

STATE OF LOUISIANA

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NO. 2003-K-1476

VERSUS

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COURT OF APPEAL

LAWRENCE MCDANIELS

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 434-998, SECTION "J"

Honorable Darryl A. Derbigny, Judge

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CHIEF JUDGE JOAN BERNARD ARMSTRONG

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(Court composed of Chief Judge Joan Bernard Armstrong, Judge David S.
Gorbaty and Judge Edwin A. Lombard)

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WRIT GRANTED; JUDGMENT REVERSED; CASE REMANDED

STATEMENT OF THE CASE

This matter comes before us pursuant to the application of the State of Louisiana for a writ of certiorari and prohibition asking that we reverse the trial court's ruling in favor of the defendant on the defendant's motion to suppress evidence, namely contraband found in a safe.

On November 25, 2002, the defendant, Lawrence McDaniels, was charged with one count of possession of at least twenty-eight but less than 200 grams of cocaine. In the same bill of information, Derek Dixon was charged with one count of distribution of cocaine. Each defendant has pled not guilty to his charge. On March 11, 2003 the court heard the defendants' motion to suppress the evidence and took the matter under advisement. On July 11 the court granted the motion to suppress the evidence.

FACTS

The evidence in this case was seized pursuant to a search warrant, but only after the residence for which the warrant was issued had already been forcibly entered by law enforcement officers. The warrant was issued for 2114 Clara Street, which is the right side of a double. According to the search warrant affidavit, within seventy-two hours of October 22, 2002

N.O.P.D. Det. Robert Ferrier received a tip from a reliable, confidential informant concerning a delivery of narcotics to 2114 Clara Street on October 22 between noon and 1:00 p.m. The search warrant affidavit went to state that the C.I. indicated that an unknown black male, whom he described, was to receive a large amount of crack cocaine from another unknown black male. The C.I. stated the cocaine would be contained in a portable safe. The C.I. further stated the man who was to receive the cocaine drove a mid to late 1990's gold Honda Accord. The C.I. indicated he/she learned of this delivery from overhearing talk about it, and he/she had also observed several narcotics transactions from the location within the preceding seventy-two hours.

The affidavit indicates Det. Ferrier set up a surveillance of the residence at 2114 Clara at approximately 11:00 a.m. on October 22, with other officers stationed in the area. At approximately 12:25 p.m. Det. Ferrier saw a gold mid-1990's Accord drive into the 2100 block of Clara and park. A man who fit the description given by the C.I. got out of the Honda and leaned on the trunk. Soon thereafter, a white Dodge van pulled up and parked behind the Honda. While the driver of the van, later identified as Derek Dixon, remained in the van, the unknown man from the Honda opened the van's passenger door, reached inside, and removed a portable

safe. The man walked back to the Honda and placed the safe on the trunk. The man produced a key and opened the safe, removing a brown paper bag. The man opened the bag and removed several white objects, counting them. The affidavit indicates Det. Ferrier recognized the objects as being consistent with crack cocaine. The man then replaced the objects in the bag, replaced the bag inside the safe, closed the safe, and stated to Dixon, "It's all there." The man walked to 2114 Clara, unlocked the door, and walked inside carrying the safe. Approximately thirty seconds later the man walked back outside, empty-handed. Dixon drove from the area, and the man entered the Honda and also drove away. Det. Ferrier radioed the descriptions of the two men, the van, and the Honda to the other officers. However, these officers were unable to find either vehicle at that time.

Det. Ferrier continued his surveillance of the residence. At some point he observed a black female, later identified as Helen Morgan, walk up to the residence, unlock the door, and enter. At 3:30, he saw Dixon drive back on the scene, park in the 2200 block of Clara, and begin "hanging" with other people in that block. Shortly after 4:00 p.m. he noticed two men looking and pointing at his surveillance position. The men quickly walked to 2114 Clara and knocked on the door, continuing to stare at Det. Ferrier's position. Fearing his surveillance had been compromised, Det. Ferrier

radioed the other officers to secure the residence. A few minutes later the officers arrived and entered the residence to secure it. The officers detained Ms. Morgan inside the residence, and other officers detained Dixon in the next block. Based upon these facts, Det. Ferrier obtained a search warrant for 2114 Clara.

