IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARK D. JONES and
THERESA A. JONES,

OPINION AND
ORDER

Plaintiffs,

03-C-25-C

v.

TRACY FINCH, RON WILHELM,
and other unidentified officers involved in
the wrongful execution of the warrant on
MARK JONES' apartment, in their
individual capacities,

Defendants.

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In this civil action for monetary damages brought pursuant to 42 U.S.C. § 1983, plaintiffs Mark and Theresa Jones contend that defendants Tracy Finch, Ron Wilhelm and other unidentified officers caused a raid on plaintiffs' home in violation of their Fourth Amendment right to be free from unreasonable searches and seizures. Plaintiffs raise the following three claims: (1) in obtaining a warrant that was invalid because it failed to describe the apartment to be searched with sufficient particularity, defendant Finch acted unreasonably; (2) in failing to recognize and correct this fatal defect before executing the

warrant or alternately, if the warrant was not defective, failing to comply with its terms, defendant Wilhelm acted unreasonably; and (3) defendant Wilhelm and the other unnamed officers violated the Fourth Amendment knock and announce rule. This case is before the court are plaintiffs' motion for summary judgment on their first two claims and defendants' motion for summary judgment with respect to all of plaintiffs' claims. Jurisdiction is present. 28 U.S.C. § 1331.

With respect to plaintiffs' first claim, I conclude that defendant Finch did not violate plaintiffs' Fourth Amendment rights because she did not have a reason to believe that she could have obtained the target apartment's number with reasonable effort and she did not actively conceal the names of the residents of that apartment. With respect to the second claim, I conclude that defendant Wilhelm did violate plaintiffs' Fourth Amendment rights because he had reason to know that the warrant was defective but failed to take reasonable steps to cure this defect. However, plaintiffs will not be able to recover any monetary relief for this violation because defendant Wilhelm is entitled to qualified immunity on this claim. Plaintiffs have not moved for summary judgment on the merits of their third claim. Thus, I make no determination on this issue. Defendants' motion for summary judgment will be denied with respect to the third claim; they have failed to show that defendant Wilhelm is entitled to qualified immunity for his alleged failure to comply with the knock and announce rule.

Finally I conclude for two reasons that I need not address the merits of plaintiffs' "fourth claim." First, plaintiffs' complaint contains no allegations of fact regarding a second frisk of plaintiff Theresa Jones. Thus, plaintiffs have failed to provide defendants with a short and plain statement of their claim as required by Fed. R. Civ. P. 8. Second, plaintiffs have not named as a defendant the officer who performed the alleged second frisk. Plaintiffs cannot obtain relief from someone who is not a party to the case. Although plaintiffs could have cured these shortcomings by amending the complaint, they did not do so before the deadline for submitting an amendment. PTC Order, dkt. #8, at 2 (deadline for amendment of pleadings June 16, 2003).

From the parties' proposed findings of fact, I find that the following facts are material and undisputed. I have disregarded the facts defendant proposed suggesting that there was probable cause for the warrant because they are irrelevant. Plaintiffs do not argue that the warrant was issued without probable cause, only that the warrant failed to describe the apartment with sufficient particularity.

UNDISPUTED FACTS

Plaintiffs Mark D. Jones and Theresa A. Jones are adult citizens of Wisconsin. At all material times, they resided in an apartment located at 220 West Burnett Avenue, Grantsburg, Wisconsin, in Burnett County. Defendants Tracy Finch and Ronald Wilhelm

are investigators employed by the Burnett County Sheriff's Department. (Defendants have identified the other officers who took part in the raid on plaintiffs' home as John Sacharski, Ryan Bybee and Daniel Wald, but plaintiffs have not amended their complaint or taken any other action to make these persons defendants. However, because it is undisputed that they participated in the raid, their deposition testimony about the incident will not be excluded for lack of personal knowledge pursuant to Fed. R. Evid. 602.)

