

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 07-2232

Plaintiff-Appellant,

**ON APPEAL FROM THE
MONTGOMERY COUNTY COURT
OF APPEALS, SECOND
APPELLATE DISTRICT**

vs.

KEVIN PETERSON

**COURT OF APPEALS
CASE NO. 22008**

Defendant-Appellee.

APPELLANT'S REPLY BRIEF

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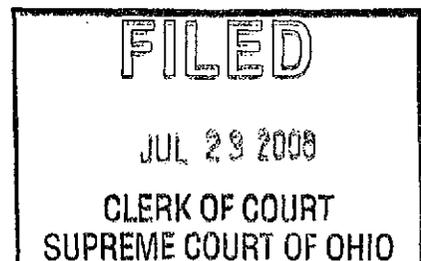


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REPLY TO PETERSON'S ARGUMENT

Peterson's Statement of Facts

The trial judge in this case did not believe the suppression hearing testimony offered by defense witnesses. Judge Wagner stated for the record, "this Court reviewed all the evidence in the pleadings and found the case made by the officers in this situation to be very credible and Mr. Peterson's case to be almost totally incredible. I mean, *** not totally but pretty close ***." (8/7/06 Tr. 4) The judge "found tremendous discrepancies" in the defense witnesses's testimony and noted for the record some of the inconsistencies and contradictions inherent in the defense testimony. (8/7/06 Tr. 4-5) The court concluded, "Well, suffice it to say, I found you not to be credible [referring to Peterson] nor your witnesses. There were other issues that led me to believe that they simply weren't credible." (8/7/06 Tr. 6) On the other hand, the trial judge "found the officers to be very credible." Id.

Despite the trial judge's rejection of the testimony presented by the defense, Peterson's brief cites this Court to the testimony offered by his witnesses in support of his argument that the Dayton Police violated his right to be free of unreasonable searches and seizures. But it would be error for this Court to rely upon the defense witnesses's testimony when deciding this case. When considering a motion to suppress, the trial court assumes the role of the trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate the credibility of the witnesses. *State v. Mayl*, 106 Ohio St.3d 207, 2005 Ohio 4629, 833 N.E.2d 1216, at ¶41, citation omitted. Accordingly, upon review of the decision on a motion to suppress, this Court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Id. Then, accepting those facts as true, this Court must independently determine as a matter of law whether they meet the applicable legal standard. Id.

Thus, this Court should base its review of this matter upon the facts as related by the Dayton Police Officers.

Peterson's Waiver of Jurisdictional Arguments

Peterson has included in his merit brief arguments intended to oppose the State's memorandum in support of jurisdiction. To the extent that Peterson now seeks to persuade this Court that this appeal was improvidently allowed, his arguments should not be considered. Peterson waived jurisdictional arguments by declining to file a memorandum in response to the State's memorandum in support of jurisdiction.

The Dayton Police Did Not Create the Exigent Circumstance That Led to the Warrantless Entry of 1609 Westona

Peterson contends that the Dayton Police improperly conducted the knock and advise procedure in this case. He is wrong. The case that Peterson cites to support his contention, *United States v. Gomez-Moreno* (2007), 479 F.3d 350 (5th Cir.), is distinguishable from the case now before this Court. In *Gomez-Moreno*, the law enforcement officers created a show of force when they surrounded a residence with ten to twelve officers and had a helicopter hovering overhead. *Gomez-Moreno*, at 355. Furthermore, when no one responded to the officers's knocking, they announced their presence and demanded that the occupants open the door. Eventually, a man exited the house, saw the police, and ran back inside. This was the exigent circumstance that officers relied upon to enter the home without a warrant. *Id.* Because the officers made a show of force, demanded entrance, and raided the residence, all in the name of a knock and talk, the Circuit Court held that the knock and talk strategy was unreasonable. Thus, the court determined that the officers had created the exigent circumstances.

In this case, the officers did not create the exigency that led to the warrantless entry of 1609 Westona. Although approximately eight officers went to the residence to conduct the

knock and advise, they did not present a show of force. The officers who were positioned on the sides of the house did nothing to make their presence known to those inside the residence. Three officers went to the front door of the house, and only one of them knocked on the door. (6/19/06 MTS Tr. 23) The officers did not identify themselves as Dayton Police officers until someone inside the house asked who was at the door. *Id.* The officers never demanded entry. Only after an occupant of the house was seen in plain view running down the basement steps carrying a jar of suspected crack cocaine did the officers go inside based upon the belief that evidence was being destroyed.

On these facts, there is no basis for this Court to find that the Dayton Police conducted the knock and advise procedure improperly. Thus, the officers did not manufacture an exigency by employing a legitimate investigative tactic, conducted in a proper fashion. *United States v. Newman* (2006), 472 F.3d 233, 238-239 (5th Cir.).

CONCLUSION

The trial court's decision overruling Peterson's motion to suppress was not error. The decision of the Second District Court of Appeals overruling the trial court's denial of Peterson's motion to suppress should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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