

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	CASE NO.
)	
APPELLEE	)	On Appeal from the Mahoning
	)	County Court of Appeals,
V.	)	Seventh Appellate District
)	
SHERRY BEMBRY)	
AND	)	Court of Appeals
HARSIMRAN SINGH	)	Case Nos. 2014 MA 51, 52
)	
APPELLANTS)	

MEMORANDUM IN SUPPORT OF JURISDICTION FOR
APPELLANTS SHERRY BEMBRY AND HARSIMRAN SINGH

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***EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY AN APPEAL
SHOULD BE GRANTED IN THIS FELONY CASE***

“This court should determine in this case whether the Ohio Constitution provides greater protections against forcible entries of homes than the United States Constitution does, and whether those protections include rendering inadmissible the fruits of such entries.”

State v. Oliver, 112 Ohio St.3d 44, 2007-Ohio-372, 860 N.E.2d 1002,
¶ 18 (Pfeifer, J., dissenting).

In *State v. Bembry*, 7th Dist. No. 2014 MA 51, 52, 2015-Ohio-5598, the Seventh District Court of Appeals, in reversing the decision of the trial court, found that the exclusionary rule is inapplicable as a remedy when the police, during the execution of a search warrant, violate R.C. 2935.12 - Ohio’s Knock and Announce Rule. In reaching its decision, the Seventh District relied exclusively on the decision of the United States Supreme Court in *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 156 L.Ed.2d 56 (2006). In both the trial court and in the Seventh District, the Appellants argued that suppression was an appropriate remedy under Article I, Section 14 of the Ohio Constitution as our state constitution provides greater protection than the Fourth Amendment against unlawful searches and seizures conducted by law enforcement. The Seventh District failed to address this issue or even mention the Ohio Constitution.

This Court should accept jurisdiction for several important reasons. First, this case essentially is one of first impression in Ohio as no Ohio court has yet to decide whether suppression is a proper remedy under Article I, Section 14 of the Ohio Constitution for a violation of Ohio’s Knock and Announce Rule. In 2007, in *Oliver, supra*, the issue of remedy for a Knock and Announce Violation was before this Court. At that time, a majority of this Court remanded that case

to the trial court to consider the effects of the then recently decided *Hudson* case on its ruling ordering the suppression of evidence. The majority held that the people of Ohio had a paramount interest in knowing how their courts would interpret and apply *Hudson*. As noted above, Justice Pfeifer, in dissenting, argued that this Court must first determine whether the Ohio Constitution would require suppression of evidence for a violation of the Ohio Knock and Announce Rule. In the nine (9) years since *Oliver* was decided, not a single Ohio appellate court has addressed the issue of what remedy is appropriate under the Ohio Constitution for a violation of the Knock and Announce Rule.

This Court has repeatedly held that Article I, Section 14 of the Ohio Constitution provides greater protection than the Fourth Amendment. Most recently, in *State v. Brown*, 143 Ohio St.3d 444, 2015-Ohio-2438, 39 N.E.3d 496, ¶¶ 23-25, this Court found suppression of evidence was an appropriate remedy under the Ohio Constitution based upon the officer's actions outside her statutory authority. Put another way, under the Ohio Constitution, the exclusionary rule can be applied in instances in which law enforcement violate a statute or act without statutory authority. It is now time for this Court to settle once and for all whether a violation of the Knock and Announce Rule requires suppression under the Ohio Constitution. The people of Ohio have a right to know the answer to this question.

In this case, the State conceded in both the trial court and the Seventh District that the officers violated Ohio's Knock and Announce Rule. The only issue remaining for the Seventh District to decide was whether the exclusionary rule was applicable. While the Seventh District found that, under the Fourth Amendment, suppression was not appropriate, it failed to consider the appropriate remedy under the Ohio Constitution. The trial court found that if there was no

consequence to a violation of the Knock and Announce Statute, why have the statute at all. This points to the second reason that this Court should hear this appeal. That is, whether law enforcement officers in Ohio must obey the law while enforcing the law.

Ohio's Knock and Announce Rule has been codified for more than fifty (50) years and pre-dates *Hudson*. Cases requiring suppression were decided in Ohio long before the United States Supreme Court squarely began addressing the issue in the mid-1990s. In the nine (9) years since *Hudson* was decided, the Ohio Legislature has not modified or repealed R.C. 2935.12. The Ohio Legislature enacted R.C. 2935.12 to protect human life, dignity and personal property. It is readily apparent that the only way to guarantee the protections of Ohio's Knock and Announce Rule is to ensure that there must be a consequence when officers violate the law. Suppression, under the Ohio Constitution, is the appropriate consequence. The Seventh District's decision in this matter eviscerates those protections and provides no consequences to officers who violate the law.

