NO. 73893-3-1

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON

Petitioner

v.

BRUCE M. SNYDER and GREGG B. SNYDER

Respondents.

RESPONDENT GREGG SNYDER'S RESPONSE BRIEF AND OBJECTION TO SNOQUALMIE TRIBE'S STATUS AS AMICUS CURIAE AND FILING A BRIEF

PAULA PLUMER #21497
Attorney at Law
417 West Gates, Suite 1
Mount Vernon, WA 98273
(360) 428-3988
(360) 428-5044 Fax
Email: plumlaw@gmail.com
Attorney for Respondent GREGG SNYDER

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Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 658, 693 n. 33, 61 L.Ed.2d 823, 99 S.Ct. 3055 (1979

State v. Posenjak, 127 W. App 41 (2005)

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State v. James, 72 Wn.2d 746, 435 P.2d 521 (1967)

Department of Game v. Puyallup Tribe, Inc., 70 Wn.2d 245, 422 P.2d 754 (1967), aff'd 391 U.S. 392, 20 L.Ed.2d 689, 88 S.Ct. 1725 (1968

State v. Petit, 88 Wn.2d 267, 275 (1977)

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State v. Lively, 921 P. 2d 1035 - Wash: Supreme Court 1996

II. INTRODUCTION

GREGG SNYDER, represented by PAULA PLUMER, undersigned, and his brother BRUCE SNYDER, represented by the Skagit County Public Defender's Office, are the Respondents. The Appellant is the Skagit County Prosecutor's Office. No parties intervened in the Skagit County case below. The WA State Department of Fish and Wildlife, the Snoqualmie Tribe and the Tulalip Tribes have requested to intervene and/or file amicus briefs, but the Court's letter decision granting the county prosecutor's motion for discretionary review limited amici involvement only to the issue of whether review should be granted.[1]

The Snyder brothers, Respondents, objected to state court prosecution and claimed from the first contact with law enforcement that they were exercising Snoqualmoo tribal treaty rights with a tribal hunting tag on "open and unclaimed land" which was open to tribal hunting. [2]

The county district court held a day long trial and heard evidence from the state and the Respondents. At the bench trial, the Respondents moved to dismiss and in the alternative to put on evidence toward the affirmative defense

[1] Letter decision to grant review, dated March 24, 2016.
[2] TR p. 29; Tr p. 38

of hunting as tribal members. The Court held "only a Tribe can exercise treaty rights. The Snoqualmoo Tribe is neither a Federally recognized Tribe nor a Treaty Tribe and therefore has no tribal hunting rights. The Def. does not have tribal hunting rights." [3]

On Respondents' RALJ appeal, the Superior court reversed and dismissed the charges, ruling that it was an abuse of discretion not to conclude that the brothers were exercising tribal treaty rights. The Superior Court judge stated he had not reviewed the entire transcript to determine all of the facts, but determined that the trial evidence was detailed and uncontroverted.[4]

Appellant's motion for discretionary review was granted and limited to addressing the Superior Court's recognition of "tribal treaty rights to individuals who are members of a tribe apparently without federal recognition".[5]

The ruling limited amici input to the determination of whether review should be granted. [6] Additional motions, pleadings and input by amici should not be considered.

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[3] CP (Dist ct order 12-6-2012)
[4] RP p. 2
[5] Letter decision to grant review, dated March 24, 2016
[6] Id.

III. STATEMENT OF RELIEF SOUGHT

Dismiss the appeal; remand to the court below to enter a final dismissal of the charges and relief consistent with dismissal and award fees to the Respondents.

IV. ARGUMENT

A. The state had advance notice of the Respondents' Snoqualmoo tribal treaty claims and their intent to raise this affirmative defense at trial, but failed to present evidence.

