**IN THE COURT OF APPEALS OF IOWA**

No. 2-702 / 11-1319
Filed October 31, 2012

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**JEREMIAH JOSEPH EILANDER,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Jasper County, Darrell Goodhue, Judge.

The defendant appeals from a conviction of conspiracy to manufacture methamphetamine. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Michael K. Jacobsen, County Attorney, and Scott W. Nicholson, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

**DANILSON, J.**

Jeremiah Eilander appeals from conviction of conspiracy to manufacture methamphetamine after a bench trial on the minutes of testimony. He contends the court erred in denying his motion to suppress evidence seized upon an April 22, 2011 search of the residence occupied by Eilander. He also contends trial counsel was ineffective in failing to assert the search warrant lacked probable cause.

## I. Background Facts and Proceedings.

Police officers attempting to execute an arrest warrant for Eilander on an unrelated matter knocked on the door of a residence. No one answered the door, but the officers present smelled the strong odor of burnt or burning marijuana coming from the residence where they believed Eilander was staying. Officers remained on sight while a search warrant was obtained.

The search warrant application was prepared by a narcotics task force member Deputy Aaron Groves, who related his general training and experience and those of fellow officers concerning investigations of drug dealers and their common habits and methods of operation. With respect to the owner of the residence, Gene Lund, Deputy Groves set forth the following grounds:

> On 8-23-10 the [drug] Task Force received an anonymous report that a subject by the name of Butch is selling drugs from the residence located at [xxxx] S. 4th Ave. E. A check of Jasper County Jail records shows Gene Arden Lund, Jr. to have an AKA of Butch.
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> A check of IA DOT records shows Gene Arden Lund, Jr. to reside at [xxxx] S. 4th Ave. E., Newton, IA 50208.
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> A check of the Jasper County Assessor's website, shows the property located at [xxxx] S. 4th Ave. E., Newton, IA 50208 to belong to Gene and Vicky Lund.

> On 4-22-11 at approximately 2130 hours Officer Brian Foster attempted to make contact with subjects inside the residence located at [xxxx] S.4th Ave. E., Newton, IA 50208. Officer Foster was looking for a subject with a valid arrest warrant. Officer Foster stated to me that he could smell the odor of burnt marijuana coming from inside the residence. Officer Foster stated that there was a strong smell of burnt marijuana on the front deck of the residence and around the windows of the residence. Officer Foster was able to identify the smell of burnt marijuana based on his training and experience.
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> A check of Gene Arden Lund, Jr.'s criminal history shows a prior conviction for possession of a controlled substance dated 2-17-11.

A search warrant issued. About one and one-half hours after the officers first approached the residence, the search entry team including Officers Chad Plowman and Jeff Morrison, again approached the residence. The team went up a set of wooden steps leading from the driveway to an enclosed front porch. The residence had "two front doors." First, there was an enclosed porch with its own separate door. Then inside the porch, about four to five steps and a "bit of a turn" from the porch door, was another door that led into the living room of the home. As the officers ascended the wooden steps to approach the porch door, Eilander opened the door from the living room to the enclosed porch and stepped out into the enclosed porch with his hands up. Officer Plowman testified the officers entered the porch, yelled for Eilander to get down on the floor, and some officers then proceeded to the front door of the residence, which was still open. They then announced their presence and purpose and entered the residence. Officers found Lund and another individual inside. These two were secured and the search warrant was executed.

Eilander moved to suppress items seized during the search, asserting the manner of entry violated both the federal and state constitutions, as well as the "knock-and-announce" rule of Iowa Code section 808.6 (2011). At the hearing on the motion to suppress, according to Officer Plowman, if Eilander had not been coming out the front door of the residence as officers were approaching, the officers would have knocked and announced at the enclosed porch door first, and then knocked and announced again at the door to the living room from inside the enclosed porch. However, when Eilander opened the door from the residence to the front porch, he stepped out and put his arms up. Officer Plowman testified, "At that point our safety and the preservation of evidence was compromised, so we made entry [onto the porch] without any further knock-and-announce."