The third reason that this Court should hear this appeal is that other states have already addressed and decided the issue of whether suppression is the appropriate remedy for a violation of their states' Knock and Announce rules. These states have recognized, under their state constitutions and jurisprudence, that suppression of evidence is the only remedy for a violation of the states' Knock and Announce Rule. Florida, Alaska and New Mexico have all essentially recognized that evidence seized in flagrant disregard of the Knock and Announce Rule cannot be allowed to stand without making the courts, themselves, accomplices in disobedience of the law. Ohio must join the growing number of states who have dealt squarely with the issue of an appropriate remedy under the state constitution for a violation of the Knock and Announce Rule. The Seventh District was presented with decisions from other jurisdictions on the issue of remedy for a Knock and Announce

violation but failed to address those decisions in any fashion.

Finally, of course, this case involves two (2) people charged with various felonies. Since the State appealed the trial court's granting of a motion to suppress, the Appellants have not yet been convicted of anything. However, the Appellants risk imprisonment, fines and other disabilities flowing from felony convictions. These convictions, of course, would follow from evidence seized by police officers in violation of R.C. 2935.12.

In sum, the people of Ohio, the lower courts, police officers and attorneys all have a paramount interest in knowing whether the Ohio Constitution requires suppression of evidence seized by police officers in violation of Ohio's Knock and Announce Rule. Thus far, no Ohio appellate court, or this Court, has dealt squarely with that issue. As the State has consistently conceded that the police, in this matter, violated R.C. 2935.12 in executing a search warrant, the only issue that would need to be decided by this Court is whether the Ohio Constitution requires exclusion of evidence obtained from a search following a violation of R.C. 2935.12. Other states have decided this issue. Appellants believe that justice requires that this Court accept jurisdiction in this case so that Ohio can join the growing number of states that have squarely dealt with the remedy, under state law, for a knock and announce violation.

STATEMENT OF THE CASE AND FACTS

On October 30, 2012, Det. Michael Dado of the Boardman Police Department obtained a search warrant authorizing a search of the Appellants' residence. Dado's affidavit alleged two (2) controlled buys between a confidential informant and Appellant Singh in or around Appellants' apartment building in October, 2012. On November 2, 2012, at approximately 8:30 a.m., Dado,

along with several other Boardman Police Officers proceeded to the residence and executed the search warrant.

Upon their arrival at the residence, Boardman Police Officer Tim Highes knocked on the Appellants' door for approximately thirty (30) seconds when officers heard a male ask "who is it?" Hughes replied, "Police, open the door" and, after approximately fifteen (15) seconds, the officers used a battering ram to knock the door down to forcefully enter the residence. The officers conducted a search of the residence and seized, among other items, .7 of a gram of heroin, two (2) guns, one of which was allegedly stolen, a Playstation 3 video game console, a 50" Plasma TV and an automobile from the driveway.

On February 21, 2013, Appellant Bembry was indicted by the Mahoning County Grand Jury for Permitting Drug Abuse, a violation of R.C. 2925.13, a felony of the fifth degree. On the same date, Appellant Singh was indicted for Possession of Heroin, a violation of R.C. 2925.11, a felony of the fifth degree, Trafficking in Heroin, a violation of R.C. 2925.03, a felony of the fourth degree, Receiving Stolen Property, a violation of R.C. 2913.51, a felony of the fourth degree, and an accompanying Forfeiture Specification.

On June 23, 2013, Appellants filed a joint *Motion to Suppress*. A hearing on the motion was held in the trial court on January 8, 2014. Dado and Appellant Singh testified at the hearing. Following the hearing, the trial court issued a written decision granting the *Motion to Suppress*. In its decision, the trial court made three (3) findings. First, the affidavit in support of the search warrant was supported by probable cause.¹ Second, that the officers violated R.C. 2935.12 when

¹This finding is not at issue in this appeal.

they failed to announce their purpose for demanding admittance into the residence.² Third, that there were no exigent circumstances that justified the violation of R.C. 2935.12.³

The State timely appealed the trial court's decision to the Seventh District of Appeals. The sole assignment raised by the State in its appeal was that the trial court should have denied the Appellants' joint *Motion To Suppress* as the exclusionary rule does not apply to violations of Ohio's Knock and Announce Rule. As noted, the State conceded in the trial court and the Seventh District that Boardman Police violated R.C. 2935.12 in executing the search warrant. The State simply argued that under *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 156 L.Ed.2d 56 (2006), and Ohio appellate decisions interpreting *Hudson*, the exclusionary rule does not apply to knock and announce violations. In the Seventh District, the Appellants argued, *inter alia*, that suppression was an appropriate remedy under the Ohio Constitution for a violation of R.C. 2935.12.

The Seventh District agreed with the State and reversed the decision of the trial court on the grounds that, under *Hudson*, the exclusionary rule is inapplicable as a remedy where the evidence was found during the course of executing a valid search warrant, regardless of a failure to knock and announce.

