Excerpt from an appellate brief written by Daniel Cohen, Legal Research & Writing

These searches were unreasonable because the agents had not obtained consent from Appellant to search the said areas of his home, and nor did the agents face any exigency. The law defines exigent circumstances as awareness by the occupants of a house "of the presence of someone outside, and are engaged in activities that justify the officers in the belief that the occupants are actually trying to escape or destroy evidence." Rowell, 83 So.3d at 994 "The state bears the burden to demonstrate that "procurement of a warrant was not feasible because the exigencies of the situation made that course imperative." Diaz v. State, 34 So.3d 797, 802 (Fla. 4th DCA 2010) (quoting Hornblower v. State, 351 So.2d 716, 717 (Fla. 1977).

In this case, the record shows the State did not, because it could not, make any such demonstration. While Agent Smith testified that, standing outside the doors of the converted barn, he smelled the "overwhelming" odor of "raw" marijuana, TR43:16-20, "[e]ven if they have probable cause, "police officers may not enter a dwelling without a warrant, absent consent or exigent circumstances." Diaz 34 So.3d at 802 (quoting Levine v. State, 684 So.2d 903, 904 (Fla. 4th DCA 1996). "The state must prove that the police lacked sufficient time to obtain a warrant." Diaz, 34 So.3d at 802. At the hearing below, the State provided no evidence that the agents lacked time to obtain a warrant; to the contrary, at the time

Agent Smith smelled marijuana in front of Appellant's residence, there was no sign of any other people on the property, and as the agents discovered as their unlawful search continued, Appellant was *asleep* with his girlfriend. TR23:21-22. The record shows no evidence of any impediment that prevented the agents from applying for a warrant. Moreover, Agent Smith testified that warrants are now obtainable remotely, without having to leave the scene, through electronic, digital application, TR26:9-12, thus accelerating the process.

As the record shows, there was no indication that anyone else was present on the property, or that anyone had seen the agents who were driving a black, unmarked pick-up truck TR85:14-15. See Diaz, 34 So.3d at 803 ("Further, the state presented no evidence that the defendant or Scott know of the police presence outside their home.") Hence, *a fortiori*, there was no suggestion that the agents observed any activity by Appellant indicating he was trying to escape or destroy evidence. See id.

Appellant had a reasonable expectation of privacy because as this Court has held, "[a] private home is an area where a person enjoys the highest reasonable expectation of privacy under the Fourth Amendment", Rowell, 83 So.3d at 994:. And the "chief evil" against which the Fourth Amendment is directed is entry into homes. Byrd, supra. Reinforcing the inherently "highest reasonable expectation of privacy," Rowell, supra, that Appellant expected to enjoy, (1) the fenced rural property was surrounded by tall trees and dense foliage, TR14:2-8; (2) the property

was posted with no-trespassing signs, TR143:6-14; and (3) agents testified that Appellant's "unfriendly" and "aggressive" pit bull dog roamed the premises,TR42-43:24-1, TR43:2-5, TR140:17-20, confronting the agents when they arrived. Indeed the dog's growling, TR60:21-22, impelled the law enforcement officers to retreat and seek refuge in their truck.TR86:21-25; TR43:6-7.

Agent Smith did not have a warrant to enter the curtilage of Appellant's residence, and rendering the agent's action even more knowing and willful, veteran Agent Smith and veteran Agent Johnson testified that they knew someone lived in the converted barn. TR16:3-5; TR16:19-21; TR21:16-20; TR67:5-8.

In its order denying Appellant's motion to suppress, the trial court concluded,

> Because the law enforcement agents acted in good faith by driving onto the property through an open and unlocked gate and knocking on the side door of the residence, which due to the layout of the property and based upon the previous owners' instructions was the preferred method of contacting the residents, they were legally on the property.

Ex.IV: p.5.

But fatally absent from the trial court's order is the fact that "the previous owners' instructions" were conveyed to the agents almost three years earlier, TR120:9-20, TR57:23-25, TR59:1-3, when, not Appellant, but the prior owner, had given the agents consent to be on the property. Hence, whatever information the agents obtained from the prior owners of the property, the passage of almost three years rendered that information completely stale. See e.g., Pilieci v. State, 991 So.2d

883, 890 (Fla. 2d DCA 2008) (finding that, in Florida, it is a "rule of thumb" that information alleging probable cause of criminal conduct is rendered stale after the passage of thirty (30) days.) (citing Rodriguez v. State, 297 So.2d 15, 18 (Fla. 1974).)[1] In addition to the fact that the change in ownership of the property terminated the prior owner's permission for the agents to be on the property, the three-year-old consent had grown stale long before.

And the record provides no evidence that the agents were ever given consent to cross the threshold of Appellant's residence in the converted barn. In other words, the agents in this case were also acting far beyond the scope of the original consent. See Walter v. United States, 447 U.S. 649, 656-57 (1980) (consensual search cannot exceed the scope of consent provided); Florida v. Jimeno, 500 U.S. 248, 251-252 (1991) (consensual search is reasonable if it remains within the scope of the consent provided); So even if the consent from 2012 given by the prior owner would be somehow considered valid in 2015 when the property was under different

[1] In Pilieci, the Second District Court of Appeal noted that a relevant American Law Review article reviewed staleness in cases involving intervals from one week to six months. Id. at 891. See also Cruz v. State, 788 So.2d 375, 378 (Fla. 4th DCA 2001) ("Most importantly, we cannot overlook the fact that staleness is a very important factor in this case and weighs heavily against a finding of probable cause. Not only was there a gap [of six months] in time from the initial complaint to the first trash pull, but there was also a gap [of six months] between the first and second trash pulls.")

ownership, the agents exceeded the scope of the original consent by crossing the threshold of Appellant's home.

The Agents' Initial Search Did Not Constitute

A Lawful "Knock and Talk" Query

In its order denying Appellant's motion to suppress, the trial court concluded that "[t]he agents were on the premises to conduct a legitimate 'knock and talk' encounter with the residents whom they believed still resided on the property." Ex.IV:,p.5,par.2. (footnote omitted). As correctly noted by the lower court, a "knock and talk" is consensual encounter. Id. at n.3. See also Hardin v. State, 18 So.3d 1246, 1247 (Fla. 2d DCA 2009).

However, the trial court overlooked the fact that the implied license given to a governmental agent to enter upon a person's property can be revoked by such things as the presence of fences, the posting of "no trespassing" signs and the presence of unfriendly dogs. See Robinson v. State, 164 So.3d 742 (Fla. 2d DCA 2015) (knock and talk violated Fourth Amendment where semirural property was surrounded by fence with closed but unlocked gate, bearing "No Trespassing" and "Beware of Dog" signs); Ferrer v. State, 113 So.3d 860 (Fla. 2d DCA 2012); See also Bainter v. State, 135 So.3d 517 (Fla. 5th DCA 2014), Brown v. State, 152 So.3d 619 (Fla. 3d DCA 2014); Niemanski v. State, 60 So.3d 521, 522 (Fla. 2d DCA 2011) (finding

entry onto curtilage for knock and talk lawful but specifically "in the absence of" signs warning potential visitors against trespassing or the presence of a hostile dog.)

In addition, it should be noted that in this case, the agents were not responding to an anonymous tip, or a complaint. See e.g., Niemanski, The agents testified that they were acting on something of a whim, TR124-125:25-7, and that had they known that the prior owner had moved, they would not have even visited the property. TR63:11-12.