The district court denied the motion to suppress, ruling in part:

> If the parties have a reasonable suspicion that knocking and announcing would be dangerous or inhibit their investigation by allowing the destruction of evidence, they can dispense with any "knock and announce" requirement. In this case the defendants obviously knew that the police were present. The police had knocked and been in the vicinity of the property to be searched for about 30 minutes in an attempt to execute a warrant to arrest one of the occupants. The officer did not attempt to enter until Eilander, the person to be arrested, was exiting the premises. The occupants had admittedly sent him out so that the arrest could be achieved. It is totally reasonable for the officers to assume that the occupants were in the process of destroying evidence, trying to escape, or even more importantly, preparing to defend themselves. Exigent circumstances obviously existed.

The district court then ruled in the alternative that the exclusionary rule would not apply in any event, citing *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) ("[T]he knock-and-announce rule has never protected . . . one's interest in preventing the government from seeing or taking evidence described in a

warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.").

Eilander appeals, contending the district court erred in finding exigent circumstances excused the announcement requirement before entering the residence. He also argues we should adopt an exclusionary rule for violations of knock-and-announce, pursuant to Article 1, section 8 of the Iowa Constitution. Eilander also contends trial counsel was ineffective in failing to move to suppress the evidence seized on the ground the search warrant was not supported by probable cause.

## II. Scope and Standard of Review.

Because Eilander's contentions raise constitutional issues, our review is de novo. *See State v. Breuer*, 808 N.W.2d 195, 197 (Iowa 2012).

## III. Discussion.

*A. Knock-and-announce*. Iowa Code section 808.6 provides in part, "The officer may break into any structure or vehicle where reasonably necessary to execute the warrant if, after notice of this authority and purpose the officer's admittance has not been immediately authorized." This knock-and-announce rule has been held to implicate the Fourth Amendment's requirement of reasonableness for searches and seizures. *See Breuer*, 808 N.W.2d at 202; *State v. Cohrs*, 484 N.W.2d 223, 225 (Iowa Ct. App. 1992) ("Implicit in prior case law is the assumption that the 'knock and announce rule' in Iowa Code section 808.6 embodies the reasonableness requirement for a Fourth Amendment search.").

However, "[a]bundant authority exists for the proposition exigent circumstances will excuse compliance with constitutional and statutory announcement requirements." *State v*. *Brown*, 253 N.W.2d 601, 603 (Iowa 1977); *Cohrs*, 484 N.W.2d at 225. In *Brown*, the court noted three exigent circumstances that have been held to excuse the announcement requirement:

> "Even if probable cause exists for the arrest of a person within, the Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, except (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted."

253 N.W.2d at 603 (quoting *Ker v*. *California*, 374 U.S. 23, 47 (1963) (Brennan, J., plurality opinion)). However, the court noted that "the mere fact that evidence easily destroyed is sought will not alone provide sufficient basis for noncompliance with the announcement rule." *Id*. at 604.

In *Wilson v*. *Arkansas*, 514 U.S. 927, 930 (1995), the United States Supreme Court held that the knock-and-announce principle forms a part of the Fourth Amendment reasonableness inquiry. The *Wilson* court concluded, however, the requirement is not inflexible and could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given." 514 U.S. at 936. In *Richards v*. *Wisconsin*, 520 U.S. 385, 390 (1997), the Supreme Court stated, "It is indisputable that felony drug investigations may frequently involve both of these circumstances." But the

Court did not adopt a blanket announcement exception in drug investigations; rather, the court found "it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement." *Richards*, 520 U.S. at 394. "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id*.

Upon our de novo review, we conclude the no-knock entry here was reasonable under the circumstances. The police had knocked at the door attempting to execute an arrest warrant of the defendant and received no response. However, a strong smell of burnt marijuana was emanating from the residence. Law enforcement remained on the scene while a search warrant was obtained to search the residence for controlled substances. As they approached the residence for the second time as a search entry team, one occupant of the residence stepped out and into the enclosed porch, with his hands up. Officers knew the residence belonged to someone other than Eilander, whom they knew from prior dealings. They could reasonably suspect that the announcement requirement at that point was "futile" or "would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *See id*. Moreover, by the door opening to the residence, the safety of the officers was

compromised. Officers did then announce their presence and purpose before entering the residence from the porch.

