FILED
APR 28, 2017
Court of Appeals
Division III
State of Washington

NO. 34926-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD ZACK,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

Yakima County Cause No. 16-1-01637-1

The Honorable Richard Bartheld, Judge

BRIEF OF APPELLANT

Skylar T. Brett
Attorney for Appellant

Law Office of Skylar Brett
P.O. Box 18084
Seattle, WA 98118
(206) 494-0098
skylarbrettlawoffice@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. The state lacked jurisdiction to charge Mr. Zack with a crime occurring on the Yakama Reservation.
2. The state lacked criminal jurisdiction over Mr. Zack under Article IV, clause 2 of the U.S. Constitution.
3. The state lacked criminal jurisdiction over Mr. Zack under Article I, section 3, clause 8 of the U.S. Constitution.
4. The state lacked criminal jurisdiction over Mr. Zack under Governor's Proclamation 14-01.
5. The trial court's interpretation of Governor's Proclamation 14-01 would grant the state broader criminal jurisdiction than it had pre-retrocession without the consent of the Yakama Nation, in violation of 25 USC 1326.

> **ISSUE 1:** The state has retroceded criminal jurisdiction within the bounds of the Yakama Reservation back to the Yakama Nation, except in cases involving "non-Indian defendants and non-Indian victims." Did the state lack jurisdiction over an alleged offense committed by Mr. Zack – who is Indian – on the Yakama Reservation post-retrocession?

6. Mr. Zack is an Indian under the *Rogers* test.

> **ISSUE 2:** A person qualifies as an Indian for criminal jurisdictional purposes if (1) s/he possesses Indian blood and (2) has been recognized by the federal government or tribe as an Indian. Is Mr. Zack an Indian when (1) he has almost one half Indian blood and (2) he has been recognized as Indian by both the federal government and the Yakama Nation?

7. The state presented insufficient evidence to convict Mr. Zack of third degree assault under RCW 9A.36.031(1)(g).
8. No rational trier of fact could have found that Mr. Zack assaulted a law enforcement officer or other employee of a law enforcement agency.

9. A corrections officer is not a law enforcement officer or other employee of a law enforcement agency.

> **ISSUE 3:** In order to convict Mr. Zack of third degree assault, the state was required to prove beyond a reasonable doubt that he assaulted a law enforcement officer or other employee of a law enforcement agency. Did the state fail to meet its burden when it proved, at most, that Mr. Zack assaulted a corrections officer of the Toppenish City Jail, which is not a law enforcement agency?

10. The court erred by entering Finding of Fact 4.D.4 (CP 64).
11. The court exceeded its statutory authority by ordering Mr. Zack to contribute to the cost of his incarceration.
12. The court lacked authority to order Mr. Zack to pay the cost of his incarceration under RCW 9.94A760(2) because he does not have the current ability to pay those costs.

> **ISSUE 4:** A sentencing court may order a person to contribute to the costs of his/her incarceration only when s/he has the ability to pay those costs "at the time of sentencing." Did the court exceed its authority by ordering Mr. Zack to contribute to the cost of his incarceration when he does not have the present ability to pay?

13. The Court of Appeals should decline to impose appellate costs, if Respondent substantially prevails and requests such costs.
14. The state cannot establish that Mr. Zack's financial circumstances have changed under RAP 14.2 since the trial court found him indigent.

> **ISSUE 5:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Zack is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Donald Zack has lived on the Yakama reservation in housing provided by the tribe for more than twenty years. RP 11. His mother and four brothers are all enrolled members of the Yakama Nation. RP 11. But Mr. Zack is 1/32 short of the one quarter of Yakama blood he would need to enroll. RP 11-12. He is, however, eligible to enroll as a member of the Muscogee Creek Tribe in Oklahoma. RP 12.

Both the Yakama Nation and Muscogee Creek Tribes have provided Mr. Zack with letters of Indian ancestry on numerous occasions in order for him to receive benefits that are only available to Indians. RP 12; CP 48. Mr. Zack has received medical and dental benefits through the federal Indian Health Services for his entire life. RP 15.

Yakama tribal police have arrested Mr. Zack in the past. RP 19. He has been previously housed in the tribal jail. RP 19.

Mr. Zack regularly participates in the cultural activities of the Yakama Nation. RP 15. He participates in treaty fishing with the tribe. RP 15-16. He has held jobs at the tribal casino. RP 16. The Yakama Nation recognizes him as an Indian. RP 16.

