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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 23, 2021
v	No. 357451 St. Joseph Circuit Court
WADE EUGENE ALLEN, Defendant-Appellant.	LC No. 19-0022973-FC

Before: MURRAY, C.J., and MARKEY and RIORDAN, JJ.

MURRAY, C.J. (*concurring*).

I concur in the majority's decision to affirm the trial court's order denying the motion to suppress. The rationale provided by the majority is sufficient to dispose of the appeal, but in my view, so too is the ultimate basis supplied by the trial court in denying the motion to suppress.

As the trial court concluded, the officers did not exceed the scope of the knock-and-talk exception to the warrant requirement. That exception "permits law enforcement officers to 'encroach upon the curtilage of a home for the purpose of asking questions of the occupants.' " *United States v Lundin*, 817 F3d 1151, 1158 (CA 9, 2016) (quoting *United States v Perea-Rey*, 680 F3d 1179, 1187 (CA 9, 2012)). Its scope is coterminous with the implied license to approach a home, which is to "knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Florida v Jardines*, 569 US 1, 9; 133 SCt 1409; 185 L Ed2d 495 (2013).[1] As the Court held in *People v Frederick*, 500 Mich 228, 239; 895 NW2d 541 (2017), social norms "typically do not extend [the implied license] to a visit in the middle of the night." In *Frederick* the officers performed a knock and talk at two different homes in the 4:00 a.m.-5:00 a.m. time frame, which was unreasonable. *Id*.

The *Frederick* Court acknowledged that it was not deciding precisely "what time the implied license to approach begins and ends[,]" *Frederick*, 500 Mich at 239 n 6, which leaves open

[1] *Jardines* was not about *when* the officers went on the front porch, but was *what they did* (use of a drug-sniffing dog) while on the porch.

the question about the extent of the license at other times of the night. As one court recently acknowledged:

> the issue is one of "time-sensitivity," that is, any implied invitation to the officer or anyone else to knock on Saal's door ceased to exist given the time of night. In effect, he contends that at some unspecified point in time, perhaps 8:00 p.m., perhaps midnight, but certainly by 12:30 a.m., the implied invitation for a visitor to knock on a door, like Cinderella's coach turning back into a pumpkin at the stroke of midnight, ceases to exist. [*Saal v Commonwealth*, 72 Va App 413, 421; 848 SE2d 612 (2020)].

So, the question is whether it would fall within the implied license for someone from the public to knock on defendant's front door at 11:12 p.m. Some cases have held that the 9:00 p.m.-midnight time frame is within the social norms of the implied license and not unreasonable to perform a knock and announce, particularly when the officers otherwise properly limit themselves to promptly knocking and only briefly waiting for the resident to open the door, which the officers did here. See, e.g., *State v Marrero*, 248 NC App 787, 788, 790-792; 789 SE2d 560 (2016) (9:15 p.m.) and *Saal*, 72 Va App at 426-428 (12:30 a.m.).

In light of these decisions and the much later time-period at issue in *Frederick*, I would hold that the knock and talk performed by the officers at defendant's residence was not unlawful. And, because the trial court's finding that defendant consented to Officer Wiard entering the apartment, the information he gathered there – specifically the fact that a cooler was present in the living room as described by Steven – was properly a part of the affidavit and considered by the issuing magistrate. With that information and the information from the first phone call from Steven contained in the first paragraph to the search warrant affidavit, there was more than enough evidence to establish probable cause-even without the evidence of the odor or the search inside the cooler-for the magistrate to issue the search warrant. *People v Williams*, 240 Mich App 316, 319-320; 614 NW2d 647 (2000).

/s/ Christopher M. Murray