

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	NO. 2004-K-0651
VERSUS	*	COURT OF APPEAL
ADELA PERALES	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA
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ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 444-596, SECTION "K"
Honorable Arthur Hunter, Judge

Judge Dennis R. Bagneris, Sr.

(Court composed of Chief Judge Joan Bernard Armstrong, ,
Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr.)

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WRIT APPLICATION GRANTED; THE JUDGMENT OF THE TRIAL COURT IS REVERSED; CASE REMANDED

On January 9, 2004 the State filed a bill of information charging the defendant with distribution of marijuana, a violation of La. R.S. 40:966(A) (2). On January 28, 2004 she pleaded not guilty. On March 12, 2004 a hearing on the motions was held. The trial court found no probable cause and granted the motion to suppress the evidence. The State now seeks this Court's supervisory review.

STATEMENT OF THE FACTS

At the March 12, 2004 hearing Detective Jayson Germann testified that on November 3, 2003 he was the lead investigator and surveillance person as to the location of 1416 Erato Street. He had received information from a concerned citizen that there had been a lot of foot traffic, and the citizen suspected narcotics trafficking. The subjects would enter the back door of the house and exit soon afterward. Based on that information, the detective set up surveillance of that location at about 4:45 p.m. on November 3, 2003. Detective Germann said that he could see the back door of the house, but the view was "a little bit obstructed" because of shrubbery.

At about 5:00 p.m. the detective noticed the traffic beginning. He observed two white males, who were later identified as Robert Hester and Harold Moccabee, approach the back door and converse with someone inside, who was not visible. The two men handed currency to the person inside and then waited. About two minutes later, a hand emerged from the house with “what appeared to be hand-rolled cigarettes” which the detective “would identify as joints.” Based upon his observation, Detective Germann believed he had observed a narcotics transaction. He notified the take-down units in the area, which consisted of Detectives Regina Barr and Kyle Hendricks. Detective Germann provided a description of the two subjects and the direction they were traveling. He was later notified by radio that Hester and Moccabee were found in possession of joints or marijuana cigarettes.

According to the detective, about thirty minutes later, a white vehicle pulled up to the intersection of Prytania and Erato Streets; 1416 Erato was the residence at that corner. He watched as the subject, later identified as Guillermo Diaz, exited the vehicle and approached the back door of the targeted house. Diaz knocked on the door and conversed with someone inside. Diaz handed currency to the person inside, who handed Diaz a hand-rolled cigarette and an unknown object. Detective Germann contacted another support unit, which consisted of Detectives Paul Coleman and Karla

Baker, and provided the officers with a description of the alleged buyer. Detectives Coleman and Baker rushed to the scene and stopped Diaz before he drove off. Detective Baker told Detective Germann that Diaz was in possession of a hand-rolled cigarette believed to be marijuana and a hard, rock-like substance believed to be crack cocaine. Because Diaz was arrested before he left the intersection, Detective Germann feared that the surveillance had been jeopardized. He did not know how many people were inside the residence and whether they witnessed the stop. Detective Germann contacted his supervisor, Sgt. Terry Wilson, and the two officers determined that it was best to secure the residence while the application for a search warrant was being typed. Sgt. Wilson devised a plan to secure the residence, and the officers relocated to the residence. As the support units approached, Detective Germann observed a third subject go to the back door of the residence, and he provided the units with the description of the subject, later identified as Michael Humphries. He remained at his surveillance location as the other officers relocated to the back door to secure the residence. Humphries was detained by Detective Barr, but the other officers were having trouble opening the iron gate/door. The defendant advised the officers that she was not going to let them in because they had no warrant and ran to the back of the house. It took the officers

several minutes to open the iron door. Once the other detectives entered and secured the residence, Detective Germann relocated to the house. As he walked inside the back door, Detective Hinrichs showed him tin boxes on the kitchen table containing numerous hand-rolled cigarettes.