On September 10, 2016, Mr. Zack allegedly spat on a non-Indian corrections officer while he was being treated in a hospital located on the Yakama reservation. CP 69-70.

The state charged Mr. Zack with third degree assault. CP 2.

Mr. Zack moved to dismiss the charge for lack of state jurisdiction. CP 3-12.

At the motion hearing, Mr. Zack argued that he was an Indian and that the state did not have jurisdiction to charge him with a crime occurring on the Yakama Reservation, pursuant to the Governor's retrocession of jurisdiction back to the Yakama Nation, which became effective before his alleged offense. RP 20-25.

In response, the state did not contest that the offense had occurred within the boundaries of the Yakama Nation. RP 26-34. The state also did not present any evidence contesting Mr. Zack's testimony that the Yakama Nation and federal Indian Health Service recognized him as an Indian. RP 1-41; *See* CP *generally*.

Rather, the prosecution argued that the state retained criminal jurisdiction because Mr. Zack was not an enrolled member of the Yakama Nation and because the alleged victim was non-Indian. RP 26-34.

The trial court did not decide whether Mr. Zack qualified as an Indian for jurisdictional purposes. RP 39.

Instead, the trial court found that the alleged victim's status was the deciding factor in determining whether the state has criminal jurisdiction over Mr. Zack's alleged offense. CP 86-89. This is because the Governor's proclamation retroceding partial criminal jurisdiction back to the Yakama Nation provided that "… the State shall retain jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims." CP 87. The trial court held that this language indicated that the state retains jurisdiction if *either* the defendant *or* the victim is non-Indian. CP 88.

The court found Mr. Zack guilty of third degree assault pursuant to a stipulated facts trial. RP 42-48; CP 72, 80-82. The court did not explicitly decide whether a Corrections Officer qualified as a "law enforcement officer or other employee of a law enforcement agency" for purposes of third degree assault. CP 80-82.

The court did not conduct any inquiry into Mr. Zack's financial situation during sentencing. RP 49-57. But the court ordered Mr. Zack to pay the cost of his incarceration up to $200. CP 64. The court entered a boilerplate finding that Mr. Zack "has the means to pay for the costs of incarceration." CP 64.

The court waived all other non-mandatory legal financial obligations. CP 64. The court also found Mr. Zack indigent on the day of his sentencing. CP 74-76.

This timely appeal follows. CP 73.

ARGUMENT

I. THE STATE DID NOT HAVE JURISDICTION TO CHARGE MR. ZACK -- WHO IS AN INDIAN -- WITH A CRIME OCCURRING ON THE YAKAMA RESERVATION BECAUSE THE ALLEGED OFFENSE OCCURRED AFTER THE STATE RETROCEDED CRIMINAL JURISDICTION BACK TO THE TRIBE, EXCEPT IN CASES INVOLVING *BOTH* A NON-INDIAN DEFENDANT *AND* A NON-INDIAN VICTIM.

A. Under the Governor's proclamation retroceding partial criminal jurisdiction to the Yakama Nation, the state only retains criminal jurisdiction over offenses on the Yakama Reservation if the defendant and victim are both non-Indian.

1. Historical and Legal Background.

A state has no inherent criminal jurisdiction over any offense occurring in Indian Country. U.S. Const. Art. IV, cl. 2; Art. I, sec. 3, cl. 8; *State v Jim*, 173 Wn.2d 672, 678, 273 P.3d 434 (2012); *State v. Comenout*, 173 Wn.2d 235, 238, 267 P.3d 355 (2011); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 481, 96 S.Ct. 1643, 48 L.Ed.2d 96 (1976); *Bryan v. Itasca Cnty., Minnesota*, 426 U.S. 373, 376, n. 2, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976).[1]

[1] Where there is no factual dispute as to the location of the alleged crime, the question of the State's criminal jurisdiction is a question of law, reviewed *de novo*. *Jim*, 173 Wn.2d at 678.