Defendant Finch obtained information from a confidential informant about an attempt to manufacture methamphetamine in the "right upstairs apartment" of a building located at 220 West Burnett Street in Grantsburg, Wisconsin. Although the informant gave defendant Finch the names of Jody Gruenwald-Anderson and John Simon as the residents of the target apartment, he did not identify the specific apartment number. Defendant Finch conveyed this information to the district attorney, who drafted the materials that defendant Finch used to apply for a search warrant. Although she gave the district attorney the names of Jody Gruenwald-Anderson and John Simon, the district attorney did not include the names in the documents he drafted. On April 6, 2002, the Burnett County Circuit Court Commissioner issued a warrant authorizing a search for methamphetamine manufacturing equipment or materials in"the upstairs apartment on the right in an apartment building at 220 West Burnett Avenue in the Village of Grantsburg." The warrant did not indicate the names of the residents of the target apartment.

Immediately after the warrant was issued, defendant Finch met with the team of officers who executed the warrant. She did not participate in its execution in any other way. Executing the warrant was the responsibility of defendant Wilhelm, who was already familiar with the apartment building. On about ten prior occasions, defendant Wilhelm had conducted surveillance of the building after a resident occupying one of the first floor apartments had told him that she believed there was drug activity in one of the upstairs apartments.

The two-story apartment building at 220 West Burnett Avenue has four units, two upstairs and two downstairs. The front of the building faces west; plaintiffs' apartment is on the northern half of the second floor. The building has two sets of stairs: one accessible from the front door and the other accessible from the back door. Plaintiffs' apartment is the one on the left from the perspective of a person facing the front of the building or reaching the top of the front staircase. However, plaintiffs' apartment is to the right of a person using the rear staircase. At the front of the building, there are four doorbells, each of which has a corresponding tenant name and apartment number. Each apartment door had a number, although the confidential informant had told defendant Finch that the doors did not have numbers. Jody Gruenwald-Anderson and John Simon occupied the upstairs apartment across from plaintiffs.

In conducting surveillance of the building, defendant Wilhelm observed what he

considered to be a high level of traffic coming in and out of the building. During the time he spent conducting this surveillance, defendant Wilhelm thought that most of the people he saw entering the building used the rear entrance. He noticed that there was always activity in plaintiffs' apartment when people entered the building from the rear, although he was unable to observe the activity closely enough to determine whether it was innocent or not. At the time of the raid, the backdoor was kept locked and the only people who used the rear door to get to plaintiffs' apartment were a neighbor and her child for whom plaintiff Mark Jones provided childcare. Defendant Wilhelm was unable to observe any activity in the other upstairs apartment because the windows were covered with heavy blankets. He did not suspect that the windows were covered in this way to hide illegal drug activity. Instead, he assumed because many of the residents were just starting out or had very little money that the residents of the southern apartment were not able to afford curtains.

At approximately 9:20 p.m. on April 6, 2002, defendant Wilhelm executed the search warrant with the assistance of two other officers from the Burnett County Sheriff's Department and one officer employed by the Village of Grantsburg. The four officers approached the front of the apartment building at 220 West Burnett Avenue. Defendant Wilhelm used a knife to unlock the building's front door. Although he read the warrant, defendant Wilhelm directed the other officers up the front staircase and to plaintiffs' apartment, which was on the officers' left when they arrived at the top of the stairs.

Defendant Wilhelm construed the warrant's reference to the apartment on the "right" to mean the "right from the perspective of a person using the rear staircase. He came to this conclusion because he had seen very little activity in the apartment on the right of the front staircase. However, he had no knowledge of which staircase the confidential informant had used. Additionally, defendant Wilhelm knew that one of the residents of the apartment to be raided was either Jody Gruenwald or Jody Anderson. He did not look at the doorbells or the mailboxes, which would have indicated her apartment number.

One of the officers knocked loudly on plaintiffs' door several times. Defendant Wilhelm waited between five and fifteen seconds. When he did not hear a response to the knock, he ordered one of the other officers to kick the door open. (The officers announced that they were police and that they had a warrant but the parties dispute whether the officers made this statement when they knocked or when they kicked in the door.) Plaintiff Mark Jones had been sitting on his couch. He got up quickly after hearing the knocks but made his way only as far as the kitchen when the officers kicked the door open. The officers had their guns drawn as they entered plaintiffs' apartment. They encountered plaintiff Mark Jones and told him to lie down on the floor and put his hands above his head immediately. When he complied, one of the officers handcuffed him. Defendant Wilhelm proceeded to the bedroom of plaintiff Theresa Jones, whom he found in bed in her pajamas. He ordered her to get out of bed, show her hands and lie on her stomach. Once she was handcuffed,