Det. Ferrier's testimony at the suppression hearing basically tracked the information set forth in the search warrant affidavit. In addition, he testified he was stationed approximately fifteen to twenty yards from the residence during the surveillance. Det. Ferrier stated the man in the Honda was later identified as Lawrence McDaniels, whom he identified at the hearing. He stated that prior to opening the safe on the street, McDaniels looked up and down the street. Det. Ferrier testified the two men whom he suspected had compromised his surveillance actually spoke with Ms. Morgan at the door, after which she closed the door and the two men walked away before the other officers arrived to secure the residence. He stated that because the men actually spoke with her, he feared she might try to destroy any contraband in the residence while the search warrant affidavit was being prepared. He testified that when no one answered the officers' knock, they broke down the door and entered. He stated that when the officers entered the residence, they found Ms. Morgan and a baby inside.

Det. Ferrier testified that once the officers were inside the residence, he went to the 2200 block where Dixon had been apprehended. He testified the officers advised Dixon of his rights, confiscated his van, and took Dixon and his van to the Sixth District police station. Det. Ferrier testified Dixon initially waived his rights and told him that although he did not know the name of the man in the Honda, he had previously purchased cocaine from him. Dixon told him that the man had met with Dixon at another location on Clara Street earlier that day, had given him the safe, and had instructed Dixon to return the safe to him in the 2100 block of Clara later. Det. Ferrier testified that when he could not guarantee to Dixon that Dixon's help would keep him from being charged in connection with this matter, Dixon told him he had nothing else to say.

Det. Ferrier stated he prepared the search warrant affidavit, and shortly after 7:00 p.m., a magistrate signed it. Det. Ferrier then went back to 2114 Clara, and the officers executed the warrant. Det. Ferrier searched the living room of the residence and found the safe he had seen McDaniels take inside the double. He testified that because he did not have a key to the safe, he dropped it on the ground a few times to break the lock. When he opened the safe, he found the paper bag inside, and inside the bag he found three clear plastic bags containing approximately 120 grams of crack cocaine and

a razor blade with what appeared to be cocaine residue. Other officers searched the residence and found paperwork in Ms. Morgan's name.

Det. Ferrier testified he ran the license plate number of the Honda and learned it was registered to McDaniels. He stated the officers then tried to pull up McDaniels' photograph, but the system was down and they were unable to do so. Two days later, another officer put together a photographic lineup from which Det. Ferrier chose McDaniels' photograph. At that point, they obtained a warrant for McDaniels' arrest.

Det. Ferrier admitted Ms. Morgan was not at the residence when McDaniels took the safe inside. He testified the only contraband that was seized was found in the safe. He stated the officers did not stop the two men who appeared to alert Ms. Morgan to the surveillance because of the limited number of officers involved in the surveillance. He admitted no contraband or drugs were seized from Dixon.

ANALYSIS

The defendant does not contend that there was insufficient probable cause for the issuance of the search warrant. Rather, the trial court suppressed the evidence because it found there were no exigent circumstances to allow the officers to enter the residence prior to the

issuance of the search warrant. In the absence of exigent circumstances, an officer cannot lawfully enter a residence without a warrant. Kirk v. Louisiana, 536 U.S. 635, 122 S.Ct. 2458 (2002); Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980).

Whether the State can show exigent circumstances, and we do find exigent circumstances in this case as will be explained later in this opinion, is not the most important factor in this case: the dispositive factor in this case is the fact that the evidence suppressed was not seized until after the search warrant was issued. The defendant relies on the United States Supreme Court case of Kirk v. Louisiana, 536 U.S. 635, 122 S.Ct. 2458 (2002), in support of its argument that in the absence of exigent circumstances, all evidence seized after an unlawful warrantless entry into a residence by an officer must be suppressed. However, in Kirk the evidence was seized prior to the issuance of the warrant, which fact the Supreme Court found to be significant:

Although the officers sought and obtained a search warrant while they detained petitioner in his home, **they only obtained this warrant after they had entered his home, arrested him, frisked him, found a drug vial in his underwear, and observed contraband in plain view in the apartment.** [Emphasis added.]

