STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1552

State of Minnesota,
Respondent,

vs.

Larry Butler,
Appellant.

Filed October 5, 2020
Reversed
Connolly, Judge

Mahnomen County District Court
File No. 44-CR-18-524

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mitchell Schluter, Mahnomen County Attorney, Mahnomen, Minnesota; and

Scott A. Hersey, Special Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant challenges his conviction of first-degree possession of heroin, arguing that the evidence seized pursuant to a search warrant must be suppressed because the warrant application did not establish reasonable suspicion to justify a nighttime search, and exigent circumstances at the time of the search did not justify an unannounced entry. Because the nighttime search was not supported by reasonable suspicion, and because there were no exigent circumstances, we reverse.

FACTS

On July 16, 2018, Investigator Bradley Houglum of the White Earth Police Department applied for a search warrant to search a mobile home in Naytahwaush. The warrant application requested to search the home for controlled substances, drug paraphernalia, and various evidence of drug sales. The redacted warrant application provided the following information to establish probable cause:

> Today, on 07/16/2018 within the past three hours, your Affiant was contacted by Officer Allen of the White Earth Police Department. Officer Allen states he had arrested [redacted] on a[n] outstanding felony warrant. In [redacted] possession he was found to have heroin. Officer Allen interviewed [redacted] about the found narcotics after reading his [M]iranda rights. [Redacted] waived his rights and admitted to have purchased the narcotics from a black male nicknamed "Moe" at [a mobile home in Naytahwaush]. Officer Allen also told your Affiant he has been observing a lot of foot traffic emanating from the wooded area behind [the mobile home].
>
> Yesterday, 07/15/2018 your Affiant and Inv. Oskowski interviewed a citizen who wanted to provide information about

> the recent heroin sales occurring in Nay Tah Waush. Your Affiant knows the identity of this citizen, but they wished to remain confidential for fear of retaliation. This citizen stated that a black male nicknamed "[M]oe" has been making frequent trips to Nay Tah Waush from the Chicago area, to sell heroin. The citizen states "Moe" usually stays at Terrance Turner['s] house . . . and also has another male with dreadlocks with him. This citizen has purchased [redacted] heroin from "Moe" in the past [redacted]. The citizen also advised that he observed a sawed off shotgun near the door, inside the residence.

The warrant application requested authorization to conduct a nighttime search of the mobile home:

> A nighttime search outside the hours of 7 a.m. to 8 p.m. is necessary to prevent the loss, destruction or removal of the objects of the search or to protect the searchers or the public because [t]his investigation is continuing beyond the normal hours of 7 [a.m.] and 8 [p.m.] and is necessary to prevent the loss of evidence from the continuing sales of narcotics from the residence.

Additionally, the warrant application requested authorization for an unannounced entry into the mobile home:

> An unannounced entry is necessary to prevent the loss, destruction, or removal of the objects of the search, or to protect the safety of the searches or the public because, Your Affiant has received information of a firearm in the residence. An unannounced entry will be necessary for the safety of all Officers and suspects.

The district court issued the search warrant and authorized a nighttime search and unannounced entry. The police executed the search warrant at approximately 11:30 p.m. on July 16. They found more than 25 grams of heroin inside the mobile home. The police arrested the four people inside the mobile home, including appellant Larry Butler.

The State of Minnesota charged appellant with first-degree possession of heroin under Minn. Stat. § 152.021, subd. 2(a)(3) (2016). Appellant filed a motion to suppress the evidence obtained during the search of the mobile home. He argued that the search warrant's authorizations of a nighttime search and unannounced entry were invalid because they were not justified by the information provided in the warrant application.

In November 2018, the district court issued an order on appellant's motion to suppress. It denied the motion to suppress based on the nighttime search, concluding that there was reasonable suspicion that heroin sales were occurring at the mobile home during the night and that "some or all of the evidence would be lost due to ongoing sales." It concluded that there was no reasonable suspicion to support the authorization of unannounced entry because the application's reference to a sawed-off shotgun near the door of the mobile home was too vague without any indication of when the shotgun was observed. But the district court deferred ruling on appellant's motion to suppress based on the unannounced entry pending an evidentiary hearing to allow the state to demonstrate that the unannounced entry was justified based on the circumstances surrounding the search.

The evidentiary hearing was held in February 2019. Investigator Houglum testified that the police prepared the search-warrant application after arresting a person who possessed heroin that he had purchased from the mobile home. Three hours passed between the time of that arrest and the execution of the search warrant. The police did not surveil the mobile home during that three-hour period.