In 1953, however, the federal legislature enacted PL 280, which permitted some states, including Washington, to assume civil and criminal jurisdiction over Indian Country. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation* (*Yakima Indian Nation*), 439 U.S. 463, 471–74, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979). This original version of PL 280 permitted assumption of such jurisdiction without the consent of the tribes that would be affected. *Id.*

In 1963, The Washington Legislature acted upon its authority under PL 280 to assume some civil and criminal jurisdiction over Indians and Indian Country within the state. *Id.* at 465-66; RCW 37.12.010. That assumption of jurisdiction, however, did not apply to "Indians when on their tribal lands or allotted lands within an established Indian reservation," except in the case of eight enumerated subject areas, unless the tribe requested full state civil and criminal jurisdiction. RCW 37.12.010.[2]

The Yakama Nation did not request any state jurisdiction beyond that dictated by RCW 37.12.010. *Yakima Indian Nation*, 439 U.S. at 476; *See also; State v. Sohappy*, 110 Wn.2d 907, 909, 757 P.2d 509 (1988).

[2] The eight subject areas are: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles. RCW 37.12.010.

In 1968, Congress amended PL 280 to allow the federal government to accept retrocession of state jurisdiction in Indian Country that had been acquired pursuant to that statute. 25 U.S.C. 1323; Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 Wash. L. Rev. 915, 945 (2012). The Secretary of the Interior may accept a state's request for retrocession, but is not required to do so. *Id.* at 945-46.

That same set of amendments prohibited states from assuming any new civil or criminal jurisdiction in Indian Country under PL 280 without the consent of the affected tribe. 25 USC 1326.

In 2012, the Washington Legislature passed a statute permitting Indian tribes to petition the Governor for retrocession of criminal and civil jurisdiction. RCW 37.12.160.

Later that same year, the Yakama Nation petitioned the Governor for full retrocession of all state criminal and civil jurisdiction within Yakama Indian Country. CP 35.

The Governor granted the retrocession petition in part and denied it in part. CP 35-37.

The Governor's retrocession proclamation (Governor's Proclamation 14-01) provides that the state returns criminal jurisdiction to the tribe "within the exterior boundaries of the Yakama Reservation" but

that "the State shall retain jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims." CP 36.

The proclamation's preamble also contains the following clarifying provisions:

> Whereas…the Yakama Nation… acknowledges that the state would retain criminal jurisdiction over non-Indian defendants…
>
> Whereas, strengthening sovereignty and independence of the federally recognized Indian tribes within Washington State is an important priority for the State…
> CP 36.

The Secretary of the Interior accepted retrocession as described in the governor's proclamation, effective April 19, 2016. Acceptance of Retrocession of Jurisdiction for the Yakama Nation, 80 Fed. Reg. 202 (Oct. 20, 2015).

2. Post-retrocession, the state does not have jurisdiction over criminal offenses within the Yakama Nation unless the crime involves *both* a non-Indian defendant *and* a non-Indian victim.

The jurisdictional question in Mr. Zack's case turns on the meaning of the phrase "criminal offenses involving non-Indian defendants and non-Indian victims" in the Governor's Proclamation 14-01. CP 36.

For the reasons set forth below, this court must construe that phrase to retain state criminal jurisdiction on the Yakama Reservation only in cases involving *both* a non-Indian defendant *and* a non-Indian victim.

As a general rule, "states lack criminal jurisdiction over Indians within Indian Country, absent federal legislation specifying to the contrary." *Comenout*, 173 Wn.2d at 238 (*citing* Cohen's Handbook of Federal Indian Law § 6.04[1], at 537 (2005)).

This is because the application of state law to Indians in Indian Country raises issues of sovereignty and "wholesale application of state law would diminish tribal autonomy." *State v. Yallup*, 160 Wn. App. 500, 504–05, 248 P.3d 1095 (2011).

Accordingly, it is a canon of Indian Law that treaties and statutes passed for the benefit of a tribe must be "liberally construed in favor of the tribe[]." *Jim*, 173 Wn.2d at 686 (*citing Bryan*, 426 U.S. at 392); *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). "Doubtful expression" must be resolved "in favor of the Indians." *Jim*, 173 Wn.2d at 686.

In *Jim*, for example, the Washington Supreme Court held that an "in-lieu fishing site," which Congress had set aside for tribal fishing, qualified as a reservation held in trust by the United States. *Id.* at 688. This holding stripped the state courts of criminal jurisdiction over Indian activities at the site. *Id.* Such a conclusion was necessary in *Jim* in order to comply with the canons of Indian law outlined above and because

Indian tribes have "the greatest interest in being free of state police power." *Id.* (*citing Yakima Indian Nation*, 439 U.S. at 502).

