

Jan 05, 2017, 5:06 pm

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 32221-1 Consolidated with 33704-9

STATE OF WASHINGTON

PETITIONER

V.

DAVID PRIEST

RESPONDENT

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

The Petitioner is the State of Washington, represented by Karl F. Sloan, Okanogan County Prosecuting Attorney, and asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition

B. DECISION

The Petitioner seeks review of the decision by the Court of Appeals in Case No. 32221-1-III consolidated with 33704-9-III, entered October 25, 2016, vacating the defendant's convictions; and seeks review of the Order Denying Motion for Reconsideration, entered December 6, 2016. A copy of the Decision is attached as Appendix A, pages 1-12; and a copy of the Order is attached as Appendix B, page 1.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it granted the defendant's personal restraint petition, where jurisdiction was not raised at the trial court level or on direct appeal?
2. Did the Court of Appeals err when it found the State lacked jurisdiction over the defendant, where a challenge to jurisdiction was never raised at the trial court level?
3. Did the court of appeals err when it acted as the finder of fact, and rejected facts presented at the trial court level, in order to find the defendant did

not possess the stolen vehicle and property off of the reservation?

D. STATEMENT OF THE CASE

In June of 2013. Omak Police Officer Michael Morrison received report of burglary complaint from James Baker, involving the theft of personal property and a pickup truck, from his property located at 62 Woods Road in Omak. RP 12/6/2013, hereinafter "RP", 70-72, 149. Officer Morrison observed the stolen truck near County Road 280. It was partially under a tarp, being held by the defendant. RP 72-73.

Officer Morrison also testified that other stolen property taken from Mr. Baker's property was located in a trailer; that the trailer had been stolen from a residence on Jackson Street in the City of Omak; and that the trailer was recovered with some of Baker's property at a residence on Edmunds Street in the City of Omak. RP 78.

Based on Officer Morrison's observation of the stolen truck, Okanogan County Sgt. Eric Mudgett went to an address at 1109 Lone Pine HUD. RP 88. Other property taken from Mr. Baker's property during the burglary was found in the truck and on the property RP 157-161.

Officers made contact with the defendant inside a travel trailer located behind a primary residence. RP 98, 109, 120, 133-134. The defendant said he did not live there, and that a person named Garret brought the truck to that location. RP 110, 113, 120. The owner of the residence was Cheryl Priest. RP 121.¹

The defendant was convicted of Possession of a Stolen Motor Vehicle and Possession of Stolen Property Third Degree. RP 235; RP 1/13/14, 241.

The defendant appealed his conviction challenging legal financial obligations. See *Opinion*, Appendix A, pg. 1-2. The defendant then moved to vacate his convictions under CrR 7.8. The motion was transferred to the Court of Appeals as a personal restraint petition.² The personal restraint petition asserted a lack of jurisdiction. See *Opinion*,

¹ Ms. Priest testified in the case of *State v. David Priest, Okanogan County #13-1-00044-8*; COA # 325491, that she is the ex-sister in law of the defendant and that he did not reside with her. RP 4/9/2014, 264.

² CrR 7.8 (2) Transfer to court of Appeals, states:
The court shall transfer a motion filed by a defendant to the court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

In transferring the defendant's motion, the trial court determined it was not time barred by RCW 10.73.090, and the defendant made no substantial showing he was entitled to relief, or that resolution required a factual hearing.

Appendix A, pg. 1-2. The defendant provided no competent evidence in support of his petition. On April 25, 2016, the Court of Appeals entered an Order for Reference Hearing. *Order for Reference Hearing*, Appendix C, pages. 1-3

The trial court held the evidentiary hearing and filed its findings of fact on July 18, 2016. *Superior Court Findings of Fact from Reference Hearing*, Appendix D, pages. 1-5. The trial court found there was no evidence that another person delivered the truck to the location where it was ultimately recovered, and that Mr. Priest possessed the truck and stolen property off of the Colville Reservation. *Id.* at 4, 5.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Review should be granted in the present case. RAP 13.4 (b) states: A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Court of Appeals decision is in conflict with existing case law, is a significant question of law, and involves a substantial issue of public interest.

1. The Court of Appeals erred when it granted appellant's personal restraint petition brought under RAP 16.4.³

³ RAP 16.4 states in part:

(a) Generally Except as restricted by section (d), 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)...

(c) Unlawful nature of restraint: The restraint must be unlawful for one or more of the following reasons:

(1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or

(4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or

In the present case, the Petitioner made no showing that his restraint was unlawful when the petition was filed. He presented no competent evidence to support any of the factors set out in RAP 16.4(c). The trial court had jurisdiction over the petitioner and the subject matter, and the Petitioner presented no facts to the contrary.

The verdict and sentence were not in violation of the Constitution of the United States or Washington State. Moreover, there had been no significant changes in the law that were material to the Petitioner's conviction, sentence, or other orders entered; and there were no other legitimate grounds to justify the collateral attack.

A defendant who has not appealed an issue may not use a personal restraint petition to raise issues he could have raised in a direct appeal, except for "grave

(6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

(d) Restrictions: The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

constitutional errors." See *State v. Hall*, 18 Wn. App. 844, 847 (1977) (quoting *Koehn v. Pinnock*, 80 Wn.2d 338, 340, 494 P.2d 987 (1972)).

