COURT OF APPEALS DECISION DATED AND FILED

December 13, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2693-CR

Cir. Ct. No. 2010CF11

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM A. GRANTHAM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Taylor County: GLENN H. HARTLEY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 HOOVER, P.J. William Grantham appeals a judgment of conviction for manufacturing THC and possession of THC with intent to deliver. Grantham disputes the validity of two search warrants executed by police. He first challenges a purported warrant authorizing a thermal imaging search of his home

because the document was titled as an order. He also argues the attendant search was invalid because police did not make the statutorily required return of the warrant and the items seized. Grantham next argues the affidavit in support of a subsequent search warrant failed to establish the reasonable suspicion necessary to issue a no-knock warrant. We reject Grantham's arguments and affirm.

BACKGROUND

¶2 Law enforcement sought permission to use a thermal imaging device on Grantham's residence. A circuit court judge signed a document titled "ORDER," and including the caption: "In The Matter Of The Application Of The Warrant For Authorizing The Usage Of A Thermal Imaging Unit To Read The Heat Signatures On Residence." Later that day, police used a thermal imaging device to scan Grantham's home for heat signatures. No return was filed with regard to this search.

¶3 A few days later, law enforcement submitted an affidavit in support of a search warrant for Grantham's home. The affidavit was prepared by a detective and attested to by the district attorney. The circuit court approved the request, signing a no-knock search warrant. The no-knock search was executed five days after the thermal imaging search. Presumably, the police recovered incriminating evidence and Grantham was charged with drug crimes.[1] Following the denial of Grantham's suppression motions challenging the validity of the searches, Grantham pled no contest to charges of manufacturing THC and possession of THC with intent to deliver. Grantham now appeals.

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[1] Grantham's brief is short on details.

DISCUSSION

Thermal imaging search of the home

¶4 Grantham and the State agree that under ***Kyllo v. United States***, 533 U.S. 27 (2001), the use of a thermal imaging device to look for heat emanating from Grantham's home was a search subject to the constitutional warrant requirement. Grantham argues the requirement was not satisfied here because: (1) the document was titled, "order," rather than "warrant;" and (2) law enforcement failed to make a return of the warrant and the items seized within forty-eight hours after execution.

¶5 Grantham acknowledges that our supreme court has concluded, "An order meeting the parameters of a search warrant set out in [WIS. STAT. § 968.12(1)][2] is a statutorily authorized warrant, even though the document is entitled 'order.'" ***State v. Sveum***, 2010 WI 92, ¶56, 328 Wis. 2d 369, 787 N.W.2d 317. "As the statute clearly states, '[a] search warrant is an order.'" ***Id.*** (quoting WIS. STAT. § 968.12(1)). Nonetheless, Grantham contends ***Sveum*** is distinguishable because that case dealt with a vehicle search, while here police searched Grantham's home.

¶6 Grantham does not, however, explain the legal significance of this factual difference. Instead, he merely quotes language from ***Sveum*** indicating the court assumed, arguendo, that the warrant application there failed to establish probable cause to search any buildings, and holding the warrant was therefore

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

invalid as to any buildings. Grantham does not argue probable cause was lacking here. Further, there is nothing in ***Sveum*** or WIS. STAT. § 968.12(1) to suggest that a search warrant may be properly titled as an "order" when authorizing vehicle searches, but must be titled as a "warrant" when authorizing searches of homes or other buildings.[3]

¶7 Grantham's next argument, that the search was unreasonably executed because law enforcement failed to make the return mandated by WIS. STAT. § 968.17(1),[4] also fails under ***Sveum***. "The timely return of a warrant is a ministerial duty which does not affect the validity of the search absent prejudice to the defendant." ***Sveum***, 328 Wis. 2d 369, ¶69 (citations and punctuation omitted).

¶8 In ***Sveum***, the court observed that the requirement of a prompt return and inventory safeguards the property rights of individuals by ensuring that defendants are not permanently deprived of access to and control over their seized property. ***Id.***, ¶68. ***Sveum*** involved the placement of a GPS tracking device on the defendant's vehicle. There, the court held:

> Sveum has failed to demonstrate that he was prejudiced by law enforcement's failure to comply with the procedural return statutes. Because the officers in this case did not seize any tangible evidence, but instead intangible

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[3] In any event, we observe that the caption of the order authorizing the search here included the term "warrant." It would be immediately apparent to any person viewing the document that it was intended to be a search warrant.

[4] WISCONSIN STAT. § 968.17(1) provides:

> The return of the search warrant shall be made within 48 hours after execution to the clerk designated in the warrant. The return shall be accompanied by a written inventory of any property taken. Upon request, the clerk shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the search warrant.

> electronic data, there was no property to be returned to Sveum and, therefore, no property to safeguard prior to its return to Sveum. Moreover, at all times Sveum had access to and control over the location of his vehicle.

Id., ¶70.

¶9 Grantham again attempts to distinguish ***Sveum***. He argues there was prejudice because thermal imaging devices exist that can produce tangible items for return, in the form of video or still images.[5] Grantham asserts those images could have been examined by experts for an opinion about whether they supported an interpretation that probable cause existed, had they been preserved and returned.

¶10 Grantham's minimally developed argument misses the point. Even if images of the thermal search existed, they would not constitute Grantham's property. Nor would the retention of such images affect Grantham's access to or control over his home. Thus, Grantham's property rights were unaffected. As to probable cause, it is not clear what Grantham is arguing. Clearly, he would have been unable to have an expert examine the covertly acquired images prior to the State's application for the subsequent warrant for the physical search of the home. Moreover, in ***Sveum*** the GPS stored tracking data, which was then downloaded, stored on a disk, and plotted on a map. Yet, our supreme court held there was no property to return and, thus, no prejudice.