These same considerations require this court to construe the Governor's Proclamation 14-01 in favor of the Yakama Nation, giving the state criminal jurisdiction only over cases involving *both* a non-Indian defendant *and* a non-Indian victim.

Indeed, the trial court's interpretation (giving the state jurisdiction if there is *either* a non-Indian defendant *or* a non-Indian victim) would actually give the state broader criminal jurisdiction over Yakama Indians than it had before the retrocession proclamation was accepted by the Secretary of the Interior.

This is because, before the Governor's retrocession proclamation, only the defendant's status mattered in the determination of whether the state possessed criminal jurisdiction over an offense occurring within specified areas of the Yakama reservation. *See* RCW 37.12.010. Accordingly, the state lacked criminal jurisdiction over all offenses involving Indian defendants occurring on the relevant areas of the reservation, regardless of whether the alleged victim was non-Indian. *See Sohappy*, 110 Wn.2d at 909 (under RCW 37.12.010, the state lacked criminal jurisdiction over an alleged assault committed by an Indian defendant against a non-Indian law enforcement officer).

Likewise, under the common law rule in place before the enactment of PL 280, the state possessed criminal jurisdiction for crimes committed in Indian Country only if *both* the defendant *and* the victim were non-Indian. *See Negotiating Jurisdiction*, 87 Wash. L. Rev. 928 (2012); *See also People of State of N.Y. ex rel. Ray v. Martin*, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261 (1946); *Draper v. United States*, 164 U.S. 240, 242, 17 S.Ct. 107, 41 L.Ed. 419 (1896); *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869 (1881).

Following the canon that "doubtful expressions" must be "liberally construed" in favor of a tribe, the governor's language retaining state jurisdiction in "criminal offenses involving non-Indian defendants and non-Indian victims" must be read as a return to the pre-PL 280, common law rule giving the state jurisdiction only over cases involving both a non-Indian defendant and a non-Indian victim. CP 36; *Jim*, 173 Wn.2d at 686; *Bryan*, 426 U.S. at 392.

Indeed, construing the proclamation – as the trial court did in Mr. Zack's case – to grant criminal jurisdiction over any offense involving an Indian defendant and a non-Indian victim would give the state criminal jurisdiction over Indians on the Yakama Reservation in more cases than it had pre-retrocession.

Pre-retrocession, the state lacked jurisdiction over all offenses committed by Indians on trust and allotted land within a reservation, regardless of whether the victim was Indian or non-Indian. RCW 37.12.010; *Sohappy*, 110 Wn.2d at 909. Under the trial court's interpretation of Proclamation 14-01, however, the state would have criminal jurisdiction over any offense committed by an Indian involving a non-Indian victim on the Yakama reservation. Such an interpretation runs afoul of the Indian Law canons of construction. *Jim*, 173 Wn.2d at 686; *Bryan*, 426 U.S. at 392.

Such an assumption of new state criminal authority via gubernatorial proclamation would also violate the requirement that any new assumption of state jurisdiction pursuant to PL 280 after 1968 may only be undertaken with the consent of the tribe. 25 USC 1326.

The rule of lenity compels the same result. Insofar as the language of the governor's proclamation is ambiguous, any ambiguity must be construed in favor of Mr. Zack. *State v. Weatherwax*, 93192-5, 2017 WL 1292624, at *7, --- Wn.2d ---, --- P.3d --- (Wash. Apr. 6, 2017).

Additionally, this interpretation of the Governor's Proclamation 14-01 complies with the general rule that the word "and" is presumed to function conjunctively. *State v. Kozey*, 183 Wn. App. 692, 698, 334 P.3d 1170 (2014) (*citing State v. Tiffany*, 44 Wash. 602, 603-04, 87 P. 932

(1906)). As such, the proclamations retention of state criminal jurisdiction in cases involving "non-Indian defendants and non-Indian victims" functions only if both parties are non-Indian.

Finally, an interpretation of the proclamation's language to grant the state criminal jurisdiction only over offenses involving both a non-Indian defendant and a non-Indian victim complies with the preamble's language, recognizing that "…the Yakama Nation…acknowledges that the state would retain criminal jurisdiction over non-Indian *defendants*." CP 36 (emphasis added).

The language in the Governor's Proclamation 14-01 reserving state criminal jurisdiction over "criminal offenses involving non-Indian defendants and non-Indian victims" must be interpreted by this court to grant state criminal authority on the Yakama reservation only if a case involves *both* a non-Indian defendant *and* a non-Indian victim.

B. Because Mr. Zack is an Indian, the state did not have jurisdiction over his alleged assault, which occurred within the boundaries of the Yakama Reservation.

The Washington retrocession statute does not define the term "Indian." *State v. Daniels*, 104 Wn. App. 271, 277, 16 P.3d 650 (2001). Neither does the Governor's Proclamation 14-01. CP 35-37. Federal law defines the term merely as: "any person who would be subject to the jurisdiction of the United States as an Indian." *Id.*; 25 USC 1301(4).

Accordingly, Washington and federal law have established a two-part test to determine whether a person is Indian for purposes of criminal jurisdiction. *Daniels*, 104 Wn. App. at 280 (citing *LaPier v. McCormick*, 986 F.2d 303, 305-06 (9th Cir. 1993); *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979); *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938); *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988)). In order to qualify as an Indian, a person must show (1) "that he is an Indian in the racial sense," meaning that s/he possesses some amount of "Indian blood;" and (2) that s/he is enrolled or affiliated with a federally-recognized tribe.[3] *Id.* Affiliation is demonstrated through "tribal or governmental recognition as an Indian." *Id.* at 278.

This test is referred to as the *Rogers* test because it was developed based on the 1846 U.S. Supreme Court decision in *Rogers*. *Id.* (*citing United States v. Rogers*, 45 U.S. 567, 573, 4 How. 567, 11 L.Ed. 1105 (1846)).

Whether a person is enrolled in a tribe is not determinative of whether s/he is Indian. *Id.*; *United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005). This is true even when s/he is not eligible for enrollment

[3] The question of whether a person qualifies as Indian for jurisdictional purposes is a mixed question of law and fact, reviewed *de novo*. *United States v. Keys*, 103 F.3d 758, 761 (9th Cir. 1996).

because s/he does not have enough blood from any particular tribe. *See e.g. Bruce*, 394 F.3d at 1224; *United States v. Stymiest*, 581 F.3d 759, 765-66 (8th Cir. 2009).

In *Pero*, for example, the court determined that the accused was Indian (even though he was not enrolled in the tribe upon whose reservation he lived) because (1) his parents were Indians and maintained tribal relations, and (2) he lived on the reservation, maintained a relationship with the tribe, and was recognized as Indian. *Daniels*, 104 Wn. App. at 278 (*citing Pero*, 99 F.2d at 31).

Similarly, in *Bruce*, the accused established that she was Indian (even though she was not enrolled with any tribe) when…

> … she offered evidence that she is one-eighth Chippewa Indian and introduced a certificate of Indian blood confirming this fact. She also offered evidence that her mother is an enrolled member of the Turtle Mountain Tribe of Oklahoma, and that two of Bruce's children are enrolled members of an Indian tribe. With respect to recognition, she presented evidence that she was born on an Indian reservation and currently lives on one; that she participates in Indian religious ceremonies; that she has, on several occasions, been treated at Indian hospitals; and that she was "arrested tribal" all her life.

Bruce, 394 F.3d at 1224.

Mr. Zack's case is directly analogous to *Bruce*. He also meets both prongs of the *Rogers* test.

In regard to the first factor, Mr. Zack has demonstrated that he is an Indian "in the racial sense." *Daniels*, 104 Wn. App. at 280. The

Yakama Nation has provided Mr. Zack with a Letter of Indian Ancestry on multiple occasions. RP 12; CP 48. While Mr. Zack is 1/32 short of the one quarter of Yakama blood needed to enroll with that tribe, he is eligible to enroll with the Muscogee Creek Tribe in Oklahoma, which is also federally-recognized. RP 11-12. His mother and brothers are all enrolled members of the Yakama Nation. RP 11. Altogether, Mr. Zack has nearly one half Indian blood. RP 11-12.

As to the second prong of the *Rogers* test, Mr. Zack has lived on the Yakama reservation for almost his whole life, in housing provided by the tribe. RP 11. All of his medical and dental benefits have been provided by the Indian Health Services. RP 15. He participates in tribal activities, including cultural ceremonies and treaty fishing. RP 15-16. He has been arrested by tribal police and held in tribal jail. RP 19. In fact, it was uncontested at the motion hearing that the Yakama Nation recognizes Mr. Zack as an Indian. RP 16.

Mr. Zack is strongly affiliated with the federally-recognized Yakama nation. He has been recognized as Indian both by the tribe and by the federal government, which provides him with benefits through the Indian Health Service.

