

ORIGINAL

No. 23-349

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
MAY 31 2023

OFFICE OF THE CLERK
SUPREME COURT, U.S.

DON ESSLINGER AND
JENNIFER ESSLINGER,
Petitioners,

SHAWN BASS AND LAREE BASS,
Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of Idaho

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In an Idaho civil trespass case petitioners were denied a first-time continuance of a summary judgment hearing after they asserted their Fifth Amendment privilege against self-incrimination because of risk of conviction in a "parallel" criminal trespass case. The trial court failed to hold an *in camera* hearing balancing the harm to parties from a delay of the civil case versus the potential for a 6-month jail sentence to the petitioners as a result of criminal trespass citations issued by the respondents that blocked petitioners testimony in the civil case.

This petition presents the following questions regarding the superiority of the 5th Amendment right to remain silent over procedural considerations in a civil case when criminal charges are pending in a "parallel" proceeding.

1. Whether in deciding a motion to continue a hearing on summary judgment after assertion of the right to remain silent to avoid self-incrimination in a parallel criminal case, it was necessary for the trial court to conduct an *in camera* hearing to determine if the harm caused by the delay of the civil proceeding would exceed the harm caused by denying the continuance.
2. Whether a state court's procedural rule requiring 14-day's advance notice for a motion to continue is preempted by a 5th Amendment claim that testimony would risk self-incrimination.

QUESTIONS PRESENTED—Continued

3. Whether constitutional safeguards are necessary when a party is charged with a criminal offense under a "citizen citation" rule of criminal procedure.
4. Whether it is overbearing and oppressive for a civil litigant to demand sanctions against a party seeking 5th Amendment protection.

PARTIES

Petitioners: Don Esslinger (misnamed "Donald Esslinger" by Respondents in the proceeding below) and Jennifer Esslingers as defendants in both the civil trespass case and in the criminal trespass cases.

Respondents: Shawn Bass and Laree Bass as plaintiffs in the civil trespass case, with Shawn Bass as the issuer and complainant against the Esslingers in the criminal trespass cases he filed under Idaho's "Citizen Citation" Criminal Rule 5(c).

RELATED PROCEEDINGS

CIVIL TRESPASS CASE:

Court: District Court, 2nd Judicial District,
Idaho County, Idaho: Case No.: CV25-20-0513
SHAWN BASS AND LAREE BASS,
Husband and Wife, Plaintiffs

vs.

DONALD (sic) ESSLINGER AND
JENNIFER ESSLINGER,
Husband and Wife, and
DOES I – IX., Defendants.

Date Case Filed: November 10, 2020

Memorandum Opinion re Various Motions:

Date of Memo Opinion: July 20, 2021

Date of Judgment: July 27, 2021

Memorandum Opinion re Motion to Reconsider:

Denial of Reconsideration: September 14, 2021

Appealed to: Court: Supreme Court of Idaho

Docket No.: 49240 Published Opinion: March 2, 2023

525 P.3d 737 (Idaho 2023)

RELATED PROCEEDINGS—Continued

CRIMINAL TRESPASS CASES

Criminal Case No. 1:

Court: District Court, 2nd Judicial District,
Idaho County, Idaho

Idaho County Sheriff
ICS7100000082

IDAHO UNIFORM CITATION

State of ID vs. **Jennifer A. Esslinger**
Misdemeanor Citation Date/Time: 11/12/2020
4:02PM

Violation #1: Idaho Code §18-7008(3)(a)(1)(2)
Trespass with property damage (\$0 TO
\$1,000)

Comment: **CITATION SIGNED BY**
SHAUN BASS

Date Case Served: November 12, 2020
4:02PM

Refiled in the District Court, 2nd Judicial
District

Idaho County, Idaho as Case No.: CR25-20-
1679

STATE OF IDAHO,

Plaintiff,

vs.

JENNIFER ESSLINGER,
Defendant.

