STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

EUGENE STEVENS,

Defendant-Appellee.

UNPUBLISHED
October 28, 1997

No. 199175
Recorder's Court
LC No. 94-009116

Before: Doctoroff, P.J., and Markman and O'Connell, JJ.

PER CURIAM

This case involves the prosecution's appeal as of right from a suppression order. The trial court found that, in conducting a search of defendant's residence, police officers failed to comply with Michigan's "knock and announce" statute, MCL 780.656; MSA 28.1259(6). In a summary order, this Court vacated and remanded for consideration in light of a recent decision of the United States Supreme Court, *Wilson v Arkansas*, 514 US 927; 115 S Ct 1914; 131 L Ed 2d 976 (1995). (Court of Appeals Docket No 180914). Defendant filed a motion for rehearing which was denied by this Court. Defendant then appealed to the Michigan Supreme Court, which vacated this Court's order and remanded the case to this Court for plenary consideration "as on rehearing granted."

The facts of the police search are as follows: On August 10, 1994, at approximately 6:00 p.m., police purchased narcotics from defendant's female companion and followed her to defendant's house where she had told a confidential informant she kept the "stash." The police determined that defendant was on probation for a controlled substance conviction, and thus decided to raid defendant's house. After obtaining a search warrant, police arrived at defendant's residence at 12:32 a.m. on August 11, 1994. No lights were on and the police heard no footsteps or signs of activity. The officers knocked on the door repeatedly and announced "in a loud voice" that they were police officers. After an eleven second wait, the officers began a forced entry. The forced entry took fifteen to eighteen additional seconds. At no time did the police hear footsteps or voices, and the lights remained off. The police officers testified that it was departmental policy to wait ten to eleven seconds for a resident to respond. This practice does not vary depending on the time of day. The testifying officer denied that a longer

time would be granted for persons sleeping upstairs because "[i]t is my experience . . . that people who are involved in narcotic trafficking usually stay up later."

The trial court found that, under the circumstances of this case, including the hour at which the search was conducted, the Michigan "knock and announce statute," MCL 780.656; MSA 28.1259(6), was violated because a reasonable time was not allowed for sleeping inhabitants to answer the door. Pursuant to the order of the Supreme Court, we will now address the issues presented "as on rehearing granted."

I

In Michigan, the statute governing the breaking of doors and windows in the execution of a search warrant provides as follows:

> 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 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 the execution of the warrant. [MCL 780.656; MSA 28.1259(6).]

This statute is commonly referred to as the "knock and announce" statute. *People v Ortiz*, ___ Mich App ___; ___ NW2d ___ (Docket No 192779, issued 7/15/97, slip op p 4).

This Court and the United States Supreme Court have recognized that the "knock and announce" principle is embodied in the Fourth Amendment's protection against unreasonable searches and seizures. *Wilson v Arkansas*, *supra* at 131 L Ed 2d 982; *People v Polidori*, 190 Mich App 673, 677; 476 NW2d 482 (1991). The Supreme Court indicated that an unannounced entry may be reasonable under the Fourth Amendment in a variety of situations, including when there was a threat of physical violence, or when "police officers have reason to believe that evidence would likely be destroyed if advance notice were given." *Wilson*, *supra* at 131 L Ed 2d 983-984; see also *Polidori*, *supra* at 677.

In the prosecution's Answer to Application for Leave to Appeal in the Supreme Court, plaintiff argues that, under the facts of this case, the eleven second wait was sufficient to satisfy the requirements of MCL 780.656; MSA 28.1259(6). Plaintiff apparently contends that the police were constructively denied admittance to the dwelling. We disagree.

Under the "knock and announce" statute, refusal of admittance is not limited to affirmative denials. *People v Slater*, 151 Mich App 432, 437; 390 NW2d 260 (1986). If the police can reasonably infer from the actions or inactions of the occupants that they have been constructively refused admittance, the police may force their entry without delay. *Griffin v United States*, 618 A2d 114, 120 (DC App, 1992). In *Ortiz*, *supra*, this Court stated:

> The "knock and announce" statute requires a person attempting to execute a search warrant to proclaim his presence and purpose in a manner reasonably calculated to

> provide notice to the occupants under the circumstances. Factors that indicate whether an officer's announcement was reasonably calculated to provide notice under the circumstances include whether the announcement was made with sufficient volume for an average person inside to hear and the time between the announcement and a subsequent forcible entry. [*Id.* at 5.]

In determining whether a refusal of admittance occurred, courts employ a highly contextual analysis, examining all of the circumstances of the case. *Griffin*, *supra* at 120. In this case, defendant contends that the officers' forced entry at 12:32 a.m., with no signs that any occupants were awake, and after only an eleven second pause, was insufficient to satisfy the "knock and announce" statute. We agree with defendant and the trial court that the police failed to give reasonable notice to the occupants of the dwelling before forcing entry.

