No. 2—10—0926
Order filed June 30, 2011



---

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

---

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Lake County. |
| Plaintiff-Appellant, | ) | |
| v. | ) | No. 10—CF—1215 |
| KENDRICK HORTON-McGEE, | ) | Honorable George Bridges, |
| Defendant-Appellee. | ) | Judge, Presiding. |

---

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

**ORDER**

*Held*: The trial court properly granted defendant's motion to suppress the fruits of a warrantless entry into his house to effect his arrest; although some of the relevant factors supported the State's claim of exigent circumstances, there was no evidence of a likelihood of escape and the entry was made nine hours after the police learned his address (during which time they could have obtained a warrant), such that the warrantless entry was not reasonably necessary to effect the arrest.

Defendant, Kendrick Horton-McGee, was charged (along with Emily A. DaValle, who is not a party to this appeal) with three counts of home invasion (720 ILCS 5/12—11(a)(1), (a)(2) (West 2010)), one count of residential burglary (720 ILCS 5/19—3(a) (West 2010)), two counts of attempted aggravated robbery (720 ILCS 5/8—4(a), 18—5(a) (West 2010)), and one count of

criminal trespass to a residence (720 ILCS 5/19—4(a)(2) (West 2010)). He moved to suppress evidence that was seized from his home without a warrant. The trial court granted the motion and denied the State's subsequent motion for reconsideration. The State timely appeals. We affirm.

## I. BACKGROUND

At the hearing on defendant's motion, Michael Langer, a detective with the Village of Gurnee police department, testified that, on April 13, 2010, he learned that a home invasion had occurred in Gurnee. The victim, Christina Herl, had reported that, at about 9 p.m. on April 13, 2010, two men, one black and one Hispanic, came to her door asking for someone. She became suspicious because she did not know the men. When she stuck her head out the door to see if anyone else was with the men, they charged into the residence. They started grabbing her or pushing her, and the black male pulled a gun from his waistband and put it to her forehead. Later that evening, just before midnight, Langer spoke with DaValle at the police station. DaValle provided him with the name "Kendrick." With DaValle's consent, Langer searched her cell phone and obtained a phone number and an address for defendant. On the morning of April 14, 2010, Langer, along with three other officers, went to Margo Horton's residence for the purpose of locating defendant.

According to Langer, when he arrived at Horton's residence, he and another officer went to the front door, while two officers went to the back of the residence. Langer knocked on the door, and no one answered. Langer knocked on the door a second time, using a closed fist to make a louder noise. As he was knocking on the door, the door creaked open. Langer shouted into the house, announcing the presence of police. When he received no response, he leaned his head into the residence to get more vocal. At that point, he heard water running upstairs. He again shouted out that the police were present. After the third announcement, he saw somebody walk across the

upstairs wearing a towel. He stated that "[a]t that point [he] entered in the residence." When asked: "Tell us when you entered into the residence," he testified:

> "After I spoke with the individual that was upstairs indicating—the individual, that's who I was looking for, and I mentioned Kendrick Horton-McGee, and then the individual said he is not home; I'm Kendall. I said all right, Kendall, I still need you to come down and talk to me. So then we waited, and then as he was coming down when I saw him come down it was obvious that it was Kendrick Horton-McGee because of the identifiers of his booking photos from our previous arrests and obviously knowing what Kendall looks like and what Kendrick looks like. So then I asked Kendrick why he was lying to me, and he said that he thought it was the probation officer."

According to Langer, "[a]t that point [he] knew that [he] was going to be taking [defendant] into custody for the investigation." He placed him in custody for the investigation of the home invasion.

Langer testified that, after he placed defendant in custody, he allowed defendant to go upstairs to get dressed. Langer and another officer escorted defendant upstairs. Langer did not ask defendant for consent to search the residence, because "[he] wasn't searching the residence." While defendant was getting dressed, Langer saw the barrel of a gun sticking out from in between two mattresses. After defendant was taken to the squad car, Langer recovered the gun.

Defendant testified that he lives with Horton (his mother) and his three brothers. At about 9 a.m. on April 14, 2010, he was in the shower and he heard someone ask, "[A]re you Kendrick[?]" He said "no," and he walked to his room to put clothes on. He saw the officers standing at the bottom of the stairway, which is about 10 to 15 feet away from the front door. As he was getting dressed, the officers entered his room. They asked him if he was Kendrick Horton, and he asked

them if they had a warrant. They told him to get dressed and then they arrested him. After the officers placed him in the police car, they reentered the house. When they returned, about 10 to 20 minutes later, they showed him a BB gun. According to defendant, the BB gun was kept under his mattress.

Horton testified that she is defendant's mother and that she also has a son named Kendall. Horton described the layout of her home as follows. When you enter the front door, you see a stairway leading upstairs. The foot of the stairway is about 10 steps from the front door. A bathroom is at the top of the stairway and can be seen from the bottom of the stairway. There are three bedrooms upstairs. One belongs to defendant, one belongs to Kendall, and one belongs to her. She did not give the police consent to search her home.

Following the hearing, the trial court granted defendant's motion. Relying on *Payton v. New York*, 445 U.S. 573 (1980), the trial court stated:

> "I don't see much of a distinction between this case. The officers had time to get a search warrant. They chose not to. They went to this home. And they saw this defendant, and when they recognized him as being the defendant, they then essentially arrested him on that fact and then escorting him up to the home—or to his room is where they see the weapon. The officer—or the State's position in this case is let's get around the issue of how they entered the home and why they entered the home to make the arrest and let's resolve this issue on the fact did they have a right to be where they were to see this gun in plain view. And I find that this is on all fours with the Payton decision, and I find that they had no right to enter that home. So I will suppress the B-B gun that was found."

The State moved for reconsideration and for clarification as to whether the court made a credibility finding in favor of defendant or Langer. The State argued that, if the court found Langer to be more credible, the motion to suppress should be denied because the police entered the residence after arresting defendant and properly seized the BB gun, which was in plain view. The State further argued that, if the court found defendant to be more credible, the motion to suppress should be denied because the pre-arrest entry into defendant's home was justified by exigent circumstances.

Following arguments on the motion, the court ruled as follows:

"I agree with the State that this is a case of credibility. And essentially the Court heard from the officer and the Defendant in this case. This Court found that the factors in this case were on all fours with Payton. It is very similar to Payton's decision [which] essentially dealt with two cases, but with one of those cases.

It was a situation where officers entered without a search warrant and without an arrest warrant and made an arrest. As I indicated the last time when I addressed this matter, there must be extenuating circumstances to justify the entry into this home.

Here the officers essentially testified about a knock, and knocking hard enough to open the door. The Defendant ultimately being seen upstairs, then came down and he realized he was going to arrest and ultimately they ended up back in the bedroom and located sticking out of the mattress what appeared to be a handgun. As I recall I believe it was some kind of pellet or bb gun [*sic*]. But in any event, this is a case of credibility, and this Court essentially ruled based upon the credibility.

I didn't believe the officer about the door. That this door just happened to open after a hard knock. So I don't find that it was a peaceful entry into the home. I find there was

entry in the home. They went there looking for this Defendant. I believe they had time to get a search warrant and/or an arrest warrant. They did not take the time. It was their position to go over there. And even when there was no indication that any one was home until they opened the door, and saw the Defendant, or heard water running they nevertheless continued with their entry.

I believe it was a very serious offense. Home invasion is that. But I do not believe that in this case here the officer[s] were acting with probable cause to justify entry in that home.

The Defendant may have known that is the last known address, but they had no information to indicate that this Defendant was in the home at the time they made the entry. And once they made the entry, the Defendant testified that they were in the threshold of his home, he came down, and the officer testified that they were essentially still at the door. I believe they were they [*sic*] threshold of the home."

The State filed a certificate of impairment and appealed pursuant to Illinois Supreme Court Rule 604(a)(1) (eff. July 1, 2006). Defendant did not file a brief. Nevertheless, we may reach the merits even without an appellee's brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

## II. ANALYSIS

The State argues that the court erred in granting defendant's motion to suppress. It argues, as it did below, that under either factual scenario—Langer's or defendant's—the arrest was proper and thus the evidence erroneously suppressed. We disagree. First, we accept the trial court's credibility determination that the warrantless arrest was made after the officers entered the home.

Second, we find that exigent circumstances did not justify the officers' warrantless entry into the home.

