COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0965-CR **Cir. Ct. No. 00-CF-373**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW J. ANDERSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Matthew J. Andersen appeals from a judgment of conviction of party to the crime of possession of cocaine with intent to deliver. The sole issue on appeal is whether police complied with the knock-and-announce requirement when executing a search warrant at Andersen's residence. We sustain

the trial court's denial of Andersen's motion to suppress evidence of cocaine found during the search and affirm the judgment.

¶2 On Tuesday, April 11, 2000, a five- to seven-member SWAT team executed a search warrant at Andersen's residence, a one-story, single-family home in Racine. The warrant authorized a search for cocaine, packaging materials, and drug paraphernalia. It required the police to knock and announce themselves upon execution. It was approximately 10:12 a.m. when officers arrived at Andersen's residence. A decorative, wrought iron gate-type door preceded the front door to the residence. Sheriff investigator Michael Prochniak knocked on the gate door and announced, "Sheriff's department, search warrant." There was no response from within the home. Five to seven seconds after the announcement, the order was given to breach the door. It took two to three seconds to pry open the locked gate door. Officers breached the front door using a ram. Andersen was located in the back bedroom, still in bed. The search warrant was then executed and cocaine discovered.

¶3 When we review an order denying a motion to suppress evidence, we are bound by the trial court's findings of facts unless they are clearly erroneous. ***State v. Long***, 163 Wis. 2d 261, 265, 471 N.W.2d 248 (Ct. App. 1991). We independently consider the circumstances to determine whether the constitutional requirement that the entry was reasonable is met. ***Id.*** In addition to announcing their identity and purpose when executing a knock-and-announce search warrant, officers must also either wait for occupants to refuse their admission or allow the occupants time to open the door. ***State v. Eason***, 2001 WI 98, ¶17, 245 Wis. 2d 206, 629 N.W.2d 625. If occupants do not admit 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).

¶4 Andersen contends that the officers did not wait a sufficient amount of time to permit a response to the knock and announcement. There is no bright-line rule for how much time must pass before entry by force is deemed reasonable. *See* ***State v. Greene***, 172 Wis. 2d 43, 50, 491 N.W.2d 181 (Ct. App. 1992); ***Long***, 163 Wis. 2d at 266. The individual circumstances of each case must be examined to determine what is constitutionally reasonable. *See* ***Long***, 163 Wis. 2d at 267-68.

¶5 Andersen first takes issue with the trial court's finding that the time interval between the knock and announce and actual breaching of the door was a minimum of seven seconds and a maximum of ten seconds. Andersen argues that under ***United States v. Espinoza***, 105 F. Supp. 2d 1015, 1018-19 (E.D. Wis. 2000), *rev'd*, 256 F.3d 718 (7th Cir. 2001), *cert. denied*, ___ U.S. ___, 2002 WL 32451 (Jan. 14, 2002) (No. 01-6757), the knock-and-announcement rule applies per dwelling and not per door. Thus, Andersen contends, the time to unlock the decorative gate should not be added to the initial waiting period and, at most, the officers only waited seven seconds to breach the door. He characterizes seven seconds as an inadequate amount of time.

¶6 We conclude that the trial court's finding on the total elapsed time before making a forcible entry is not clearly erroneous. While officers were attempting to unlock the decorative iron gate, occupants in the home could have still responded and avoided the forced entry. Adding the two periods together was appropriate. *See* ***Long***, 163 Wis. 2d at 267-68 (police waited seven to ten seconds to enter outer door and another five to seven seconds to enter door to Long's first-

floor apartment and the court considered both periods to determine that a reasonable period elapsed). Even if we were to read ***Espinoza*** as Andersen does, we are not bound by it. The decision was reversed on appeal in a manner which makes its holding on the time issue suspect. *See* ***Espinoza***, 256 F.3d at 723 (even though timing of entry was not an issue pursued by the prosecution on appeal, the court did not want silence on the issue to be deemed approval of the holding and noted that it accepted the district court's finding of a Fourth Amendment violation "only for the sake of argument").

¶7 The trial court made findings on five factors in concluding that seven to ten seconds was a reasonable amount of time to wait. First, the court found that it would not take an undue length of time for someone to answer the door, get to the door, or be heard from within the ranch-style, single-level home. Andersen argues that the trial court's finding is unsupported by the record. We disagree. The warrant described the home as a one-story, single-family residence. An officer's testimony confirmed that it was a ranch-style home. Pictorial evidence was also available to the trial court.

¶8 The trial court's second finding was that at 10:12 a.m. on a weekday, if someone were home, he or she would likely be up and about and able to hear and respond relatively promptly to a knock at the door. This finding is not challenged.

¶9 Third, the trial court found that the police knew they would be searching for cocaine, a substance which, except in unusually large amounts, can be easily and quickly disposed of. The trial court noted that there was no indication that an unusually large amount would be found in Andersen's residence. Thus, the court properly noted that the waiting time could be shorter to prevent the

possible destruction of evidence after the knock and announcement. *See* ***Long***, 163 Wis. 2d at 268.

¶10 Andersen contends that a shorter period is not appropriate based on the presence of drugs because the police had no reason to believe that anyone was at home when the warrant was executed. We cannot penalize police for operating as if the occupants are at home when we have indicated that the failure to do so is perilous. *See* ***State v. Moslavac***, 230 Wis. 2d 338, 346 n.7, 602 N.W.2d 150 (Ct. App. 1999) ("the police will operate at their peril if they do not knock and announce and the premises prove to be occupied"). Moreover, here the court found (as its fifth factor) that the appearance of the residence was unusual enough to suggest to officers that the occupants were trying to conceal something. The trial court considered the possible destruction of drugs as one of the activities the occupants could have attempted to conceal.

¶11 Finally, the trial court found that the police heard no movement from within the house in response to the knock and announce. There was no need for the police to wait longer when there was no indication that occupants were attempting to respond. Although tension exists between this factor and the shorter period acceptable because of the possible destruction of drugs, it is not fatal to the determination that a reasonable amount of time elapsed. Each factor is relevant in considering the totality of the circumstances.

¶12 The trial court's findings are not clearly erroneous. We conclude that the time before forced entry was constitutionally reasonable.

By the Court.—Judgment affirmed.

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