

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT HENRY GONZALES,

Defendant-Appellant.

UNPUBLISHED

July 30, 1996

No. 182116

LC No. 94 0377 FH

Before: Michael J. Kelly, P.J., and Reilly and E. Sosnick,* JJ.

PER CURIAM.

Defendant pleaded guilty of possession with intent to deliver cocaine less than fifty grams, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv) and possession with intent to deliver marihuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c).¹ He was sentenced to lifetime probation for the cocaine conviction and a concurrent term of one year probation for the marihuana conviction. He appeals as of right. We reverse.

Defendant states that his plea was conditioned on appellate review of the trial court's denial of his motion to suppress. The record is not clear that the court and the prosecutor agreed to the conditional plea. However, because the prosecutor does not contend that the plea was unconditional, we will review the issue as though a conditional plea was accepted.

Defendant first contends that the evidence seized from his residence should have been

*Circuit Judge sitting on the Court of Appeals by Assignment.

suppressed because the "knock-and-announce statute", MCL 780.656; MSA 28.159(6) was violated. We agree. The only witness who testified at the hearing on the motion to suppress observed the police entry into defendant's residence from approximately fifteen to twenty feet away. The witness testified that at approximately 11:40 a.m. or noon, as she was about halfway down the driveway from defendant's house, police officers arrived in two vans. Four or five officers arrived in the first van, which was parked two houses away from defendant's house. As they simultaneously ran toward the witness and defendant's house, they said, "Police, stop," and then "Police, warrant." At the time they said, "Police, warrant," they were in front of the neighbor's house and had their guns drawn. A second van stopped in front of defendant's house, and the officers from inside disbursed around the house as directed by one of the officers from the first van. The witness testified that she saw one officer pull open a screen door on defendant's house and try to turn the knob of the door. He then said to the other officers, "Let's ram it." As the officers were ramming the door, they said "Police warrant." According to the witness, the officers did not knock on the door before they rammed it. They hit the door with the ram about four times before it opened. Approximately two minutes passed from when the officers in the first van arrived until the door opened.

The trial court ruled:

The Court finds that the officers did not violate the knock and announce requirements. From that testimony included [sic], that the officers stopped 2 doors down the road and they came running up as the witness was leaving the house. She had just gone down the driveway a short time and had been in the house visiting. Then, shortly thereafter and [sic] of course they were yelling to her, "Police warrant". Shortly thereafter, the second van pulled up and there seemed to be a considerable amount of commotion outside. The officers in the first van who were attired in their SWAT team, so to speak, attire with caps and vests on [they] were directing the traffic around the house and telling officers where to go. And then from the testimony, as I understand it, they yelled several times, "Police warrant" and rammed the door, or knocked on the door 4 times with the ram. And her testimony was that 2 minutes elapsed while they were ramming. So, for that reason, the court has denied the motion.

The knock-and-announce statute requires police executing a warrant to give "notice of [their] authority and purpose" and be "refused admittance" before forcing entry. MCL 780.656; MSA 28.159(6). The police must wait a sufficient period of time to allow the occupants to reach the door and grant the police entrance. *People v Williams (After Remand)*, 198 Mich App 537, 545-546; 499 NW2d 404 (1993); *People v Polidori*, 190 Mich App 673, 674-675; 476 NW2d 482 (1991). Noncompliance with the statute's requirements may be excused under certain circumstances, such as where there is a basis to conclude that evidence will be destroyed, lives will be endangered or compliance would be a useless gesture. *Id.* Absent justification for violation of the statute, the evidence recovered must be suppressed. *People v Asher*, 203 Mich App 621, 624; 513 NW2d 144 (1994). A trial court's ruling at a suppression hearing will not be disturbed unless the ruling is found to

be clearly erroneous. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983).

According to the witness whose testimony was not challenged, the officers announced their "authority and purpose" at two times: (1) while in front of the neighbor's house, and (2) as they rammed the door.

First, we do not agree with the prosecutor that the yelling of "Police, warrant" while in front of the neighbor's house gave defendant notice that the officers sought entry to his house. The officers were not "refused admittance" as required by the statute when defendant failed to open his door in response to the activities on the street in front of his neighbor's house.

Second, the witness' testimony indicates that defendant was not given adequate time to respond to the officers' yelling "Police, warrant" while they rammed the door. Contrary to the court's findings, the witness did not testify that two minutes elapsed while the officers were ramming the door. Rather, the witness testified that two minutes elapsed from the time the officers arrived in the first van until they forced the door open. There is no indication how long it took for the officers to ram the door four times. Under these circumstances, we cannot conclude that the officers' actions complied with the statute.

Because the prosecution chose not to present any witnesses at the hearing, there is no evidence that noncompliance with the statute was justified. The prosecutor did not show exigent circumstances that would avoid the requirement of suppression imposed by *Polidori, supra* at 626. Accordingly, the evidence must be suppressed. *Asher, supra*. The trial court's ruling to the contrary was clearly erroneous.

In light of our conclusion on this issue, it is unnecessary to address defendant's remaining issue.

Reversed.

/s/ Maureen Pulte Reilly

/s/ Edward Sosnick

¹ The offense took place before the effective date of 1994 PA 221, which amended this subsection.