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Court of Appeals
Division III
State of Washington

NO. 32221-1
Consolidated with 33704-9

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

DAVID R. PRIEST

APPELLANT,

V.

STATE OF WASHINGTON

RESPONDENT

SUPPLEMENTAL BRIEF FOLLOWING REFERENCE HEARING

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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. <i>Id.</i> at 395, 937 P.2d 1069.....	3
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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by Karl F. Sloan, Okanogan County Prosecuting Attorney.

B. FACTS

On April 25, 2016, the Court of Appeals remanded the matter to the trial court for a reference hearing. The Court of Appeals asked the trial court to respond to three questions:

1. During what dates if any, 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 [the] stolen motor vehicle off the Confederated Tribes of the Colville territory, and if so, when?

A reference hearing was held on July 6, 2016. The trial court's findings of fact from the referencing hearing are attached hereto. The court found Mr. Priest was an enrolled member and that he possessed stolen property and the stolen motor vehicle off the reservation between May 2013 and the first two weeks of June 2013.

C. ARGUMENT

1. The state court had jurisdiction and there was no evidence in the record to support any other finding.

At the time of trial, there was no evidence, argument, offer of proof, or anything else raised by defense to contest jurisdiction. 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). 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)).

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 394¹

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.

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 evidence

¹ 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).

before the trial court to support a claim of tribal jurisdiction, or to support the contention that the State failed to prove state court jurisdiction.

The Appellant's challenge to jurisdiction, after jeopardy attached, must be denied where the record before the trial court did not support any claim of error regarding state court jurisdiction.

Even considering the reference hearing, the defendant's claim of Indian status for the purpose of tribal criminal jurisdiction, where he asserts he is 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.

2. Even if the defendant was a tribal member, the reference hearing clearly established state jurisdiction.

Even if the defendant had timely contested jurisdiction at the trial court level, the findings by the trial court after the reference hearing would defeat the defendant's challenge to jurisdiction.

To overcome the presumption of state jurisdiction, the defendant need only point to evidence of facts, which, if proved, would defeat jurisdiction. *L.J.M.*, 129 Wash.2d at 394-95. 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. *Id.* at 395, 937 P.2d 1069. In this case, there is more than prima facie evidence that the court had jurisdiction over the defendant.

In this case, the trial court found the defendant possessed the stolen property and the motor vehicle off the reservation. There is no question that the State has exclusive jurisdiction over an enrolled member defendant who commits crimes off the reservation. See *Nevada v. Hicks*, 533 U.S. 353, 362, 121 S. Ct. 2304, 2312, 150 L. Ed. 2d 398 (2001); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973).² Additionally, neither tribal sovereignty nor federal law prevents the State from serving criminal process on the reservation for an off-reservation crime. See *State v. Clark*, 178 Wn.2d 19, 28, 308 P.3d 590, 595 (2013) (citing *Hicks*, 533 at 360-66).

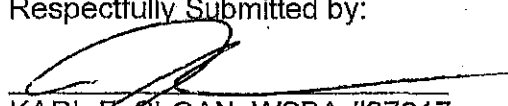
The Appellant's assertion that the State did not have jurisdiction is without merit and the defendant's appeal and PRP should be denied.

D. CONCLUSION

The jurisdictional issue raised by the Appellant should be denied where he failed to timely challenge jurisdiction, failed to carry his burden to contest jurisdiction, and where the trial court record shows the State had jurisdiction.

Dated this 16 day of September 2016.

Respectfully Submitted by:


KARL E. SLOAN, WSBA #27217
Prosecuting Attorney
Okanogan County, Washington

² Moreover, the State also has jurisdiction over crimes committed on fee lands within the borders of a reservation or on trust or allotment lands outside a reservation's borders. See *State v. Clark*, 178 Wn.2d 19, 25, 308 P.3d 590, 593 (2013).

Attachment A

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CHARLENE JOHNSON
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
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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)
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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).

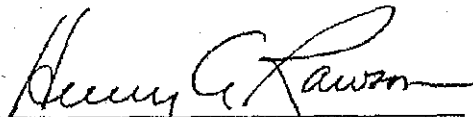
3. David Priest testified at this Reference Hearing that he has been a member of the Colville Confederated Tribe since birth; however *his Certificate of Indian Blood* does not bear a date of enrollment. Further he stated that his mother, Donna Mae Priest, was full (4/4) Colville and that his dad, William 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 Elsborg 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 Elsborg and have him contact the officer which never occurred. Elsborg 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 Elsborg 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 Elsborg delivering the truck and personal property.
10. Additionally David Priest talked about Garrett Elsborg 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 Elsborg might be contacted or what specific repairs Elsborg 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.

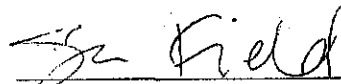

HENRY A. RAWSON, Judge
Okanogan County Superior Court

PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 16th day of September, 2016, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Supplemental Brief Following Reference Hearing:

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