

1992

Utah v. Ruiz : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Lisa J. Remal; Elizabeth Holbrook; Salt Lake Legal Defender Association; Attorneys for Appellant. R. Paul Van Dam; Attorney General; J. Kevin Murphy; Assistant Attorney General; Attorneys for Appellee.

Recommended Citation

Brief of Appellee, *Utah v. Ruiz*, No. 920126 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/4042

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
50

DOCKET NO. 92-0126-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Appellee, : Case No. 920126-CA
v. :
RENE RUIZ, : Priority No. 2
Defendant-Appellant. :

BRIEF OF APPELLEE

- - - - -

APPEAL BY DEFENDANT OF CONVICTION FOR
UNLAWFUL POSSESSION OF A CONTROLLED
SUBSTANCE, A THIRD DEGREE FELONY, IN
VIOLATION OF UTAH CODE ANN. §§ 58-37-
8(2)(a)(i), 58-37-8(2)(b)(ii) (1990), IN THE
THIRD JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, UTAH, THE HONORABLE TIMOTHY
R. HANSON, PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
J. KEVIN MURPHY (5768)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

Attorneys for Appellee

LISA J. REMAL
ELIZABETH HOLBROOK
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

FILED

JUL 23 1992

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Appellee, : Case No. 920126-CA
v. :
RENE RUIZ, : Priority No. 2
Defendant-Appellant. :

BRIEF OF APPELLEE

- - - - -

APPEAL BY DEFENDANT OF CONVICTION FOR
UNLAWFUL POSSESSION OF A CONTROLLED
SUBSTANCE, A THIRD DEGREE FELONY, IN
VIOLATION OF UTAH CODE ANN. §§ 58-37-
8(2)(a)(i), 58-37-8(2)(b)(ii) (1990), IN THE
THIRD JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, UTAH, THE HONORABLE TIMOTHY
R. HANSON, PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
J. KEVIN MURPHY (5768)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

Attorneys for Appellee

LISA J. REMAL
ELIZABETH HOLBROOK
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTION AND NATURE OF PROCEEDINGS	1
ISSUE PRESENTED AND STANDARD OF APPELLATE REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	6
ARGUMENT	
POINT I DEFENDANT HAS WAIVED THE "NO-KNOCK" ISSUE, AND HAS NOT SHOWN THE MANNER IN WHICH THE SEARCH WAS ACTUALLY CONDUCTED; THEREFORE, THE DENIAL OF HIS MOTION TO SUPPRESS SHOULD BE SUMMARILY AFFIRMED	7
POINT II THE MAGISTRATE PROPERLY AUTHORIZED A NIGHTTIME SEARCH, AND THE TRIAL COURT PROPERLY AFFIRMED THE MAGISTRATE'S DECISION	11
CONCLUSION	18

TABLE OF AUTHORITIES

CASES CITED

	Page
<u>Dalia v. United States</u> , 441 U.S. 238, 99 S. Ct. 1682 (1979) . . .	13
<u>Illinois v. Gates</u> , 462 U.S. 213, 103 S. Ct. 2317 (1983)	3
<u>Meadow Fresh Farms v. Utah State University</u> , 813 P.2d 1216 (Utah App. 1991)	11
<u>People v. Barber</u> , 449 N.Y.S. 2d 140 (N.Y. App. Div. 1982)	9
<u>People v. Hughes</u> , 767 P.2d 1201 (Colo. 1989)	18
<u>People v. Kimble</u> , 44 Cal. 3d 480, 244 Cal. Rptr. 148, 749 P.2d 803 (1988)	18
<u>State v. Ailport</u> , 412 N.W. 2d 35 (Minn. App. 1987)	18
<u>State v. Archambeau</u> , 820 P.2d 920 (Utah App. 1991)	7
<u>State v. Ayala</u> , 762 P.2d 1107 (Utah App. 1988), <u>cert. denied</u> , 773 P.2d 45 (Utah 1989)	4
<u>State v. Bartley</u> , 784 P.2d 1231 (Utah App. 1989).	12
<u>State v. Buck</u> , 756 P.2d 700 (Utah 1988) 8, 9, 10	
<u>State v. Carter</u> , 707 P.2d 656 (Utah 1985)	7
<u>State v. Dorsey</u> , 731 P.2d 1085 (Utah 1986)	17
<u>State v. Fixel</u> , 744 P.2d 1366 (Utah 1987)	10
<u>State v. Lee</u> , 633 P.2d 48 (Utah), <u>cert. denied</u> , 454 U.S. 1057, 102 S. Ct. 606 (1981)	14
<u>State v. Leonard</u> , 175 Utah Adv. Rep. 49, 54 n.9 (Utah App. Dec. 5, 1991), <u>petition for cert.</u> <u>filed</u> , No. 920140 (Utah March 11, 1992)	17
<u>State v. Menke</u> , 787 P.2d 537 (Utah App. 1990)	13
<u>State v. Purser</u> , 182 Utah Adv. Rep. 28, 31 n.1 (Utah App. March 11, 1992)	9
<u>State v. Rowe</u> , 806 P.2d 730 (Utah App.), <u>cert. granted</u> , 817 P.2d 327 (Utah 1991) 1, 5, 8, 12, 13, 15, 16, 17	