Detective Germann said that he then relocated to the Sixth District to type up an application for a search warrant. After having the search warrant signed, the detective returned to 1416 Erato Street. The detectives then conducted a systematic search of the house. They discovered several more tin boxes in addition to two plastic bags containing vegetable matter on a shelf next to a blender containing what appeared to be a vegetable matter residue. Currency was found in the defendant's bedroom along with bills, which showed the defendant's name and that address. The detective identified the return on the search warrant, which indicated that the officers found: 182 marijuana joints; 39.38 grams of marijuana; one picture containing marijuana residue; \$954.00 in currency; a shotgun; a .22 caliber rifle; eight metal tins containing joints; documents addressed to the defendant at that address; a box of wrapping papers; a cigar box; a Pringles can; and keys to the residence at 1416 Erato Street (confiscated from the defendant's person). Detective Germann identified the defendant and two of the buyers, Humphries and Diaz.

On cross-examination by Perales' counsel, the detective admitted that the information was given to him by a person, who called by phone. Detective Germann said that he spoke to the concerned citizen several times by phone, but he also met the person. The detective said that he gave the concerned citizen his cell phone number. He admitted that he had conducted surveillance of the house several other times and saw no criminal activity, but did not include that information in the application for the search warrant. The affidavit indicated that the citizen informant had said that white and black males of middle and low income went to the house. When asked whether the informant was therefore a person of high income, the detective answered that he did not know and would not say because it might jeopardize the informant. The defense presented a number of photographs of the surveillance location and questioned the detective about his position and what he could see. He stated that he could see the back door despite the hedge, which was not as large and green in November when the surveillance occurred as in the defense photos. Counsel repeatedly asked where the detective was positioned, but Detective Germann would not answer and divulge his location. He admitted that his view was partially obstructed by the shrubbery. When defense counsel questioned the lighting at 5:00 p.m. after sunset, the detective explained that there were Christmas lights around

the back (he assumed they were not related to a Christmas celebration) and the light from inside the house when the door was open. Detective Germann explained that he could count the joints because they were distinct and separate; he could not count currency.

Detective Germann said that there were windows on the side of the house from which someone inside could have seen the stop of Diaz at the corner. When asked who decided to stop Diaz in that location, the detective said that “the officers didn’t wait for him to leave the area.” Counsel argued that the police officers used a police action to create the exigent circumstances to justify the entry into the home without a warrant.

Detective Germann testified that during the prior surveillances, he had discovered that Mr. Weinman leased the residence, and he had a prior conviction. He had not checked utility bills to determine who resided there. He did not include that information in his affidavit because Weinman was not the target. The citizen informant stated that an elderly white lady was selling the contraband. According to the detective, he and Sgt. Wilson decided to enter without a warrant to secure the residence. Detective Germann stated that it did not take long to finish the application for the search warrant because he had begun typing the paperwork on his laptop computer during the surveillance. Counsel pointed out that the last

paragraph included the contraband the detective saw while he was securing the house.

On cross-examination by Diaz's counsel, the detective explained that he called the informant a "concerned citizen" because the informant was not paid. He never checked to see whether the person was in fact a citizen or a naturalized citizen. He could not say whether he had set up surveillance the day before November 3, 2003; none of the prior attempted observations was recorded. He stated that he started to type the application about 4:30 p.m. in hope of speeding up the process if a warrant was necessary, but he typed without looking at the screen. The detective said that if he observed nothing suspicious, he would have deleted what he had typed. He conceded that Diaz was not parked directly in front of the residence, but his car was not parked as much as a half a block down. According to Detective Germann, Diaz had nothing in his hand as he exited his vehicle and walked to the back of the residence; however, he then handed currency to someone inside. Therefore, the detective concluded that Diaz had pulled the money from a pocket, but he could not see which pocket because of the shrubbery. The detective stated that when Diaz walked up the back stairs, he could clearly see the paper currency in his hand. He never lost sight of Diaz.

