

AFFIRMED

William M. Barker, Judge

Opinion

The State of Tennessee appeals an order of the Davidson County Criminal Court sustaining the appellee's motion to suppress evidence. The State argues on appeal that the trial court erred when it excluded evidence obtained as a result of a valid search of the appellee's home. Having reviewed the record on appeal, we affirm the action of the trial court.

On April 5, 1994, at approximately 7:00 p.m., officers of the Metropolitan Nashville Police Department and the Tennessee Bureau of Investigation went to the appellee's residence for the purpose of executing a search warrant.¹ The testimony as to what occurred at the time the warrant was executed is conflicting. The Metropolitan Nashville police officer in charge of the search, James P. Buck, testified that he remained in the front yard of the residence while a TBI team made the initial entry, followed closely by a chemical disposal team from the Metropolitan Nashville Police Department. Buck testified that when the TBI team reached the front door of the residence, a member of that team announced, "Police" and "Search Warrant," paused, and then broke down the appellee's unlocked front door. A battering ram was used to break through the doorway into the house. The TBI team was immediately followed by a chemical disposal team, which was there to dispose of potentially volatile substances thought to be present in connection with suspected methamphetamine production.²

The appellee, on the other hand, testified that just before the police entered his home, he and two friends were in his living room visiting with soft music playing in the

¹The record on appeal does not contain the search warrant or the affidavit in support of the warrant. However, testimony at the suppression hearing revealed that a confidential informant had advised police that he had observed some form of chemical apparatus inside of the appellee's residence, and further, that undercover police officers had purchased methamphetamine at the appellee's residence.

²As it turned out, there were no volatile substances present on the premises. The "chemical apparatus" was some antique chemistry equipment appellee's wife, an employee of Vanderbilt University, had been given by the school. It was kept by appellee in a display case.

background. He testified that he and his friends were located about eight to ten feet from the front door and could have easily heard if the police had announced their presence prior to entry and could have also heard a knock on the door or a ring of his doorbell. He testified that he heard nothing prior to the forced entry. The appellee's two friends also testified at the suppression hearing, confirming the appellee's testimony. The trial court chose to accredit the testimony of the appellee and his two friends over that of Officer Buck and found that the police did not properly knock and announce their presence before entering the house. Thus, finding the search was executed in violation of Rule 41(e) of the Tennessee Rules of Criminal Procedure, the trial court suppressed the evidence obtained as a result thereof.

The State does not contest the trial court's ruling that the police did not properly knock and announce before entering the residence. Indeed, the only issue raised in this appeal is whether the search fell under the exigent circumstances exception to the knock and announce rule. See State v. Lee, 836 S.W.2d 126 (Tenn. Crim. App. 1991). In response, the appellee contends that the State waived its right to raise this issue on appeal because it did not make the exigent circumstances argument at the suppression hearing. We agree.

Pursuant to Rule 12 of the Tennessee Rules of Criminal Procedure, the appellee filed a timely motion to suppress the evidence obtained as a result of the search. The trial court thereafter conducted an extensive evidentiary hearing in order to determine whether the knock and announce rule was violated. At that hearing, the State simply contended that the evidence supported a finding that the police did in fact knock and announce prior to the police entering the appellee's home. At no time during the hearing did the State contend that exigent circumstances existed which would obviate the officers' duty to knock and announce prior to a forced entry. Issues that are not presented or litigated in the trial court are considered waived for purposes of appeal. State v. Burtis, 664 S.W.2d 305, 310 (Tenn. Crim. App. 1983); See State v. Strickland, 885 S.W.2d 85, 88 (Tenn. Crim. App. 1994).

Because the State failed to raise the issue of the existence of exigent circumstances before the trial court, the trial court obviously made no finding of fact on that issue. Therefore, this Court, which is appellate only, is precluded from making such a factual determination, and the issue is therefore waived.

The trial court is affirmed.

WILLIAM M. BARKER, JUDGE

CONCUR BY:

DAVID H. WELLES, JUDGE

JERRY L. SMITH, JUDGE