Mr. Zack is an Indian under the *Rogers* test. *Bruce*, 394 F.3d at 1224; *Daniels*, 104 Wn. App. at 280. Accordingly, as outlined above, the

state did not have jurisdiction to prosecute him for a crime occurring on the Yakama reservation. Mr. Zack's conviction must be reversed and his charge dismissed with prejudice for lack of jurisdiction.

II. NO RATIONAL FACT FINDER COULD HAVE FOUND MR. ZACK GUILTY OF THIRD DEGREE ASSAULT AS CHARGED BECAUSE A CORRECTIONS OFFICER IS NOT A "POLICE OFFICER OR OTHER EMPLOYEE OF A LAW ENFORCEMENT AGENCY."

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found each element met beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied,* 176 Wn.2d 1003, 297 P.3d 67 (2013).

In order to convict Mr. Zack with third degree assault as charged in this case, the state was required to prove beyond a reasonable doubt that he assaulted "a law enforcement officer or other employee of a law enforcement agency." CP 2; RCW 9A.36.031(1)(g).

But the state's evidence demonstrated, at most, that Mr. Zack had assaulted a corrections officer employed by the City of Toppenish Jail. RP 46-47; CP 69-71. Because the corrections officer was not "a law enforcement officer or other employee of a law enforcement agency," no rational fact finder could have found Mr. Zack guilty of third degree assault. RCW 9A.36.031(1)(g); *Chouinard*, 169 Wn. App. at 899.

The legislature has created a criminal statute specifically to punish assault against a corrections officer: custodial assault. RCW 9A.36.100(1)(b) prohibits assault upon any staff member at any corrections institution or local detention facility who was performing his/her official duties at the time of the assault.

Staff members at corrections institutions include corrections officers. *See e.g. State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000) (affirming custodial assault conviction against a corrections officer); *State v. Ratliff*, 77 Wn. App. 522, 892 P.2d 118 (1995) (same)*; State v. Skenandore*, 99 Wn. App. 494, 994 P.2d 291 (2000) (same).

Under the "general-specific rule" of statutory construction, where two statutes punish the same conduct, the more specific statute prevails over the general one. *State v. Conte*, 159 Wn.2d 797, 803, 154 P.3d (2007). The state must charge someone accused of the more specific conduct only under the specific statute. *Id.*

Under this rule, even if the term "law enforcement officer or other employee of a law enforcement agency" (which is not defined by the legislature) could be read to include a corrections officer, the state must,

nonetheless, charge assault against a corrections officer under the more specific statute for custodial assault.[4] *Id.*

Statutes should also be interpreted so as not to render any provision superfluous. *State v. K.L.B.*, 180 Wn.2d 735, 740, 328 P.3d 886 (2014).

Applying this rule, the Department of Corrections and local jails cannot be "law enforcement agencies" for purposes of third degree assault. *Id.* If they were, the portion of the custodial assault statute protecting "full or part-time staff member[s]… of adult corrections institution or local adult detention facilities" would be superfluous because those parties would already be protected by the third degree assault statute.

The rule of lenity compels the same result. *Weatherwax*, 93192-5, 2017 WL 1292624, at *7. If the third degree assault statute is ambiguous as to whether it punishes assault against a corrections officer, that ambiguity must be construed in favor of Mr. Zack. *Id.*

Under the rules of statutory construction, a corrections officer does not qualify as "a law enforcement officer or other employee of a law

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[4] In another context, this Court has held that the Department of Corrections qualifies as a "law enforcement agency" for purposes of the Employment Disqualification Statute. *See McLean v. State, Dep't of Corr.*, 37 Wn. App. 255, 680 P.2d 65 (1984).

But *McLean* was decided before the custodial assault statute was enacted in 1987. *See* 1987 Wash. Sess. Laws. 657, ch. 188. Accordingly, the *McLean* court did not have the benefit of the application of the rules of statutory construction as discussed herein.

enforcement agency" for purposes of third degree assault. *Id.*; *K.L.B.*, 180 Wn.2d at 740; RCW 9A.36.031(1)(g).

No rational fact finder could have found Mr. Zack guilty of third degree assault based on the allegations that he spat at a corrections officer. RCW 9A.36.031(1)(g); RP 46-47; CP 69-71. Mr. Zack's conviction must be reversed for insufficient evidence. *Chouinard*, 169 Wn. App. at 899.