<u>State v. Rowe</u> , No. 910165	10
<u>State v. Sery</u> , 758 P.2d 935 (Utah App. 1988)	3
<u>State v. Sessions</u> , 583 P.2d 44 (Utah 1978)	10
<u>State v. Vigil</u> , 815 P.2d 1296 (Utah App. 1991)	16
<u>State v. Weaver</u> , 817 P.2d 830 (Utah App. 1991)	14, 15, 16
<u>United States v. Pryor</u> , 652 F. Supp. 1353 (D. Me. 1987)	18
<u>United States v. Searp</u> , 586 F.2d 1117 (6th Cir. 1978), cert. denied, 440 U.S. 921, 99 S. Ct. 1247 (1979)	10, 13, 14

CONSTITUTIONAL PROVISIONS, STATUTES & RULES

Fed. R. Crim. P. 41 (West 1991 Rev. Ed.)	14
U.S. Const. art I, cl. 3	16
Utah Code Ann. § 58-37-8 (1990).	1, 3
Utah Code Ann. § 77-23-1 (1990)	12
Utah Code Ann. § 77-23-5 (1990)	2, 12
Utah Code Ann. § 77-23-10 (1990)	2, 12
Utah Code Ann. § 78-2a-3 (1992)	1
Utah Const. art. IV, § 10	16
Utah R. Crim. P. 12	7
Utah R. Evid. 201(b)	15

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Appellee, : Case No. 920126-CA
v. :
RENE RUIZ, : Priority No. 2
Defendant-Appellant. :

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals his conviction of unlawful possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. §§ 58-37-8(2)(a)(i), 58-37-8(2)(b)(ii) (1990). This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (1992).

ISSUE PRESENTED ON APPEAL
AND
STANDARD OF APPELLATE REVIEW

Did a warrant to search defendant's apartment, which was supported by probable cause, also properly authorize police officers to conduct the search at night, and on an unannounced, "no-knock" basis?

To justify a no-knock, nighttime search, the affidavit supporting a warrant application must make a particularized showing that such a search is necessary. State v. Rowe, 806 P.2d 730, 732-33 (Utah App.), cert. granted, 817 P.2d 327 (Utah 1991). As set forth in the State's argument, this requirement entails deferential appellate review, asking only whether the affidavit

contains some factual information upon which a no-knock, nighttime search could be authorized.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The fourth amendment to the United States Constitution, and Article I, section 14 of the Utah Constitution are virtually identical in text. The former provision reads:

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.

Utah's "no-knock" search statute, Utah Code Ann. § 77-23-10 (1990), states in pertinent part:

When a search warrant has been issued . . . the officer executing the warrant may use such force as is reasonably necessary to enter:

(2) Without notice of his authority and purpose, if the magistrate issuing the warrant directs in the warrant that the officer need not give notice. The magistrate shall so direct only upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given.

Utah Code Ann. § 77-23-5(1) (1990), governing authorization of a nighttime search, states:

The magistrate must insert a direction in the [search] warrant that it be served in the daytime, unless the affidavits or oral testimony state a reasonable cause to believe a search is necessary in the night to seize the property prior to it being concealed, destroyed, damaged or altered, or for other good reason; in which case he may insert a

direction that it be served any time of the day or night.

