

NO. 36485-9-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Appellant,

v.

WILLIAM PINK

Respondent.

STATE OF WASHINGTON
BY: [Signature]
COURT REPORTER
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COUNTY CLERK

ON APPEAL FROM THE
SUPERIOR COURT OF GRAYS HARBOR COUNTY

Before
The Honorable David Foscue, Judge

BRIEF OF RESPONDENT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Respondent

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A. STATEMENT OF THE CASE

William Pink moved to dismiss the charge of unlawful possession of a firearm in the second degree on the basis of lack of criminal jurisdiction by the state. The trial court granted the motion and dismissed the charge on June 11, 2007. The court entered a Letter Opinion and Order of Dismissal on June 11. Clerk's Papers [CP] at 22-23, 24.

In his Letter Opinion, the Honorable David Foscue found the following facts were not in dispute:

1. Pink was the passenger in a vehicle stopped for a traffic offense on State Route 109, just south of the Moclips Highway.
2. Pink was arrested on an outstanding warrant and found to be in possession of a firearm.
3. He is currently charged with unlawful possession of a firearm in the second degree.
4. The portion of State Route 109 where the arrest occurred is within the bounds of the Quinault Reservation.
5. The land is tribal land.
6. The State has an easement to build and maintain State Route 109 over that portion of the Quinault Reservation.
7. The Quinault Indian Nation has specifically consented to this easement in writing.

CP at 22.

In his Letter Opinion, Judge Foscue wrote:

The state has assumed jurisdiction over Indians on tribal lands for specific matters, including the operation of motor vehicles on the public highways. However, this assumption does not include general criminal jurisdiction. RCW 37.12.010. RCW 37.12.021 provides a way for the state to assume criminal jurisdiction over Indians on Indian land by formal agreement with the governing Indian body. Criminal jurisdiction over Indians on Indian land has not been assumed under this statute. Thus the state does not have general criminal jurisdiction over members of the Quinault Indian Nation white on tribal lands within the Reservation.

In *Somday v. Rhay*, 67 Wn.2d 180 (1965), the Washington Supreme Court held that the state has criminal jurisdiction over Indians on roads in reservations where the roads have been deeded in fee simple to the state because the fee is neither trust land nor allotted land. The state argues that the easement for highway purposes is the equivalent of the grant of a fee simple interest. Following the precedence of *Somday*, argues the state, the court should hold that the Quinault portion of SR 109 subject to the easement is neither trust land nor allotted land and that the state has general criminal jurisdiction over Indians on the roadway.

Somday involved the actual grant of a fee interest. It did not involve an easement. In *Somday*, there was simply no remaining tribal interest. An easement, however, is a right of use distinct from ownership. *Olympia v. Palzer*, 107 Wn.2d 225, 229 (1986). There is no transfer of ownership. The land subject to the easement for SR109 remains Indian land. Nothing in the statute or easement suggests any intention that the state assumes criminal jurisdiction over Quinault Indians on the highway.

Since the land remains Indian land, the Quinault's have criminal jurisdiction on Indians on Indian land. Since there are recognized ways the tribe could cede criminal jurisdiction

to the state and since no such action has been taken, I must conclude that the State of Washington does not have criminal jurisdiction over Mr. Pink under the facts of this case.

I am persuaded by Mr. McNeill's presentation that the United States Supreme Court cases cited by the state are distinguishable and do not compel a contrary result. Fundamentally my conclusion is that jurisdiction should not be implied where the land remains Indian land and where the statutory provisions for assumption of jurisdiction have not been followed.

The Motion to Dismiss will be granted.

CP at 22-23. Appendix A.

The State filed timely notice of appeal.

B. ARGUMENT

1. THE TRIAL COURT CORRECTLY RULED THAT THE STATE DID NOT HAVE JURISDICTION OVER THE CRIME OR THE APPELLANT

The trial court properly found that the land on which the State Route 109 easement passes remains Quinault land, that the Quinault tribe has criminal jurisdiction over tribal members on that land, and that the tribe did not cede criminal jurisdiction to the state.

The Quinault Indian Nation is the federally recognized governing body of the Quinault Indian Reservation. *See, e.g. United States v. Washington*, 384 F.Supp. 312, 374 (D. Wash. 1974), *aff'd.*, 520 F.2d 676 (9th

Cir. 1975); 102 Stat. 3327. The Quinault Indian Reservation was established in accordance with Article II of the Treaty with the Quinault, 12 Stat. 971. *See, Quinault Allottee Association v. United States*, 485 F.2d 1391, 1392-93 (Ct. Cl. 1973).

The superior court has original jurisdiction in all criminal felony cases, and in all proceedings in which jurisdiction has *not* been vested exclusively in some other court. Wash. Const., art. IV, § 6. The state's criminal jurisdiction extends across the geographical boundary of the reservation except for tribal trust land and allotted lands. RCW 37.12.010; *State v. Cooper*, 130 Wn.2d 770, 775-76, 928 P.2d 406 (1996). Title to trust land is held by the federal government in trust for the Indian tribe as a community. Title to allotted land is held by individual tribe members, also in trust for the community, and subject to restrictions against alienation by the holders. *Somday v. Rhay*, 67 Wash.2d 180, 184, 406 P.2d 931 (1965).

In 1957 the state legislature enacted Laws of 1957, ch. 240, § 1 and § 2, p. 941, which provided that the state would assume civil and criminal jurisdiction over members of Native American tribes and Native American land, but only if the "Indian tribe, community, band or group in the state [pass] a resolution expressing its desire that its people and lands be subject [to state jurisdiction]" *Somday*, 67 Wn.2d at 182-83. The state acted

unilaterally to assume jurisdiction over reservations in 1963 when it enacted Laws of 1963, ch. 36 amending Laws of 1957, ch. 240 (now codified as RCW 37.12.010).

RCW 37.12.010 provides:

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to 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, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and
- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways:

PROVIDED FURTHER, That Indian tribes that petitioned

for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

RCW 37.12.010.

RCW 37.12.021, enacted in the same legislation as RCW 37.12.010, provides that state would assume full criminal jurisdiction (*i.e.* jurisdiction over tribal members on tribal lands) pursuant to tribal consent.

In enacting RCW 37.12.010 in 1963, the legislature, with certain exceptions, assumed civil and criminal jurisdiction within Indian Reservations located within the state. The assumption of jurisdiction excluded coverage of Native Americans on tribal or allotted lands held in trust. The statute provided that such assumption of jurisdiction did not apply to Native Americans when on their tribal or allotted lands.

RCW 37.12.010 provides that the state has criminal jurisdiction on “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.” The meaning of this phrase was defined in *Somday*, in which the Court explained:

Generally speaking, tribal lands are lands within the boundaries of an Indian reservation held in trust by the federal government for the Indian tribe as a community, and allotted lands are grazing and agricultural lands within a reservation

which are apportioned and distributed in severalty to tribal members, title to the allotted lands being held in trust and subject to restrictions against alienation for varying periods of time.

Somday, 67 Wn.2d at 184.

Whether the State assumed criminal jurisdiction over a particular piece of land depends on whether the property constitutes “tribal lands or allotted lands within an established Indian reservation.” RCW 37.12.010. Lands held in fee are not lands “held in trust by the United States or subject to a restriction against alienation imposed by the United States,” and therefore RCW 37.12.010 effected an assumption of state jurisdiction over fee lands within Indian reservations. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 475, 99 S.Ct. 740, 748, 58 L.Ed.2d 740 (1979).

Here, the trial court held that the Quinault Nation granted an easement to the state to “build and maintain SR 109 over this portion of the Quinault Reservation.” CP at 22. The state presented no evidence that the tribe ceded interest in the land to the State other than granting an easement, or otherwise consented to the application of RCW 37.12.021.

As Judge Foscue noted in his Letter Opinion, the jurisdictional issue in *Somday* did not involve an easement, but instead concerned a state

highway for which a fee simple patent was granted. Somday, an enrolled member of the Colville Tribe, pleaded guilty to second degree assault. *Somday*, 67 Wn.2d at 180. The offense for which Somday was arrested took place on the right of way of a state highway in Elmer City, Washington, which is within the boundaries of the Colville Indian Reservation. *Id.* at 180-81. He subsequently challenged his arrest, incarceration, and guilty plea, in part upon the contention that the Okanogan County Superior Court lacked jurisdiction and that the highway right-of-way was located on tribal or allotted land. *Id.* at 181. The court found that the highway right-of-way where the offense was committed runs across property for which a fee simple patent was granted in 1935, and that the land was therefore not tribal or allotted land as contemplated by RCW 37.13.010. *Id.* at 184.

