IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Criminal Action No. 02-35-JJF
	:	
LANCE LEATHERBERRY,	:	
	:	
Defendant.	:	

Colm F. Connolly, Esquire, United States Attorney, and Marc I. Osborne, Esquire, Special Assistant United States Attorney, UNITED STATES ATTORNEY'S OFFICE, DISTRICT OF DELAWARE, Wilmington, Delaware.
Attorneys for Plaintiff.

Penny Marshall, Esquire, Federal Public Defender, FEDERAL PUBLIC DEFENDER'S OFFICE, Wilmington, Delaware.
Attorney for Defendant.

MEMORANDUM OPINION

January 30, 2003
Wilmington, Delaware

FARNAN, District Judge.

Presently before the Court is Defendant Lance Leatherberry's Motion to Suppress Statements and Tangible Evidence (D.I. 14). For the reasons set forth below, the Motion (D.I. 14) will be denied.

INTRODUCTION

Defendant has been charged with being a felon in possession of a firearm. Defendant moves, pursuant to the Fourth, Fifth, Sixth,[1] and Fourteenth Amendments of the United States Constitution, to suppress any evidence or statements directly or indirectly derived from the search of his residence on February 15, 2002.

The Court held a hearing on the Motion to Suppress (D.I. 14) on July 23, 2002, and ordered the parties to submit proposed findings of fact and conclusions of law. This Memorandum Opinion sets forth the Court's findings of fact and conclusions of law regarding the instant Motion (D.I. 14).

---

[1] Although Mr. Leatherberry's Motion (D.I. 14) raises the Sixth Amendment as a ground for suppression, none of his subsequent submissions (D.I. 19 & 21) to the Court address the issue. For that reason, and because the Sixth Amendment right to counsel is not implicated by the events at issue in this Motion, the Court will not address the Sixth Amendment. See e.g., United States v. Gouveia, 467 U.S. 180, 187-88 (1984)("[A] person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him ... whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.")(citations and internal quotation marks omitted).

FINDINGS OF FACT

1. During the week of December 30, 2001, Detective Jeffrey Carey of the New Castle County Police Department arranged for a confidential informant to make a controlled purchase of drugs from Mr. Leatherberry, who the informant referred to by his street name, L.B. Tr. at 5, 24.[2]

2. After searching the informant for weapons, money, and drugs, Detective Carey gave the informant money for the drug purchase and drove him to Mr. Leatherberry's apartment building at 1501 New Jersey Avenue, Manor Park Apartments, New Castle, Delaware. Tr. at 5-7.

3. The informant then entered the apartment building, purchased drugs from Mr. Leatherberry, returned to Detective Carey's car, and turned over to him a substance that was later determined to be crack cocaine. Tr. at 7-8.

4. During the week of January 6, 2002, Detective Carey arranged a second, similar purchase of crack cocaine from Mr. Leatherberry. Tr. at 40.

5. Additionally, during the week of February 3, 2002, Detective Carey arranged a third purchase of crack cocaine from Mr. Leatherberry that occurred outside his apartment building. Tr. at 8-9.

---

[2] Transcript of the July 23, 2002, suppression hearing. (D.I. 17).

6. Based on the three controlled buys, Detective Carey obtained a search warrant for Mr. Leatherberry's apartment (1501 New Jersey Avenue, Apartment 1, New Castle, Delaware). Tr. at 5, 9-10; Gov. Ex. 1.

7. On February 15, 2002, at 7:00 a.m., eight law enforcement officers arrived at Mr. Leatherberry's apartment to execute the search warrant. Tr. at 10.

8. The officers loudly knocked on Mr. Leatherberry's door and announced "New Castle County Police, search warrant." Tr. at 11-12, 43-45.

9. The officers then waited five to seven seconds and, hearing nothing, the officers again loudly knocked and announced "New Castle County Police, search warrant." Tr. at 12, 44-45.

10. The officers waited another five to seven seconds and, receiving no response, forced open the door with a battering ram and began searching the apartment, finding Mr. Leatherberry and his girlfriend, Portray Price, in bed. Tr. at 13-14, 45-46.

11. After Mr. Leatherberry was informed of his Miranda rights by Detective Carey, Mr. Leatherberry confirmed he understood each of his rights and agreed to speak with Detective Carey. Tr. at 15-17.

12. Mr. Leatherberry then confessed to possessing marijuana. Tr. at 17-18.

13. During the subsequent search of the apartment, the

officers discovered a gun. Tr. at 19.

14. After the discovery of the gun and twenty to thirty minutes after reading Mr. Leatherberry his Miranda rights, Detective Carey questioned Mr. Leatherberry about the gun and obtained a statement from him. Tr. at 18-19.