STATEMENT OF THE CASE

Defendant Rene Ruiz was charged with unlawful possession of a controlled substance with intent to distribute, a second degree felony (R. 5). He moved to suppress evidence seized in a warranted search of his apartment, arguing that authority to conduct the search on a nighttime basis was improperly granted (R. 25). The motion was denied (R. 60).

Defendant then pleaded guilty to a reduced charge of possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. §§ 58-37-8(2)(a)(i), 58-37-8(2)(b)(ii) (1990) (R. 1). As permitted under State v. Sery, 758 P.2d 935 (Utah App. 1988), defendant reserved the right to appeal the denial of his motion to suppress (R. 138). He was sentenced to zero to five years in the Utah State Prison and fined (R. 93-94). On appeal, he challenges only the magistrate's authorization in the search warrant to conduct the search on a no-knock basis and at nighttime.

STATEMENT OF FACTS

Because defendant does not challenge the underlying probable cause finding, this appeal proceeds upon the premise that the magistrate properly found probable cause, that is, "a fair probability that contraband or evidence of a crime" would be found in defendant's apartment. See Illinois v. Gates, 462 U.S. 213, 235, 103 S. Ct. 2317, 2332 (1983). This premise is supported by a controlled cocaine buy in defendant's apartment

(warrant affidavit at 2, found at R. 55 and copied at Appendix 2 to Br. of Appellant). See State v. Ayala, 762 P.2d 1107, 1110 (Utah App. 1988) (single drug buy established probable cause), cert. denied, 773 P.2d 45 (Utah 1989). The facts bearing upon the magistrate's authorization to conduct the search on a no-knock, nighttime basis are therefore of primary concern.

The Warrant and the Search

The warrant affidavit recited that defendant had "intense counter surveillance" measures in place. These measures had been reported by a confidential informant; the police officer affiant had also observed "persons walking back and forth in front of the apartment, writting [sic] down license plates, watching for persons being followed, and or just being a lookout" (affid. at 2). The officer reported that all apparent drug trafficking activity around the apartment had been observed "in the evening hours" (affid. at 3). He related reports from two confidential informants that defendant claimed to have a handgun that he would use to defend his contraband (id.). Finally, the officer, a trained narcotics investigator, recited that "[h]andguns have been found on most narcotic search warrants" (affid. at 2, 3). Accordingly, a no-knock, nighttime entry to conduct the search was requested, and the magistrate granted the request (affid. at 3; warrant at 2, found at R. 52-53 and copied at Appendix 2 to Br. of Appellant).

The warrant was executed on June 5, 1990, and cocaine, packaging materials, and cash was seized, along with four

handguns (search warrant return, found at R. 57-59 and copied at Appendix 2 to Br. of Appellant). However, no other circumstances of the actual search are disclosed in the record: there is no information regarding the precise time of the search, the exact manner of entry, the number of officers involved, the number of persons on the premises when entry was made, or whether such persons, if present, were asleep or awake.

The Motion to Suppress

Defendant's motion to suppress, relying on State v. Rowe, 806 P.2d 730, 732-33 (Utah App.), cert. granted, 817 P.2d 327 (Utah 1991), challenged only the authority to conduct the search at night (R. 25). He did not challenge the warrant's no-knock provision. Counsel and the court determined that no testimony would be needed to decide the motion; accordingly, neither the affiant officer nor defendant testified (R. 97, 104).

The court and counsel discussed Rowe at length, comparing its standards with the warrant affidavit in this case (R. 104-121). The trial court observed that the Rowe nighttime search request had been supported by little more than checked boxes on a pre-printed affidavit (R. 119; see Rowe, 806 P.2d at 731). In contrast here, reading the affidavit as a whole, the court noted the information specifying nighttime drug activity, the evident presence of "lookouts," and a risk of armed resistance, along with an inference of readily disposable contraband (R. 119-21). Accordingly, the court ruled that the

affidavit showed "a reasonable basis" for a nighttime search, and denied the motion to suppress (R. 121).¹

SUMMARY OF ARGUMENT

Because defendant never challenged the no-knock entry, that issue is not properly before this Court. Further, defendant has not established the time when the search actually occurred, nor shown that anybody was home at the time. Absent such facts, he cannot claim harm from the magistrate's authorization of a nighttime search. Accordingly, his appeal should be rejected, for it turns on "facts" not before this Court.

