IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL D. MARSH,

Defendant.

REPORT AND RECOMMENDATION

01-CR-57-C-2

REPORT

Defendant Paul Marsh has filed a motion to suppress evidence seized from his home during the execution of a state search warrant. (Dkt. 26). Marsh contends that task force agents violated the Fourth Amendment's knock and announce requirement by forcing entry too quickly after they knocked and announced. For the reasons stated below I am recommending that this court deny Marsh's motion.

On July 17, 2001, I held an evidentiary hearing on the motion. Having heard and seen the witnesses and having reviewed the exhibits, I find the following facts:

Facts

On Friday, February 23, 2001, at about 10:00 a.m., agents of the St. Croix Valley Drug Task Force executed a search warrant at defendant Paul Marsh's home in Stark Prairie. The agents believed there was an active meth lab in Marsh's home. Because meth labs are

notoriously unstable, explosive and inflammable, all five members of the entry team wore "Nomex" flame retardant uniforms, air purifying respirators with side canisters, and ballistic vests that said "POLICE" in four-inch tall letters. Although the respirators muffled the agent's voices, they could be heard clearly when they raised their voices.

Sergeant John Shilts of the St. Croix Sheriff's Department led the team. Sergeant Shilts has twenty-one years of law enforcement experience and had executed over 200 search warrants. Agent David Hake, Director of the St. Croix Valley Drug Task Force, was also on the entry team; Agent Hake has over twenty years' experience in law enforcement (fourteen years as a drug investigator) and has executed several hundred search warrants. Task force agents Schultz, Pasternak and Rehl rounded out the team. The agents were familiar with Marsh from past professional contact with him. In fact, Agent Hake had executed a warrant at this same residence about two or three months earlier. Marsh had not been home during the previous entry, but did he come home later while Hake and other agents were still there.

Marsh's front door was wood with a glass window approximately 18" x 20" near the top, draped on the inside with a cloth curtain. The door handle was to the agents' right, which meant the door opened toward their left. Sergeant Shilts stood to the left of the door, Agent Schultz stood to the right of it, while Investigator Hake and the other two agents stood back about four feet directly in front of the door. Sergeant Shilts knocked loudly on the door and loudly announced "police! search warrant!" Upon hearing no response, Sergeant Shilts loudly repeated this process.

About 20 to 30 seconds after the first knock and announcement, Marsh came to the door but did not open it. Instead, he lifted the window curtain to gaze out for 2 or 3 seconds. Marsh made eye contact with Sergeant Shilts, whom he knew. Marsh said nothing and did nothing to open the door.

Both Sergeant Shilts and Agent Schultz started shouting at Marsh to open the door. Marsh did not respond, but simply dropped the curtain. The agents heard nothing from inside the house. After waiting about 5 seconds after Marsh dropped the curtain, Agent Schultz kicked open the door and the agents rushed in. They found Marsh lying in the laundry room to the left of the front door.

Analysis

The Fourth Amendment's proscription of unreasonable searches and seizures incorporates the requirement that law enforcement officers entering a dwelling with a search warrant must knock on the door and announce their identity and intention before attempting a forcible entry. *Wilson v. Arkansas*, 514 U.S. 924, 934, (1995). *See also United States v. Espinoza*, 256 F.3d 718, 723 (7th Cir. 2001).

Although not directly addressed in *Wilson*, a necessary corollary of the knock and announce requirement is that officers must wait a reasonable amount of time after announcing their presence and intention before forcing entry. *United States v. Jones*, 208 F.2d 603, 609-10 (7th Cir. 2000). Requiring the officers to wait a bit provides the residents of

the dwelling: 1) the opportunity to comply with the law and peaceably permit officers to enter the residence; 2) the opportunity to avoid the destruction of property occasioned by forcible entry; and 3) the opportunity to "prepare themselves" for entry by law enforcement officers, for example, by pulling on clothes, or getting out of bed. *Richards v. Wisconsin*, 520 U.S. 385, 393 n. 5 (1997); *Wilson*, 514 U.S. at 930-32; *Espinoza*, 256 F.3d at 723.

In the absence of exigent circumstances, courts have not set a lower limit on how long the agents must wait after announcing their presence and before attempting forcible entry pursuant to a valid warrant. *Espinoza*, 256 F.3d at 722; *Jones*, 208 F.3d at 610; *United States v. Jones*, 214 F.3d 836, 844 (7th Cir. 2000) (Coffey, J., concurring and dissenting). Whenever a knock-and-announce challenge is based on a claim that the agents forced entry too quickly, a court must determine how long a wait would have been reasonable under the circumstances. *Jones*, 208 F.3d at 610; *United States v. Markling*, 7 F.3d 1309, 1318 (7th Cir. 1993).