The facts at trial were unrebutted – the Respondents established they were Snoqualmoo tribal members who were direct descendants of a Treaty of Pt. Elliot signer (Pat-ka-num) and that they are recognized as such by the BIA.[7] Respondents were validly exercising tribal treaty rights to hunt one elk and no conservation issues related to this hunt were raised by the state at trial.[8]

On RALJ appeal, the state argued that State v. Posenjak[9] and US v. Washington[10] were controlling law regarding establishing tribal status, and the

[7] TR p. 54 and Ex. 10, 11, Tr. Pp 182-183
[8] TR p. 31-32
[9] State v. Posenjak, 127 W. App 41 (2005)
[10] United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir.1975), cert. denied, 423 U.S. 1086, 47 L.Ed.2d 97, 96 S.Ct. 877 (1976),

Superior Court followed the Posenjak outline of how to determine establishment of tribal treaty status, but even though the Posenjak case related to a Snoqualmoo tribal member, the legal reasoning is faulty. The factors are taken from the US v. Washington case which involved only certain tribes and their experts and was regarding fishing and not hunting. There are no hunting cases in Washington state that establish a tribe's right to hunt or not.

The state court cannot establish federal treaty rights; they did not do that in this case and regarding treaty rights to hunt in Washington state – those issues are never going to be resolved in a district court.

The analysis in State v. Posenjak, a Wa Court of Appeals case from Division III, is not actually instructive or analogous. That case involved an individual Snoqualmoo tribal member in a bench trial without evidence. At the bench trial, he did not seek to admit any evidence. (Posenjak at p. 48.) The court cited State v. Moses[11] and held a tribal member must establish an affirmative defense to a hunting charge. In this case, there was substantial evidence to support dismissing the charge. In this case, both sides testified that at the time of arrest and detention, Respondent Gregg Snyder had a Snoqualmoo hunting tag, that he was in open and unclaimed land open for

[11] State v. Moses, 79 Wn 2d 104, 110, 483 P. 2d 832 (1971)

tribal hunting, that when the state Fish and Wildlife officer arrived and detained the Respondents, they asked for a federal marshal to intervene in the law enforcement contact to make a determination of treaty hunting; and that Gregg Snyder had BIA paperwork showing his membership. [12]

At the trial, there were multiple tribal witnesses, but no federal agents were apparently contacted or involved in the investigation. [13] The only witness at trial for the state was DFW officer, Sgt. Phillips. He testified that at the time of the arrest he contacted by phone trial witness Erngy Sandstrom, the Snoqualmoo spokesperson, as well as deputy Attorney General for Washington State Dept. of Fish and Wildlife, Michael Grossman, (attorney for Amicus State DFW , brief was filed Dec. 15, 2015).[14]

Mr. Grossman did not testify or make argument at the trial. The state should not be permitted to submit evidence by amicus briefing from a witness who could have submitted information at the trial if he had been called by the state prosecutor to testify.

No conservation issues were raised by the state at trial[15]

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[12] TR p.8
[13] TR p. 24
[14] TR p. 9, 24, 28
[15] Tr. P 31-32

B. This ruling on a RALJ appeal does not grant status to treaty hunters, it merely resolves this specific hunting incident.

No new tribal status was gained in this case and no new law was made in the RALJ appeal – it merely resolves this specific hunting incident.

The state court cannot and did not establish Snoqualmoo tribal members' rights to hunt. Only a federal court or agency can do that.

Federal treaties granting tribal hunting rights are acts of Congress. As such, the supremacy clause bars state statutes from affecting tribal hunting rights. State v. McCormack, 812 P. 2d 483 - Wash: Supreme Court 1991, citing Antoine v. Washington, 420 U.S. 194, 204, 43 L.Ed.2d 129, 95 S.Ct. 944 (1975); U.S. Const. art. 6, cl. 2. A state may, however, regulate acts protected by treaty rights when the state shows that its regulation is necessary for wildlife conservation. Antoine, at 207; Williams, at 729.

The US Constitution "supremacy clause" provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.
>
> U.S. Const, art. VI.

The BIA already recognized Respondents as tribal members and they have enjoyed various benefits of tribal membership including medical and dental care dating back to 1974 when members established their tribal status per the exhibits at pages 182 and 183.[16]

Snoqualmoo tribe has cohesion, membership rolls and procedures[17], written tribal hunting regulations that were promulgated [18] and communicated to the State DFW on an annual basis, along with the record of what tags were issued.[19]

If the state disagrees with the BIA recognition of the Snyders, they must resolve the issue in a different case, at trial, or in federal court.

Other tribes' federal or state recognition is not relevant, nor was it considered below. All of the federal cases cited by Appellant regarding the process of determining tribal status cannot be applied in a state court – the issue is a matter of federal law.

