

No. 34905-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO MARCELL MITCHELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF SPOKANE

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. The State failed to establish that Mr. Mitchell was lawfully trespassed from the Intermodal bus terminal.

The jury in Mr. Mitchell's case was instructed that "the State has the burden of proving beyond a reasonable doubt that the trespass was not lawful." CP 25. The State did not object to, or appeal the trial court's instruction to the jury on Mr. Mitchell's affirmative defense to criminal trespass. CP 25; RP 186. There is thus no question that the State was required to establish the lawfulness of Mr. Mitchell's trespass from the Intermodal. *See State v. Johnson*, 188 Wn.2d 742, 755, 399 P.3d 507 (2017) (the law-of-the-case doctrine "refers to the principle that jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal."). Yet on appeal, the State curiously asserts, contrary to the jury instructions provided at trial, that "the burden did not shift to the State to establish a lawful basis for the trespass notice." BOR at 7.

Respondent then attempts to argue the issue of whether the Intermodal had the right to exclude persons, by focusing on the irrelevant distinction of public/private for purposes of freedom of speech that simply has no bearing on this case. BOR at 8-10. In Mr. Mitchell's case, it was not disputed that the Intermodal was open to the public, whether or not it

is managed by a private security firm. RP 164; *See State v. R.H.*, 86 Wn. App. 807, 811, 939 P.2d 217 (1997) (privately owned parking lot of fast food restaurant that disallows skateboarding and loitering was “open to the public.”). The question in Mr. Mitchell’s case was not whether the Intermodal bus terminal had the right to exclude persons from its property—it was whether the Intermodal’s trespass of Mr. Mitchell was lawful. RCW 9A.52.090(2); AOB at 6; CP 25.

The State relies on *State v. Kutch*, for its distracting fixation on the “private property owner’s right to exclude.” BOR at 11. However, the question in *Kutch* that actually is relevant to Mr. Mitchell’s case is: “was the written notice sufficient to exclude Mr. Kutch?” *State v. Kutch*, 90 Wn. App. 244, 246, 951 P.2d 1139 (1998). In *Kutch*, the answer was “yes” under the following facts:

Robert Kutch shoplifted from the Mervyn's store in the Yakima Mall on Aril 30, 1996. Mervyn's security guards arrested Mr. Kutch for the crime. They also handed him a written form notifying him that his invitation to enter the Yakima Mall, including Mervyn's, was revoked for one full year. The written notice also informed him that if he entered the mall during that year, he would be charged with criminal trespass. And if he shoplifted again he would be charged with second degree burglary. He signed the form.

Id. The court deemed this notice to be lawful, finding that Mr. Kutch was “sufficiently notified that he was no longer invited into the mall as a member of the general public.” *Id.* at 248. But it is precisely this lawful

notice that was lacking in Mr. Mitchell's case, where there was no written trespass notice; there was no written advisement of the consequences of violating the terms of the trespass; and no document establishing the duration or nature of the restrictions imposed. RP 166, 163. Thus, the State's focus on the undisputed question of the Intermodal's right to exclude persons fails to even address the lawfulness of the Intermodal's exclusion of Mr. Mitchell, which was the central disputed issue at trial.

In comparing Mr. Mitchell's case to *Kutch*, the State erroneously claims, "Like the mall security officer in *Kutch*, Security Officer Power acted within the scope of his authority in issuing the no trespassing order to Mr. Mitchell and asking him to leave." BOR at 13. But there was no order trespassing Mr. Mitchell presented at trial, and Mr. Power did not know if any such order existed. RP 163. The State also incorrectly asserts that Mr. Mitchell "acknowledged that he knew he was trespassed from the premises." BOR citing to RP 166. However, the record reflects only that Mr. Power, the private security guard, asked Mr. Mitchell whether or not he knew he was trespassed. RP 166. The record does not reflect acknowledgement by Mr. Mitchell. RP 166. In fact the record reflects quite the opposite—Mr. Power did not have an order trespassing Mr. Mitchell from the premises that would have provided proof Mr. Mitchell

had been properly notified that he was trespassed from the premises. RP 166.

The State tries to distinguish *State v. Green*, and *State v. R.H.* from the facts of Mr. Mitchell's case. In *State v. Green*, the State failed to prove the notice of the trespass constituted a lawful condition on the mother's presence at her son's school. 157 Wn. App. 833, 837, 239 P.3d 1130 (2010). In *R.H.*, there was insufficient evidence that the defendant did not comply with the lawful conditions of access to the premises. *State v. R.H.*, 86 Wn. App. 807, 812, 939 P.2d 217 (1997). The State claims that unlike in these two cases, Mr. Mitchell did not "contest testimony establishing the fact that he had acknowledged that he knew he was trespassed from the premises." BOR at 7. But in *R.H.*, the court is clear that what the defendant "understood or believed is not relevant to whether his presence was unlawful. Under this analysis, one would be guilty of trespass by returning to property after being unjustly ordered to vacate it. That, the law does not condone." *R.H.*, 86 Wn. App. at 813.