defendant Wilhelm frisked her. Two of the officers found plaintiffs' two children in the next bedroom and brought their mother in handcuffs to their room to calm them. Plaintiff Mark Jones insisted that the officers were in the wrong apartment. When defendant Wilhelm saw plaintiff Theresa Jones, he suspected that Mark Jones was right. He recognized her and thought that her name was Theresa but knew that the suspect's name was Jody. He asked plaintiffs their names and the apartment number of one of their downstairs neighbors. After realizing that he was in the wrong apartment, defendant Wilhelm apologized, ordered that the handcuffs be removed and then directed a similar raid on the apartment across the hall. The total time the officers were in plaintiffs' apartment did not exceed fifteen minutes.

OPINION

A. Constitutionality of Search

1. Validity of search warrant

Plaintiffs contend that the search of their home violated their Fourth Amendment rights because it was not conducted pursuant to a valid search warrant. They argue that the warrant obtained by defendant Finch is void because it does not describe the target apartment with sufficient particularity.

A warrant that fails to describe the place to be searched with sufficient particularity is invalid under the Fourth Amendment. Jacobs v. City of Chicago, 215 F.3d 758, 767 (7th

Cir. 2000). However, the particularity requirement does not mandate elaborate detail. United States v. Somers, 950 F.2d 1279, 1285 (7th Cir. 1991). The purpose of the requirement is to insure that searches do not go beyond what is necessary to achieve the valid law enforcement purpose for which the warrant was granted. United States v. Sefonek, 179 F.3d 1030, 1033 (7th Cir. 1999). Within a multi-unit building, probable cause must exist to search each apartment; searching multiple apartments within one building is the same as searching two separate houses. Jacobs, 215 F.3d at 767 (citations omitted). A warrant is sufficiently particular if an executing officer reading the description in the warrant would reasonably know what apartment to search. See United States v. Hall, 142 F.3d 988, 996 (7th Cir. 1998) (executing officer must reasonably know what items to seize).

"'The validity of the warrant must be assessed on the basis of information that the officers disclosed, or had a duty to discover and disclose.'" Jacobs, 215 F.3d at 768 (quoting Maryland v. Garrison, 480 U.S. 79, 85 (1986)). Thus, if a warrant is overbroad or describes a building or apartment that does not exist, it is not void unless the officer seeking the warrant concealed information she was under a duty to disclose. E.g. Jacobs, 215 F.3d at 768. Conversely, if the officer does conceal information she was under a duty to disclose, the warrant may be invalid even if it adequately describes the place to be searched. E.g., Garrison, 480 U.S. at 85-86. "[T]he omitted fact must be material — that is, if the fact were included, the affidavit would not support a finding of probable cause." United States v.

Williams, 737 F.2d 594, 604 (7th Cir. 1984). Further, the standard for establishing a Fourth Amendment violation in procurement of a warrant is that the officer must have acted "intentionally, or with reckless disregard for the truth." Franks v. Delaware, 438 U.S. 154, 155 (1978). Although this standard was developed to apply to false statements made in the warrant application, id., it has been extended to omissions. Williams, 737 F.2d at 604. Defendants concede that, in retrospect, the warrant's description proved insufficient. But, as they note, the validity of a warrant is not determined "'[w]ith the benefit of hindsight.'" Jacobs, 215 F.3d at 768 (quoting Garrison, 480 U.S. at 85).

The main thrust of plaintiffs' arguments appears to be that defendant Finch failed to include in the warrant certain additional information that she had (the names of Jody Gruenwald-Anderson and John Simon) or could have obtained with reasonable efforts (the specific apartment number). There is no evidence that defendant Finch acted intentionally or recklessly with respect to either of these omissions. As defendants note, defendant Finch's confidential informant did not know the apartment number and thought that there were no numbers on the apartment doors. Although defendant Finch could have obtained the specific apartment number by going to the building and looking around at the doors and doorbells, she did not act unreasonably in failing to do this when she had reason to believe that such an effort would be futile. Cf. Garrison, 480 U.S. at 86 n. 10 (deferring to state court conclusion that officer was not unreasonable in not going to third floor of building,

which would have revealed two apartments, when gas company had told him that entire third floor was billed to one person). Further, defendant Finch was not primarily responsible for drafting the documents that made up the warrant application. She merely failed to notice that the names of Jody Gruenwald-Anderson and John Simon had been omitted.

