COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2003AP3373-CR **Cir. Ct. No. 2002CF1421**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARTIN J. ZIELINSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 WEDEMEYER, P.J. Martin J. Zielinski appeals from a judgment entered after he pled no contest to one count of manufacturing marijuana with intent to deliver and one count of possession of marijuana with intent to deliver,

contrary to WIS. STAT. §§ 961.41(1)(h)3 and 961.41(1m)(h)3 (2003-04).[1] Zielinski claims the trial court erred in denying his suppression motion and his motion requesting disclosure of informant information. Because the trial court did not err in denying the motions, we affirm.

BACKGROUND

¶2 On February 24, 2002, Police Officer Thomas Carr obtained a search warrant for Zielinski's residence. The warrant was based on the statement of a confidential informant that he or she had been inside the Zielinski home within the past seven days and had observed marijuana growing in the basement.

¶3 On February 28, 2002, at approximately 7:50 a.m., a team of police officers approached the Zielinski front door. They used a battering ram to forcibly enter and execute the search warrant. When the police entered, they observed Zielinski by the front door and located his twenty-year-old daughter, Kaela Zielinski, in her bedroom. The police seized over 5,500 grams of marijuana located throughout the house and an outbuilding. They also seized a variety of equipment associated with the marijuana growing operation.

¶4 Zielinski was charged with manufacturing and possession of a controlled substance with intent to deliver. He pled not guilty and filed a motion seeking to suppress the seized evidence on the basis that the police violated the rule of announcement. He also filed a motion seeking disclosure of information regarding the confidential informant. After conducting an evidentiary hearing on

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

the suppression motion, the trial court found that there was no violation of the knock and announce rule. The trial court acknowledged that there was some discrepancy in the police officers' accounts as to how many seconds they waited before forcibly entering the home and whether there were one or two announcements of the police presence. Nevertheless, the trial court ruled that all of the witnesses were credible, and testified as to how each personally remembered the event. It held that whether there were one or two announcements and whether there was a three or fifteen second pause between announcement and entering, the facts were sufficient to satisfy the knock and announce rule.

¶5 The trial court also denied the motion seeking information about the confidential informant. Following the trial court's ruling, Zielinski changed his plea to no contest and judgment was entered. Zielinski now appeals.

DISCUSSION

A. Motion to Suppress.

¶6 Zielinski argues that the trial court erred in finding that the police complied with the knock and announce requirement when executing the search warrant. He claims that knocking twice, announcing once, and then entering the home within three seconds of the announcement is insufficient to satisfy constitutional requirements. Accordingly, he requests that we reverse the trial court's order denying his suppression motion and asks this court to order suppression of the evidence seized by the police. In reviewing suppression motions, our standard of review is mixed. ***State v. Martwick***, 2000 WI 5, ¶16, 231 Wis. 2d 801, 604 N.W.2d 552. We review the trial court's findings of historical fact using the clearly erroneous standard. ***Id.***, ¶18. Our review of the application of those facts to constitutional principles and whether Zielinski's constitutional

rights were violated presents a question of law, which we review independently. ***Id.***, ¶¶18-20.

¶7 Both the Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution require police officers to comply with the rule of announcement before forcibly entering a home to execute a search warrant. ***Wilson v. Arkansas***, 514 U.S. 927 (1995); ***State v. Ward***, 2000 WI 3, ¶44, 231 Wis. 2d 723, 604 N.W.2d 517. The rule of announcement requires that the police: (1) announce their authority; (2) announce their purpose; and (3) allow the occupants time to open the door or wait for the occupants to refuse their admittance. ***State v. Eason***, 2001 WI 98, ¶17, 245 Wis. 2d 206, 629 N.W.2d 625.

¶8 In finding that the knock and announce rule was not violated, the trial court made the following findings:

> In any event, I will state at the outset that I did not find any of the witnesses who testified to be inherently incredible, not the state's witnesses and not Mr. Stewart or Ms. Zielinski.
>
> The general impression that I had of the witnesses as they testified was that they were trying to be truthful and relate the facts as they remembered them.
>
> There were some aspects to the state's witnesses, certain aspects to their testimony that was in error; and I'm referring specifically to Officer Buerger's repeated statements about ringing the doorbell. And that came across from the beginning of his testimony, I, I stopped him, and that witness had a way of talking about what he usually does rather than what he did on the day in question.
>
> ….
>
> There were a number of inconsistencies among the officers with respect to their estimation of time. Sometimes there were references to 10 seconds, 15 seconds; as I've

> already referenced, Officer Buerger, I think it is, says that it's three seconds after the second knock.
>
> None of the inconsistencies, though, either the internal inconsistencies in the officer's testimony or the inconsistencies between the officers' testimony, however, is sufficient in witnesses who are testifying credibly to undermine the notion that there was compliance with the knock and announce rule at least by the burden that the state has here which is a very low burden. The only thing that the state needs to show is compliance and reasonableness by a preponderance of the evidence standard.
>
> The testimony is that there were -- there was knocking on at least two instances, that 10 to 15 seconds separated the first knock from the second knock, and then that somewhere between 2 to 3 seconds if you believe Officer Buerger and 10 to 15 seconds if you believe the other officers separated the breaking into the house.
>
> Officer Goldsworthy says they announced twice. The other officers say that they announced only once and that then there was the lapse of time.
>
> I do believe that that was sufficient to comply with the knock and announce rule.

¶9 Zielinski disagrees with the trial court's ruling and argues that because the officers waited only three seconds after announcing their presence and purpose before forcibly entering, their conduct was unreasonable and does not comply with the knock and announce rule. Zielinski relies on language in ***United States v. Banks***, 540 U.S. 31 (2003), addressing the length of time police should wait before knocking down the front door. ***Banks*** stated that the length of time that fairly suggests that the occupants are refusing to voluntarily open the door "var[ies] with the size of the establishment, perhaps five seconds to open a hotel room door, or several minutes to move through a townhouse." ***Id.*** at 524.

¶10 Fourth Amendment cases are fact-specific and, in reviewing a trial court's decision denying a motion to suppress, we look to the totality of the

circumstances in determining whether the officers' actions were reasonable. ***Richards v. Wisconsin***, 520 U.S. 385, 388 (1997). We start with the trial court's factual findings. The trial court found that all the witnesses were credible—telling the truth as to how they remembered it. Then the trial court extrapolated from the officers' testimony that the police approached the Zielinski door, knocked and waited ten to fifteen seconds. Then the police knocked a second time and announced their presence and purpose. Three seconds later, the police forcibly entered the home. The trial court specifically found that any inconsistencies between the officers' independent recollection did not affect their credibility or somehow create a violation of the knock and announce rule.

¶11 Based on our review of the record, we cannot conclude that the trial court's findings are clearly erroneous. Each finding is supported by testimony from the suppression hearing. The next question then, is whether, based on those findings, the trial court's conclusion that the entry did not violate the Fourth Amendment was correct. We conclude that the trial court did not err.

¶12 The facts demonstrate that the police knocked twice loudly, with pauses in between knocks, and then announced very loudly their presence and purpose. It was after the announcement that the officers heard a voice and movement inside the house, which sounded as if someone was going to barricade the door. It was at this point that the split-second decision was made to forcibly enter. These facts gave the officers a reasonable basis for concluding that the occupants would not voluntarily admit the officers, despite the search warrant. Given this factual scenario, we cannot conclude that the knock and announce rule was violated. There is no dispute that the amount of time the officers gave to the Zielinskis to either answer the door or refuse admittance was short—approximately thirty to forty seconds from the first knock to the forcible entry.

The brevity, however, was affected by the particular circumstances police encountered when they heard noises leading them to believe that entry would be refused. "If the police can reasonably infer from the actions or inactions of the occupants that they have been refused admission, the police may enter without waiting for an actual reply." ***Moore v. United States***, 748 A.2d 915, 918 (D.C. Ct. App. 2000); *see also* ***United States v. Jenkins***, 175 F.3d 1208, 1215 (10th Cir. 1999) (holding a fourteen to twenty second wait at 10 a.m. was reasonable). Here, the police officers heard noises that led them to believe the occupants were going to barricade the door. This specific information caused them to forego any further delay in executing the search warrant. The noises signaled to police that the occupants were refusing entry and if they were successful in barricading the door, it would delay or prevent the officers from coming into the home. Based on these specific facts, the brevity of the time between knocking/announcing and entry was not unreasonable. The actions of the occupants led the officers to believe that the Zielinskis heard the knock and announcement and intended to block any entry by the police into the home.

¶13 Accordingly, we conclude that under the particular facts in this case, the search was reasonable; therefore, the trial court did not err in denying the motion to suppress.

