COURT OF APPEALS, STATE OF COLORADO,
101 West Colfax Ave., Suite 800
Denver, CO 80202

FILED IN THE
COURT OF APPEALS

Appeal from the 17th Judicial District
The Honorable C. Vincent Phelps
District Court Case No. 07 CR 634

▲ COURT USE ONLY▲

THOMAS ANTHONY LOFTON,

Defendant/Appellant,

vs.

PEOPLE OF THE STATE OF COLORADO,

Plaintiff/Appellee.

Case No. 10 CA 286

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DEFENDANT/APPELLANT'S OPENING BRIEF

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☐ It contains words.

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.,p.) not to an entire document, where the issue was raised and ruled on.

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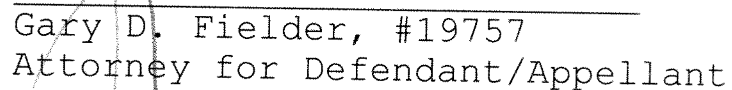
It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.



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STANDARD OF REVIEW

Appellant appeals the ruling of law by the Trial Court, Volume 1, Page 127. Therefore, the proper standard of review for this appeal is a review *de novo*. *People v. Quezada*, 731 P.2d 730, 732-33 (Colo. 1987).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

I. The trial Court erred, when, at the motions hearing it ruled that the police officer's search was reasonably executed, pursuant to a warrant, under the Constitution of the State of Colorado, despite the fact that munitions/tear gas devices were used on private citizens and upon private real and personal property.

STATEMENT OF THE CASE

On or about February 22, 2007, the Defendant/ Appellant, Thomas Anthony Lofton (hereinafter referred to as "Mr. Lofton"), was arrested in a basement at 11360 Corona Drive in Northglenn, Colorado. The record on appeal in this case will be referred to by volume (V), page number (P), and line or paragraph L or ¶), as applicable. (V. 1, pp. 9-10)).

Shortly thereafter, Mr. Lofton was charged with Possession with Intent to Distribute a Schedule II

Controlled Substance, and, among other things, as a Special Offender, contrary to C.R.S. §18-18-407(1)(f). (V. 1, p. 1).

Soon thereafter, Mr. Lofton entered a not guilty plea and undersigned counsel filed certain motions to suppress. (V. 1, pp. 20-21).

The above-referenced arrest was in relation to a search warrant executed at the above-referenced address. (V. 1, pp. 28-33). Mr. Lofton challenged the sufficiency of the warrant, and the way upon which the warrant was executed. (V. 1, pp. 20-21).

The motions were denied without a hearing on August 24, 2007. (V. 1, p. 112).

Subsequently, the matter proceeded to trial on November 13, 2007, and Mr. Lofton was found guilty after deliberation of Possession With Intent to Distribute and under the special offender sentencing enhancer. (V. 1, pp. 64-66).

On February 29, 2008, Mr. Lofton was sentenced to 16 years in the Department of Corrections, suspending six of that upon successful completion of intensive

supervised program. (V. 1, pp. 67-69).

Mr. Lofton elected to appeal the trial court's ruling in not allowing Mr. Lofton to challenge the sufficiency of the warrant. (V. 1, p. 75).

An appeal was filed and the case was remanded to the trial Court to determine the motion to suppress the search warrant and to challenge the reasonableness of the search itself. (V. 1, pp. 75-101).

At the motions hearing, the State offered evidence which established the use of chemical munitions in the basement of the searched home which contaminated the house requiring hazmat personnel and ultimate cleanup. (T. 1, p. 13, l. 16).

Mr. Lofton argued that the use of chemical munitions in the ordinary search of a residence without more information to the District Court was unreasonable in light of the damage such actions would cause to personal property. (V. 1, p. 9, ll. 11-21).

A motions hearing was held on January 8, 2010, and concluded on January 11, 2010. At that time, the Court denied Mr. Lofton's motion to suppress, (V. 1, p. 16,

ll. 22-25), thereby finding that both the search and the execution of the search warrant were reasonable (V. 1, p. 16, ll. 13-22).

ARGUMENT

The legal grounds for challenging a search warrant are limited to five specific circumstances. Cr.Crim.P. 41(e). Of special importance here is that a search warrant may be challenged upon the grounds that it was illegally executed. Cr.Crim.P. 41(e)(5); Cr.Crim.P. 41(d)(5)(V). It clearly manifests that the legislative intent is that a search warrant, by default, be executed in a knock and announce fashion. "The officers executing the search warrant shall first announce their identity, purpose and authority, and if they are not admitted, then may make forcible entry." Cr. Crim.P.(d)(5)(V). *Emphasis added.*

The trial Court erred at the motions hearing when it ruled that the police officers' search was reasonably executed pursuant to warrant, despite the fact that the munitions/tear gas devices were used on private citizens and upon real and personal property

without first hand knowledge by the officers that such force was reasonable and necessary.

A search warrant may be executed by a neutral judge or magistrate upon application by the police or District Attorney. *People v. Gall,* 30 P.3d 145, 149 (Colo. 2001). In order to issue a search warrant, the neutral judge or magistrate must find, among other things, that there is a reasonable cause that the items sought in the search warrant will be found at that particular place, or upon that particular person. C.R.S. §16-3-303(1)(d).

A search warrant must be executed within ten days of its issuance. Cr.Crim.P. 41(d)(5)(VI).

Additionally, the execution of the search warrant must be reasonable. Article II, Section 7 of the Colorado Constitution.

In the present case, the search warrant did not meet the reasonable test. Originally, in this case, a no knock search warrant was requested by the North Metro Drug Task Force by use of an Affidavit. (T. 1, p. 27, ll. 4-7).

In the Application and Affidavit for Search Warrant after the original no knock search warrant was refused, the requesting Officer Dudley did not, at any point, state upon the record that a confidential informant had informed him that Mr. Lofton might have weapons available to him. All that was set forth in the warrant was Mr. Lofton's alleged drug transactions. (V. 1, pp. 30-34).

Despite the lack of specificity of the possibility of guns in the residence, the police elected to indiscriminately use chemical munitions before their entry into the residence. (T. 1, p. 21, LL. 17-18).

In 2000, the 7th Cir. Court of Appeals expressed their disdain for the increasing police use of stun grenades and other devices.

"Police cannot automatically throw bombs into the drug dealers houses, even if the bomb goes by the euphemism 'flash bang device'." *United States* v. Jones, 214 F.3d 836, 837 (7th Cir. 2000).

The legal grounds for challenging a search warrant are limited to five specific circumstances. Cr.Crim.P.

41(e).

Of special importance here, is that a search warrant may be challenged upon the grounds that it was illegally executed. Cr.Crim.P. 41(e)(5).

Cr.Crim.P. 41(d)(V) clearly manifests legislative intent that a search warrant, by default, be executed in a knock and announce fashion:

> the officers executing the search warrant shall first announce their identity, purpose and authority, and if they are not admitted, may make forcible entry without prior announcement of the warrant expressly authorized them to do so if the particular facts and circumstances known to them at the time the warrant is to be executed adequately justifies dispensing with the requirement.

Cr.Crim.P. 41(d)(5)(V). (Emphasis added).

In the instant case, the officers applied for and did not receive a no knock warrant, and the form of the warrant itself had to be changed to a knock and announce warrant. (T. 1, p. 27, ll. 4-14).

The officers in charge of the search never announced their identity, purpose and authority before making forcible entry. In fact, Officer Scott Dodendorf knocked on the door while Officer Shane

Hendrickson performed a ten second countdown. (T. 1, p. 8, ll. 4-12).

C.R.S. §16-3-304(3)(b) specifically states "that the police may use and employ such force as reasonably necessary in the performance of the duties commanded by the warrant."

