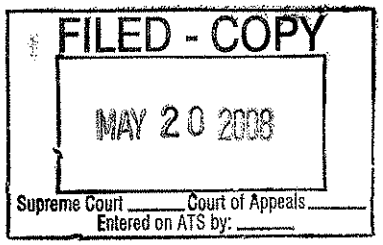
5-20-2008

State v. Kofoed Appellant's Brief Dckt. 34589

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 34589
	)	
v.	)	
	)	
KAY JAMES KOFOED,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	



BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF PAYETTE

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STATEMENT OF THE CASE

Nature of the Case

Kay James Kofoed appeals from his judgment of conviction for possession of a controlled substance. He asserts that the district court erred by denying his motion to suppress. Specifically, he asserts that suppression was proper on the grounds that the officers' entry into his residence was unreasonable under the Fourth Amendment of the United States Constitution, Article I, Section 17 of the Idaho Constitution, and I.C. § 19-4409, in that it failed to substantially comply with the requirements of the "knock and announce" rule.

Statement of the Facts and Course of Proceedings

Mr. Kofoed resided at 2007 ½ N. Whitley Drive in a loft space above a workshop in a metal building. (R., p.100.) In October, 2006, during the arrest of an employee of Mr. Kofoed, officers walked through the building in order to allow another individual to obtain identification. (R., pp.100-101.) The officers did not conduct a search of the building at that time. (R., p.101.)

On October 24, 2006, Officer Huff responded to a complaint of a strong chemical odor at a grocery store a short distance away from the Mr. Kofoed's residence. (R., p.101.) He eventually tracked the smell to an area of storage units near Mr. Kofoed's workshop. (R., p.101.) On October 30, 2006, the officer responded to another complaint regarding a chemical odor coming from the same area. (R., p.101.) Officer Huff summoned Officer Hall of the Payette Police Department; both officers

identified the odor as consistent with that which is present during the manufacture of methamphetamine. (R., p.101.)

A search warrant was applied for and issued on November 2, 2006, and was executed the following day at approximately 11 a.m. (R., p.101.) After knocking on the door and announcing their presence, officers heard a sound like something was dropped and heard footsteps moving quickly away from the door. (R., p.101.) As a result, the officers "immediately" entered the building and served the warrant. (R., p.101.) The district court found that "the officers knocked on the door, approximately two seconds later announced their position and authority, and approximately four seconds thereafter were entering the workshop." (R., p.105.) The occupants, therefore, were given four seconds to open the door following the announcement that the knock came from a police officer. Mr. Kofoed filed a motion to suppress, asserting, among other arguments, that the officers failed to comply with the "knock and announce" rule. (R., p.60.)

The district court found that an exigency was present:

> the warrant was executed close to noon, when people would normally be up and about. However, the officers could not be sure of the amount of drugs or other evidence that would be present. Thus, when they heard sounds that indicated people were quickly moving away from the door, it was reasonable for them to believe that evidence was being, or was about to be, destroyed, thereby created exigent circumstances that justified the officers' hurried entry into the building.

(R., p.106.) The district court, therefore, denied the motion to suppress. (R., p.100.)

Mr. Kofoed entered in to a conditional plea wherein he pleaded guilty to possession of a controlled substance and he preserved the right to appeal from the denial of his motion to suppress. (R., p.117.) The district court imposed a unified

sentence of four years, with one and one-half years fixed, and the court retained jurisdiction. (R., p.136.) Mr. Kofoed timely appealed. (R., p.141.) On appeal, he asserts that the district court erred by denying his motion to suppress because the officers failed to substantially comply with the "knock and announce" rule.

ISSUE

Did the district court err when it denied Mr. Kofoed's motion to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. Kofoed's Motion To Suppress

A. Introduction

The district court concluded that the police were excused from adhering to the "knock and announce" rule's requirement because of an exigency. Mr. Kofoed asserts that the district court erred.

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, this Court accepts the trial court's findings of fact which were supported by substantial evidence, but freely reviews the application of constitutional principles to the facts as found. *State v. Atkinson,* 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996).

C. The District Court Erred When It Denied Mr. Kofoed's Motion To Suppress

Mr. Kofoed asserts that the district court erred by denying his motion to suppress because the officers did not substantially comply with the "knock and announce" rule.