B. Motion for Information on Informant.

¶14 Zielinski also claims the trial court erred in denying his motion seeking information regarding the confidential informant. We reject his claim.

¶15 Zielinski's motion was filed under WIS. STAT. § 905.10(3)(c) (1999-2000), which allows the trial court to disclose an informant's identity if the court "is not satisfied that the information was received from an informer reasonably

believed to be reliable or credible." Here, the trial court reviewed the information pursuant to an *in camera* review and concluded that there was nothing contained in the documents to justify disclosure of the informant's identity.

¶16 We conclude that the trial court's decision was correct. After reviewing the materials as requested, we find nothing to lead us to believe that the informant was not reliable or credible. Accordingly, the trial court's decision denying the motion on the informant is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶17 KESSLER, J. (*dissenting*). Because I find the officers' failure to give the defendant a reasonable opportunity to open the door in the fifteen seconds—which the officers say was the maximum time—that passed between when they knocked the second time, announced the search warrant, and broke into the house, I find that the execution of the search warrant was unreasonable under the authority of ***Wilson v. Arkansas***, 514 U.S. 927 (1995), and ***State v. Meyer***, 216 Wis. 2d 729, 576 N.W.2d 260 (1998). The rule of announcement is a constitutional requirement. The "common law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." ***Wilson***, 514 U.S. at 929. I dissent from the Majority's conclusion with respect to the reasonableness of the search. I would suppress the evidence seized and remand to the trial court.

¶18 The officers executing the search warrant all testified at a hearing that the search occurred at approximately 7:50 a.m. on a weekday. It is undisputed that the time was chosen because the police believed all occupants of the house would be present. It is also undisputed that the house was surrounded by police officers. All agree that an officer knocked on the front door twice, perhaps a maximum of fifteen seconds apart. Three officers, who stood next to each other at the front door of the house when the search warrant was executed, all testified. One officer said he announced the search warrant after *each* knock, and that the two knocks were about fifteen seconds apart. The two other officers, who were immediately behind him, testified they heard him announce only once, and that was immediately before, or *at the same time* as, the door was broken down. None

of the officers testified to hearing a comprehensible sound from inside the house, much less a specific verbal refusal to permit entry. None of the officers testified that they feared for their own safety or feared that the inhabitants of the house would escape. The trial court made no specific findings as to what occurred except to say that it believed the officers' testimony. The trial court acknowledged that the testimony of the officers was occasionally inconsistent.

¶19 The rule of announcement requires that police do three things before forcibly entering a home to execute a search warrant: (1) announce their identity; (2) announce their purpose; and (3) wait for either the occupants to refuse their admittance or, "'in the absence of an express refusal, allow the occupants time to open the door.'" ***State v. Ward***, 2000 WI 3, ¶15 n.1, 231 Wis. 2d 723, 604 N.W.2d 517 (citations omitted). As the United States Supreme Court has instructed, the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." ***Wilson***, 514 U.S. at 929. Even with a search warrant, a search must still be executed in a reasonable manner. As the Wisconsin Supreme Court has explained:

> For Fourth Amendment purposes, an entry that does not comply with the rule of announcement "is justified if police have a 'reasonable suspicion' [under the particular circumstances] that knocking and announcing would be dangerous, futile, or destructive to the purposes of the investigation." Following the principles set forth by the Supreme Court, we have held that when there is no compliance with the rule there must exist particular facts to support an officer's reasonable suspicion that exigent circumstances exist.

Ward, 231 Wis. 2d 723, ¶38 (citations omitted, bracketing in original).

¶20 The State in this appeal relies on the claimed fear of destruction of evidence in support of the trial court's conclusion that there was no Fourth

Amendment violation. There are several problems with relying on the argument that the potential destruction of evidence was a legitimate basis to force entry when so little time elapsed between the officers' announcement of their presence and purpose and the forced entry.

¶21 First, at a motion hearing, the State explicitly represented to the trial court that it would not rely on this basis, such that defense counsel did not pursue questioning about the type of evidence in the house and the likelihood that it could be destroyed in the time involved here. After the parties and the trial court discussed the matter in detail, the State said it was its understanding that the officers were going to order the forced entry "because they waited long enough." The State continued: "So I think that kind of alleviates some of the issue." Based on this representation, defense counsel ceased questioning about the size and quantity of the marijuana plants the police hoped to recover. Thus, the issue of whether destruction of evidence was a reasonable concern was resolved based on the State's representation.