Second, the omitted information was not "material." Facts are "material" when they contradict the other information provided in the affidavit. Williams, 737 F.2d at 604. Although the undisclosed information would have had the desirable effect of minimizing the risk of mistakes in execution, this is not the applicable standard. Defendant Finch did not know that the four unit building had more than one staircase. Without knowledge of the rear set of stairs, she had no reason to believe that the warrant was confusing or that greater specificity was needed. She may have been negligent in failing to insure that the warrant included the suspects' names, but her error did not rise to the level of a Fourth Amendment violation.

2. Failure to correct known defect prior to execution

Although I conclude that the warrant was valid at the time of its execution, defendant Wilhelm may still be held liable for violating plaintiffs' Fourth Amendment rights if he executed it unreasonably. Plaintiffs argue that it was unreasonable for defendant Wilhelm to execute the warrant when he knew that either upstairs apartment could be "on the right,"

depending on which staircase is used.

a. Knowledge of defect

Generally, an officer may not conduct a search under the authority of a warrant once he discovers a mistake that strips the warrant of probable cause or demonstrated that it does not give a sufficiently particular description of the place to be searched. Jacobs, 215 F.3d at 769 (mistake revealing lack of particularity); United States v. Ramirez, 112 F.3d 849, 852 (7th Cir. 1997) (mistake showing warrant to be unsupported by probable cause). First, defendants argue that defendant Wilhelm never actually believed that the warrant was ambiguous. However, Jacobs, 215 F.3d at 769, requires only that a reasonable officer should have discovered the mistake prior to conducting the search. Defendants concede that defendant Wilhelm knew there were two sets of stairs in the building and that determining which apartment is "on the right" depends on which set of stairs is used. Thus, defendant Wilhelm should have been aware of a latent ambiguity in the warrant's description.

b. Failure to cure defect

Even if an officer has reason to know of a warrant's defect, he may cure the defect by relying on common sense and reliable information known to him outside the language of the warrant. Garrison, 480 U.S. at 87 n.11. Although courts must allow room for mistakes,

"the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." Id. (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

Defendants argue that defendant Wilhelm relied on his personal knowledge about the building and its occupants in resolving what may have been a fatal defect in the warrant's description. In the months preceding the search, defendant Wilhelm had conducted surveillance of the building. He noticed what he considered to be a high level of traffic coming in and out of the building and that most people entered through the rear. Additionally, he observed that there was always activity in plaintiffs' apartment when people entered the building from the rear, although only one neighbor used the rear door to get to plaintiffs' apartment. Defendant Wilhelm was unable to observe the activity closely enough to determine whether it was innocent or not. In addition, he was not able to see anything in the other upstairs apartment because its windows were covered with heavy blankets. From this information, defendant Wilhelm concluded that plaintiffs' apartment must have been the one described in the warrant. This conclusion was objectively unreasonable.

Frequent visitors to an apartment may be a factor in establishing probable cause to conduct a search. United States v. Jones, 72 F.3d 1324, 1326 (7th Cir. 1995) (four visitors staying short period of time in five hour span); United States v. Sewell, 942 F.2d 1209, 1210 (7th Cir. 1991) (fifteen visitors staying short period of time in ten minute span).

However, there must be some reason, other than frequency, for believing that the traffic indicates criminal activity. See id. One reason could be that the officers witnessed the illegal activity in conducting the surveillance. Eg., Jones, 72 F.3d at 1326 n. 3 (suspecting money counterfeiting operation, officers witnessed residents of house hand visitors currency); Sewell, 942 F.2d at 1210 (7th Cir. 1991) (undercover officer purchased marijuana from residents of one apartment after surveillance revealed heavy traffic to building). In this case, defendant Wilhelm did not witness methamphetamine production or sale or any other illegal activity during his surveillance.