1. The Officers Did Not Substantially Comply With The "Knock And Announce" Rule

Both the Fourth Amendment of the United States Constitution, and Article I, Section 17 of the Idaho Constitution, guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." (emphasis added.) "The United States Supreme Court has held that the Fourth Amendment incorporates the common law requirement that prior to executing a

search warrant the police must knock on the door, announce their identity and authority, and wait a reasonable time for the occupants to respond before entering forcibly." *State v. Ramos*, 142 Idaho 628, 630, 130 P.3d 1166, 1168 (Ct. App. 2005) (citing *United States v. Banks,* 540 U.S. 31, 36 (2003); *Richards v. Wisconsin,* 520 U.S. 385, 387 (1997); *Wilson v. Arkansas,* 514 U.S. 927, 934 (1995)).

Idaho Code § 19-4409 provides that in executing a warrant, "[t]he officer may break open any outer or inner door or window of a house, or any part of a house, or any thing therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance." I.C. § 19-4409. "However, this rule is not absolute and the Court recognized that, under some circumstances, an unannounced entry was permissible." *Ramos*, 142 Idaho at 631, 130 P.3d at 1169 (citing *Richards*, 520 U.S. at 387).

"Specific exigencies include threats to officer safety or a likelihood that evidence might be destroyed." *Id.* (citing *Richards*, 520 U.S. at 391, 117 S. Ct. at 1420, 137 L.Ed.2d at 622.) "In order to justify such an entry, the police must have reasonable suspicion that knocking and announcing prior to entry would pose a threat to their safety or inhibit the investigation." *Id.* (citing *Banks,* 540 U.S. at 36; Richards, 520 U.S. at 394.) "The reasonable suspicion standard requires less than probable cause but more than mere speculation or instinct on the part of the officer." *Id.* (citing *State v. Cerino,* 141 Idaho 736, 738, 117 P.3d 876, 878 (Ct. App. 2005)). "In justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* (citing *Terry v. Ohio,* 392 U.S. 1, 21 (1968); *Cerino,* 141 Idaho at 738, 117 P.3d at 878.)

Even if exigent circumstances are initially absent, however, reasonable suspicion of an exigency may develop when the police arrive to execute a search warrant, and the police may then proceed with immediate forced entry. *See Banks*, 540 U.S. at 37. The police may also conduct a forced entry after knocking and announcing if exigent circumstances arise prior to an occupant answering the door. *See id.* at 38. Post-knock exigencies are to be treated the same as exigencies giving rise to a no-knock entry. *Id.* at 41. The type of evidence that provides reasonable suspicion of exigent circumstances, allowing forced entry after the police arrive or after they knock and announce, is to be determined on a case-by-case basis by considering the totality of the circumstances. *Id.* at 36.

In this case, the district court found that "the officers knocked on the door, approximately two seconds later announced their position and authority, and approximately four seconds thereafter were entering the workshop." (R., p.105.) The occupants, therefore, were given four seconds to open the door following the announcement that the knock came from a police officer. The district court found that an exigency was present:

> the warrant was executed close to noon, when people would normally be up and about. However, the officers could not be sure of the amount of drugs or other evidence that would be present. Thus, when they heard sounds that indicated people were quickly moving away from the door, it was reasonable for them to believe that evidence was being, or was about to be, destroyed, thereby created exigent circumstances that justified the officers' hurried entry into the building.

(R., p.106.) The district court erred.

Regarding the fact that the officers could not be sure of the amount of drugs or other evidence in the residence, "the United States Supreme Court has held that there

is no blanket exception to the knock-and-announce requirement for drug investigations." *Ramos*, 142 Idaho at 631, 130 P.3d at 1169 (*citing Richards*, 520 U.S. at 393.) In *Richards,* the United States Supreme Court determined that, "while felony drug investigations may pose special risks to officer safety and the preservation of evidence, it is an overgeneralization to find every drug investigation poses these risks." *Id.* (citing Richards, 520 U.S. at 392-94.) Additionally, if a drug crime category exception to the knock-and-announce rule is recognized, that same logic could be applied to a multitude of other crimes and would eventually make the knock-and-announce rule essentially meaningless. *Id.* (citing *Richards*, 520 U.S. at 394.). Given this, the Court held that justification for a no-knock entry must be determined on a case-by-case analysis, and there cannot be an exception to this analysis by making particular categories of alleged crimes an automatic exigent circumstance. *Id.* (citing *Richards*, 520 U.S. at 392-394.)

The fact that the officers did not know the quantity of drugs that might be in the residence does not justify the failure to substantially comply with the "knock and announce" rule. Absent an informant who is in the residence at the time the police arrive, police officers are never going to know the precise amount of drugs they may find. To hold that officers may suddenly enter because they are unsure of the quantity of drugs is the equivalent of a blanket exception to the "knock and announce" rule in drug cases.

Furthermore, the fact that the officers heard movement away from the door does not establish an exigency in this case. In the affidavit in support of the search warrant, Officer Huff stated that his observations were "indicative of an illegal drug operation" and that Officer Hall "identified the odor as an odor that is consistent with, and often

present during, the manufacture of methamphetamine." (R., p.74.) Therefore, the officers had suspicion not that simple drug possession was occurring at the residence, but that drug *manufacture* was occurring. While it may be possible for an occupant to dispose of a small quantity of drugs prior to an officer entering a residence, it is extremely unlikely that evidence of manufacturing, such as a methamphetamine laboratory and all of the precursors to methamphetamine, would be quickly destroyed. And while the officer stated, "it is my opinion that upon service of this search warrant an operational laboratory will not be discovered; however, remnants of the lab such as glass beakers, finished product, quantities of precursors, and other forms of paraphernalia will be found," (R., p.75), there was no way for him to know before entering whether he would find an operational laboratory or just remnants of a lab.

In any event, due to the fact that the officers possessed information that manufacturing was occurring in the residence, it is highly unlikely that movement away from the door would create the exigency that the evidence would be destroyed. The fact that the officers were unsure of the quantities of drugs they might and that they heard movement did not create an exigency in this case. The district court therefore erred in holding that, due to an exigency, the officers were excused from substantially complying with the "knock and announce" rule.

2. Suppression Is The Remedy Under The Idaho Constitution

In *Hudson v. Michigan*, 547 U.S. 586 (2006) the United States Supreme Court held that the Fourth Amendment does not require suppression of evidence obtained following a violation of the "knock and announce" rule. *Id.* at 599. However, suppression remains the remedy in Idaho. *Ramos*, 142 Idaho at 634, 130 P.3d at 1172.

In *Ramos*, the Court of Appeals concluded, after finding that the officers did not substantially comply with the "knock and announce" rule, "even if exclusion of the evidence is not the necessary remedy for the Fourth Amendment violation, it would be required here for violation of Idaho's Constitution and statutory law." *Id.* The court noted, "long before the exclusionary rule was found to apply to the states through the Due Process Clause, it was the law in Idaho. *Id.* (citing *State v. Conner,* 59 Idaho 695, 703, 89 P.2d 197, 201 (1939)). Indeed, the Idaho Supreme Court has held that the "rule is well settled in this state that evidence, procured in violation of defendant's constitutional immunity from search and seizure, is inadmissible and will be excluded if request for its suppression be timely made." *Connor,* 59 Idaho at 703, 89 P.2d at 201. Furthermore, in analyzing Idaho's knock-and-announce statutes, the Idaho Supreme Court has held that, once it is determined a defendant's rights have been violated by police entry into a residence, evidence resulting from the entry must be suppressed. *State v. Rauch,* 99 Idaho 586, 594, 586 P.2d 671, 679 (1978). In explaining its decision, the Idaho Supreme Court held that any other result would completely nullify the knock-and-announce statutes and would create a dangerous situation for citizens and police officers alike. *Id.*

Therefore, under *Rauch* and *Ramos*, suppression remains the remedy in Idaho despite the holding *Hudson*. It is the required remedy in this case for the failure to substantially comply with the "knock and announce" requirement.

CONCLUSION

Mr. Kofoed respectfully requests that this Court vacate the district court's order of judgment and commitment and reverse the order which denied his motion to suppress.

DATED this 20th day of May, 2008.

JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of May, 2008, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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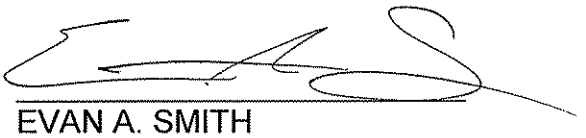

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