquired whether anyone was hurt. Willing and the others refused to answer. At some point, the deputies notified Officer Barker that someone in the apartment had guns. And when defendant was putting a dog in the bedroom to confine it, Officer Barker saw defendant make a sweeping motion near the dresser and then close the bedroom door. Defendant then stepped toward the bathroom door, between the bathroom door and the bedroom door, and just stood there. Officer Barker suspected that defendant had done something to the suspected marijuana on the dresser, so he opened the bedroom door and noticed that all the suspected marijuana was off the dresser. He could see parts of the suspected marijuana on the carpet. Officer Barker later collected as many pieces as he could from the carpet and placed it into a plastic grocery bag.

Defendant was arrested and taken into custody. Officer Barker subsequently looked around the area where defendant had been. He stepped into the small bathroom and noticed the layout and several items lying around, including hair products, a small duffle bag with a hair dryer protruding, men's and women's clothing near the tub and shower, and a large pile of clothing near the door. Officer Barker was then summoned outside to deal with Willing.[2] Deputy Curtis and his canine, Benny, arrived and went into the apartment while Officer Barker was still attending to Willing. Benny did not alert to anything in the bedroom. But as Benny exited the bedroom he immediately pulled Deputy Curtis forcefully toward the bathroom. As they entered the bathroom, Benny went into a pile of clothing near the door. Benny began digging in the pile of clothes and uncovered a hidden dark nylon bag. Deputy Curtis picked up the bag, set it on the sink, unzipped it, and found inside a gallon-size plastic Ziploc type freezer

[2] At that time, the only people remaining in the apartment were in the living room with two deputies.

bag and women's clothing. He handed the nylon bag to Sgt. Coates, who searched the bag and found a hair tie, a gallon-size Ziploc bag with a green leafy material that appeared to be marijuana, and a luggage tag with defendant's name, address, and telephone number. Several gallon-size plastic bags, a few of them containing what appeared to be marijuana, were also found under the kitchen sink. Subsequent testing determined that the plastic bag inside the duffle bag contained 231.8 grams of marijuana. Testing also determined that the suspected marijuana from the bedroom was, in fact, marijuana. Defendant was charged with possession with the felony of possession with intent to deliver marijuana, MCL 333.7402(d)(iii).

I

When considering a motion to suppress evidence, this Court reviews a trial court's factual findings to determine if they are clearly erroneous and reviews a trial court's conclusions of law de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005); *People v Walters*, 266 Mich App 341, 352; 700 NW 2d 424 (2005).

Defendant first argues that the initial warrantless entry into the apartment was unlawful. We disagree. Under the exigent circumstances exception to the warrant requirement, police may enter a dwelling without a warrant if the officers have probable cause to believe (a) that a crime was recently committed on the premises, and (b) that evidence or perpetrators of the suspected crime remain on the premises. *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 192 (2001). In addition, the police must establish an actual emergency based on specific, objective facts indicating that immediate action is necessary (1) to prevent the imminent destruction of evidence, (2) to protect the police or others, or (3) to prevent the escape of a suspect. *Id.* at 749-750. Probable cause exists when the circumstances known to the police at the time of the search would lead a reasonably prudent person to believe that a crime has been or is being committed and that evidence will be found in a particular place. *Id.* at 750.

In *Beuschlein*, there was a 911 call indicating domestic violence and the presence of weapons. *Id.* at 755. The defendant argued that the 911 call alone did not constitute an exigent circumstance sufficient to justify the warrantless entry into his home. *Id.* at 750. This Court rejected that argument because (1) the 911 call reported a domestic violence and the presence of guns and knives on the premises, and (2) after repeated knocking, the officer heard noises from inside indicating wrestling or shuffling around. *Id.* at 755. Given those facts, the officers were justified in entering the home without a warrant when someone opened the door because the "home might have been harboring an individual who posed a threat to the officers or to another." *Id.* at 755.

Here, the trial court found that the entry of the officers into the apartment was for the purpose of checking to see if someone needed assistance and therefore fell within the exception of the exigent circumstances. Because no evidence was adduced at the hearing on the motion to suppress or to quash, the trial court's conclusion was necessarily based on the evidence adduced at the preliminary examination, which did, in fact, support that conclusion. Officer Barker was dispatched to the apartment in response to a 911 call reporting possible domestic violence with "a lot of banging and thumping like there was a fight going on." Upon arrival, Officer Barker heard yelling, and recognized Willing's voice as the man's and believed he recognized defendant's voice as the woman's. Officer Barker knocked and everything went silent.

The foregoing specific, objective facts known to the officers were sufficient to warrant a reasonable person to conclude that a crime was being or had recently been committed, namely, a domestic violence or assault, and that evidence or perpetrators of the suspected crime remained inside. *Beuschlein, supra* at 749. The officers had legitimate "concerns for the safety and welfare of the people [who] were involved in the fight." The evidence justified the officers' warrantless entry into the apartment under the exigent circumstances exception. *Id.* at 756.