If this was a nighttime search, the warrant affidavit set forth sufficient information to justify it. Once a probable cause finding is made, such that a search will occur, a lower quantum of proof and broad deference should be given to decisions about how to conduct the search. Such deference should account for officer expertise in conducting searches safely and effectively. This affidavit adequately showed particular reasons for conducting a nighttime search, and the nighttime authority granted in the warrant should therefore be reaffirmed.

¹Although the prosecutor submitted findings of fact and conclusions of law to the trial court, defendant objected to them, and the trial court apparently did not sign them (R. 74-79).

ARGUMENT

POINT ONE

DEFENDANT HAS WAIVED THE "NO-KNOCK" ISSUE, AND HAS NOT SHOWN THE MANNER IN WHICH THE SEARCH WAS ACTUALLY CONDUCTED; THEREFORE, THE DENIAL OF HIS MOTION TO SUPPRESS SHOULD BE SUMMARILY AFFIRMED.

Before proceeding to the merits of the issues on appeal, some preliminary matters require attention. As follows, there are questions of waiver and an insufficient factual record. The latter problem may allow for summary disposition of this appeal.

A. Only the Nighttime Search Authorization, Not the No-Knock Authorization, is Properly Before this Court.

First, because defendant specifically challenged only the nighttime search authorization in the warrant (R. 25), his present challenge to the no-knock authorization need not be considered. See Utah R. Crim. P. 12(a) (grounds for motion must be particularly stated). Nor does he show exceptional circumstances that would require review of this issue for the first time on appeal; accordingly, such review should be deemed waived. See State v. Carter, 707 P.2d 656, 660-61 (Utah 1985); State v. Archambeau, 820 P.2d 920, 922-26 (Utah App. 1991).²

²Waiver also bars defendant's attempt to attack the warrant as not meeting constitutional "particularity" requirements (Br. of Appellant at 19-21). An apparent misnumbering of defendant's apartment in the warrant affidavit (affid. at 2; compare affidavit at 1, warrant at 1, warrant return at 1), was never brought to the trial court's attention. Nor was any argument about lack of particularity in the items to be seized made in the trial court.

While this Court need not address the no-knock question, similar policy concerns--such as possible evidence loss and safety considerations--underlie both Utah's no-knock and nighttime search statutes. See State v. Rowe, 806 P.2d 730, 732-34 (Utah App.), cert. granted, 817 P.2d 327 (Utah 1991) (comparing Utah Code Ann. §§ 77-23-10 and 77-23-5(1) (1990)). Therefore, the State's arguments regarding the nighttime search authorization will include reference to no-knock cases. Further, if this Court does not agree that defendant's no-knock challenge was waived, the State's arguments in support of the nighttime authorization also apply to the no-knock question.

B. Because Defendant has Not Shown How the Search Was Actually Conducted, this Court Need Not Review the Nighttime Search Authorization.

As a second preliminary issue, defendant has not established that this search was conducted at night. Nor has he shown that anybody was home when his apartment was searched, or shown the time of the search. Absent such showings, this Court need not review the nighttime search authorization.

In State v. Buck, 756 P.2d 700 (Utah 1988), officers conducted a warranted residential search upon a no-knock entry, failing to recognize that their warrant did not authorize such entry. However, nobody was home at the time. Id. at 700-01 & n.1. The Utah Supreme Court held that because nobody was home when the search occurred, the safety and privacy interests underlying the normal "knock-and-announce" requirement had not

been implicated. Id. Therefore, suppression of the seized evidence was not required. Id. at 702-03 (citing authorities).

Under Buck, if a search warrant is executed in a clearly unauthorized manner, but no harm to privacy and safety interests results, beyond that inherent in a routine search, the fruits of the search are admissible as evidence. It should follow that if a no-knock or nighttime entry is authorized in a warrant, but officers do not actually execute the warrant on such basis, the special concerns of such searches are also not implicated. Indeed, People v. Barber, 449 N.Y.S. 2d 140, 145 (N.Y. App. Div. 1982), reached precisely this result: evidence was not suppressed where police did not rely upon an unjustified no-knock authorization, but instead announced themselves when executing the warrant.

