

FARNAN, District Judge.

Presently before the Court is Defendant Demetrius Cubbage's ("Defendant") Motion to Suppress Evidence (D.I. 19). For the reasons set forth below, the motion will be denied.

I. Nature and Stage of the Proceedings

Defendant has been charged with knowingly possessing cocaine with intent to distribute under 21 U.S.C. § 841(a)(1) and (b)(1)(A)(iii). Defendant moves pursuant to Federal Rule of Criminal Procedure 12(b)(3) and the Fourth Amendment of the United States Constitution to suppress all physical evidence and all statements obtained as a result of or following the search of Liberty Apartment E-24, located at 1289 Walker Road, Dover, Delaware on February 7, 2002.

The Court held a hearing on the Motion (D.I. 19) on October 2, 2002, and ordered the parties to submit letters outlining their respective positions. This Memorandum Opinion sets forth the Court's findings of fact and conclusions of law regarding the instant Motion. (D.I. 19).

II. Legal Standard on a Motion to Suppress and Knock and Announce

Rule 41(f) of the Federal Rules of Criminal Procedure provides that "[a] motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12." Fed. R. Crim. P. 41(f). Rule 12 provides that suppression motions should

be made prior to trial. See Fed. R. Crim. P. 12(b)(3), (f).

In the instant case, the warrant was issued by a state court and executed by state detectives, therefore the federal knock and announce statute, 18 U.S.C. §3109, does not apply. See United States v. Murcer, 849 F. Supp. 288, 292 (D. Del. 1994) (quoting United States v. Stiver, 9 F.3d 298, 301 (3d Cir. 1993), cert. denied, 510 U.S. 1136 (1994)). Since there is no federal statute governing the execution of a warrant by state detectives, the Fourth Amendment "reasonableness" standard should be applied to the knock and announce procedure at issue. See Stiver, 9 F.3d at 301-302; see also Wilson v. Arkansas, 514 U.S. 927, 936 (1995).

III. Findings of Fact

1. The City of Dover Police Department had an ongoing investigation concerning the activities at 1289 Walker Road, Apartment E-24, Dover, Delaware. (Tr. at 7). On the morning of February 6, 2002 the police were told by a confidential informant that Defendant was actively selling drugs at his residence. Id.

2. Specifically, the confidential informant, who on previous occasions had purchased crack cocaine from Defendant, told police that if Defendant was home, he was probably selling drugs and if others were present in the apartment, they too were probably actively selling or picking up drugs. (Tr. at 8).

3. The confidential informant placed a telephone call to Demetrius Cubbage, which was recorded, and Defendant told the

source "I'm at the Court." Id. The confidential source explained to the investigators that when Defendant says he is at the Court, it means that he is at Liberty Court (apartments) and has crack cocaine for sale. (Tr. at 9).

4. On February 6, 2002, a second confidential informant was sent by Detectives Pires and Mailey to Defendant's apartment with money to purchase crack cocaine from Defendant. (Tr. at 9). The second confidential informant purchased the crack cocaine from Defendant and informed the police that other individuals were present at the residence during the purchase which he/she identified by name. Id.

5. Detective Mailey, through his own experiences and conversations with other detectives, knew that the named individuals in Defendant's apartment were "upper level narcotics dealers." (Tr. at 10-12).

6. Based on the information received from the two confidential informants, the Dover Police obtained a search warrant for Defendant's apartment. (Tr. at 7; Government Exhibit 1).

7. The Special Operations Response Team ("SORT Team") was called to execute the warrant. (Tr. at 10). The SORT Team is utilized when there is a "high probability of encountering violent subjects, subjects that might be armed, [and/or] dangerous situations that other police officers are not equipped

to deal with." (Tr. at 10). The SORT Team was called to execute the warrant in the instant search because of Defendant's recent conviction for carrying a concealed deadly weapon and the presence of known drug dealers in the apartment. (Tr. at 10, 37, 56).

8. Detective Mailey, a member of the SORT Team, has participated in the execution of over one hundred search warrants, fifteen of which were at Liberty Court Apartments. (Tr. at 9-10).

9. At 2:00 p.m. on February 6, 2002, the SORT Team, which consisted of ten officers, arrived at Liberty Court Apartments to execute the search warrant. They arrived in a white van, which they drove down the sidewalk in a space between the apartment buildings. They stopped the vehicle and exited about fifteen to twenty feet from Defendant's apartment door. (Tr. at 13, 46).

10. When Detective Mailey exited the van, he noticed a female on a cellular phone saying something to the effect of, "Girl, the police out there. They are getting ready to go in somebody's house." (Tr. at 16). Detective Mailey also noticed that people were coming out of their houses screaming "5-0 is here. 5-0 is here." (Tr. at 17).

11. Detective Mailey and the SORT team were aware of the layout of the apartment due to a pre-raid briefing and other searches conducted at the apartment complex. (Tr. 18-19). The

entrance to Defendant's apartment is at street level. Once inside the front door, there are twelve to fourteen steps leading directly to the living room. (Tr. at 18). At the top of the steps there is a half wall to the right side. (Tr. at 18).