Thus even though the State may have established a pattern of Mr. Power telling Mr. Mitchell to leave the premises, it does not establish that the Intermodal's purported trespass was lawful. Nor does it establish that on this occasion Mr. Mitchell did not comply with all lawful conditions

when the evidence showed that at the time of his arrest he was simply sitting on a bench, doing nothing unlawful. RP 175.

He contested the lawfulness of the Intermodal's trespass through asserting the affirmative defense under RCW 9A.52.090(2); this shifted the burden of proof to the State to prove beyond a reasonable doubt that the trespass was not lawful. CP 25. The jury was instructed that the State needed to prove this essential element. CP 25. Absent evidence of a lawful trespass order, the State failed to meet this burden, and Mr. Mitchell's conviction for trespass should be reversed and remanded for dismissal. *Green*, 157 Wn. App. at 838.

2. The trial record shows that defense counsel was ineffective for not moving to suppress the .2 grams of methamphetamine seized pursuant to Mr. Mitchell's unlawful arrest and for failing to object to inadmissible hearsay used to prove the truth of the matter asserted.

- a. Because the State had the burden of proving the lawfulness of Mr. Mitchell's trespass from the Intermodal, the trial record was developed sufficient for review of whether Mr. Mitchell was subject to unlawful arrest.

Contrary to the State's assertion that the record is not sufficient to develop a claim of ineffective assistance of counsel,¹ these facts were fully developed at trial, because the State bore the burden of establishing the legality of the trespass. CP 25. RP 196-197. Thus, the State presented

¹ BOR at 15.

evidence at trial about the entirety of events that led police to arrest Mr. Mitchell. This included Mr. Power's inability to confirm there was in fact a trespass order that prohibited Mr. Mitchell from entering the Intermodal; police arrest of Mr. Mitchell based on a dispatch record that provided no evidence of whether Mr. Mitchell was in fact lawfully trespassed; and evidence that Mr. Mitchell was doing nothing illegal when he was arrested.

State v. O' Cain, relied on by the State in its attempt to justify Mr. Mitchell's illegal arrest, underscores the importance of police corroboration of information provided in a computer compilation:

when a conclusory allegation (e.g., that a named individual is a drug dealer) is obtained from some computerized compilation of information but no showing is made as to the basis of that allegation, it must be treated as if it were nothing more than an anonymous tip.

State v. O' Cain, 108 Wn. App. 542, 555, 31 P.3d 733 (2001)

(citing *United States v. Ornelas-Ledesma*, 16 F.3d 714 (7th Cir.1994); 2 Wayne R. LaFare, Search and Seizure § 3.5(e) at 277, n. 103 (1996)).

Of course, a police officer may take additional steps to establish probable cause based on the type of evidence relied on by the dispatch record.

O' Cain at 552. Or, after establishing reasonable suspicion that a person is not authorized to be on the premises, police may gain more information that would turn reasonable suspicion into probable cause to arrest. *See*

State v. Blair, 65 Wn. App. 64, 70, 827 P.2d 356 (1992) (“Because [the officer] knew Blair did not live in Roxbury Village, had admonished Blair not to return and had arrested him nearby for a drug transaction, Officer Williams had an articulable suspicion that Blair might be trespassing on September 1. Based on this information, Officer Williams could properly stop Blair, ask him why he was on the premises, and investigate to see if his purpose for being there was in fact legitimate.”).

But here, like in *Blair*, no such additional steps were taken. *Id.* at 69. Similarly, Officer Kester immediately approached Mr. Mitchell and arrested him without verifying whether he was in fact illegally on the premises. RP 91. Officer Kester testified that she knew that Mr. Mitchell had been contacted by Mr. Power three times previously, but not arrested for being at the Intermodal. RP 101. Police do not have physical trespass orders. RP 102. If any such actual trespass notice existed, Officer Kester explained that would be on file with the issuing agency. RP 102. Mr. Power’s testimony was that he did not know if such an order existed in Mr. Mitchell’s case, and no trespass order was provided to police. RP 176. Mr. Power’s testimony established that he thought that police officers issued trespass notices to people, and Officer Kester testified that the Intermodal would be the issuing agency. RP 162-163. Because neither police nor the Intermodal could verify the information in dispatch, there

was no corroboration of the dispatch record to establish the reliability of the information it contained. Thus, the trial record, which was fully developed based on the State's burden to establish the lawfulness of Mr. Mitchell's exclusion, also established that police lacked probable cause to arrest Mr. Mitchell.

- b. There is no strategic reason to forego a motion to suppress on the felony offense of possession of methamphetamine since counsel's theory at trial was that Mr. Mitchell was unlawfully excluded from the Intermodal.

