

CERTIFICATE OF SERVICE

I certify that I mailed

1 copies of SAC
to App Counsel Doyle
& Thurston Co. Prob. Adv. Office
5/12/12 C
Date Signed

IN THE APPELLATE COURT OF WASHINGTON
DIVISION II.

John Lundy,
Appellant

Ref. No. 42886-5-II

v.

Statement of Additional Grounds
Pursuant To RAP 10.10

State of Washington,
Respondent

I. ASSIGNMENTS OF ERROR

(1) Did the trial court abused it's discretion in allowing Lundy's Bail Jumping charges to go forward when the cause of his failure to appear was his being in custody of a recognized Indian Tribe and his being compelled to attend tribal court during the same period of time as his missed appearance at the Thurston County Superior Court violating both the Supremacy Clause and the Fourteenth Amendment of the United States Constitution?

(2) Did the trial court abuse its discretion and violete Mr Lundy's right to procedural due process under the Fourteenth Amendment when it failed to send the issue of the tribal court's jurisdiction to the 9th Circuit's, Western Dist. of Washington at Tacoma resolving treaty-sovereignty issues before allowing the bail-jumping issue to go foward?

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DIVISION II
2012 MAY 11 PM 4:20
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BY [Signature]
DEPUTY

(3) Did the trial court violated the appearance of fairness doctrine in the proceedings against Mr Lundy individually or cummulatively?

(4) Was the trial court barred from hearing the charges of bail-jumping against Mr Lundy under the Common Law Doctrine of Forfeiture by Wrongdoing?

(5) Did the trial court abuse it's discretion in not giving a 'uncontrolled circumstance' affirmative defense instruction on his Bail Jumping because Mr Lundy was in front of a tribal court at the same time causing his failure to appear?

(6) Did Mr Lundy recieve ineffective assistance of counsel at trial when counsel among other things failed to object to the court's jurisdiction over the bail jumping charge, argue the treaty-sovereignty issue, challenge the states witness on the treaty-sovereignty issue, argue forfeiture by wrongdoing, or present a limiting instruction of uncontrollable circumstances?

(7) Did the trial court abuse its discretion, demonstrate bias and violated the appearance of fairness doctrine as well as Mr Lundy's Fourteenth Amendment Right to Due Process and Equal Protection when he used (9) of Mr Lundy's previous class C felonies which should have washed out in his offender score for sentencing?

(8) Did the trial court abuse its discretion and violate the appearance of fairness doctrine when it resentenced Mr Lundy to an exceptional sentence a second time, after having been remanded back by the appellate court for resentencing?

(9) Should the appellate court resentence Mr Lundy to the presumptive mid-range of his standard range to correct the trial court's errors and refusal to exercise discretion upon remand?

II. HISTORY OF THE CASE

The State charged Mr Lundy with Possession of a Stolen Motor Vehicle and two counts of Unlawful Issuance of Bank Checks, all occurring in March of 2009. CP 2-3. By the time of trial, the state had added three counts of Bail Jumping, including allegations that Mr Lundy had missed court on July 1, 2009 (Count IV) and October 19, 2009 (Count VI). CP 3.

To support the Bail Jumping charges, the state presented the testimony of Superior Court employee Kelly McIntosh. RP (1/26/10) 192-239. Shee reviewed for the jury 27 documents admitted by the court. Exhibit 9 was an unredacted copy of Clerk's Minutes from Mr Lundy's initial appearance. The minutes indicated (among other things) that Mr Lundy was indigent, and that the court had "found probable cause for initial arrest and detention." Exhibit 9, Supp. CP. The packet of exhibits also included three different

unredacted Bench Warrant Orders, each of which set forth the court's findings in support of the warrant: "the court now finding that after proper notice the Defendant has failed to appear as scheduled for [the] hearing". Exhibits 15, 27, 35, Supp. CP. After explaining the documentary evidence to the jury, McIntosh testified that Mr Lundy did not "offer any bona fide explanation for not being present." RP (1/26/10) 227. Defense counsel did not object to any of this evidence, or request instructions limiting the jury's consideration of it.