¶22 Zielinski urges this court to apply judicial estoppel with respect to the fear-of-destruction-of-evidence argument because the State is taking a different position on appeal than it took at the trial court. Such inconsistent conduct is an appropriate basis for judicial estoppel. *See* ***State v. Michels***, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987) (A position on appeal that is inconsistent with that taken at trial is subject to judicial estoppel.). Judicial estoppel has three "identifiable boundaries": (1) the party's position is clearly inconsistent with his or her prior position; (2) the party to be estopped succeeded in selling its position to the court below; and (3) the facts at issue are the same. ***State v. Johnson***, 2001 WI App 105, ¶10, 244 Wis. 2d 164, 628 N.W.2d 431. The State now asserts the contrary of what it represented to the trial court at a hearing.

The trial court and Zielinski accepted the State's position at the hearing. The issue and facts now in dispute are identical to those involved at the hearing. Therefore, the State should be judicially estopped from arguing that a fear of destruction of evidence justified the forced entry.

¶23 Even if this court were to consider the alleged fear as a basis for justifying the forced entry, the argument would fail. The trial court indicated that, in its view, the possible destruction of *any* evidence was sufficient to make the break-in reasonable. That is too broad a reading of the constitutional requirement of reasonableness in the context of this search. The affidavit supporting the search warrant sought "a large amount of marijuana plants growing in the basement" which were described as "typically stationary or fixed in nature." What the search warrant sought was not a tiny quantity of powder easily flushed down a toilet or destroyed within fifteen or even thirty seconds.

¶24 Fear of destruction of evidence must have some articulable rational basis. Subjective fear by any officer executing any search warrant that even a miniscule flake of a larger quantity of available evidence might be destroyed would make it "reasonable" to force entry on all search warrants. ***Wilson*** teaches that the law requires more. Even a "no-knock" search warrant authorizing immediate forced entry may not permit forced entry that is not reasonable at the time the search warrant is executed. *See* ***Richards v. Wisconsin***, 520 U.S. 385, 394 (1997) ("In order to justify a 'no-knock' entry, the police must have 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 evidence.").

¶25 Here, the facts do not support a rational fear of destruction of evidence. The search warrant application asserted that the police would find "a large amount of marijuana plants growing in the basement" including plants in pots being grown under high pressure sodium lights. The amount of evidence expected to be found, and ultimately seized, was so large that no reasonable officer would believe that it could be destroyed in seconds (unlike, for example, a baggie of cocaine). The search warrant application indicates that the harvested marijuana was stored "at various locations" in the house. The diverse locations of the illegal goods further reduces any reasonable basis to fear destruction of both stored product and growing plants in the fifteen to thirty seconds that passed between the first knock and the announcement. The police seized sixty marijuana plants, a little more than five kilos[2] of harvested marijuana located throughout the house, and numerous light bulbs and other equipment used to grow marijuana. This is precisely what the police expected to find. It would not have been reasonable to believe that the occupants were destroying this evidence in the few seconds between the time the police knocked, announced their presence and forced entry.

¶26 Not only do the facts not support a conclusion that evidence was possibly being destroyed, they also do not support a conclusion that the occupants were refusing entry. When executing a "knock-and-announce" search warrant, as was the case here, the police must announce their identity and purpose, then either wait for the occupants to refuse admission or allow the occupants time to open the

[2] The Majority refers to this as "5,500 grams." One thousand grams is a kilogram, sometimes referred to as a "kilo." A kilo is 2.2046 pounds. So, slightly more than eleven pounds of harvested marijuana was seized. Any way you look at it, that is a lot of marijuana!

door. ***State v. Eason***, 2001 WI 98, ¶17, 245 Wis. 2d 206, 629 N.W.2d 625. If occupants do not admit the police within a reasonable period of time after the knock and announcement, officers may deem it a constructive refusal and enter by force. ***United States v. Jenkins***, 175 F.3d 1208, 1213 (10th Cir. 1999). Thus, it can be said that a factual basis must exist to permit a reasonable person to conclude that entry is actually being refused.

¶27 The State notes that two officers testified that they heard movement in the residence. One officer testified that he heard "a voice behind the door" and "what sounded like furniture being moved against the door or something of that sort." Another officer stated that he heard an unintelligible male voice and something that "sounded like movement." Nothing more, except the passage of at most fifteen seconds between the second knock, the announcement and the near simultaneous break-in, is offered by the State to justify the forced entry.