On cross-examination by Humphries' counsel, the detective reviewed

the face sheets provided by counsel and stated that he did not type them (he used only capital letters). The time of Humphries' arrest on the face sheet at 7:35 p.m. was incorrect; it was about 5:35 or 5:40 or 5:45 p.m. Detective Germann did not know and could not tell who typed the face sheets. The detective said that the narrative did not indicate the time of Humphries' arrest, but it was about ten minutes after Diaz's arrest. The detective did not personally observe Humphries' alleged transaction. The take-down unit officers were Sgt. Terry Wilson and Detectives Regina Barr, Kyle Hendricks, Karla Baker, Paul Coleman, Joe Williamson, and Rick Welch. Five were in uniform (task force traditional uniform) and two were in plain clothes. One unit was marked and one unit was not. Guns are not customarily drawn, and the detective did not recall any officer with a gun drawn. Detective Germann said that he watched Humphries walk to the back of the house, and that behavior was consistent with a transaction occurring, but he did not see the transaction because other officers obstructed his view.

Detective Regina Barr testified that she was involved in the arrests of Humphries, Moccabee, Hester, and Perales, but not that of Diaz. She explained that Detective Germann set up surveillance and she and Detective Kendrick comprised a take-down unit. Detective Barr stated that she was

also part of the team entering the residence and securing it. She said that as the officers approached the back door of the residence, they saw “Perales with her hand through the gate handing Mr. Humphries what was later determined to be three hand-rolled cigarettes containing marijuana.”

Detective Barr said that she handcuffed Humphries, retrieved the contraband, and then later entered the residence with the team. She stated that she was inside the residence and saw the open mint tin with marijuana cigarettes, but she did not locate any other items. Detective Barr testified that when the team was outside and Perales was at the gate, she told the officers that she would not let them into the house because she knew that they did not have a warrant. At that point the defendant said that she did not have her keys, which were in the other room. The defendant stated that Detective Barr’s testimony was not the truth. Defense counsel explained that the defendant would have her chance to tell the judge what happened. Detective Barr said that she assisted in the transportation and some of the paperwork.

On cross-examination by Perales’ counsel, the detective testified that she and the other officers were told to enter the residence and secure it until the warrant could be typed because Detective Germann felt that his surveillance had been compromised. She said that Detective Welch had the

tool with which to pry the iron gate/door open. The other officers were identifying themselves as police and asking Perales to open the door without having to use force. Detective Barr denied hearing the defendant say to wait a moment because she needed to get her keys. She said that she clearly heard the defendant say that she was not letting the officers inside if they did not have a warrant.

On cross-examination by Humphries' counsel, Detective Barr stated that she approached the back door of the residence with Sgt. Wilson and Detectives Hendricks and Welch. The officers pulled into the vacant lot adjacent to the residence and entered through an open gate. She said that she was driving an unmarked unit. Other officers went to the front of the residence. Detective Barr stated that she had car lights on until she turned into the vacant lot; she did not activate lights or siren. She witnessed the transaction between the defendant and Humphries at about 5:40 or 5:45 p.m. She acknowledged that she filled out the face sheet relating to Humphries. When asked about the time of 7:35 p.m., Detective Barr stated that she put the time that the warrant was signed because Humphries was detained at the residence with the defendant until the search warrant was signed. She stated again that the officer entered the residence about 5:45 p.m., and the search warrant was signed around 7:35 p.m.

Detective Karla Baker testified that she was part of the take-down unit on November 3, 2003. She and Detective Coleman were told to stop a white male (in beige pants, a white shirt, and a white hat), who had allegedly made a drug transaction, with a white Toyota parked on Erato Street near Prytania Street. The two detectives pulled up to the Toyota “just as the gentleman was entering the car.” Detective Coleman went to the driver’s side while she went to the passenger’s side. Detective Baker said that she looked inside and saw what she believed to be two marijuana cigarettes. As she retrieved the two cigarettes, she also found a piece of what she believed to be crack cocaine. The detective stated that she transported Diaz to the Sixth District. She and Detective Barr were at the station when Detective Germann informed them that he was ready to search the residence. The two detectives left their prisoners at the station, relocated to the residence, and assisted in the search. Detective Baker said that she did not find any items in the house.

On cross-examination by Perales’ counsel, Detective Baker stated that Detective Germann made the decision to stop Diaz, but once she saw the marijuana in the car, he was arrested. When asked if any thought was given to the fact that stopping Diaz “out front” of the residence might alert someone in the house, she answered: “No.”