The Seventh District erred in finding that suppression was not an appropriate remedy. The Seventh District never addressed whether the exclusionary rule would be applicable under the Ohio Constitution for a violation of R.C. 2935.12. While exclusion of evidence may not be required under the Fourth Amendment, under Article I, Section 14 of the Ohio Constitution, which provides greater

²This finding was conceded by the State in the trial court and court of appeals.

³This finding is not at issue as the State never contested this finding in the Seventh District Court of Appeals.

protection than the Fourth Amendment, exclusion of evidence is not just an appropriate remedy, but, the only appropriate remedy.

In support of their position on this issue, the Appellants present the following argument.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NO. 1

THE EXCLUSIONARY RULE IS THE APPROPRIATE REMEDY UNDER ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION FOR A VIOLATION OF R.C. 2935.12.

R.C. 2935.12 was enacted in 1990. It contains provisions analogous to the former *Ohio Revised Code* § 2935.15, which was enacted in 1960.⁴ It is important to note that *Hudson* was decided more than nine (9) years ago and the Ohio Legislature has not modified or revoked the requirements of *Ohio Revised Code* § 2935.12.

R.C. 2935.12 provides:

(A) When making an arrest or executing an arrest warrant or summons in lieu of an arrest warrant, or when executing a search warrant, the peace officer, law enforcement officer, or other authorized individual making the arrest or executing the warrant or summons may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make the arrest or to execute the warrant or summons, he is refused admittance, but the law enforcement officer or other authorized individual executing a search warrant shall not enter a house or building not described in the warrant.

The Knock and Announce Rule existed at common law and predates the United States Constitution. *Wilson v. Arkansas*, 514 U.S. 927, 931-934, 115 S.Ct 1914, 131 L.Ed.2d 976 (1995). The rule is codified in Ohio in R.C. 2935.12. *Oliver, supra*, at ¶ 9. The Knock and Announce Rule

⁴See Ed. Note to *Ohio Revised Code* § 2935.12.

directs police officers executing a search warrant at a residence to first knock on the door, announce their purpose, and identify themselves before they forcibly enter the home. *Id.* In this case, it is uncontested by the State that the Boardman Police Officers violated R.C. 2935.12 by not announcing that they were there to serve a search warrant.

In *Miller v. United States*, 357 U.S. 301, 313, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958), the United States Supreme Court first addressed the Knock and Announce Rule and specified one of the reasons for it as “Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.” In *Miller*, the Court suppressed evidence seized in violation of the Knock and Announce Rule as it found the actions of the officers to be unlawful in that the officers did not expressly demand admission or state their purpose for their presence. *Id.* at 303. The Court held:

The rule seems to require notice in the form of an express announcement by the officers of their purpose for demanding admission. The burden of making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirement in this case.

Id. at 313.

In *State v. Valentine*, 74 Ohio App.3d 110, 113, 598 N.E.2d 82 (1991), the Fourth District Court of Appeals held that pursuant to R.C. 2935.12, it is not sufficient for an officer merely to identify himself as police officer, the officer must also give notice of his intention to make a search. In *Valentine*, the officer merely stated he was from the Sheriff’s Department but did not state that he was there to execute a search warrant. *Id.* The court found that this violated the Knock and Announce Rule and, since none of the exceptions (*i.e.*, exigent circumstances) applied, required suppression of the evidence seized. Specifically, the court held that “if the provisions of R.C.

2935.12 are not followed, then before a search can withstand a motion to suppress, it must overcome statutory and constitutional concerns.” *Id.*

Here, there is no question that the officers violated R.C. 2935.12 by failing to announce their purpose in seeking admission into Appellants residence. The only issue to decide is what remedy is proper for the officers’ violation of the law.

The United States Supreme Court did, indeed, in *Hudson* find that even if the police violate the knock-and-announce rule before executing a search warrant, the Fourth Amendment does not necessarily require the suppression of all evidence found in the ensuing search. *Oliver, supra*, at ¶ 11. In *Hudson*, Justice Scalia, writing for the majority noted that while the Knock and Announce Rule protects human life and limb, privacy and dignity and personal property, the rule has never protected one's interest in preventing the government from seeing or taking evidence described in a warrant. *Hudson* at 594. Since the interests that are violated in Knock and Announce cases have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable. *Id.* *Hudson* was a divided opinion, with three (3) Justices joining Scalia, Justice Kennedy filing a separate, concurring opinion and four (4) Justices dissenting.

In his dissent, Justice Breyer noted that the decision of the Court not only represented a significant departure from the Court’s precedents, but, it also weakened and, perhaps, destroyed, much of the practical value of the Constitution's knock-and-announce protection. *Id.* at 605 (Breyer, J., dissenting). Justice Breyer noted that without such a rule the “police know that they can ignore the Constitution's requirements without risking suppression of evidence discovered after an unreasonable entry.” *Id.* at 609.

