

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

Docket No. 131276

v

WILLIE R. GILLAM
Defendant-Appellee.

BRIEF ON APPEAL - APPELLEE

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STATEMENT OF APPELLATE JURISDICTION

Defendant agrees with and adopts Plaintiff's statement of jurisdiction.

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT HAVE A REASONABLE EVIDENTIARY BASIS FOR CONCLUDING THAT THE POLICE CONDUCT CONSTITUTED A “CONSTRUCTIVE ENTRY” FOR PURPOSES OF A FOURTH AMENDMENT SEARCH AND SEIZURE ANALYSIS WHEN THE TRIAL COURT RULED THAT THE POLICE ACTUALLY COERCED DEFENDANT INTO LEAVING HIS APARTMENT THUS EXPOSING HIM TO A WARRANTLESS ARREST WITHOUT EXIGENT CIRCUMSTANCES?

Plaintiff-Appellant answers, “No.”

Defendant-Appellee answers, “Yes.”

Trial Court answers, “Yes.”

Court of Appeals answers, “Yes.”

II. DID THE TRIAL COURT MAKE A DETERMINATION THAT DEFENDANT VOLUNTARILY OPENED HIS DOOR, AND DOES A CITIZEN RELINQUISH ALL EXPECTATIONS OF PRIVACY MERELY BY OPENING HIS DOOR THUS MAKING THE FINDING OF “CONSTRUCTIVE ENTRY” FOR PURPOSES OF A FOURTH AMENDMENT SEARCH AND SEIZURE ANALYSIS UNNECESSARY?

Plaintiff-Appellant answers, “Yes.”

Defendant-Appellee answers, “No.”

The Trial Court did not address this issue.

The Court of Appeals did not address this issue.

COUNTER STATEMENT OF FACTS

Defendant-appellee was charged with conspiracy to deliver more than 50 grams but less than 449 grams of cocaine, contrary to MCL 333.7401(2)(a)(iii), delivery of more than 50 grams but less than 450 grams of cocaine, contrary to MCL 333.7401(2)(a)(iii), and two counts of delivery of less than 50 grams of cocaine contrary to MCL 333.7401(2)(a)(iv). Defendant was also charged as habitual offender, fourth offense pursuant to MCL 769.12.

On April 12, 2004, a preliminary examination was started then later waived by defendant. During the preliminary examination Lansing Police Officer Hung Tran testified that in March, 2004, he participated in a drug transaction with a female individual. There was no testimony that Officer Tran ever met defendant personally however Officer Tran believed that he spoke with defendant on the phone. On the basis of Officer Tran's investigation a decision was made to arrest defendant at his apartment on March 30, 2004.

Lansing Police Officer Del Kostanko testified during the April 4, 2004, preliminary examination that the police did not expect to find any evidence in defendant's apartment. Officer Konstanko indicated that he entered defendant's apartment to get defendant's coat and shoes and six feet from the door area he noticed a white piece of paper with the name "John" and Officer Tran's phone number written on it, laying on a glass coffee table.

A motion to suppress hearing was held on August 5, 2004, before Circuit Court Judge Thomas L. Brown. During this hearing the trial court heard defendant's testimony as well as the testimony of Lansing Police Officers Donald Bey and Jerry Blow. Officer Bye testified that Officer Tran instructed him to arrest defendant and that Officer Tran believed that defendant was the

person “G” that he had spoken to on the phone on March 29 and March 30, 2004.¹ (AT App, page 33A; MT, page 16)

Defendant testified that when police arrived he opened his door, told the police he could not leave his apartment because he was on tether, did not voluntarily leave his apartment, that it was not his own free will to step outside, that he felt threatened by police officers when they came to arrest him, and that he was coerced by the officers present.

THE WITNESS: Yes. I looked at the box to make sure it wasn't going off because it was giving me problems. When I saw it was okay I opened the door, the police asked me to come out, I told them: No, I couldn't come out because I was on tether. We went back and forth. They kept telling me: come out of the door. I kept on telling them: No, I'm on tether. We went back and forth, back and forth.

Q Eventually did you leave the apartment?

A Yes I did, because there was an officer to my right. There was something about it that made me feel threatened. So I came on out and they arrested me.

Q What happened when you stepped out of the apartment?

A They arrested me.

Q When you stepped outside of that apartment, were you – are you out doors or are you in a hallway? How is it set out?

A I'm in a hallway. As soon as you step outside of the apartment, you stepped into the hallway.

Q Do you think you exited the apartment voluntarily?

A No.

Q Was it your own free will to step outside the apartment?

A No.

Q You felt coerced by the officers present there?

A Yes. . . . (AT App, page 31A; MT, page 5-6)

¹For purposes of this brief, the following transcript designations apply:

AT App = Appellant's Appendix

MT = Specific transcript page number of circuit court motion to suppress evidence hearing held on August 5, 2004, contained in Appellant's Appendix which begins at AT App, page 30A)

Defendant testified that he never gave police permission to search his apartment:

- Q Mr. Gillam, did officers go into your apartment at some point?
A Yes.
Q Did they have permission to do so?
A No. I gave one officer permission. That was the officer, he asked me about, did I have my – give me my coat and my shoes. (AT App, page 31A; MT, page 7)

During cross examination defendant testified that he was ordered out of his apartment.

THE COURT: The question was: How did you get outside.

THE WITNESS: The officers kept telling me to come out of the house.

- Q (By Mr. Bostic) Did you then walk out?
A Yeah. I ended up walking out.
Q Were people yelling, were people excited or was it fairly calm?
A I guess it was excited. . . (AT App, page 32A; MT, page 11)
Q There was a lot of verbal back and forth, but you physically walked out across the threshold into the hallway?
A Because I felt threatened. (AT App, page 33A; MT, page 14)

During cross-examination Officer Bey was asked why an arrest warrant was never requested:

- Q Why didn't you go into his apartment and arrest him?
A No arrest was warranted. No search warrant.
Q You knew you needed a warrant to arrest him in his apartment, correct?
A Yes.
Q Why didn't you get a warrant? Was there some problems with time?
A Well, we made the attempt of going down there, I guess, to see if we could make contact. As it turned out, that's the way to save time on our part. But at the same time, if we actually knew he was there, he would not open the door, we

would obtain the search warrant and possibly go in and make, get an arrest that way

Q Did you know he was on tether before you went to the apartment?

A I did know he was on probation. And yes, that there was a tether system involved, yes. (AT App, page 35A; MT, pages 21-22)

Officer Bey testified that Officer Tran informed him that he participated in a telephone conversation regarding selling drugs with defendant. (AT App, page 36A; MT, page 25) Officer Bey further testified that Officer Tran did not accompany them to make the arrest and that Officer Bey did not know defendant by sight. (AT App, page 36A; MT, page 25) The trial court questioned Officer Bey as to the probable cause of the arrest.

THE COURT: Excuse me. What did you do after you got this information from officer Tran?

THE WITNESS: We made a decision that we would go downtown to the apartment and make an attempt to arrest Mr. Gillam on probable cause.

THE COURT: What probable cause did you have?

THE WITNESS: Probable cause of conspiracy of the delivery of cocaine that had been made to officer Tran.

THE COURT: And then Officer Tran was not with you?

THE WITNESS: No.

THE COURT: And these officers who were with you, these uniformed officers, do you know if they recognized Mr. Gillam?

THE WITNESS: I couldn't –

THE COURT: Or knew him?

THE WITNESS: I could not say. I did not have that information from him.

THE COURT: So it is possible that none of you knew who he was?

THE WITNESS: That's correct.

THE COURT: If he hadn't identified himself, you still would not know, I take it?

THE WITNESS: That would have been possible. (AT App, page 36A; MT, pages 26-27)

Officer Bey testified that police had time to speak with a judge and could of attempted to get an arrest warrant. (AT App, page 37A; MT, page 32)

The trial court then questioned Officer Bey regarding the operations of tether and whether a person would be in violation of probation if the stepped outside of the house. Officer Bey at first thought that a person on tether could step outside of the house without violating tether. (AT App, page 36A; MT, page 28) Officer Bey later admitted that a tether violation could occur if someone stepped outside of their house.

THE COURT: But tether could be set in a range, you couldn't leave your house, right? It all depends on how they set tether?

THE WITNESS: Exactly. Yes.

THE COURT: In Mr. Gillam's case, the tether could have been set that he couldn't leave his apartment?

THE WITNESS: I guess that could be possible, yes. (AT App, page 37A; MT, page 29)

The trial court opined that defendant violated his tether agreement by stepping outside of the house, “[n]ow, he is in violation of the tether, he could be picked up for violating the tether, I guess? . . .” (AT App, page 37A; MT, page 30)

The trial court concluded that police coerced defendant to step outside of the apartment.

THE COURT: I believe they were told by Mr. Gillam: Look, I'm on tether. The gentleman has a record. He has a record here as long as my arm. So he certainly is familiar with the system. And I'm certain that he knows the meets and bounds of a tether system. And he knows he was told, apparently he was told, he said he didn't want to step outside. He was somehow or other – the officers say he really steps outside. I find that hard to believe. In any event, I think he was, in some manner or another, caused to step outside and be arrested. Thereafter, he needed a coat, so forth, to go downtown. Some of the others – he could have got it himself. That's not the way the other officers operate. Once you get there, they go get their stuff. It was a product of illegal arrest.

They had plenty of time to go get the judge, get a search warrant, information they had, which they chose not to do. As I said, they found it expeditious to do it in this fashion. Sometimes when you get in a big rush to get expeditious, you lose your quarry. I'm going to grant the motion. Do it right. (AT App, page 41-42A; MT, pages 48-49)

The prosecutor asked the trial court if probable cause existed for the arrest. Judge Brown answered:

THE COURT: I think they had probable cause to get an arrest warrant, yes sir. They could have done it, they got there. Mr. Gillam told them, I can't come outside. They knew then we had to get an arrest warrant. Now that's just tough. So they said come outside. Okay? (AT App, page 42A; MT, page 49)

The trial court denied the prosecutor's motion to adjourn on August 30, 2004, and the prosecutor did not object to the motion to dismiss which was granted on August 31, 2004. The prosecutor appealed and in People v Gillam, unpublished opinion per curiam of the Court of Appeals, decided April 4, 2006, (Docket No. 259122) the Court of Appeals ruled that the trial court did not err in concluding that the police coerced defendant into leaving his apartment and then arrested him at home without a warrant in violation of defendant's constitutional rights. The Court of Appeals also concluded that the trial court properly suppressed the evidence seized as the result of the illegal arrest.

ARGUMENT

I. THE TRIAL COURT HAD A REASONABLE EVIDENTIARY BASIS FOR CONCLUDING THAT THE POLICE ACTUALLY COERCED DEFENDANT INTO LEAVING HIS APARTMENT AND THEREFORE THE POLICE CONDUCT CONSTITUTED “CONSTRUCTIVE ENTRY” FOR PURPOSES OF A FOURTH AMENDMENT SEARCH AND SEIZURE ANALYSIS.

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A. Discussion

During the August 5, 2004, motion to suppress hearing the trial court heard testimony from three witnesses, defendant and two police officers, and found that the police, without exigent circumstances, coerced defendant into leaving his apartment which constituted a constructive entry.

This Court in People v Houstina, 216 Mich App 70, 73-74; 549 NW2d 11 (1996), lv den 451 Mich 915(1996), summarized the basic constitutional principles concerning searches and seizures:

The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Const 1963, art 1, § 11 provides:

The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug ... seized by a peace officer outside the curtilage of any dwelling house in this state.

This right to be secure against unreasonable searches and seizures absent a warrant based upon probable cause is subject to several specifically established and well-delineated exceptions. People v Davis, 442 Mich 1, 10; 497 NW2d 910 (1993), cert den 508 US 947 (1993). Generally, evidence obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings. In re Forfeiture of \$176,598, 443 Mich 261, 265; 505 NW2d 201 (1993). Thus, in order to show that a search was legal, the police must show either that they had a warrant or that their conduct fell within one of the narrow, specific exceptions to the warrant requirement. Davis, *supra* at 10.

See generally, Mapp v Ohio, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961) (US Const, Am IV exclusionary rule applies to state prosecutions through the Due Process Clause of US Const, Am XIV).

The Constitution does not forbid all searches and seizures, only unreasonable ones. Harris v United States, 331 US 145, 150; 67 S Ct 1098; 91 L Ed 2d 1399 (1947). A warrant is normally required to arrest a suspect in his or her home. People v Johnson, 431 Mich 683, 691; 431 NW2d 825 (1988) A warrantless search or entry is per se unreasonable, absent a warrant exception. Katz v United States, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967). It is the prosecutions' burden to prove that exigent circumstance existed. Vale v Louisiana, 399 US 30; 90 S Ct 1969; 26 L Ed 2d 409. The court in United States v Brown, 449 F3d 741, 744 (CA 6, 2006) summarized the

exceptions to a warrant requirements and emphasized the police's heavy burden when attempting to demonstrate an urgent need that might justify warrantless arrests:

A basic tenet of Fourth Amendment law is that warrantless searches and seizures carried out inside private residences are presumptively unreasonable unless justified by one of the well-established exceptions to the warrant requirement. Welsh v. Wisconsin, 466 U.S. 740, 748-49 (1984); Payton v. New York, 445 U.S. 573, 586 (1980). The exigent circumstances exception has been recognized in situations of hot pursuit of a fleeing felon, imminent destruction of evidence, the need to prevent a suspect's escape, and risk of danger to the police and others. United States v. Rohrig, 98 F.3d 1506, 1515 (6th Cir. 1996). The police bear a "heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." Welsh, 466 U.S. at 749-50; see also United States v. Morgan, 743 F.2d 1158, 1162 (6th Cir. 1984).

In determining whether sufficient exigent circumstances exist to justify the warrantless entry and search or seizure, Brown at 745, further provided that "the court must 'consider the totality of the circumstances and the 'inherent necessities of the situation at the time.' citing Rohrig, 98 F3d at 1511 (quoting Johnson, 9 F.3d at 508) (internal quotation marks omitted)."

Probable cause to believe that a felony has been committed is not an "exigency" in itself, permitting a warrantless entry. Payton v New York, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980). In Payton the defendant's arrest for murder was classified as a routine felony arrest by both the New York Supreme Court and the United States Supreme Court. The Court held that there was ample time to obtain an arrest warrant. Absent any exigent circumstances, the Supreme Court held that the forced entry by police without a warrant, even when accomplished under statutory authority and where probable cause existed was unconstitutional. The defendant's conviction was reversed. Id at 603.

In defendant's case no exigent circumstances were present that would justify an arrest without a warrant. There was no immediate danger to the officers inside the building. The

officers never testified they felt danger at any time prior to defendant's arrest. Officer Kostanko testified at the preliminary examination hearing that five officers in total arrived to arrest defendant, two road patrol officers and three undercover officers.

There was no risk of escape by defendant. Defendant was on tether and the officers knew he was on tether. Officer Bey testified that the only reason that they did not try to get a warrant first was to save time. (AT App, page 35A; MT, page 21)

There was no risk that evidence might be destroyed. During the initial April 12, 2004, preliminary examination hearing Officer Kostanko testified that since defendant was on tether with the Michigan Department of Corrections, it was doubtful defendant would have any evidence in his apartment.

In applying Payton to a warrantless arrest case, the court in United States v Berkowitz, 927 F.2d 1376, 1388 (CA 7, 1991), was critical of police attempting to make an arrest at home without a warrant and without exigent circumstances:

One might argue that to disallow the minimal entry into the home to arrest in this case could hamstring police. But Payton forbids any non-consensual warrantless entry into the home absent exigent circumstances. Payton did not draw the line one or two feet into the home; it drew the line at the home's entrance. Also, if police go to a person's home to arrest him, and have reason to believe they may have to enter the home to make the arrest, they should obtain a warrant. There was no reason in this case for Shearer and his cohorts not to get a warrant, and plenty of reason to obtain a warrant. . . . Obtaining a warrant in the first place would have prevented these potential problems, to say nothing of the time it would have saved at trial and on appeal litigating the legality of Berkowitz's arrest.

In Sparing v Village of Olympia Fields, 266 F.3d 684, 691 (CA 7, 2001) the court also disapproved of police making warrantless home arrests:

"We pause here, momentarily, to reiterate what seems to have been lost from our discussion in Berkowitz: there was no reason in this case not to get a warrant and every reason to obtain one. See Berkowitz, 927 F.2d at 1388 ("Obtaining a warrant

in the first place would have prevented these potential problems, to say nothing of the time it would have saved at trial and on appeal litigating the legality of [the] arrest."). When time permits, officers who elect not to obtain a warrant unnecessarily risk the type of constitutional violation involved in this case.

B. The trial court correctly concluded that the police conduct coerced defendant into leaving his apartment thus establishing a "constructive entry" into defendant's home.

In United States v Morgan, 743 F2d 1158, 1166 (CA 6, 1984), the court added that a "constructive entry" into a home in violation of Payton occurs whenever the police use "coercive conduct" to force a defendant outside of the home. Consensual encounter at the doorstep may evolve into a "constructive entry" when the police, while not entering the house, deploy overbearing tactics that essentially force the individual out of the home. The difference between the two-between a permissible consensual encounter and an impermissible constructive entry-turns on the show of force exhibited by the police. United States v Thomas 430 F3d 274, 278 (CA 6, 2005) In Thomas at 278, the Court determined that constructive entry did not exist since defendant voluntarily left his apartment:

Two officers "knocked on the rear door When Defendant came to the door, Officer Cunningham told Defendant that the Alabama investigators wanted to talk to him and asked him to come out of the residence, which he did." D. Ct. Order at 5. As in Nash, "[n]otestimony . . . indicate[d] drawn weapons, raised voices, or coercive demands on the part of the police." 2004 WL 2912796, at *1. Thomas responded to a simple knock and request, not an order to emerge or the threat of firearms. And he has given us no basis for concluding that a reasonable person, confronted with a knock on the door by police officers, would believe without more that he was either under arrest or otherwise compelled to leave the house. On this record, no "constructive entry" occurred. (Emphasis supplied)