Even if the officer does not witness the illegal activity, he may rely on seemingly innocent activity when it corroborates a tip about illegal activity. Illinois v. Gates, 462 U.S. 213, 245 n.13 (1983) (citing Draper v. United States, 358 U.S. 307 (1959)). However, in the cases applying this rule, the officers observed relatively unique activity that had been described by an informant. Gates, 462 U.S. at 244 (one suspect would leave his car at specified location, other suspect would fly to that location, retrieve car and drive to second location); Draper, 358 U.S. at 309 (informant described physical attributes of suspect and indicated that suspect would be arriving in Denver on train from Chicago on one of two mornings). The facts in this case are distinguishable. Defendant Wilhelm observed innocent activity that was neither unique nor described by the informant. The question is one of probability, that is, was it likely that the appearance of activity in plaintiffs' apartment

indicated methamphetamine production? Garrison, 480 U.S. at 87 n.11. By itself, observing frequent traffic into a four unit building and general activity in one of those apartments does not lead sensibly to the conclusion that the residents were distributing methamphetamine. See id.

Defendants argue that defendant Wilhelm was reasonable in believing that the residents of the apartment across the hall from plaintiffs may have been using heavy blankets as curtains because they were able to afford proper window coverings. But that is not the issue. What is relevant is whether he had a reason to believe that the activity he observed in plaintiffs' apartment was more suspicious than the heavy blankets blocking the window in the other apartment. Just as there was a feasible explanation for the heavy blankets, any number of reasons exist for the appearance of activity in an apartment. In this case, the explanation is that plaintiffs provided child care in their home. Both the use of heavy blankets to cover windows and a high level of traffic could have an innocent or illegal explanation. United States v. Lechuga, 925 F.2d 1035, 1039 (7th Cir. 1991) (unusual efforts to shield one's activities from public view can form basis to suspect illegal activity). In light of the facts known to defendant Wilhelm suggesting that either apartment could have been the one referred to in the complaint, the Fourth Amendment required him to seek further clarification when there was no reasonable way to resolve the ambiguity.

Next, defendants argue that defendant Wilhelm reasonably concluded that the

informant providing the directions likely used the rear staircase because most people entering the building used the rear entrance. Assuming that the informant did enter the building at the back door, defendants have not identified any reason for defendant Wilhelm's conclusion that the description that made its way onto the warrant was written from that perspective. To draw this conclusion, one would have to assume that neither the informant nor defendant Finch modified the directions so that they would be accurate to a person using the main public entrance or looking at the building from the front. The informant may have recognized that the apartment was to her left only because she entered the building through the rear private entrance and adjusted her description to the police accordingly. Further, defendant Finch may have questioned the informant about the lay-out of the building and realized that the apartment to be searched was actually the one on the right. There is no reason to assume that neither of these things occurred.

There is a common sense presumption that a warrant's directions are oriented to main, primary or public entrances. Cf. United States v. McGee, 280 F.3d 803, 806 (7th Cir. 2002) (officers typically execute knock and announce warrants via front door); United States v. Rivera, 465 F. Supp. 402 (S.D.N.Y. 1979) (presumption that executing officers should look to address indicated on building's main entrance overcome when building's rear faced avenue listed on warrant); United States v. Owens, 848 F.2d 462, 466 (4th Cir. 1988) (common sense used to cure defective search warrant). But cf. Samuels v. Smith, 839 F.

Supp. 959 (D. Conn. 1993) (warrant executed through use of backdoor when front door was locked and backdoor was propped open). Defendant Wilhelm's observation about the frequent use of the rear door should have caused him to question this presumption but not lead him to a counter-intuitive conclusion.

It is unnecessary to resolve plaintiffs' alternative argument that if the warrant did not suffer from a latent ambiguity of which defendant Wilhelm should have been aware, then he disregarded its reasonably clear language. I conclude that defendant should have been aware that the warrant was fatally deficient. Whether defendant is entitled to qualified immunity is a question I will address in § B(1), infra.

3. Violation of the knock and announce rule

Although plaintiffs have not moved for summary judgment on their third claim, defendants argue that they are entitled to qualified immunity with respect to it. The qualified immunity analysis is a two-step inquiry. Although there is a factual dispute governing the merits of this claim, a court must determine that "plaintiff's allegations, if true, establish a constitutional violation" in the qualified immunity analysis. Hope v. Pelzer, 536 U.S. 730, 736 (2002) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). Because plaintiffs are the non-moving party with respect to this claim, all factual disputes will be resolved in their favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (on motion for

summary judgment, all inferences are to be drawn in favor of non-moving party).