Fortunately, this Court need not decide which side of this debate accurately reflects and

safeguards the concerns expressed by our nation's founders when they adopted the Fourth Amendment, because *Hudson* does not govern the application of the Ohio Constitution for a violation of R.C. 2935.12.

Article I, Section 14 of the Ohio Constitution provides:

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.

In *State v. Brown*, 99 Ohio St.3d 323, 325, 2003-Ohio-3931, 792 N.E.2d 175, ¶ 21, this Court held that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups. *Id.*

In *Brown*, this Court held that Article I, Section 14 of the Ohio Constitution provides greater protection than the Fourth Amendment to the United States Constitution. In *Brown*, this Court found that an arrest for minor misdemeanor (in violation of R.C. 2935.26) violated Article I, Section 14 of the Ohio Constitution and required suppression of crack cocaine seized in search incident to arrest. *Id.* at ¶ 25.

Recently, in *State v. Brown*, 143 Ohio St.3d 444, 2015-Ohio-2438, 39 N.E.3d 496, ¶ 23, this Court reiterated those principles. In this later *Brown* case, this Court held that a traffic stop for a minor misdemeanor offense made by a township police officer without statutory authority to do so

violates Article I, Section 14 of the Ohio Constitution. *Id.* This Court found that:

In this case, the state admits that Officer Clark violated R.C. 4513.39 by stopping Brown for a marked lane violation on Interstate 280. Thus, Clark acted outside her authority and exercised law-enforcement powers not expressly granted to a township officer by the General Assembly. The government's interests in permitting an officer without statutory jurisdiction or authority to make a traffic stop for a minor misdemeanor offense in these circumstances is minimal and is outweighed by the intrusion upon the individual's liberty and privacy that necessarily arises out of the stop. Accordingly, the traffic stop and the ensuing search and arrest in this case were unreasonable and violated Article I, Section 14 of the Ohio Constitution, and the evidence seized as a result should have been suppressed.

Id. at ¶ 25.

Thus, this Court held that a search and seizure conducted by an officer, in contradiction to an Ohio Statute, can rise to a constitutional violation under Article I, Section 14, mandating the use of the exclusionary rule. There is no reason not to apply this same logic to a violation of R.C. 2935.12. Other states have held that their own state constitution and/or state jurisprudence provide greater protection on knock and announce cases, and have refused to extend the *Hudson* holding on state constitutional and/or statutory grounds.

The Florida Supreme Court in *State v. Cable*, 51 So.3d 434 (Fla. 2010) held that police officers' failure to comply with the Knock and Announce Rule required suppression of the evidence based on the Florida Knock and Announce statute. In *Cable*, the Florida Supreme Court held that while exclusion of evidence is not mandated under the Fourth Amendment, pursuant to *Hudson*, for a Knock and Announce violation, *Hudson* is not controlling in Florida as evidence can be excluded for violating the Florida Knock and Announce Statute. *Id.* at 441. The court found that as "a matter of state law, a state may provide a remedy for violations of state knock-and-announce statutes, and nothing in *Hudson* prohibits it from doing so." *Id.* at 442.

In *Cable*, the Florida Supreme Court approved Florida's Second Circuit Court of Appeals decision applying the exclusionary rule for a violation of the Knock and Announce Rule by citing directly to language of that court in its opinion:

The issue in the instant case, however, is not—as it was in *Hudson*—whether the evidence is subject to suppression under the Fourth Amendment. Instead, the issue is whether suppression of the evidence is a remedy that must be applied for the violation of the statutory knock-and-announce provision. The Florida case law recognizes the common law and constitutional background for the knock-and-announce statute. See *Benefield*, 160 So.2d at 710 (stating that section 901.19 "appears to represent a codification of the English common law which recognized the fundamental sanctity of one's home"); *State v. Loeffler*, 410 So.2d 589, 593 (Fla. 2d DCA 1982) (stating that the purpose of the knock-and-announce statute "parallels that of the constitutional guarantees against search and seizure"). But the case law does not support the conclusion that the statute has no force independent of the requirements of the Fourth Amendment. Under the Florida case law, it is by no means clear that the exclusionary rule has been applied to violations of the knock-and-announce statute only because Fourth Amendment knock-and-announce violations were subject to the exclusionary rule. Indeed, *Benefield* applied the exclusionary rule for violations of the knock-and-announce statute long before the United States Supreme Court decided in *Wilson v. Arkansas*, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995), that the common law knock-and-announce rule was also a "command of the Fourth Amendment." *Id.* at 931, 115 S.Ct. 1914 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985)).

Id. at 441.