Here the Petitioner did appeal his convictions. In his appeal, he failed to raise any challenge that he asserted as grounds for relief in his PRP. This was because the Petitioner raised no challenge to jurisdiction at the trial court level, and the record did not support the claim subsequently raised in his petition.

As stated above, when considering a timely personal restraint petition, courts may grant relief to a petitioner only if the petitioner is under an unlawful restraint, as defined by RAP 16.4(c). RAP 16.4(a). Additionally, the availability of collateral relief is limited in two ways. *In re Yates*, 177 Wn.2d 1, 16-18, 296 P.3d 872, 880-81 (2013); *In re Pers. Restraint of Davis*, 152 Wash.2d 647, 670-72, 101 P.3d 1 (2004) (Davis I).

First, the petitioner in a personal restraint petition is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require re-litigation of that issue. *Davis* at 671, 101 P.3d 1. Here the issue was not raised on direct appeal.

Second, new issues must meet a heightened showing before a court will grant relief. For alleged constitutional errors, a petitioner has the burden of showing actual prejudice ...; for alleged non-constitutional error, he must show a fundamental defect resulting in a complete miscarriage of justice. *In re Yates*, 177 Wn.2d 16-18; *In re Pers. Restraint of Elmore*, 162 Wash.2d 236, 251, 172 P.3d 335 (2007) (Elmore II)). The petitioner must make these heightened showings by a preponderance of the evidence. *In re Yates*, 177 Wn.2d 16-18. In the present case, any claimed error is non-constitutional, and the Petitioner must show a fundamental defect resulting in a complete miscarriage of justice.

Where the record did not provide facts or evidence on which to decide the issue and the petition instead relied solely on conclusory allegations, the Court of Appeals should have declined to determine the validity of a personal restraint petition. *E.g., Matter of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506, 512 (1990). Compliance with that threshold burden is an absolute necessity to enable the appellate court to make an informed review. Lack of such compliance will necessarily result in a refusal to reach the merits. *Id.* A petitioner will be entitled to relief only if he can meet his

ultimate burden of proof, which, on collateral review, requires that he establish error by a preponderance of the evidence.

Id. The defendant did not meet his burden at the time of filing the petition or after the remand hearing.

2. The Court of Appeals erred when it found there was no State jurisdiction when there was no evidence in the record to support that finding.

Proof of jurisdiction beyond a reasonable doubt is an integral component of the State's burden in every criminal prosecution. *State v. Svenson*, 104 Wash. 2d 533, 542, 707 P.2d 120 (1985). In most circumstances, proof that the crime was committed in the state of Washington satisfies the jurisdictional element. *State v. L.J.M.*, 129 Wash. 2d 386, 392, 918 P.2d 898 (1996). Ordinarily, it is the State's burden to establish that jurisdiction is appropriate in state court. *L.J.M.*, 129 Wash. 2d at 392.

Where the underlying facts are undisputed, a trial court's decision regarding jurisdiction is reviewed de novo *State v. Squally*, 132 Wash. 2d 333, 340-41, 937 P.2d 1069, 1073 (1997) (citing *Lewis v. Bours*, 119 Wash.2d 667, 669, 835 P.2d 221 (1992)).

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 Wash. 2d 122, 129, 312 P.3d 637, 641 (2013); *See also, In re Disciplinary Proceedings Against Turco*, 137 Wash. 2d 227, 245–46, 970 P.2d 731 (1999) (de novo review does not mean that the court holds a new evidentiary hearing); *State v. Armenta*, 134 Wash. 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).

In the present case, the facts before the trial court were uncontested. There were no facts before the trial court that supported a the claim of lack of jurisdiction, or that would support a finding on review that the trial court committed legal error.

The State does not acquire a higher burden of proof on jurisdiction unless the totality of the evidence before the trial court causes it to reasonably question the State's prima facie showing that jurisdiction exists simply because the site of the alleged crime is within the state of Washington.

L.J.M., 129 Wash. 2d at 394⁴

⁴ Jurisdiction need not be exclusive and both the State and a tribe may prosecute an Indian for offenses for which each has jurisdiction without violating the constitutional prohibition against double jeopardy or the state statutory prohibition against double jeopardy. *State v. Moses*, 145 Wash. 2d 370, 37 P.3d 1216 (2002).

The amount of evidence that would cause a court to reasonably question whether jurisdiction properly lies in state court is similar to that which a defendant must present when raising an affirmative defense of self-defense. It requires only that the defendant point to evidence that has been produced and presented to the court, which, if true, would be sufficient to defeat state jurisdiction. *L.J.M.*, 129 Wash. 2d at 394-95.

The burden of proof for subject matter jurisdiction shifts as follows:

1. The State always has the burden of establishing jurisdiction beyond a reasonable doubt. By alleging that the crime took place in Washington, the State meets this burden.
2. To overcome this presumption, the defendant need only point to evidence of facts, which, if proved, would defeat jurisdiction.
3. The State must then come forward with a prima facie showing of additional jurisdictional facts sufficient to refute the defense's theory and satisfy the court that it has jurisdiction.
4. If the defense fails to convince the court that jurisdiction is questionable, the State can rest on its initial showing that the crimes occurred within the state.
5. If, however, the court remains in doubt as to its jurisdiction, then the jurisdictional facts become an element of the crime to be decided by the finder of fact in the event of a trial. The State must prove the jurisdictional facts by the usual standard of beyond reasonable doubt.

State v. Boyd, 109 Wash. App. 244, 251, 34 P.3d 912, 915 (2001) (internal citations omitted). As in *L.J.M.*, 129 Wash.

2d 386, there was no evidence before the trial court that would cause it to doubt the State's assertion of jurisdiction based on its showing that the site of the alleged crime was within the state. The State made a prima facie showing of jurisdiction. The "burden of contesting" shifted to the defendant to produce evidence sufficient to defeat State jurisdiction. *E.g., State v. Waters*, 93 Wash. App. 969, 978, 971 P.2d 538, 543 (1999); *L.J.M.*, 129 Wash. 2d at 395–96.

There was no competent evidence to support the Appellant's claim on appeal (or in the PRP). As in *L.J.M.*, 129 Wash. 2d 386, the defendant's attempt to show Indian status for the purpose of tribal criminal jurisdiction, where he alleged he was a member of the Colville Indian Tribe, even if true, does not defeat state jurisdiction, because tribal membership alone is not necessarily adequate to establish Indian status for the purposes of RCW 37.12 and 18 U.S.C.A. § 1151-53 (West). *L.J.M.*, 129 Wash. 2d at 396.

The allegation should have been denied where the record before the trial court did not support the claim of error by the trial court in finding state court jurisdiction.

3. The Decision of the Court of Appeals was not based on undisputed facts, and the direct and circumstantial facts were sufficient to establish the

defendant possessed the stolen vehicle and property off the Colville Reservation.

Proof of jurisdiction beyond a reasonable doubt is an integral component of the State's burden in every criminal prosecution. *State v. Svenson*, 104 Wash.2d 533, 542, 707 P.2d 120 (1985). As stated above, in most circumstances, proof that the crime was committed in the state of Washington satisfies the jurisdictional element. *State v. L.J.M.*, 129 Wash.2d 386, 392, 918 P.2d 898 (1996).

When the underlying facts are undisputed, the question of whether Washington's courts have jurisdiction to hear the charges against a native defendant is a question of law, and review of the lower courts' determinations is de novo. *Crosby v. Cty. of Spokane*, 137 Wn.2d 296, 301, 971 P.2d 32, 36 (1999); *State v. Squally*, 132 Wn.2d 333, 340–41, 937 P.2d 1069, 1073 (1997).

In the present case, the Court of Appeals did not accept the facts as undisputed, but made a factual determination that is in conflict with the facts presented at trial, the facts presented at the remand hearing, and that was in conflict with the findings of fact made by the trial court. Despite the evidence presented and the trial court findings, the Court of Appeals stated:

The State has forwarded no evidence that David Priest possessed either the stolen car or other stolen items off the reservation. The State presented no testimony as to what, if any, purloined property David Priest possessed outside the reservation, and, if so, where he possessed the property and on what date or dates he possessed the property.

In finding of fact 14 of the reference hearing, the trial court determined that the jury, who found 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. We 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.⁵

See Opinion, Appendix A, pg. 11. The Court of Appeals decision ignored the direct evidence that the truck and property came from a location off the reservation, and ignores the circumstantial evidence supporting the defendant's possession of the stolen property off the reservation before the defendant disabled the vehicle.

Circumstantial evidence and direct evidence carry equal weight when reviewed by an appellate court. *State v. Goodman*, 150 Wash.2d 774, 781, 83 P.3d 410 (2004). A reviewing court defers to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Rodriguez*, 187 Wash.App. 922,

⁵ The fact that the jury was not specifically asked to determine location is because the defendant never raised any issue of, or contested jurisdiction, at the trial court level. Therefore, the State, nor the trial court, was ever on notice that location as it related to jurisdiction was element of the crime.

930, 352 P.3d 200, review denied, 184 Wash.2d 1011, 360 P.3d 817 (2015).

In order for the Court of Appeals to reach its decision, it had to make a credibility determination that the defendant's statement that "Garret" brought the truck to the location where it was recovered was somehow credible or factual. The direct and circumstantial evidence showed the defendant brought the stolen vehicle and property to the location where it was recovered. This evidence included the following:

- That the truck was taken from a location off the reservation.
- That the truck was operable when it was taken and was not in need of work by the defendant to make it operable.
- That the defendant was in fact stripping the vehicle; not making it operable.
- That the defendant concealed the vehicle with a tarp, which contradicts any claim that the truck was brought to him for any legitimate purpose.
- That the defendant hid from law enforcement when they arrived to search for the truck.
- That the defendant lived off the reservation and did not live at the location where the truck was recovered. This conflicts with any assertion that another person brought the truck to the

defendant's sister residence for the defendant to work on.

- That the items of stolen property were not located in the truck at the time it was taken from the victim; but were taken from other locations on the victim's property. The stolen items were transported away from the victim's property with the truck.
- That location of the items of stolen property recovered in the truck and on the property is consistent with the defendant bringing the stolen property and truck to his sister's property. It is inconsistent with another person bringing the truck to the location for the defendant to work on, and abandoning the other stolen property.

See Findings of Fact, Appendix D. The facts presented at trial and at the remand hearing, supported the trial court's findings of fact. The facts, both direct and circumstantial, show the defendant possessed the stolen truck and property off the reservation prior to their discovery and recovery by law enforcement.

F. CONCLUSION

Review of the Court of Appeals decision should be granted. The decision vacating the defendant's convictions was in error.

Dated this 5th day of Jan 2017

Respectfully Submitted by:



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APPENDIX A

FILED
OCTOBER 25, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	
)	
Respondent,	)	No. 32221-1-III
	)	(consolidated with
	)	33704-9-III)
v.)	
)	
DAVID RANDALL PRIEST,)	
)	
Appellant.	)	UNPUBLISHED OPINION
_____)	
)	
IN THE MATTER OF PERSONAL)	
RESTRAINT OF)	
)	
DAVID RANDALL PRIEST.)	
)	
Petitioner.)	

FEARING, C.J. — David Randall Priest seeks, through a personal restraint petition, relief from his January 13, 2014, convictions for possession of a stolen motor vehicle and possession of stolen property in the third degree. Priest contends that the superior court lacked jurisdiction over him and this prosecution because he is an enrolled member of the Confederated Tribes of the Colville Nation and any crimes occurred solely on tribal land.

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State v. Priest; In re Pers. Restraint of Priest

This court consolidated Priest's personal restraint petition with his direct appeal, in which he challenges legal financial obligations imposed by the trial court. Because the only evidence of possession of stolen property showed the property to be on reservation land, we hold that the trial court lacked jurisdiction to entertain this prosecution against David Priest. We vacate his convictions, judgment, and sentence. We need not and do not address Priest's challenge to legal financial obligations.

FACTS

In June 2013, while investigating another crime, Omak Police Officer Michael Morrison recovered stolen property belonging to James Barker. Officer Morrison notified Barker, who reported that someone stole other items from his property, including a blue and white 1985 Ford F-250 pickup truck.

Later, while off-duty and driving on County Road 280, Officer Michael Morrison saw a truck fitting the pickup's description at 1109 Lone Pine HUD Road, 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. As he drove along Lone Pine HUD Road, Officer Morrison saw David Priest, whom he knew by sight, lift a tarp that covered the pickup. Officer Morrison directed James Barker to drive by the Lone Pine HUD Road residence to confirm his ownership of the Ford pickup. Barker did.

On June 16, 2013, Omak Officer Michael Morrison contacted Okanogan County Sheriff Deputy Eric Mudgett, who obtained a search warrant for 1109 Lone Pine HUD Road. In preparing the affidavit for the warrant, Deputy Mudgett contacted the Colville Tribe and confirmed that Cheryl Priest, David Priest's sister, resided at the residence. Upon arriving at 1109 Lone Pine HUD Road, law enforcement found Priest in a travel trailer behind the house on the property. Priest told Deputy Mudgett that Garret Elsberg brought the Ford F-250 to the property a few weeks earlier and asked Priest to perform repairs on the pickup. Deputy Mudgett examined the pickup truck and confirmed it was the same truck reported stolen by James Barker. The deputies also discovered other personal property on the Lone Pine HUD Road property reported stolen by Barker, including a tool box, a pressure washer, a shop vacuum, a dolly, a cooler, a gas can, and some tie-down straps.

PROCEDURE

The State of Washington charged David Priest, in Okanogan Superior Court, with possession of a stolen motor vehicle and possession of stolen property in the third degree. A jury found Priest guilty of both crimes. The trial court sentenced Priest to fifty months' confinement for possession of a stolen motor vehicle and 364 days' confinement for possession of stolen property in the third degree. The superior court also ordered Priest to pay \$1,110.50 in legal financial obligations, including a \$100.00 mandatory deoxyribonucleic acid (DNA) collection fee. The court additionally ordered Priest to

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State v. Priest; In re Pers. Restraint of Priest

Okanogan County Assessor's Office, and a letter from Okanogan County Assessor Scott D. Furman. Priest asked that we accept the attachments as evidence for purposes of his appeal. The State objected to Priest's motion and argued that Priest failed to satisfy five of the six requirements of RAP 9.11. The State also contended that this court should not consider the attachments to the motion because they cannot be found in the original trial court record.

This court ordered a reference hearing and asked the superior court, by written findings of fact, to answer the following 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?

Order for Reference Hearing, *State v. Priest*, No. 32221-1-III, consolidated with *In re Pers. Restraint of Priest*, No. 33704-9-III (Wash. Ct. App. April 25, 2016).

During the reference hearing, Deputy Eric Mudgett testified that he never saw the stolen car or property off the reservation. Deputy Mudgett testified that David Priest told him that Garrett Elsberg delivered the stolen pickup truck to the reservation.

After a reference hearing, the trial court entered the following findings of fact:

1. The Defendant/Petitioner, DAVID RANDALL PRIEST (hereinafter referred to as "Priest"), was found guilty of the crimes of

Possessing a Stolen Motor Vehicle and Possessing Stolen Property in the Third Degree by a jury on the 6th day of December, 2013.

2. Priest did not testify at the trial and the defense presented no witnesses. (From review of trial proceedings).

3. David Priest testified at this Reference Hearing that he has been a member of the Colville Confederated Tribe since birth; however *his Certificate of Indian Blood* does not bear a date of enrollment. Further he stated that his mother, Donna Mae Priest, was full (4/4) Colville and that his dad, William Virgil Priest, was a non-member. This information would lead this court to understand that David Priest would be 2/4 or one-half; however, the *Certificate of Indian Blood* disclosed 5/16. The Court finds that he is an enrolled member of the Colville Confederated Tribes, but cannot confirm the information that he was enrolled since birth. However the [c]ourt would find that he was enrolled at the time of these alleged offenses (June 2013) as he was an adult at the time.

4. The residence and premises from which the Ford F250 pickup truck and various items of personal property were stolen or taken from was located at 62 Woods Road (property of James Lee Barker) which is located north of Omak (Okanogan county), Washington and NOT within the boundaries of the Confederated Tribes of the Colville Reservation. This locality lies west of the Okanogan River near the Omak airport.

5. The Ford F250 pickup belonging to Romero Chavez (stored at James Lee Barker's premises) was initially viewed by Omak Police Officer Morrison after receiving information about a stolen truck while following up on and investigating other burglaries. Officer Morrison located the truck at 1109 Lone Pine HUD which lies east of Omak and is within the boundaries of the Colville Reservation. The residential property was determined to be tribal property and in the possession of Cheryl Priest who is Mr. Priest's sister. Officer Morrison turned the burglary investigation information over to Sgt. Mudgett of the Okanogan County Sheriff's Office due to jurisdictional concerns, since Barker's and Chavez's properties were outside the city limits of Omak and within county jurisdiction.

6. David Priest did not reside at 1109 Lone Pine HUD, but in fact resided at 119 S. Cedar in the City of Omak which location is NOT within the boundaries of the Colville Tribes Reservation. This is the same address disclosed in his *Certificate of Indian Blood* and testified in the Reference Hearing as being his address at the time of his arrest.

7. The time frame for the burglaries and theft of property from the Barker property was approximately the second half of May 2013 and the

first two weeks of June 2013. Barker thought Chavez had removed the pickup truck and didn't immediately concern himself to the fact that it was gone. Further Barker had an elderly parent whom he cared for which took him away from his premises during that time frame. He was contacted by Omak Police, who found an old box of his bank checks during their investigation of several burglaries that alerted him to the initial burglary and theft at his premises.

8. David Priest has an extensive criminal history of burglaries, theft, trafficking and possession of stolen property. He has thirteen convictions for crimes of dishonesty. He was then (June 19, 2013) out on bail and facing new criminal charges for Trafficking in Stolen Property in the First Degree (Three counts) and Possession of a Stolen Motor Vehicle (Two counts), which had been found at Shelly Priest's (ex sister in law) residence which was nearby the 1109 Lone Pine house. He was subsequently convicted in April 2014 on all five counts as the undersigned judge was the trial judge in that matter.

9. David Priest related to Sgt. Mudgett that an individual known as Garrett Elsberg had brought the Ford F250 pickup to the Cheryl Priest's [sic] so David Priest could put it in working or running order. Further Mr. Priest told Sgt. Mudgett that he would get ahold of Elsberg and have him contact the officer which never occurred. Elsberg had multiple warrants out for his arrest. However, this inability to start or run the pickup is contrary to the evidence submitted at trial by Mr. Chavez and Mr. Barker who both knew the truck was operational. The photographs introduced at trial and the Reference Hearing show the truck being stripped and disassembled which is clearly contrary to the preliminary statement made to Sgt. Mudgett. No evidence was presented that Garrett Elsberg delivered the pickup except the self-serving statement of David Priest. A jury has the ability to determine the credibility of statements and whether it makes sense given the facts. Here the jury did not accept the facts of Mr. Priest as relayed to Sgt. Mudgett relative to Garrett Elsberg delivering the truck and personal property.

10. Additionally David Priest talked about Garrett Elsberg being a person involved in drugs and other criminal activities when he had his initial contact with Sgt. Mudgett; yet David Priest provided no information about how Elsberg might be contacted or what specific repairs Elsberg had ask[ed] Priest to do except get the pickup operational. All the statements and actions by Priest appeared to be contrary to the evidence and

unreasonable given the situation along with the disclosures by Barker and Chavez.

11. In addition to the Ford F250 pickup, other items of personal property were located and found at 1109 Lone Pine that had been stolen from Barker's premises including a cooler, cargo strap, gas can, tool box, pressure washer, shop vac, hand truck, and Troy-bilt mower. These items were not located in the pickup at Barker's property but in his shop and in his house from which they were taken. Thus Mr. Barker's premises had been burglarized.

12. David Priest did not respond to Sgt. Mudgett's initial contact at the travel trailer, but did when Dep. Dave Rodriguez entered the trailer, went to the back bedroom area, and actually saw Mr. Priest present. He appeared to be hiding from law enforcement, but for Dep. Rodriguez' search of the trailer sleeping area.

13. The Ford F250 truck was covered by a tarp, except for the rear portion, which hid items of personal property taken from the Barker property. This was to prevent others from seeing the items or to secret them.

14. This court finds David Priest's prior criminal activities of theft, possessing stolen property, stripping or disassembling property or vehicles are factually related to the crimes he was charged with herein. While he did not testify at his trial, the jury is instructed on direct and circumstantial evidence along with witness credibility. Given that his claim to Sgt. Mudgett was that he was to repair and make operational the Ford F250, the clear evidence is contrary and unresponsive of his claim. Therefore the credibility of Mr. David Priest must be called into question, including the truthfulness of any statement given to law enforcement, and the jury found that he "knowingly" had possession of stolen property and possession of a stolen motor vehicle off the Colville Tribes Reservation between the last two weeks of May 2013 and the first two weeks of June 2013.

