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IN THE SUPREME COURT OF FLORIDA

NATHANIEL H. THOMAS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

Supreme Court Case No. 80,624

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

MERITS BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

This court should dismiss this case, finding that review was improvidently granted. The facts show that the defendant was not even at home when the search warrant was served. Therefore, he could not possibly suffer any harm when the officers failed to knock and announce.

If the court chooses to examine the merits, however, this court should affirm the district court. The Fifth District Court of Appeal properly reversed the lower court's order granting the motion to suppress, basing its ruling on a well-established exception to the knock and announce requirement. When officers break into premises without knocking and announcing, each situation must be examined on a case by case basis, depending on the totality of the circumstances, to see if some exception to the statute applies. Among the original exceptions acknowledged by this court is the situation in which the officers have a "reasonable belief at the time of entry that the evidence would be destroyed if the police satisfied their statutory obligation to knock and announce."

This court should recognize that the totality of the circumstances analysis in knock and announce cases includes the officer's training and experience. Courts should include the officer's interpretation of the circumstances in determining whether there is a reasonably grounded suspicion that the evidence will be destroyed if the officers knock and announce. This will serve the ends of justice without destroying the goals of the knock and announce requirement.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL APPLIED THE PROPER LAW WHEN IT REVERSED THE TRIAL COURT'S GRANTING OF THE MOTION TO SUPPRESS.

Initially, the State argues that this court should dismiss this case, finding that review was improvidently granted. The facts of this case show that the defendant was not home when the officers executed the search warrant. *State v. Thomas*, 604 So. 2d 1277 (Fla. 5th DCA 1992). Common sense readily admits that the defendant could not be harmed in any way by the officers' failure to knock and announce if he was not present. Indeed, the officers would have ultimately broken into the defendant's home because there was no one there to admit them.

When the premises which are the subject of a search warrant are unoccupied, there is no violation of the knock and announce requirement if the officers break in without knocking and announcing. *Van Allen v. State*, 454 So. 2d 49 (Fla. 4th DCA 1984). The *Van Allen* court recognized that "announcing to a non-occupant" would be "fruitless". *Id.* at 51. Furthermore, "the goals of knock and announce" are not harmed if the knock and announce requirement is waived for unoccupied premises. *Id.*

In the instant case, "the goals of knock and announce" certainly were not harmed when the officers broke into the defendant's home. Since the defendant himself suffered no harm, this court should find that he has no standing to now challenge the officers' failure to knock and announce. This court should then dismiss this cause.

However, should this court choose to review the matter with the purpose of resolving conflict, this court can and should find that the Fifth District Court of Appeal properly reversed the lower court's ruling. This court must assure that the ends of justice are met, for both the State and for individuals.

The Fifth District Court of Appeal properly reversed the lower court's order granting the motion to suppress, basing its ruling on a well-established exception to the knock and announce requirement. Florida Statutes very specifically delineate the requirements for acquiring and executing a search warrant. Chapter 933, Florida Statutes (1991). Included in that statute is the provision which allows officers to forcibly enter premises in order to execute that warrant. That section provides that when the officer has given "due notice of his authority and purpose" but is refused admittance, he may forcibly break into the premises. Section 933.09, Fla. Stat. (1991). This is commonly referred to as the "knock and announce" requirement.

Florida courts have established that there is no provision in the statute for issuing a "no knock" warrant -- that is, a warrant which precludes the need for the officers to knock and announce before breaking into the premises. *State v. Price*, 564 So. 2d 1239 (Fla. 5th DCA 1990); *State v. Bamber*, 592 So. 2d 1129 (Fla. 2d DCA 1991). When officers break into premises without knocking and announcing, each situation must be examined on a case by case basis, depending on the totality of the circumstances, to see if some exception to the statute applies.

This very court, nearly thirty years ago, set out four possible exceptions which validate an officer's breaking and entering without knocking and announcing. *Benefield v. State*, 160 So. 2d 706 (Fla. 1964). While identifying those recognizable exceptions, this court made it clear that the list of exceptions was not exhaustive. The court stated that "[t]ime and experience will no doubt suggest other exceptions". *Id.* at 710. So, even then, this court realized that each situation may reveal some new exception, depending on the circumstances.

Among those original exceptions acknowledged by this court is the situation in which the officers have a "reasonable belief at the time of entry that the evidence would be destroyed if the police satisfied their statutory obligation to knock and announce." *Bamber, supra* p. 3, at 1131. This exigency has long been held to be an acceptable exception to the knock and announce requirement. *State v. Kelly*, 287 So. 2d 13 (Fla. 1973). Reviewing courts do not require officers to have absolute knowledge that the evidence will be destroyed -- only a "reasonably grounded suspicion that the quantity and nature of the contraband and the circumstances surrounding its possession are such as to **make it readily disposable.**" (emphasis added) *Berryman v. State*, 368 So. 2d 893 (Fla. 4th DCA 1979).