Id., 536 U.S. at 636, 122 S.Ct. at 2458. Thus the facts in Kirk are clearly

distinguishable from those of the instant case where the safe containing the contraband was only opened **after** the warrant was issued. The reasoning in Kirk also has no bearing on the outcome of the instant case. In Kirk the Supreme Court referred to the defendant's unconstitutional arrest and "the search 'incident thereto,'" whereas in the instant case the search of the safe was conducted "incident" to the execution of the search warrant, and was not "incident" to the warrantless entry into the residence.

The defendant also cites United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, but no search warrant was ever issued in that case. Moreover, Chadwick was subsequently abrogated by the Supreme Court in California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619. Thus, Chadwick has no bearing on the outcome of this case.

Likewise, no search warrant was ever issued in either State v. Melbert, CR-140 (La.App. 3 Cir. 11/30/94), 649 So.2d 740, or State v. Harris, 97-2269 (La.App. 4 Cir. 1/20/99), 727 So.2d 670, the other two cases cited by the defendant in his response to the State's writ application. Therefore, those cases provide no authority in support of the defendant's argument.

Additionally, as indicated earlier, we also find that even in the absence of a warrant, the search and seizure of the contraband was permissible because there *were* exigent circumstances to justify the warrantless entry to

secure the residence while the warrant was being prepared.

The exception to the warrant requirement to which the State refers was described in State v. Jones, 2002-1931, p. 5-6 (La. App. 4 Cir. 11/6/02), 832 So. 2d 382, 386:

In *State v. Page*, 95-2401, p. 10 (La. App. 4 Cir. 8/21/96), 680 So. 2d 700, 709, this court discussed the warrantless entry into a protected area:

There is a justified intrusion of a protected area if there is probable cause to arrest and exigent circumstances. *State v. Rudolph*, 369 So.2d 1320, 1326 (La. 1979), cert. den., *Rudolph v. Louisiana*, 454 U.S. 1142, 102 S.Ct. 1001 (1982). Exigent circumstances are exceptional circumstances which, when coupled with probable cause, justify an entry into a "protected" area that, without those exceptional circumstances, would be unlawful. Examples of exigent circumstances have been found to be escape of the defendant, avoidance of a possible violent confrontation that could cause injury to the officers and the public, and the destruction of evidence. *State v. Hathaway*, 411 So.2d 1074, 1079 (La. 1982).

See also *State v. Julian*, 2000-1238 (La. App. 4 Cir. 3/4/01), 785 So. 2d 872; writ den. 2001-1247 (La. 3/22/01), 8111 So.2d 920; *State v. Brown*, 99-0640 (La. App. 4 Cir. 5/26/99), 733 So. 2d 1282.

See also United States v. Rubin, 474 F.2d 262 (3 Cir.1973), which set forth

factors that might lead officers to conclude a warrantless entry is necessary to prevent the destruction of evidence: (1) the amount of time needed to obtain a warrant and the immediacy of the circumstances; (2) a reasonable belief contraband is in danger of being removed or destroyed; (3) the degree of danger to officers guarding the site of the contraband while the warrant is being obtained; (4) information that the person possessing the contraband is aware the officers know they are in possession; and (5) the ready ability of the person in possession of the contraband to destroy it and/or escape. See also State v. Wright, 2002-2354 (La. App. 4 Cir. 6/18/03), 850 So. 2d 778.

In State v. Kirk, 2000-0190 (La. App. 4 Cir. 11/13/02), 833 So. 2d 418, officers conducting a surveillance observed four suspected drug transactions from the defendant's apartment, at least one of which involved the defendant. The officers stopped one suspected buyer near the apartment. Finding contraband, the officers went back to the defendant's apartment, entered it to "secure" it, arrested the defendant, and found contraband on his person pursuant to the search incident to his arrest. On appeal of his conviction, the defendant alleged the officers' warrantless entry into his house was illegal due to the absence of exigent circumstances. In its first opinion, State v. Kirk, 2000-0190 (La. App. 4 Cir. 11/15/00), 773 So. 2d 259, this court found that because the officers had probable cause to arrest

the defendant, this court need not consider whether there were exigent circumstances to allow the officers to enter the house to secure it while they obtained a warrant. The Louisiana Supreme Court denied writs. State v. Kirk, 2000-3395 (La. 11/9/01), 801 So. 2d 1063. On review, the U.S. Supreme Court reversed, noting that probable cause by itself would not have justified the officers' entry into the apartment. The Court remanded the case for a determination of whether there were exigent circumstances which would have justified the officers' entry. Kirk v. Louisiana, 536 U.S. 635, 122 S.Ct. 2458 (2002). On remand, this court found the facts did not support a finding of exigent circumstances, and it suppressed the evidence and reversed the defendant's conviction. State v. Kirk, 2000-0190 (La. App. 4 Cir. 11/13/02), 833 So. 2d 418.