In light of Buck and Barber, the merits of defendant's challenge to the authorization of a nighttime search should not be addressed. It may seem likely that because they had authority to do so, the officers did conduct a nighttime search. However, it is possible that they did not. It is also possible that, as in Buck, nobody was home when the entry was made. Nor is there any evidence about the hour when the search took place. This is important, for not all nighttime searches are equally traumatic. See State v. Purser, 182 Utah Adv. Rep. 28, 31 n.1 (Utah App. March 11, 1992 (search when occupants are more likely to be awake is less problematic)).

The facts of the search as actually conducted are also necessary to decide whether, even if an improper nighttime search occurred, suppression is the required remedy.³ In United States v. Searp, 586 F.2d 1117 (6th Cir. 1978), cert. denied, 440 U.S. 921, 99 S. Ct. 1247 (1979), a warranted search that was supported by probable cause, 586 F.2d at 1119, but where the warrant improperly authorized a nighttime search under the applicable federal rule, id. at 1122, did not require suppression of the seized evidence. Instead, finding no police "bad faith," and no unduly "abusive" search, the court held that suppression was not required, id. at 1125. Similarly, in State v. Fixel, 744 P.2d 1366 (Utah 1987), the Utah Supreme Court held that evidence obtained by a police officer acting outside his statutory geographic authority was not suppressible. Relying on Searp and other authorities, the Court held that absent deliberate, "bad faith" police statutory violations, or violations amounting to the deprivation of fundamental constitutional rights, suppression was not required. 744 P.2d at 1368-69 & nn. 6-13.

The reasonableness of a warranted search "depends on the facts of the case." Buck, 756 P.2d at 703. Similarly, in State v. Sessions, 583 P.2d 44, 45 (Utah 1978), the Utah Supreme Court approved the rule that "a defendant must submit some evidence in support of his motion to suppress or the motion would

³As the petitioner on certiorari in Rowe, now under advisement in the Utah Supreme Court the State has argued, as it does here, that suppression is not always required when a search is erroneously conducted at night. State v. Rowe, No. 910165, Br. of Petitioner at 8-17.

be denied." Here, in failing to establish facts upon which the reasonableness of this search can be assessed, defendant has left the State and this Court with no information upon which his motion to suppress can be meaningfully reviewed.

Under these circumstances, any analysis of the nighttime search authorization will amount to an advisory opinion, based upon hypothetical "facts," disfavored by appellate courts. See Meadow Fresh Farms v. Utah State University, 813 P.2d 1216, 1220-21 & n.8 (Utah App. 1991). This Court should decline to issue such an opinion; instead, it should summarily affirm the denial of defendant's motion to suppress.

POINT TWO

THE MAGISTRATE PROPERLY AUTHORIZED A NIGHTTIME SEARCH, AND THE TRIAL COURT PROPERLY AFFIRMED THE MAGISTRATE'S DECISION.

If it is assumed that this was a nighttime search, the magistrate's authorization of such search can be examined. Upon reviewing Rowe, the trial court denied defendant's motion to suppress. Under the correct standards of proof and review for nighttime search authorization, this ruling should be affirmed.

A. Nighttime Search Authorization Should be
Deferentially Reviewed for Reasonableness.

Defendant clearly believes that a nighttime search requires a showing of "probable cause" that such a search is necessary (Br. of Appellant at 14, 19), but offers no supporting analysis. He is mistaken. As follows, the decision to conduct a search at night should require a less strict showing, and be deferentially reviewed.

1. Reasonableness, Not Probable Cause, Is the Test.

Utah Code Ann. § 77-23-5(1) (1990) requires that "reasonable cause" be shown to conduct a nighttime search. This phrase lends some support to defendant's belief that a nighttime search request must satisfy the "probable cause" level of proof. See State v. Bartley, 784 P.2d 1231, 1236 (Utah App. 1989) (equating statutory "reasonable cause" for warrantless arrest with "probable cause"). The main opinion in Rowe, however, noted that the "precise quantum of information" to justify a nighttime search is undefined. 806 P.2d at 733. For several reasons, cause to conduct a search at night should require a lesser quantum of proof than probable cause.

First, section 77-23-5(1) comes into play only when probable cause to issue the warrant has already been shown. The statute simply directs that warrants must normally be served in the daytime, unless cause for a nighttime search exists. It presupposes the issuance of a warrant, and addresses only the question of when the search will occur. Thus probable cause, in its usual sense, is no longer in issue when a nighttime search request is made.