Mr Lundy's wife testified that Mr Lundy missed court on one occasion because he was in jail at the Chehalis Tribal Jail, and that he had missed on another occasion because he was in court at the Chehalis Tribal Court (which is only held one day per month). RP (1/26/10) 265-266. It also appears that Mr Lundy had scheduling conflicts with the Pierce County Superior Court.

The Court gave the jury one "to convict" instruction for each bail jumping charge. Instructions Nos. 20-22, Supp.CP. After the instruction were read to the jury, the bailiff notified the court that the jurors had only one question: Only Instruction 20 required the jury to find that the defendant "knowingly failed to appear before a court." RP (1/26/10) 349-350. The judge corrected instructions 21 and 22, and re-read them to the jurors when they returned to court the next day. RP (1/27/10) 359-362. Even after

this correction, Instructions No. 20, 21, and 22 placed different standards before the jury to convict on three counts of the same charge.

Before the jury was re-instructed on the morning of January 27, defense counsel requested an instruction regarding the "uncontrollable circumstances" defense to Bail Jumping. The court declined to give the instruction. RP (1/27/10) 335-358. Defense counsel did not propose any specific written instructions relating to the affirmative defense.

Mr Lundy was acquitted of Count IV. (Bail Jumping on September 23), and found guilty of all the remaining charges. CP 4, 7. The trial court found that Mr Lundy had 9 prior adult felony convictions and three prior juvenile felony convictions. CP 5-6. According to the court's findings, Mr Lundy spent a period of nearly ten years without committing any crime that resulted in a subsequent conviction. The court did not find that he was in custody during this period which would toll the statute of limitations for washing out the Class C prior convictions for Mr Lundy's Offender Score. CP 5-6. Despite the prior Class C felonies having washed out, the court included them in his offender score. RP (2/4/10) 3-23, CP 5-6. Defense counsel did not object to the offender score calculation. RP (2/4/10) 4.

[RP 13].

going to impose the 70 months..."

I find no additional basis for changing my sentence, and I'm

subsection 2(c) of the sentencing statute, 9.A.535 (sic)...

I agree that my sentencing initially was based solely upon

same exceptional sentence saying:

At resentencing, the trial court, sentenced Mr Lundy to the

reconsider Mr Lundy's exceptional sentence.

Lundy's case back to the sentencing court without directions to

Washington Supreme Court. However, Division II, did remand Mr

other appellate divisions and may need to be reconciled by the

on Mr Lundy's case. Portions of its ruling are in conflict with

On July 26, 2011 the Court of Appeals Div. II, made ruling

sentence on Count I, CP 6-9. Mr Lundy timely appealed. CP 15.

Judge imposed standard range sentences concurrent with the

(Possession of a Stolen Motor Vehicle); on the other charges, the

sentenced Mr Lundy to a 70-month exceptional sentence on Count I

offenses not being adequately punished." CP 6. The court

a presumptive sentence that is to [sic] light and results in some

The court found that Mr Lundy's "unscored history results in

On April 13, 2012, Thomas Doyle WSBA No. 10634, as attorney for appellate Lundy, filed a brief of appellate ind Division II regarding Mr Lundy's resentencing. Mr Lundy was provided a copy of this brief on April 17, 2012 at the SCCC by institutional legal mail. Mr Lundy now files this timely Statement Of Additional Grounds in accordance with RAP 10.10.

III. ARGUMENT

A Court Can Abuse Its Discretion In Many Ways!

Firstly, a court can abuse its discretion when it makes an error of law. See e.g., *Republic of the Phillipines v Pimentel* 553 US 851 (2008)("[A] court by definition abuses its discretion when it makes an error of law."); *Koon v United States* 518 US 81, 99-100 (1996)(same).

Secondly, when it makes a error of fact. See e.g., *United States v Washington* 98 F3d 1159 (9th Cir), review denied, 116 Sct 301 (1995)("[A] "court abuses its discretion if... its rests its decision on a clearly erroneous finding of material fact."). See also e.g., *State v Dixon* 159 Wn2d 65 (2006).

proceedings on the proceedings.