The Florida Supreme Court found that since Florida courts had used the remedy of exclusion of evidence for a Knock and Announce violation prior to the United Supreme Court's decision in *Wilson*, *supra*, (decided in 1995), a state remedy of exclusion existed independent of the Fourth Amendment. The same logic applies in Ohio, as cases were decided (like *Valentine*, *supra*, in 1991) prior to the United States Supreme Court decision in *Wilson*, which held that evidence must be excluded as a result of a violation of Ohio's Knock and Announce Statute.

Likewise, the Alaska Court of Appeals, in 2008, found that, despite the pronouncement in

Hudson, exclusion of evidence is the appropriate remedy for evidence seized as a result of a violation of Alaska's Knock and Announce Statute. *Berumen v. State*, 182 P.3d 635, 637 (Alaska Ct. App. 2008). The Alaska Court of Appeals found that:

The police officers in this case violated a longstanding requirement of Alaska law that is designed to protect the privacy and dignity of this state's citizens. On the issue of whether the police must announce their claimed authority and purpose, and on the related issue of whether the police are allowed to break into a building if they have neither sought nor been refused admittance, the statute is written in clear and unambiguous terms. The only exception to the statute's requirements, the "exigent circumstances" exception, has been identified and analyzed in *Lockwood* and in various subsequent decisions issued by this Court, and the State concedes that this exception does not apply to the facts of Berumen's case.

Id. at 642. The Alaska court concluded that the evidence seized by the officers in the case was "secured through such a flagrant disregard" of the procedure specified by the Alaska legislature that it "cannot be allowed to stand without making the courts themselves accomplices in [willful] disobedience of [the] law." *Id.*

The same logic can be applied to this matter. Indeed, the trial court recognized as much when it granted Appellees' motion to suppress because "if there is no consequence to a violation of the rule [Ohio's Knock and Announce Rule], then why have the rule at all." The Boardman Police in this case failed to announce their purpose (to serve a search warrant) and, in acting as they did, they flagrantly violated Ohio law and the items seized during the search in this matter were properly suppressed. To hold otherwise would make the courts complicit in the Police Department's violation of long standing Ohio law (the current Ohio Knock and Announce Rule was enacted in 1990, however, as noted, it replaced a nearly analogous provision that was enacted in 1960).

New Mexico appellate courts have consistently held, post-*Hudson*, that suppression of evidence seized as a result of a violation of the New Mexico Knock and Announce Rule is the

appropriate remedy as such searches constitute unreasonable searches under the New Mexico Constitution. See, for example, *State v. Vargas*, 2008-NMSC-019, 181 P.3d 684 (2008), *State v. Gonzales*, 2010-NMCA-023, 147 N.M. 735, 228 P.3d 519 (2010) and *State v. Jean-Paul*, 2013-NMCA-032, 295 P.3d 1072, 1077 (2013) [despite the holding of *Hudson*, “the remedy for any violation of Article II, Section 10's knock-and-announce requirement continues to be suppression of the evidence”].

Given the fact that Article I, Section 14 provides greater protecting than the Fourth Amendment, given the history of the Knock and Announce Rule in Ohio and its purposes and given this Court’s prior pronouncements on the Ohio Constitution’s protections of civil liberties and rights, suppression under the Ohio Constitution is the only appropriate remedy for a violation of R.C. 2935.12. Other states have recognized as much in their courts and Ohio must now join that group.

In addition, there is a need for this Court to deal squarely with this issue to provide guidance to the lower courts in this state. As noted, in *Bembry*, the Seventh District failed to even address the state constitutional grounds argument. After an exhaustive search, the Appellants note that the only appellate case in which suppression pursuant to the Ohio Constitution was addressed for a violation of R.C. 2935.12 was by the Twelfth District in *State v. Macke*, 12th Dist. No. CA2007-08-033, 2008-Ohio-1888. In *Macke*, the court declined to address the state constitutional argument while noting that it was cognizant of the argument that the Ohio Supreme Court, given previous rulings on the Ohio Constitution, would hold that Ohio provides greater protections on this specific issue than the United States Constitution, and would exclude the evidence. *Id.* at ¶ 31.

Other Ohio appellate courts have simply sidestepped the issue of whether *Hudson* represents the final word on Knock and Announce violations in Ohio. See, for example, *State v. Nunez*, 180

Ohio App.3d 189, 2008 Ohio-6806, 904 N.E.2d 924, ¶ 53 [holding that it was “unnecessary for this court to decide whether under *Hudson* the exclusionary rule applies to violations of the knock-and-announce rule” as the Knock and Announce rule was not violated].

CONCLUSION

Hudson was decided nearly a decade ago, and the Ohio Legislature has not modified or repealed R.C. 2935.12. *Oliver* was decided by this Court nine (9) years ago, and neither the Seventh District in *Bembry* or any other Ohio appellate court has addressed, let alone decided, the whether Article I, Section 14 of the Ohio Constitution requires suppression of evidence obtained in flagrant disregard of R.C. 2935.12. It is time for this issue to be addressed and decided in Ohio by this Court. Numerous other states have already addressed and decided the issue.

