

No. 37301-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

LARRY P. GUIDRY, JR.,

Appellant.

09 APR 10 PM 12:14
STATE OF WASHINGTON
BY *[Signature]*

COURT OF APPEALS
DIVISION TWO

RESPONSE TO BRIEF OF AMICUS CURIAE
NISQUALLY INDIAN TRIBE

Loreva M. Preuss, WSBA #33045
Special Deputy Prosecuting Attorney
Attorney for Respondent
600 Capitol Way, North
Olympia, Washington 98501
(360) 902-2930

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ARGUMENT 2

 1. The Nisqually Tribe's treaty fishing rights do not preclude application of state law against Guidry 2

 2. *State v. Price* is dispositive of the Tribe's arguments..... 4

 3. The Nisqually Tribal Code does not relieve Guidry from his obligation to comply with state law. 6

 a. The Nisqually Tribe cannot expand the scope of the Tribe's treaty right..... 7

 b. The State's presence requirement in RCW 77.15.570 is consistent with Nisqually Tribal Code § 14.20.01 7

 c. Guidry's wife did not assist him within the meaning of "assistance" in the Nisqually Tribal Code or in RCW 77.15.570 9

C. CONCLUSION..... 10

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

New Mexico v. Mescalero Apache,
462 U.S. 324 (1983)..... 3

Puyallup Tribe v. Washington Game Dep't
(*Puyallup III*), 546 U.S. 95, 113 (2005)..... 3

Tulee v. Washington,
315 U.S. 681 (1942)..... 3

Wagnon v. Prairie Band Potawatomi Nation,
546 U.S. 95 (2005)..... 3

Washington v. Confederated Tribes of the Colville Indian
Reservation, 447 U.S. 134, 156, 158 (1980)..... 7

Washington v. Wash. State Commercial Passenger Fishing
Vessel Ass'n, 443 U.S. 658, 679 (1979) 3

Decisions of the United States Court of Appeals

Cree v. Waterbury,
873 F. Supp. 404 (E.D. Wash. 1994) 4

United States v. Montana,
604 F.2d 1162 (9th Cir. 1979) 7

United States v. Washington,
384 F. Supp. 312 (W.D. Wash. 1974) 5, 7

United States v. Washington,
476 F. Supp. 1101, (W.D. Wash. 1981) 3

Washington Supreme Court Decisions

State v. Price,
94 Wn.2d 810, 620 P.2d 994 (1980) 5

Young v. Young,
164 Wn.2d 477, 191 P.3d 1258 (2008) 3

Decisions of the Court of Appeals

State v. Price,
87 Wn. App. 424, 942 P.2d 377 (1997)..... 1, 2, 4, 5, 6, 9, 11

Statutes and Rules

50 CFR § 300.95(d)(1) 5, 6
18 U.S.C. § 1151..... 3
Nisqually Tribal Code, §§ 14.20.01(c)(i) and (d)(i)(A)..... 8
RCW 37.12.010..... 3
RCW 77.15.570..... 1, 2, 3, 4, 6, 7, 8, 9, 10, 11

A. INTRODUCTION

The Nisqually Indian Tribe's brief mischaracterizes the issue in this case. The issue is whether the State can enforce criminal laws against a non-tribal member who is illegally participating in a treaty Indian fishery. The issue is not whether the State has jurisdiction to regulate the Nisqually Tribe's treaty fishing rights.

The Nisqually Tribe's treaty fishing rights do not preclude application of state law against Guidry. RCW 77.15.570 does not regulate treaty fishing. Instead, it requires that a tribal member be present at the fishing site in order for a non-member spouse to assist the tribal member in the exercise of his or her treaty fishing rights. Reserved treaty fishing rights belong to tribal groups, not to individual tribal members. A tribal member can exercise a tribe's treaty fishing rights, but he or she cannot delegate those rights to a non-tribal member.

State v. Price is dispositive of the Tribe's arguments. In that case, Division One of the Washington Court of Appeals considered and rejected the same arguments made in this case by the Nisqually Indian Tribe. The *Price* court held that the *Boldt* decision and analogous federal regulations support the State's presence

requirement in RCW 77.15.570. *State v. Price*, 87 Wn. App. 424, 432, 942 p.2d 377 (1997).

The Nisqually Tribal Code does not relieve Guidry from his obligation to comply with state law. The Nisqually Tribe cannot expand the scope of the Tribe's treaty right. The State's presence requirement in RCW 77.15.570 is consistent with Nisqually Tribal Code. Guidry's wife did not "assist" him within the meaning of "assistance" in the Nisqually Tribal Code or in RCW 77.15.570. Guidry's actions were illegal, and the State has the right to enforce its criminal laws against him.