Discretion and Appearance of Fairness Doctrine puts a more proper

Looking at the Mr Lundy's case through the twin lens of Abuse of

Doctrine).

(5th Cir 1985)(citing Washington's Appearance of Fairness

See also e.g., Shelton v City of Collage Station 780 F2d 475

"Judges must not only be impartial, but also must appear to be impartial because judicial fairness is violated when the appearance of fairness is ignored. State ex rel McFarren v Justice Court of Evangeline Staff 32 Wn2d 544, 549... (1949)('The principle of impartiality, disinterestedness, and fairness on the part of the court is as old as the history of courts.' (quoting State ex rel Barnard v Bd. of Educ. 19 Wash 8, 17... (1898)); Dittmer v Campbell 68 Wn2d 697, 699 (1961)('It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties.') CJC, Cannon 1, cmt."

See e.g., State v Moreno 147 Wn2d 500 (2002)

**Closely Tied To Abuse Of Discretion
Is The Appearance Of Fairness Doctrine
Which Should Be Reviewed At The Same Time**

discretion."

injustice'; to refuse to do so would constitute an abuse of

is required to grant relief upon a... showing of 'manifest

United States v Harris 534 F2d 141, n.1 (9th Cir 1976)('The court

unless it acts to avoid a miscarriage of justice."). See also,

(2005)('Calderson held that... the court abuses its discretion

affirmative action. See e.g., Bell v Thompson 545 US 794

Thirdly, courts abuse their discretion for failing to take

**The Superior Court Did Not Have
Jurisdiction Over The Bail Jumping
Issue Because Of Tribal Sovereignty**

It is well-established that Federal Treaties and Sovereignty Issues superceed State law and jurisdiction. See e.g., *Skokomish Indian Tribe v United States* 410 F3d 506 (9th Cir 2005)

"A treaty between the united States and an Indian tribe 'is essentially a contract between two sovereign nations' *Washington v Wash. State Commercial Passinger Fishing Vessel Assn.* 443 US 656, 675 (1979)(Fishing Vessel). Nonetheless, treaties constitute the 'supreme law of the land,' *Bread v Green* 523 US 371, 376 (1998)(per curiam), and they have occasionally been found to provide rights of action for equitable relief against non-contracting parties, see *United States v Winnans* 198 US 371, 377 (1905). Equitable relief, however, merely ensures compliance with a treaty; that is, it forces state governmental agencies and their officers to conform their conduct top federal law."

In the case at hand Mr Lundy was in custody at the Chehalis Tribal Jail being held for court at the Chehalis Tribal Court. The Chehalis Tribe is a federally recognized sovereign entity within the United States. It has the authority to set laws, and have courts to enforce those laws. See e.g., *State v Moses* 145 Wn2d 370 (2002)

"The sovereign nature of Indian tribes is not disputed. Indian tribes are unique sovereigns. Indian tribes possess those attributes of sovereignty not withdrawn by treaty or statute, or by implication because of their dependent status. *United States v Wheeler* 435 US 313, 324... (1978). We have held Indian tribes to be truly sui generis, but possessing some of the powers and characteristics akin to those of other sovereigns. *Queets Band of Indians v State*

over the bail-jumping issue vote. Or, Thurston County Superior Court, rendering its jurisdiction (1) had jurisdiction to hold Mr Lundy which superseded the

853." In Mr Lundy's case the tribal court either: has exceeded the lawful limits of its jurisdiction. Id. It Federal court may determine under S 1331 whether a tribal court question under 28 USC S 1331. Id. [471 US] at 650-53. [A] 1998) ("[T]he question of tribal court jurisdiction is a federal See e.g., County of Lewis v Allen 149 F3d 1228 (9th Cir

When There Is A Question Of Tribal Jurisdiction
It Is The Federal Court's Review
Not The State Court's To Decide

"The district court held that the tribal court had jurisdiction to hear the suit brought by Hicks against state officials for tribal common law torts and federal and tribal civil rights violations occurring on Indian-owned land. We affirm the district court's holding that the tribal court has jurisdiction."