As Judge Foscue noted, the Colville Tribe retained no interest in the land, whereas the Quinalts retained ownership and granted only an easement to the state. An easement is an interest which one person has in the land of *another*. It is a nonpossessory interest in land that is in possession of another, whereas an estate in land is a possessory interest. Restatement of Property § 450, comments *a, e*, at 2902-05 (1944). *Butler v. Craft Eng Constr. Co.*, 67 Wn. App. 684, 843 P.2d 1071 (1992). See also, *Olympia v. Palzer*, 107 Wn.2d 225, 728 P.2d 135 (1986).

The state argues, based on the easement granted to the state, that it has jurisdiction over the section of SR 109 that runs within the boundaries of the Quinault Reservation. Without citation to authority, the State argues that “given the circumstances at the time of the creation of the easement, it is difficult to understand how anyone could have understood or intended that the public highway would constitute “tribal lands” or “allotted lands” since it was maintained as a public highway to be used for a public purpose at a time when the State had full criminal and civil jurisdiction.” Brief of Appellant at 5. The state fails to show that it has any possessory interest in the land other than the easement, and fails to show that RCW 37.13.010 is overborne or otherwise inapplicable.

The State cites *Strate v. A-1 Contractor*, 520 U.S., 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997) in support of its argument. In *Strate*, which involved a civil tort claim involving non-tribal members, the Supreme Court held that a highway right-of-way within an Indian reservation may be the equivalent of non-Indian fee land. *Strate* arose out of a collision between a car and a truck on a section of a North Dakota state highway that crosses the Fort Berthold Indian Reservation. *Id.* at 1408. “North Dakota maintains the road under a right-of-way granted by the United States to the State's Highway Department; the right-of-way lies on land held by the United States in trust

for the Three Affiliated Tribes . . . and their members.” *Id.* The driver of the car, Gisela Fredericks, was the widow of a member of the Three Affiliated Tribes, and her five adult children were members, but she was not a member herself. *Id.* The driver of the truck, Lyle Stockert, was not an Indian. *Id.* The owner of the truck, A-1 Contractors, Stockert's employer, was neither owned by Indians nor based on the Fort Berthold Indian Reservation. *Id.*

Fredericks, who was severely injured, brought an action against A-1 Contractors and Stockert in the Tribal Court for the Three Affiliated Tribes of the Fort Berthold Reservation. *Id.* The defendants moved to dismiss the action for lack of jurisdiction, and the tribal court denied the motion. *Id.*

The Supreme Court affirmed the judgment of the Court of Appeals and concluded that the tribal court did not have jurisdiction over Fredericks' complaint because the defendants were neither members of the tribe nor parties to a relevant type of consensual relationship with the tribe or its members; *Id.* at 1413. The Court concluded that tribes generally *lack* civil authority over the tortious conduct of nonmembers of the tribe unless the underlying activity directly affects the tribe's political integrity, economic security, health or welfare. *Id.*

Strate pertains to the question of tribal jurisdiction over the conduct of nonmembers. The State fails to demonstrate how *Strate*'s holding that a tribal court may not exercise subject matter jurisdiction in personal injury suit

between non-Indians on highway that entered a reservation applies to Pink's case.

Similarly, *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, (9th Cir. 2000), also cited by the state, addresses the Crow Tribe's jurisdiction in taxing a nonmember utility located on congressionally-granted rights-of-way. Neither *Strate* nor *Big Horn* address a tribe's criminal jurisdiction. Criminal jurisdiction was not one of the eight categories of law in which the State assumed jurisdiction over all Indian country; RCW 37.12.010 is not overcome by *Strate* or *Bighorn*.

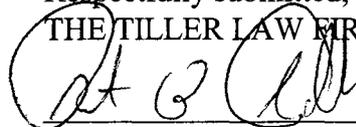
The land in question continues to be held in fee by the Quinaults, and the trial court appropriately recognized it as such. This case manifestly does not fall within any of the eight areas of subject matter over which the legislature assumed jurisdiction in RCW 37.12.010, and the order of dismissal must be affirmed. *See, State v. Cooper*, 130 Wn.2d at 774.

F. CONCLUSION

The trial court's decision must be affirmed.