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[16] Tr. P 130
[17] Tr. P 54-58
[18] Tr. P 135
[19] Tr. P 66

Appellant's submission of an unpublished decision in their brief at page 35 should be sanctioned. It's not authority and inclusion in their brief is misleading and unable to be verified because the federal decision is unavailable for viewing.

C. State law regarding proof of affirmative defenses in criminal cases has changed since State v.Moses [20] was decided in 1971.

The Moses case addressed a planned test of tribal fishing law by members of the Muckleshoot Tribe who were off-reservation gill-netting. The Court declined to address numerous issues related to establishing treaty rights by descendants of treaty signers, but stated that

> If one accused of violating the state's fishing laws and regulations claims a treaty exemption to their operation, his claim constitutes an affirmative defense and he has the burden of showing by a preponderance of the evidence the existence of the treaty, that he is a beneficiary of it and that the treaty as a matter of law bars as to him the operation and enforcement of the fishing laws and regulations. State v. James, 72 Wn.2d 746, 435 P.2d 521 (1967); Department of Game v. Puyallup Tribe, Inc., 70 Wn.2d 245, 422 P.2d 754 (1967), aff'd 391 U.S. 392, 20 L.Ed.2d 689, 88 S.Ct. 1725 (1968).[21]

Addressing their case involving Muckleshoot signatories to the Treaty of Point Elliott, noting the trial court found that the defendants

[20] State v. Moses, 79 Wn 2d 104, 110, 483 P. 2d 832 (1971)
[21] Id. At p. 110-111

were beneficial members of that tribe and that the state challenged those findings for a lack of substantial evidence, it did not weigh the evidence but upheld the state action on the basis of their right to stop all fishing in the state based on conservation consideration. [22] Nor did they decide

> "whether the Muckleshoot Tribe, Inc., off-reservation fishing rights, if any, inure to the individual benefit of its members or are reserved to the tribe as a corporate, juridical entity" nor "whether there was substantial admissible evidence to support the court's finding that the Muckleshoot Tribe of Indians as presently incorporated is the beneficial successor in interest to any of the tribal signatories of the 1855 Treaty of Point Elliott (12 Stat. 927 (1863)), or whether any of these defendants were members of that tribe."... Resolution of these and other issues raised in this review is left to another day — or more happily to a speedier solution by the Congress.[23]

The Court in State v. Moses was citing State v. James, a case regarding Cascade tribe members and their affiliation or membership in the Yakima tribe, and their tribal fishing rights. The James court stated:

> In this state and elsewhere, Indian treaties have given rise to a great deal of litigation. The many decided cases have established certain principles which should be kept constantly in mind in approaching the problems of this case.[24]
>
> (1) A treaty entered into by the United States with an Indian Nation is a part of the supreme law of the land and

[22] Id. At p. 111-
[23] Id at p. 113.
[24] State v. James, 750, 751, 435 P. 2d 521 - Wa Supreme Court, 1967

binding on state courts. State v. Satiacum, supra; United States v. Taylor, supra; Hauenstein v. Lynham, 100 U.S. 483, 25 L.Ed. 628 (1879). (complete citations omitted)

(2) Treaties with Indians are to be construed liberally to protect the rights of Indians. United States v. Winans, 198 U.S. 371, 49 L.Ed. 1089, 25 Sup. Ct. 662 (1905); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832)

(3) Any ambiguity should be resolved in favor of the Indians. State v. Edwards, 188 Wash. 467, 62 P.2d 1094 (1936); Winters v. United States, 207 U.S. 564, 52 L.Ed. 340, 28 Sup. Ct. 207 (1908); Jones v. Meehan, 175 U.S. 1, 44 L.Ed. 49, 20 Sup. Ct. 1 (1899).

(4) The construction placed upon the treaty by the parties should be taken as true when such construction has been adopted and acted upon by them over a long period of years. Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 78 L.Ed. 695, 54 Sup. 751*751 Ct. 361 (1934); United States v. Payne, 8 Fed. 883 (W.D. Ark. 1881); State v. Edwards, supra.[25]

Whether a criminal defendant has the burden to prove and persuade a Court regarding the affirmative defense of tribal treaty rights was addressed by the dissent in State v. Petit [26] thus:

The Supreme Court's recent decision in Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975), holding impermissible the use of a presumption to shift the burden of persuasion as to the existence of an element of a crime to the defendant, contains language strongly suggesting that placing a preponderance of