CONCLUSIONS OF LAW

1. The Fourth Amendment to the United States Constitution, made applicable to the States by way of the Fourteenth Amendment, guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." U.S. Const. amend. IV; see also U.S. Const. amend XIV; Mapp v. Ohio, 367 U.S. 643 (1961).

2. The Fourth Amendment incorporates the general common-law requirement that law enforcement officers must knock and announce their presence and authority before forcibly entering a dwelling. Wilson v. Arkansas, 514 U.S. 927 (1995).

3. However, "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." Id. at 934; see also Richards v. Wisconsin, 520 U.S. 385 (1997)(rejecting a blanket no-knock rule for felony drug search warrants). After reviewing the applicable case law, the Court concludes that there is no fixed rule as to the amount of time officers must wait before entering a home forcefully;

rather, the circumstances of the officers' entry should be considered as part of the court's general Fourth Amendment reasonableness inquiry.

4. The Court's Fourth Amendment reasonableness inquiry can be informed by examining and analogizing to cases decided under the Federal knock and announce statute, 18 U.S.C. § 3109.[3] United States v. Goodson, 165 F.3d 610, 614 n.2 (8th Cir. 1999).

5. Under Section 3109, federal officers, after knocking and announcing and actually being denied entry, may use force to achieve entry. The police may also be constructively denied entry after waiting a sufficient amount of time and receiving no response. United States v. Murcer, 849 F. Supp. 288, 293-94 (D. Del. 1994)(citing United States v. Bonner, 874 F.2d 822, 824 (D.C. Cir. 1989)("'refused admittance' is not restricted to an affirmative refusal, but encompasses circumstances that constitute constructive or reasonably inferred refusal")).

---

[3] Contrary to the assertion in Defendant's Proposed Findings of Fact and Conclusions of Law (D.I. 19), Section 3109 is not directly applicable to the instant case because it only governs the execution of federal warrants by federal agents, and here, state and local police officers were serving a state warrant. As the Third Circuit has pointed out, "there is no federal statute governing the execution of warrants by state officers." United States v. Stiver, 9 F.3d 298, 301 (3rd Cir. 1993), cert. denied, 510 U.S. 1136 (1994). Furthermore, other courts have recognized that "[s]ection 3109 regulates execution of a federal warrant by federal officers, but does not govern the conduct of state or local police officers executing state warrants." United States v. Andrus, 775 F.2d 825, 844 (7th Cir. 1985).

6. In cases decided under Section 3109, courts have held that federal officers executing search warrants in daytime hours have been constructively refused admittance when they received no response after knocking and announcing and waiting ten to twenty seconds. United States v. Spriggs, 996 F.2d 320 (D.C. Cir. 1993)(officers knocked and announced and waited fifteen seconds at 7:45 a.m.); United States v. Phelps, 490 F.2d 644, 647 (9th Cir. 1974)(officers knocked and announced, waited five to ten seconds, knocked and announced again, and waited another five to ten seconds at 1 p.m.); United States v. Poppitt, 227 F. Supp. 73 (D. Del. 1964)(officers knocked and announced three times and waited twelve or fifteen seconds at 1:30 p.m.).

7. Nonetheless, under Section 3109, "[t]here are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case." United States v. Banks, 282 F.3d 699, 703 (9th Cir. 2002)(quoting McClure v. United States, 332 F.2d 19, 22 (9th Cir. 1964), cert. denied 380 U.S. 945 (1965)); see also Goodson, 165 F.3d at 614.

8. The potential for destruction of evidence is a relevant factor in evaluating law enforcement's compliance with Section 3109. United States v. Murcer, 849 F. Supp. 288, 294 (D. Del. 1994) ("[I]t is reasonable for law enforcement officials to assume that suspects selling illegal drugs in small quantities

from a residence that has normal plumbing facilities will attempt to destroy the drugs if they are aware of the officers' presence."); United States v. One parcel of Real Property, 873 F.2d 7, 9 (1st Cir.), cert. denied, Latraverse v. United States, 493 U.S. 891 (1989) ("The fact that the officers had probable cause to believe that the occupants possessed cocaine, a substance that is easily and quickly removed down a toilet, is additional justification for the shorter wait before entry.")).

9. In the instant case, the Court concludes, after evaluating the totality of the circumstances, that the officers' forced entry into Mr. Leatherberry's apartment on February 15, 2002, was reasonable and thus comported with the Fourth Amendment. Before entering Mr. Leatherberry's apartment, the officers loudly knocked and announced their purpose and waited at least ten to fourteen seconds. Additionally, during the ten to fourteen seconds that elapsed between the first knock and the entry, the officers knocked and announced a second time. Thus, the Court concludes that the officers complied with the knock and announce requirement, but what is at issue is whether their ten to fourteen second delay prior to entry was reasonable under the circumstances.

