

68058-7

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NO. 68058-7-I

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

**ORIGINAL**

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STATE OF WASHINGTON,

Appellant,

v.

JENNIFER L. YOUDE

Respondent.

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REPLY BRIEF OF RESPONDENT

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KRADEL DEFENSE PLLC

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Jeffrey L. Kradel, WSBA #26767  
Attorney for Respondent

One Union Square, Suite 1928  
600 University Street  
Seattle, WA 98101  
(t) 206.397.3102  
[jeff@kradeldefense.com](mailto:jeff@kradeldefense.com)

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**A. ASSIGNMENTS OF ERROR**

The Appellant, State of Washington, has set forth two assignments of error in this appeal. First, that the trial court erred in dismissing the case. Second, that the trial court erred in reaching the legal conclusion that the assertion of sovereign immunity by the investigating law enforcement agency “is equivalent to governmental misconduct as it denies due process and effective assistance of counsel.” The record does not support either assignment of error, and instead fully supports the dismissal of the case by the trial court in the face of a refusal by the Tulalip Tribes to recognize the authority of the Snohomish County Superior Court.

**B. ISSUES PRESENTED**

1. In the trial court, Jennifer Youde, through counsel, requested and received an Order, in the form of a subpoena duces tecum, directing the investigating law enforcement agency to produce items subject to discovery under CrR 4.7. The State did not object to the issuance of the subpoena. The law enforcement agency did lodge objections to the subpoena. When faced with having those objections overruled, the law enforcement agency abandoned objections, and simply asserted that the trial court lacked jurisdiction to order them to produce discoverable items, as they are a “sovereign nation.” The trial court agreed that the law enforcement agency was part of a sovereign entity, not subject

to the Court's compulsory process, but also concluded that by preventing the defendant from investigating possible defenses, the law enforcement agency was engaged in arbitrary action and/or misconduct justifying dismissal pursuant to CrR 8.3(b). Did the trial court commit a manifest error in concluding that the investigating law enforcement agency's invocation of sovereign immunity from compulsory process denied the defendant due process and the effective assistance of counsel thereby requiring dismissal under CrR 8.3(b)? (Assignment of Error 1).

2. The State did not object to the issuance of the subpoena duces tecum directing the investigating law enforcement agency to produce certain items of discovery. The State did not assign error to the issuance of the subpoena. The trial court determined that the discovery sought by the defense in the subpoena duces tecum was relevant and discoverable under CrR 4.7, and that conclusion is not subject to review in this appeal, where the sole issue is whether the trial court erred in dismissing the case pursuant to CrR 8.3(b). Can the State raise the issue of the propriety of the issuance of a subpoena duces tecum for the first time on appeal, when no objection was made below and appellant actually acceded to the issuance of the subpoena duces tecum? (Assignment of Error 2).

**C. STATEMENT OF THE CASE**

This case involves an allegation that Ms. Youde delivered marijuana on or about February 6, 2010. The case involves an undercover “buy/bust” operation commenced and executed by officers of the Tulalip Tribes Police Department.

Detective Wayne Schakel posed as a user of medical marijuana and responded to an advertisement on Craigslist which offered delivery of “medical marijuana.” CP 39. Detective Schakel communicated by email with the advertiser about a time and place for a delivery of medical marijuana to take place, using terminology consistent with the acquisition of medical marijuana such as “donation rate” instead of “price.” Detective Schakel arranged for the meeting place to be on the Tulalip Indian Reservation, in a strip mall parking lot owned by the Tribe, changing it from a location off of tribal land. CP 41-45.

Detective Schakel, posing as the medical marijuana consumer, eventually contacted Jennifer Youde when she arrived at the pre-arranged location in a 2009 Honda CRV. After she handed him the medical marijuana he had requested by email, Ms. Youde and the passenger in her car were arrested.

Ms. Youde was later charged with Delivery of Marijuana in Snohomish County Superior Court. The charge was filed by the Snohomish County Prosecuting Attorney's Office, acting pursuant to an agreement with the Tulalip Tribes that ceded jurisdiction from the Tribes to the county prosecutor, for offenses on tribal lands involving non-tribal members. Ms. Youde, pursuant to CrR 4.7(d), sought a subpoena duces tecum directing the Tulalip Tribes to produce certain items of discovery as part of her investigation. The State did not oppose the issuance of the subpoena, and the superior court judge granted the request, ordering the Tribes to produce the discovery. RP 2-3; CP 71.

The Tribes, through counsel, filed legal objections to the subpoena duces tecum, including the assertion of attorney-client privilege, and asked that it be quashed. At a hearing on the Tribes's motion to quash, counsel for the Tribes admitted that "the tribes has not made an effort to determine if these documents exist[.]" RP 10. At the close of oral argument, counsel for the Tribes told the court that the Tribes wished to make an argument regarding immunity, should the court determine that the legal objections it raised had been rejected. RP 11. The court directed that the issue of sovereign immunity be briefed. Subsequent to reviewing that briefing, the court held that the Tulalip Tribes had not waived their sovereign immunity, and were therefore not subject to the jurisdiction of the

Snohomish County Superior Court, and quashed the subpoena. The court did not address any of the Tribes's other objections to the subpoena, finding they were moot in light of the invocation of sovereign immunity. CP 21-27.

**D. SUMMARY OF ARGUMENT**

The United States Supreme Court has long made clear the importance of compulsory process, finding that "to ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." United States v. Nixon, 418 U.S. 683, 709, 894 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974). The Tribes' selective invocation of sovereign immunity in this case in order to block Ms. Youde's right to compulsory process made it impossible to "ensure that justice is done."

When the Court issued the subpoena, it determined that the requested records were within the scope of legitimate defense investigation. The State offered no objection to its issuance. The Court then determined that the Tribes retain the power to invoke sovereign immunity whenever they see fit, and that the defendant's constitutional right to compulsory process cannot overcome that invocation. Those two

legal realities cannot coexist in constitutional system of criminal justice and, in order to ensure the integrity of that system and provide the Ms. Youde with the opportunity to receive effective assistance of counsel, dismissal of the criminal prosecution in this case was required. It was not a manifest abuse of the trial court's discretion.

**E. ARGUMENT**

**1. The Trial Court Exercised Sound Discretion in Dismissing the Case When the Investigating Law Enforcement Agency Selectively Chose to Reject the Court's Jurisdiction Thereby Foreclosing the Ability to Regulate and Enforce Discovery in Order to Afford the Defendant a Fair Trial.**

A trial court may dismiss charges under CrR 8.3(b) if the defendant shows by a preponderance of the evidence (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. State v. Rohrich, 149 Wn.2d 647 654, 71 P.3d 638 (2003). Governmental misconduct need not be evil or dishonest. Simple mismanagement is sufficient. State v. Blackwell, 120 Wash.2d 822, 831, 845 P.2d 1017 (1993). Prejudice affecting the defendant's "right to a fair trial" includes the right to a speedy trial and the "right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense...." State v. Michielli, 132 Wash.2d 229, 240, 937 P.2d 587 (1997); State v. Price, 94 Wash.2d 810, 814, 620 P.2d 994

(1980). In this case, the trial court properly concluded that the selective invocation of sovereign immunity by the law enforcement agency which had investigated the offense and referred it for prosecution in state court, was an arbitrary action which served to deny Ms. Youde's right to compulsory process and the effective assistance of counsel.

When reviewing a trial court's dismissal of charges under CrR 8.3(b), appellate courts ask whether the trial court's conclusion that both elements were satisfied was a "manifest abuse of discretion." Michielli, 132 Wn.2d at 240. The reviewing court will find an abuse of discretion "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." Blackwell, 120 Wash.2d 822, 830, 845 P.2d 1017 (1993); Michielli, 132 Wash.2d at 240, 937 P.2d 587. A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take," State v. Lewis, 115 Wash.2d 294, 298-99, 797 P.2d 1141 (1990), and arrives at a decision "outside the range of acceptable choices." State v. Rundquist, 79 Wash.App. 786, 793, 905 P.2d 922 (Div. 2 1995).

The trial court acted well within its discretion in dismissing the case pursuant to CrR 8.3(b). The Tribes's selective invocation of sovereign immunity was an arbitrary action and constituted governmental

misconduct, particularly where, as here, the Tribes had requested prosecution of the case in Snohomish County Superior Court. The State has cited no cases where, as here, a governmental agency has commenced prosecution in a court, and then asserted, when ordered to produce relevant discovery, that the agency is not subject to the court's jurisdiction.

**a. The Selective Invocation of Sovereign Immunity is Arbitrary Action and Governmental Misconduct.**

The Tribes did not raise a claim of immunity until they were convinced that their legal objections to the subpoena were going to be rejected. RP 11. Up until that point, the Tribes were readily agreeing to be subject to the Court's authority, including entering into the cooperation agreement under which the state prosecutor was pursuing the action *on behalf of the Tribes*. Counsel for the Tribes filed a Limited Notice of Appearance, and made efforts to determine if they had materials responsive to the first two paragraphs of the very Subpoena Duces Tecum which they subsequently sought to defeat with a claim of sovereign immunity. CP 34-52. It was only when it appeared the Court was likely to direct the disclosure of the materials in paragraph number 3 of the subpoena that the Tribe invoked sovereign immunity. That is arbitrary - it

has no legitimate basis and is inconsistent with the Tribes's purported submission to the criminal jurisdiction of the Superior Court.

The State concedes that dismissals pursuant to CrR 8.3(b) have been upheld in situations where prosecutors "either violated court rules or orders or were dilatory in complying with them." Appellant's Brief, p. 8. The Tribes's actions in this case are worse – the Tribes assert they are not subject to the court rules or orders. This is not a "procedural objection" as the State attempts to portray it, but rather an assertion that the superior court lacks any authority over the Tribes at all.

The Tribe's position, asserted on their behalf by the State, is that they can utilize Snohomish County Superior Court and the Snohomish County Prosecutor's Office to handle their criminal prosecutions but, when they do so, they are not ceding jurisdiction. If the Tribe is correct, then if a Tulalip Police Officer refused to be interviewed in a case, a superior court judge could not order them to submit to a deposition. If the Tribe holds evidence helpful to an accused, they cannot be forced to produce it. They want to use the system, but not be subject to it. That is arbitrary.

Were a county prosecutor to file a criminal charge and then refuse to comply with the constitutional and procedural mandates to provide discovery to the accused, there is no doubt dismissal under CrR 8.3(b)

would be warranted. See State v. Brooks, 149 Wn.App. 373, 203 P.3d 397 (Div. 2, 2009)(upholding dismissal under CrR 8.3(b) where prosecutor failed to meet its obligation to provide timely discovery under CrR 4.7). There is no substantive difference between that scenario, and what took place in this case.

**b. Ms. Youde's Right to a Fair Trial Includes the Constitutional Right to Effective Assistance of Counsel and Due Process.**

A dismissal under CrR 8.3(b) may be justified where the government's misconduct violates the defendant's right to due process. State v. Starrish, 86 Wash.2d 200, 206 n. 9, 544 P.2d 1 (1975); State v. Cantrell, 111 Wash.2d 385, 389, 758 P.2d 1 (1988); Blackwell, 120 Wash.2d at 831. The court's role is not to define due process in line with "personal and private notions" of fairness but rather to determine whether the government's conduct violates " 'fundamental conceptions of justice which lie at the base of our civil and political institutions.' " Cantrell, 111 Wash.2d at 389, 758 P.2d 1 (quoting U.S. v. Lovasco, 431 U.S. 783, 790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)).

In this case the Tulalip Tribes pursued a criminal investigation, and then turned it over to the Snohomish County Prosecuting Attorney's Office for prosecution in Superior Court. Those two governmental entities

have a cooperation agreement in effect that provides for Snohomish County to prosecute cases on behalf of the tribes, when the defendant is a non-Indian and the case is an alleged felony on tribal land. There is, therefore, no distinction between actions taken by the tribal government, and the prosecutor's office, insofar as who "the government" is for CrR 8.3(b) analysis.

The "fundamental conceptions of justice" in the criminal justice system include the core rights to effective assistance of counsel and to present a defense. U.S. Constitution, Sixth Amendment; see also, Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). An attorney breaches the duty to provide his client with effective assistance if he fails "to make reasonable investigations[.]" In re Personal Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). Defense counsel must "conduct a reasonable investigation enabling counsel to make informed decisions about how best to represent the client." Id. This includes "investigating all reasonable lines of defense." Id.

The State attempts to cast this issue as whether or not the defense is going to prevail on an entrapment defense, or whether there exists a "constitutional right to discovery." Br. Of App. 10-19. That argument appears to be nothing more than an effort to avoid the very real issue that

the trial court faced: Ms. Youde has a constitutional right to have her attorney investigate potential defenses and the invocation of sovereign immunity in this case defeated that right.

