an iron pin set by Byers and Runyon under a willow tree in lands of Plaintiff; thence through lands of Plaintiff South 48 degrees 11 minutes 21 seconds West (South 45 degrees 47 minutes 01 seconds West) 52.80 feet to an iron pin at place of beginning.

Courses given in parenthesis are courses of Byers & Runyon shown on plat recorded in Franklin County Plat Book Volume 288B, Page 889; other courses are courses and distances based on meridian as established by courses of Plaintiff Keto's deed.

2. The Recorder of Deeds shall note on the plat recorded at Volume 288B, Page 889, as follows:

"The line shown as boundary lines of Jorma R. Keto et ux. are not to be accepted as accurately depicting the said Keto boundary lines of courses and distances."

3. The parties shall each pay their own costs.

This Decree nisi shall become absolute unless exceptions are filed within thirty days from the date hereof.

Upon the Decree becoming absolute, a copy of this Order shall be recorded by the Recorder of Deeds who is directed to index Paragraph 1(a) with James E. Schaefer and Suzanne I. Schaefer, his wife, as grantors and Jorma R. Keto and Julia H. Keto, his wife, as grantees and Paragraph 1(b) with Thomas E. Daley and Victoria A. Daley, his wife, as grantors and Jorma R. Keto and Julia H. Keto, his wife, as grantees.

COMMONWEALTH v. EICHELBERGER, C.P. Franklin County Branch, No. 349 - 1983

Criminal Law - Search Warrant - Knock and Announce Rule

1. Where the owner of a home subject to a search warrant does not respond to an officers' question concerning concealed weapons, the officers had grounds for a reasonable belief the owner was armed.

2. The "knock and announce" rule an officer executing a search warrant to give notice of his identity, authority, and purpose to an occupant

unless there is possibility of harm to the officer or evidence is being destroyed.

3. Where police met the owner of a residence outside his home and entered the home immediately prior thereto or at the same time as confronting him, the knock and announce rule applies and evidence discovered in the home will be suppressed.

David W. Rahauser, Esq., Assistant District Attorney

Philip S. Cosentino, Esq., Attorney for Defendant

OPINION AND ORDER

EPPINGER, P.J., January 26, 1984:

A Pennsylvania state trooper filed an application for a search warrant which was granted by a district justice to search the residence of the defendant, Warren Snyder Eichelberger, Jr. The same day several troopers executed the warrant and discovered $4,332 in marked bills in a green bag and marijuana seeds at defendant's house. Eichelberger was also searched and 25 grams of Cocaine and 10 Plasidil capsules were taken from his pockets.

Eichelberger filed an omnibus pretrial motion asking us to suppress all of the evidence and to find that the Commonwealth does not have a prima facie case. He had also asked us to sever the counts but that matter was not pursued at the hearing because defendant waived jury trial.

We find that probable cause existed for the issuance of a search warrant, that the evidence seized from the defendant's pockets is admissible and that the Commonwealth presented a prima facie case, so we deny the prayers of the omnibus pretrial motion related to these issues. However, as to the evidence taken from Eichelberger's home, we find that must be suppressed.

A search warrant was issued in this case after a period of investigation by various officers of the Pennsylvania and Maryland State Police. The affidavit for a search warrant filed July 19, 1983, and the evidence before us at the hearing show that Trooper Hammon of the Pennsylvania State Police, operating undercover, spoke to Jeff Gorman in Hartman's Tavern in Greencastle offering to purchase one-half ounce of cocaine and gave Gorman $300. Gorman left the tavern with an unknown white male, described as being in his thirties, to go get the drugs. Gorman drove to what was found to be Eichelberger's residence at 11068

Williamsport Pike where Gorman entered and returned to his car a few moments later. The two then returned to the tavern, to meet Trooper Hammon and Trooper Michael College of the Maryland State Police, also working undercover. The two troopers and Gorman went to the Pizza Hut parking lot across the street from the tavern where Gorman delivered the cocaine for an additional $300.