In United States v Saari, 272 F3d 804, 809 (CA 6, 2001), the court, quoting Morgan at 1164, also described coercive police conduct as "such a show of authority that [the] Defendant reasonably

believed he had no choice but to comply." As the Supreme Court has explained, a person has been seized for Fourth Amendment purposes if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v Mendenhall, 446 US 544, 554; 100 S Ct 1870; 64 L Ed2d 497 (1980)

Therefore if a reasonable person would have believed that he was not free to remain inside his home because of the force of the police order and apparent authority, then the police "constructively entered" the person's home and seized the person for Fourth Amendment purposes. The Fourth Amendment protects people's legitimate expectations of privacy. A person's subjective privacy expectation in any situation is legitimate, and therefore worthy of Fourth Amendment protection, if it is "one that society is prepared to recognize as reasonable." Berkowitz, at 1387 (quoting Minnesota v Olsen, 110 S Ct @ 1687, citation omitted).

There is ample evidence and testimony to support the trial court's conclusion that defendant was coerced into leaving his apartment. During the August 5, 2004, motion to suppress hearing, defendant testified that he initially refused to leave his apartment, did not voluntarily leave the apartment, that it was not his own free will to step outside, that he felt threatened by police officers when they came to arrest him, police were excited outside of his apartment and that he was coerced by the officers to exit his apartment. (AT App, pages 31 -33A; MT, Pages 5-6, 11, 14) Defendant testified that he could not leave his apartment because he was on tether and that "we went back and forth. They kept telling me: Come out the door. I kept telling them: No, I'm on tether. We went back and forth, back and forth." (AT App, page 31A; MT, page 5)

The prosecutor argues that defendant voluntarily left his apartment but ignores the most

crucial fact of this arrest; defendant initially refused to leave his apartment when commanded by police. One of the reasons why defendant “disinclined” to leave his apartment was because he was on tether. This fact persuaded both the trial court and the Court of Appeals. In Gillam at 2, the court made note of the described pattern of repeated police entreaties for defendant to leave his apartment and concluded, “[s]uch persistence on the part of uniformed police officer in response to defendant’s initial stated disinclination to leave the premises could reasonably be taken to constitute actual coercion.” This is comparable to asserting the right to remain silent after an arrest and then acquiescing after continued questioning by the police. None of the authority relied on by the prosecutor show the defendants actually refusing to leave their home. The fact that defendant was on tether and initially refused to leave his apartment is simply ignored by the prosecutor.

The trial court also undoubtedly has presided over countless probation violation hearings where defendants violated tether conditions by simply stepping outside of the home. The trial court even opined that defendant violated his parole when he was forced outside of his apartment. (AT App, page 37A; MT, page 30). The trial court listened to the testimony, weighed witness credibility, and concluded that officer Bey’s testimony was not credible:

THE COURT: . . . and I’m certain that he knows the meets and bounds of a tether system. And he knows he was told, apparently he was told, he said he didn’t want to step outside. He was somehow or other – the officers say he really steps outside. I find that hard to believe. In any event, I think he was, in some manner or another, caused to step outside and be arrested. (AT App, page 41A; MT, page 48)

The court’s conclusion that defendant did not want to leave his apartment is not clearly erroneous.

The prosecutor further argues that the court in Gillam at 2, considerably stretched the record

testimony in finding defendant “ended up walking out in an excited atmosphere”.

Defendant’s testimony during the August 5, 2004, suppression hearing is clear:

THE COURT: The question was: How did you get outside.

THE WITNESS: The officers kept telling me to come out of the house.

Q (By Mr. Bostic) Did you then walk out?

A Yeah. I ended up walking out.

Q Were people yelling, were people excited or was it fairly calm?

A I guess it was excited. . . (AT App, page 32A; MT, pages 10-11)

Q There was a lot of verbal back and forth, but you physically walked out across the threshold into the hallway?

A Because I felt threatened. (AT App, page 33A; MT, page 14)

The testimony is clear that defendant was threatened by the police. The prosecutor simply chooses to ignore defendant’s testimony and claims there is no record to support the finding of police coercion. The trial court’s findings of coercion was supported by strong evidence and is not clearly erroneous. Police conduct can still be considered coercive even without weapons being displayed. The totality of the circumstances of the arrest must be examined. Defendant’s case is unique in that he was on tether and actually refused to leave his apartment after repeated threatening police demands from several officers in an excited atmosphere. The trial court had a reasonable evidentiary basis in concluding that the police actually coerced defendant into leaving his apartment.

II. THE TRIAL COURT NEVER CONCLUDED THAT DEFENDANT VOLUNTARILY OPENED HIS DOOR; AND A “CONSTRUCTIVE ENTRY” ANALYSIS MUST EXAMINE THE TOTALITY OF CIRCUMSTANCES OF THE ARREST INCLUDING POLICE CONDUCT, NOT JUST DEFENDANT’S CONDUCT.

