STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED
v	No. 199175 Recorder's Court
EUGENE STEVENS, Defendant-Appellee.	LC No. 94-009116 ON REMAND

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

MARKMAN, J. (concurring).

I concur with the opinion of Judge Doctoroff. In *Richards v Wisconsin* , ___ US ___; 117 S Ct 1416; 137 L Ed2d 615 (1997), the United States Supreme Court concluded that the Fourth Amendment does not permit a blanket exception to the "knock and announce" requirement for drug searches. While the burden of making the necessary showing in support of such searches is "not high," some articulated justification is required. Despite repeated opportunities to set forth justification for the search-- something that this Court believes that plaintiff could not have been expected to do adequately at trial in light of the subsequent decisions of the United States Supreme Court in *Richards* and *Wilson v Arkansas*, 514 US 927; 115 S Ct 1914; 131 L Ed 2d 976 (1995)-- plaintiff has chosen not to avail itself of such opportunities. As Judge Doctoroff points out, plaintiff has resisted this Court's effort to remand in order to elicit further justification, it has failed to submit supplemental briefs for such purpose and it has chosen not to participate in oral argument in support of its position. Inexplicably, plaintiff has rebuffed the efforts of this Court to afford it a "full and fair" opportunity to justify a search in view of later-clarified legal standards. As a result, it has failed clearly to set forth evidence either of concern on the part of the police of potential physical harm to themselves or concern that drugs might be destroyed, had the search been conducted differently.

Despite this history, my own preference would still be to remand for additional proceedings. However, unlike the dissent, I believe that we have been precluded from this course of action by Supreme Court's remand order. Such order vacated this Court's earlier order remanding for hearings in light of *Wilson* and observed that "The prosecution has conceded that the present record is adequate and complete on the question of the sufficiency of the announced entry."

Not only do I disagree with plaintiff that the record is sufficient in light of *Richards*, but I believe that the record could have been usefully supplemented even prior to *Richards*. For example, the dimensions of defendant's house and the time required by an occupant to respond to a "knock and announce" are unclear, *People v Harvey*, 38 Mich App 39, 43; 195 NW2d 773 (1972), as are the circumstances of the "armored" front door and the extent and timeliness of its recognition by the police.

Therefore, I am compelled to affirm the trial court because of plaintiff's failure to satisfy its burden of demonstrating the reasonableness of its search in light of *Richards*. However, I would only affirm the court's suppression of the evidence here because I am required to do so under *People v Asher*, 203 Mich App 621; 513 NW2d 544 (1994). MCR 7.215(H).

/s/ Stephen J. Markman