Second, the warrant overcomes the core privacy expectation of the occupants of the place to be searched: the premises are going to be entered, even over the occupants' possible objection. See Utah Code Ann. § 77-23-10(1) (1990) (if occupants do not promptly respond to announcement of purpose, searching officers may forcibly enter). Indeed, Utah Code Ann. §

77-23-1 (1990) defines a search warrant as a judicial order to search the premises.

Third, the police, commanded to conduct a search, should be allowed some latitude in choosing the best way and time to perform this duty. See Dalia v. United States, 441 U.S. 238, 257, 99 S. Ct. 1682, 1693 (1979) (question of how to conduct warrant-authorized search "is generally left to the discretion of the executing officers," subject to reasonableness requirement). Accordingly, the nighttime search statute should not be given an over-restrictive reading. Instead, nighttime search requests under it should be concerned with reasonableness, not probable cause. The trial court's "reasonable basis" approach (R. 121) was therefore correct.

Section 77-23-5, as construed in Rowe, requires a nighttime search request to show a risk of evidence loss, or "other good reason," such as a physical safety risk, if a daytime search is attempted. 806 P.2d at 733-34 & n.5. As a reasonableness question, the quantum of proof for such a showing should be more akin to "reasonable suspicion" than to "probable cause." So long as some evidence, specific to the case at hand, suggests that evidence may be lost, or safety may be imperiled in a daytime search, the nighttime search request should be granted. See State v. Menke, 787 P.2d 537, 541 (Utah App. 1990) (defining reasonable suspicion).

A similar rule was followed in United States v. Searp, 586 F.2d 1117 (6th Cir. 1978), cert. denied, 440 U.S. 921, 99 S.

Ct. 1247 (1979), interpreting the federal nighttime search rule. The Sixth Circuit held that the federal provision "requires only some factual basis for a prudent conclusion that the greater intrusiveness of a nighttime search is justified by the exigencies of the situation." 586 F.2d at 1121. The federal rule is similar to Utah's nighttime search statute: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." Fed. R. Crim. P. 41(c)(1) (West 1991 Rev. Ed.). Utah's nighttime search statute should be similarly construed.

As a matter of policy, a defendant should not be allowed to defeat a valid probable cause finding by claiming that the decision of how to act upon that finding must be based upon an equally strict standard of proof. Efforts to avoid the detection of criminal activity do not create a expectation that such activity will remain "private." State v. Lee, 633 P.2d 48, 51 (Utah), cert. denied, 454 U.S. 1057, 102 S. Ct. 606 (1981). By selling illegal drugs at night (affid. at 3), defendant did not confer legal protection upon that crime. Accordingly, this Court should hold that reasonableness, or a reasonable suspicion-type standard, applies to nighttime search requests.

2. Appellate Deference is Appropriate.

Defendant also argues for nondeferential appellate review of nighttime search authorization in a warrant (Br. of appellant at 8-13). His argument, however, is derived from State

v. Weaver, 817 P.2d 830 (Utah App. 1991), which deals solely with the question of probable cause to issue the warrant, id. at 832. This issue, again, is not presented on this appeal. His argument is also based upon Judge Orme's criticisms of deferential warrant review, in his Weaver concurrence, not the main opinion. Therefore, Weaver only minimally supports defendant, if at all.

The reasons for requiring a lower quantum of proof for a nighttime search, already set forth in this brief, also support deferential review of nighttime search authority. Further, notwithstanding dictum in Rowe, 806 P.2d at 734 n.5 ("of course, ordinarily a nighttime search would pose a heightened safety risk . . ."), additional deference is due because of officer expertise in performing searches. Police officers, not appellate courts, are charged with executing warrants successfully, such that evidence will not be lost. They are also the ones at risk for real physical injury in carrying out a task that, at best, must be fraught with hazard. Reviewing courts should not overscrutinize the means, requested by officers and then approved by a magistrate, by which a search is conducted.

Defendant asserts that nondeferential review of search warrants is necessary because "Utah magistrates do not uniformly have the opportunity to develop expertise in issuing search warrants" (Br. of Appellant at 10). This assertion is neither "generally known," nor "capable of accurate and ready determination." Therefore, contrary to defendant's invitation, it should not be judicially noticed. See Utah R. Evid. 201(b).