The facts of *Griffin*, *supra* were very similar to those of the instant case. In that case, decided by the District of Columbia Court of Appeals, the police knocked and announced their presence, waited approximately thirty seconds, and forced entry into the defendant's apartment at 1:40 a.m. Under a similar statute to MCL 780.656; MSA 28.1259(6), the defendant argued that the "knock and announce" mandate was violated. The *Griffin* court conducted a thorough and competent analysis of the issue presented, in which it stated:

> [Breaking down the door to a residence] is no trivial invasion of the privacy of those inside. Aside from the terror that such police action is likely to instill, especially where, as here, it is taken in the middle of the night, the effect of destroying the door may be to deprive the occupants of the apartment of their personal security.
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> So drastic a forced entry affects everyone who uses the dwelling, and not just the suspected drug dealer. . . . Use of a battering ram to break down the door of a dwelling will almost inevitably harm the innocent as well as those suspected of breaking the law. Whether or not so intended, its practical effect is to inflict de facto collective inconvenience which, to innocent persons so inconvenienced, will seem a lot like collective punishment. [*Id.* at 119.]

In discussing the police entry "in the middle of the night," the *Griffin* court stated:

> The law does not require us to close our minds to facts which are known to all reasonably intelligent people. We may thus take judicial notice that, at that time of night, most people are in bed, and many are asleep. If a person is awakened by a banging on the door, an immediate and appropriate response may not be feasible. For at least a brief period, the erstwhile sleeper is likely to be too bewildered to react. He or she must then focus on the possibility that those demanding entry may have no legitimate purpose on the premises. . . . Indeed, the occupant's first instinct – a reasonable one – may be to call 911. Moreover, most citizens are not clad at 1:40 a.m. in manner

> suitable for opening the door to strangers. If someone is not dressed, sufficiently or at all, dressing takes time. Finally, for most people awakened or startled by loud banging at twenty to two in the morning, the circumstances are not likely to be conducive to rational analysis or to swift or provident decision-making. [*Id.* at 121 (citations omitted).]

Under the facts of *Griffin*, the District of Columbia Court of Appeals found that no refusal of admittance was shown. The court cited the hour of the intrusion, the brief amount of time between the announcement and the entry, and the lack of any sign that the occupants were awake. *Id.* Under these facts, the *Griffin* court stated: "Certainly no reasonable law enforcement should have sensibly expected that a 15 to 30 second delay in answering the door at that hour constituted a denial of admittance." *Id.* at 125.[1]

In this case, the police waited only eleven seconds before forcing entry into defendant's dwelling, as opposed to the thirty seconds allowed in *Griffin*. As in *Griffin*, the police in this case arrived at defendant's residence at a time of night when "most people are in bed, and many are asleep." *Id.* at 121. In addition, the officers in this case admitted that they heard no noises and saw no signs that any of the occupants of the house were awake. We find that, under the facts of this case, the police actions were not "reasonably calculated to provide notice to the occupants under the circumstances." *Ortiz, supra*. It could not be reasonably expected that people sleeping inside the dwelling at 12:32 a.m. could arise and answer the door in a mere eleven seconds. Thus, on the facts of this case, we find that the police were not constructively denied entry into defendant's home, and the officers failed to comply with the requirements of the "knock and announce" principle.

II

The issue then becomes whether the police were justified in violating the Michigan "knock and announce" statute. We find that the forced entry violated defendant's Fourth Amendment rights against an unreasonable search and seizure, and thus affirm the trial court.

The United States Supreme Court recently clarified this area of law in *Richards v Wisconsin*, ___ US ___; 117 S Ct 1416; 137 L Ed 2d 615 (1997). In *Richards*, the Wisconsin Supreme Court had concluded that police officers are never required to knock and announce their presence when executing a search warrant in a felony drug investigation. *Id.* at 117 S Ct 1418. The United States Supreme Court disagreed, finding that the Fourth Amendment does not permit a blanket exception to the "knock and announce" requirement for an entire category of criminal activity. In *Richards*, the Court stated that a "no-knock"[2] entry into a dwelling will only be valid if the prosecution can articulate a reasonable justification for an unannounced entry. *Id.* at 117 S Ct 1421-1422. The search will be found valid if police can articulate "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of the evidence." *Id.* at 117 S Ct 1421. The Court further stated that the burden of such a showing "is not high." *Id.* at 117 S Ct 1422. The reasonableness of the officers' decision must be evaluated as of the time of the entry. *Id.* at 117 S Ct 1422.