DATED: October 18, 2007.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for William Pink

A

THE SUPERIOR COURT OF WASHINGTON
GRAY'S HARBOR COUNTY

COPY

GORDON L. GODFREY, JUDGE
DAVID FOSCUE, JUDGE
F. MARK MCCAULEY, JUDGE
(360) 249-6363
BONNIE KINDLE, ADMINISTRATOR
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CHERYL BROWN
COUNTY CLERK

June 8, 2007

Gerald Fuller
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Steven G. McNeill
Attorney at Law
107 E. Marcy Avenue
Montesano, WA 98563

Re: *State v. William P. Pink*
Grays Harbor County Cause No. 06-1-00739-8

Dear Counsel:

The essential facts in this case are not in dispute:

- Mr. Pink was the passenger in a vehicle stopped for a traffic offense on SR109, just south of the Moclips highway.
- Mr. Pink was arrested on an outstanding warrant and found to be in possession of a firearm.
- He is currently charged with unlawful possession of a firearm in the second degree.
- Mr. Pink is an enrolled member of the Quinault Indian Nation.
- That portion of SR109 where the arrest occurred is within the bounds of the Quinault Reservation.
- The land is tribal land.
- The state has an easement to build and maintain SR109 over this portion of the Quinault Reservation.
- The Quinault Indian Nation has specifically consented to this easement in writing.

The state has assumed jurisdiction over Indians on tribal lands for specific matters, including the operation of motor vehicles on the public highways. However, this assumption does not include general criminal jurisdiction. RCW 37.12.010. RCW 37.12.021 provides a way for the State to assume criminal jurisdiction over Indians on Indian land by formal agreement

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June 8, 2007

Page 2

with the governing Indian body. Criminal jurisdiction over Indians on Indian land has not been assumed under this statute. Thus the state does not have general criminal jurisdiction over members of the Quinault Indian Nation while on tribal lands within the Reservation.

In *Somday v. Rhay*, 67 Wn. 2d 180 (1965), the Washington Supreme Court held that the state has criminal jurisdiction over Indians on roads in reservations where the roads have been deeded in fee simple to the state because the fee is neither trust land nor allotted land. The state argues that the easement for highway purposes is the equivalent of the grant of a fee simple interest. Following the precedence of *Somday*, argues the state, the court should hold that the Quinault portion SR 109 subject to the easement is neither trust land nor allotted land and that the state has general criminal jurisdiction over Indians on the roadway.

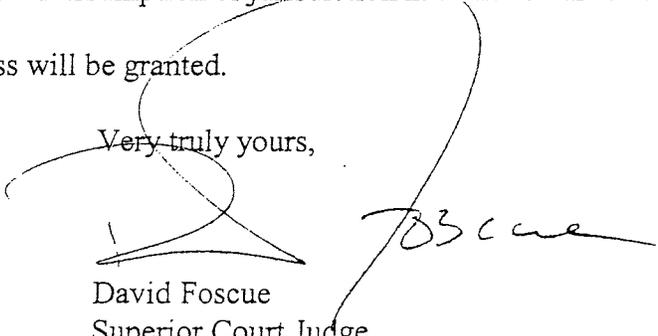
Somday involved the actual grant of a fee interest. It did not involve an easement. In *Somday*, there was simply no remaining tribal interest. An easement, however, is a right of use distinct from ownership. *Olympia v. Palzer*, 107 Wn. 2d 225, 229 (1986). There is no transfer of ownership. The land subject to the easement for SR109 remains Indian land. Nothing in the statute or easement suggests any intention that the state assumes criminal jurisdiction over Quinault Indians on the highway.

Since the land remains Indian land, the Quinaults have criminal jurisdiction on Indians on Indian land. Since there are recognized ways the tribe could cede criminal jurisdiction to the state and since no such action has been taken, I must conclude that the State of Washington does not have criminal jurisdiction over Mr. Pink under the facts of this case.

I am persuaded by Mr. McNeill's presentation that the United State Supreme Court cases cited by the state are distinguishable and do not compel a contrary result. Fundamentally my conclusion is that jurisdiction should not be implied where the land remains Indian land and where the statutory provisions for assumption of jurisdiction have not been followed.

The Motion to Dismiss will be granted.

Very truly yours,


David Foscue
Superior Court Judge

DF/rz

cc: file ✓

COURT OF APPEALS
STATE OF WASHINGTON
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STATE OF WASHINGTON
BY YMN
DEPUTY

IN THE COURT OF APPEALS
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DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

WILLIAM PINK,

Respondent.

COURT OF APPEALS NO.
36485-9-II

GRAYS HARBOR COUNTY
NO. 06-1-00739-8

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original Brief of Respondent was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to William Pink, Respondent and Gerald R. Fuller, deputy prosecuting attorney, by first class mail, postage pre-paid on October 18, 2007, at the Centralia, Washington post office addressed as follows:

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Grays Harbor Co. Prosecutor's Office
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