12. The SORT team took cover under the awning at the entrance to Defendant's apartment and formed a line. (Tr. at 14). Once the team was in place, one of the Detectives opened the screen door to the apartment, knocked loudly on the front door and shouted "Dover Police, search warrant." (Tr. at 21, 40). The SORT Team did not hear anything from inside Defendant's apartment. (Tr. at 34, 36).

13. The SORT Team waited approximately eight seconds before breaching the Defendant's door. (Tr. 34-35, 48). They then arrested the Defendant, who was in the shower, and various other individuals in the apartment. (D.I. 19). They also seized approximately 632.9 grams of cocaine found inside a helmet cover and 76.1 grams of cocaine from the Defendant's pants pocket.

IV. Conclusions of Law

1. In Wilson v. Arkansas, 514 U.S. 927, (1995) the United States Supreme Court held that the common-law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before entry is incorporated

into the guarantees of the Fourth Amendment. Wilson v. Arkansas, 514 U.S. 927, 934 (1995).

3. In Wilson, the Supreme Court held that the knock and announce rule is subject to a Fourth Amendment reasonableness inquiry, stating "we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of search or a seizure." Id. at 934. Therefore, the entry at issue here is governed by a Fourth Amendment reasonableness analysis

4. Although there is no per se exception to the knock and announce rule for felony drug cases, courts have held that the "knock and announce" requirement may be dispensed with in certain situations. See Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (noting that there is no per se exception to the knock and announce rule in felony drug cases); Kornegay v. Kottingham, 120 F.3d 392, 397 (3d Cir. 1997) (stating that the knock and announce rule can be dispensed with in certain situations).

5. Courts have concluded that the knock and announce rule can be dispensed with in the following situations: (1) when the individual inside was aware of the officer's identity and therefore the announcement would be a useless exercise; (2) when announcement might lead to the suspect's escape; (3) when announcement might place the officers in physical peril; (4) when

announcement might lead to the destruction of evidence. See Richards, 520 U.S. at 393; Wilson, 514 U.S. at 936; Kornegay v. Cottingham, 120 F.3d 392, 397 (3d Cir. 1997); Bodine v. Warwick, 72 F.3d 393, 397 (3d Cir. 1995); United States v. Stiver, 9 F.3d 298, 302 (3d Cir. 1993); United States v. Kane, 637 F.2d 974, 978 (3d Cir. 1981).

6. At the time of the execution of the search warrant in this case, the SORT Team was aware of the following facts prior to breaching the door at Liberty Court Apartment E-24, on February 7, 2002:

a. Defendant had been previously convicted of carrying a concealed deadly weapon;

b. High level drug dealers were in the apartment earlier on the day of the search;

c. When the SORT Team exited the van, people in the apartment complex in the area of Defendant's apartment began to scream "5-0 is here, 5-0 is here";

d. While the SORT Team was exiting the van, a woman on a cellular phone outside the apartment complex said, "Girl, the police out there. They are getting ready to go in somebody's house.";

e. A half wall at the top of the stairs in the Defendant's apartment obscured the police officers' view into the living room as they stood at the bottom of the staircase.

7. Based on the facts outlined in Paragraph 6 above, the Court concludes that exigent circumstances existed at the time the SORT Team executed the search warrant for Defendant's apartment. The Court further concludes that the exigent circumstances excused any requirement of knocking and announcing under the Fourth Amendment.

8. The Court concludes that the totality of the circumstances encountered by the SORT Team created a reasonable probability that the individuals inside the Defendant's apartment were armed and that the SORT Team could be in danger of physical peril. Therefore, the Court concludes that exigent circumstances existed to justify even an unannounced entry into Defendant's apartment, and thus, the entry by the SORT Team was reasonable.¹ See e.g. Stiver, 9 F.3d at 301-302 (upholding entry based on exigent circumstances where the officers knocked and announced and waited five to ten seconds before breaching the door); United States v. Murcer, 849 F. Supp. 288, 297 (D. Del 1994) (upholding entry based on exigent circumstances where officers entered after waiting two to three seconds and where there was physical danger to police officers and possibility of destruction of evidence).

10. For the reasons discussed, the Motion to Suppress will be denied. An appropriate Order will be entered.

¹ Although the Court accepts the testimony of the police witnesses that the SORT Team delayed its entry by at least eight seconds, the Court concludes the SORT Team was not required to knock and announce prior to entry in the circumstances presented.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :
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 Plaintiff, :
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 v. : Criminal Action 02-44-JJF
 :
DEMETRIUS R. CUBBAGE, :
Defendant. :

ORDER

NOW THEREFORE, for the reasons discussed in the Memorandum Opinion issued this date, IT IS HEREBY ORDERED this 29th day of January 2003 that Defendant's Motion to Suppress Evidence (D.I. 19) is **DENIED**.

 JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE