

A05-0247

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Susan Ranae Jackson,

Appellant.

RESPONDENT'S BRIEF

JOHN M. STUART
State Public Defender

DAVI E. AXELSON
Assistant State Public Defender

2221 University Avenue Southeast
Suite 425
Minneapolis, Minnesota 55414

ATTORNEYS FOR APPELLANT

MIKE HATCH
Minnesota Attorney General

THOMAS R. RAGATZ
Assistant Attorney General
Atty. Reg. No. 0236822

445 Minnesota Street, Suite 1800
St. Paul, Minnesota 55101-2134
(651) 296-6598 (Voice)
(651) 282-2525 (TTY)

JOHN J. MUHAR
Itasca County Attorney
Itasca County Courthouse
123 Fourth Street NE
Grand Rapids, MN 55744

ATTORNEYS FOR RESPONDENT

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LEGAL ISSUE

At 9:30 p.m., when appellant was in her kitchen, the police executed a search warrant on her residence; they found methamphetamine. The warrant improperly authorized a nighttime search. Should this Court overrule nearly thirty-year-old precedent, reject a recent United States Supreme Court decision, and hold that the federal or state constitution requires the suppression of any evidence obtained from an improperly authorized nighttime search, regardless of the facts of the particular search?

The trial court and the court of appeals ruled in the negative.

State v. Lien, 265 N.W.2d 833 (Minn. 1978)

Hudson v. Michigan, 126 S.Ct. 2159 (2006)

State v. Bourke, 718 N.W.2d 922 (Minn. 2006)

Kahn v. Griffin, 701 N.W.2d 815 (Minn. 2005)

PROCEDURAL HISTORY

Respondent accepts appellant's statement of the procedural history, with the following additions and corrections.

December 11, 2003:	Date of search.
December 12, 2003:	Complaint filed.
September 8, 2004:	Appellant pleaded guilty.
November 8, 2004:	Appellant withdrew her guilty plea.
August 23, 2006:	This Court vacated stay and requested that the Office of the Attorney General assume representation of the respondent.
November 21, 2006:	Respondent's brief filed and served by mail.

STATEMENT OF THE CASE

Respondent accepts appellant's statement of the case, and provides the following summary. After the Itasca County District Court, the Honorable Jon A. Maturi presiding, denied appellant's motion to suppress the evidence found in the search of her home, appellant ultimately submitted her case on stipulated facts per *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). Judge Maturi found appellant guilty of two counts of second-degree controlled substance crime in violation of Minn. Stat. § 152.022, subs. 1(1) (2004) (sale of methamphetamine) and 2(1) (2004) (possession of methamphetamine), and two counts of child endangerment in violation of Minn. Stat. § 609.378, subd. 1(b)(2) (2004). Appellant has a criminal history score of 6; Judge Maturi sentenced her to a term within the presumptive range.

The court of appeals affirmed appellant's conviction in an unpublished decision. See Appellant's Appendix ("Appendix") 14-29. This Court granted review.

STATEMENT OF FACTS

Respondent accepts appellant's statement of the facts. Because respondent does not dispute that the nighttime search was improperly authorized here, only the following undisputed facts are relevant to the issue in this appeal: upon entering appellant's home pursuant to the search warrant at approximately 9:30 p.m., the police found appellant at her kitchen table with her two teenage children. Findings of Fact, Conclusions of Law, Order and Memorandum, Appendix 2.

ARGUMENT

THIS COURT SHOULD REFUSE APPELLANT'S REQUEST THAT IT OVERRULE NEARLY 30-YEAR-OLD PRECEDENT, REJECT A RECENT UNITED STATES SUPREME COURT DECISION, AND HOLD THAT ANY IMPROPERLY AUTHORIZED NIGHTTIME SEARCH MUST RESULT IN SUPPRESSION OF THE EVIDENCE, REGARDLESS OF THE FACTS OF THE PARTICULAR SEARCH.

