

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT NO. 7925236 | 11/12/16 2:40

IN THE SUPREME COURT OF THE STATE OF WASHINGTON
BY RONALD R. CARPENTER
Clerk

LEO C. BRUTSCHE,

Petitioner,

vs.

CITY OF KENT, a Washington
Municipal Corporation

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Brian Gain, Judge

RESPONDENT CITY OF KENT'S SUPPLEMENTAL BRIEFING
ON THE ISSUE OF TRESPASS

Richard B. Jolley, WSBA #23473
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861 / (206) 223-9423 Fax

ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. FACTS.....	3
A. The officers had specific authority to breach locked containers.....	3
B. Officer safety and crime scene integrity required breaching of the doors.....	4
III. LAW AND ARGUMENT.....	5
A. Trespass ab initio does not apply where entry onto the property is privileged.....	5
B. The Court of Appeals properly affirmed dismissal of Brutsche’s claim.....	7
1. State law fails to support an actionable claim for trespass when executing a valid warrant.....	7
C. Petitioner presents no evidence that the actions of the officers went beyond the scope of the warrant.....	8
IV. CONCLUSION.....	9

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES:	
<i>Hamilton v. King County</i> , 195 Wn.84, 79 P.2d 697 (1938).....	7
<i>Jahns v. Clark</i> , 138 Wn.288, 294-295, 244 P. 729 (1926).....	8
OTHER JURISDICTIONS:	
<i>Turner v. Sheriff of Marion County</i> , 94 F.Supp. 2d 966, 984 (SD Ind. 2000).....	7, 8
RULES, STATUTES AND OTHERS:	
RESTATEMENT (SECOND) OF TORTS (1965).....	2, 5, 6

I. INTRODUCTION

Petitioner's trespass claim was dismissed by the trial court and affirmed by the Washington Court of Appeals. The Supreme Court has determined that it will now review the Court of Appeals ruling on the trespass claim as well as Petitioner's negligence and takings claims. Respondent now briefs the trespass issue pursuant to the Supreme Court's Order inviting briefing and oral argument on this issue in addition to the other issues before the Court.

It is undisputed here that the police entered Petitioner's property based on a valid search warrant. Petitioner's apparent trespass theory is that the police committed a trespass because doors that were damaged were breached unnecessarily. Petitioner forwards the theory that the police should have called the property owner, Petitioner Leo Brutsche, *beforehand* so that he could accompany them to the property and open any locked doors for them as they served the warrant.

Petitioner ignores the obvious safety risks and potential compromise of evidence created by that suggestion. More significantly, Petitioner ignores that the valid, judicially issued warrant specifically provided authority for the police to open locked containers during the course of the search.

The Court of Appeals ruling should be affirmed as the execution of a valid search warrant where the police had actual authority to open locked containers cannot give rise to a trespass. Petitioner incorrectly attempts to apply the doctrine of trespass ab initio to the case here. The trespass ab initio doctrine is an ancient legal premise of questionable viability today. The Restatement 2nd of Torts, in discussing the liability for trespass when an actor is privileged initially to enter a property but exceeds the scope of that privilege, specifically rejects the application of the trespass ab initio doctrine when entry on the land was originally privileged. Petitioner specifically references that authority in arguing that the doctrine should apply, but fails to consider the specific rejection of the doctrine according to the Restatement under the facts here. Further, Petitioner's only legal support applying doctrine occur in factual circumstances far removed from the facts here.

The case law and authorities supplied by Petitioner rely on strained interpretations of those authorities and depend on a myopic interpretation of the facts which directly contradicts the record before the Court. Two members of the SWAT team that executed the warrant have provided declarations explaining the hazards presented by execution of a search warrant at a suspected methamphetamine location. These declarations expose the absurdity of Petitioner's suggestion that the police should have

notified him beforehand of the warrant service. Petitioner's suggestion would create a significant compromise to officer safety and the integrity of the scene being searched. Those declarations are unchallenged and provide an absolute basis for affirming dismissal of the trespass claim.

II. FACTS

A. The officers had specific authority to breach locked containers.

When the Valley Special Response Team (VSRT) executed the search warrant on the suspected methamphetamine location in question, the warrant provided specific authority to search an abandoned warehouse, various outbuildings, semi-trailers and a pink and white mobile home located at 426 Naden Avenue in Kent. CP 316 – 318. The warrant also specifically authorized the police to search locked containers and numerous abandoned or disabled vehicles. CP 316. The validity of the warrant has never been challenged by Petitioner.

Based on the authority provided in the warrant, the VSRT breached several locked doors on the premises. CP 45, 49. The VSRT also breached the sliding glass door of the pink mobile home after the warrant subject, Petitioner's son, ran away from the police and barricaded himself inside the trailer when the police arrived on the property. CP 44, 48.

B. Officer safety and crime scene integrity required breaching of the doors.

As set forth in the declarations of VSRT Commander Mike Villa and VSRT member Officer Darren Majack, the warrant execution involved a suspected methamphetamine lab or distribution site on Petitioner's property. CP 43 – 44, 46 – 47. When the VSRT arrived on Petitioner's property, Jim Brutsche ran inside a trailer, closed the sliding glass door, and attempted to barricade himself inside by placing a dowel at the bottom of the sliding door. CP 44, 48. Officer safety concerns along with concerns for compromise of any evidence dictated that the VSRT breach the slider to the trailer to take Brutsche into custody as quickly as possible. *Id.*

After Brutsche was apprehended and placed in custody, VSRT proceeded to search the remaining areas subject to the warrant including locked containers and outbuildings. CP 45, 49. The police needed to gain access to the remaining buildings as quickly as possible because of obvious safety concerns for the police officers as well as ensuring that no potential evidence was destroyed. CP 45, 49.

Leo Brutsche claims he arrived while the subject search was still ongoing and that he offered to use his keys to open various doors for SRT. Allowing Petitioner access to a potential crime scene before the search had

been completed or all potential subjects had been accounted for would have violated the VSRT's standard operating procedures and accepted law enforcement practices. CP 50. These procedures are in place to maintain the integrity of potential crime scenes and ensure the safety of innocent bystanders as well as the police in a potentially high risk environment such as a suspected methamphetamine location. CP 50.

III. LAW AND ARGUMENT

A. **Trespass ab initio does not apply where entry onto the property is privileged.**

Relying on a case from 1938, Petitioner mistakenly attempts to apply the doctrine of trespass ab initio to the case at bar. The doctrine of trespass ab initio, however, is inapplicable in circumstances where the original entry onto the property in question is privileged. In commenting on §214(2), Liability for Excess; Trespass Ab Initio, the Restatement 2nd of Torts specifically states:

Subsection (2) rejects, as the entries on land which were originally privileged, the doctrine of trespass ab initio....

Since 1900 the weight of authority has rejected trespass ab initio, and there have been very few cases in which it has been applied. The decisions rejecting it have been concerned almost entirely with lawful arrest followed by tortious conduct on the part of the arresting officer; but the number of decisions which have thus rejected the doctrine, and their repudiation of the principle, indicate it will no longer be accepted in cases of entry on land, which there is no good reason to distinguish.

See Restatement 2nd, §214, Comment on Subsection (2).

Obviously, the warrant execution provided privilege for the police to enter the property. Accordingly, the doctrine of trespass ab initio is inapplicable here.

Further, the comment accompanying §204 of Restatement 2nd of Torts specifically states that no permission or explanation is required when such an explanation is thought to be *useless* or *impracticable* for entering the property. “Except when he really believes it to be useless or impracticable, before effecting a forcible entry in such a building, the actor should explain his errand and demand admittance.” *See* Restatement 2nd of Torts, §204 comment b. [emphasis supplied]. Likewise, at §206 (1), the same principle regarding use of force to enter a dwelling to take someone into custody applies. “Such force may be used only after explanation and demand for admittance, unless the actor reasonably believes such demand to be impracticable or useless. *See* Restatement 2nd of Torts, §206(1).

Here, the declarations of the involved police officers make clear how impracticable and/or useless it would have been to request permission to breach doors given the officer safety issues and evidence integrity at stake. Assuming, arguendo, that the doctrine of trespass ab initio actually applies, the evidence still fails to support Petitioner’s claim as there is

uncontroverted evidence that seeking permission or making announcements would have been impracticable under the circumstances. Accordingly, the Court of Appeals decision should be affirmed.

B. The Court of Appeals properly affirmed dismissal of Brutsche's claim.

1. State law fails to support an actionable claim for trespass when executing a valid warrant.

While Petitioner acknowledges that the police were authorized to enter the property in question to serve a warrant, Petitioner claims that an action for trespass lies for “tortious property destruction”. To support his trespass claim, Petitioner fails to provide a single Washington state case that specifically involves police executing a search warrant. Instead, Petitioner relies on *Hamilton v. King County*, 195 Wn.84,79 P.2d, 697 (1938). *Hamilton* does not involve police officers executing a search warrant. Rather, it involves mink farmers asserting that construction by King County of a large drainage ditch caused plaintiff's minks to abort their young or kill and eat them after birth because of nervousness and fright brought on by the construction. Obviously, the facts of that case are so removed from the facts here that *Hamilton* is clearly inapplicable.

