COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2111-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PETER J. BARTRAM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

¶1 PER CURIAM. Peter J. Bartram appeals a judgment of conviction for maintaining a dwelling to manufacture a controlled substance. The issue is whether the no-knock execution of a search warrant was unlawful. We conclude that part of Bartram's argument is made for the first time on appeal, and we do not

address it. The remainder of his argument is not directed to a relevant legal issue. Accordingly, we affirm the judgment.

¶2 Police searched Bartram's residence pursuant to a search warrant which authorized no-knock entry. Bartram moved to suppress evidence from that search. The motion was accompanied by an affidavit by Bartram's counsel, stating that Bartram told him the warrant was executed by a forcible opening of his door without the officers first announcing their identity and purpose. In other words, it was a "no-knock" entry.

¶3 At the hearing on Bartram's motion, no testimony was presented by either party. The argument focused on whether the affidavit presented to the court commissioner was sufficient to support the issuance of the no-knock search warrant. The trial court concluded that it was. Bartram pled guilty, and now appeals.

¶4 Police may execute a search warrant by no-knock entry when they 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. *See* ***Richards v. Wisconsin***, 520 U.S. 385, 394 (1997).

¶5 To put Bartram's arguments in context, we must first note how judicial review of a no-knock entry differs in a key respect from review of whether there is probable cause to support the search itself. When we review probable cause for a search warrant, we review the decision of the magistrate, based upon the information that was before the magistrate when the warrant was issued. *See* ***State v. Ward***, 2000 WI 3 at ¶¶ 20-24, 231 Wis. 2d 723, 604 N.W.2d 517. However, in reviewing a no-knock entry we are not reviewing the decision of the

magistrate. The case law makes it plain that the decision we review is the one made by the executing officers, based on the circumstances that existed at the time of entry.

¶6 This point is made in three leading opinions on this topic by the federal and state supreme courts. In ***Richards***, the Court held that the no-knock entry was valid even though the magistrate had deleted the warrant language authorizing a no-knock entry. The court stated: "[T]his fact does not alter the reasonableness of the *officers'* decision, which must be evaluated *as of the time they entered* the motel room." ***Richards***, 520 U.S. at 395 (emphasis added). The Court then reemphasized this point in ***United States v. Ramirez***, 523 U.S. 65, 71 n.2 (1998).

¶7 The supreme court, relying on ***Richards*** and earlier Wisconsin precedent, has stated: "The reasonableness of an officer's decision to enter a premise without first knocking and announcing his or her presence must be evaluated by a reviewing court as of the time of the entry." ***State v. Meyer***, 216 Wis. 2d 729, 753, ¶34, 576 N.W.2d 260 (1998). The court continued: "Therefore, even if the particular facts initially available to an officer provide reasonable suspicion of exigent circumstances, that reasonable suspicion may be negated where additional facts are revealed prior [to] the execution of the search warrant that would negate an officer's earlier suspicion of exigent circumstances." ***Id.*** The court then cited an earlier Wisconsin case for the proposition that where a no-knock warrant has been issued, the circumstances justifying such entry might change before the officer's entry. *See* ***id.***

¶8 These cases demonstrate that we do not review the magistrate's decision to issue a no-knock warrant. In ***Richards***, the Court entirely disregarded

the magistrate's conclusion. Similarly, the language from ***Meyer*** makes it clear that our supreme court contemplates that a no-knock entry might be unlawful, even though authorized by a magistrate, if the officers later discover additional facts which "negate" their once-reasonable suspicion. The Seventh Circuit has also suggested, even before ***Richards***, that during the period between a warrant's issuance and execution, if the police received reliable information that the defendant no longer possessed firearms, the police would have been required to reevaluate the planned no-knock entry. *See* ***United States v. Singer***, 943 F.2d 758, 763 (7th Cir. 1991).

¶9 In this appeal, Bartram first argues that because the State did not present any evidence at the motion hearing, the State failed to meet its burden to prove that the circumstances at the time of the entry justified a no-knock entry. Without that evidence, he argues, there is nothing in the record upon which the court could find the no-knock entry lawful. However, for reasons which follow, we conclude that Bartram abandoned this issue in the trial court and is now trying to raise it for the first time on appeal.

¶10 The text of Bartram's suppression motion relied on two grounds that are material here. The first was that the warrant's authorization of a no-knock entry was improper because the affidavit that was presented to the commissioner did not contain specific facts justifying a no-knock entry. The second ground was that the no-knock entry was unlawful because a basis for no-knock entry "did not exist *at the time of the execution* of the Search Warrant." (Emphasis added.)

¶11 When the motion was argued to the trial court, however, Bartram pursued only the issue of whether the affidavit was sufficient to support the warrant. Because Bartram made no argument about the circumstances at the time

of the officers' entry, we consider him to have abandoned that portion of his motion. When Bartram now argues on appeal that the State failed to present evidence of the circumstances at the time of entry, he is essentially attempting to raise this issue for the first time on appeal. Because Bartram limited his argument before the trial court to the affidavit and the warrant, the State would have had no reason to respond with officer testimony. We do not ordinarily consider issues raised for the first time on appeal, and we decline to do so here. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (superseded by WIS. STAT. § 895.52 on other grounds).

¶12 Bartram next argues that even if the affidavit's allegations are relevant to this issue, the affidavit was insufficient. However, as we have discussed, the affidavit is not by itself dispositive of our review of the no-knock entry. Even if we were to agree that the affidavit was not sufficient, that conclusion would not answer whether the no-knock entry was lawful, because that entry must be judged by the circumstances as they existed at the time of entry, not when the warrant was sought. Accordingly, we see no reason to decide whether the affidavit was sufficient.

¶13 We do not regard our conclusion as necessarily inconsistent with our recent opinion in ***State v. Eason***, 2000 WI App 73, 234 Wis. 2d 396, 610 N.W.2d 208. We affirmed the suppression of evidence in ***Eason*** because we agreed with the trial court's conclusion that the search warrant affidavit did not contain sufficient information for the warrant to authorize a no-knock entry. ***Id.*** at ¶8. According to the State's brief in that case, Eason's suppression motion asserted both that the affidavit was insufficient and that there were no exigent circumstances at the time of the no-knock entry. However, the State indicated that at the motion hearing, Eason argued only that the affidavit was insufficient. The

trial court accepted this argument and suppressed the evidence on that basis. ***Id.*** at ¶1.

¶14 The State, the appellant in ***Eason***, argued in this court that the trial court erred in concluding that the affidavit's averments were insufficient to support a no-knock entry, but it did not argue that the inquiry was irrelevant, or that we should reverse based on the existence of grounds to enter unannounced at the time the warrant was executed. Thus, in contrast to the present appeal, neither party in ***Eason*** made an appellate argument regarding the primacy of the circumstances at the time of the no-knock entry. As a result, our attention was not directed to the case law instructing that our review should focus on the circumstances at the time of entry. In the present case, however, Bartram's argument on appeal squarely presents the issue for our consideration, even though we conclude that Bartram abandoned the issue in the trial court and thus may not raise it now.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.