B. ARGUMENT

1. The Nisqually Tribe's treaty fishing rights do not preclude application of State law against Guidry.

The Nisqually Tribe argues that federal and tribal law preempt application of RCW 77.15.570 as conflicting with the right of taking fish reserved by the Tribe in the Treaty of Medicine Creek. The Tribe is mistaken. RCW 77.15.570 does not regulate treaty fishing; it regulates the conduct of non-Indian spouses by prohibiting them from participating in tribal fisheries unless their tribal member spouses are present "at the site."

Federal treaties, such as the Medicine Creek Treaty, may preempt the State's authority to regulate treaty fishing by members

of treaty tribes.¹ However, the State may regulate non-Indians such as Larry Guidry, unless Congress expressly says otherwise or unless a particular application would have a discriminatory effect on a Tribe. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005). Neither of these limitations applies here.

Reserved treaty rights belong to tribal groups, not to individual tribal members. *E.g.*, *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979). While a tribal member can exercise a tribe's treaty fishing right, he or she cannot delegate that right to a nonmember. *United States v. Washington*, 476 F. Supp. 1101, (W.D. Wash. 1981), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143, 71

¹ The State may regulate the exercise of off-reservation treaty fishing rights where reasonable and necessary for the conservation of fish or game. *Tulee v. Washington*, 315 U.S. 681, 684 (1942); *E.g.*, *Puyallup Tribe v. Washington Game Dep't (Puyallup III)*, 433 U.S. 165, 177 (1977). Contrary to the Tribe's argument, because RCW 77.15.570 does not regulate treaty fishing, the State need not show the existence of a conservation necessity. Nor is the Tribe's Public Law 280 argument relevant to this appeal. Public Law 280 governs the scope of the State's jurisdiction in "Indian Country" (i.e., on the reservation). See RCW 37.12.010 and 18 U.S.C. § 1151. Similarly, this court likewise need not concern itself with the Tribe's argument that preemption is justified by virtue of the U.S. Supreme Court's holding in *New Mexico v. Mescalero Apache*, 462 U.S. 324 (1983). *Mescalero* concerned the scope of state authority to regulate non-Indian hunting and fishing on the reservation. In the case now before this court, the trial court found that Guidry's violations took place off the reservation. [FF 8-9]. Because Guidry did not challenge those findings at trial, this court should consider them verities on appeal. *Young v. Young*, 164 Wn.2d 477, 482, 191 P.3d 1258 (2008).

L. Ed. 2d 294, 102 S. Ct. 1001 (1982); *Cree v. Waterbury*, 873 F. Supp. 404 (E.D. Wash. 1994), *rev'd on other grounds*, 78 F3d 1400 (9th Cir. 1996).

It does not matter that the Nisqually Tribe issues permits and tribal identity cards to authorized fishing assistants for use in the treaty tribal fishery, or that Guidry had a tribal permit and identity card on his person at all times when fishing. As discussed below, the Tribe cannot create rights that were not secured by the treaty, nor expand rights to others.

2. *State v. Price* is dispositive of the Tribe's arguments.

Division One of the Court of Appeals has already considered and rejected the arguments now made by the Nisqually Tribe. See *State v. Price*, 87 Wn. App. 424, 432, 942 p.2d 377 (1997). In *Price*, the criminal defendant was the husband of a Yakama tribal member and was allegedly fishing in the Tribe's usual and accustomed (U&A) fishing places. Like Guidry, Price was charged with participating in a tribal fishery when his tribal member spouse was not present.² As the Nisqually Tribe does in this case, Price argued that the statute's "presence" requirement constituted an unlawful regulatory burden on his Indian treaty fishing rights, and that it was

² Price was charged with violating RCW 75.12.320, which was subsequently recodified at RCW 77.15.570.

inconsistent with Judge Boldt's landmark treaty fishing rights decision, *U.S. v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974) ("Boldt"). *State v. Price*, 87 Wn. App. at 429.

After analyzing the *Boldt* decision, the *Price* Court of Appeals held that RCW 75.12.320 was promulgated in order to guarantee protection of Indian treaty rights, and that the requirement of the Indian's presence with the non-Indian is a reasonable requirement. 87 Wn. App. at 431. "The nature of fishing is that it is an instantaneous transaction in that the fish are caught at a given moment in time. Thus, in order to assist in fishing, the person assisted or assisting must be present at the catch." *Id.* The court said that this limitation promotes the fair distribution of fishery resources among Indian and non-Indian fishermen while deterring non-Indian fishing under "a guise of 'transferable' treaty right assistance." *Id.* (citing *State v. Price*, 94 Wn.2d 810, 819-20, 620 P.2d 994 (1980) (discussing the policy of appropriate allocation in regard to forged steelhead tags).