Suppl. Clerk's Paper at 108-11. (Emphasis in original).

LAW AND ANALYSIS

David Priest contends that the trial court lacked jurisdiction over his prosecution for possession of a stolen motor vehicle and possession of stolen property in the third

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degree. We agree.

We review de novo whether a particular court has jurisdiction. *Shoop v. Kittitas County*, 149 Wn.2d 29, 33, 65 P.3d 1194 (2003). A petitioner who raises a nonconstitutional error as a basis for relief in a personal restraint petition must show that the error alleged constitutes a fundamental defect that inherently results in a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 811, 792 P.2d 506 (1990).

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. 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). 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. Schneckloth*, 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).

Article IV, section 6 of the Washington State Constitution provides, in relevant part:

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The superior court shall have original jurisdiction . . . in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law. . . . The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court[.]

David Priest's petition turns on whether the State's jurisdiction to prosecute him has been "vested exclusively in some other court." WASH. CONST. art. IV, § 6.

The Confederated Tribes of the Colville Nation is a tribe "acknowledged to have the immunities and privileges available to federally recognized Indian Tribes." Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5,019-02 (Jan. 29, 2016). The State of Washington does not have criminal or civil jurisdiction over "Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States," save for eight enumerated legal issues, none of which apply here. RCW 37.12.010. However, the State may assume civil or criminal jurisdiction if a tribe asks it to do so pursuant to RCW 37.12.021.

The Colville Tribe originally invoked the State's assumption of jurisdiction under RCW 37.12.021. Nevertheless, the State of Washington retroceded all civil and criminal jurisdiction back to the tribe in 1987. LAWS OF 1986, ch. 267 § 2. Thus, if David Priest was an enrolled member of the Colville Tribe and possessed stolen property solely on "tribal lands or allotted lands within an established Indian reservation and held in trust by

Nos. 32221-1-III; 33704-9-III

State v. Priest; In re Pers. Restraint of Priest

the United States,” the State did not have jurisdiction to prosecute him. RCW 37.12.010; *State v. Clark*, 178 Wn.2d 19, 25, 308 P.3d 590 (2013).

The trial court found that David Priest was an enrolled member of the Colville Tribe during the time of the crimes. The trial court also found that 1109 Lone Pine HUD Road, where the car and property were found, is on the Colville Reservation. The trial court convicted Priest only of possession crimes. The State has forwarded no evidence that David Priest possessed either the stolen car or other stolen items off the reservation. The State presented no testimony as to what, if any, purloined property David Priest possessed outside the reservation, and, if so, where he possessed the property and on what date or dates he possessed the property.

In finding of fact 14 of the reference hearing, the trial court determined that the jury, who found 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. We 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.

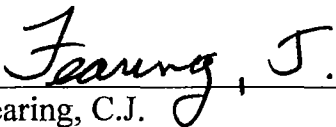
David Priest moves this court to deny the State an award of appeal costs. Since we rule in favor of Priest on the merits the motion is moot.

Nos. 32221-1-III; 33704-9-III
State v. Priest; In re Pers. Restraint of Priest

CONCLUSION

We vacate the convictions of David Priest for possession of a stolen motor vehicle and possession of stolen property in the third degree.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

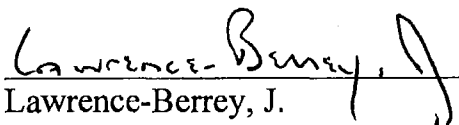


Fearing, C.J.

WE CONCUR:



Korsmo, J.



Lawrence-Berrey, J.

APPENDIX B

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

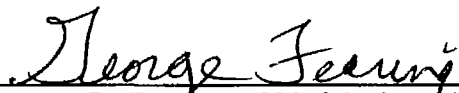
STATE OF WASHINGTON,)	
)	
Respondent,	)	No. 32221-1-III
	)	(consolidated with
v.	)	33704-9-III)
)	
DAVID RANDALL PRIEST,)	
)	
Appellant.	)	ORDER DENYING MOTION
<hr style="border: 1px solid black;"/>	)	FOR RECONSIDERATION
)	
IN THE MATTER OF PERSONAL)	
RESTRAINT OF)	
)	
DAVID RANDALL PRIEST.)	
)	
Petitioner.)	

THE COURT has considered respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of October 25, 2016, is hereby denied.

PANEL: Judges Fearing, Korsmo, Lawrence-Berrey

FOR THE COURT:



George B. Fearing, Chief Judge

APPENDIX C

FILED
Apr 25, 2016
Court of Appeals
Division III
State of Washington

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

STATE OF WASHINGTON,	)	No. 32221-1-III
	)	(consolidated with
Respondent,	)	No. 33704-9-III)
)	
v.	)	ORDER FOR REFERENCE
	)	HEARING
DAVID RANDALL PRIEST,)	
)	
Appellant.)	
_____)	
)	
In re the Matter of the Personal Restraint of)	
)	
David Randall Priest)	
)	
Petitioner.)	

