

FILED
COURT OF APPEALS
DIVISION II

No. 36485-9-II

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

STATE OF WASHINGTON
BY C. Men
DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

WILLIAM PETER PINK, A/K/A WILLIAM PETER PINK BAILEY,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID E. FOSCUE, JUDGE

BRIEF OF APPELLANT

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: Gerald R. Fuller
GERALD R. FULLER
Chief Criminal Deputy
WSBA # 5143

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STATEMENT OF THE CASE

Procedural History

The defendant was charged by Information on December 27, 2006, with Unlawful Possession of a Firearm in the Second Degree. RCW 9.41.040(1)(b). The facts, as set forth below, allege that the defendant, an enrolled Quinault Indian, committed the offense while in a motor vehicle traveling on a State Highway within the bounds of the Quinault Indian Reservation. The defendant moved to dismiss for lack of State jurisdiction. On June 11, 2007, the Court granted the motion and dismissed the case.

Factual Background

The facts are not in dispute. The matter was submitted to the trial court on stipulated facts. A copy of the stipulated facts and the memorandum opinion of the trial court judge setting forth those facts is attached hereto and incorporated herein by this reference.

ASSIGNMENT OF ERROR

The trial court improperly dismissed the prosecution of this matter for lack of State jurisdiction.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Is State Highway 109 which runs within the bounds of the Quinault Indian Reservation “tribal lands or allotted lands” within the meaning of RCW 37.12.010?

ARGUMENT

In 1953, Congress enacted Public Law 280, 67 Stat. 588 (1953). Pursuant to Public Law 280, the State of Washington enacted RCW 37.12 which allowed the State to assume criminal jurisdiction over the Quinaults if they so requested. On April 22, 1958, the Quinault Tribe enacted a resolution requesting that the criminal and civil jurisdiction of the State of Washington be extended to include the Quinault Indian Tribe and Reservation. Pursuant to this resolution, the governor of the State of Washington, on May 15, 1958, issued a proclamation pursuant to RCW 37.12.020 extending State jurisdiction to the Quinault Reservation effective July 14, 1958. See Quinault Tribe of Indians v. Gallagher, 368 F.2d 648, 652 (1966). The validity of this proclamation was subsequently upheld in State v. Bertrand, 61 Wn.2d 333, 378 P.2d 427 (1963).

The easement in question for State Route 109 was approved in 1957. The map was certified in 1959 at a time when the State of Washington had assumed full criminal jurisdiction. (See Exhibit 1). The Quinault Tribe later petitioned for retrocession of State jurisdiction in

1965. The Federal government ultimately accepted the Quinault Tribe's request for retrocession of State jurisdiction in 1969. See Comenout v. Burden, 84 Wn.2d 192, 198, 525 P.2d 217 (1974) for an outline of the history of State jurisdiction over the Quinault Tribe.

RCW 37.12.010, in its current form, was enacted in 1963 and provides as follows:

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and
- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways: ...

Admittedly, RCW 37.12.010 limits State jurisdiction. The State has no jurisdiction over enrolled tribal members for matters that occur on their "... tribal land or allotted lands within an established Indian reservation ...” except for the eight exemptions listed in the statute.

However, given the circumstances at the time of the creation of the easement, it is difficult to understand how anyone could have understood or intended that the public highway would constitute “tribal lands” or “allotted lands” since it was maintained as a public highway to be used for a public purpose at a time when the State had full criminal and civil jurisdiction.

The issue presented, on the facts of this case, is whether the state highway, which runs through the reservation on an easement granted with the consent of the tribe became “tribal lands or allotted lands” within the meaning of RCW 37.12.010 when the Quinaults request to retrocede jurisdiction was accepted by the Federal government on August 30, 1969.

A public highway owned in fee simple by the state of Washington, which happens to run through an Indian reservation, is not “tribal lands or allotted lands.” In Re Somday v. Rhay, 67 Wn.2d 180, 406 P.2d 931 (1965). Likewise, the state has jurisdiction over crimes committed on land owned by the federal government which happens to be within the bounds of an Indian reservation. State v. Boyd, 109 Wn.App. 244, 34 P.3d 912 (2001).

In the case at hand, the State of Washington has an easement to build and maintain State Route 109 beginning at the southern boundary of the Quinault Reservation. That easement is granted under the authority of

federal law, as provided by 25 C.F.R., Part 169, implementing 25 U.S.C. Section 323-328. 25 C.F.R. 169.3 specifically requires the prior written consent of the tribe for this easement. As set forth in the stipulation of the parties, State Route 109 is a public highway maintained exclusively by the State of Washington, which has sole responsibility for the highway's construction, maintenance, and repair. In essence, the tribe has relinquished all control over the public highway to the State of Washington.

Other courts, in slightly different context, have found that such a right-of-way is not "tribal lands or allotted lands." In Strate v. A-1 Contractors, 520 U.S. 538, 117 S.Ct. 1404 (1997), a tribal court attempted to assert jurisdiction over a non-Indian who was involved in a traffic accident on a public highway within the bounds of an Indian reservation. In Strate, as in the case here, the highway was built on a right-of-way granted by the federal government pursuant to 25 U.S.C. Section 323-328. The Supreme Court in Strate concluded that the state highway was the equivalent of non-Indian fee land. In other words, it is not "tribal lands or allotted lands" that would be specifically excluded from state jurisdiction under RCW 37.12.010.

The Supreme Court in Strate set forth the following factors that are to be considered in a circumstance such as this: (1) the legislation creating

the right-of-way; (2) whether the right-of-way was acquired with the consent of the tribe; (3) whether the tribe had reserved the right to exercise dominion and control over the right-of-way; (4) whether the land was open to the public; and (5) whether the right-of-way was under state control.

All of these factors, when considered in this case, demonstrate that State Highway 109 is a public highway which is solely under the control of the state. As such, conduct on the highway falls within state jurisdiction.

The 9th Circuit Court of Appeals reached the same result in a different context. In Bighorn County Electric Cooperative v. Adams, 219 F.3d 944 (9th Cir. 2000) the electrical cooperative (Bighorn) had an easement granted pursuant to 25 U.S.C. 325-28 for its power lines. The court in Bighorn held that the right-of-way was the equivalent of non-Indian fee land. The tribe in Bighorn was found to have relinquished any control over the right-of-way and relinquished any ability to attempt to levy a tax on the utility.

Contrary authority is found in State v. Ambro, 142 Idaho 77, 123 P.3d 710 (2005), an opinion of the Idaho Court of Appeals. The Court in Ambro did hold that the state of Idaho could not prosecute an enrolled Indian for a non-traffic related crime that occurred on a public highway

within the bounds of an Indian reservation. The problem, however, is that the Idaho Court assumed, without ever addressing the issue, that the public highway, which had been granted by federal easement, was “tribal lands or allotted lands” over which the state only had jurisdiction for criminal traffic matters. In short, the court did not consider the analysis as set forth in Strate and Bighorn. That case was wrongly decided.

Logically, it makes no sense to parse out different parts of a single event. The State of Washington clearly has criminal jurisdiction over the operation of a motor vehicle on the public highway. This obviously involves more than just the stop and the issuance of a citation. The driver or his passenger may have a warrant of arrest. The driver may be arrested for an offense that occurred in the officer’s presence. As a consequence, the arresting officer is entitled to search the arrested person and the vehicle. Is the State now to have jurisdiction for the traffic offense, but have no jurisdiction for offenses that arise from the traffic stop. At a minimum, this court should find that the State has jurisdiction over Quinault Indians for events that occur on a public highway which arise directly from the enforcement of the motor vehicle laws of the State of Washington.

CONCLUSION

For the reasons set forth, the decision of the trial court must be reversed and the case remanded for trial.