106 F3d 1020 (9th Cir 1999)

tribal courts also have jurisdiction over non-tribal members for violations of tribal law on Indian land. See e.g., Nevada v Hicks

102 W2d 1, 4.. (1984). For example, tribes retain the sovereignty to create and prescribe law for their members and to punish violations of those laws. State v Schmuck 121 W2d 373, 381... (1993)."

(2) The Tribal Court had no jurisdiction to hold Mr Lundy and should have delivered him to the Thurstan County Superior Court on a timely basis for his hearing.

But either why it was not in the Thurstan County Superior Court's authority to move forward. It should have either: (A) referred the matter to the Federal District Court; Western District of Washington at Tacoma for an evidentiary hearing and ruling. See e.g., County of Lewis v Allen 149 F3d 1228 (9th Cir 1998). Or (B) Declared its lack of jurisdiction and dismissed the charge. See e.g., Haywood v Drown ___ US ___, 129 Sct 2106, 2126 (2009)

"The Supreme Court has recently reemphasized that, '[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

**But That Is Not What The Court Did.
It Grabbed Jurisdiction For Itself**

The Thurstan County Prosecutor relied on the testimony of Kelly McIntosh to establish the elements of bail jumping. Ms McIntosh introduced herself as an employse of the Thurstan County Superior Court, and established her credentials as an 'expert' on court procedure, and explained what each document meant and how it related to Mr Lundy's charge. RP (1/26/10) 192, 195-224. After

explaining the documentary evidence to the jury, McIntosh testified that Mr Lundy did not "offer any bona fide explanation for not being present." RP (1/26/10) at 227.

While Ms McIntosh was an expert on Thurston County Court rules and procedures she it was not established that she was an expert on treaty rights, sovereignty issues, or Constitutional law. Not only could the elements of the crime of bail-jumping not be ruled on without resolving these issues, the issue of Forfeiture by Wrongdoing also needs to be addressed. See e.g., *Giles v California* 554 US 353 (2008)(discussing forfeiture by wrongdoing in a variety of setting). Here, since we have one system of jurisprudence (See e.g., *Haywood v Drawn* 129 Sct 2108 (2009)) Thurston County would not be allowed to benefit from Mr Lundy's failure to attend a court hearing and find him guilty of bail-jumping when his absence was caused by being in another court and under their jurisdiction.

Mr Lundy's attorney did not object nor challenge the court's jurisdiction over the matter on the basis of tribal sovereignty. This violated Mr Lundy's Sixth Amendment right to the effective assistance of counsel meeting both prongs of the Strickland standard. See e.g., *Strickland v Washington* 466 US 668 (1984)((1)counsel's performance fall below an objective standard of reasonableness; (2) counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding.).

Judicial Bias Against Mr Lundy
Is Demonstrated In Several Ways

1) Using Mr Lundy's Previous Class C Felony
Convictions For Offender Score Demonstrates Bias

See e.g., State v Ervin 169 Wn2d 815 (2010)(en banc)

"This case concerns the proper interpretation of RCW 9.94A.525(2)(C), which governs when class C felony convictions may be included in a person's offender score. That statute provides in relevant part:

[C]lass C prior felony convictions... shall not be included in the offender score if, since the last date of release from confinement... pursuant to a felony conviction, if any, or entry of judgement and sentence, the offender had spend five consecutive years in the community without committing any crime that subsequently results in a conviction...

...Because Ervin, for a period of five years, did not commit any crime subsequently resulting in a conviction, and because Ervin was not confined pursuant to a felony conviction during that period, his prior class C felonies washed out and should not have been included in his offender score. Wee therefore reverse the Court of Appeals and remand for resentencing."