[25] James at p. 751

[26] State v. Petit, 88 Wn.2d 267, 275, (1977) 558 P. 2d 796 - Wash: Supreme Court 1977, dissent by J. Utter, HOROWITZ and DOLLIVER, JJ., concur

> the evidence burden upon a defendant seeking to establish a defense such as this one violates the defendant's right to due process of law. This decision, subsequent to the Moses decision, makes it clear that the language used in Moses no longer states a constitutionally supportable test. Comment, Unburdening the Criminal Defendant: Mullaney v. Wilbur and the Reasonable Doubt Standard, 11 Harv. Civ. Rights-Civ. Lib. L. Rev. 390, 400-18 (1976).
>
> ...To hold that individual Indian defendants charged with minor violations of our laws, arising from their assertion of a right to fish in areas not yet finally determined to be within the scope of their tribe's treaty in a case involving all interested parties, must produce evidence sufficient to establish such a right by a preponderance of the evidence not only is inconsistent with the great body of our criminal law, but in the context of this case, effectively precludes assertion of a treaty right defense.
>
> Our court has previously recognized that it is inappropriate to make final determinations as to the scope of a treaty fishing right upon the basis of a limited record in a criminal case. State v. James, supra. This case, like James, involves primarily the potential criminal liability of the named The scope of their treaty fishing right is a collateral issue relevant only as a defense to the crime charged. The ultimate resolution of these criminal cases "should not foreclose the reception of evidence relating to this question and perhaps a new and different determination thereof" (State v. James, supra at 752) in a subsequent case involving other parties.[27]

The criminal law in Washington has changed regarding affirmative defenses since the Moses, James and Petit cases were decided. Regarding statutory definitions of an affirmative defense, such as entrapment,

> Under the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution, the State must prove every element of an offense beyond a reasonable doubt. If a statute indicates an intent to include absence of a defense as an element of the

[27] Petit at p. 275 and 276

offense, or the defense negates one or more elements of the offense, the State has a constitutional burden to prove the absence of the defense beyond a reasonable doubt. State v. Lively, McCullum, 98 Wash.2d at 490, 656 P.2d 1064; Acosta, 101 Wash.2d at 615, 683 P.2d 1069; see also Patterson v. New York, 432 U.S. 197, 214-15, 97 S.Ct. 2319, 2329-30, 53 L.Ed.2d 281 (1977).[28]

IV. CONCLUSION

Respondent requests the Court dismiss the appeal; remand to the court below to enter a final dismissal of the charges and relief consistent with dismissal and award fees to the Respondents.

DATED: 10/12, 2016.

PAULA PLUMER, WSBA# 21497
Attorney for Respondent GREGG SNYDER

[28] State v. Lively, 921 P. 2d 1035 - Wash: Supreme Court 1996

Washington State Court of Appeals
Division One

STATE OF WASHINGTON,	)	
Appellant	)	# 73893-3-I
v.	)	
BRUCE AND GREGG SNYDER,	)	
Respondents	)	
	)	

DECLARATION OF SERVICE

I declare under the penalty of perjury that on 10/12, 2016, I served a true and correct copy of this document by email to Appellant by email to Karen Wallace to karenw@co.skagit.wa.us, and to Haley Sebens hsebens@co.skagit.wa.us, attorney for the Appellant and also by delivery to the Skagit County Prosecuting Attorney's office, 605 South Third, Mount Vernon, WA 98273;

by email to Michael Grossman, attorney for Washington State DFW to mikeg1@atg.wa.gov;

by email to the attorneys for the Respondent Bruce Snyder to Wes Richards and Jessica Fleming by email to jessicaf@co.skagit.wa.us and delivery to 121 W. Broadway, Mount Vernon, WA 98273;

by email to Rob Roy Smith attorney for Amicus Snoqualmie Tribe to rrsmith@kilpatricktownsend.com and

by email to Mason Morrissett, attorney for Amicus Tulalip Tribes to m.morisset@msaj.com.

DATED: 10/12, 2016

PAULA PLUMER, WSBA# 21497
Attorney for Respondent Gregg Snyder

2016 OCT 17 AM 11:35

COURT OF APPEALS
STATE OF WASHINGTON

PAULA PLUMER
Attorney at Law
417 West Gates, Suite 1
Mount Vernon, WA 98273
(360) 428-3988