Likewise, in Jones, supra, this Court found there were no exigent circumstances to justify the officers' warrantless entry into a residence. The officers conducted a surveillance of a targeted residence for three days over a period of one and a half months. On each occasion they observed suspected drug transactions, and after the first two days they had obtained an arrest warrant for one of the participants. In addition, they had also begun preparing a search warrant application for the residence, but were waiting for additional information from the third day of surveillance. After watching

more suspected drug sales on the third day of the surveillance, the officers stopped one of the participants “near” the residence. After finding contraband and arresting the participant, they then entered the residence to secure it while they sought the search warrant and in fact began searching the residence prior to the issuance of the warrant. The trial court suppressed the evidence, finding the fact that the participant was arrested “near” the residence did not give the officers exigent circumstances to enter the residence prior to the issuance of the warrant. This Court agreed and upheld the suppression of the evidence.

However, we find that the facts in Kirk and Jones, supra, are distinguishable from those of the instant case, whereas the facts in Wright, supra, are so similar as to be controlling. In Wright, this Court found there were exigent circumstances to justify the officers’ warrantless entry into a residence. Police officers received a tip about drug activity at a residence, and they set up surveillance of the residence during which they saw suspected drug transactions. They later observed a woman looking at their surveillance position, who then approached the defendants as they were standing outside and spoke with them. One of the defendants ran inside, and the officers approached the residence and entered it to secure it while they obtained a search warrant. On appeal, the defendants argued the evidence

should have been suppressed because the officers did not have exigent circumstances to enter the house without a warrant. This Court disagreed, distinguishing Kirk:

In the instant case, unlike *Kirk*, the detectives observed an unidentified woman looking at their surveillance position, and the woman had a conversation with both the defendants, which then caused the defendant Richardson to run into the residence at 2802 Freret Street. Prior to the woman observing their surveillance position, the detectives observed both the defendants conduct hand-to-hand drug transactions on the front porch of the residence on Freret Street. The detectives had reason to believe their surveillance position had been made known to the defendants, and that the defendants knowing they had been observed by police officers would destroy evidence. We find that the detectives had probable cause to arrest the defendants and exigent circumstances to justify entering the residence to ensure no evidence was destroyed until a search warrant could be obtained. Therefore, we find that the trial court did not abuse its discretion in denying the motion to suppress the evidence. This assignment of error is without merit.

Wright, 2002-2354 at p. 6, 778 So. 2d at 781.

Thus, the facts in Wright, where this Court found the unknown woman's warning to the defendants gave the officers exigent circumstances to enter the residence, are much closer to those of the instant case than those found in Kirk and Jones. While we recognize that there are some distinctions between this case and Wright, we do not find those distinctions

to be material. In Wright one of the defendants was seen running into the house after the woman alerted them to the surveillance. Here, as noted by McDaniels, the two men who possibly discovered the surveillance told Ms. Morgan, who was not present when the safe containing the cocaine was delivered by Dixon. McDaniels argues that it was possible that Ms. Morgan was not aware there was cocaine in the safe, and thus it was possible that she would not have known to try to destroy the cocaine, thereby negating any exigent circumstances. However, it was just as possible that she did know of the safe's contents and that she could try to destroy the cocaine inside. Like McDaniels, she had access to the residence, using a key to enter. Given these factors, we find there were exigent circumstances to enter the residence in the absence of a warrant to secure it while the warrant was being obtained.

For the foregoing reasons, we grant the State's writ, reverse the ruling of the trial court, and remand the case for further proceedings.

WRIT GRANTED; JUDGMENT REVERSED; CASE REMANDED