Date of Dismissal: February 22, 2022

RELATED PROCEEDINGS—Continued

Criminal Case No. 2:

Court: District Court, 2nd Judicial District,
Idaho County, Idaho

Idaho County Sheriff

ICS710000083

IDAHO UNIFORM CITATION

State of ID vs. **Don Esslinger**

Misdemeanor Citation Date/Time: 11/12/2020 4:02PM

Violation #1: Idaho Code §18-7008(3)(a)(1)(2)

Trespass with property damage (\$0 TO \$1,000)

Comment: **CITATION SIGNED BY SHAUN BASS**

Date Case Served: November 12, 2020 4:02PM

Refiled in the District Court, 2nd Judicial District

Idaho County, Idaho as

Case No.: CR25-20-1680

STATE OF IDAHO,

Plaintiff,

vs.

DON ESSLINGER,

Defendant.

Date of Dismissal: February 22, 2022

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DECISIONS BELOW

Bass v. Esslinger, No. 49240, Supreme Court of Idaho,
Published Opinion Rendered: March 2, 2023,
525 P.3d 737 (Idaho 2023).

State v. Jennifer Esslinger, 2nd Judicial District of Idaho Co.
Case No. CR25-20-1679-Dismissal: February 22, 2022

State v. Don Esslinger, 2nd Judicial District of Idaho County
Case No. CR25-20-1680-Dismissal: February 22, 2022

JURISDICTION

Petitioners rely upon 28 U.S.C. §2101(c) and USSC
Rule 12(b) as their basis of jurisdiction as follows:

§2101(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

Rule 12(b) [quoting in relevant part]: "...a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort...."

**CONSTITUTIONAL PROVISIONS IMPLICATED
V AMENDMENT TO THE U.S. CONSTITUTION:**

[quoting in relevant part]: "No person shall be ... compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Petitioners were deprived of property when denied due process of law as they asserted their Fifth Amendment privilege against self-incrimination while seeking a continuance of the hearing on summary judgment that should have caused the trial court to conduct an *in camera* evaluation to determine whether a stay would cause greater harm to respondents by delaying the proceeding until disposition of pending “parallel” criminal charges that respondents had self-initiated as “citizens” or if proceeding against petitioners by summary judgment without their testimony would be more detrimental.

Criminal trespass charges had been issued personally by respondents under Idaho’s “citizen citation” rule¹ (two days after filing the civil trespass case) despite the advice of Deputy Sheriff Cody Killmar that there was no probable cause to believe a crime had been committed and that his investigation revealed that this was a “civil” matter. These criminal charges kept petitioners from testifying as to the June 28, 2021 summary judgment hearing because of the fact that petitioners reasonably believed would likely lead to self-incrimination (see Appendix, Declarations of Don Esslinger and Jennifer Esslinger.)

¹ Idaho Misdemeanor Criminal Rule 5(c): “Citizen Citation. The uniform citation may be signed by any person in whose presence an alleged offense occurred and be witnessed by a peace officer whose name shall be endorsed on the citation.

The District Court superficially considered the Motion to Continue, taking jurisdiction of the motion, even though it was late-filed, then denied it because petitioners did not file the same 14-days or more before the hearing on summary judgment, and such denial was without conducting an *in camera* evidentiary hearing as to the comparative harm to the litigants in granting or denying said stay.

Idaho's Supreme Court followed suit and decided the stay issue on procedural grounds, holding that a general 14-day notice must control over the fundamental constitutional right to remain silent. (See appendix page 29). Because the Supreme Court of Idaho is a court of last resort and because the courts of last resort of other states ruled in favor of staying civil cases under similar circumstances, especially after the application of a balancing test, there is a split of authority that can only be reconciled by the U.S. Supreme Court.

It should be noted that, instead of sanctions for asserting the Fifth Amendment privilege, petitioners were punished by an award of treble damages of \$107,134.32 for performing statutorily mandated weed removal from the Disputed Area of land and by the loss of 1/3 of an acre they had just bought and paid for as bona fide purchasers for value without notice that respondents claimed said property.

ARGUMENT

In an Idaho civil trespass case that was filed November 10, 2020, after fast-tracking the summary judgment to a June 2021 hearing and without discovery or testimony from petitioners, the respondents were awarded damages of \$107,134.32 for petitioners' work in clearing invasive species of vegetation with huge thorns dangerous to humans that harbored ticks carrying limes disease plus respondents were awarded title to one-third (1/3) acre (the "Disputed Area") being land that was a part of petitioners' 2019 seven-acre ("7-Ac.") acquisition.

Petitioner's discovery depositions were set to occur on April 7, 2021 by respondents' counsel at Grangeville, Idaho, a location 1-1/2 hours from his office in Lewiston, Idaho. The venue for the case was at the courthouse in Grangeville, Idaho where the case was filed by respondent's counsel and in the city where the depositions were set. Counsel complained of inconvenience when respondents refused to answer case specific questions at the deposition by taking the Fifth Amendment and became visibly frustrated as said depositions were essentially fruitless. Contrary to U.S. Supreme Court holdings, respondents' counsel filed a motion for sanctions against petitioners, which, in addition to the citizen criminal citations added to the intimidation of petitioners.

Eight weeks later, at the summary judgement hearing, respondents pushed for a ruling on sanctions

and petitioners were denied a continuance when they asserted the Fifth Amendment privilege as the basis to stay the proceedings.

The case proceeded to judgment without consideration of petitioners' Fifth Amendment claims and was solely based on evidence presented by respondents as petitioners declined to present any potentially self-incriminating rebuttal testimony that would have demonstrated genuine issues of material fact as they were facing pending parallel criminal trespassing charges arising from the same facts and circumstances. (See Appendix for Declarations of Don Esslinger and Jennifer Esslinger.)

The reason Petitioners "took the 5th" was that they were each subject to a jail sentence stemming from the criminal trespass charges that had been initiated by Shaun Bass as "citizen citations" issued contrary to a law enforcement advisory that there was no probable cause to believe that a crime had been committed and that this was just a "civil" matter. These criminal citations were an afterthought, issued two days after the civil trespass case was filed, but were effectively used to silence any opposition to summary judgment.

Under Idaho's "citizen citation" rule² the respondents were personally allowed to charge

² Idaho Misdemeanor Criminal Rule 5(c): Citizen Citation. The uniform citation may be signed by any person in whose presence an alleged offense occurred and be witnessed by a peace officer whose name shall be endorsed on the citation.

petitioners with criminal trespass, giving them the tactical advantage of silencing petitioners, so their testimony could not be heard at summary judgment which was only in their own self-interest. Criminal trespass in Idaho has the potential for up to 6-months of imprisonment.³

It is beyond reason to believe that the Idaho Supreme Court (“ISC”) would create a rule vesting probable cause determinations in the hands of random citizens with no due process protections; and further beyond reason to believe the ISC would not enforce the right of petitioners to protect themselves from self-incrimination by reversing the district court’s unevaluated and unjustified denial of a continuance.

Under the Idaho trespass statute,⁴ the probable cause standard was whether the petitioners knew or had reason “... to know that [their] presence is not permitted”⁵ on the subject property. Ironically, the property in this case involved ground that petitioners’ had just bought and paid for in May of 2019. Given that the trespass statute itself was new in 2018 and

³ Idaho Code §18-7008(3)(i)(2) ...[T]he person may be sentenced to jail for a period of no more than six (6) months and shall be fined in an amount no less than five hundred dollars (\$500) and no more than one thousand dollars (\$1,000).

⁴ *Id.*

⁵ Idaho Code §18-7008(2)(a). A person commits criminal trespass and is guilty of a misdemeanor, except as provided in subsection (3)(a)(i) of this section, when he enters or remains on the real property of another without permission, knowing or with reason to know that his presence is not permitted.

had not been tested and remains unchanged to this day,⁶ the full reach of that statute is yet unknown; but, when placed in operation against petitioners in conjunction with “citizen citations” issued by respondents it worked a grievous injustice in this case.

To be guilty of criminal trespass, there must be evidence that the accused actually knew or had reason to know (*mens rea*) that the purported landowner claimed the Disputed Area as their property and that their presence on the land was not permitted by the owner.

There was ample proof from the petitioners’ testimony that would have shown they never knew about respondents’ well-kept secret of claiming ownership of the Disputed Area before petitioners purchased the real estate in 2019 or before improving the land in 2020. Such testimony would have included the fact that for 30 years before the purchase took place, the petitioners home overlooked the Disputed Parcel. During that time they watched as title to the 7-Ac. tract including the Disputed Area changed hands multiple times and never once did respondents’ assert a claim of ownership.

Further, at the time of their purchase in 2019, petitioners made a personal inspection of the property looking for encroachments and contra-indications of ownership such as painted rocks that would give notice of a different boundary or other party owners.

⁶ [18-7008, added 2018, ch. 350, sec. 6, p. 828.]

There were no “No Trespassing” signs or other evidence of encroachments.

Before purchase, petitioners also had a professional boundary survey performed confirming the perimeter of the property with the Disputed Area inside the petitioners’ boundaries. In 2019, Petitioners also engaged a title search, purchased title insurance and paid full value for the entire 7-Ac. tract which included the Disputed Parcel.

The evidence was beyond a reasonable doubt that petitioners did not know or have reason to know that respondents held a claim of ownership as to the Disputed Area before they began clearing it of noxious vegetation as ordered by the State of Idaho. (See Appendix for Declaration of Jennifer Esslinger.) Hence, there was no *mens rea* (making the criminal charges meritless); but for the petitioners to testify to these facts, that they had indeed gone onto the property and had indeed removed vegetation, despite such action was with the imprimatur of the State of Idaho Department of Agriculture and with the pending criminal cases, it would likely open the door to other potentially incriminating cross examination and created a risk not worth taking.

Instead, waiting for the Magistrate Judge to dismiss the meritless cases on February 22, 2022, was the prudent course of action. (See Appendix, for criminal case Dismissal Orders.)

Since as far as petitioners knew, the respondents' assertion of their ownership claim was being presented for the first time on November 10, 2020, and since it was the respondents who never recorded their purported ownership claim, and since it was the respondents who signed the "citizen citations" initiating the meritless criminal prosecution, then on balance it would have been equitable to delay the respondents civil summary judgment hearing until petitioners could testify without risk of self-incrimination.

Whereas, a fair minded district court judge using a balancing test after an *in camera* hearing on the comparative harm of a continuance vs proceeding to hearing without testimony from petitioners would have found that extreme unfair prejudice would result from requiring petitioners to go to an immediate summary judgment hearing on June 28, 2021 as long as there was unresolved self-incrimination issues, while petitioners were holding their silence pending resolution of the criminal cases.

The idea that the Disputed Area or one-third of an acre of the 7-Ac. tract didn't belong to the petitioners or to their predecessors in interest was unimaginable to petitioners as there were no title issues presented at the petitioners' closing and certainly by waiting a full year and one-half (1-1/2) after purchase before raising the issue made their claim appear highly suspicious as if it was a manufactured claim.

Because of the proximity to their adjacent five-acre home site respondents could see that petitioners were pouring in large amounts of sweat equity as they beautified the 7-Ac. former strip mine site that overlooks the Salmon River. Respondents could observe the petitioners' improvements to the land, reclaiming it from mining destruction, with deep pits, trenches and tall mounds of tailings all of which needed to be resurfaced by petitioners who were in the business of using earth moving equipment.

Because respondents never in 30 years took any action to maintain the land they claimed to have owned since 1975, there were huge patches of Canadian thistle and thorn bushes so toxic that the State of Idaho ordered the petitioners as landowners to eradicate these invasive species in order to prevent them from spreading; which is exactly what the petitioners were doing when the respondents filed the civil suit on November 10, 2020 and issued their companion "citizen citations" on November 12, 2020 all complaining that the petitioners were improperly removing vegetation from respondents' property.