¶28 There are competing inferences to be drawn from these aspects of the officers' testimony that were not resolved by the trial court. Although several officers testified to hearing a male voice, not one understood what the voice said. The mere sound of a voice does not imply that the speaker is refusing to open the door. Equally plausible could have been acknowledgement (saying "just a minute") and acquiescence (saying "I'm coming").

¶29 Although less than fifteen seconds had passed from the announcement of the officers' purpose and the forced entry, the State asserts in its brief that "the movement that sounded like someone trying to barricade the door gave the officers a reasonable basis for concluding that the occupants would not voluntarily admit the officers, despite the search warrant." The officer in charge, who ordered the forced entry, testified that he never heard *any* officer say the

movement sounded like someone trying to barricade the door. Further, how the sound of "moving a chair" is more evident of "barricading" than of someone getting up from the chair to admit the officers is never explained. Indeed, one wonders how Zielinski might have moved to the door from his bedroom, or kitchen, or wherever he was at eight o'clock in the morning, to admit the officers *without* making any sound. The officer who made the decision to force entry was not relying on "barricading noises" because he never heard the noise or any officers' characterization of it.

¶30 The only conclusion that the testimony about hearing movement supports is that no safety concern existed, because not a single officer mentioned any concerns for his safety when describing what each heard or did not hear. This is not surprising since the search warrant application makes no mention of suspected weapons, and the police had the house completely surrounded when they executed the search warrant.

¶31 Nor did the officers mention any fear that Zielinski or other occupants of the house might escape. The officers had had the house under surveillance previously, and they executed the search warrant somewhat before eight o'clock in the morning, a time when they expected the occupants of the house to be present. The officers had a number of photographs of the house, from all angles, and had obviously familiarized themselves with the physical premises they were to search prior to executing the search warrant. These facts all suggest that under the facts presented, the reasonableness required by the Fourth Amendment required either a specific refusal to permit entry, or a reasonable period after announcing their purpose before battering the door.

¶32 Other courts, dealing with timing and circumstances much like in the present case, have found that timeframes comparable to those here were inadequate to provide a reasonable opportunity for the inhabitants of the house to provide, or specifically refuse, admission. *See, e.g.*, ***People v. Hoag***, 100 Cal. Rptr. 2d 556 (Cal. Ct. App. 2000) (a wait of fifteen to twenty seconds after knocking violated knock and announce requirement even if officers believed no one was inside; such a short delay did not amount to refused admittance); ***Jeter v. Superior Court***, 188 Cal. Rptr. 351 (Cal. Ct. App. 1983) (one cannot infer refusal to admit when only five to ten seconds have passed from the announcement to the forced entry); ***State v. Moore***, 535 N.W.2d 417 (Neb. 1995) (entry within fifteen seconds of announcing is unreasonable where nothing supports a finding of implied or constructive refusal to admit); ***Commonwealth v. Means***, 614 A.2d 220 (Pa. 1992) (officers who waited only five to ten seconds before forcible entry, with no exigent circumstances, did not provide a reasonable time for the occupant to respond); ***Commonwealth v. DeMichel***, 277 A.2d 159 (Pa. 1971) (Fourth Amendment announcement rule violated where officers broke the door between five and fifteen seconds after announcement because they saw someone on the first floor of the two-story dwelling raise and lower the blinds. Five- to fifteen-second delay was insufficient to give adequate opportunity to voluntarily open the door and there is nothing inherently suspicious about somebody looking out of blinds, nor does that act imply refusal to admit.); ***Commonwealth v. Douventzidis***, 679 A.2d 795 (Pa. Super. Ct. 1996) (delay of only ten to fifteen seconds before entering is unreasonable); and ***Commonwealth v. Rudisill***, 622 A.2d 397 (Pa. Super. Ct. 1993) (forcible entry after fifteen-second delay simultaneous with the announcement is unreasonable).

¶33 Under the facts of this case, forcing entry to a private house at eight o'clock in the morning either simultaneous with, or at most fifteen seconds after, announcing the purpose of the police is unreasonable where there were no reasonably based exigent circumstances, and where there was no clear refusal to admit. Under the circumstances present here, the passage of fifteen seconds cannot reasonably be understood to imply refusal to admit. Because I conclude that Zielinski's Fourth Amendment rights were violated, I respectfully dissent from that part of the Majority opinion upholding the reasonableness of the execution of the search warrant.