Two officers who executed the search warrant testified at the evidentiary hearing, and the videos from their body cameras were entered into evidence. One officer testified that, as he approached the front door of the mobile home, he saw an occupant look out the window and yell "something about the cops" into the home. The officer then observed two other occupants run toward the back of the mobile home, before one of them began to run toward the front again. Moments later, the police breached the front door with a battering ram and entered the mobile home. The officers' guns were drawn at the time of entrance. The other officer testified that, as he was securing the rear side of the mobile home, he saw two occupants run toward the back, and he relayed that information over the radio to the officers at the front of the home. That officer knew the occupants may be armed, based on the information previously obtained during the investigation. The officers stated that, upon seeing the occupants run through the mobile home, they were concerned that the occupants were attempting to either obtain a weapon, destroy evidence, or escape.

In March 2019, the district court issued an order denying appellant's motion to suppress. The district court determined that, despite the search warrant's invalid authorization of unannounced entry, exigent circumstances justified the police's unannounced entry into the mobile home. Specifically, the officers were in "hot pursuit of a fleeing felon" at the time of entry, and alternatively, exigent circumstances existed based on "the totality of the circumstances."

Appellant waived his right to a jury trial and stipulated to the prosecution's case to obtain review of a pretrial ruling, under Minn. R. Crim. P. 26.01, subd. 4. The district court

found appellant guilty of first-degree possession of heroin and sentenced appellant to 81 months in prison. This appeal follows.

D E C I S I O N

I. The nighttime search violated appellant's statutory rights under Minn. Stat. § 626.14 (2016) and requires suppression of the evidence.

A. The warrant application did not establish reasonable suspicion that a nighttime search was necessary.

Appellant contends that the nighttime search of the mobile home violated Minn. Stat. § 626.14. Under Minn. Stat. § 626.14, a search warrant may be executed "only between the hours of 7:00 a.m. and 8:00 p.m." unless the issuing court "determines on the basis of facts stated in the affidavits that a nighttime search outside those hours is necessary to prevent the loss, destruction, or removal of the objects of the search or to protect the searchers or the public." To satisfy this requirement, "the application for the warrant must establish at least a reasonable suspicion that a nighttime search is necessary to preserve evidence or to protect officer or public safety." *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). Reasonable suspicion is "something more than an unarticulated hunch" and requires that the police "point to something that objectively supports the suspicion at issue." *Id.* (quoting *State v. Wasson*, 615 N.W.2d 316, 320 (Minn. 2000)).

Appellant argues that the search warrant's authorization of a nighttime search was invalid because the warrant application did not establish reasonable suspicion that a nighttime search was necessary. When reviewing a pretrial order on a motion to suppress evidence, we review the district court's findings of fact for clear error and its legal determinations de novo. *Id.* When reviewing whether there was reasonable suspicion to

support a nighttime search, we give great deference to the issuing court's determination. *Id.* at 928.

Here, the warrant application presents two reasons as to why a nighttime search is necessary: (1) the "investigation is continuing beyond the normal hours of 7 [a.m.] and 8 [p.m.]," and (2) a nighttime search is "necessary to prevent the loss of evidence from the continuing sales of narcotics from the residence."[1] The first stated reason clearly does not satisfy the requirements of Minn. Stat. § 626.14, as the mere fact that an investigation is continuing outside normal daytime hours does not demonstrate that a nighttime search is necessary to prevent the loss of evidence or to promote safety.

Nor does the application establish reasonable suspicion that evidence would be lost due to ongoing drug sales. It provides no information indicating that heroin sales were occurring at the mobile home at night. Even though the application states that two individuals had purchased heroin from the mobile home and that Officer Allen had observed foot traffic from the area behind the mobile home, it does not indicate that the transactions or foot traffic occurred during the night. Therefore, there is nothing objective to point to that demonstrates that a nighttime search was necessary to preserve evidence.

[1] The state contends that the possible presence of firearms at the mobile home also justified a nighttime search because a search during the daylight would have allowed the occupants of the mobile home to see the officers approaching and enabled them to obtain the firearm before execution of the search warrant. But the warrant application did not include police safety as a reason to justify a nighttime search, so we do not consider that basis on appeal. *See Bourke*, 718 N.W.2d at 927 n.6 (observing that Minn. Stat. § 626.14 expressly limits a determination of reasonable suspicion for a nighttime search to the facts stated in the warrant application).

The search warrant's authorization of a nighttime search was not supported by reasonable suspicion, and the nighttime search violated Minn. Stat. § 626.14.

B. The nighttime search subverted the basic purpose of Minn. Stat. § 626.14, so suppression of the evidence is required.

When a search violates Minn. Stat. § 626.14, the evidence seized during the search must be suppressed if the violation "subverts the basic purpose" of the statute. *State v. Jackson*, 742 N.W.2d 163, 168-69 (Minn. 2007). Suppression is not required, however, when the violation is "merely technical in nature." *Id.* at 169. Historically, nighttime searches have been considered more intrusive than daytime searches because of "the more personal nature of nighttime activities that occur in the home." *Id.* at 171. The purpose of the statutory prohibition on nighttime searches is to protect "freedom from intrusion during *a period of nighttime repose*." *Id.* "Repose" refers to the "private nature of customary nighttime activities." *Id.* A determination of whether a nighttime search subverts the basic purpose of Minn. Stat. § 626.14 is based on what the police knew *before* entering the home. *Id.* at 173.

In *Jackson*, the Minnesota Supreme Court provided guidelines for determining whether a nighttime search subverts the basic purpose of Minn. Stat. § 626.14. *Id.* at 172-73. A nighttime search does not violate the basic purpose of the statute when the police knew at the time of entry that the occupant had not entered a period of nighttime repose. *Id.* at 173. That includes situations in which the police knew the occupant was fully clothed and was not sleeping or engaged in personal behavior. *Id.* In explaining this rule, the supreme court reaffirmed its decision in *State v. Lien*, 265 N.W.2d 833 (Minn. 1978),

overruled on other grounds by Richards v. Wisconsin, 520 U.S. 385, 117 S. Ct. 1416 (1997), where suppression of evidence obtained during a nighttime search was not required when the police, prior to entry, observed that the occupant had just returned home, that he was fully clothed, that there was "considerable activity" in the apartment, and that the apartment door was partly open. *Id.* at 172-73. In contrast, a nighttime search violates the basic purpose of Minn. Stat. § 626.14 when the police did not know before they entered whether the occupant was sleeping or engaging in personal behavior. *Id.* at 173.

Here, the search of the mobile home occurred at approximately 11:30 p.m., which is well outside the hours permitted under Minn. Stat. § 626.14. Prior to the search, the police had not surveilled the mobile home for the previous three hours. This case is distinguishable from the circumstances in *Lien* that allowed the police to realize that the occupants had not entered a period of repose. The police here did not observe anyone enter the mobile home or see that anyone was fully clothed, there was no evidence of activity inside the mobile home, and the door to the mobile home was not open. Therefore, the police did not know whether the occupants of the home were sleeping or otherwise engaging in personal behavior.

There is only one fact that suggested to the police that the occupants of the mobile home were not in a period of nighttime repose—as the police approached the mobile home, they heard one occupant yell that the police were coming and saw other occupants run toward the back of the home. Appellant contends that those facts do not render the search lawful because the police had already begun to execute the search warrant when they became aware of the occupants' actions. We agree. By the time the police observed the

occupants' movements, they had approached the front door with a battering ram and guns drawn. The occupants' movements were merely a response to the police arriving. Therefore, the occupants' actions in response to the police's arrival do not change our conclusion that the police did not know whether the occupants had entered a period of nighttime repose when they executed the search warrant.

In sum, because the nighttime search subverted the basic purpose of Minn. Stat. § 626.14, suppression of the evidence is required.[2]

II. Exigent circumstances did not justify the officers' nighttime search or unannounced entry when executing the search warrant.

Considering that the search warrant's authorizations of a nighttime search and unannounced entry were invalid, we now determine whether exigent circumstances justified the warrantless search. We observe that Minnesota courts generally examine exigent circumstances when there is no search warrant in the first place, not when the search warrant contains invalid authorizations of a nighttime search or unannounced entry. Nevertheless, we decide this issue because the parties disputed at oral argument whether exigent circumstances could justify the nighttime search, and because the district court determined that the warrant's authorization of unannounced entry was invalid but that exigent circumstances justified the unannounced entry. We conclude that there were no exigent circumstances to justify either the nighttime search or the unannounced entry.

[2] Because suppression is required under Minn. Stat. § 626.14, we do not consider appellant's alternative argument that the nighttime search violated the United States and Minnesota Constitutions' prohibitions on unreasonable searches and seizures.

The state has the burden of proving that exigent circumstances existed so as to justify the warrantless entry. *State v. Gray*, 456 N.W.2d 251, 256 (Minn. 1990). We review de novo whether the district court's findings of fact demonstrate that exigent circumstances existed. *State v. Olson*, 436 N.W.2d 92, 97 (Minn. 1989).

