

ARKANSAS COURT OF APPEALSDIVISION I
No. CACR12-177

ELFIDO GUTIERREZ

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered November 7, 2012

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT
[NO. 23CR-10-1135]HONORABLE DAVID L.
REYNOLDS, JUDGE

REVERSED AND REMANDED

ROBIN F. WYNNE, Judge

Appellant Elfido Gutierrez entered a conditional guilty plea under Arkansas Rule of Criminal Procedure 24.3(b) to charges of simultaneous possession of drugs and firearms, two counts of possession of a controlled substance (methamphetamine and cocaine), and possession of a firearm by certain persons.¹ He was sentenced to 120 months' imprisonment on each drug possession charge² and 72 months' imprisonment on the possession of a firearm by certain persons charge, to be served concurrently, and he was assessed various costs and fees. Gutierrez now appeals to this court, arguing that the circuit court erred in denying his motion to suppress because law-enforcement officers lacked the authority to enter the

¹Under the plea agreement, charges of theft by receiving (\$2500 or more) and misdemeanor possession of a controlled substance (marijuana) were nolle prossed.

²Imposition of the 120-month sentence for simultaneous possession of drugs and firearms was suspended.

residence where he and the evidence were located. We find merit in his arguments and reverse and remand.

Gutierrez was arrested on October 14, 2010, when federal agents were attempting to execute an arrest warrant for his nephew, Alonzo Gutierrez, at a residence in Vilonia. Appellant filed a motion to suppress the evidence, arguing that the seizure violated the Fourth Amendment, article 2 section 15 of the Arkansas Constitution, and the Arkansas Rules of Criminal Procedure.

At the suppression hearing, Special Agent Jon Vannatta of the Drug Enforcement Administration (DEA) testified that he was tasked with finding Alonzo. The State introduced an arrest warrant for Alonzo dated October 8, 2010, which had been issued by the United States District Court for the Eastern District of Arkansas. During the course of a long-term investigation, Alonzo had been observed at 83 Hollands Hill Loop in Vilonia on numerous occasions, including following narcotics transactions. Agent Vannatta stated that on October 13, 2010, Alonzo was observed in the front yard at the residence, where agents believed he was staying, and his truck was parked there. At around 6:00 a.m. on October 14, 2010, officers initiated ground and aerial surveillance to determine whether anyone was at the residence. Agent Vannatta testified that the officers' goal was to allow people to leave the residence and to then conduct traffic stops to make it safe to take Alonzo into custody. He stated that at around 6:20 a.m. a vehicle was observed traveling behind the house in the woods. At around 7:00 a.m., according to Agent Vannatta, he went to do ground reconnaissance to see if he could locate the vehicle or any people at the residence. He did not see any vehicles at or around the residence. He did, however, notice that windows were

open upstairs and one window in the back of the residence was broken; there was glass on the ground both inside and outside. Agent Vannatta testified that he thought there could be a kidnapping because of the possible break in. In the past, he had encountered cases where people had attempted to break into rural stash houses, kidnapped the occupants, and tortured them. He testified that they thought Alonzo “might” still “possibly” be there, they knew that the residence was a stash house for crystal methamphetamine, and crystal methamphetamine organizations are usually more violent and paranoid than other organizations.

According to Agent Vannatta, they decided to go in the house to look for Alonzo and make sure there was no “foul play.” Agent Vannatta entered through the broken window. The officers announced themselves in both English and Spanish, and they heard movement upstairs. Agent Vannatta stated that he secured the ground floor of the residence and then went to secure the stairwell at the far end of the house. At that point, he heard what sounded like a round being chambered into a pistol; he alerted the rest of the team and yelled “police” and “come out.” A woman appeared at the top of the stairs and indicated that there was another person upstairs. Agent Vannatta and Agent Juan Storey encountered appellant and took him into custody. They continued with their security sweep of the house. They did not find Alonzo or anyone else; they did find, in plain view, controlled substances and drug paraphernalia. Agent Storey advised appellant of his *Miranda* rights in Spanish. Agent Vannatta testified that agents recovered \$850 in currency on appellant, a plastic baggy containing a white powdery substance in appellant’s front pocket, aluminum foil with

suspected crystal methamphetamine in his other pants pocket, and numerous firearms in the bedroom that appellant occupied.

During cross-examination, Agent Vannatta clarified that at 6:20 a.m. the aerial surveillance team notified the ground team that headlights from a vehicle were seen in the woods; they determined that the vehicle had actually been on the adjoining property. According to Agent Vannatta, he “really didn’t want to be sitting out there all day waiting to see if anything was going to happen so [they] were ready to kind of move forward[.]” He testified that they made the decision to go in and secure the residence due to exigent circumstances; they saw the broken window and had “no idea if there was any foul play . . . or not.” Agent Vannatta stated that he was not aware of any reports of imminent danger or death that morning.

Agent Juan Storey testified that he was assigned to the DEA Task Force and had been for about six years. He stated that he conducted surveillance on the residence in question on October 13, 2010. He testified that on that date he had seen many individuals in the yard, as well as a black Chevy pick-up truck believed to be driven by Alonzo. On the following day, they arrived in the area at around 5:30 a.m. Agents observing from the air told them that they saw headlights behind the house. Agent Vannatta walked to the curtilage to see if there was any movement. As they approached the house, Agent Storey saw someone peek out of the upstairs window as they were yelling “police.” Vannatta entered the residence and opened the back door for the others.³

³There was testimony at the hearing that appellant signed a consent-to-search form, but that was not a basis for the trial court’s ruling.