On cross-examination by Diaz’s counsel, Detective Baker stated that

Detective Germann informed her that he believed that he had witnessed a hand-to-hand drug transaction. She could not recall how far from the entrance of the residence Diaz' car was parked, but answered negatively when asked if it could have been half a block. When asked if it could have been a block, the detective said: "I don't recall, sir." She later stated that it was not parked right in front of the targeted residence.

The State submitted into evidence the criminalist's report that the items tested positive for marijuana as to Humphries and the search warrant *in globo* including the return and the application.

The defendant testified that Humphries was her neighbor, who was talking to her about babysitting his daughter when the police officers entered her house. Humphries was telling the defendant that her services would not be needed the following weekend. Humphries also paid the defendant for the babysitting she did on the last weekend; he did not have his work check to pay her at the time. The defendant said that she and Humphries were inside her house, and the door was open. When Humphries left, she locked the main gate on the door and threw the keys on the table by her bed. The officers were trying to enter before she even closed the wooden door. She denied selling or giving Humphries joints. The defendant said that she is seventy-three years old, and several officers were screaming at her to open

the door. The defendant said that she asked if they had a warrant; she told them that she would not let them in without a warrant. When she saw that the officers had a crowbar and were going to force the door, she asked the officers to let her get her keys from the other room. An officer told her not to move. The defendant said that Diaz, who “lives around there” and “belongs in the neighborhood,” had been by the house earlier to visit, but she did not have time and told him so. She denied giving Diaz marijuana cigarettes that day because he did not stay long enough for them to talk. She admitted sharing joints with Diaz in the past, but she never charged him because he was a friend from the neighborhood. The defendant stated that she had worked for twenty-two years as a housekeeper for Steve, who had a liver transplant, and she was caring for him as well. She said that Steve was not at home; he was attending night school to learn computers because he could no longer do construction work. Steve left about 4:30 p.m. or 5:00 p.m.

On cross-examination by the State, the defendant stated that the residence did not belong to her because Steve paid all the bills. Her counsel stipulated that she lived there. The defendant said that she recalled that Michael (Humphries) stopped by to tell her that her babysitting services would not be needed the next weekend and to pay her for her services the

weekend before. She admitted that she smoked joints with Diaz. She said that Diaz stopped by to visit, but she did not have time and did not open the door. The defendant reiterated that she asked the officers if they had a warrant and said that she would not let them in. However, when an officer returned with a crowbar, she said that she would go get her key in her bedroom, but the officers did not want her to move.

On cross-examination by Diaz's counsel, the defendant denied giving Diaz crack cocaine. She stated that she did not even know what crack looked like.

On redirect examination the defendant said that she never saw a search warrant while she was in her house. She stated that after she had been taken to the station, someone said there was a warrant.

Guillermo Diaz testified that he had gone to see the defendant on November 3, 2003, but she was too busy. He returned to his car without giving the defendant any money. He denied having money in his hand or marijuana cigarettes. He denied having any crack cocaine in his vehicle or ever possessing crack cocaine. On cross-examination by the State, Diaz stated that he and the defendant had been neighbors. On November 3, 2003 he had stopped on his way home from work to see her and to drink a beer. He denied stopping to smoke a joint. He denied ever smoking a joint with

the defendant. Diaz said that he had two joints in his car that day because the defendant had given them to him the day before. He did not pay for the joints. He denied having crack in his car even though the officers said that he did.

On cross-examination by Perales' counsel, Diaz said that the officers had their weapons drawn when they approached his car. The trial court asked Diaz how far from the defendant's house he was parked that day when he was stopped by the officers. He said: "There's a church, the house. Not in front of the house, but a street after the house. Maybe a block on the other side of the street." When the court asked if Diaz parked on the same street as the defendant's house, he answered: "No. On the next street." However, he could not remember the name of the street. On redirect examination Diaz explained that he parked on that street because of the direction he was traveling as he traveled from across the river on Tchoupitoulas Street.