In *Cohrs*, this court found exigent circumstances supported quick entry when, after providing a name, an officer received no response from the occupant, and could see drug paraphernalia through the door, which was slightly ajar. 484 N.W.2d at 225-26. We noted:

> The officer knew his presence had been exposed in a potentially criminal setting. Here, an even greater potential exists for danger to the officer who stands by waiting. Critical seconds pass by while opportunities exist for evidence to be destroyed or weapons to be acquired and used. Additionally, the door to the dwelling was partially open. Regardless of the degree to which the door was ajar, the officer could not be certain his presence had not been viewed from within. Absent this certainty, no officer can be reasonably expected to stand by and await a potentially dangerous response. We find, in balancing the potential dangers present, the officer's decision to enter rather than wait was reasonably necessary. Such conduct under the circumstances did not subject him to any greater potential endangerment than that which already existed.

*Id*.

We agree with the district court that the failure to fully comply with section 808.6 was reasonable under the circumstances as compliance was futile and excused by exigent circumstances.

Because we find no knock-and-announce violation, we need not address the district court's alternate ruling that that the exclusionary rule does not apply to such a violation. *See Hudson*, 547 U.S. at 594. Nor do we need address the defendant's request that we conclude the exclusionary rule does apply based on our state constitution. *See generally Breuer*, 808 N.W.2d at 200 (noting that where a defendant does not advance a reason for interpreting the state

constitution differently than the federal constitution, "we ordinarily consider the substantive standards under the Iowa Constitution the same as those developed by the United States Supreme Court under the Federal Constitution" (internal quotation marks omitted)).

We uphold the denial of the motion to suppress.

*B*. *Ineffective assistance*. Eilander argues that his trial counsel was ineffective in failing to move to suppress on grounds the warrant was not supported by probable cause. In order to prevail on his ineffectiveness claim, the defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v*. *Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Because counsel has no duty to raise a meritless claim, see *State v*. *Utter*, 803 N.W.2d 647, 652 (Iowa 2011), we review the record to determine whether a judge could find probable cause to issue the April 22, 2011 warrant.

"The test for probable cause is whether a reasonably prudent person would believe that a crime has been committed on the premises to be searched or evidence of a crime is being concealed there." *State v*. *Green*, 540 N.W.2d 649, 655 (Iowa 1995).

> This nexus between criminal activity, the items to be seized and the place to be searched can be found by considering the type of crime, the nature of the items involved, the extent of the defendant's opportunity for concealment, and the normal inferences as to where the defendant would be likely to conceal the items.

*State v*. *Gogg*, 561 N.W.2d 360, 365 (Iowa 1997) (internal quotation marks omitted). "The facts and information presented to establish this finding need not rise to the level of absolute certainty, rather, it must supply sufficient facts to

constitute a fair probability that contraband or evidence will be found on the person or in the place to be searched." *State v*. *Thomas*, 540 N.W.2d 658, 662-63 (Iowa 1995). We do not make an independent determination of probable cause; rather, we merely decide whether the issuing judge had a substantial basis for concluding probable cause existed. *Gogg*, 561 N.W.2d at 363.

In determining whether a substantial basis existed for a finding of probable cause, we are "limited to consideration of only that information, reduced to writing, which was actually presented to the [judge] at the time the application for the warrant was made." *Id*. (alteration in original). In determining whether a search warrant application demonstrates the existence of probable cause, Iowa follows the "totality of the circumstances" test established in *Illinois v*. *Gates*, 462 U.S. 213, 238 (1983). *State v*. *Randle*, 555 N.W.2d 666, 670 (Iowa 1996). In *Gates* the United States Supreme Court wrote:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

462 U.S. at 238. Under the "totality of the circumstances" approach, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. *Id*. at 243 n.13. Because there is a preference for warrants, we resolve doubtful cases in favor of their validity. *State v*. *Beckett*, 532 N.W.2d 751, 753 (Iowa 1995).

Here, we have reviewed the information provided to the issuing judge. While we observe the slight basis[1] for finding Officer Brian Foster qualified to recognize the odor of burnt marijuana, under the totality of the circumstances presented – the tip about ongoing drug sales on the premises, the residence owner's 2011 controlled substances conviction, and the detection of a strong odor of burnt marijuana by an officer – we conclude a reasonably prudent person would believe that a crime had been committed on the premises to be searched. Particularly in light of the preference to uphold warrants in close cases, we conclude Eilander has failed to prove the prejudice prong of his ineffectiveness claim. We therefore affirm his conviction.

**AFFIRMED.**

[1] Deputy Grove stated that "Officer Foster was able to identify the smell of burnt marijuana based on his training and experience." Although this statement is conclusory it does reflect that Officer Foster has "some" training and "some" experience in detecting the smell of marijuana.