In reviewing a trial court's decision on a motion to suppress, we apply a two-part standard of review. First, the trial court's factual findings are given great deference and will be disturbed only if they are against the manifest weight of the evidence. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). Second, the ultimate legal conclusion as to whether suppression is warranted is reviewed *de novo*. *Luedemann*, 222 Ill. 2d at 542.

The chief evil against which the fourth amendment to the United States Constitution is directed is the physical entry of the home. *Payton*, 445 U.S. at 585; *People v. Wear*, 229 Ill. 2d 545, 562 (2008). Thus, the fourth amendment "has drawn a firm line at the entrance to the house" (*Payton*, 445 U.S. at 590), and warrantless searches and seizures inside a home are presumptively unreasonable (*Payton*, 445 U.S. at 586; *Wear*, 229 Ill. 2d at 562). Accordingly, absent exigent circumstances, police may not enter a private residence to make a warrantless search or arrest. *Payton*, 445 U.S. at 590; *People v. Foskey*, 136 Ill. 2d 66, 74 (1990). The State bears the burden of demonstrating exigent circumstances necessitating a warrantless search or arrest. *Foskey*, 136 Ill. 2d at 75.

We first consider whether the trial court's finding that the officers arrested defendant *after* making a warrantless entry into the home is against the manifest weight of the evidence. The State contends that "the trial court made conflicting findings of fact." According to the State, at the suppression hearing, the trial court accepted Langer's testimony and found that defendant was arrested when he came to the door; whereas, on the motion to reconsider, the court stated that it "didn't believe the officer about the door." Thus, the State maintains that the court's latter

pronouncement that it "didn't believe the officer about the door" should be disregarded since the purpose of a motion to reconsider is to address errors in law and not to relitigate or reconsider the facts. We disagree with the State. First, contrary to the State's contention, the court did not expressly credit Langer's testimony at the suppression hearing. In fact, the court stated: "I find that this is on all fours with the Payton decision, and I find that they had no right to enter that home." It seems from this statement that the court credited defendant's testimony. In any event, to the extent that the court's ruling was unclear, the State sought and received clarification. In response to the State's motion for reconsideration and clarification, the court made it clear that it found defendant more credible and that the officers entered the home prior to effectuating the arrest. As the State sought clarification, it cannot now argue that in so clarifying the court erred. In sum, the court found more credible defendant's testimony that the officers arrested him *after* making a warrantless entry into the home, and we cannot say that such a finding is manifestly erroneous.

We also note that the State asserts that, although defendant initially testified that the police came walking into his room after he had put on his clothes, he later testified that when he first saw the police they were at the foot of the stairs. This testimony is not inconsistent. According to defendant, he walked from the bathroom to his room. Thus, he likely first saw the police at the foot of the stairs at that time. He never expressly testified that he first saw the police when they came to his room. In any event, he did expressly testify that he never went to the door.

Because we have accepted the court's credibility determination, it follows that we must reject the State's argument that the arrest was lawful because it occurred in a "public place," *i.e.*, the doorway of his home. Relying on *United States v. Santana*, 427 U.S. 38, 42 (1976), *Wear*, 229 Ill. 2d at 568, and *People v. Graves*, 135 Ill. App. 3d 727, 730-31 (1985), the State argues that "by

coming to the door, the defendant was in a public place for purposes of the fourth amendment and could have no reasonable expectation of privacy." Those cases are distinguishable. Unlike in *Santana*, defendant was not standing in the open doorway of the house when the police arrived (*Santana*, 427 U.S. at 40); to the contrary, he was in an upstairs bathroom showering. Similarly, unlike in *Graves*, defendant did not come to the doorway. See *Graves*, 135 Ill. App. 3d at 730. And finally, unlike *Wear*, the present case does not involve hot pursuit. In *Wear*, the court found that, where the police pursued the defendant for suspicion of driving under the influence and followed him into a residence, the subsequent arrest was proper. Here, there was no evidence tending to suggest that this is a case of hot pursuit.