Appellant discusses this issue in terms of single-factor exigent circumstances and the totality of the circumstances. *See Gray*, 456 N.W.2d at 256 (explaining that exigent circumstances can exist based on either a single factor or the totality of the circumstances). Recently, however, the United States Supreme Court indicated that an analysis of exigent circumstances should focus on the totality of the circumstances, and it treated each single factor as merely a portion of the totality-of-the-circumstances analysis. *Missouri v. McNeely*, 569 U.S. 141, 149-50, 133 S. Ct. 1552, 1558-59 (2013). Factors that may demonstrate exigent circumstances include hot pursuit of a fleeing suspect, imminent destruction of evidence, protection of human life, and likely escape of the suspect. *Id.* at 149, 133 S. Ct. at 1558-59; *Gray*, 456 N.W.2d at 256. We therefore consider these factors when determining whether exigent circumstances existed based on the totality of the circumstances.

Here, the occupants of the mobile home began to yell and move around when the police approached the home. One officer who executed the search warrant testified that, as he moved toward the front door, he heard an occupant yell "something about the cops" into the home. The officer then observed two other occupants begin to run toward the back of the mobile home. He and another officer testified that seeing occupants run through the

home raised concerns that the occupants were attempting to either destroy evidence or acquire a weapon.

These facts do not demonstrate the presence of exigent circumstances. This case did not involve hot pursuit because that factor applies to situations in which the police chase a suspect in a public place, and the suspect retreats to a private place. *State v. Paul*, 548 N.W.2d 260, 264-65 (Minn. 1996). Here, the police did not chase any of the occupants from a public place into the mobile home; the occupants were already inside when the police arrived. Nor does likely escape of the suspect apply to this case. Even though the occupants ran through the mobile home upon observing the police, the officers secured all exits to the mobile home, so it was unlikely that the occupants would be able to escape. Also, the facts here do not establish that the officers' entry was necessary to prevent the imminent destruction of evidence or to protect human life. It is not sufficient that the occupants merely yelled "something about the cops" and began to run around the mobile home. No one said anything about destroying the drugs or obtaining a weapon. Therefore, exigent circumstances did not exist based on those factors.

The Minnesota Supreme Court has examined other factors when analyzing the totality of the circumstances, including:

> (a) whether a grave or violent offense is involved; (b) whether the suspect is reasonably believed to be armed; (c) whether there is strong probable cause connecting the suspect to the offense; (d) whether police have strong reason to believe the suspect is on the premises; (e) whether it is likely the suspect will escape if not swiftly apprehended; and (f) whether peaceable entry was made.

Gray, 456 N.W.2d at 256 (citing *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970)).

Although some of these factors may have been present here, some factors were clearly not. As to the fifth factor, it was not likely that the occupants of the mobile home would escape because, as explained above, the police secured all exits before they entered. Also, as to the sixth factor, "officers' entry 'with guns drawn' does not constitute peaceable entry under any circumstances." *In re Welfare of D.A.G.*, 484 N.W.2d 787, 791 (Minn. 1992). Since the police here entered the mobile home using a battering ram and with guns drawn, their entry was not peaceable. Based on our examination of these factors, we conclude that exigent circumstances were not present under the totality of the circumstances.

Furthermore, even if exigent circumstances were present, the police impermissibly created the exigency. A warrantless search based on exigent circumstances is valid only when the police's conduct before the exigency is reasonable. *Kentucky v. King*, 563 U.S. 452, 462, 131 S. Ct. 1849, 1858 (2011). And a warrantless entry to prevent the destruction of evidence is permissible only when the police "did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment." *Id.* When the police approach a home without a warrant, they may "do no more than any private citizen might do." *Id.* at 469, 131 S. Ct. at 1862.

Here, the police approached the mobile home with their guns drawn and carrying a battering ram in order to break down the front door. They also shone lights around the property as they prepared to enter the home. Considering that the police did not have a

valid authorization to execute the search at night, these actions are clearly more than a private citizen can do. Additionally, considering that the police did not have a valid authorization of unannounced entry, the use of a battering ram demonstrates that the police intended to break down the front door—also something that a private citizen obviously cannot do.

The state insists that the police did not threaten to violate the Fourth Amendment because the exigency commenced before the officers reached the front door. This argument is unpersuasive because the police threatened to violate the Fourth Amendment simply by approaching the door while carrying the battering ram and with their guns drawn. As such, the threatened violation occurred before the police actually broke down the front door, and this threat was the cause of the occupants' actions. It is reasonable that, upon observing lights shining into a house and observing police officers approaching with guns and a battering ram, the occupants would respond by yelling that the police had arrived and by moving throughout the house. Thus, any exigency was created by the police's threat to violate the Fourth Amendment and cannot justify the warrantless entry.

Thus, exigent circumstances did not justify the police's nighttime search or unannounced entry into the mobile home. Because the invalid nighttime search requires suppression of the evidence, we do not address the state's contention that the unannounced entry does not necessarily require suppression, nor do we address appellant's alternative argument that the search warrant is void due to material misrepresentations in the warrant application.

Reversed.