Appellant asks that the methamphetamine and other evidence found in her home be suppressed, because the police improperly received authorization to conduct a nighttime search. Respondent does not contest the conclusion of the district court and court of appeals that the search warrant application "did not make a specific showing to justify inclusion of the nighttime search clause." Appendix 22. Therefore, the only issue here is suppression -- specifically, whether either the United States or Minnesota Constitution strictly requires suppression of any evidence seized during an improperly authorized nighttime search, without regard to the facts of the particular search. To rule in appellant's favor, this Court would have to overrule *State v. Lien*, 265 N.W.2d 833 (Minn. 1978), and reject *Hudson v. Michigan*, 126 S.Ct. 2159 (2006). It should decline to do so.

A. The Federal Constitution

The Fourth Amendment to the United States Constitution states:

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.

Appellant asks this Court to interpret the Fourth Amendment as requiring “additional exigency or necessity beyond probable cause to justify nighttime execution of a search warrant.” Appellant’s Brief (“App. Br.”) 14. But to so interpret the Fourth Amendment would be to render an advisory opinion. Minnesota law already requires “necessity beyond probable cause” to justify a nighttime search, and respondent does not contend that the nighttime search here was justified. Therefore, this Court need not determine what the Fourth Amendment would require if Minnesota’s nighttime-search law did not exist or if the validity of the nighttime-search authorization was at issue here. See *State v. Bourke*, 718 N.W.2d 922, 926, 929 (Minn. 2006) (declining to decide constitutional issue and noting “general practice” of avoiding ruling on a constitutional issue “if there is another basis on which a case can be decided”) (quoting *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 732 n.7 (Minn. 2003)). Pages 9-14 of appellant’s brief, therefore, can be ignored, as they address a point that is moot.

As noted, the only issue in this case is whether evidence from an improperly authorized nighttime search must, in all cases, be suppressed. Appellant does not argue that the federal constitution requires such a result, presumably because she recognizes that such an argument is doomed by *Hudson v. Michigan*, 126 S.Ct. 2159 (2006).

Hudson held that the exclusionary rule does not apply to violations of the knock-and-announce rule. *Id.* at 2165. The United States Supreme Court noted the exclusionary rule’s “‘costly toll’ upon truth-seeking and law enforcement objectives” and that the court has “rejected ‘[i]ndiscriminate application’ of the rule.” *Id.* at 2163

(citations omitted). The court also noted that the knock-and-announce rule is “a command of the Fourth Amendment” -- unlike a limit on nighttime searches, which the United States Supreme Court has never held the Fourth Amendment requires¹ -- but nevertheless declined to apply the exclusionary rule to knock-and-announce violations, at least in part because “[t]he interests protected by the knock-and-announce requirement are quite different” from the interests protected by the search-warrant requirement “and do not include the shielding of potential evidence from the government’s eyes.” *Id.* at 2162, 2165.

Similarly, any limit on nighttime searches goes only to the manner of execution of a search warrant, not whether the warrant to search should have been issued. Appellant has not cited any federal case law from the past quarter century that holds that the Fourth Amendment requires suppression of all evidence from improperly authorized nighttime searches, regardless of the facts of the particular case.² Numerous federal courts have rejected such an approach.³

¹ See, e.g., *Gooding v. United States*, 416 U.S. 430, 457 (1974) (concluding that “21 U.S.C. § 879(a) requires no special showing for a nighttime search, other than a showing that the contraband is likely to be on the property or person to be searched at that time”).

² *O’Rourke v. City of Norman*, 875 F.2d 1465 (10th Cir.), *cert. denied*, 493 U.S. 918 (1989), on which appellant relies (App. Br. 12), involves an arrest warrant, not a search warrant, with no nighttime authorization, and a search of a home with at least one sleeping resident that began after 10:00 p.m. *Id.* at 1467-68.

³ See, e.g., *United States v. Schoenheit*, 856 F.2d 74, 77 (8th Cir. 1988) (rejecting argument that evidence should be suppressed because the search at issue improperly began after 10:00 p.m., where the appellant “was not awakened in the middle of the night while in bed, and he answered the door on his own volition,” and noting that “the court is aware of no authority for concluding that a search is *per se* unconstitutional simply
(Footnote Continued On Next Page.)