Michael Humphries testified that he encountered the police officers as he was "about to walk out of her [defendant's] back gate into the yard." The four or five officers arrived in two cars, and they had their guns out; therefore, Humphries said that he put his hands in the air. According to Humphries, the officers "slammed" him "up against the side of the house" and put him in handcuffs. The officers then yelled at the defendant to open

the door, but she asked to see a search warrant. The officers yelled that they “don’t need a fucking search warrant” and ripped open the defendant’s door. Humphries testified that the defendant eventually asked to go get her keys, but the officers pulled out their guns and told her not to move. According to Humphries, after the officers ripped off the door, they took him and the defendant inside. He denied having three joints that day. One of the officers threatened to plant a gun and heroin on him if he did not take his charge (he assumed the marijuana charge), but that male officer had not testified at the hearing. He denied a hand-to-hand transaction with the defendant.

Humphries stated that he was in the defendant’s kitchen when he was talking to her for about two seconds before the officers arrived. He denied ever having purchased marijuana from the defendant. He claimed not to know that the defendant smoked marijuana or that she sold it. He said that he saw no marijuana in the defendant’s house that day.

As to Diaz, the court found probable cause and denied the motion to suppress the evidence. As to the defendant, the court found no probable cause and granted the motion to suppress the evidence.

DISCUSSION

The State argues that the trial court erred by granting the defendant’s motion to suppress the evidence. It contends that the “detectives had exigent

circumstances justifying their entry to secure the residence.” Additionally, the State argues that without the exigent circumstances, the evidence would have been discovered because Detective Germann probably would have obtained a search warrant based on his observations prior to the entry into the residence.

According to the application for the warrant, the detective spoke to a concerned citizen about the pedestrian traffic noted going to the back door of 1416 Erato Street. The citizen noted that an elderly white female met the pedestrians and allowed them inside. After a minute or two they would leave the residence and head out of the area or to an abandoned house in the block. Detective Germann set up surveillance at 4:45 p.m. on November 3, 2003 at a location with a partially obstructed view (due to shrubbery) of the back door of the residence. At about 5:00 p.m. the detective observed two white males, later identified as Robert Hester and Harold Moccabee, approach the rear of the residence. Someone (who could not be seen) answered the door and conversed with the two men. Hester then handed through an iron gate to the subject inside what appeared to be currency. A hand from inside accepted the money. Two minutes later a hand reached through the iron gate to hand to Hester what appeared to be hand-rolled cigarettes, which Hester placed in his pocket. He then walked off toward the

expressway. Believing that he had witnessed a hand-to-hand drug transaction, Detective Germann provided Detectives Barr and Hinrichs with a description of Hester and Moccabee and authorized a stop. The detectives followed the two men as they walked away. The officers pulled up to their vehicle before Hester could enter it. Detective Hinrichs saw Hester drop four hand-rolled cigarettes to the ground, and the officer recognized the cigarettes to be joints of marijuana. Detective Hinrichs detained Hester, recovered the joints, and arrested him for possession of marijuana.

Detective Barr asked Moccabee and a female to exit the vehicle. As Moccabee was stepping out, the detective saw three joints fall from Moccabee's lap onto the floor. Detective Barr detained Moccabee, recovered the joints, and arrested him for possession of marijuana. The female was released, and the two men were taken down to the station.

According to the application for the warrant, at about 5:30 p.m. Detective Germann observed a white male, later identified as Guillermo Diaz, exit a white Toyota, which was parked at Erato and Prytania Streets, and walk to 1416 Erato Street. He knocked on the back door, it opened, and he handed someone inside an unknown amount of currency. The subject accepted the cash and closed the door. In about two minutes the door opened, and a hand reached out with two joints and a small unknown object,

which Diaz accepted. Diaz walked off toward his car as Detective Germann alerted Detectives Coleman and Baker to stop Diaz. The two detectives arrived as Diaz was entering his car. The officers approached and identified themselves. Detective Baker then saw in plain view on the passenger seat two hand-rolled cigarettes and a small plastic bag containing a rock-like substance, which she recognized to be crack cocaine. Diaz was asked to step out of the vehicle, was placed under arrest for possession of marijuana and cocaine, and was taken down to the station. Fearing that the surveillance had been compromised because Diaz was stopped in front of the target location, Detective Germann felt that the officers should secure the residence before the subject inside had an opportunity to destroy evidence or to leave. Detective Germann consulted with Sgt. Wilson, who devised a plan by which all the officers relocated to the residence to secure it. As the officers were traveling to the residence, Detective Germann observed a white male, later identified as Michael Humphries, enter the gate and head for the back door. As the officers pulled up and exited their vehicles, they observed an elderly white female, the defendant, handing Humphries three joints. As he saw the officers, Humphries dropped the joints. Officer Barr detained him and recovered the joints. Detective Hinrichs then noticed that the defendant had picked up a bowl and walked to the back room. Fearing that the

