

Supplemental Opinion on Denial of Rehearing  
December 14, 1987

742 S.W.2d 550

1. SEARCH & SEIZURE — SEARCH WARRANT — VALIDITY. — Where a search warrant showed that a nighttime search was authorized but the judge neglected to line out the appropriate alternative at another place on the face of the warrant, this technicality will not invalidate the warrant.
2. SEARCH & SEIZURE — SEARCH WARRANT SHOULD NORMALLY BE EXECUTED DURING THE DAY — EXCEPTION. — A search warrant

should provide for execution between the hours of six a.m. and eight p.m. unless the judge has reasonable cause to believe, among other things, that the objects to be seized are in danger of imminent removal. [Ark. R. Crim. P. 13.2(c).]

3. SEARCH & SEIZURE — NIGHTTIME SEARCH — JUSTIFICATION. — A nighttime search was justified where the judge had been told of the heavy traffic and use of drugs during the evening hours at the place to be searched, and the affidavit stated that the controlled buy of cocaine earlier in the evening had been made with photographed bills and the chances that these same bills would be in the possession of the suspects would diminish with the passage of time.

DAVID NEWBERN, Justice. Appellant Brent Kevin Holloway has correctly pointed out that our initial opinion was incorrect in stating that he had not given the trial court an opportunity to rule upon the facial validity of the search warrant which led to evidence used against him and upon his objection to the insufficiency of evidence to justify a nighttime search. Both were argued by him at a pre-trial hearing.

#### *The Face of the Warrant*

[1] In our original opinion we discussed the fact that the warrant at one point showed that a nighttime search was authorized although the judge neglected to line out the appropriate alternative at another place on the face of the warrant. We are satisfied that the warrant showed that a nighttime search was authorized. This sort of technical attack on the warrant is not favored. *Watson v. State*, 291 Ark. 358, 724 S.W.2d 478 (1987).

#### *Basis of Nighttime Search Order*

We have no doubt that the judge could reasonably have concluded that a nighttime search was justifiable in the circumstances presented to him. The affidavit of Detective Robert Ross of the Fort Smith Police Department showed that he had learned, through information obtained in the process of making the controlled cocaine buy at the residence to be searched, that illegal drug sales were taking place there. The controlled buy had been made "during the evening hours" on the very evening the warrant was sought. It was then that the "additional quantities of

cocaine" were observed. The affidavit stated that information had been obtained that "numerous vehicles [were] coming and going from this residence especially at night."

[2, 3] According to Ark. R. Crim. P. 13.2(c), a search warrant will provide for execution between the hours of six a.m. and eight p.m. unless the judge has reasonable cause to believe, among other things, that "the objects to be seized are in danger of imminent removal." In *Murray v. State*, 275 Ark. 46, 628 S.W.2d 549 (1982), we held that a nighttime search was justified on the basis of an affidavit showing that the suspect had said he had drugs which could easily be sold. While no such statement was before the judge in this case, he had been told that the drugs had been observed in the evening hours and that that was when the traffic in and out of the dwelling to be searched was heavy. The affidavit presented to the judge also noted that the controlled buy of cocaine earlier in the evening had been made with bills which had been photographed by the police beforehand. Given the evidence that sales were occurring, and presumably currency was changing hands, it was obvious that the chances that these same bills would be in the possession of the suspects would diminish with the passage of time. We deem the totality of this information provided a sufficient basis for permitting the search after eight p.m. See *Boyd v. State*, 13 Ark. App. 132, 680 S.W.2d 911 (1984); *Lewis v. State*, 7 Ark. App. 38, 644 S.W.2d 303 (1982).

While we agree with the appellant that both these issues were presented to and ruled upon by the trial judge, we conclude his rulings on them were not erroneous. Therefore, the petition for rehearing is denied.

PURTLE, J., would grant.