In any event, appellant's argument here is not that under federal law *Hudson* should be limited to no-knock searches, but rather that this Court should decline to follow *Hudson* on state-law grounds. App. Br. 15-18 Because appellant makes no federal constitutional argument for suppression of the evidence here, the only issue for this Court is suppression under the Minnesota Constitution.

B. The Minnesota Constitution

As appellant recognizes, to rule in her favor this Court would have to overrule *State v. Lien*, and reject the reasoning of *Hudson v. Michigan*, by interpreting the Minnesota Constitution "as affording greater protection against unreasonable searches and seizures than the United States Constitution." App. Br. 15, 19 (quoting *State v. Askerooth*, 681 N.W.2d 353, 361 (Minn. 2004)). There is no objective basis for doing so.

1. *State v. Lien* and *Stare Decisis*

More than 28 years ago, this Court refused to automatically suppress evidence obtained pursuant to a warrant that improperly authorized a nighttime search. *Lien*, 265 N.W.2d at 840-41. Instead, this Court looked at the particular facts of the search, and declined to exclude the evidence seized because there was no "nighttime intrusion with people being roused out of bed and forced to stand by in their night clothes." *Id.* at 841. In the past three decades, *Lien* has been cited numerous times for the principle that the

because it was conducted after 10:00 p.m."); *United States v. Searp*, 586 F.2d 1117, 1122-23 (6th Cir. 1978), *cert. denied*, 440 U.S. 921 (1979), (refusing to suppress evidence from search conducted after 11:30 p.m. and holding that "requiring suppression in all cases would be a remedy out of all proportion to the benefits gained to the end of obtaining justice while preserving individual liberties unimpaired").

facts of the particular search must be analyzed in determining whether suppression is the appropriate remedy for an improper nighttime search. *See, e.g., State v. Goodwin*, 686 N.W.2d 40, 44 (Minn. Ct. App. 2004), *rev. denied* (Minn. Dec. 14, 2004); *State v. Kochendorfer*, 304 N.W.2d 336, 338 (Minn. 1981).

Appellant asks this Court to overrule *Lien*. App. Br. 19. This Court recently emphasized that it is “extremely reluctant to overrule our precedent under principles of *stare decisis*. When overruling precedent, we have required a ‘compelling reason’ to do so.” *State v. Lee*, 706 N.W.2d 491, 494 (Minn. 2005) (citation omitted). Appellant offers no compelling reason to overturn *Lien*. She does not cite persuasive reasoning from any post-*Lien* case law, from any jurisdiction, that takes the extreme position she advocates and requires suppression of all evidence seized in an improperly authorized nighttime search, regardless of the facts of the particular search. Numerous courts have rejected such an approach.⁴ Nor does she cite any scholarly attacks on *Lien*.

⁴ *See, e.g., State v. Nicholas*, 652 So.2d 666 (La. Ct. App. 1995), *rev. denied* (La. June 23, 1995); *State v. Moore*, 508 N.W.2d 305 (Neb. Ct. App. 1993), *rev. denied* (Neb. Mar. 23, 1994); *Commonwealth v. Grimshaw*, 595 N.E.2d 302 (Mass. 1992); *Gamble v. State*, 473 So.2d 1188 (Ala. Crim. App. 1985), *rev. denied* (Ala. Aug. 23, 1985); *Commonwealth v. Johnson*, 462 A.2d 743 (Pa. Super. 1983); *State v. Brock*, 633 P.2d 805 (Or. App. 1981), *rev. denied* (Or. Dec. 2, 1981); *People v. Glen*, 282 N.E.2d 614 (NY 1972). Indeed, according to Professor LaFave less than half of the fifty states have statutes or court rules restricting the execution of search warrants to daytime hours absent some special showing and authorization. *See* Wayne R. LaFave, *Search and Seizure*, § 4.7(b) at 650 (4th ed. 2004).

The only basis appellant offers for overturning *Lien* is a broad reading of the Minnesota Constitution for which there is no principled basis, and which would raise practical difficulties, as discussed below.

2. *Hudson v. Michigan and the Minnesota Constitution*

Appellant asks this Court to overturn *Lien*, “not follow the *Hudson* decision,” and instead “interpret the Minnesota Constitution as affording greater protection” than the United States Constitution. App. Br. 15 (quoting *Askerooth*, 681 N.W.2d at 361).

As this Court recently noted in *Bourke*, “Article I, Section 10 of the Minnesota Constitution has nearly identical language to the Fourth Amendment of the United States Constitution.” 718 N.W.2d at 926 n.2. Just last year, this Court explained that

[W]e will not construe our state constitution as providing more protection for individual rights than does the federal constitution unless there is a *principled basis* to do so. . . . We will not reject a Supreme Court interpretation of a provision of the U.S. Constitution merely because we want to bring about a different result. We have also said that we will not lightly reject a Supreme Court interpretation of identical or substantially similar language. *Favoring uniformity* with Supreme Court interpretation of constitutional law reflects our belief in the primacy of the federal constitution in matters affecting individual liberties, even if the Supreme Court’s interpretation is not always determinative. Moreover, uniformity places a value on consistency of practice in state and federal courts and the availability of ample federal case law that assists in illuminating the issues when addressing similar state constitutional provisions.

We have acknowledged that it is a significant undertaking to independently interpret a provision of our state constitution to allow greater protection of our citizens' rights, particularly when there exists a federal counterpart provision with identical or substantially similar language and there are Supreme Court precedents interpreting that language. We have repeatedly stated that we will not "cavalierly construe our state constitution more expansively than the United States Supreme Court has construed the federal constitution." Generally we do not independently apply our state constitution absent *language, concerns, and traditions unique to Minnesota*.

Kahn v. Griffin, 701 N.W.2d 815, 824-25 (Minn. 2005) (citations omitted; emphasis added).

Appellant does not cite any "language" or "concerns" that are "unique to Minnesota." Appellant does cite several cases where this Court has interpreted the Minnesota Constitution more broadly than the United States Constitution. App. Br. 16. But there is no dispute that this Court has the power to broadly interpret the Minnesota Constitution; the question is whether it should do so on this particular issue, so these cases involving different issues are of marginal relevance at best. Further, to the extent that appellant relies on these cases to establish a "tradition" that is "unique to Minnesota," obviously there is no tradition in Minnesota of suppressing all evidence seized in improperly authorized nighttime searches, regardless of the facts of the search. To the contrary, under *Lien* the "tradition" has been to look at the facts of the particular search, and appellant makes no claim that a different "tradition" existed prior to *Lien*.

Appellant's argument is striking for its complete lack of any compelling, "principled basis" for overturning *Lien* and broadly construing the Minnesota Constitution. Appellant does not cite any language from the Minnesota Constitution, any historical

analysis of the Minnesota Constitution, any “tradition” of interpreting the Minnesota Constitution in the way she advocates, or even any scholarly argument for such an interpretation. See *Kahn*, 701 N.W.2d at 829. The cases she cites on improperly issued search warrants are inapposite to this case, which merely involves an improperly executed search warrant. App. Br. 18-19.⁵ And her rhetoric about police “misconduct” is unsupported by anything in the record that would support a conclusion that this case involves anything other than a simple mistake by the police and by the judge who signed this search warrant -- not any bad faith or misconduct. Indeed, appellant never argued below that any misconduct occurred, so the prosecution was not on notice that it needed to create a record explaining the mistake here.

Further undermining her argument, appellant offers no basis for making a practical determination of what the framers of the Minnesota Constitution would have considered a nighttime search. Any search after the sun goes down, and before it rises? A search between set hours, regardless of the time of year? If so, what hours? 8:00 p.m. and

⁵ Appellant also cites *Garza v. State*, 632 N.W.2d 633 (Minn. 2001), and *State v. Wasson*, 615 N.W.2d 316, 320 (Minn. 2000), but these cases involve no-knock searches, not nighttime searches, and do not purport to overrule or even criticize *Lien*'s ruling on nighttime searches. Further, it is unclear whether the automatic application of the exclusionary rule in *Garza* and its predecessors is still good law following *Hudson*, because these decisions do not rely on an interpretation of the Minnesota Constitution that is broader than the United States Supreme Court's interpretation of the federal constitution. Finally, *Garza* left open the possibility that an unauthorized no-knock entry might not lead to suppression of evidence if, because the residents were not home, there was no “practical significance to the unannounced entry.” 632 N.W.2d at 637. In the instant case there was no “practical significance” to the nighttime entry because it took place at a time when most people are still awake and when appellant was in her kitchen.