Generally, police officers are required under the Fourth Amendment to knock, announce their presence and wait a reasonable amount of time before breaking into a dwelling unless there are exigent circumstances warranting a deviation from this rule. United States v. Jones, 208 F.3d 603, 609 (7th Cir. 2000). The purpose of this rule is to give suspects an opportunity to comply voluntarily with the law before being subjected to a forced entry of their home. Wilson v. Arkansas, 514 U.S. 927, 930-32 (1995).

The parties dispute the amount of time that the officers waited after knocking and announcing their presence before kicking-in plaintiffs' door. According to plaintiff Mark Jones, the officers knocked on the door loudly, announced they had a search warrant less than ten seconds after they knocked and broke down the door within three to five seconds of making this announcement. Mark Jones Dep., dkt. #18, at 76-77, 124. Jones testified that he sprang up from the couch as soon as he heard the knocks but was able to take only eight steps towards the door when the officers kicked it down. Id. at 76-77. However, defendant Wilhelm has testified that the officers knocked and made the announcement simultaneously and then he waited ten to fifteen seconds before he gave the order to Officer Sacharski to break down the door. Wilhelm Dep., dkt. #12, at14-16. According to officer Bybee, who was one of the executing officers, the announcement and knocks were simultaneous, but the officers waited only five seconds before kicking in the door. Bybee

Dep., dkt #15, at 13. Finally, officer Sacharski provides a fourth version of the events. According to Sacharski, who knocked, announced and kicked the door in, he knocked, waited ten to fifteen seconds, announced "sheriff's department, warrant" and kicked the door immediately after making this announcement. Sacharski Dep., dkt. #16, at 9-10. This testimony establishes a dispute about how long the officers waited after knocking before breaking down the door and whether the officers made the announcement simultaneously with knocking or kicking in the door.

Unless there are exigent circumstances warranting such a short delay, waiting only five seconds after knocking before forcible entry is unreasonable. United States v. Jones, 133, F.3d 358, 361 (5th Cir. 1998); United States v. Sargent, 105 F. Supp. 2d 157 (D. Me. 2001) (five-second delay is de facto no-knock entry, warranted only when there are exigent circumstances). Officers are justified in waiting five seconds or less when they have reason to believe that residents may be armed. United States v. Nabors, 901 F.2d 1351 (6th Cir. 1990) (armed felon); Jones, 208 F.3d 603 (same); United States v. Gaines, 726 F. Supp. 1457 (E.D. Pa. 1989) (armed occupant with history of violence). They are also justified in waiting such a short period if suspected evidence of narcotics could be destroyed in that period of time, Jones, 208 F.3d 603; however, they are not justified if the suspected evidence could not be destroyed in a short period of time, e.g. United States v. Espinoza, 105 F. Supp. 1015 (E.D. Wis. 2000), rev'd on other grounds, 256 F.3d 718 (7th Cir. 2001) (50-60

pounds of marijuana cannot be destroyed in five seconds). A reasonable suspicion that an apartment may house a methamphetamine lab may justify a five-second delay because of the highly flammable materials used to manufacture the drug. E.g., United States v. Streeter, 907 F.2d 781 (8th Cir. 1990), overruled on other grounds, United States v. Wise, 976 F.2d 393 (8th Cir. 1992); United States v. Spinelli, 848 F.2d 26 (2d Cir. 1988). However, the officers must have feared that the occupant might destroy these materials by causing an explosion. See Streeter, 907 F.2d at 789; Spinelli, 848 F.2d at 30.

Defendants have adduced no evidence that the officers suspected the occupants of the target apartment to be armed. More important, none of the testimony of the executing officers indicates that they considered the suspected existence of a methamphetamine lab when they shortened the time they waited after the knock before breaking down the door. To the contrary, it appears that they intended to wait a standard amount of time after knocking. See Wilhelm Dep., dkt. #12, at 14 (indicating that officers complied with "standard" procedure for executing a warrant not authorizing no-knock entry). The record is totally devoid of evidence suggesting that the executing officers relied on any exigent circumstance that may have warranted such a short delay. Viewing the evidence in the light most favorable to plaintiffs, a jury could find that defendant Wilhelm waited only five seconds before ordering another officer to kick in the door and did not rely on an exigent circumstance warranting such an abbreviated delay.