The State also attempts to re-litigate an issue that was decided at the trial level, and is not a subject in this appeal: whether the items required to be produced by the Tribes were relevant and discoverable. The trial court determined that the items were relevant, and were subject to discovery by the defendant. There was no objection from appellant in the trial court, and they cannot now raise that issue for the first time on appeal. In any event, the arguments on this point are wholly without merit, and ignore the facts in this case, and the operation of the law regarding the entrapment defense.

Certain facts are not in dispute. The Tulalip Tribal police answered an advertisement that was directed at “medical marijuana users.” Marijuana is only “*medical* marijuana” if it is in the possession of an “authorized user.” Detective Schakel was pretending to be an authorized user of medical marijuana. He even mimicked terminology consistent with a legal transaction involving the provision of medical marijuana by a “designated provider” (i.e. “donation rates.”). The detective then specifically steered the location of the meeting for the transaction involving the acquisition of “medical marijuana” to tribal land. These are

all facts that show the tribal police were pretending to be engaging in a legal transaction under Washington law, in an effort to induce Ms. Youde to provide marijuana to someone who was not actually a “qualified patient.” That is, by definition, entrapment – “[t]he criminal design originated in the mind of law enforcement officials who lured or induced the defendant to commit a crime.” State v. Smith, 93 Wn.2d 329, 350, 610 P.2d 869 (1980); See also RCW 9A.16.070(1)(a);

The State suggests Ms. Youde must be satisfied with Detective Youde’s claim that he answered the Craigslist ad because he received a tip that someone was selling drugs on the Reservation, and that “[s]he has been given full discovery of all facts relevant to [her entrapment] claim.” App. Br. 17. The manner in which this undercover operation was conducted makes Detective Schakel’s claim suspect at best. That is why Ms. Youde, utilizing the subpoena power of the court, sought access to documents or evidence that could either support or undermine her entrapment defense, and which could speak to the veracity of Detective Schakel’s claim to have been following up on a generic tip which made no mention of marijuana or Craigslist.

The State’s arguments appear to view the constitutional right to effective assistance of counsel as somehow divorced from the procedural tools that the court rules provide for attempting to carry out that right.

Otherwise how can they contend that a defendant can conduct a sufficient investigation of all defenses without having the power of subpoena in order to pursue that investigation?

In this case Ms. Youde sought to investigate a possible defense. In so doing, she made a specific request for items of discovery, pursuant to CrR 4.7(d). When the State was unable to provide those items, the defendant sought a subpoena duces tecum from the trial court. The State did not object to the issuance of the subpoena duces tecum, thereby conceding the subpoena sought materials that were within the scope of relevant discoverable information. The party to whom the subpoena was directed, the Tulalip Tribes, then appeared in Court, answering the subpoena in part, and lodging legal objections to other parts. When it became clear their legal objections would not prevail, the Tribes invoked sovereign immunity in order to defeat the compulsory process issued by the superior court.

[T]he right (to compulsory process) is, in plain terms, the right to present a defense.” Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The trial court in this case recognized the critical role compulsory process plays in investigating and developing a defense, the very foundation of effective assistance of counsel. RP 10. It was that

recognition that led to the determination that dismissal pursuant to CrR 8.3(b) was appropriate.

**F. CONCLUSION**

The trial court did not abuse its discretion in dismissing the charge in this case pursuant to CrR 8.3(b). The selective assertion of sovereign immunity in order to defeat the defendant's right to effective assistance of counsel is both an arbitrary act, and misconduct. It strikes at the most fundamental bedrocks of the due process guaranteed to a criminal defendant, and no justification for its assertion has ever been posited in this case, short of "because we can." That is not a sufficient reason to undermine the fundamental fairness to which any criminal defendant is entitled.

Respectfully submitted this 21<sup>st</sup> day of September, 2012

  
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Jeffrey L. Kradel, WSBA #26767  
Attorney for Respondent

CERTIFICATE

I certify that I mailed a copy of the foregoing Reply Brief of Respondent to:

Seth A. Fine, Deputy Prosecuting Attorney),  
at 3000 Rockefeller, M/S #504  
Everett, WA 98201

postage prepaid, on September 21, 2012



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Jeffrey L. Kradel  
Attorney for Respondent Jennifer Youde

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