II

Defendant asserts that the subsequent search of the apartment exceeded the scope of the warrantless entry and was unlawful. We agree.

Officer Barker saw marijuana left in plain view on top of a dresser and later witnessed defendant's attempt to conceal the drugs. Rather than securing the scene and seeking a warrant on the basis of this evidence, the responding officers requested a canine unit to assist in their search. The prosecution contends that an immediate search was necessary for the protection of the officers and to locate any weapons. However, these reasons are disingenuous. The officers clearly could have safely requested a warrant in the time that they requested the assistance of a canine unit. Defendant had already been placed under arrest and was no longer a threat to the officers' safety. Thereafter, Officer Barker conducted a visual search of the area, including the bathroom, and found no dangerous objects. Officer Barker then left the apartment and neither he nor defendant returned before the canine unit's arrival. Furthermore, the dog brought to the scene was not trained to search for weapons, and the handler specifically testified that he was asked to conduct a narcotics search. Accordingly, it is clear that the officers' warrantless search was improper.

Regardless of the impropriety of the search, defendant was not entitled to the suppression of this evidence. There was probable cause to support the issuance of a search warrant and, therefore, the evidence would inevitably have been discovered. See *People v Vasquez (After Remand)*, 461 Mich 235, 241-242; 602 NW2d 376 (1999); *People v Stevens (After Remand)*, 460 Mich 626, 637; 597 NW2d 53 (1999). We note, however, that the United States Supreme Court recently granted certiorari in *Hudson v* Michigan, 125 S Ct 2964; ___ US ___; 162 L Ed 2d 886 (2005), to consider whether evidence discovered during an illegal search is otherwise admissible pursuant to the inevitable discovery doctrine.[3] Therefore, the continuing validity of this doctrine in Michigan is questionable.[4]

[3] In *Hudson*, the police officers had a valid warrant to search the defendant's home, but entered in violation of the knock-and-announce rule. The trial court initially suppressed the evidence and dismissed the charges. This Court peremptorily reversed. *People v Hudson*, unpublished order of the Court of Appeals, entered May 1, 2001 (Docket No. 230594), lv denied 465 Mich 932; 639 NW2d 255 (2001). This Court affirmed the defendant's subsequent conviction, *People v Hudson*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket No. 246403), and the Michigan Supreme Court again denied leave to appeal. *People v Hudson*, 472 Mich 862; 692 NW2d 386 (2005).

[4] In its second order denying leave to appeal, the Michigan Supreme Court expressly declined to
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III

Defendant asserts that the trial court erred in admitting evidence seized in violation of the knock-and-announce statute, MCL 780.656. The Michigan knock-and-announce statute 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 the execution of the warrant. [MCL 780.656]

In this case, the police were not required to "knock and announce" because they made a warrantless entry justified by the exigent circumstances discussed above. "If police officers have a basis to conclude that evidence will be destroyed or lives will be endangered by delay, or if events indicate that compliance with the knock-and-announce statute would be a useless gesture, strict compliance with this statute may be excused." *People v Polidori*, 190 Mich App 673, 676; 476 NW2d 482 (1991); see also *People v Marsh*, 108 Mich App 659, 672; 311 NW2d 130 (1981). The circumstances justified any failure to knock and announce.[5]

Affirmed.

/s/ Alton T. Davis
/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper

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consider an opinion of the Sixth Circuit, which was inconsistent with Michigan law. See *People v Dice*, 200 F3d 978 (CA 6, 2000) (finding that evidence discovered after officers violated the knock-and-announce rule must be suppressed even where the officers were armed with a valid search warrant). In light of the United States Supreme Court's recent decision overruling another Michigan law, *Halbert v Michigan*, 125 S Ct 2582; ___ US ___; 162 L Ed 2d 552 (2005), despite the Michigan Supreme Court's assertion that it was not required to abide by the orders of lower federal courts, *People v Harris*, 470 Mich 882; 681 NW2d 253 (2004); *People v Bulger*, 462 Mich 495, 522 n 12; 614 NW2d 103 (2000), *Hudson* will also be decided on the basis of federal law

[5] We note, however, that Officer Barker substantially complied with the knock and announce statute because he pounded loudly and repeatedly on the door and specifically called for Willing, who knew his voice, and Willing heard the knocking. An announcement by Officer Barker that he was a police officer would have been futile under these circumstances. *Richards v Wisconsin*, 520 US 385, 394; 117 S Ct 1416; 137 L Ed 2d 615 (1997). An announcement of purpose by Officer Barker that he was a police officer would also have been futile because Willing "most likely already kn[ew] why the officers 'we[re] approaching." *Leaf v Shelnutt*, 400 F3d 1070, 1084 n 17 (CA 7, 2005). Willing in fact conceded that he knew his neighbor below would make a noise complaint, that he heard the knocking and calling of his name, and that "it occurred [to him that] it might have been the police" at the door.