B. Qualified Immunity

Although defendant Wilhelm violated plaintiffs' Fourth Amendment rights, he may be shielded from liability for civil damages under the doctrine of qualified immunity. Hope, 536 U.S. at 739. Government officials performing discretionary functions are entitled to this protection "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638 (1987). See also Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity represents an accommodation of the conflicting concerns of providing remedies for persons injured as a result of a public official's abuse of his office, thus vindicating constitutional guarantees, and insuring that "fear of personal monetary liability and harassing litigation" does not unduly inhibit officials in the discharge of their duties. Anderson, 483 U.S. at 638.

The first step in the qualified immunity analysis is to determine that "plaintiff's allegations, if true, establish a constitutional violation." Hope, 536 U.S. at 736 (citing Saucier, 533 U.S. at 201). I have already determined that plaintiffs have met this standard with respect to their second and third claims. The second step is to determine whether the constitutional right was clearly established at the time of the alleged injury. Saucier, 533 U.S. at 201; Payne v. Pauley, 337 F.3d 767, 775 (7th Cir. 2003). This second inquiry requires consideration of the specific context of the case. Saucier, 533 U.S. at 201. A plaintiff may show that a right is clearly established by pointing to "closely analogous cases

establishing that the conduct is unlawful, or demonstrate that the violation is so obvious that a reasonable state actor would know that what he [or she] is doing violates the Constitution." Morrell v. Mock, 270 F.3d 1090, 1100 (7th Cir. 2001). However, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Hope, 536 U.S. at 739 (quoting Anderson, 483 U.S. at 640). Even if the constitutional right was clearly established at the time of the alleged injury, a public official may still be entitled to qualified immunity if he makes an objectively reasonable mistake about what the law requires. Saucier, 533 U.S. at 205.

1. Immunity for failure to reasonably discover and cure warrant's defect

a. Failure to discover defect

The cases cited by plaintiffs do not show that it was clearly established that defendant Wilhelm should have known that the warrant's description was ambiguous. It is clearly established that when a warrant authorizes a search of an entire building containing multiple residences, officers act unreasonably by searching all of the units or conducting a fishing expedition by searching any apartment until they find what they are looking for. United States v. Hinton, 219 F.2d 324, 326 (7th Cir. 1955). In Jacobs, 215 F.3d at 769, an officer had a warrant authorizing a search of a single family home but showing a street address for

a multi-unit apartment building. The court concluded that the officer acted unreasonably in failing to deduce from this information that the warrant was fatally defective. Id. Defendant Wilhelm's failure to recognize the warrant's defect is not as egregious as the officers' shortcomings in either Hinton or Jacobs. The warrant did not describe a place that clearly did not exist, as in Jacobs, or fail to acknowledge the existence of or distinguish between multiple residences, as in Hinton.

b. Unreasonable failure to cure deficient warrant

Plaintiffs have not cited any case showing that defendant Wilhelm should have known that the conclusions he drew from his personal observations were unreasonable. In Hartsfield v. Lemacks, 50 F.3d 950 (11th Cir. 1995), the court held that the defendants were not entitled to qualified immunity for their violation of the plaintiff's Fourth Amendment rights when they mistakenly entered a different house from the one described in the warrant. In Hartsfield, the officer had a search warrant for a residence located at 5108 Middlebrooks Drive but conducted a search at 5128 Middlebrooks Drive instead. The officer had no reason whatsoever to believe that the house he search was the one authorized by the warrant. In fact, he had accompanied a confidential informant to 5108 Middlebrooks Drive house the day before the search. The court acknowledged that it was clearly established that "absent probable cause and exigent circumstances, a warrantless search of

a residence violates the Fourth Amendment, unless the officers engage in reasonable efforts to avoid error." Id. at 955. Thus, the court concluded, it was clearly unconstitutional to take no precautionary measures to avoid error. Id.

The present case is easily distinguishable from Hartsfield. In this case, plaintiffs apartment did match the street address provided in the warrant. Further, Hartsfield, 50 F.3d at 955, establishes only the limited proposition that an officer is not entitled to qualified immunity when "he ha[s] done *nothing* to make sure he was searching the house described in the warrant." (Emphasis added). Defendant Wilhelm read the warrant and had a reason, albeit an unreasonable one, to believe that the apartment on the right referred to plaintiffs' apartment.