Trooper College had a phone conversation with Gorman on August 1 during which Gorman stated that "a new shipment of drugs had just arrived and that it was better than the last time." College met Gorman at the tavern. The latter said they had the dope but they "had to go and get it." An hour and a half later College and Gorman, traveling in Gorman's car, drove to Frank Road in Antrim Township where they met an unknown white male with a cast on his leg. This was about twenty-minutes after they left the tavern. Earlier that evening the unknown white male with a cast on his leg was seen entering Eichelberger's residence and then going to Hartman's tavern. At the meeting on Frank Road, Trooper College purchased another one-half ounce of cocaine from Gorman and the unknown white male for $1175, first recording the serial numbers on the bills.

Some days later, Gorman called Trooper College to say that his man had cocaine and that the deal would go down the same as the other deals, with Gorman receiving part of the money, then leaving and going to his supplier to get the drugs to return and deliver them.

To execute the search warrant authorized by the disrict justice of the peace, a detail of troopers was outside Eichelberger's residence waiting for him to return. When defendant and another male arrived, Trooper Weachter approached the defendant, identified himself and asked who occupied the house, Eichelberger identified himself as the person and Weachter read the search warrant to him.

While this was going on, or perhaps seconds before Trooper Weachter talked with Eichelberger, two other troopers entered the house to secure the residence. The defendant was taken inside the house where Trooper Weachter asked him if he had any weapons concealed on his person. Receiving no response, Weachter had Eichelberger empty his pockets. From his pockets defendant laid out a plastic bottle of capsules which contained Plasidil, a controlled substance. Since defendant made no other move to empty his pockets. Weachter reached into Eichelberger's pockets

and removed two baggies containing a white substance, later determined to be cocaine.

During the search of the house, the troopers found a bank bag containing $4,332 in eight packets, including 46 of the 59 twenty-dollar bills, the serial numbers of which had been recorded.

Eichelberger's first point is that Trooper Weachter had no right to search him. We do not agree.

Anyone named in a search warrant for a particular premises may be searched for either weapons or evidence as incidental to the search of the premises. *Commonwealth v. Villego,* 24 D&C3d 736, 739 (Adams 1982). Eichelberger was named in the search warrant as the owner, occupant or possessor of the premises to be searched. He was not one who merely happened to be present. So the defendant's argument that this case is governed by the principles of *Commonwealth v. Luddy,* 281 Pa. Super. 541, 551, 422 A.2d 601, 606 (1980), is not correct. *Luddy* holds that a warrant authorizing the search of a building does not authorize search of either the persons or property of those who merely happened to be present when the warrant is executed.

To sustain this search on the ground that the trooper was authorized to do so for his security, the Commonwealth must show that the trooper had a reasonable belief that Eichelberger was armed and presently dangerous. *Ybarra v. Illinois,* 444 U.S. 75, 88 S.Ct. 388, 62 L.Ed.2d 238 (1979). In this case there was no patdown search. Instead the trooper asked Eichelberger if he had any weapons concealed on his person. He did not respond. At this point the trooper formed a reasonable belief that Eichelberger was armed and directed him to empty his pockets. In doing so Eichelberger laid out only a vial containing Plasidil. The trooper's belief was reinforced at that point and he completed the search, finding the baggies of cocaine. The requirements of *Ybarra* were met.

Defendant next argues that the search of the house was not properly executed in that the officers violated the "knock and announce" rule, Pa.R.Crim.P. 2007(a), and that the evidence found in the search of the house should therefore be suppressed. We agree that this is required here.

In executing the search warrant, the police met Eichelberger outside his house. If defendant had been inside the house, it is certain that 2007(a) would have been applicable. The "knock and

announce" rule requires a law enforcement officer in executing a search warrant to give or make reasonable effort to give notice of his identity, authority, and purpose to any occupant of the premises specified in the warrant, unless exigent circumstances require an immediate forcible entry. *Comm. v. Clemson,* 234 Pa. Super. 191, 193, 338 A.2d 649, 650-51 (1975). Such exigent circumstances include the possibility of harm to the officers or unusual activity which leads to a reasonable belief that evidence is being destroyed. *Comm. v. Beard,* 282 Pa. Super. 583, 586, 423 A.2d 398, 400 (1980). In either situation, an officer must be able to articulate specific facts which caused him to believe that they would be in danger or that evidence would be destroyed if they followed the procedures of the "knock and announce" rule. *Comm. v. Johnson,* 223 Pa. Super. 83, 86, 289 A.2d 733, 734 (1972); *Comm. v. Samuels,* 235 Pa. Super. 192, 203, 340 A.2d 880, 885 (1975). But no facts were present here that would justify the officers in such a belief.