We next address the State's argument that the officers' warrantless entry was justified by exigent circumstances. Recently, in *People v. Davis*, 398 Ill. App. 3d 940, 948 (2010), we discussed the principles to be applied when determining whether a warrantless entry into a home was justified by exigent circumstances. We restate those principles here:

> "In reviewing the propriety of a warrantless entry into a private residence under claimed exigent circumstances, the guiding principle is reasonableness, and each case must be decided on its own facts. [Citation.] Some of the factors that may be considered in determining whether exigent circumstances existed justifying the warrantless entry into a private residence to effectuate an arrest include the following:
>
> > '(1) whether the offense under investigation was recently committed; (2) whether there was any deliberate or unjustifiable delay by the officers during which time a warrant could have been obtained; (3) whether a grave offense is involved, particularly one of violence; (4) whether the suspect was reasonably believed to be

> armed; (5) whether the police officers were acting upon a clear showing of probable cause; (6) whether there was a likelihood that the suspect would have escaped if not swiftly apprehended; (7) whether there was strong reason to believe that the suspect was on the premises; and (8) whether the police entry, though nonconsensual, was made peaceably.' [Citation.]
>
> This list is not exhaustive, nor are the factors included in it cardinal maxims that are to be applied rigidly in each case. [Citation.] Rather, the totality of the circumstances facing the officers at the time of the entry must be considered and, based on those circumstances, it must be determined whether the officers acted reasonably. [Citation.] 'The circumstances must militate against delay and justify the officers' decision to proceed without a warrant.' [Citation.]" *Davis*, 398 Ill. App. 3d at 948.

The State argues that exigent circumstances justified the officers' warrantless entry into defendant's home and warrantless arrest of defendant. In support, the State points to the seriousness of the offense, the speed with which the police acted, the officers' peaceful entry, and the reasonableness of the officers' belief that defendant was in the home. According to the State, given the circumstances, "there was little opportunity to obtain a warrant." Although some of the factors to be considered might favor the State, we are not persuaded that these circumstances, without more, necessitated a warrantless entry and arrest.

As noted above, in determining whether the officers acted reasonably, we must consider the totality of the circumstances. Cases have held that, even where many of the factors to be considered have favored a finding of exigency, the warrantless arrest was unjustified where there was no likelihood of flight. See *Davis*, 398 Ill. App. 3d at 949 (and cases cited therein). Here, there was

absolutely no evidence establishing that " 'there was a likelihood that the suspect would have escaped if not swiftly apprehend.' " *Davis*, 398 Ill. App. 3d at 948 (quoting *Foskey*, 136 Ill. 2d at 75). For instance, the State presented no evidence that defendant knew that the police had been called or that they were on their way to his home. See *Davis*, 398 Ill. App. 3d at 949; see also *Foskey,* 136 Ill. 2d at 84 (reversing the trial court's determination that exigent circumstances justified the warrantless arrest of the defendant in the defendant's home where there was no indication that the defendant knew of the planned arrest or anything that would have prompted him to flee).

Moreover, we disagree with the State's assertion that "there was little opportunity to obtain a warrant." While the State emphasizes the speed with which the officers acted, arguing that it demonstrates that the officers acted reasonably, the circumstances here do not suggest that any delay in obtaining a warrant would have impeded the investigation or apprehension of defendant. See *Davis*, 398 Ill. App. 3d at 949. Langer testified that the crime occurred at 9 p.m. and that, later that evening, just before midnight, he spoke with DaValle, who provided him "Kendrick." The officers arrived at defendant's residence about nine hours later. While the failure to obtain a warrant might not have been deliberate, here it was unjustifiable. Given the circumstances, nine hours was ample time to obtain a warrant.

Accordingly, because "the facts do not suggest that immediate action was reasonably required to succeed in making the arrest" (*Foskey,* 136 Ill. 2d at 80), we hold that the warrantless entry into defendant's home and his warrantless arrest were improper. Indeed, as we noted in *Davis*, "were we to hold that exigent circumstances existed justifying the warrantless entry and arrest in the present case, police could avoid the warrant requirement of the fourth amendment so long as they quickly and accurately tracked a defendant to a private residence and entered in a peaceful manner." *Davis*,

398 Ill. App. 3d at 951. Because the warrantless entry and arrest were improper, the officers' subsequent seizure of the BB gun was likewise improper and the court's suppression order is affirmed.

## III. CONCLUSION

Based on the foregoing, we affirm the order of the circuit court of Lake County.

Affirmed.