7:00 a.m., as set out in Minn. Stat. § 626.14 (2004)? 10:00 p.m. and 6:00 a.m., as set out in Fed. R. Crim. P. 41(a)(2)(B)?⁶

Under a daylight-only search requirement, a court would have to suppress evidence from an improperly authorized “nighttime” search that occurred at 4:45 p.m. on a December day in Minnesota. Under a fixed-hours search requirement, like the 8:00 p.m. to 8:00 a.m. limit set out in the model code cited by appellant (App. Br. 11, n.6), a court would have to suppress evidence from an improperly authorized “nighttime” search that occurred at 8:01 p.m. on a sunny July evening in Minnesota, when the residents of the house to be searched were outside barbequing. Under either sort of requirement, appellant’s automatic-exclusion approach would require Minnesota courts to suppress evidence from an improperly authorized nighttime search of a storage facility, locked trunk at an airport, or impounded vehicle, even though none of these searches involve a situation “more onerous than with a typical search of a home.” App. Br. 13. Appellant offers no principled basis for concluding that any of these results were intended by the framers of the Minnesota Constitution.

To be clear, respondent is not asking this Court to overrule *Lien* and hold that, under *Hudson*, the exclusionary rule *never* applies to evidence from an improperly authorized nighttime search. Rather, respondent asks this Court to reject appellant’s

⁶ Under this federal rule, the search here would not have been considered a nighttime search in federal court. Appellant’s argument -- if it is to grant her any relief -- therefore would necessarily result in evidence from an improperly authorized “nighttime” search that took place before 10:00 p.m. being admissible in a federal prosecution, but inadmissible in a state prosecution.

argument that it overrule *Lien* and adopt the extreme position that the exclusionary rule *always* requires suppression of evidence obtained from an improperly authorized nighttime search, regardless of the facts of the particular search. This Court should continue to follow the moderate, common-sense approach of *Lien* -- the approach also followed by the Eighth Circuit and most other courts that have ruled on the issue -- under which evidence will be suppressed when it is obtained in an improperly authorized nighttime search that resulted in an unreasonable nighttime intrusion, but will not be suppressed when there is merely a "technical violation" of the prohibition of unjustified nighttime searches. 265 N.W.2d at 841.

Finally, appellant makes a half-hearted argument that even if the facts of this search are analyzed, the results still should be suppressed. App. Br. 20-21. As in *Lien*, however, this search warrant "was executed at a reasonable hour when most people are still awake." 265 N.W.2d at 841. Appellant was in her kitchen with her teenage children; there was no "nighttime intrusion with people being roused out of bed and forced to stand by in their nightclothes." *Id.* Again, under federal law this would not have been considered a nighttime search. *See* Fed. R. Crim. P. 41(a)(2)(B). The refusal of the district court and court of appeals to suppress the methamphetamine and other evidence found in appellant's home should be affirmed. App. 6-7, 21-22.

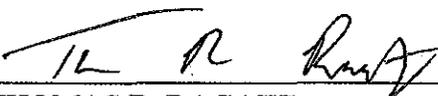
CONCLUSION

Respondent respectfully requests that this Court affirm appellant's conviction.

Dated: November 21, 2006

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota


THOMAS R. RAGATZ
Assistant Attorney General
Atty. Reg. No. 0236822

445 Minnesota Street, Suite 1800
St. Paul, Minnesota 55101-2134
(651) 296-6598 (Voice)
(651) 282-2525 (TTY)

JOHN J. MUHAR
Itasca County Attorney
Itasca County Courthouse
123 Fourth Street NE
Grand Rapids, MN 55744

ATTORNEYS FOR RESPONDENT