If Idaho had chosen to place Constitutional 'guardrails' on the citizen citation rule (first effective in 1979) the abuses experienced by petitioners in this case would have been prevented. Instead, there was a 'stampede' environment created where an unwitting neighbor (petitioners) were charged with jailable offenses by a "citizen" for merely cleaning up the property they reasonably believed was their own land

then severe civil consequences were perpetrated on them when deprived of their opportunity to share the facts and circumstances at the hearing on summary judgment presenting genuine issues of material fact to rebut the assertions by respondents. And then, the criminal trespass charges that held petitioners at bay, were merely dismissed on February 22, 2022 as they were baseless, meritless and without foundation.

The Idaho Supreme Court (“ISC”) held⁷ that granting a continuance was simply a discretionary procedural matter for the trial court and since petitioners violated the 14-day rule, petitioners must pay the consequences for late filing by having their

⁷ “The Esslingers challenge the district court’s denial of their motion to continue the summary judgment hearing, contending that the invocation of their Fifth Amendment rights precluded them from submitting material evidence in opposition to the Basses’ motion for summary judgment. The district court denied the motion because it was untimely and also because the Esslingers had failed to provide legal authority supporting their position.

“The decision to grant or deny a motion for continuance is within the discretion of the judge.” *State v. Payne*, 146 Idaho 548, 567, 199 P.3d 123, 142 (2008). The criminal charges were initiated in November of 2020, and the Esslingers did not file their motion until two days before the summary judgment hearing in June 2021. Idaho Rule of Civil Procedure 7(b)(3)(A) requires motions to be filed at least fourteen days prior to the hearing. The district court’s decision to deny a continuance on timeliness grounds was consistent with the time standards set forth in Rule 7. As such, the Esslingers have failed to demonstrate an abuse of discretion.”

525 P.3d 737, 742.

continuance denied and proceed to judgment without being able to testify with information that clearly would have provided a genuine issue of fact for a jury, rather than a judge to decide.

The issue was notice. Were the petitioners bona fide purchasers for value without notice of any claim by the respondents. If so, respondents ownership claims would have failed and their \$107,134.32 damage claim would have been baseless.

It is ironic that neither the District Court nor the ISC considered the supremacy of rights a party faced with double-jeopardy from the respondents civil and criminal claims. First, under the US Constitution their right to remain silent should have been premiere and protected by both the district and supreme courts; and second, when the plaintiffs in the civil case were also prosecuting the criminal charges, the District Court should have made certain that those criminal charges were disposed of before proceeding with any civil remedies, especially when sanctions were sought, this scenario gives the appearance of being overbearing and oppressive conduct, especially when the threat of treble damages is considered.

Because other states⁸ have encountered similar quandaries whether a trial court should continue civil

⁸ *Ex parte COASTAL TRAINING INSTITUTE (Re Leslie SAWYER) v. COASTAL TRAINING INSTITUTE, et al.)*

proceedings with a criminal action pending and potential self-incrimination, there is a split of authority that can only be reconciled by the U.S. Supreme Court.

In Idaho the court of last resort decided an important federal question in a way that conflicts with the decision of another state court of last resort.⁹

CONCLUSION

Certiorari to the Idaho Supreme Court should issue and the case be reversed and remanded to the trial court for further proceedings on the motion for summary judgment.

583 So.2d 979, 69 Ed. Law Rep. 644 (Ala. 1991) "It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. Quoting from *McCarthy v. Arndstein*, 266 U.S. at 40, 45 S.Ct. at 17; see also: *In Ex parte White*, 551 So.2d 923 (Ala.1989), "[T]his Court followed Baugh and again held that the privilege against self-incrimination required that the petitioner's civil action be stayed until the criminal process against him was completed. The Court noted that in balancing the interests of the parties, we must favor the constitutional privilege against self-incrimination over the interest in avoiding the delay of a civil proceeding."

⁹ Rule 12(b) "...a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort...." Compare the Idaho Supreme Court decision with the Alabama Supreme Court decision in *Coastal Training*, Id.

We declare under penalty of perjury that the foregoing is true and correct. Executed on September 13, 2023.

Don Esslinger

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Jennifer Esslinger

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