defendant was destroying evidence, the officers elected a forced entry.

Detective Hinrichs detained the defendant in the kitchen, and he observed in plain view an open tin box containing several hand-rolled cigarettes.

Detective Germann concluded that based on his observations, the contraband confiscated from the arrested subjects, and the contraband in plain view while securing the residence, he believed that marijuana and cocaine were being secreted at the residence. The search warrant was signed at 7:25 p.m., and it was subsequently executed.

Probable cause alone is not justification for entry into an area otherwise protected by the U.S. Const. Fourth Amendment or La. Const. Art. I, § 5.

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).

State v. Jones, 2002-1931, p. 5 (La. App. 4 Cir. 11/6/02), 832 So.2d 382,

386, writ denied, 2001-2940 (La. 6/21/02), 831 So.2d 973, quoting State v. Page, 95-2401, p. 10 (La. App. 4 Cir. 8/21/96), 680 So.2d 700, 709. See also State v. Julian, 2000-1238 (La. App. 4 Cir. 3/4/01), 785 So.2d 872, writ denied, 2001-1247 (La. 3/22/02), 811 So.2d 920; State v. Brown, 99-0640 (La. App. 4 Cir. 5/26/99), 733 So.2d 1282. A federal court has listed circumstances that might lead police officers to reasonably conclude that evidence would be destroyed or removed before the officers could secure a search warrant:

- (1) The degree of urgency involved and the amount of time necessary to obtain a warrant;
- (2) A reasonable belief that the contraband is about to be removed;
- (3) The possibility of danger to police officers guarding the site of the contraband while a search warrant is sought;
- (4) Information indicating the possessors of the contraband were aware that the police were on their trail; and
- (5) The ready destruction of the contraband and the knowledge and efforts to dispose of narcotics and escape are characteristic behavior of persons engaged in narcotics traffic.

State v. Wright, 2002-2354, p. 5 (La. App. 4 Cir. 6/18/03), 850 So.2d 778, 781, quoting United States v. Rubin, 474 F.2d 262, 268-69 (3 Cir. Pa. 1973). On remand from the U.S. Supreme Court in State v. Kirk, 2000-0190, pp. 2-3 (La. App. 4 Cir. 11/13/02), 833 So.2d 418, 420, writ denied, 2002-3079 (La. 5/9/03), 843 So.2d 394, this Court discussed exigent circumstances:

According to Roska, *supra* [Roska v. Peterson, 304 F.3d 982, 989 (C.A.10 (Utah))], exigent circumstances arise when

(1) the law enforcement officers ... have reasonable grounds to believe that there is immediate need to protect their lives or others or their property or that of others, (2) the search [is not] motivated by an intent to arrest and seize evidence, and (3) there [is] some reasonable basis, approaching probable cause, to associate an emergency with the area or place to be search[ed].

United States v. Anderson, 981 F.2d 1560, 1567 (10th Cir.1992) (alterations in original). The government bears the burden of proving exigency. United States v. Wicks, 995 F.2d 964, 970 (10th Cir.1993). The government's burden is "Particularly heavy where the police seek to enter a suspect's home." Anderson, 981 F.2d at 1567 (quoting United States v. Maez, 872 F.2d 1444, 1452 (10th Cir.1989).) In evaluating whether exigent circumstances existed. We examine the circumstances "as they would have appeared to prudent, cautious, and trained officers." United States v. Anderson, 154 F.3d 1225, 1233 (10th Cir.1998). This exception is narrow, and must be "jealously and carefully drawn." Id.