David Randall Priest seeks, by way of a personal restraint petition, relief from his January 13, 2014, convictions for possession of a stolen motor vehicle and possession of stolen property in the third degree. This court consolidated Mr. Priest's personal restraint petition with his direct appeal, in which he challenges legal financial obligations imposed by the trial court. This matter was set before a panel of judges to consider Mr. Priest's contention that the trial court lacked jurisdiction over him and this case because Mr. Priest is an enrolled member of the Confederated Tribes of the Colville Nation and any

alleged crimes occurred solely on tribal land. This court having considered the matter without oral argument on March 18, 2016, and having determined there are unresolved factual questions,

IT IS HEREBY ORDERED that the matter is referred to the Okanogan County Superior Court under RAP 16.11 (b) for a hearing, at which the court shall determine by written findings of fact:

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?

The Okanogan County Superior Court shall also permit the parties to address other factual matters related to the above questions and shall make a thorough record. The reference hearing shall be held before a judge who was not involved in the trial court proceedings at issue. RAP 16.12. The superior court shall appoint counsel for Mr. Priest for purposes of the reference hearing. CrR 3.1.

IT IS FURTHER ORDERED that the Okanogan County Superior Court shall transmit to this court, not later than **June 14, 2016**, its written findings of fact on the questions set forth, together with a complete certified record of the reference hearing. This record shall be provided to this court at public expense. Thereafter, this court will

determine further disposition of Mr. Priest's personal restraint petition. RAP 16.11(b);

RAP 16.13.

IT IS SO ORDERED.



GEORGE FEARING
CHIEF JUDGE

APPENDIX D

FILED

2016 JUL 18 PM 2: 56

CHARLEEN SAUNDERS
OKANOGAN COUNTY CLERK

SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF OKANOGAN

STATE OF WASHINGTON,
Respondent/Plaintiff

vs.

DAVID RANDALL PRIEST
Appellant/Defendant

No. 13-1-00282-3
SUPERIOR COURT'S FINDINGS
OF FACT FROM REFERENCE
HEARING

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Personal Restraint of:

DAVID RANDALL PRIEST
Petitioner

No. 32221-1-III
(consolidated with
No. 33704-9-III)

This matter comes before the undersigned judge of the above-entitled superior court for a Reference Hearing, pursuant to RAP 16.11(b), as ordered by the Court of Appeals Division III entered the 25th day of April, 2016, to determine the following questions or factual issues:

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 Confederated 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?

The undersigned judge was not involved in the defendant's/petitioner's criminal trial which resulted in his conviction and from which issues have been referred back to this court for consideration under this reference hearing. This court, in compliance with the Reference Order, did appoint legal counsel for Mr. David Priest, being Mr. Michael Prince of Okanogan, WA, a contract public defender. He was not the attorney who represented Mr. Priest in the criminal trial. Mr. Priest did not testify in his trial as the defense rested at the conclusion of the Plaintiff, State of Washington, evidentiary presentation.

The Reference Hearing was held on Wednesday, July 6, 2016. A certified record of the reference hearing has been ordered and should be delivered separately to the Court of Appeals by the court reporter. All exhibits presented and admitted at said hearing shall be submitted separately by the Okanogan County Superior Court Clerk.

At the hearing, the State of Washington, the Plaintiff/Respondent, was represented by Karl Sloan, Okanogan County Prosecuting Attorney; and the Defendant/Appellant Mr. David Priest by Mr. Prince of Okanogan, WA. On behalf of the State of Washington, Mr. Sloan presented one witness: Sgt. Eric Mudgett of the Okanogan County Sheriff's office who was the lead investigating officer for the Okanogan County Sheriff's office. Further the State presented copies of testimonial transcriptions from the trial for Sgt. Eric Mudgett, Romero Chavez and James Lee Barker which were admitted without objection. Additionally the court was provided, without objection, previously admitted trial photographs of items stolen from Chavez and Barker located where Mr. Priest was found including the interior of the Ford F250 which depicted the destruction and removal of parts.

Mr. Priest offered one exhibit, being a photocopy of a Certificate of Indian Blood, for the Confederated Tribes of the Colville Reservation which the court admitted over the State's objection.

FINDINGS OF FACT

1. The Defendant/Petitioner, DAVID RANDALL PRIEST (hereinafter referred to a "Priest") was found guilty of the crimes of Possessing a Stolen Motor Vehicle and Possessing Stolen Property in the Third Degree by a jury on the 6th day of December, 2013.
2. Priest did not testify at the trial and the defense presented no witnesses. (From review of trial proceedings).