In *Jones*, the agents knocked and announced in the "early morning," while the defendant and his wife were still asleep in their bedroom. Then they waited a mere 5 to 13 seconds before forcing entry. The court nonetheless found this wait was long enough for the agents to infer that the defendant's failure to open the door or acknowledge the agents' presence was a refusal. The court also determined that a short wait was appropriate because the officers had information that the defendant was a dangerous felon in possession of a gun,

and because waiting longer would have given him an opportunity to destroy the drug evidence. 208 F.3d at 609-10.

In *Markling*, the court found that waiting seven seconds at a motel room door before breaching it was long enough for the agents to infer refusal. One factor in this decision was that informants had told the police that the defendant was likely to flush his cocaine down the toilet if given the chance. 7 F.3d at 1318.

Here, the agents waited 20 to 30 seconds after knocking and announcing without making any attempt to force entry. Ironically, given both the time of day and nature of the investigation, if the agents had chosen to force entry sometime after the 20th second elapsed but before Marsh came to the door, it is likely that this court would have deemed their actions reasonable. But the agents waited a bit longer and Marsh actually came to the door. So, the analysis hinges on what happened in the next 7 or 8 seconds, not the preceding 20-30 seconds.

Upon lifting the window curtain, Marsh eyeballed the five strangely-garbed visitors, all vividly emblazoned as POLICE, while they shouted at him to open the door. Marsh silently assessed this clamorous group and made eye contact with Sergeant Shilts, but he offered no response. Having provided no visual or verbal clue that he intended to comply with the demands for entry, Marsh dropped the window curtain. Five more seconds passed with no indication that Marsh was in the process of unlocking or opening the door. Patience

expended, exasperation rising, adrenalin pumping, the agents forced entry. Now Marsh cries foul.

Marsh contends that the agents jumped the gun because it was objectively unreasonable for the agents to assume that he had refused entry as opposed to something innocuous, such as going to pen a dog, to put his pants on, or to get his identification. Having given these examples, Marsh argues that it is irrelevant what he actually was or was not doing during those 5 seconds, since the pertinent question is whether it was unreasonable for the agents so quickly to conclude that he had refused entry.

Marsh frames the argument correctly but reaches the wrong conclusion. Let's start with the basics: it was 10:00 in the morning on a week day. Police were knocking on Marsh's front door, loudly announcing who they were, why they were there, and demanding entry. Upon arriving at the door after 20 or 30 seconds of pounding, Marsh allowed the agents to see that he was aware of their presence, yet he neither said nor did anything in response to their demands. He merely gazed upon them for a bit, made eye contact with at least one of them, then dropped the curtain without comment. Let's add some facts specific to Marsh: he knew some of these agents already, although it is not clear whether he recognized them with their gear on. He had suffered through the execution of a search warrant at his house by these same people just several months earlier. In other words, he was not some newbie caught off guard and paralyzed into inaction by the presence of police on his porch.

Would a reasonable person in Marsh's position have provided a non-response so inscrutable to the entry team that it begged for interpretation as a refusal? No. Would reasonable people in the agents' position have legitimate cause to believe that Marsh had refused entry? Yes. Absent some clue from Marsh that he was *not* refusing entry, the agents could reasonably infer from what he did that he *was* refusing entry. Marsh did not say "Okay, okay, give me a second to unlock the door," or "Just a minute, I have to get my pants," or "You'd better wait until I cage my vicious dog!" The die was cast by Marsh's wordless drop of the drape.

Having foregone his opportunity to provide the most reasonable response to the agents' demands for entry (a verbal response), the only remaining reasonable response Marsh could have provided would have been to open the door immediately. He did not do so in the five seconds the agents waited. In this specific situation, five seconds was long enough for the agents to determine that Marsh had refused entry.

Having failed to speak or act in some fashion that would have assuaged the agents' concerns, Marsh cannot now argue that the agents violated his Fourth Amendment rights by forcing entry too quickly. True, the burden of proving that they acted reasonably is on the government and its agents, but the reasonableness of their actions is determined by the circumstances created by Marsh. Under the totality of the circumstances, the agents waited long enough. Marsh's motion to suppress should be denied.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Paul Marsh's motion to suppress evidence.

Dated this 27th day of August, 2001,

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge