

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
SENECA COUNTY**

**STATE OF OHIO**

**CASE NUMBER 13-04-14**

**PLAINTIFF-APPELLANT**

**v.**

**OPINION**

**LOLITA NOETHTICH**

**DEFENDANT-APPELLEE**

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**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.**

**JUDGMENT: Judgment reversed and cause remanded.**

**DATE OF JUDGMENT ENTRY: November 15, 2004**

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**ATTORNEYS:**

**KEN EGBERT, JR.**  
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**BRYANT, J.**

{¶1} Appellant, State of Ohio (“State”), appeals the May 10, 2004 judgment entry of the Common Pleas Court of Seneca County granting Lolita Noethlich’s (“Noethlich”) motion to suppress. Although originally placed on our accelerated calendar, we have elected, pursuant to Local Rule 12(5), to issue a full opinion in lieu of a judgment entry.

{¶2} On March 13, 2003, Detective Clark of the Fostoria Police Department requested the issuance of a search warrant for the residence of Andre Williams, at 339 West North Street, Apartment F, in the City of Fostoria, Ohio. Andre Williams was the only name listed in the warrant affidavit. However, Noethlich was residing in the residence at the time of the execution of the warrant. A controlled purchase had been made from this residence within forty-eight hours of the warrant being requested.

{¶3} The search warrant affidavit filled out by Detective Clark stated that Detective Clark believed with good cause that there was a risk of serious physical harm to law enforcement officers if they executed the warrant in compliance with the statutory precondition for non-consensual entry. The warrant was granted by the Fostoria Municipal Court on March 13, 2003. The court found probable cause to waive the statutory precondition for non-consensual entry. During the

execution of the warrant, officers found crack cocaine, marijuana and currency in the residence.

{¶4} Noethlich was indicted on December 30, 2003 on one count of permitting drug abuse, a felony of the fifth degree in violation of R.C. 2925.13(B). On February 12, 2004, Noethlich filed a motion to suppress the evidence obtained during execution of the search warrant alleging that there was no probable cause for the issuance of the search warrant and that police failed to knock and announce prior to the execution of the warrant. A hearing on the motion to suppress was held on March 16, 2004. On May 10, 2004, the Common Pleas Court of Seneca County found that there was probable cause for the issuance of the search warrant; however, the court found that there was no statement of facts to support Detective Clark's belief that a risk of serious physical harm existed, as required under R.C. 2935.12 and R.C. 2933.231(B)(2). Therefore, the court granted Noethlich's motion to suppress. It is from this judgment that the State now appeals asserting the following two assignments of error.

**The trial court erred by granting a motion to suppress under R.C. 2933.231(B)(2) because the exclusionary rule applies only to constitutional violations, not statutory violations that do not violate the Fourth Amendment.**

**The trial court erred in granting the motion to suppress evidence when the officers acted in good faith upon the search warrant.**

{¶5} We begin by noting that appellate review of a trial court's decision on a motion to suppress evidence presents mixed questions of law and fact. *State*

*v. Dixon*, 141 Ohio App.3d 654, 658, 2001-Ohio-2120, 752 N.E.2d 1005. The trial court assumes the role of the trier of facts at a suppression hearing and evaluates the credibility of witnesses. *Id.*; *State v. Norman*, 136 Ohio App.3d 46, 51, 1999-Ohio-961, 735 N.E.2d 953. The weight of the evidence is also primarily determined by the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus, 227 N.E.2d 212. In our review, we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *Norman*, 136 Ohio App.3d at 52, citing *State v. Brooks*, 75 Ohio St.3d 148, 1996-Ohio-134, 661 N.E.2d 1030. Accepting those facts as true, we independently determine as a matter of law, without giving deference to the trial court's decision, whether they meet the applicable legal standard. *Dixon*, 141 Ohio App.3d at 659, citing *State v. Anderson* (1995), 100 Ohio App.3d 688, 691, 654 N.E.2d 1034. Therefore, we review the trial court's application of the law *de novo*. *Dixon*, 141 Ohio App.3d at 659.

{¶6} In the first assignment of error, the State argues that the trial court erred in granting the motion to suppress based upon the alleged statutory violation of R.C. 2933.231(B)(2). R.C. 2935.12 sets forth Ohio's knock and announce rule.

The statute provides:

**(A) \* \* \* when executing a search warrant, the peace officer, law enforcement officer, or other authorized individual \* \* \* executing the warrant or summons may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to \* \* \* execute the warrant or**

**summons, he is refused admittance, but the law enforcement officer or other authorized individual executing a search warrant shall not enter a house or building not described in the warrant.**

**(B) The precondition for nonconsensual forcible entry established by division (A) of this section is subject to waiver, as it applies to the execution of a search warrant, in accordance with section 2933.231 [2933.23.1] of the Revised Code.**

R.C. 2935.12.

{¶7} R.C. 2933.231 sets forth the procedure necessary for proper issuance of a warrant with a waiver of the statutory precondition for nonconsensual entry.

The statute provides, in relevant part:

**(B) A law enforcement officer, prosecutor, or other authorized individual who files an affidavit for the issuance of a search warrant pursuant to this chapter or Criminal Rule 41 may include in the affidavit a request that the statutory precondition for nonconsensual entry be waived in relation to the search warrant. A request for that waiver shall contain all of the following:**

**(1) A statement that the affiant has good cause to believe that there is a risk of serious physical harm to the law enforcement officers or other authorized individuals who will execute the warrant if they are required to comply with the statutory precondition for nonconsensual entry;**

**(2) A statement setting forth the facts upon which the affiant's belief is based, including, but not limited to, the names of all known persons who the affiant believes pose the risk of serious physical harm to the law enforcement officers or other authorized individuals who will execute the warrant at the particular dwelling house or other building;**

**(3) A statement verifying the address of the dwelling house or other building proposed to be searched as the correct address in**

**relation to the criminal offense or other violation of law underlying the request for the issuance of the search warrant;**

**(4) A request that, based on those facts, the judge or magistrate waive the statutory precondition for nonconsensual entry.**

R.C. 2933.231(B).

{¶8} Detective Clark did request the judge reviewing the affidavit for the issuance of the search warrant to waive the statutory precondition for nonconsensual entry. However, Detective Clark did not list the names of the persons he believed posed a risk of serious physical harm to law enforcement officers. Detective Clark did include the following paragraph as justification for seeking a search in the nighttime:

**The majority of drug transactions take place after 8:00 P.M. Some subjects inside the residence have previous narcotic and crimes of violence arrests and convictions. An approach to the premises under the cover of darkness would enhance officer safety and minimize the possibility that evidence would be destroyed before officers could gain entry.**

March 13, 2003 Search Warrant Affidavit of Detective Michael Clark.

{¶9} Since the search warrant affidavit did not strictly comply with all the requirements of R.C. 2935.12 and R.C. 2933.231(B)(2), the trial court found that the no-knock search was not valid and suppressed the evidence. However, the Ohio Supreme Court has consistently taken the position that the exclusionary rule does not apply to violations of state law which do not rise to constitutional violations, unless otherwise is specifically provided by the legislature. *State v.*

*Baker* (1993), 87 Ohio App.3d 186, 193, 621 N.E.2d 1347, citing *State v. Thompson* (1987), 33 Ohio St.3d 1, 8, 514 N.E.2d 407; *Kettering v. Hollen* (1980), 64 Ohio St.2d 232, 234, 416 N.E.2d 598. The First District Court of Appeals applied this proposition of law in *State v. Childs* (June 19, 1998), 1st Dist. No. C-961134, unreported, 1998 WL 321301, \*4, holding that even if it were found that law enforcement officers failed to comply with R.C. 2935.12, such a violation would not render the seized evidence inadmissible.

{¶10} When the requirements of a state statute regarding search warrants are not strictly complied with, the relevant Fourth Amendment inquiry becomes whether the search was reasonable. *Wilson v. Arkansas* (1995), 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976; *State v. Smith* (Mar. 16, 1994), 9th Dist. No. 93CA005585, unreported, 1994 WL 78610; *State v. Southers* (June 8, 1992), 5th Dist. No. CA-8682, unreported, 1992 WL 127164. The Fourth and Fourteenth Amendments of the United States Constitution require searches to be reasonable in order to be valid. Forced entry by police is justified in the following circumstances: “when lawful entry into a residence has been refused or when necessary to protect the police, to prevent disposal of evidence or contraband, or to forestall escape.” *State v. Davies* (Jan. 8, 1986), 1st Dist. Nos. C-850112, C-850113, C-850128, C-850129, unreported, 1986 WL 657, \*1. The reasonableness of the circumstances will be determined on a case by case basis. *Id.*

{¶11} In the case sub judice, the State asserts that circumstances existed that justified noncompliance with the statutory knock and announce requirement. The State argues that law enforcement officers conducted themselves reasonably under the Fourth Amendment. While Detective Clark conceded at the suppression hearing that he failed to state in his affidavit the names of the individuals that specifically posed a risk of serious physical harm to law enforcement officers, he testified that he requested a “no-knock warrant” due to the people he had seen going to the residence at 339 West North Street, Apartment F, and due to resident Andre Williams’ past history of violent crime, including assault on a police officer. March 16, 2004 Motion to Suppress Hearing Transcript, p. 13. Detective Clark testified that he felt it was best for the safety of all law enforcement officers involved if the search warrant was executed without the knock and announce requirement. Detective Clark also testified that he did not know specifically which individuals would be in the residence at the time the officers executed the search warrant. Detective Clark’s affidavit for the search warrant did state that some subjects seen at the residence had prior convictions for violent crimes and also expressed Detective Clark’s concern regarding the possible destruction of evidence as well as officer safety.

{¶12} Detective Boyer, an officer with the Tiffin Police Department, also testified at the suppression hearing. Detective Boyer participated in executing the search warrant at 339 West North Street, Apartment F. Detective Boyer testified

that the execution of warrants involving drug operations is more dangerous than the execution of other warrants because weapons, specifically firearms, are typically associated with drug trafficking. March 16, 2004 Motion to Suppress Hearing Transcript, p. 23.

{¶13} We note that the trial court reviewed the testimony at the suppression hearing and the original search warrant in determining that there was probable cause for the issuance of a search warrant. However, the trial court failed to determine if a no-knock search was reasonable under the circumstances, finding instead that the evidence should be suppressed based upon Detective Clark's failure to include the names of the persons believed to pose a risk of serious physical harm in his statement of facts in the original warrant request. After reviewing the record and applying the appropriate law to the facts in the case, we find that the State demonstrated the existence of circumstances that justified deviating from the mandate of R.C. 2935.12. Even though the State did not strictly comply with all the technical requirements of R.C. 2933.231, the supporting facts were known to the affiant officer but were not included in the affidavit for the search warrant. Law enforcement officers acted reasonably, and therefore constitutionally, in obtaining and executing a search warrant that requested noncompliance with the statutory knock and announce requirement. Therefore, the evidence obtained during the search should not be excluded pursuant to the exclusionary rule.

{¶14} We hold that the trial court erred in suppressing the evidence based solely on the officer's failure to include all the requirements of R.C. 2933.231 in his affidavit. Further, in applying the appropriate law to the facts in the case, we hold that the no-knock search was reasonable under the circumstances of this case. Accordingly, the State's first assignment of error is sustained.

{¶15} Based upon our determination of the first assignment of error, we find the second assignment of error to be moot. While agreeing that this assignment of error is moot, the concurrence proceeds to suggest "that the failure of a reasonably well trained police officer to comply with the requirements of a state statute is prima facie evidence that he or she did not act in good faith." While we can hypothesize situations in which the failure on the part of a requesting officer to provide pertinent information in an affidavit accompanying a search warrant request would preclude that officer from claiming good faith in the execution of an invalid warrant, the circumstances in this case do not present one of these particular situations. Although the affiant in this case failed to include required information in the search warrant request, the information required for statutory noncompliance with the knock-and-announce statute was known to the officer at the time he requested the no-knock warrant. The affiant officer then executed the no-knock warrant based upon this information and the magistrate's grant of the no-knock warrant. This situation differs from one in which an officer requests and executes a no-knock warrant without having any justification for the

request. Since the officer in this case had knowledge of circumstances that warranted statutory noncompliance with the knock-and-announce requirement prior to requesting the no-knock warrant, it is not prima facie evidence that his failure to comply with the requirements of the statute indicates he did not act in good faith in executing the warrant.

{¶16} Having found merit with the State's first assignment of error, we reverse the ruling of the Common Pleas Court of Seneca County and remand the cause for proceedings consistent with this opinion.

*Judgment reversed and  
cause remanded.*

**CUPP, J., concurs.**

**ROGERS, J., concurs in judgment only.**

{¶17} **ROGERS, J., concurs in judgment only.** I concur with the opinion of the majority that suppression based solely upon non-compliance with R.C. 2935.12 and 2933.231(B)(2) was inappropriate. However, I would remand for a further hearing to allow the trial court to make the factual determination concerning whether exigent circumstances existed which rendered a no-knock search permissible in this case.

{¶18} It is well settled that the issue of credibility of the witnesses is a matter to be determined by the trial court and not by the reviewing court. *Ardrey v. Ardrey*, 3rd Dist. No. 14-03-41, 2004-Ohio-2471, at ¶ 17, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraph one of the syllabus; *State v. Parks*, 3rd

Dist. No. 15-03-16, 2004-Ohio-4023, at ¶ 13, citing *State v. Twitty*, 2nd Dist. No. 18749, 2002-Ohio-5595, at ¶ 114. The majority herein has taken upon itself the responsibility of making the determinative finding of fact that exigent circumstances existed in this case. One cannot make such a finding of fact without considering the credibility of the witnesses. It appears to me that the majority has accepted, without question, the credibility of the State's witnesses. I would remand to allow the trial court, based upon the weighing of the credibility of the witnesses, to make the appropriate findings.

{¶19} Furthermore, I note that the affidavit requesting the issuance of a search warrant contained the following:

**Affiant has good cause to believe and does believe that there is a risk of serious physical harm to the law enforcement officers or other authorized individuals who will execute the warrant if they are required to comply with the statutory precondition for nonconsensual entry;**

**Affiant verifies that the address of the dwelling house or other building proposed to be searched is the correct address in relation to the criminal offense or other violation of law underlying the request for the issuance of the search warrant;**

**The facts upon which Affiant's belief is based, including but not limited to, the names of all known persons who Affiant believes pose a risk of serious physical harm to the law enforcement officers or other authorized individuals who will execute the warrant at the particular dwelling house or other building are as follows:**

{¶20} Conspicuous by its absence is the listing of names. The fact that something is missing is so obvious it should not need comment.

{¶21} The issuing magistrate's failure to note the omission of the information required by R.C. 2933.231 and failure to require that said information be supplied prior to granting the request for a nonconsensual search suggests that said magistrate may have abandoned his responsibility and failed to act as an impartial magistrate. If the magistrate gave so little consideration to one issue, he may well have given no more serious consideration to any other issue.

{¶22} The language used in this request for a search warrant appears to be "boiler plate" as evidenced by the continued reference to some "other building." Does the State contend that every search warrant should be by forced entry? They probably will if they believe the request will not be denied by the issuing magistrate even though statutorily required information is not included.

{¶23} Fortunately, in this case, there was sufficient information contained in the affidavit to justify the issuance of the search warrant. The real question then became whether exigent circumstances existed, and the majority of this court has supplied that finding. Again, I would remand that issue for the trial court to determine.

{¶24} Finally, because of the majority's additional finding that "the State demonstrated the existence of circumstances that justified deviating from the mandate of R.C. 2935.12," I would agree that the issue of whether the executing officers acted in good faith reliance on the search warrant is rendered moot. However, I would suggest that the failure of a reasonably well trained police

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officer to comply with the requirements of a state statute is prima facie evidence that he or she did not act in good faith.

{¶25} Based on the above, I respectfully concur with the majority in judgment only.