III. THE SENTENCING COURT EXCEEDED ITS AUTHORITY BY ORDERING MR. ZACK TO PAY THE COST OF HIS INCARCERATION WITHOUT FIRST DETERMINING WHETHER HE HAD THE *CURRENT* ABILITY TO PAY.

A court derives the authority to order payment of legal financial obligations (LFOs) from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied*, 172 Wn.2d 1021, 268 P.3d 224 (2011).

A sentencing court may only order a person to pay the cost of his/her incarceration upon finding that s/he "at the time of sentencing, has the means to pay the cost of incarceration." RCW 9.94A.760(2) (emphasis added). The plain language of the statute permits the court to require payment of incarceration costs only of someone who has the current ability to pay. RCW 9.94A.760(2).

This requirement stands in contrast to that regarding other LFOs, of which the court may order payment as long as the person "is or will be

able to pay them." RCW 10.01.160(3). This language – which applies to all LFOs except for costs of incarceration – permits an order of payment even if the accused cannot pay at the time of sentencing but will be able to pay at some future date. RCW 10.01.160(3).

Here, the sentencing court did not conduct any inquiry into Mr. Zack's current financial situation. RP 49-57. In fact, the court found Mr. Zack indigent on the day of sentencing and waived all non-mandatory legal financial obligations. CP 74-76; CP 64. Even so, the court ordered him to pay up to $200 toward the cost of his incarceration. CP 64.[5]

The court exceeded its statutory authority by ordering Mr. Zack to contribute to the cost of his incarceration when he did not have the means to do so at the time of sentencing. RCW 9.94A.760(2); *Hathaway*, 161 Wn. App. at 651-653. The order that Mr. Zack pay $200 toward the cost of his incarceration must be vacated. *Id*.

IV. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE ANY REQUEST TO IMPOSE APPELLATE COSTS UPON MR. ZACK BECAUSE HE IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant

[5] The sentencing court entered a boilerplate finding that Mr. Zack had the present means to pay the cost of incarceration. CP 64. That finding is not based on any evidence and must be vacated.

can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3 612 (2016).[6]

Appellate costs are "indisputably" discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court waived non-mandatory LFOs in Mr. Zack's case. CP 64. The trial court also found Mr. Zack indigent at the end of the proceedings in superior court. CP 74-76.

That status is unlikely to change. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

Additionally, the newly amended RAP 14.2 specifies that the trial court's finding of indigency stands unless the state presents evidence that the accused's financial circumstances have changed:

[6] Though the recent amendments to RAP 14.2 arguably negate the requirement for an indigent appellant to raise this issue in his/her Opening Brief, Mr. Zack raises it, nonetheless, out of an abundance of caution. *See* RAP 14.2 (*as amended* by 2017 WASHINGTON COURT ORDER 0001).

> When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

RAP 14.2 (*as amended by* 2017 WASHINGTON COURT ORDER 0001).

The state is unable to provide any evidence that Mr. Zack's financial situation has improved since he was found indigent by the trial court.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested. RAP 14.2; *Blazina,* 182 Wn.2d 827.

CONCLUSION

The state did not have jurisdiction to charge Mr. Zack, who is an Indian, with an offense occurring on the Yakama Reservation after the state retroceded partial criminal jurisdiction back to the Yakama Nation. Mr. Zack's conviction must be reversed and the charge against him must be dismissed for lack of jurisdiction.

No rational fact finder could have found Mr. Zack guilty of third degree assault based on the allegation that he spat at a corrections officer because a corrections officer is not a law enforcement officer or employee

of a law enforcement agency. Mr. Zack's conviction must be reversed for insufficient evidence.

In the alternative, the sentencing court exceeded its authority by ordering Mr. Zack to pay $200 toward the cost of his incarceration.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Zack who is indigent.

Respectfully submitted on April 28, 2017,

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Donald Zack
401 Shix Neet Street, POB 24
Wapato, WA 98951

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Yakima County Prosecuting Attorney
appeals@co.yakima.wa.us

Fronda Woods
LALOlyEF@ATG.WA.GOV
FrondaW@ATG.WA.GOV

Lise Ellner
liseellnerlaw@comcast.net

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on April 28, 2017.

_____

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

ELLNER LAW OFFICE
April 28, 2017 - 2:30 PM
Transmittal Letter

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