Similarly, Petitioner's Petition for Review cites *Turner v. Sheriff of Marion County*, 94 F.Supp. 2d 966, 984 (SD Ind. 2000) and claims that *Turner* has “been applied in other jurisdictions in the context of service of

a search warrant”. Petitioner ignores that the issue in *Turner* was whether immunity protected defendants from an action arising from service of a warrant at a *wrong location* . Further, *Turner* specifically addresses the applicability of a specific Indiana statute dealing with warrant services occurring at the wrong location and the rights of those mistakenly subject to warrant execution under Indiana state law. Once again, this case has no applicability to the trespass issue before the Court.¹

C. Petitioner presents no evidence that the actions of the officers went beyond the scope of the warrant.

Petitioner argues that the doctrine of trespass ab initio applies here because though the officers had authority to enter the property, they abused that authority through positive acts of misconduct. There is no factual support in the record for this assertion.

The declarations of SRT Commander Mike Villa of the Tukwila Police Department and SRT member officer Darren Majack of the Kent Police Department are uncontroverted. Those declarations set forth why it was necessary to breach various doors and why the actions of the Petitioner’s son Jim Brutsche dictated that those actions occur. Petitioner

¹ Petitioner also cites in his Petition for Review *Jahns v. Clark*, 138 Wn.288, 294-295, 244 P. 729 (1926) for the proposition that the doctrine of trespass ab initio has been applied in the service of a search warrant context. Like the other cases cited by Petitioner, *Jahns* has no relation to the case at bar. *Jahns* involved a shooting which occurred on a public highway. The involved police officers mistakenly shot a young man thinking he was a bootlegger. The facts in *Jahns* distinctly separate it from the case at bar as the officers here were acting pursuant to a valid warrant and doing exactly what the warrant authorized.

fails to provide any evidence that would call into question the assertions in those declarations. Petitioner simply has a “theory” which is nothing more than a self-serving, naked assertion by the Petitioner himself as to why the officers went beyond the scope of the warrant.

I believe the custom or practice of using a battering ram to breach the doors is unreasonable under the circumstances here. Use of my keys would be much quicker and quieter, making entry much safer for the officers. Also, keys would not damage the doors and the door jams like the battering ram.

See Brutsche declaration at CP 135, ¶7.

Petitioner Brutsche is not a police expert. His naked assertion, which ignores the dangers and necessities set forth in the declarations of the police officers, fails to create a question of fact regarding a trespass. Even assuming, *arguendo*, that a trespass claim can actually be brought under the circumstances presented here, Petitioner still has no evidence in the record before the Court that would create a question of fact as to whether the officers went beyond the scope of the warrant under the circumstances.

IV. CONCLUSION

The Court of Appeals dismissal of Petitioner’s trespass claim should be affirmed. First, the police possessed a valid warrant to enter

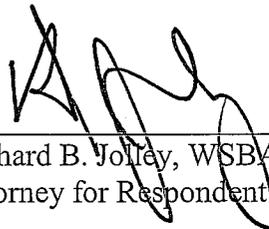
Petitioner's property. The entry was privileged based on that warrant and no trespass claim is available. Further, Petitioner's theory of trespass ab initio does not apply as the doctrine is inapplicable when the entry is privileged.

Also, the warrant provided specific authority to breach locked containers and buildings. The actions of Petitioner's son, fleeing from the police and attempting to barricade himself inside a trailer, dictated that the police breach that door to preserve evidence integrity and maintain officer safety. The basis for the police actions and the validity of the warrant are undisputed and the Court of Appeals ruling should be affirmed.

DATED this 13th day of November, 2007.

Respectfully Submitted,

KEATING, BUCKLIN &
McCORMACK, INC., P.S.



Richard B. Jolley, WSBA #23473
Attorney for Respondent City of Kent

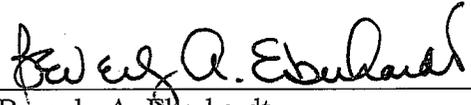
RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CERTIFICATE OF SERVICE
2007 NOV 14 P 2:41

I, Beverly Eberhardt, certify that on November 13, 2007 I served
counsel of record with a copy of the Respondent City of Kent's
Supplemental Briefing on the Issue of Trespass via legal messenger to:

John R. Muenster
Muenster & Koenig
1111 Third Avenue, Suite 2220
Seattle, WA 98101

Counsel for Petitioner

DATED this 13th day of November, 2007.


Beverly A. Eberhardt