On appeal, the State conjures non-existent evidence regarding the lawfulness of the trespass that might have emerged had the defense raised the motion to suppress at the trial level, citing to the "non-trial sentencing record" which asserted that Mr. Mitchell was released from jail following conviction for conspiracy to PCS-Methamphetamine, "also occurring at the Intermodal." BOR at 15. However, this is not a conviction for the offense of trespass. CP 30. And had there been a lawful trespass order in effect for that offense, the State surely would have subsequently relied on this to prove the lawfulness of Mr. Mitchell's exclusion, as it was the State's burden to do so in the instant case. The State also notes Mr. Mitchell's trespass convictions, asking, with no basis, whether these trespass convictions occurred in the Intermodal. BOR at 16. Again, if the State had evidence that Mr. Mitchell was lawfully trespassed from the

Intermodal, and had proved this in prior cases, it surely would have brought such evidence in against Mr. Mitchell at a subsequent trial, where his affirmative defense required the State to prove beyond a reasonable doubt that the trespass was not lawful. CP 25. But the State produced no such evidence.

And defense counsel knew the State had no such evidence to establish that Mr. Mitchell was lawfully excluded from the Intermodal. Defense counsel, in arguing for exclusion of the prosecution's belatedly produced photographs of Mr. Mitchell at the Intermodal, plainly asserts:

There's no form or anything that's available to them that they give to somebody to say you're not suppose to be here. Their trespass policy has been deemed constitutionally insufficient by Judge O'Connor.

RP 142. The record was fully developed in regard to the State's inability to prove the legality of Mr. Mitchell's exclusion. And, as stated in Appellant's opening brief, the defense at trial was that the State could produce no documentation to show that Mr. Mitchell was lawfully trespassed at the time he was arrested for the offense:

Now, the State keeps saying he was trespassed, and we heard from Officer Kester who said when I looked on the screen and he had been trespassed and when asked do you have evidence of that? You have evidence that he knew that? Do you have anything that shows a piece of paper saying you're not allowed to go to this otherwise entirely open public building? No.

RP 209. The State attempts to cast the defense's focus on the lack of the State's evidence and ability to prove Mr. Mitchell's lawful exclusion as trial strategy, claiming that Mr. Mitchell's attorney "would rather argue the case *without* the prejudicial documents and additional proof." BOR at 23. But this cannot be the case here, where defense counsel was in fact fully acquainted with the State's dearth of evidence to support the criminal charge of trespass, and knew this evidence to be constitutionally deficient. RP 142.

Because there is no legitimate trial tactic in foregoing a motion to suppress after establishing at trial that Mr. Mitchell was subject to illegal arrest, the case should be reversed and remanded to the trial court for suppression of the evidence that was illegally seized from Mr. Mitchell. *See State v. Allen*, 138 Wn. App. 463, 472, 157 P.3d 893 (2007) (evidence obtained pursuant to an invalid arrest he evidence must be suppressed as fruit of the poisonous tree.) (quoting *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999)).

- c. There was no tactical reason for not objecting to the hearsay of the dispatch record, which was the sole evidence relied on by police to confirm Mr. Mitchell's trespass status.

This error is manifest for the same reasons that defense counsel's failure to move to suppress was manifest—the defense at trial required the

State to prove the lawfulness of the trespass, and defense counsel knew of the State's deficient evidence prior to trial. RAP 2.5

The State asserts that it could have been a strategic choice for defense counsel not to object to the hearsay of the dispatch record, suggesting that it would have been easy to obtain the actual "hard copies, or logs of the actual notifications of trespass." BOR at 22-23. But the testimony at trial showed quite the opposite: the police had not issued the trespass notice, and did not have a copy of it. RP 102. And the same was true for Mr. Power, who did not know if Mr. Mitchell had ever received a trespass admonishment form from the Intermodal. RP 163. Nor did Mr. Power know for certain that Mr. Mitchell was in fact trespassed from the Intermodal. RP 153. Thus neither the Intermodal nor police claimed to have an order notifying Mr. Mitchell that he was trespassed from the premises, and the dispatch record appears to have been the only record relied on by police prior to arresting Mr. Mitchell for trespass. RP 90.

The State argues that there was no error in defense counsel's failure to object to dispatch record on hearsay grounds, claiming that a trespass notice could come in as a business record exception to the rule against hearsay. BOR at 21. But this argument fails where there was no notice of trespass, and so no business record to be admitted.

Thus, where defense counsel was fully aware of this deficiency in the State's evidence, there can be no tactical reason for failing to object to this hearsay testimony at trial. Had the defense objected, the court would have excluded the hearsay, and the State would have been unable to prove its case.

B. CONCLUSION

Mr. Mitchell's conviction for trespass should be reversed and remanded for dismissal where the State failed to meet its burden to prove the absence of the affirmative defense beyond a reasonable doubt. Alternatively, where the defense fully developed the record on appeal that Mr. Mitchell was subject to an illegal arrest, yet did not move to suppress evidence seized as a result of this unlawful seizure, and also failed to object to inadmissible hearsay evidence used to prove the truth of the matter asserted, reversal and remand for a new trial due to ineffective assistance of counsel is required.

DATED this 28th day of September, 2017.

Respectfully submitted,

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RESPONDENT,)	
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v.)	NO. 34905-5-III
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ANTONIO MITCHELL,)	
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APPELLANT.)	

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