Article I, Section 14 of the Ohio Constitution requires that a search be reasonable. R.C. 2935.12 forms part of the reasonableness inquiry. See *Valentine, supra*. This Court has held, in *Brown, supra*, that an officer, acting contrary to a statute, in making a stop, search and seizure violates the reasonableness requirement of Article I, Section 14 and requires suppression of evidence. In this matter, the Boardman Police violated R.C 2935.12 and, therefore, conducted an unreasonable search under the Ohio Constitution. The Appellants urge this Court to accept jurisdiction so that these important state constitutional issues will be reviewed on the merits.

Respectfully submitted,

/s Louis M. DeFabio

LOUIS M. DEFABIO
COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was emailed and sent by ordinary U.S. Mail to Ralph Rivera, Assistant Prosecuting Attorney, Counsel for Appellee, Mahoning County Prosecutor's Office, 21 W. Boardman St., Youngstown, OH 44503 this 11th of February 2016.

/s Louis M. DeFabio

LOUIS M. DEFABIO

COUNSEL FOR APPELLANTS

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	CASE NO. 15 MA 9
)	
APPELLEE	)	On Appeal from the Mahoning
	)	County Court of Appeals,
V.	)	Seventh Appellate District
)	
SHERRY BEMBRY)	
AND	)	Court of Appeals
HARSIMRAN SINGH	)	Case Nos. 2014 MA 51, 52
)	
APPELLANTS)	

APPENDIX

Opinion and *Judgment Entry* of the Seventh District
Court of Appeals (December 30, 2015)

CLERK OF COURTS
MAHONING COUNTY, OHIO
DEC 30 2015
FILED
ANTHONY VIVIO, CLERK

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO)
)
 PLAINTIFF-APPELLANT)
)
 V.)
)
 SHERRI A. BEMBRY)
 AND)
 HARSIMRAN SINGH)
)
 DEFENDANTS-APPELLEES)

CASE NO. 2014 MA 51
2014 MA 52

OPINION

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case Nos. 2013 CR 110 & 2013 CR 110A

JUDGMENT: Reversed, Suppression Order Vacated and Remanded.

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JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 30, 2015



2014 MA
00051
00042419176
MEMO

DeGENARO, J.

{¶1} These consolidated appeals, filed by the State of Ohio, challenge the Mahoning County Common Pleas Court's decision granting a joint motion to suppress evidence filed by Defendants-Appellees Sherri Bemby and Harsimran Singh. The State asserts the trial court failed to apply the proper analysis to determine whether the failure of the police to comply with R.C. 2935.12—Ohio's knock-and-announce rule—necessitated suppression of the evidence seized pursuant to a lawful search warrant.

{¶2} In *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 156 L.Ed.2d 56 (2006), the United States Supreme Court held that the exclusionary rule is inapplicable as a remedy where the evidence was discovered during the course of executing a valid search warrant, regardless of a failure to knock and announce. As such, the trial court erred when it suppressed the evidence. Accordingly, the State's argument is meritorious; the judgment of the trial court is reversed, the suppression order vacated, and the matter remanded for further proceedings on the pending criminal charges.

Facts and Procedural History

{¶3} On February 21, 2013, Bemby was indicted by the Mahoning County Grand Jury for Permitting Drug Abuse, a fifth degree felony. On the same date, Singh was indicted for the following offenses: Possession of Heroin, a fifth degree felony; Trafficking in Heroin, and Receiving Stolen Property, both fourth degree felonies, as well as an accompanying Forfeiture Specification.

{¶4} Bemby and Singh filed a joint motion to suppress challenging the issuance of the search warrant and the reasonableness of the search itself. The motion was set for an evidentiary hearing.

{¶5} Police Detective Michael Dado of the narcotics division testified that in October of 2012 police executed two controlled buys between a confidential informant and Singh in or around a two-story six-plex apartment building. Around 8:30 a.m. on November 2, 2012, police executed a search warrant at apartment

number five of the building. Inside the building, Officer Tim Hughes knocked on the apartment door. Dado testified that approximately thirty seconds elapsed before a male asked, "Who is it?" from directly on the other side of the door. Hughes replied, "Police. Open the door." Police made a forcible entry after another fifteen seconds without a response, breaking down the door. Upon entering the apartment unit, police encountered Bemby and Singh and took both into custody while officers seized several items of contraband pursuant to the search warrant.

{¶16} Granting Bemby and Singh's joint motion to suppress, the trial court made three findings. First, the affidavit in support of the search warrant provided a substantial basis to establish probable cause that contraband would likely be found at Bemby's residence. Second, the officers violated R.C. 2935.12—Ohio's knock-and-announce rule—when they failed to announce their purpose for demanding admittance into the apartment. Finally, there were no exigent circumstances that justified the violation. The State timely appealed as of right pursuant to Criminal Rule 12(K) and R.C. 2945.67(A).