Id. at pp. 2-3, 833 So.2d at 420. In the original opinion, State v. Kirk, 2000-190 (La. App. 4 Cir. 11/15/00), 773 So.2d 259, this Court did not determine whether there were exigent circumstances. In State v. Jones, at pp. 4-5, 832 So.2d at 385-86, this Court discussed Kirk:

In Kirk, the officers had received a tip concerning drug sales from the defendant's residence. The officers watched several drug transactions and then stopped one buyer on the street

outside the defendant's residence. Because the stop was near the residence, the officers knocked on defendant's door, entered the house, arrested the defendant, and "secured" the residence while they obtained a search warrant. A search incident to the arrest netted drugs, and the officers also saw contraband lying in plain view. The defendant was convicted, and on appeal he contended the evidence should have been suppressed because the officers were not justified in entering the residence in the absence of exigent circumstances. This court affirmed his conviction, finding that because the officers had probable cause to arrest him, there was no need for this court to determine whether there were exigent circumstances to allow them to enter. State v. Kirk, 2000-190 (La. App. 4 Cir. 11/15/00), 773 So.2d 259. The Louisiana Supreme Court denied writs. State v. Kirk, 2000-3395 (La. 11/09/01), 801 So.2d 1063.

The U.S. Supreme Court reversed. The Court looked to Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), where that Court held that officers cannot enter a residence to effectuate a warrantless arrest, absent exigent circumstances. The Court noted that the officers entered Kirk's home without an arrest or a search warrant, and that this court specifically did not make a determination of whether there were exigent circumstances which would have allowed them to enter the residence. The Court stated: "As Payton makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home. The Court of Appeal's ruling to the contrary, and consequent failure to assess whether exigent circumstances were present in this case, violated Payton." 447 U.S. at 756, 100 S.Ct. at 2459. The Court declined to make a finding as to the presence or absence of exigent circumstances in the case, remanding the case "for further proceedings not inconsistent with this decision." Id.

Id. at pp. 4-5, 832 So.2d at 386. The U.S. Supreme Court also expressed "no opinion ... on respondent's argument that any Fourth Amendment violation was cured because the police had an 'independent source' for the recovered

evidence.” 122 S.Ct. at 2459. On remand this Court declared:

In applying the above principles to the facts of this case we find there were insufficient exigent circumstances to justify the warrantless entry. The only reason given by the officer in support of the decision to enter the apartment was because the "take down" of the fourth purchases occurred within the same block as the apartment. However, there is no testimony or other evidence in the record from which we can conclude that the occupants of the apartment were aware of the police surveillance or of the "take down" nearby. There is no evidence that anyone else discovered the police presence who could notify the occupants of the surveillance or "take down." There is no evidence that a crowd was gathering as a result of the police activities. In the absence of a showing that the officers possessed specific and articulable facts, together with the rational inferences from those facts, we cannot find that their belief that exigent circumstances existed to enter the apartment without a warrant was a reasonable one.

Kirk, at pp. 3-4, 833 So.2d at 420.

In State v. Wright, at pp. 5-6, 850 So.2d at 781, the officer received information from a confidential informant that illegal drugs were being sold from 2802 Freret Street. Two detectives conducted surveillance in the 2800 block of Freret and observed what they believed to be four hand-to-hand transactions. Two purchasers (one buy) were stopped and found to be in possession of marijuana. Then the surveillance position was compromised when an unknown woman looked at their position and then went over to talk to the two subjects being investigated. One ran into the targeted residence. The back-up units were told to enter the residence in order to prevent the

destruction of evidence. This Court concluded that the officers had reason to believe that their position had been made known to the defendants by the woman, who had noticed them, and that evidence would be destroyed. This Court held that the officers had probable cause to arrest the defendants and exigent circumstances to enter the residence to insure that evidence would not be destroyed. Id.