Standard of Review - In reviewing a trial court’s decision following a suppression hearing, the trial court’s factual findings are reviewed for clear error, and the legal conclusions are reviewed de novo. People v Abraham, 234 Mich App 640, 644; 599 NW2d 736 (1999) People v Burrell, 417 Mich 439, 448; 339 NW2d 403 (1983)

A. Defendant did not relinquished all expectations of privacy merely by opening his door.

For the first time the prosecutor argues that determining “constructive entry” is unnecessary since defendant voluntarily exposed himself to a warrantless arrest simply by opening the door. This essentially argues that citizens relinquish all expectation of privacy just by opening their doors. The prosecutor is attempting to draw the focus away from the police conduct after the door was opened.

In any event, the trial court never concluded that defendant’s door was opened voluntarily. If the trial court was asked to examine this issue, undoubtedly, once again, the fact defendant was on tether argues against defendant voluntarily opening his door. The trial court would need to examine the contents of defendant’s electronic tether agreement, parole agreement, and any special conditions imposed on defendant by the parole board and his parole agent regarding tether compliance. Any contact defendant has with the police may require defendant to offer an explanation to his parole officer or risk a parole violation for noncompliance with parole terms. The proposition that defendant voluntarily opened his door is premature and baseless.

Furthermore the officers testified that they knew defendant was on tether when they went

to his house. (AT App, page 35A; MT, page 22) Defendant testified that when he saw the police his first thought was that his tether box was malfunctioning and then he checked the control unit before opening the door. (AT App, page 31A; MT, page 5) The prosecutor's argument that defendant actually could choose not to open his door gives incentive for tethered Michigan citizens to ignore police knocks on the door because, pursuant to the prosecutor's reasoning, they have a choice.² Such a result would not benefit society.

If the issue of whether defendant voluntarily opened his door becomes necessary for this Court's determination of constructive entry, then the trial court is the one that must decide whether defendant voluntarily opened his door. A factual dispute regarding the legality of an arrest arose in Berkowitz at 1388, and the court concluded:

Because there is a factual dispute in this case, and because resolving that dispute is necessary to determine whether Berkowitz's arrest was legal, the district judge should have held an evidentiary hearing. Therefore, we must reverse and remand so that the judge may hold that hearing.

However, with the facts already developed in the record it is apparent that under the totality of the circumstances a constructive entry of defendant's apartment occurred. The court in Berkowitz at 1387, focused on whether a person abandoned their expectation of privacy by answering his door and concluded that they did not:

As the Court noted in Payton, there is no place where a person's expectation of privacy is greater than in his own home. See Payton, 445 U.S. at 589. A person does not abandon this privacy interest in his home by opening his door from within to answer a knock. Answering a knock at the door is not an invitation to come in the house. We think society would recognize a person's right to choose to close his

² Although not part of the record, according to the Michigan Department of Corrections Client Census Summary Report on January 5, 2007 there were 1,389 Michigan citizens on probation, parole or prison tether.

door on and exclude people he does not want within his home. This right to exclude is one of the most -- if not the most -- important components of a person's privacy expectation in his home.

Berkowitz at 1387, further examined when a warrantless entry is proper, absent exigent circumstances, and focused on if the person submitted to the police:

That warrantless entry before arrest is not legal (and, conversely, that a slight entry after the defendant has submitted to the police is legal) can be seen from analyzing the privacy interests involved in the situation.

The prosecutor has not cited any "knock and arrest" cases upholding arrests where the police entered the arrestee's home before telling the person he was under arrest. The Fourth Circuit Court of Appeals has held that a warrantless nonconsensual entry into a hotel room to arrest a subject who answered a knock at his door and was standing near the door when the police entered violates Payton. United States v McCraw, 920 F2d 224, 228-30 (CA 4, 1990). Acquiescence, submission or consent to the police conduct needs to be the focus, not simply if defendant voluntarily opened his door. The analysis of reasonable privacy expectations does not start and end with the person opening his/her door.

Plaintiff cites to United States v Vaneaton, 49 F3d 1423 (CA 9 1995) in arguing that defendant consented to the arrest by opening his door. In Vaneaton a majority of the panel concluded that when a person opens the door in response to a police knock, and thereby stands on the threshold of the home, that person is no longer in a private place. In Vaneaton the defendant heard a knock on his door, saw the police, opened the door and was placed under arrest while the officers were standing outside of his motel room. The court in United States v Oaxaca, 233 F3d 1154, 1158 (CA 9 2000) concluded that "[m]ore specifically, we upheld Vaneaton's warrantless

arrest because the officers arrested him "while standing outside his motel room." Id. @ 1425-26" (emphasis supplied by court) There is no dispute that Vaneaton consented to the arrest after he opened his door while still in the threshold of his apartment. It is also undisputed that in our case defendant was first coerced out of his apartment and then arrested in the hallway. Defendant did not consent to the arrest after he opened his door.