The Fifth District and other courts have held that one of the circumstances which can provide a "reasonably grounded suspicion" that the evidence will be destroyed is the officer's knowledge that the premises which are the subject of the warrant have proper, working plumbing -- that is, the sinks and toilets

are in working order and that the premises are equipped with running water. *State v. Bell*, 564 So. 2d 1235 (Fla. 5th DCA 1990); *Armenteros v. State*, 554 So. 2d 574 (Fla. 3rd DCA 1989). However, no court has held that this fact alone is enough to provide the exigency necessary to override the knock and announce requirement.

The Fifth DCA, in the instant case, recognized several additional facts, articulated by the officer, which combined to provide the necessary exception. The officer testified that the defendant had sold small amounts of cocaine. *Id* at 1278. He had very good reason to believe that there was additional cocaine in the house. *Id*. The officer stated that the size of the cocaine rocks involved made it readily "eaten, flushed, crushed, or hidden". *Id*.

The court also looked to the officer's experience and training in determining whether the officer had a reasonably grounded suspicion that the evidence would be destroyed. The officer testified that his training and experience taught him that "drug dealers with small amounts of drugs will try to conceal or discard such drugs." *Id*.

Finally, based on his knowledge of the size and kind of drugs that the defendant kept and sold, and his training and experience, the officers checked to see if the defendant's house had normal working utilities. When the officers found that the house did have proper plumbing and utilities, combined with all of the other facts, they developed a "reasonably grounded suspicion" that the defendant would destroy the drugs if they

knocked and announced. The record before the district court certainly supported the appellate court's ruling.

This court should recognize that officers develop suspicions based on a multitude of things. While the officer sometimes refers to the various facts and factors as "gut feeling", the law and courts require that he be able to articulate those facts. But the facts are only relevant to the officer in light of his training and experience. If the courts exclude that aspect of the totality of the circumstances in knock and announce cases, it will bind the hands of law enforcement, effectively forcing them to always have absolute proof before they act in any matter.

The Second District Court of Appeal, in *Bamber*, *supra* p. 4, has held that the destruction of evidence exception to the knock and announce requirement can only be valid when the officers provide a "case-specific" explanation that caused the officers to be certain -- not just "the mere possibility" -- that the drugs would be destroyed. *Id.* at 1133. This would require the officers to either have some statement by the defendant that he would destroy the evidence or to actually see the defendant running to the bathroom before justifying breaking in the door. Unfortunately, the latter example would clearly be too late.

While the Second DCA was clearly concerned with the possibility that the exception would overshadow the rule, the Fifth DCA is likewise concerned that "the exception will be rendered meaningless". *Thomas*, *supra* p. 1, at 1279. This court can find the balance between the rule and the exception. The exception which allows courts to look to all of the

circumstances -- including the officers training and experience, and what the facts mean to him in light of that background -- would still be a narrow one. It would still apply only in those cases in which the suspected contraband is of such a nature or size as to be "readily disposable". And the officers would still have to make a showing, articulating their reasonably grounded suspicion, to support their failure to knock and announce.

Each and every case presents a new and distinct set of facts. This is partly because each officer will have his own individual insight into the outward facts presented by the case. Some officers simply are more experienced and better trained at interpreting those facts.

In *State v. Price*, *supra* p. 4, the Fifth DCA examined several factors which contributed to the ruling that the officers were justified in their failure to knock and announce. The court particularly acknowledged that each case requires the individual officers to make the decision on the spot as to whether to knock and announce or not. *Id.* at 1242. This necessarily requires officers to rely on their training and experience to make such a split-second decision, combined with the facts they have uncovered in the investigation.

In *Price*, the officers had made several controlled buys from the defendant. Each time, the amount was small. During one controlled buy, the informant had seen a gun. The officers also knew that the defendant's brother, who lived with the defendant, had a lengthy arrest history, including battery on officers. The officer determined, based on this information "and his experience

as a law enforcement officer", that it would be dangerous and ineffective to knock and announce. *Id.* at 1240.

The *Price* analysis is important because it acknowledges the significance of the officer's training and experience in making a showing of exigency. This court, likewise, should acknowledge the significance of the officer's subjective analysis of each knock and announce situation.

In the instant case, the officers utilized the objective facts that they discovered in the investigation -- the controlled buys for very small amounts of crack cocaine and the fact that the defendant had the capability to very easily destroy or hide the drugs. They also used their training and experience to interpret those facts. All of that analysis combined to provide the reasonably grounded suspicion that the defendant would destroy the drugs if they knocked and announced.

The Fifth DCA applied the proper and correct law when it reached its ruling. The facts of the case support that ruling. This court should, therefore, affirm the Fifth District Court of Appeal.

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully prays this honorable court affirm the ruling of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief Of Respondent has been furnished by delivery to Michelle Lucas, Assistant Public Defender for Petitioner, this 12th day of March, 1993.

Rebecca Roark Wall
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Of Counsel