¶11 Regardless, here, the circuit court expressly found that no permanent images were created by the thermal scanning device; the user simply views images

[5] Grantham cites ***Kyllo v. United States***, 533 U.S. 27, 29-30 (2001), to demonstrate that thermal imaging devices exist that can produce tangible images.

on a screen. It appears Grantham may be arguing that, as a matter of law, when police conduct a search using a thermal imaging device, they must use a device that is capable of recording still or moving images so that those images may be returned following the search. If that is his argument, he cites no authority for it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.").

Physical search of the home

¶12 Grantham next argues that the issuance and execution of the no-knock warrant for a physical search of his home was unreasonable and that the evidence obtained in the ensuing search should therefore be suppressed. Whether officers have followed the announcement rule is part of a Fourth Amendment reasonableness inquiry. ***State v. Brady***, 2007 WI App 33, ¶8, 298 Wis. 2d 782, 729 N.W.2d 792 (citing ***Wilson v. Arkansas***, 514 U.S. 927, 934 (1995)); ***State v. Eason***, 2001 WI 98, ¶17, 245 Wis. 2d 206, 629 N.W.2d 625).

¶13 The announcement rule requires that before police forcibly enter a home to execute a search warrant, they must announce their identity and purpose and wait for either the occupants to refuse their admittance or allow the occupants time to open the door. ***Brady***, 298 Wis. 2d 782, ¶9. The rule fulfills three purposes: protecting the safety of police and others; preventing the physical destruction of property; and protecting the limited privacy interests of the occupants of the premises to be searched. ***Id.*** (citing ***Eason***, 245 Wis. 2d 206, ¶17). The first purpose "is important because 'an unannounced entry may provoke violence in supposed self-defense by the surprised resident.'" ***Id.***, ¶10 (quoting ***Hudson v. Michigan***, 547 U.S. 586, 594 (2006)). To prevent physical destruction

of property, the knock-and-announce rule gives individuals an opportunity to comply and avoid damage resulting from forced entries. ***Id.*** Finally, the limited privacy interest protects the resident's dignity by providing an opportunity to collect oneself before answering the door. ***Id.***

¶14 "[T]o dispense with the rule of announcement, '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.'" ***Eason***, 245 Wis. 2d 206, ¶18 (citations omitted). The showing necessary to establish reasonable suspicion can be less in both content and reliability than the information needed to establish probable cause. ***Id.***, ¶19. Thus, the required showing of reasonable suspicion is low, and depends upon the facts and circumstances of each case. ***Id.***

¶15 Although Grantham initially states that the no-knock warrant was unreasonably executed, his argument focuses exclusively on whether the affidavit in support of the warrant established a reasonable suspicion that a no-knock entry was necessary to protect the officers' safety. The warrant application described information received from a named informant about marijuana sales by Grantham and a large marijuana growing operation the informant observed in Grantham's basement. The informant had not been to Grantham's house for about a year, but stated he had friends who recently purchased marijuana from Grantham. The informant told the investigating detective that the last time he was at the home, Grantham had a loaded pistol and several pit bulls inside the residence and that Grantham shows off the .22 caliber pistol and uses it as protection. The warrant application further indicated that Grantham had "prior drug arrests/convictions for drug/marijuana possession in recent years." The application also included

evidence from utility records and the thermal imaging search suggesting the home was currently being used to grow marijuana.

¶16 Grantham's criticism of the warrant application is addressed exclusively to the pit bulls. He makes two points. First, Grantham notes that dogs might be territorial and aggressive in response to sudden noises or intrusions. Thus, he argues, "entering the residence without knocking would be more likely to generate an attack by the animals than knocking and allowing the owner to gain control of them." That is a reasonable inference. However, it is also reasonable to infer that knocking and announcing would allow Grantham an opportunity to gather the pit bulls and utilize them as attack dogs. Thus, it would be reasonable for the warrant-issuing judge to accept the position of trained law enforcement officers that dispensing with the rule of announcement would increase their safety.

¶17 Grantham's second criticism is that the warrant application omitted the following paragraph, which had been included in the earlier application for the thermal imaging search:

> Your affiant also learned that Taylor County Deputies responded to N1838 CTH H three (3) different times in regard to barking dogs and possible animal neglect. The address deputies responded to on 09/07/08, 10/10/08, and 10/11/08 was N1838 CTH H. Your affiant learned after reviewing the reports that contact had been made with Billy Grantham at the residence and the dogs in question were Pitbulls.

According to Grantham, the above paragraph would have negated any reasonable suspicion that knocking and announcing would be dangerous because "law enforcement knew from their own records and experience that they could approach this house without being attacked by the defendant's dogs or being fired upon by the defendant."

¶18 Grantham's assertion is overstated. At best, it is but one reasonable inference from the very vague statement in the earlier application. Moreover, Grantham's responses to police inquiring about dog complaints do not necessarily indicate what his response might be to a drug bust. In any event, Grantham fails to present a compelling argument that the omission of the paragraph negated satisfaction of the very low standard of reasonable suspicion of danger. Regardless of the dogs, we have repeatedly held that "a police officer's knowledge that a drug dealer is armed" satisfies the requirement that the affidavit for a no-knock warrant demonstrates with sufficient particularity that special circumstances justify a no-knock entry. ***State v. Hanson***, 163 Wis. 2d 420, 425, 471 N.W.2d 301 (Ct. App. 1991); *see also* ***State v. Watkinson***, 161 Wis. 2d 750, 757, 468 N.W.2d 763 (Ct. App. 1991). Grantham's argument therefore fails.[6]

By the Court.—Judgment affirmed.

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[6] The State presents alternative arguments that we need not reach. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).