The prosecutor is now attempting to expand the holding in Vaneaton by suggesting that defendant consented to a warrantless arrest and submitted to police authority simply by opening his door. The fact that a person answers a knock at the door doesn't mean that he agrees to let the person who knocked enter. Hadley v Williams, 368 F3d 747, 750 (CA 7, 2004) citing Sparing v Village of Olympia Fields, 266 F3d 684, 688-90 (CA 7, 2001); Berkowitz, at 1387; McCraw, at 229-30. The court in United States v Beadouin, 362 F3d 60, 69 (CA 1, 2004) indirectly examined this issue and concluded, "[w]e do not say that Beaudoin relinquished all expectations of privacy merely by opening his door. . . . A police command to step out of the opened door of one's motel room is, nonetheless, a non-trivial invasion of privacy." Beadouin in fact voluntarily stepped outside his doorway after the initial police command.

In our case defendant did not step outside his apartment, consent or acquiesce to the arrest after he opened the door. In United States v Quaempts, 411 F3d 1046 (CA 5, 2005) defendant's trailer home was so small that he could open the front door while lying in his bed. His doing so on one occasion, in response to the knock of Yakima Nation police officers, resulted in his warrantless arrest for sexual assault. The government relied on Vaneaton and argued that when Quaempts opened the door to the officers, he waived any expectation of privacy in his home. The court in Quaempts at 1049, rejected this argument:

In the alternative the government suggests that by opening the door and offering no objection to the warrantless arrest, Quaepts consented to it. The government offers no authority to support its theory that an individual must offer resistance to a warrantless arrest in his home in order to invoke the protection of the Fourth Amendment. The suggestion is belied by the language and purpose of the Fourth Amendment's "right of the people to be secure in their houses.

Furthermore the court in Hadley at 750, also rejected Vaneaton for the following reasons:

But those decisions, in addition to being contrary to the law of this circuit as enunciated in Sparing and Berkowitz, are inconsistent with the spirit of Payton v. New York. Since few people will refuse to open the door to the police, the effect of the rule of Gori and Vaneaton is to undermine, for no good reason that we can see, the principle that a warrant is required for entry into the home, in the absence of consent or compelling circumstances.

The prosecutor also cites to United States v Santana, 427 US 38; 96 S Ct 2406; 49 L Ed 2d 300 (1976) in defining an open doorway as a public place. Berkowitz at 1388, however distinguished Santana as a "hot pursuit case":

Santana does not require a different result. As far as reasonable privacy expectations go, there is a significant difference between a person who for no reason voluntarily decides to stand in his open doorway, and a person who merely answers a knock on his door. The person who answers the knock and stays within the house is not voluntarily exposing himself "to public view, speech, hearing, and touch as if [he is] standing completely outside [his] house." Santana, 427 U.S. at 42. Moreover, the entry in Santana was justified by hot pursuit; Santana had just completed a heroin transaction, she voluntarily relinquished her privacy expectation in her home by exposing herself to the public in her open doorway, the police began the arrest while Santana had no reasonable privacy expectation, and there was a real possibility that delaying her arrest would result in her destroying evidence. See *id.* at 42-43. In this case, there was no justification for Shearer and the other agents to enter Berkowitz's home to arrest him without a warrant.

The analysis in the Sixth Circuit Court of Appeals case of Saari, *supra*, is helpful. In Saari at 807, the court found that:

Defendant, on the other hand, specifically testified that when he opened the door, he was standing inside his apartment in the doorway. According to defendant, the officers had their weapons pointed at him and instructed him to step outside. The court finds defendant's uncontroverted testimony that he was ordered to come out of the apartment to be credible and finds as a fact that such order was given. Defendant testified that he stepped outside because he was ordered to do so . . .

Saari at 809, concluded that “the officers . . . summoned Defendant to exit his home and acted with such a show of authority that Defendant reasonably believed he had no choice but to comply.”

In Saari the record indicates that defendant voluntarily opened his door. There is no indication that Saari ever saw the officers with guns drawn before he opened his door. But once he opened his door he was coerced outside by a show of force, and stepped outside. Although in Saari the defendant was in his doorway when he first encountered the police the court still concluded “his warrantless arrest was accomplished while he was in his home, in violation of the Fourth Amendment.” *Id.* at 809. Therefore Saari did not endorse the broad position that defendant could have simply been arrested in his doorway. The court in Saari did not even analyze if defendant voluntarily opened his door, but concluded that under the totality of circumstances defendant was forced to leave his apartment because he reasonably didn't believe that he had any choice but to comply.

The government in Saari also relied on Vaneaton. However the court in Saari at 809, footnote 4, indicated that Saari did not present himself for arrest as in Vaneaton. Defendant in our case also did not present himself for arrest or acquiesce to the arrest in any way. Since defendant was on tether he knew he was not leaving his house even before he opened the door. When the door was opened defendant furthermore refused to leave his home and then, after persistent police requests, was forced out.

B. The Trail Court did not specifically rule that the police had probable cause to arrest.

Finally the prosecutor claims that police had probable cause to arrest defendant. First, a thorough reading of the record shows that the police did not have probable cause to arrest defendant. There is no testimony in the preliminary examination transcripts or the motion to suppress hearing transcripts that officer Tran ever spoke face-to-face with defendant on any occasion. If Officer Tran did not speak directly with Mr. Gillam how could he have identified him as the voice of “G” in November of 2003, and March of 2004?

The prosecutor’s assertion that Officer Tran could somehow identify the defendant or that there was probable cause to arrest defendant is not supported by the record. An arrest warrant would not have been issued based on officer’s Tran’s speculation as to the identity of “G”. However in this case police decided to forgo the warrant procedures altogether and, for the sake of convenience, arrest defendant solely on Officer Tran’s speculative hunch.

Next the prosecutor’s assertion that the trial court made a specific ruling that probable cause existed to arrest defendant is stretching that court’s opinion. Officer Tran’s did not testify during the August 5, 2004, suppression hearing. The trial court specifically asked Officer Bey what probable cause the police had for an arrest since officer Tran was not present at the arrest. (AT App, page 36A; MT, page 27) The trial court also inquired how anyone could have identified defendant since no one even knew what he looked like. (AT App, page 36A; MT, page 27) The trial court then sarcastically dismissed the idea that the officer Bey had valid probable cause:

THE COURT: Now, he is in violation of the tether, he could be picked up for violating the tether, I guess? Okay. You indicated that you decided to go there with this, what you call probable cause, from Officer Tran, to arrest Mr. Gillam? (AT App, page 37A; MT, page 30-31; emphasis supplied)

The trial court stated at the conclusion of the motion to suppress hearing that:

THE COURT: I think they had probable cause to get an arrest warrant, yes sir. They could have done it, they got there. Mr. Gillam told them, I can't come outside. They knew then we had to get an arrest warrant. Now that's just tough. So they said come outside. Okay? (AT App, page 42A; MT, page 49, emphasis supplied)

An entire reading of the transcripts shows that the trial court was incredulous of the entire police conduct and that the police needed to “get an arrest warrant.” The trial court was very critical that the police had no exigent circumstance for a warrantless arrest,

THE COURT: . . . That's not the way the other officers operate. Once you get there, they go get their stuff. It was a product of illegal arrest. They had plenty of time to go get the judge, get a search warrant, information they had, which they chose not to do. As I said, they found it expeditious to do it in this fashion. Sometimes when you get in a big rush to get expeditious, you lose your quarry. . . . **Do it right.**” (AT App, page 41A-42A; MT pages 48-49, emphasis supplied)

Suppression of evidence was the proper remedy since the trial court determined defendant's Fourth Amendment rights were violated.

CONCLUSION AND RELIEF REQUESTED

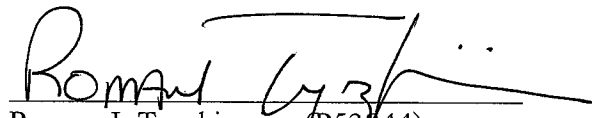
The trial court had a reasonable evidentiary basis for concluding that the police actually coerced defendant into leaving his apartment which constituted “constructive entry” for purposes of a Fourth Amendment search and seizure analysis. The record demonstrated that defendant initially refused to leave his apartment and was ultimately coerced to leave by the persistent demands of numerous police officers. Defendant did not acquiesce to the arrest.

The trial court never ruled that defendant voluntarily opened the door to his apartment. The Fourth Amendment search and seizure analysis should not be limited to the issue if defendant voluntarily or not opened his door but must examine the totality of the circumstances of defendant’s contact with the police.

The trial court and Court of Appeals did not err in concluding that the police officers conduct in response to defendant’s initial stated disinclination to leave the premises could reasonably be taken to constitute actual coercion. Therefore evidence obtained in violation of the Fourth Amendment is inadmissible as substantive evidence in criminal proceedings.

The defendant respectfully request this Honorable Court affirm the trial court’s granting of the motion to suppress, and the Court of Appeals affirmation of that order.

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