10. There is no bright-line rule as to how much time between announcement and entry is reasonable. See e.g., Banks, 282 F.3d at 703. The Court concludes that the officers' entry

after waiting ten to fourteen seconds was reasonable. In reaching this conclusion, the Court finds the holdings of Phelps, Poppitt, and Spriggs, persuasive because of the factual similarities between those cases and the instant case. In those cases, the courts held that the officers had been constructively refused admittance after waiting ten to twenty, twelve to fifteen, and fifteen seconds, respectively, while here the officers waited ten to fourteen seconds. In addition to finding support in the case law, the Court's conclusion is also supported by the particular circumstances of the search at issue. In the instant case, the officers received no verbal response from the occupants of the apartment and heard no noises, such as footsteps approaching the door, that would indicate that someone was coming to answer the door. Moreover, the officers knocked on Mr. Leatherberry's apartment door on a weekday at 7:00 a.m., when it is reasonable to assume that the occupants might be awake and preparing for the day. At such a time, it is not unreasonable to expect some type of a response within ten to fourteen seconds. Generally, apartments are smaller than single-family homes and have only one entrance, which enables the occupant to respond more quickly to a knock on the door.

11. In addition to all of the above factors supporting the reasonableness of the officers' search, the officers here also knew that user quantities of crack cocaine had been sold from Mr.

Leatherberry's apartment on three recent occasions. Law enforcement's interest in preventing the destruction of evidence, particularly easily disposed of substances like cocaine, is a relevant factor in evaluating whether a delay between announcement and entry is reasonable. See One parcel of Real Property, 873 F.2d at 9; Murcer, 849 F. Supp. at 294. Because user quantities of crack cocaine could be easily disposed of in a sink or toilet, an overly long delay prior to entry could possibly have allowed Mr. Leatherberry to destroy evidence; therefore, the Court concludes it was reasonable for the officers to enter when they did.

12. The Fifth Amendment to the United States Constitution, which applies to the States by way of the Fourteenth Amendment, provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself...." U.S. Const. amend. V; see also U.S. Const. amend XIV; Malloy v. Hogan, 378 U.S. 1 (1964).

13. The United States Supreme Court, in Miranda v. Arizona, 384 U.S. 436, 444-45 (1966), held that:

> the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective

> means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

Miranda, 384 U.S. at 444-45.

14. Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any way." Oregon v. Mathiason, 429 U.S. 492, 494 (1977).

15. It is the Government's burden, in accord with Miranda and its progeny, to prove that a waiver of rights was both: (a) voluntary; and (b) knowing and intelligent. United States v. Durham, 741 F. Supp. 498, 502 (D. Del. 1990).

16. In the instant case, the Court concludes that Mr. Leatherberry was subjected to custodial interrogation because he was handcuffed and asked direct questions by Detective Carey. On the record presented in this case, the Court also concludes that Detective Carey's custodial interrogation of Mr. Leatherberry did not violate Mr. Leatherberry's Fifth Amendment rights. Specifically, the Court concludes that Detective Carey's questioning of Mr. Leatherberry on February 15, 2002, at Mr. Leatherberry's apartment was not in violation of Miranda and its

progeny. Detective Carey read Mr. Leatherberry his Miranda rights, and Mr. Leatherberry acknowledged that he understood each of those rights. Thereafter, Mr. Leatherberry knowingly, intelligently, and voluntarily waived his Miranda rights and agreed to talk with Detective Carey. Mr. Leatherberry contends in his brief that the chaotic scene in his apartment on the morning of his arrest confused him and thus vitiated his waiver. The Court finds this argument unpersuasive, and, based on the credible testimony of Detective Carey regarding his conversations with Mr. Leatherberry on the morning in question, the Court concludes that Mr. Leatherberry was capable of understanding and waiving his Miranda rights. Because Mr. Leatherberry was read his rights, indicated he understood them, and then voluntarily waived those rights, the Court concludes that Mr. Leatherberry's subsequent statements were not obtained in violation of the Fifth Amendment.

CONCLUSION

For the reasons discussed, Defendant's Motion to Suppress Statements and Tangible Evidence (D.I. 14) will be denied.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Criminal Action No. 02-35-JJF
	:	
LANCE LEATHERBERRY,	:	
	:	
Defendant.	:	

ORDER

At Wilmington this 30th day of January 2003, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that Defendant's Motion To Suppress Statements and Tangible Evidence (D.I. 14) is **DENIED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE