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Supreme Court No. 94010-0
Court of Appeals No. 32221-1-III
(consolidated with 33704-9-III)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Petitioner,

vs.

DAVID RANDALL PRIEST,
Defendant/Respondent.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF RESPONDENT AND RELIEF REQUESTED

Pursuant to RAP 13.4(b) and (d), Respondent David Randall

Priest asks this Court to deny the State's petition for review.

B. ISSUE

The State of Washington does not have jurisdiction to prosecute an Indian for crimes that occurred solely on tribal land. David Randall Priest was convicted of possession of a stolen truck and possession of stolen property valued no more than \$750 on evidence the truck and property were found on tribal land on the Colville Reservation. Mr. Priest was an enrolled member of the Confederated Tribes of the Colville Nation, a federally-recognized tribe, at the time he was found in unlawful possession. Subject matter jurisdiction may be raised for the first time in a personal restraint petition. The Court of Appeals properly ruled the State did not have jurisdiction to prosecute Mr. Priest, requiring vacation of the convictions. Did the State fail to show a basis for granting review under RAP 13.4(b)?

C. STATEMENT OF THE CASE

In June 2013, Omak Police received a report of a burglary/theft involving a pickup truck and other personal items missing from a

location in Omak, Washington. The stolen truck containing some of the missing property was found at 1109 Lone Pine HUD Road off of County Road 180, in East Omak, Washington. Trial RP 70–72, 88, 149, 156–61. 1109 Lone Pine HUD Road is located on the reservation of the Confederated Tribes of the Colville Nation. The United States holds this reservation land in trust, or the land is an Indian allotment remaining under restriction from alienation. *Slip Op.* at 2.

A few days later, officers executed a search warrant for 1109 Lone Pine HUD Road and recovered the truck and some of the missing items from the location on tribal land. David Randall Priest was found at the same location at that time and taken into custody. Trial RP 98, 109, 120, 133–34; *Slip Op.* at 3.

Mr. Priest was charged and convicted by a jury of possession of a stolen motor vehicle and third degree possession of stolen property, for which the trial court imposed concurrent sentences of fifty months and 364 days' confinement, respectively. CP 32, 56–57. Mr. Priest appealed. CP 9.

While the appeal was pending¹ Mr. Priest raised the subject matter jurisdiction issue in a motion to vacate and set aside his judgment, which was transferred by the Okanogan County Superior Court to Division Three of the Court of Appeals for consideration as a PRP. He raised the same issue in his Statement of Additional Grounds for Review directly as well as through an ineffective assistance of counsel claim. In both the transferred motion and statement of additional grounds for review, Mr. Priest contended the trial court lacked jurisdiction to prosecute him because he is an enrolled member of the Confederated Tribes of the Colville Nation and all the acts supporting his convictions occurred on the Colville Reservation. The Court of Appeals consolidated Mr. Priest's PRP with his direct appeal. *Slip Op.* at 4.

After the State filed a responsive brief, Mr. Priest filed a reply and motion to accept additional evidence under RAP 9.11(a). Mr. Priest attached, to the motion, a Certificate of Indian Blood, two print-outs of property records obtained from the Okanogan County Assessor's Office, and a letter from Okanogan County Assessor Scott

¹ The direct appeal has not been mandated yet due to the State's filing of this petition for discretionary review.

D. Furman. Mr. Priest asked that the Court of Appeals accept the attachments as evidence for purposes of his appeal. The State objected to Mr. Priest's motion and argued that he failed to satisfy five of the six requirements of RAP 9.11. The State also contended that the Court of Appeals should not consider the attachments to the motion because they cannot be found in the original trial court record. *Slip Op.* at 4–5.

The Court of Appeals ordered a reference hearing and asked the superior court to answer three questions.

1. During what, if any dates, has David Priest been an enrolled member of the Confederated Tribes of the Colville Nation?
2. Whether David Priest knowingly had possession of stolen property off the Confederate Tribes of the Colville territory, and, if so, what stolen property? Also, if so, when?
3. Whether David Priest knowingly had possession of stolen motor vehicle off the Confederate Tribes of the Colville territory, and, if so, when?

Slip Op. at 5.

By unchallenged findings of fact, the reference hearing court found Mr. Priest was an enrolled member of the Colville Confederated Tribes at the time the possession crimes occurred, and that the stolen truck and property were found in Mr. Priest's possession on tribal land at 1109 Lone Pine HUD Road *Slip Op.* at 6; Reference Hearing RP 26.