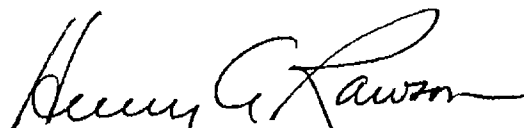
3. David Priest testified at this Reference Hearing that he has been a member of the Colville Confederated Tribe since birth; however *his Certificate of Indian Blood* does not bear a date of enrollment. Further he stated that his mother, Donna Mae Priest, was full (4/4) Colville and that his dad, William Virgil Priest, was a non-member. This information would lead this court to understand that David Priest would be 2/4 or one-half; however, the *Certificate of Indian blood disclosed 5/16*. The Court finds that he is an enrolled member of the Colville Confederated Tribes, but cannot confirm the information that he was enrolled since birth. However the Court would find that he was enrolled at the time of these alleged offenses (June 2013) as he was an adult at the time.
4. The residence and premises from which the Ford F250 pickup truck and various items of personal property were stolen or taken from was located at 62 Woods Road (property of James Lee Barker) which is located north of Omak (Okanogan county), Washington and NOT within the boundaries of the Confederated Tribes of the Colville Reservation. This locality lies west of the Okanogan River near the Omak airport.
5. The Ford F250 pickup belonging to Romero Chavez (stored at James Lee Barker's premises) was initially viewed by Omak Police Officer Morrison after receiving information about a stolen truck while following up on and investigating other burglaries. Officer Morrison located the truck at 1109 Lone Pine HUD which lies east of Omak and is within the boundaries of the Colville Reservation. The residential property was determined to be tribal property and in the possession of Cheryl Priest who is Mr. Priest's sister. Officer Morrison turned the burglary investigation information over to Sgt. Mudgett of the Okanogan County Sheriff's Office due to jurisdictional concerns, since Barker's and Chavez's properties were outside the city limits of Omak and within county jurisdiction.
6. David Priest did not reside at 1109 Lone Pine HUD, but in fact resided at 119 S. Cedar in the City of Omak which location is NOT within the boundaries of the Colville Tribes Reservation. This is the same address disclosed in his *Certificate of Indian Blood* and testified in the Reference Hearing as being his address at the time of his arrest.
7. The time frame for the burglaries and theft of property from the Barker property was approximately the second half of May 2013 and the first two weeks of June 2013. Barker thought Chavez had removed the pickup truck and didn't immediately concern himself to

the fact that it was gone. Further Barker had an elderly parent whom he cared for which took him away from his premises during that time frame. He was contacted by Omak Police, who found an old box of his bank checks during their investigation of several burglaries, that alerted him to the initial burglary and theft at his premises.

8. David Priest has an extensive criminal history of burglaries, theft, trafficking and possession of stolen property. He has thirteen convictions for crimes of dishonesty. He was then (June 19, 2013) out on bail and facing new criminal charges for Trafficking in Stolen Property in the First Degree (Three counts) and Possession of a Stolen Motor Vehicle (Two counts), which had been found at Shelly Priest's (ex sister in law) residence which was nearby the 1109 Lone Pine house. He was subsequently convicted in April 2014 on all five counts as the undersigned judge was the trial judge in that matter.
9. David Priest related to Sgt Mudgett that an individual known as Garrett Elsburg had brought the Ford F250 pickup to the Cheryl Priest's so David Priest could put it in working or running order. Further Mr. Priest told Sgt. Mudgett that he would get ahold of Elsburg and have him contact the officer which never occurred. Elsburg had multiple warrants out for his arrest. However, this inability to start or run the pickup is contrary to the evidence submitted at trial by Mr. Chavez and Mr. Barker who both knew the truck was operational. The photographs introduced at trial and the Reference Hearing show the truck being stripped and disassembled which is clearly contrary to the preliminary statement made to Sgt. Mudgett. No evidence was presented that Garrett Elsburg delivered the pickup except the self-serving statement of David Priest. A jury has the ability to determine the credibility of statements and whether it makes sense given the facts. Here the jury did not accept the facts of Mr Priest as relayed to Sgt. Mudgett relative to Garrett Elsburg delivering the truck and personal property.
10. Additionally David Priest talked about Garrett Elsburg being a person involved in drugs and other criminal activities when he had his initial contact with Sgt. Mudgett; yet David Priest provided no information about how Elsburg might be contacted or what specific repairs Elsburg had ask Priest to do except get the pickup operational. All the statements and actions by Priest appeared to be contrary to the evidence and unreasonable given the situation along with the disclosures by Barker and Chavez.

11. In addition to the Ford F250 pickup, other items of personal property were located and found at 1109 Lone Pine that had been stolen from Barker's premises including a cooler, cargo strap, gas can, tool box, pressure washer, shop vac, hand truck, and Troy-bilt mower. These items were not located in the pickup at Barker's property but in his shop and in his house from which they were taken. Thus Mr. Barker's premises had been burglarized.
12. David Priest did not respond to Sgt. Mudgett's initial contact at the travel trailer, but did when Dep Dave Rodriguez entered the trailer, went to the back bedroom area and actually saw Mr. Priest present. He appeared to be hiding from law enforcement, but for Dep Rodriguez' search of the trailer sleeping area.
13. The Ford F250 truck was covered by a tarp, except for the rear portion, which hid items of personal property taken from the Barker property. This was to prevent others from seeing the items or to secret them.
14. This court finds David Priest's prior criminal activities of theft, possessing stolen property, stripping or disassembling property or vehicles are factually related to the crimes he was charged with herein. While he did not testify at his trial, the jury is instructed on direct and circumstantial evidence along with witness credibility. Given that his claim to Sgt. Mudgett was that he was to repair and make operational the Ford F250, the clear evidence is contrary and unresponsive of his claim. Therefore the credibility of Mr. David Priest must be called into question, including the truthfulness of any statement given to law enforcement, and the jury found that he "knowingly" had possession of stolen property and possession of a stolen motor vehicle off the Colville Tribes Reservation between the last two weeks of May 2013 and the first two weeks of June 2013.

The foregoing Findings of Fact are respectfully submitted to the above-entitled Court of Appeal this 18th day of June, 2016.


HENRY A. RAWSON, Judge
Okanogan County Superior Court

PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the January 5, 2017, 2016, I provided service to the following, a true and correct copy of the Discretionary Review:

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