Unlike Wright, in State v. Jones, 832 So.2d at 382, this Court found no exigent circumstances to justify the entry without a warrant. In Jones, this Court, relying on Kirk v. Louisiana, 536 U.S. at 635, 122 S.Ct. at 2458, found that the inevitable discovery doctrine did not excuse the police officers' failure to obtain a search warrant prior to commencing their search. This Court noted that even though there was probable cause for a warrant, there were no exigent circumstances to justify the officers searching before obtaining a search warrant even though the officers did ultimately obtain a search warrant. In Kirk, the United States Supreme Court held that, even if though there was probable cause to arrest the defendant, the police could not enter his home to do so without a warrant unless exigent circumstances existed, and evidence seized as a result had to be suppressed. This Court noted that there was no language in Kirk, which indicated that the inevitable discovery doctrine could apply when the police, without a showing of

exigent circumstances, made a conscious choice to act without a warrant. Id.

In the present case in granting the motion to suppress, the trial court stated:

Ironically, Detective Germann believed the stop was so close to the residence that it compromised the investigation. It was assumed, without any evidence, that the defendant Perales may have observed the officers confronting defendant Diaz, which perhaps would have led her to destroy the evidence.

As a result, the officers decided to enter the residence without a warrant. It's obvious that the officers' actions of arresting Diaz in front of the residence created a so-called exigent circumstance. It was an event which was caused by the officers' actions rather than circumstances beyond the officers' control.

Without a warrant or probable cause to arrest plus exigent circumstances, there can be no lawful entry into a home. That's pursuant to State versus Jones, 832 So.2d 382, and Kirk versus Louisiana, 536 U.S. 635.

Therefore, the Court finds no probable cause on two counts of distribution of marijuana and the motion to suppress the evidence is granted.

Here Detective Germann acted upon a citizen's information relating to pedestrian traffic at the rear of 1416 Erato Street. He observed what he believed to be two drug transactions at the back door of that residence. When the buyers were stopped by the take-down units, they were in possession of marijuana (one also had crack cocaine). At that point the detectives had probable cause to believe that there was contraband in the

target residence, which would justify the issuance of a search warrant.

Detective Germann testified that at that point he feared that the surveillance had been jeopardized because the second take-down unit stopped Diaz before he entered his car near the target residence, and the occupant(s) of the residence might have witnessed the stop from windows on the side of the house. However, the testimony of the officers was not clear as to exactly where Diaz was parked although all the witnesses stated that Diaz was not parked directly in front of 1416 Erato Street. As in Kirk, there was no testimony or other evidence from which to conclude that the occupant of the target residence was aware of the “take-down” of Diaz. The trial court in its ruling was concerned that the detectives created the exigent circumstance, which allowed them to enter the residence without a warrant. However, clearly the stop and arrest of Diaz was not observed by the defendant inside the target residence or by Humphries, who was outside the residence approaching the back door to buy marijuana. After Diaz was stopped and arrested, the defendant continued selling marijuana and was not attempting to destroy the evidence. The State’s argument that the stop and arrest near the target residence constituted an exigent circumstance is not persuasive in light of the facts of the case.

However, after the decision was made to converge on the house and

the detectives approached the back door of the residence, they interrupted the defendant's next drug transaction. According to Detective Barr's testimony, she and the other officers walked up as the defendant's hand was through the iron gate handing Humphries three hand-rolled cigarettes. The defendant testified that the officers approached before she had time to close the wooden door; she said that she would not open the iron bar/door because the officers did not have a warrant. Even if the stop of Diaz near the target residence did not constitute a legitimate exigent circumstance (not created by the officers to gain entry without a warrant) to justify a warrantless entry, it would appear that the detectives' approach during the defendant's next hand-to-hand drug transaction (as the defendant was handing marijuana joints to Humphries) certainly created an exigent circumstance. The defendant definitely was alerted to the presence of the officers, and the destruction of contraband was imminent if the detectives did not enter to secure the residence. Because the officers had probable cause to believe that there was contraband in the residence, and there were exigent circumstances, their warrantless entry to secure the residence while the warrant was prepared was justified. Accordingly, we find that the trial court erred by granting the motion to suppress.

For these reasons, we hereby grant the writ application, we reverse the

trial court's decision to suppress the evidence, and we remand the case to the trial court for further proceedings.

WRIT APPLICATION GRANTED; THE JUDGMENT OF THE TRIAL COURT IS REVERSED; CASE REMANDED