During the reference hearing, Deputy Eric Mudgett testified that he never saw the stolen car or property off the reservation. *Slip Op.* at 5; Reference Hearing RP 26.

In its unpublished opinion filed October 25, 2016, the court held that the trial court lacked jurisdiction to entertain the State's prosecution against Mr. Priest because he was an Indian and the only evidence of possession of stolen property showed to property to be on reservation land. *Slip Op.* at 2, 11.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Court of Appeals' decision falls squarely within established precedent and does not meet this court's criteria for review.

This is a simple case which follows settled law and does not warrant review. Mr. Priest is an enrolled member of the Confederated Tribes of the Colville Nation, a federally-recognized tribe. He was convicted for knowingly possessing a stolen truck and some of its contents. The State's petition does not dispute Mr. Priest's enrollment status or that the State of Washington does not have criminal jurisdiction over his possession crimes if committed solely on tribal lands. The State's petition does not dispute that the State's evidence showed the truck and property were found on tribal land and that no

one saw Mr. Priest with the stolen truck or property off the reservation. The Court of Appeals correctly held the trial court lacked subject matter jurisdiction to entertain the State's prosecution against Mr. Priest for possession of the stolen property. This Court should reject the State's attempt to obfuscate the issue, and should deny review.

1. Mr. Priest's PRP was properly before the Court of Appeals.

The State asserts Mr. Priest's PRP is procedurally barred because the PRP "raises an issue that could have been raised on appeal." State's Petition for Discretionary Review (State's PDR) at 6–7. But this Court has repeatedly rejected the notion that failure to address an issue on appeal bars addressing that same issue in a PRP. *See, e.g., In re Adolph*, 170 Wn. 2d 556, 563, 243 P.3d 540 (2010), (citing *Hews v. Evans*, 99 Wn.2d 80, 87, 660 P.2d 263 (1983) ("We hereby hold the failure to raise a constitutional issue for the first time on appeal is no longer a reason for automatic rejection of a Personal Restraint Petition.")); *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990) ("[W]e now reject the automatic bar to advancing a non-constitutional argument in a personal restraint petition merely because the argument was not advanced earlier.")).

More important, while the appeal was pending Mr. Priest raised the subject matter jurisdiction issue in a motion to vacate and set aside his judgment, which was transferred by the Okanogan County Superior Court to Division Three of the Court of Appeals for consideration as a PRP. He raised the same issue in his Statement of Additional Grounds for Review directly as well as through an ineffective assistance of counsel claim. The Court of Appeals consolidated Mr. Priest's PRP with his direct appeal. *Slip Op.* at 4. Thus the issue was raised concurrently in the direct appeal. "It is axiomatic that a party may challenge a court's subject matter jurisdiction at any time, including for the first time on appeal or through a collateral attack. *Slip Op.* at 9 (citing RAP 2.5(a)(1); RAP 16.4(c)(1); *Matheson v. City of Hoquiam*, 170 Wn. App. 811, 819, 287 P.3d 619 (2012); *Wesley v. Schneckloth*, 55 Wn.2d 90, 94; 346 P.2d 658 (1959)). Further, "[i]f a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Mr. Priest's PRP is not barred.

The State also argues that review of Mr. Priest's PRP is improper because he has not shown that his restraint is unlawful for one of the reasons in RAP 16.4(c). State's PDR at 5–9. However, "RAP 16.4 establishes the criteria required to grant a PRP, not to review one." *In re Adolph*, 170 Wn. 2d at 562 (emphasis added).

The review of Mr. Priest's PRP does not violate RAP 16.4(c). Lack of subject matter jurisdiction is a non-constitutional error. *See Slip Op.* at 9; *see* State's PDR at 8 To grant relief on a personal restraint petition alleging a non-constitutional claim, the appellate court generally requires a threshold showing that the error " 'constitute[s] a fundamental defect and inherently result[s] in a complete miscarriage of justice.' " *In re Pers. Restraint of Gentry*, 170 Wn.2d 711, 714, 245 P.3d 766 (2010) (quoting *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994)). But when a petition "raises issues that were afforded no previous opportunity for judicial review, ... the petitioner need not make the threshold showing of actual prejudice or complete miscarriage of justice." *Id.* at 714–15, 245 P.3d 766 (citing *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 214, 227 P.3d 285 (2010)). It

is enough if the petitioner can demonstrate unlawful restraint under RAP 16.4. *Id.* at 715, 245 P.3d 766.

The State concedes the jurisdiction issue was not previously raised at the trial level. *See* State's PDR at 7. No court has ruled on jurisdiction and Mr. Priest has therefore not had a prior opportunity for judicial review. Mr. Priest filed his PRP while incarcerated due to the convictions he challenges. He has demonstrated restraint as required by RAP 16.4(b). In his PRP Mr. Priest asserted the trial court lacked jurisdiction to entertain a prosecution against him because he was an Indian and his wrongful possession occurred solely on tribal land, citing applicable factual and legal authority. Mr. Priest has made the required *prima facie* showing his restraint was unlawful under RAP 16.4(c)(1). The Court of Appeal's review did not violate 16.4(c).

The Court of Appeals actually considered review of Mr. Priest's PRP under the greater "threshold" standard. *Slip Op.* at 9. In *In re Adolph*, this Court clarified that the burden to avoid summary dismissal of a PRP requires only a *prima facie* showing that a petitioner has suffered a fundamental defect that resulted in a miscarriage of justice. *In re Adolph*, 170 Wn. 2d at 563.

There, the defendant argued that two years of his sentence were imposed unlawfully because the State did not prove he committed the DUI that triggered the sentence enhancement. *In re Adolph*, 170 Wn. 2d at 563. The court noted, “[w]e have identified that sentences entered in excess of lawful authority are fundamental defects that results in miscarriages of justice. *See In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868–69, 50 P.3d 618 (2002).” *In re Adolph*, 170 Wn. 2d at 563. The court continued:

Adolph has made a prima facie showing that he suffered a fundamental defect that resulted in a miscarriage of justice and has met the burden to avoid summary dismissal of his PRP. If we were to agree that Adolph’s sentence was unlawful, he would satisfy the grounds for relief in RAP 16.4(c)(2) because his sentence would have been entered in violation of the laws of Washington.

Id. The court concluded review of the defendant’s PRP did not violate RAP 16.4(c). *In re Adolph*, 170 Wn. 2d at 562.

Just as in *In re Adolph*, the Court of Appeals correctly determined Mr. Priest’s PRP alleging lack of subject matter jurisdiction identified a fundamental defect that inherently results in a complete miscarriage of justice.

The Washington Supreme Court explained over fifty years ago: if a court lacks jurisdiction, "any judgment entered is void ab initio and is, in legal effect, no judgment at all." *Wesley v. Schneekloth*, 55 Wn.2d at 93–94. We conclude that a petitioner who can demonstrate the court of conviction lacked jurisdiction to convict him has identified a "fundamental defect" entitling him to relief in a personal restraint petition. Jurisdiction is essential to due process. *State v. LG Elecs., Inc.*, 185 Wn. App. 394, 410, 341 P.3d 346 (2015), *aff'd*, 186 Wn.2d 169, 375 P.3d 1035 (2016).

Slip Op. at 9; *see also In re Pers. Restraint of Goodwin*, 146 Wn.2d at 868–69 (“When the court *has jurisdiction of the person and the subject matter*, and the punishment is of the character prescribed by law, habeas corpus will not lie for the release of a prisoner because of mere errors, irregularities, and *defects in the sentence which do not render it void*. If, however, *the court lacked the authority to render the particular judgment, the judgment was fatally defective and open to collateral attack.*”) (citations omitted) (emphasis added)). The Court of Appeal’s review did not violate 16.4(c).

2. The decision of the Court of Appeals granting a personal restraint petition due to lack of subject matter jurisdiction falls squarely within established precedent.

“The appellate court will grant appropriate relief to a petitioner if the petitioner is under a ‘restraint’ as defined in section (b) and the petitioner’s restraint is unlawful for one or more of the reasons defined

in section (c).” RAP 16.4(a). “A petitioner is under a ‘restraint’ if the petitioner has limited freedom because ... the petitioner is confined ... resulting from a judgment or sentence in a criminal case.” RAP 16.4(b). The State does not dispute Mr. Priest is under a “restraint.” *See* State’s PDR at 6.

A restraint is unlawful if the decision in the criminal proceeding was entered without jurisdiction over the subject matter. RAP 16.4(c)(1). A jurisdictional defect constitutes a fundamental defect for which relief can be granted by way of a personal restraint petition. *Matter of Fleming*, 129 Wn.2d 529, 533, 919 P.2d 66 (1996). Subject matter jurisdiction exists where “the court has the authority to adjudicate the *type of controversy* in the action.” *Id.* (citation omitted). Whether a particular court has jurisdiction is a question of law reviewed de novo. *Shoop v. Kittitas Cty.*, 149 Wn.2d 29, 33, 65 P.3d 1194, 1196 (2003).

The State mistakenly attributes an appellate court’s standards regarding de novo review to Division Three, which in this case was functioning as the first court of judicial review of the jurisdiction issue

because the matter had not been raised before the trial court.² State’s PDR at 9–10.³ The applicable Rules of Appellate Procedure quite clearly required (and allowed) Division Three to seek the additional information it wanted through a reference hearing: “The Chief Judge determines at the initial consideration of the petition the steps necessary to properly decide on the merits the issues raised by the petition. If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing.” RAP 16.11(b).

The jurisdiction issue required Division Three to determine whether Mr. Priest was an Indian and whether the crimes of simple

² Division Three of the Court of Appeals has original non-exclusive appellate court jurisdiction in this personal restraint petition, which does not involve the death penalty. RAP 16.3(c). The issue of subject matter jurisdiction was not raised in the trial court and Division Three is the first court to judicially review the issue. In its petition the State refers to some standards and procedures of review that apply to a court acting in its appellate capacity, not to a court acting in a trial court-like capacity. To prevent confusion, counsel uses “Division Three” when the appellate court is acting in the latter capacity. Counsel means no disrespect.

³ The State argues: “When reviewing a trial court’s decision de novo, review is limited to the trial court record of the facts that were in front of the trial court, and the reviewing court does not consider evidence outside the record. *State v. Monfort*, 179 Wn.2d 122, 129, 312 P.3d 637, 641 (2013); *See also, In re Disciplinary Proceedings Against Turco*, 137 Wn.2d 227, 245–46, 970 P.2d 731 (1999) (de novo review does not mean that the courts holds a new evidentiary hearing); *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997) (de novo review is limited to the legal conclusions the trial court drew from its findings of fact).” State’s PDR at 9–10.

possession⁴ occurred solely on tribal land. *See Slip Op.* at 9–11.

Division Three ordered a reference hearing and asked the superior court to answer three questions:

1. During what, if any dates, has David Priest been an enrolled member of the Confederated Tribes of the Colville Nation?
2. Whether David Priest knowingly had possession of stolen property off the Confederate Tribes of the Colville territory, and, if so, what stolen property? Also, if so, when?
3. Whether David Priest knowingly had possession of stolen motor vehicle off the Confederate Tribes of the Colville territory, and, if so, when?

By Finding of Fact 3, the reference hearing court found Mr.

Priest was an enrolled member of the Colville Confederated Tribes at

the time the possession crimes occurred. *Slip Op.* at 6. Mr. Priest's

membership in a tribe recognized by the United States sufficiently

establishes Indian status for purposes of RCW 37.12 and 18 U.S.C.A.

§1151–53. *Slip. Op.* at 10; *State v. Daniels*, 104 Wn. App. 271, 281, 16

P.3d 650, 654 (2001).

By Finding of Fact 5, the reference hearing court found the

stolen truck and property were found in Mr. Priest's possession at 1109

⁴ Simple possession is based on the location or place where the property is possessed. To find actual possession, the property must be in one's personal custody. *State v. Callahan*,

Lone Pine HUD, which is tribal land. *Slip Op.* at 6; Reference Hearing RP 26. The State did not challenge the above two factual findings. State’s Supplemental Brief Following Reference Hearing, filed September 16, 2016, *passim*. During the reference hearing, Deputy Eric Mudgett testified that he never saw the stolen car or property off the reservation. *Slip Op.* at 5; Reference Hearing RP 26. The evidence established Mr. Priest is an Indian and the crimes of possession occurred solely on Indian land.

The State oddly claims “[t]he Court of Appeal[‘]s decision [1] ignored the direct evidence that the truck and property came from a location off the reservation, and [2] ignores the circumstantial evidence supporting the defendant’s possession of the stolen property off the reservation before the defendant disabled the vehicle.” *See* State’s PDR at 14–16. This argument is simply a red herring.

What the reference hearing court received was the same evidence presented during trial: the truck and property disappeared from locations off the reservation and they were found in Mr. Priest’s possession on the reservation. Reference hearing court’s Finding of

77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession requires dominion and control over the property or the premises on which it is found. *Id.* at 29–31.

Fact 4 (*Slip Op.* at 6); Reference Hearing Exhibits 1⁵, 2⁶ and 3⁷. Mr. Priest was not charged with theft. How the truck and property got from Mr. Barker's property to the reservation or who brought it there was irrelevant to the jury's task to determine whether Mr. Priest unlawfully possessed property.

In Finding of Fact 14, the reference hearing court determined that the jury, who found Mr. Priest guilty of the possession crimes, also found that he "knowingly" possessed the stolen property off the Colville Tribes Reservation between the last two weeks of May 2013 and the first two weeks of June 2013 [date span as to when the property had been stolen]. Reference hearing court's Finding of Fact 14 (*Slip Op.* at 8) [explanation added].

The State incorrectly contends Division Three must accept the reference hearing court's findings as undisputed. State's PDR at 13. Mr. Priest challenged three of the findings, including Finding of Fact 14. Petitioner's Supplemental Brief (filed September 28, 2016). Division Three has authority (and obligation) to review the reference

⁵ Portion of trial transcript of witness James Barker's testimony.

⁶ Portion of trial transcript of witness Romero Chavez' testimony.

⁷ Portion of trial transcript of witness Eric Mudgett's testimony.

hearing court's challenged factual findings to determine whether substantial evidence supports them. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 410, 972 P.2d 1250 (1999) *as amended* (June 30, 1999); *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true. *In re Davis*, 152 Wn.2d 647, 679–80, 101 P.3d 1 (2004).

Division Three appropriately concluded, “[w]e find no such finding in the record and the trial court did not cite to the record for that finding. The jury was never asked to determine the location of the crimes.” *Slip Op.* at 11. It is telling that in its petition for discretionary review, the State fails to identify for this Court where the alleged jury finding or any request for such a finding may be found in the record. State’s PDR, *passim*. Substantial evidence did not support the finding and Division Three was correct in disregarding it.

The State and the reference court seem to have conflated the question of whether Mr. Priest possessed the stolen truck and property off the reservation with whether he in fact stole the truck and property.

State's PDR at 14–16. As fact-finder, the jury was never asked to infer that Mr. Priest stole the property. Nor was the reference hearing court asked to determine and/or infer that he stole the property. In fact the State and the trial court went to great lengths to exclude any evidence of theft (i.e. implied possession *off* the reservation) so as not to prejudice the case against Mr. Priest for possession of the stolen truck and property *on* the reservation. The State was quite clear at trial it was charging Mr. Priest with possession of the truck *at the location where it was found*, and not with stealing the truck *from where it was taken*. The trial court and counsel engaged in extensive discussion as to how to not prejudice the jury with information as to the theft of the truck and goods, which implicitly took place off the reservation, as distinct from their possession, which the State's witness admitted at trial was on the reservation. Trial RP 33–45, 88.

The State's final suggestion that the reference hearing court's finding was a reasonable inference because the jury could have inferred Mr. Priest's possession of the stolen property off the reservation is ill-founded. *See* State's PDR at 14–16. It is axiomatic that "[a]ppellate courts will generally not inquire into the internal process by which the

jury reaches its verdict. The individual or collective thought processes leading to a verdict ‘inhere in the verdict’ and cannot be used to impeach a jury verdict.” *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204–05, 75 P.3d 944, 949 (2003) (citations omitted).

In sum, ordinarily it is the State’s burden to establish that jurisdiction is appropriate in state court. *State v. L.J.M.*, 104 Wn.2d 386, 392, 918 P.2d 898 (1996). In most circumstances, proof that the crime was committed in the state of Washington satisfies the jurisdictional element. *Id.* Division Three had before it trial testimony the stolen property was found on tribal land, and evidence Mr. Priest was an enrolled member of the Confederated Tribes of the Colville Reservation and the tribe was recognized under federal law—all evidence which, if true, would be sufficient to defeat state jurisdiction. *See L.J.M.*, 104 Wn.2d at 395. The findings from the reference hearing confirmed Mr. Priest’s Indian status and that the possession crimes occurred solely on tribal land. The State failed to show additional jurisdictional facts sufficient to refute Mr. Priest’s theory and satisfy Division Three that the State had jurisdiction to prosecute Mr. Priest for these crimes. *State v. Boyd*, 109 Wn. App. 244, 251, 34 P.3d 912

(2001). Division Three properly held the trial court lacked jurisdiction to entertain the State's prosecution against Mr. Priest. This Court should deny review.

E. CONCLUSION

For the reasons set forth above, Mr. Priest respectfully requests that this Court deny review.

Respectfully submitted on February 13, 2017.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 13, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of respondent's answer to petition for review:

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