Supreme Court of Ohio Clerk of Court - Filed February 16, 2016 - Case No. 2016-0238

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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.
APPEARANCES: For Plaintiff-Appellant		Paul Gains Mahoning County Prosecuting Attorney Ralph M. Rivera Assistant Prosecuting Attorney 21 W. Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendants-Appellees		Attorney Louis M. DeFabio 4822 Market Street, Suite 220 Youngstown, Ohio 44512
JUDGES: Hon. Mary DeGenaro Hon. Gene Donofrio Hon. Cheryl L. Waite		

Dated: December 30, 2015

2014 MA
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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 Bembry 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, Bembry 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} Bembry 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 Bembry and Singh and took both into custody while officers seized several items of contraband pursuant to the search warrant.

{¶6} Granting Bembry 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 Bembry'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

{¶7} 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.

{¶8} 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 Bembry 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 Bembry 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:

Mary DeGenaro

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,)
) CASE NOS. 14 MA 51
PLAINTIFF-APPELLANT,) 14 MA 52
)
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

Gene Donofrio

Cheryl Waite

JUDGES.

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JUDENT

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