After hearing the arguments of counsel, the circuit court denied appellant's motion to suppress, basing its ruling on two separate grounds: (1) the existence of a valid arrest warrant that authorized the officers to enter the property, and (2) exigent circumstances "as evidenced by the broken window and the surveillance that had been provided identifying this as a stash house." On appeal from the denial of a motion to suppress, we conduct a de novo review based upon the totality of the circumstances, reviewing findings of historical fact for clear error and giving due weight to inferences drawn by the trial court. *Gonder v. State*, 95 Ark. App. 144, 147–48, 234 S.W.3d 887, 891 (2006). Thus, the trial court's ruling will not be reversed unless it is clearly erroneous. *Id.*

I. *Arrest Warrant*

In *Payton v. New York*, 445 U.S. 573 (1980), the Supreme Court held that "for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Id.* at 603. In *Steagald v. United States*, 451 U.S. 204 (1981), the Supreme Court was asked to decide whether, under the Fourth Amendment, a law enforcement officer may legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant. The court concluded that, absent exigent circumstances or consent, the officer could not.

In the present case, appellant first asserts that the only issue to resolve is whether the searched residence was Alonzo's home. However, appellant conceded below that Alonzo resided at the house where appellant was arrested. Therefore, the State is correct when it asserts that the issue of whether the house was Alonzo's residence has been waived for appeal

purposes. *Mine Creek Contractors, Inc. v. Grandstaff*, 300 Ark. 516, 520, 780 S.W.2d 543, 544 (1989) (conceding a point before the trial court precludes a claim of error on appeal). Thus, for our purposes, it has been established that law-enforcement officers were attempting to execute an arrest warrant on Alonzo at what they reasonably believed to be his home, and the third-party analysis of *Steagald* is not applicable. Under *Payton*, officers executing an arrest warrant at a residence must have (1) a reasonable belief that the suspect resides at the place to be entered and (2) reason to believe the suspect is present. *United States v. Risse*, 83 F.3d 212 (8th Cir. 1996); *Benavidez v. State*, 352 Ark. 374, 375, 101 S.W.3d 242, 243 (2003). “[T]he officers’ assessment need not in fact be correct; rather, they need only ‘reasonably believe’ that the suspect resides at the dwelling to be searched and is currently present at the dwelling.” *Risse*, 83 F.3d at 216.

While appellant challenges both prongs of the *Payton* analysis, as noted above, he has waived any argument regarding whether Alonzo actually resided at the house. We therefore turn to whether the officers had a reasonable belief that Alonzo was present when they entered the house. Our supreme court has held that officers reasonably believed that a defendant was present at his residence at the time they went to execute the warrant because his car was parked there. *Benavidez v. State*, 352 Ark. 374, 101 S.W.3d 242 (2003). Here, Alonzo’s vehicle was not present; that fact, while not determinative, is important in assessing the reasonableness of the officers’ belief that Alonzo was home. The State argues that it was reasonable for agents to believe that Alonzo was present when they executed the warrant because it was in the early morning, a time when the residents of a house are most likely to be there, and because they had seen him standing outside the house the day before.

There must be some reasonable basis for officers to believe a suspect is present in order to enter a residence to execute an arrest warrant. Here, there was no vehicle present or any other reason to believe that Alonzo was there when agents made the decision to enter the house. Alonzo had been seen there the day before, but at that time his vehicle was there—making it even less likely that he was home the following day when his vehicle was not. Furthermore, Agent Vannatta admitted at the suppression hearing that he did not want to be “sitting out there all day waiting to see if anything was going to happen,” so he made the decision to go into the house. Under the particular facts of this case, we hold that the circuit court’s denial of appellant’s motion to suppress based on the existence of the arrest warrant was clearly erroneous.

II. *Exigent Circumstances*

Arkansas Rule of Criminal Procedure 14.3 provides an emergency exception to the search warrant requirement:

An officer who has reasonable cause to believe that premises or a vehicle contain:

- (a) individuals in imminent danger of death or serious bodily harm; or
- (b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or
- (c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed;

may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.

Our supreme court has explained:

Warrantless searches in private homes are presumptively unreasonable, and the burden is on the State to prove that the warrantless activity was reasonable. An

exception to the warrant requirement, however, occurs where, at the time of entry, there exists probable cause and exigent circumstances. Probable cause is determined by applying a totality-of-the-circumstances test and exists when the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. Exigent circumstances are those requiring immediate aid or action, and, while there is no definite list of what constitutes exigent circumstances, several established examples include the risk of removal or destruction of evidence, danger to the lives of police officers or others, and the hot pursuit of a suspect.

Steinmetz v. State, 366 Ark. 222, 225, 234 S.W.3d 302, 304 (2006) (internal citations omitted).

The State contends that the officers in this case had an objectively reasonable basis for believing that people were in imminent danger and their entry into the residence was proper under Rule 14.3(a). We note that at the time agents entered the house, they had been conducting surveillance for over an hour. They neither saw nor heard the window break, nor was there any movement from within the house. Agent Vannatta testified to the violent nature of methamphetamine organizations and stated that he had seen instances where kidnapped individuals were being tortured, but there was no basis for believing that a kidnapping was underway that morning. This is exactly the type of "potential or speculative harm" that this court has rejected as exceeding the scope of the imminent danger exception. See *Starks v. State*, 74 Ark. App. 366, 372, 49 S.W.3d 122, 126 (2001). We hold that the trial court clearly erred when it denied Gutierrez's motion to suppress based on exigent circumstances.

Reversed and remanded.

VAUGHT, C.J., and BROWN, J., agree.

James Law Firm, by: William O. "Bill" James, Jr., for appellant.

Dustin McDaniel, Att'y Gen., by: Kathryn Henry, Ass't Att'y Gen., for appellee.