IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARK D. JONES and
THERESA A. JONES,

Plaintiffs,

v.

RON WILHELM,

Defendant.

MEMORANDUM

03-C-0025-C

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Defendant Ron Wilhelm has filed an interlocutory appeal with the Court of Appeals for the Seventh Circuit under the authority of Mitchell v. Forsyth, 472 U.S. 511 (1985). He is challenging this court's holding that he is not entitled to qualified immunity on plaintiff Mark D. Jones's and Theresa A. Jones's claim that he violated their Fourth Amendment rights by failing to comply with the "knock and announce" rule. In an order entered on January 15, 2004, I found that when the facts were construed most favorably to plaintiffs, defendant waited no more than five seconds after knocking on plaintiffs' door before he made forcible entry into their apartment. Defendant did not suggest, much less prove, that any exigent circumstances necessitated such a short wait. Therefore, I found that

he had not shown that the entry was reasonable. I found also that he had not shown that a reasonable officer would have believed that waiting only five seconds after knocking was reasonable in the absence of exigent circumstances, so as to qualify him for immunity from suit. The filing of a notice of appeal confers jurisdiction on the court of appeals over those aspects of the case involved in the appeal and strips it from the district court. Boomer v. AT&T Corp., 309 F.3d 404, 413 (7th Cir. 2002); Kusay v. United States, 62 F.3d 192, 913 (7th Cir. 1995) (citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982)). "If the claim of immunity is a sham, however, the notice of appeal does not transfer jurisdiction to the court of appeals." Apostol v. Gallon, 870 F.2d 1335, 1339 (7th Cir. 1989).

On February 19, 2004, the Court of Appeals for the Seventh Circuit ordered this court to stay trial pending resolution of the appeal, unless the court made a reasoned finding that the appeal is frivolous. Upon review of the matter, I continue to hold the view that an appeal is a waste of judicial resources and the litigants' money, but I cannot say that it is frivolous in the sense that it is a sham or so baseless that it does not invoke appellate jurisdiction. Id. I find nothing in the record to suggest that defendant has forfeited his right to take an appeal by waiting too long or by using the appellate process as a means of manipulating matters in the district court.

Courts have read the Fourth Amendment as requiring law enforcement officers to wait

a reasonable amount of time after knocking and announcing their presence at a private residence. Wilson v. Arkansas, 514 U.S. 927, 930 (1995). The purpose of the requirement is to give suspects an opportunity to comply voluntarily with the law before being subjected to a forced entry of their home. Id. at 930-32. Courts recognize that the reasonableness of the waiting time may vary depending upon the existence or non-existence of exigent circumstances. Id. at 934 ("The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests.").

In the January 15, 2004 order, I held that waiting only five seconds after knocking before forcible entry is unreasonable in the absence of circumstances justifying so short a wait. In order to succeed on his appeal of this determination, defendant will need to convince the court of appeals that an officer could have believed reasonably that a five-second interlude between knock and entry is reasonable in any circumstances. I have found no decision by the court of appeals that suggests that it would reach such a conclusion. Usually, the court considers the totality of the circumstances in which a forced entry is made following the occupants' failure to answer the door promptly. It has stressed repeatedly that "there is no bright-line rule delineating the boundary between a reasonable and unreasonable amount of time for officers to wait after announcing their presence and before attempting to forcible entry pursuant to a valid search warrant." United States v. Espinoza, 256 F.3d

718, 722 (7th Cir. 2001).

Thus, the court has held that a five-second wait may be reasonable because of case-specific exigencies. E.g., United States v. Jones, 208 F.3d 603, 610 (7th Cir. 2000) (five to thirteen-second wait reasonable because officers had information that suspect was dangerous and armed with gun); United States v. Markling, 7 F.3d 1309, 1318 (7th Cir. 1993) (seven-second wait reasonable "given the circumstances": officers believed suspect would destroy small amounts of cocaine; officers heard no noise coming from room that would have made knocks hard to hear; and hotel room was small enough that suspect should have been able to reach door quickly). Other federal courts of appeals have reached similar conclusions. E.g., United States v. Spikes, 158 F.3d 913, 926 (6th Cir. 1998) (five-second wait could be reasonable if officer suspects destruction of evidence or use of violence in resisting search); United States v. Jones, 133 F.3d 358, 361 (5th Cir. 1998) (same). Finally, at least one court has held that a five-second delay is a de facto no-knock entry, warranted only by exigent circumstances. United States v. Sargent, 105 F. Supp. 2d 157 (D. Me. 2001).

Again, I note my belief that this appeal is a waste of time; the court of appeals has stressed that reasonableness is determined by the "particular factual situation presented," Espinoza, 256 F.3d at 722, yet defendant is appealing this court's conclusion that he had not shown he was entitled to qualified immunity when he had not proposed facts to show that a five-second delay was reasonable. As noted in the January 15 order, defendant indicated

in his deposition that he intended to wait a standard amount of time after knocking. See Wilhelm Dep., dkt. #12, at 14. From this testimony, the reasonable inference is that he did not view the circumstances as exigent. However, Apostol, 870 F.2d at 1339, cautions district courts to use restraint in classifying an appeal as a sham. Because the court of appeals has never held explicitly that a five-second knock is unreasonable in the absence of case-specific exigencies, I cannot say that the appeal is frivolous. I have no reason to hold that defendant has forfeited his right to appeal. Accordingly, I decline to exercise the authority granted to district courts in Apostol.

Entered this 24th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge