IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20040965-CA
v.	)	
	)	F I L E D
Paul Anthony Armijo,	)	(April 13, 2006)
	)	
Defendant and Appellant.	)	2006 UT App 147

Third District, Salt Lake Department, 031908515
The Honorable Dennis M. Fuchs

Attorneys: Ralph W. Dellapiana, Debra M. Nelson, and Josie E. Brumfield, Salt Lake City, for Appellant
Mark L. Shurtleff and J. Frederic Voros Jr., Salt Lake City, for Appellee

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Before Judges Billings, Davis, and Thorne.

DAVIS, Judge:

Defendant Paul Anthony Armijo appeals from a conviction for unlawful possession of a controlled substance in violation of Utah Code section 58-37-8(2)(a)(i). See Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 2003). We affirm.

Defendant argues that the police officers' failure to wait a reasonable time after knocking and announcing their presence and purpose before entering the residence where he was sleeping (the Residence) by force violated the knock and announce rule because no exigent circumstances required immediate entry. Defendant therefore contends that the evidence should have been suppressed because the search violated the United States Constitution and Utah code section 77-23-210. See U.S. Const. amend. IV; Utah Code Ann. § 77-23-210 (2003).[1] We review for correctness mixed questions of law and fact in search and seizure cases. See State

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[1]Utah code section 77-23-210 states that an officer executing a search warrant may use such force as is reasonably necessary to enter "if, after notice of his authority and purpose, there is no response or he is not admitted with reasonable promptness." Utah Code Ann. § 77-23-210 (2003).

v. Brake, 2004 UT 95,¶15, 103 P.3d 699. Where, as here, the accuracy of the facts is unchallenged, our review is limited to the correctness of the legal conclusion reached by the trial court. See Brigham City v. Stuart, 2005 UT 13,¶9, 122 P.3d 506, cert. granted, 126 S. Ct. 979 (2006); City of Orem v. Henrie, 868 P.2d 1384, 1386 (Utah Ct. App. 1994) ("[T]he facts relevant to the exigent circumstances determination are undisputed. We thus review for correctness the trial court's conclusion that exigent circumstances justified the warrantless search.").

Under the knock and announce rule, an officer must give notice of his authority and purpose and wait a reasonable time before entering the premises to be searched. See Utah Code Ann. § 77-23-210; State v. Floor, 2005 UT App 320,¶¶10-13, 119 P.3d 305. Although the knock and announce rule is "an element of the reasonableness inquiry under the Fourth Amendment," the "Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." Wilson v. Arkansas, 514 U.S. 927, 934 (1995). Indeed, "if circumstances support a reasonable suspicion of exigency when the officers arrive at the door [of the premises to be searched], they may go straight in." United States v. Banks, 540 U.S. 31, 37 (2003).

We have previously held that exigent circumstances are sufficient to forgo the knock and announce rule when a "reasonable person" believes that immediate entry is "necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." Floor, 2005 UT App 320 at ¶13 (quotations and citation omitted) (holding that police officers did not violate the knock and announce rule by failing to wait "a reasonable time before entry" because exigent circumstances existed); see also Banks, 540 U.S. at 36 ("[T]he obligation [to knock and announce] gives way when officers 'have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or . . . would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.'" (final alteration in original) (citation omitted)); Wilson, 514 U.S. at 936 (stating that the presumption in favor of announcement yields under circumstances presenting a threat of violence or the destruction of evidence). In determining whether exigent circumstances justify an officer's failure to adhere to the knock and announce rule, we look to the totality of the circumstances. See Banks, 540 U.S. at 36 ("[N]o template is likely to produce sounder results than examining the totality of circumstances in a given case . . . ."); Floor, 2005 UT App 320 at ¶12 ("Though the reasonable waiting period [required by the knock and announce rule] is designed as a check upon police action and a protection to the rights of citizens, a determination of reasonable promptness . . . must be made under all the circumstances

. . . ." (quotations and citation omitted)); cf. State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987) (holding that exigent circumstances justified warrantless entry and stating that "[o]ur task is to review the totality of the facts and circumstances of the particular case to determine if the finding of exigency was proper").

It is undisputed here that the officers entered the Residence under a claim of exigent circumstances. The question, however, is "whether it was reasonable [for the officers] to suspect imminent loss of evidence" and risk while serving the warrant. Banks, 540 U.S. at 38 (emphasis added). This showing of exigent circumstances "is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged." Richards v. Wisconsin, 520 U.S. 385, 394-95 (1997); see also Stuart, 2005 UT 13 at ¶31 (determining whether warrantless entry was supported by exigent circumstances, the court stated that "[t]he degree of potential harm to an officer that is necessary to create an exigent circumstance is minimal, reflecting the high value we place on the security of peace officers"); State v. Rosenbaum, 845 P.2d 962, 966 n.2 (Utah Ct. App. 1993) ("The criteria for issuance of no-knock searches . . . is less stringent than that required for the initial probable cause determination.").

Here, police officers were charged with serving a knock and announce warrant seeking evidence of, among other things, crystal methamphetamine, marijuana, and firearms. Detective Watkins, who obtained the search warrant and signed the affidavit in support thereof, specifically requested that the warrant be issued "for the seizure of said items at any time day or night" because "there is reason to believe it is necessary to seize the property prior to it being concealed, destroyed, damaged, [or] altered" and because "[t]he cover of darkness would enhance an undetected approach to the [R]esidence without endangering the safety of police officers or innocent uninvolved parties . . . [by] reducing the possibility to retrieve a weapon or arm any explosive device or trap to defeat law enforcement." Indeed, in his affidavit, Detective Watkins specifically noted that the Residence was located in a residential area, wherein the safety of the neighbors was an issue to be considered when serving the warrant, and one of the persons named in the search warrant had two active arrest warrants and a criminal history of assault, aggravated burglary, resisting an officer, disorderly conduct, and numerous drug- and alcohol-related offenses.

The officers served the warrant in the predawn hours of December 4, 2003. Although the twelve officers were led by Sergeant Mathews, Detective Watkins was the lead person on the entry team to the Residence. When the officers were one house away from the Residence, an unknown vehicle began to turn into the Residence's driveway. After its headlights illuminated the officers, who were dressed in helmets, vests, and clearly marked

uniforms, the vehicle quickly backed out onto the street and continued past the officers. At least one of the officers on the scene observed a passenger in the car talking on a cell phone as the vehicle reversed and left the premises. In addition, Sergeant Mathews said that he observed a light come on in the basement of the Residence as the vehicle drove off. Under these circumstances and in light of the search warrant and affidavit in support thereof, it was entirely reasonable for the police to believe that someone in the Residence had been notified of the imminent search and was either destroying evidence or physically preparing themselves for the search.[2] Because the officers reasonably believed that immediate entry was necessary to prevent the destruction of evidence or physical harm to themselves, see Floor, 2005 UT App 320 at ¶13, we hold that they did not violate the knock and announce rule.

Defendant argues that the trial court erred because it looked at the totality of the circumstances subjectively, rather than objectively,[3] and therefore erroneously relied upon Sergeant Mathews's perception that a light came on in the basement rather than making its own determination.[4] But what the officers believed they saw when they were serving the warrant is of the utmost importance when determining whether their actions were objectively reasonable and whether, under the totality of the circumstances, there were exigent circumstances requiring immediate entry. "Courts have emphasized that the analysis requires an objective determination; that is, while exigent circumstances have multiple characteristics, the guiding

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[2]Defendant implies that circumstances that alert a person to the presence of officers serving a knock and announce search warrant cannot rise to the level of exigent circumstances because the officers serving the warrant were going to knock and announce their presence anyway. However, as the State has pointed out, the difference is that knocking and announcing allows the police officers serving the warrant to reveal their presence on their own terms, in keeping with their tactical plan, and only after they are poised to seal and search the house.

[3]In its conclusions of law, the trial court stated that it "looked subjectively through the eyes of the officers at the scene to assess the specific facts of this case" to determine if exigent circumstances existed.

[4]Defendant notes that the trial court found that "Sergeant Mathews[] said that . . . he observed a light come on in the basement," but "never affirmatively found that a light actually came on in the basement." Indeed, Defendant argues that "had the [trial] court applied the correct objective standard analysis," it "would have determined that a light had not come on in the basement."

principle is reasonableness, and each case must be examined in light of the facts known to officers at the time they acted." City of Orem v. Henrie, 868 P.2d 1384, 1391 (Utah Ct. App. 1994) (quotations and citation omitted) (holding that exigent circumstances justified warrantless search). Indeed, the Utah Supreme Court has stated that a trial court objectively determining reasonableness

> should question whether the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate . . . . [T]he officer must be able to point to specific facts which, considered with rational inferences from those facts, reasonably warrant the intrusion.

State v. Warren, 2003 UT 36,¶14, 78 P.3d 590 (quotations and citations omitted) (determining the reasonableness of a protective frisk for weapons). The supreme court went on to state that, when determining reasonableness, "'due weight must be given, not to [an officer's] inchoate and unparticularized suspicion or "hunch," but to specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his experience.'" Id. (alterations in original) (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).

In other words, the question that the trial court was required to ask was not whether the light actually came on in the basement, but rather, whether the facts available to the officers at the time of the search would have led officers of "reasonable caution" to believe that immediate entry was necessary to prevent destruction of evidence or physical harm to themselves. Id. (quotations and citation omitted). Here, the officers did not rely upon unparticularized suspicion or hunches, but instead pointed to articulable and specific facts that supported their belief that exigent circumstances existed. And what Sergeant Mathews believed he saw when they were approaching the Residence is important in determining whether the officers' actions--namely, their failure to wait a reasonable time after knocking and announcing their presence and purpose before entering the Residence by force--were objectively reasonable.[5] Furthermore,

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[5]Defendant implies that the trial court's denial of his motion to suppress was erroneous because there was no evidence that a light actually came on in the Residence's basement. But we refuse to second-guess a trial court where, as here, there is conflicting evidence on an issue and Defendant's argument is "predicated upon our acceptance of his version of what occurred

(continued...)

when read in context, the trial court's use of the word "subjective" suggests that it was viewing the facts from the point of view of reasonable officers at the scene of the search. Quite simply, the trial court's analysis of the totality of the circumstances was appropriate, and we therefore affirm its denial of Defendant's motion to suppress.

Affirmed.

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James Z. Davis, Judge

I CONCUR:

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Judith M. Billings, Judge

THORNE, Judge (concurring in part and dissenting in part):

I concur with the majority opinion's thorough discussion of the caselaw governing both the knock and announce rule and the exigent circumstances exception to that rule. I part ways with the majority in its application of the exigent circumstances exception to the facts of this case.

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[5](...continued)
and how the officers should have perceived the circumstances as they existed." State v. Ashe, 745 P.2d 1255, 1262 (Utah 1987) (holding that exigent circumstances justified warrantless entry). Here, Defendant conceded that Sergeant Mathews would have testified that he saw a light come on in the basement, not that he just had a hunch that a light came on. The testimony presented did not imply or suggest that Sergeant Mathews was wrong or lying, just that other officers at the scene did not see the basement light. And indeed, Sergeant Mathews may have actually seen a light in the basement window--it may have been turned on by someone who escaped out a back or side door or window, or Sergeant Mathews may have seen a reflection of the vehicle's headlights in a basement window or may have noticed a basement light that had been on from the outset only when the vehicle drove past.

The majority opinion recites the facts leading up to the police entry in great detail, and concludes that it was "entirely reasonable for the police to believe that someone in the Residence . . . was either destroying evidence or physically preparing themselves for the search." There is nothing in the factual record to support this conclusion. Rather, the majority opinion simply buys into the State's position that a few seconds of additional notice of an impending search constitutes, per se, reason to assume the destruction of evidence or the arming of the home's occupants. Under this logic, the knock and announce requirement could simply be discarded by the police any time a dog barks or a motion light comes on while a search team approaches a residence.

As essentially conceded by the State at oral argument, the only honest argument for exigent circumstances under the facts of this case is that the approach and setup of the search did not go exactly as planned. The majority opinion expresses this idea in footnote four: "[K]nocking and announcing allows the police officers serving the warrant to reveal their presence on their own terms, in keeping with their tactical plan, and only after they are poised to seal and search the home." I do not believe that the Fourth Amendment yields to some idealized notion of tactical perfection or, as suggested at oral argument, the loss of tactical control. I believe that a search team, in this case heavily armed and armored and hopefully highly trained, must deal with the inevitable minor deviations from prior plans that occur during the execution of warrants without abandoning constitutional requirements.

The time for the police to consider the need for a no-knock entry to the Residence was when they applied for the warrant. Having sought and received a knock and announce warrant, the police were bound to respect the knock and announce requirement absent actual reason to believe that exigent circumstances existed, i.e., a heightened risk of destruction of evidence or physical harm to the officers. Because there was simply no evidence of exigent circumstances in this case, I would hold that the police entry into the Residence without knocking and announcing violated the Fourth Amendment.

I also believe, however, that the violation was harmless to Defendant and does not warrant suppression of the resulting evidence. The record reveals that Defendant was asleep in the basement when the search was executed, and neither the sound of the forced entry, the shouts of the police, or even the physical "nudging" of the officers aroused him. I see no reason to believe that the lesser tumult of a knock and announce entry would have altered either the results of the search or Defendant's subjective experience.

Under these circumstances, there is no causal link between the police misbehavior and the discovery of the evidence

Defendant seeks to suppress. Further, given Defendant's unconscious state and utter lack of awareness of the search team's actions, he cannot be said to have experienced the kind of unreasonable violation of his privacy that the knock and announce rule is, in part, designed to guard against. Cf. State v. Buck, 756 P.2d 700, 702 (Utah 1988) ("[S]uppression of the evidence is not justified when an unauthorized no-knock entry is made when no one is at home.").

Thus, while I disagree with the majority opinion's approval of the unannounced police entry in this case, I ultimately concur that the trial court's denial of Defendant's motion to suppress should be affirmed.

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William A. Thorne Jr, Judge