Knock & Announce Violation During Execution of Valid Search Warrant

{¶17} The State's sole assignment of error asserts:

The trial court should have denied defendants' motion to suppress, because the law is well-settled that the exclusionary rule does not apply to violations of the knock-and-announce rule.

{¶18} Appellate review of a motion to suppress presents a mixed question of law and fact. *United States v. Martinez*, 949 F.2d 1117, 1119 (C.A. 11, 1992). The trial court assumes the role of trier of fact and is in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). [A]n appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982). "Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the

trial court, whether the facts satisfy the applicable legal standard." *State v. Burnside*, 100 Ohio St.3d 152, 2003–Ohio–5372, 797 N.E.2d 71, ¶ 8.

{¶9} Pursuant to the Fourth Amendment—unless an exception applies—police must comply with the knock and announce rule when executing a valid warrant, which requires that officers knock and announce their identity and purpose before forcibly entering a residence, if admittance is refused. *Wilson v. Arkansas*, 514 U.S. 927, 931–936, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995). The rule has been codified by Ohio in R.C. 2935.12.

{¶10} The State concedes that police violated the knock and announce rule when executing the search warrant, instead contending the trial court erred by granting Bemby and Singh's motion to suppress as a remedy, contrary to *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 156 L.Ed.2d 56 (2006).

{¶11} The facts in *Hudson* are virtually identical to this appeal. There, the State conceded the police failed to comply with the knock and announce requirement while executing a valid search warrant; at issue was whether applying the exclusionary rule was the proper remedy. The Supreme Court held it was not, concluding that the knock and announce rule never protected "one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable." *Id.* at 594 (emphasis in original).

{¶12} In its reasoning, the *Hudson* Court reiterated that the exclusionary rule was created to vindicate Fourth Amendment violations arising from the unlawful seizure of evidence without a warrant from someone's home; but then cautioned that suppression was to be a last resort, not a first impulse, or applied indiscriminately. *Id.* at 590-91. This is because the Court determined that excluding evidence exacts substantial social costs—such as the guilty going free—and therefore the exclusionary rule would only be applied where its deterrent effect upon police behavior outweighs the substantial social costs upon law enforcement goals and

truth seeking. *Id.* That balance is struck in favor of exclusion when evidence is obtained by a warrantless search, because the Fourth Amendment guarantees that until a valid warrant is procured and served, citizens are shielded from the State's scrutiny. Thus, suppression vindicates that violation. *Id.* at 593.

{¶13} However, the "interests protected by the knock-and-announce requirement are quite different[.]" *Id.* As articulated in *Hudson*, the purpose of the knock and announce requirement is to give individuals "the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry." *Id.* at 594, quoting *Richards v. Wisconsin*, 520 U.S. 385, 393, n.5, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997). Given the nature of this violation, *Hudson* concluded that "civil liability is an effective deterrent" noting that colorable knock and announce actions have gone forward "unimpeded by assertions of qualified immunity." *Hudson*, at 597- 98.

{¶14} These are very different interests to be protected: the Fourth Amendment's prohibition against an unlawful warrantless search and seizure of evidence, as opposed to the avoidance of bodily harm, prevention of property damage, and preservation of one's dignity—the purposes of the knock and announce rule as articulated in *Hudson*. Suppression vindicates and deters the former conduct, but does nothing to remedy the latter three.

{¶15} The U.S. Supreme Court's warning against indiscriminate application of the exclusionary rule in *Hudson* and its foundational precedent guided the analysis in *State v. Gilbert*, 4th Dist. No. 06CA3055, 2007-Ohio-2717, where the Fourth District affirmed the trial court's refusal to suppress evidence seized during the execution of a valid search warrant:

Considering the interests served by the knock and announce rule, which "do not include the shielding of potential evidence from the government's eyes," it cannot be said that the remedial objectives of applying the exclusionary rule would be served by suppressing the evidence seized in connection with the search of Appellant's home.

Hudson at 2163, 2165. This is because there is a causal disconnect between the interests served by the knock and announce rule and the remedial objectives achieved by application of the exclusionary rule.

Gilbert, ¶ 38.

{¶16} Here, the trial court suppressed the evidence to remedy the knock and announce violation, reasoning in its judgment entry:

[T]here has been a violation of Sec. 2935.12, and the only issue remaining is whether the Court must exclude the evidence based on the violation.

In *State v. Marcum*, 7th Dist., No. 04 CO 66, 2006-Ohio-7068, our Seventh District Court of Appeals held that a violation of R.C. 2935.12 did not trigger the exclusionary rule because the police arrived at a residence to serve an arrest warrant on an individual they knew to be armed.