Efforts to put "magistrate expertise" into issue should be supported with evidence, not conjecture.⁴

Hindsight-based, nondeferential review of nighttime search requests would not advance the interest in stable, consistent results. See State v. Vigil, 815 P.2d 1296, 1299-1300 (Utah App. 1991). Indeed, a possible reversal of this nighttime authorization by a two-to-one, split appellate decision would actually reflect a three-to-two determination of all the involved judges--magistrate, trial court, and this Court--that the authorization was valid. Therefore, particularly in a close case, cf. Weaver, 817 P.2d at 835 (Orme, J., concurring), deference to the warrant is appropriate.

Accordingly, officer opinion that a nighttime search is more likely to safely succeed than a daytime search should not be lightly dismissed by a magistrate, and certainly, once approved by a magistrate, should not be subject to nondeferential, after-the-fact reversal on appeal. In Rowe, a nighttime authorization was reversed because this Court could find no evidence, in the warrant affidavit, showing cause for such a search. 806 P.2d at 734. However, so long as some evidence supports such cause, a magistrate's authorization for a nighttime search should be not be reversed unless it is clearly unreasonable.

⁴Defendant also implies that some magistrates neglect their duty to enforce the federal and state constitutions, see U.S. Const. Art VI, cl. 3, Utah Const. Art. IV, § 10, at the behest of "forum shopping" law officers (Br. of Appellant at 11-12). This accusation is also unsupported, and should be rejected.

B. The Magistrate's Authorization of a Nighttime Search in this Case Should be Reaffirmed.

Under the foregoing standards, this nighttime search authorization was valid. Both concerns for evidence loss and for safety risks were shown in the affidavit, read "in a common sense manner and as a whole," Rowe, 806 P.2d at 732 (quotation and citation omitted).

Evidence might have been lost during a daytime, more easily observed, officer approach to the premises. Informants told the affiant officer that defendant had counter-surveillance measures in place, and this information was confirmed by direct observation (affid. at 2). In his expertise, the observing officer reasonably concluded that the people seen in front of defendant's apartment and writing things down, were acting as "lookouts" for defendant (id.). The use of lookouts, in turn, supports a reasonable inference that defendant had measures in place to quickly dispose of contraband upon a warning that officers were approaching.

Safety concerns were supported by defendant's statements, reported by informants, that he was armed and intended to forcibly defend his drugs (affid. at 3). Further, defendant has not challenged the affiant officer's statement that "[h]andguns have been found on most narcotic search warrants" (id.). The fact that drug dealers are often armed, well within the officer's experience, has also been noticed by Utah's appellate courts. State v. Dorsey, 731 P.2d 1085, 1092 (Utah 1986) (Zimmerman, J., concurring); State v. Leonard, 175 Utah

Adv. Rep. 49, 54 n.9 (Utah App. Dec. 5, 1991), petition for cert. filed, No. 920140 (Utah March 11, 1992). Accord People v. Hughes, 767 P.2d 1201, 1204-05 (Colo. 1989).

Accordingly, the magistrate's decision that a nighttime search would be more likely to succeed, and less likely to result in bodily injury, was properly affirmed by the trial court. Accord United States v. Pryor, 652 F. Supp. 1353, 1363 (D. Me. 1987) (finding "genuine risks" if search of suspected armed robber's room were attempted in daytime); People v. Kimble, 44 Cal. 3d 480, 244 Cal. Rptr. 148, 749 P.2d 803, 810 n.6 (1988) (citing Model Code of Pre-Arrest Procedure); State v. Ailport, 412 N.W. 2d 35, 36 (Minn. App. 1987) (safety justification for nighttime search supported by affiant officer's experience that searches are often resisted). This Court should therefore reaffirm the nighttime search authorization.

CONCLUSION

Defendant has failed to produce evidence that this probable cause-supported search was actually conducted at night, or that the search might have been unreasonable in any respect. Further, the magistrate's authorization to conduct the search at night was supported by the warrant affidavit. For these reasons, the denial of defendant's motion to suppress, and his conviction for possession of a controlled substance, should be affirmed.

RESPECTFULLY SUBMITTED this 23 day of July, 1992.

R. PAUL VAN DAM
Attorney General



J. KEVIN MURPHY
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was mailed, postage prepaid, to LISA J. REMAL AND ELIZABETH HOLBROOK, attorneys for appellant, Salt Lake Legal Defenders Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 23 day of July, 1992.