Whether the force used in a particular case is objectively reasonable depends on the facts and circumstances of the case, including such factors as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers, and whether he is actively resisting or attempting to evade by flight." *Graham v. Conner*, 490 U.S. 386 *id.* at 396.

The use of a flash bang, gas or concussion device is neither per se objectionably reasonable nor unreasonable. The reasonable of it depends on the facts or circumstances of each case. *United States v. Meyers,* 106 F.3d 936 (10th Cir. 1997).

In the instant case, the search warrant as submitted by the North Metro Drug Task Force, did not

articulate whether or not the suspect posed an immediate threat to the safety of others, possessed weapons, or had he ever actively resisted arrest or attempted to evade arrest by flight. (V. 1, p. 30-33).

Police officers may lawfully use some degree of force to fulfill their duties, however, this right is violated only if the force used was "objectively unreasonable." *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985).

In *Langford v. Superior Court*, 729 P.2d 822 (California) (1987), officers may only detonate certain devices after they have seen fully into a targeted room. In the instant case, the officers testified that they saw partially through a window, and were unable to see the entire room. (T. 1, p. 14, ll. 7-9).

In *Kirk v. Watkins*, 182 F.3d 932 (10th Cir. 1989) the Court found that the use of flash bang/tear gas devices were objectively reasonable considering that guns and drugs are a volatile combination. The Court stated that an officer executing a search warrant could reasonably believe that a distraction device would be

likely to lessen the possibility of injury by allowing the police to subdue a Defendant without further violence. However, in this case, the agents had reason to believe that *Kirk* had a number of loaded firearms at his disposal, and that he had threatened to kill officers if they entered his home again to serve a search warrant.

In the instant case, officers never set forth in either search warrant that expressed any of the concerns as the officers in *Kirk*.

The method of executing the search warrant violated Mr. Lofton 4th Amendment right against an unreasonable search. The officers failed to comply with the knock and announce requirement in violation of the 4th Amendment of the U.S. Constitution. *Wilson v. Arkansas*, 514 U.S. 927 – 115 Supreme Ct. 1914, 1918, 131 L.Ed. 2d 976 (1995).

In *United States v. Meyers*, 106 F.3d 936 (10th Cir. 1997), the Court set out the "objectively reasonable standard in light of the circumstances confronting them in conjunction with *Graham v. Connor*, 490 U.S. 386, 397

109 (Supreme Ct. 1865, 1872, 104 L.Ed. 2d, 443 (1989), the Court said, "the use of a flash bang device in a house where innocent and unsuspecting children slept gave us great pause and certainly we would not condone such a device as a routine matter." *Jenkins v. Woods*, 81 F.3d 988, 996-98 (10th Cir. 1996).

In *Graham*, the Court found that the officers had legitimate concerns in not only doing their job, but their safety.

The Court found that they agents knew that Mr. Meyers had a history of illegal drug trafficking and had spent time in federal prison for a firebombing incident and obviously had a lengthy pattern of criminal activity.

Based upon that, the Court found that the actions of the officers reasonable due to safety concerns.

In the instant case, the same did not exist. No mention of specific weapons as set forth by the confidential informant were included in the search warrant, and the existence of these weapons was only brought to light upon the officers' testimony in the

motions hearing.

CONCLUSION

The Trial Court erred when at the motions hearing, it ruled that the police officer's search was reasonably executed, pursuant to a warrant, under the Constitution of the State of Colorado, despite the fact that munitions/tear gas devices were used on private citizens and upon private real and personal property.

Mr. Lofton respectfully requests this Court issue an order finding that the trial Court erred in denying the Defendant's motion to suppress and issue an order finding that the trial Court's finding that the use of tear gas devices were reasonable.

In light of the trial Court's err, Mr. Lofton respectfully requests that the trial Court be reversed

with such instructions as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I have on this 3rd day of November, 2010, mailed a true and correct copy of the foregoing **DEFENDANT/APPELLANT'S OPENING BRIEF** to the following, postage prepaid:

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1525 Sherman Street, 5th Floor
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Shelley Packer