The purpose of the rule is to protect the dignity and privacy afforded individuals by the Fourth Amendment even after a police officer has been authorized to search their property, *Comm. v. Beard,* 282 Pa. Super. 583, 586, 423 A.2d 398, 400 (1980), and to give the occupant a sufficient time to voluntarily surrender the premises. See *Comm. v. Clemson,* supra, at 193, 550-51.

When the police entered the Eichelberger residence, without first "knocking and announcing" and giving defendant or the occupants an opportunity to voluntarily surrender the premises, they found Mrs. Eichelberger and a small child inside. We think that the "knock and announce" rule applies if defendant has standing to assert the rule. We think that he does have standing. While it is true that Fourth Amendment rights are personal in nature, *Comm. v. Treftz,* 465 Pa. 614, 621, 351 A.2d 265 (1976), citing *Brown v. U.S.,* 411 U.S. 223, 230, 93 S. Ct. 1565, 36 L.Ed. 2d 208 (1973), the personal interests required to have standing to challenge a search of a premises include a defendant's presence on the premises at the time of the search and seizure and proprietary or possessory interest in the search premises. *Comm. v. Treftz,* Id. Here, defendant Eichelberger was present when the warrant was executed and owner of the searched premises.

Since the officers failed to give defendant or the occupants an opportunity to voluntarily surrender the premises by knocking and announcing prior to their entry, Pa.R.Crim.P. 2007(a) requires us to suppress the money and marijuana seeds from within the house.

Defendant's third argument is that the evidence seized should be suppressed because the facts set forth in the affidavit were insufficient to establish probable cause. We do not agree.

Probable cause to issue a search warrant "has been defined as those facts necessary to show (1) that the items sought are connected with criminal activity, and (2) that the items will be found in the place to be searched." *Ryan,* supra, at 167, 283. It is not for us to decide whether the facts set forth would support a conviction but rather whether the facts justify the district justice in determining there was sufficient probable cause for the issuing of a search warrant. *Comm. v. Blakney,* 261 Pa. Super, 220, 224, 396 A.2d 5, 7 (1978). We are of the opinion that considering the affidavit in its entirety, *Comm. v. Mazzochetti,* 299 Pa. Super. 447, 454, 445 A.2d 1214, 1217 (1982), sufficient facts were presented to find that probable cause was present in light of the standard enunciated in *Ryan,* supra, at 167, 283.

Defendant finally argues that the evidence presented is insufficient to establish a prima facie case against the defendant for conspiracy and delivery of a controlled substance and that, therefore, the information must be quashed. We do not agree.

While it is true that the prosecution has the burden of establishing prima facie that a crime was committeed and that defendant was the one who committed it, this does not mean the defendant must be shown guilty beyond a reasonable doubt at the preliminary hearing. *Comm. v. Prado,* 481 Pa. 485, 489, 393 A.2d 8, 10 (1978). We are not to try the case at this point but only determine whether there is sufficient probable cause that defendant has committed the offense of which he is accused to permit the case to go to trial so that the fact-finder may determine whether or not defendant is guilty beyond a reasonable doubt. *Comm. v. Rick,* 244 Pa. Super. 33, 36, 366 A.2d 302 (1976).

ORDER OF COURT

January 26, 1984, the defendant's motion to suppress the evidence taken by the Pennsylvania State Police from defendant's home at 11068 Williamsport Pike, Antrim Township, Franklin County, on August 5, 1983, is granted. Defendant's remaining motions in accord with this opinion are denied.

Trial is set for March 6, 1984, at 9:30 o'clock a.m.