In addition to the guidance provided by the United States Supreme Court, this Court has similarly found that a search was unreasonable when the prosecution failed to articulate a justification for lack of adherence to the Michigan "knock and announce" statute. In *Polidori, supra*, this Court cited a case from the Illinois Court of Appeals, stating that in that case:

> [T]he information acquired by the police officers "was insufficient to supply the requisite exigent circumstances which would permit them to dispense with the knock and announce rule." There was no proof that the evidence sought to be seized was kept in a place that would facilitate its destruction. Nor was there any indication that the occupant was armed. Without more, there was no justification for the conduct of the police. [*Id.* at 677.]

Similarly, in *People v Asher*, 203 Mich App 621; 513 NW2d 144 (1994), this Court stated:

> [N]othing in this case indicates that there was any evidence that drugs were kept in a manner that would facilitate their immediate destruction or that these particular defendants possessed weapons. Without such evidence, there was no justification for the police to dispense with the requirements of the knock-and-announce statute. [*Id.* at 624.]

Pursuant to the decisions in *Richards*, *Polidori*, and *Asher*, we find that the prosecution was required to articulate a justification for a forced entry into a dwelling in violation of the "knock and announce" principle. As set forth in *Richards*, possible justifications for an unannounced or "no-knock" entry could include danger of physical harm, futility of an announcement, or possible inhibition of a criminal investigation, such as the destruction of evidence. *Id.* at 117 S Ct 1421. "This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged." *Id.* at 117 S Ct 1422.

In this case, neither the prosecution nor the police provided any justification for the noncompliance with MCL 780.656; MSA 28.1259(6). In the prosecution's Answer to Application for Leave to Appeal in the Supreme Court, plaintiff stated, "the People agree that the record is adequate and complete" on the question of whether the officers' forced entry was sufficiently announced. However, the record is devoid of any evidence that exigent circumstances existed which would have allowed the officers to violate the statute.

In its brief, plaintiff contends that this Court should follow the Wisconsin Supreme Court's opinion in *Wisconsin v Stevens*, 181 Wis 2d 410; 511 NW2d 591 (Wis, 1994), which held that in felony drug cases, the "knock and announce" principle does not apply because exigent circumstances will always be present in such cases. However, as set forth, *supra*, the United States Supreme Court specifically rejected this argument and overruled the Wisconsin Supreme Court. *Richards, supra*. Plaintiff makes no other attempt to justify the police violation of the "knock and announce" principle, and the record indicates that the house was quiet and dark. Thus, there is no indication that a quick entry was needed for safety or to prevent the destruction of evidence.

We wish to express our displeasure with parties' failure to appear at oral argument before this Court. We are particularly offended by the prosecution's forfeiture of yet another opportunity to satisfy its responsibility to articulate a justification for the police action. Although "the showing is not high," *Richards*, *supra* at 117 S Ct 1422, the prosecution has repeatedly failed to articulate any legitimate reasons for the quick forced entry into defendant's dwelling. The prosecution found the resources to appeal the trial court's ruling to this Court and to the Michigan Supreme Court (which remanded the case to us). Yet, when this Court offered to accept supplemental briefs, the prosecution declined to submit any materials. In addition, this panel went to considerable lengths to schedule a full hearing on this matter, yet the prosecution could not be bothered to appear. In this case, it was the prosecution that appealed the trial court's decision, and the burden of proof rested with it. We find it inexcusable that the prosecution declined its many opportunities to present a justification for the police action in this case.

Because the prosecution failed to present any reasonable justification for the quick forced entry into defendant's home, we must conclude that, under the circumstances of this case, the police entry was not reasonable under the Fourth Amendment and the Michigan "knock and announce" statute, MCL 780.656; MSA 28.1259(6).

III

The prosecution contends that, even if the "knock and announce" statute was violated and the search was found unreasonable, the evidence should not be suppressed. However, this Court has specifically held, "if the method of entry violates the knock-and-announce statute, the exclusionary rule must apply." *Asher*, *supra* at 624. Accordingly, plaintiff's argument is without merit and the trial court properly suppressed the seized evidence.

Affirmed.

/s/ Martin M. Doctoroff

[1] For other cases making similar conclusions see *Poole v United States*, 630 A2d 1109 (DC App, 1993) and *Commonwealth v Newman*, 429 Pa 441; 240 A2d 795 (Pa, 1968). Although these other cases may serve as "useful guideposts," we agree with the observation in *Griffin*, that, due to the "highly contextual analysis" of this issue, precise "case matching" may not be particularly useful in "knock and announce" cases. *Griffin*, *supra* at 122.

[2] We recognize that, technically, the instant case does not involve a "no-knock" situation since police did knock before forcing entry. However, because the reasonableness of the police's forced entry was similarly challenged in both cases, we find that the same standard applies in assessing whether the entry in this case violated the "knock and announce" principle and the Fourth Amendment.