Dated this 10 day of August, 2007.

Respectfully Submitted,

By: Gerald R. Fuller
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

GRF/jfa

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COUNTY

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

Plaintiff,

No.: 06-1-739-8

v.

**DECLARATION OF
GERALD R. FULLER**

WILLIAM PETER PINK,
A/K/A WILLIAM PETER PINK BAILEY,

Defendant.

I, Gerald R. Fuller, being first duly sworn on oath, deposes and states as follows:

I am the Deputy Prosecuting Attorney responsible for prosecution of this matter. I submit the following facts, based upon the incident report submitted by the Grays Harbor County Sheriff's Department, Case No. 06-13164, as stipulated facts for purposes of the hearing on the motion to dismiss.

On December 10, 2006, Sergeant Johansson and Deputy Wallace were on patrol on State Route 109 north of Smith Lane. They observed a motor vehicle being driven by the defendant north of them on State Route 109. The vehicle was stopped for a traffic infraction on the shoulder of the highway just south of the Moclips Highway at a location within the bounds of the Quinault Indian Reservation.

The driver was identified as Rebecca Waugh. The vehicle had license plates for the Quinault Indian Nation. Dispatch advised that Waugh's privilege to drive was suspended. There

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4 was a two-year-old sitting on the seat next to Ms. Waugh, unrestrained. Waugh was
5 subsequently arrested for Driving While License Suspended.

6 The defendant was seated in the passenger seat. He identified himself as "William".
7 Johansson recognized him as the defendant, William Pink. The defendant's information was
8 obtained through dispatch. The defendant returned with three confirmed warrants for his arrest.
9 The defendant was contacted at the vehicle and arrested pursuant to the warrants.

10 The defendant was searched incident to arrest. A live .270 caliber round was found in his
11 right front pocket. The defendant was placed in the back of Johansson's patrol car. The vehicle
12 was searched incident to arrest. Johansson located a Winchester .270 rifle behind the seat of the
13 truck. Two live rounds were found next to the rifle.

14 The defendant was subsequently advised of his Miranda rights. The defendant
15 acknowledged that the rifle belonged to him. The defendant stated that he was a Tribal member
16 and that he had hunting rights. The defendant claimed that the Tribe had issued him a hunting
17 license.

18 Sergeant Johansson knew that the defendant was a convicted felon. In fact, the defendant
19 has a prior felony conviction for Assault in the Third Degree, Grays Harbor County Cause No.
20 03-1-200-6 and Forgery, Grays Harbor County Cause No. 03-1-37-2.

21 SR 109 is a public highway maintained exclusively by the State of Washington which has
22 sole responsibility for the highway's construction, maintenance and repair. The State of
23 Washington has a right-of-way across the Quinault Reservation granted pursuant to 25 U.S. C. §
24 323-328.

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

Dated this 8 of May, 2007, at Montesano, Washington.

Gerald R. Fuller
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

GRF/jfa



Certificate of Clerk of the Superior Court of Washington in and for Grays Harbor County. The above is a true and correct copy of the original instrument which is on file or of record in this court.

Done this 8/10/07 day of
Cheryl Brown, Clerk By Janis Graham
Deputy Clerk

THE SUPERIOR COURT OF WASHINGTON
GRAYS HARBOR COUNTY

COPY

GORDON L. GODFREY, JUDGE
DAVID FOSCUE, JUDGE
F. MARK McCAULEY, JUDGE
(360) 249-6363
BONNIE KINDLE, ADMINISTRATOR
(360) 249-5311

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CHEERY BROWN
COUNTY CLERK

June 8, 2007

Gerald Fuller
Chief Criminal Deputy
Grays Harbor County Courthouse
Montesano, WA 98563

Steven G. McNeill
Attorney at Law
107 E. Marcy Avenue
Montesano, WA 98563

Re: *State v. William P. Pink*
Grays Harbor County Cause No. 06-1-00739-8

Dear Counsel:

The essential facts in this case are not in dispute:

- Mr. Pink was the passenger in a vehicle stopped for a traffic offense on SR109, just south of the Moclips highway.
- Mr. Pink was arrested on an outstanding warrant and found to be in possession of a firearm.
- He is currently charged with unlawful possession of a firearm in the second degree.
- Mr. Pink is an enrolled member of the Quinault Indian Nation.
- That portion of SR109 where the arrest occurred is within the bounds of the Quinault Reservation.
- The land is tribal land.
- The state has an easement to build and maintain SR109 over this portion of the Quinault Reservation.
- The Quinault Indian Nation has specifically consented to this easement in writing.

The state has assumed jurisdiction over Indians on tribal lands for specific matters, including the operation of motor vehicles on the public highways. However, this assumption does not include general criminal jurisdiction. RCW 37.12.010. RCW 37.12.021 provides a way for the State to assume criminal jurisdiction over Indians on Indian land by formal agreement

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June 8, 2007

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with the governing Indian body. Criminal jurisdiction over Indians on Indian land has not been assumed under this statute. Thus the state does not have general criminal jurisdiction over members of the Quinault Indian Nation while on tribal lands within the Reservation.

In *Somday v. Rhay*, 67 Wn. 2d 180 (1965), the Washington Supreme Court held that the state has criminal jurisdiction over Indians on roads in reservations where the roads have been deeded in fee simple to the state because the fee is neither trust land nor allotted land. The state argues that the easement for highway purposes is the equivalent of the grant of a fee simple interest. Following the precedence of *Somday*, argues the state, the court should hold that the Quinault portion SR 109 subject to the easement is neither trust land nor allotted land and that the state has general criminal jurisdiction over Indians on the roadway.

Somday involved the actual grant of a fee interest. It did not involve an easement. In *Somday*, there was simply no remaining tribal interest. An easement, however, is a right of use distinct from ownership. *Olympia v. Palzer*, 107 Wn. 2d. 225, 229 (1986). There is no transfer of ownership. The land subject to the easement for SR109 remains Indian land. Nothing in the statute or easement suggests any intention that the state assumes criminal jurisdiction over Quinault Indians on the highway.

Since the land remains Indian land, the Quinaults have criminal jurisdiction on Indians on Indian land. Since there are recognized ways the tribe could cede criminal jurisdiction to the state and since no such action has been taken, I must conclude that the State of Washington does not have criminal jurisdiction over Mr. Pink under the facts of this case.

I am persuaded by Mr. McNeill's presentation that the United State Supreme Court cases cited by the state are distinguishable and do not compel a contrary result. Fundamentally my conclusion is that jurisdiction should not be implied where the land remains Indian land and where the statutory provisions for assumption of jurisdiction have not been followed.

The Motion to Dismiss will be granted.

Very truly yours,

David Foscue
Superior Court Judge



DF/rz
cc: file ✓

Certificate of Clerk of the Superior Court of Washington in and for Grays Harbor County. The above is a true and correct copy of the original instrument which is on file or of record in this court.

Done this _____ day of 8/10/07

Cheryl Brown, Clerk By [Signature]
Deputy Clerk

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STATE OF WASHINGTON
BY cm
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

Appellant,

v.

WILLIAM PETER PINK,
A/K/A WILLIAM PETER PINK BAILEY,

Respondent.

No.: 36485-9-II
DECLARATION OF MAILING

DECLARATION

I, Randi M. Toyra hereby declare as follows:

On the 13th day of August, 2007, I mailed a copy of the BRIEF OF APPELLANT to STEVEN MCNEILL; ATTORNEY AT LAW; 107 E. MARCY AVE.; MONTESANO, WA 98563 and to WILLIAM PINK; P.O. BOX 271; TAHOLAH, WA 98527, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Randi M. Toyra