Second, plaintiffs rely on Owens, 848 F.2d 462. In Owens, the warrant described the apartment to be searched as apartment number 336 on the third-floor of an apartment building located at 3901 Edgewood Road. Id. at 462-63. The executing officers had participated in preparing the affidavit supporting the warrant application, which indicated the name of the resident of the target apartment ("Charlie"). Id. at 463. When they reached the third floor of the building, they found that there were only two apartments and that neither was numbered 336. Id. One of the doors was open and the officers could see that the apartment was vacant. Id. When they knocked on the door of the other apartment, the person who answered identified herself as "Charlie." Id. The court held that the officers

had a reasonable and objective basis on which to conclude that the warrant authorized their search of the occupied apartment. Id. at 466. It reasoned, in part, that the warrant authorized a search of an occupied apartment on the third floor of a particular building and that "[n]o other apartment fit that description." Id. at 465.

Under Owens, a court may rely on the fact that only one apartment fits the description in a warrant as helping to establish a reasonable basis for concluding that the warrant authorizes its search. The case does not stand for the opposite proposition. In other words, Owens did not hold that it is per se unreasonable to conclude that a warrant authorizes the search of an apartment unless it could be read to describe no other. Moreover, in concluding that the officer's determination was reasonable, the court relied on other factors as well: the person answering the door of the apartment the officers searched was the resident of the target apartment; the officers had verified their information regarding the identity of the apartment with local utility companies before executing the warrant; and other exigent circumstances suggested that any narcotics the officers might find in the search would be removed or destroyed unless immediate action was taken. Id. at 465.

Plaintiffs have not cited, and I am not aware of any cases holding that warrants must be read from the perspective of a person using a building's primary or public entrance. Further, it does not appear that it was clearly established that unusual measures to cover windows or otherwise insulate oneself from normal exposure to the public should be

considered more suspicious than having frequent visitors. Although I believe that common sense compels these conclusions, an assessment that a judge can work out in a quiet office over a period of time is not necessarily one that an officer would reach on the spot.

Plaintiffs argue that finding defendant Wilhelm entitled to qualified immunity would require the adoption of what Justice Brennan dubbed "the mind-boggling concept of objectively reasonable reliance upon an objectively reasonable warrant." United States v. Leon, 486 U.S. 897, 955 (1984) (Brennan, J., dissenting). As odd as it may seem to find that an officer could reasonably undertake an unreasonable search, such a finding merely reflects the accommodation the Supreme Court has worked out between governmental need and individual freedom. Anderson, 483 U.S. at 644.

2. Immunity for failure to wait reasonable length of time after knock and announce

As a preliminary issue, it is doubtful whether it is appropriate to address the issue of defendant Wilhelm's entitlement to qualified immunity with respect to plaintiffs' knock and announce rule claim. Defendants have moved for summary judgment on all three of plaintiffs' claims. However, in their brief supporting this motion, they direct their specific arguments to only the first and second claims. Plaintiffs note this in their response brief, in which they argue why defendant Wilhelm should not be entitled to qualified immunity with respect to their third claim. In their reply, defendants advance specific arguments relating

to the third claim. Because both parties have briefed the issue, neither will be unfairly disadvantaged by consideration of the issue.

As noted above, it is clearly established that in the absence of exigent circumstances, a five-second delay is unreasonable and violates the Fourth Amendment knock and announce rule. I must assume for purposes of deciding this motion that the delay was only five seconds. Anderson, 477 U.S. at 250. Defendants have adduced no evidence that defendant Wilhelm relied on an exigent circumstance at the time of the incident or even considered one. At trial, defendant Wilhelm may be able to prevail on qualified immunity grounds by persuading a jury that he waited longer than five seconds or that he authorized an abbreviated delay because he feared that the suspects would destroy the evidence. However, defendant Wilhelm is entitled to summary judgment only if the *undisputed* facts show that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Accordingly, defendants' motion will be denied with respect to plaintiffs' knock and announce claim.

ORDER

IT IS ORDERED that plaintiffs Mark and Theresa Jones's motion for summary judgment is DENIED. FURTHER, IT IS ORDERED that the motion for summary judgment filed by defendants Tracy Finch and Ron Wilhelm on the ground of qualified

immunity is DENIED with respect to plaintiffs' claim that defendant Wilhelm violated their Fourth Amendment rights by failing to comply with the knock and announce requirements. With respect to all other claims, it is GRANTED.

Entered this 15th day of January, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge