STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JEREMY STEVEN VASQUEZ,

Defendant-Appellee.

UNPUBLISHED
March 11, 1997

No. 176917
LC No. 94-009021-FH

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,* JJ.

PER CURIAM.

The prosecution appeals by leave granted the trial court's order granting defendant's motion to suppress evidence seized during the execution of a search warrant. We affirm.

After a controlled buy of marijuana at a house occupied by defendant and his family, the police obtained a search warrant for the premises. The police officers who gathered to execute the warrant were advised that one of the individuals thought to live at the house was known to carry a shotgun. As the officers approached the house, a person looked out the front window and saw them. The officers observed movement toward the rear of the house. After yelling, "Police, search warrant," an officer kicked the front door open and entered the house. Less than a second elapsed between the observation of someone looking out a window and the officers' forced entry. During the search, the police seized 9.8 grams of marijuana, paraphernalia associated with the sale and use of marijuana, and envelopes indicating that defendant lived at the house.

The prosecution does not dispute that it failed to comply with the knock-and-announce statute, MCL 780.656; MSA 28.1259(6). However, it argues that its lack of compliance was excused by exigent circumstances. We disagree. A trial court's decision ruling on a motion to suppress evidence will not be disturbed on appeal unless it was clearly erroneous. *People v Solomon*, ___ Mich App ___; ___ NW2d ___ (Docket No. 181158, issued 12/20/96) slip op p 1.

The knock-and-announce statute provides:

* Circuit judge, sitting on the Court of Appeals by assignment.

> The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant. [MCL 780.656; MSA 28.1259(6).]

If police officers have a basis to conclude that evidence will be destroyed or lives will be endangered by delay, or if events indicate that compliance with the knock-and-announce statute would be a useless gesture, strict compliance with this statute may be excused. *People v Polidori*, 190 Mich App 673, 676; 476 NW2d 482 (1991).

Here, the trial court's finding that exigent circumstances did not exist was not clearly erroneous. In *People v Williams (Aft Remand)*, 198 Mich App 537, 545-546; 499 NW2d 404 (1993), this Court summarized the cases in which exigent circumstances have been found:

> In practice, substantial compliance has been found or has been excused where the officers have been observed before knocking and where, after knocking, officers have heard running and other suspicious noises inside. See, e.g., *People v Jackson*, 179 Mich App 344, 346-347; 445 NW2d 513 (1989), sentence vacated 437 Mich 866 (1990) (as officers approached, a woman was seen running from the front porch into the house); *People v Slater*, 151 Mich App 432, 434-440; 390 NW2d 260 (1986) (after officers knocked, they observed defendant running up the stairs inside the house); *People v Brown*, 43 Mich App 74, 77-90; 204 NW2d 41 (1972) (after police knocked, they heard running inside away from the front door); *People v Doane*, 33 Mich App 579, 581-584; 190 NW2d 259 (1971), rev'd on other grounds 387 Mich 608 (1972) (after knocking, officers saw defendant and his wife observing them through a window instead of opening the door).

The facts here are distinguishable from the facts in all of the above cases. In *Slater*, *supra*, *Brown*, *supra*, and *Doane*, *supra*, the police knocked before the running was observed. Similarly, in *Williams*, *supra*, p 544, the police observed several people running after the police had announced their presence. In applying the totality of the circumstances, there is a distinction, not necessarily a determinative one, between seeing movement away from the front door upon arrival and seeing the same movement after the police have announced their presence. Similarly, there is a distinction between the police seeing someone notice their arrival from a window and seeing the same thing after they have knocked on the front door and waited for a response. See *Doane*, *supra*, p 581. Finally, this case is distinguishable because of the total lack of detail about the observed movement. The testimony at the suppression hearing does not reveal what kind of movement was observed. For example, how many people were observed in the house prior to the forced entry? How many of these people moved? Was the movement swift, as in someone running? Did the movement appear to be in response to the police presence? The lower court record does not answer any of these questions.

Noncompliance with the knock-and-announce statute will not be excused where police do not allow a reasonable time for the occupants to open the door if no suspicious movements are heard to justify an immediate intrusion. *Williams, supra*, p 546. Although the police here had been warned that one of the persons expected to be inside the house customarily carried a shotgun, this fact alone is not determinative. After reviewing the record, we are not left "with the definite and firm conviction that the trial court made a mistake" in granting defendant's motion to suppress. *Id.*

The prosecution also argues that the trial court should have adopted the remedy provided by the knock-and-announce statute rather than granting defendant's motion to exclude the seized evidence. We disagree. Under the Fourth Amendment, the lawfulness of a search or seizure will depend upon its reasonableness. *Polidori, supra*, p 676. Because there is no formula for the determination of reasonableness, each case must be decided on its own facts. *Id.* The requirement that officers identify themselves and state their authority and purpose before entering a private residence has its roots in the Fourth Amendment. *Id.* Consequently, when the method of entry violates the knock-and-announce statute, the exclusionary rule may come into play if the Fourth Amendment standard of reasonableness is also offended. *Id.*, p 677. Here, as in *Polidori, supra*, pp 677-678, the lack of exigent circumstances rendered the search and seizure constitutionally invalid as well as statutorily illegal. See also *People v Asher*, 203 Mich App 621, 624; 513 NW2d 144 (1994). There is no dispute that evidence seized in violation of the Fourth Amendment is subject to the exclusionary rule. *Polidori, supra*, p 678.

Affirmed.

/s/ Myron H. Wahls
/s/ Mark J. Cavanagh
/s/ John F. Kowalski