* * * There is absolutely no evidence that the Defendant in this case was armed and dangerous. Beside the delay of fifteen seconds, there is no evidence that evidence was being destroyed. There is no evidence that there was any concern about public safety. In sum, there are general assertions about police and public safety, which can exist in every case. If there is any "teeth" to the statute, there must be some specific fact established [i]n the record to justify a violation of the statute. When left with general statements as to officer and public safety, if there is no consequence to a violation of the rule, then why have the rule at all?

Based on the foregoing, this Court finds that the officers did violate the "knock and announce rule," that there were no exigent circumstances that would justify the violation, and as a result, the Defendant's Motion to Suppress is sustained.

{¶17} It was error for the trial court to grant Bemby and Singh's motion to suppress. The presence or absence of exigent circumstances is only considered when determining whether there has been a violation; not what the remedy should be. *Hudson* at 596 (exigent circumstances "suspend the knock-and-announce requirement"). The State conceded the violation in the present case.

{¶18} The holding in *State v. Marcum*, 7th Dist. No. 04 CO 66, 2006-Ohio-7068, is inapplicable here, because that case involved the execution of a valid *arrest* warrant. *Hudson's* holding was limited to circumstances where, as here, the knock and announce violation occurred during the execution of a valid *search* warrant. The D.C. Circuit recently analyzed the distinction between a search and an arrest warrant, and the attendant remedy for violation of knock and announce:

In *Hudson*, the Supreme Court held that, when officers violate that rule in executing a search warrant, exclusion of the evidence they find is not an appropriate remedy. The Court reasoned that the officers would have discovered the evidence in any event when they went through the house under the authority of the valid search warrant. As the Court emphasized, the knock-and-announce rule "has never protected" any "interest in preventing the government from seeing or taking evidence described in a warrant." *Id.* at 594. Where officers armed with a search warrant have a judicially-sanctioned prerogative to invade the privacy of the home, the knock-and-announce violation does not cause the seizure of the disputed evidence. In that context, the exclusionary remedy's significant costs outweigh its minimal privacy-shielding role, and its deterrent utility is "not worth a lot." *Id.* at 596.

Unlike the officers in *Hudson*, who had a warrant to search the home, the officers here acted pursuant to a warrant to arrest a person. An arrest warrant reflects no judicial determination of grounds to search the home; rather, it evidences probable cause to believe that the arrestee has committed a crime, and authorizes his arrest wherever

might be found. If an arrestee is found away from home—at work, on the street, or at someone else's home—the privacy of his home remains inviolate. So, too, if an arrestee is not at home when officers seek him there, or if he comes to the door and makes himself available for arrest, the arrest warrant does not authorize officers to enter the home. Any prerogative an arrest warrant may confer to enter a home is thus narrow and highly contingent on the particular circumstances of the arrest.

An individual subject to an arrest warrant accordingly retains a robust privacy interest in the home's interior. That privacy interest is protected by requiring law enforcement officers executing an arrest warrant to knock, announce their identity and purpose, and provide the arrestee with the opportunity to come to the door before they barge in. And, where evidence is obtained because officers violated the knock-and-announce rule in executing an arrest warrant at the arrestee's home, the exclusionary rule retains its remedial force. Under *Hudson's* own analytic approach, then, exclusion of the evidence may be an appropriate remedy.

United States v. Weaver, D.C. Cir. No. 13-3097, 2015 WL 5165990, *1 (September 4, 2015).

{¶19} In sum, the exclusionary rule is inapplicable as a remedy where the evidence was discovered during the course of executing a valid search warrant, regardless of a knock and announce violation. Thus, the trial court erred as a matter of law when it suppressed the evidence. Accordingly, the State's assignment of error is meritorious. The judgment of the trial court is reversed, the suppression order is

vacated, and the matter remanded for further proceedings on the pending criminal charges.

Donofrio, P.J., concurs

Waite, J., concurs

APPROVED:

A handwritten signature in cursive script that reads "Mary DeGenaro". The signature is written in black ink and is positioned above a horizontal line.

Mary DeGenaro, Judge

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STATE OF OHIO)
) IN THE COURT OF APPEALS OF OHIO
)
MAHONING COUNTY) SS: SEVENTH DISTRICT

STATE OF OHIO,)
)
) PLAINTIFF-APPELLANT,)
)
) VS.)
) JUDGMENT ENTRY
)
SHERRY BEMBRY,)
)
) AND)
) HARSIMRAN SINGH,)
)
) DEFENDANTS-APPELLEES.)

For the reasons stated in the opinion rendered herein, the judgment of the trial court is reversed, the suppression order is vacated, and the matter is remanded for further proceedings on the pending criminal charges. Costs taxed against Appellees.

Mary DeGenaro

Mark E. DePina

C. J. White
JUDGES.



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