Here Mr Lundy had no felony convictions for a period of ten years. Twice as long as Mr Ervin or the period required by RCW 9.94A.525(2)(c). Thus the use these old "washed out" class C felonies to inflate Mr Lundy's offender score and justify an exceptional sentence did several things:

(1) It was done in violation of both statutory jurisdiction and Washington Supreme Court ruling on the subject.

(2) It violated Mr Lundy's federally protected Equal Protection Rights. See e.g., Cleburne v Cleburne Living Center 473 US 432 (1985)((1) The equal protection clause essentially requires that all persons similarly situated be treated alike. [and] (2) Equal protection violation occurs when government treats someone differently than another who is similarly situated.)).

**2) Having Multiple To Convict Instructions
Also Demonstrates Judicial Bias**

Here, Mr Lundy had three counts of Bail Jumping (counts IV, V, VI). Count IV. had one instruction while counts V. and VI. had another. This allowed the jury to convict on separate basis. The jury actually acquitted Mr Lundy on count IV. But convicted him on counts V. and VI. with the different instruction with a lower burden. This violated Mr Lundy's Fourteenth Amendment rights to Due Process and Equal Protection. See e.g., Devereaux v Abbey 263 F3d 1070 (9th Cir 2001)("Even if there is no analogous caselaw, a right can be clearly established on the basis of common sense.").

IV. CONCLUSION

1. It is clear that no reasonably disinterested person with knowledge of the law and facts against Mr Lundy would say the proceedings against him were fair.
2. The trial court abused its discretion, making errors of law and fact during trial, sentencing and resentencing.
3. The proceedings against Mr Lundy violated the Appearance of Fairness Doctrine.
4. The proceedings against Mr Lundy violated his federally protected rights under the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States of America.
5. The trial court violated both statutory and Washington Supreme Court caselaw in using Mr Lundy's previous class C felonies which had washed out to unlawfully inflate his sentence.
6. It is abundantly clear the trial judge was biased against Mr Lundy.

7. This court can and should correct the manifest injustice of Mr Lundy's exceptional sentence by resentencing him itself to the mid-range of his standard range sentence in the interest of justice since the trial court refuses to.

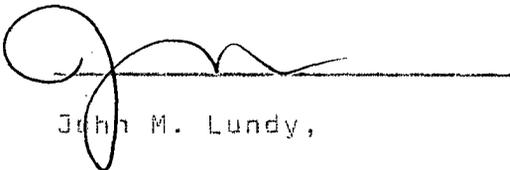
7. This court should grant Mr Lundy any other such relief as this court deems necessary to correct the Constitutional deficiencies in the proceedings against Mr Lundy.

V. OATH

I declare that the foregoing is true and correct under threat of perjury, under the laws of the State of Washington.

Dated this 9th day of May, 2012 at the Stafford Creek Corrections Center, Aberdeen, Washington.

Signed,

A handwritten signature in black ink, appearing to be 'John M. Lundy', is written over a horizontal line. The signature is stylized with a large loop at the beginning and a wavy end.

John M. Lundy,
Petitioner, Pro Se

DECLARATION OF MAILING
PURSUANT TO GR 3.1

DECLARATION

I, John M Lundy, declare that on 5-9-2012, I deposited the following document: Statement of Additional Grounds; Pursuant to RAP 10.10, or a copy thereof, in the internal mail system of the Stafford Creek Corrections Center and made arraignments for postage to:

Washington Court of Appeals
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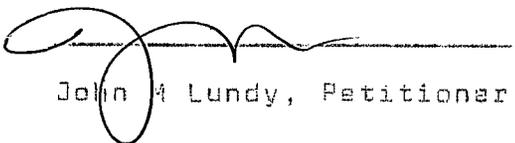
Thurston County Prosecutor
2000 Lakeridge Dr SW.
Olympia, WA 98502

Thomas E Doyle
Attorney for Appellant
PO BOX 510
Hansville, WA. 98340

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BY DEPUTY

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 9th day of May, 2012 at the Stafford Creek Corrections Center, Aberdeen, Washington.


John M Lundy, Petitioner Pro Se

(Declaration of Mailing)