The *Price* court also noted that analogous federal law, formerly 50 CFR § 371.7(c) (1994) (now codified at 50 CFR § 300.95(d)(1)) addressing salmon fishing by treaty Indians in the Fraser River Panel Area, likewise includes a presence requirement.

State v. Price, 87 Wn. App. 424, 431-32, 942 p.2d 377 (1997). The federal rule provides, in pertinent part, “. . . the treaty Indian tribal member whom the assistant is authorized to assist must be present aboard the fishing vessel at all times while engaged in the exercise of treaty Indian fishing rights. . .” 50 CFR § 300.95(d)(1). Although Guidry was not fishing in the Fraser River Panel Area, 50 CFR § 300.95(d)(1) shows that the federal law is consistent with RCW 77.15.570 in requiring the tribal member to be present at the fishing site.

The Nisqually Indian Tribe attempts to distinguish the *Price* case on pages 10-11 of its brief. It states that the facts in *Price* were different because Price was not fishing in the Yakama Tribe’s U&A. However, the *Price* court did not consider this fact, and it was not relevant to the court’s decision:

Given our determination that the limitation requiring the Indian spouse’s presence is valid, and that Price admits his Indian spouse was not present, we need not address whether his spouse possessed treaty rights in the area in which he illegally fished. *Id.* at 432.

For the foregoing reasons, the Court of Appeals’ decision in *Price* should dispose of the Nisqually Tribe’s arguments.

3. The Nisqually Tribal Code does not relieve Guidry from his obligation to comply with State Law.

a. The Nisqually Tribe cannot expand the scope of the Tribe's treaty right.

The Nisqually Tribe argues that because the Tribe's regulations do not expressly require the tribal member's presence at the site while assisting a tribal member, the State cannot impose such a requirement. However, the Tribe cannot, by adopting regulations, expand the scope of the Tribe's treaty right. The scope of the Nisqually Tribe's treaty right of taking fish is established by the Medicine Creek Treaty and cannot be expanded by the Tribe. Tribal regulations cannot preempt state law. *U.S. v. Washington*, 384 F. Supp. 312, 403 (Conclusion of Law 37) (W.D. Wash. 1974). See also *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156, 158 (1980); *United States v. Montana*, 604 F.2d 1162, 1172 (9th Cir. 1979). Therefore, the scope of the right of assistance embodied in the Nisqually Tribal Code is not material to the application of RCW 77.15.570 to Guidry. In any event, as discussed below, RCW 77.15.570 is consistent with the Tribal Code, and the trial court did not abuse its discretion in finding that Guidry failed to comply with either of them.

b. The State's presence requirement in RCW 77.15.570 is consistent with Nisqually Tribal Code § 14.20.01.

The Nisqually Tribal Code does not conflict with state law. Instead, the two are consistent with one another regarding the presence requirement for tribal members being assisted by non-tribal spouses. The Nisqually Tribal Code requires a tribal member to take part in a tribal fishery if he or she is assisted in the fishery by a non-tribal spouse. The code states that within the Nisqually Reservation and the Tribe's off-reservation usual and accustomed fishing places,

An enrolled member may secure the assistance of his or her spouse. Such spouse may fish for the enrolled member without the enrolled member *present on the boat*. Nisqually Tribal Code, §§ 14.20.01(c)(i) and (d)(i)(A) (italics added).

The Tribe's regulation does not permit the enrolled member's absence for any part of the fishing process except being on the boat.

The State's statute, RCW 77.15.570, makes it unlawful for a non-treaty fisherman ". . . to participate in taking fish or shellfish in a treaty Indian fishery, or to be aboard a vessel, or associated equipment, operating in a treaty Indian fishery." However, like the Nisqually Tribal Code, the statute allows for conditional spousal assistance. RCW 77.15.570(3)(a) provides:

The spouse, forebears, siblings, children, and grandchildren of a treaty Indian fisherman may assist

the fisherman in exercising treaty Indian fishing rights when the treaty Indian fisherman is present at the fishing site.

This concept of “assist” in the State’s statute does not conflict with the meaning of “assistance” in Nisqually Tribal Code. In *State v. Price*, 87 Wn. App. 424, 431, 942 P.2d 377 (1997), the court said that to assist in fishing, “the person assisted or assisting must be present at the catch.” *Id.* at 431. Such assistance can include helping to unload the boat, sorting the fish from the boat, and gutting the fish. Guidry can fish alone in his boat, as the Nisqually regulation allows, without violating RCW 77.15.570, if his wife is “present at the fishing site,” sorting or cleaning fish on the shore. Even if the trial court erred in holding that the Nisqually fishing regulation requires the spouse’s presence at the treaty fishing site, it is harmless error, because, as discussed, the Tribe’s regulation cannot preempt the applicability of State law.

c. Guidry’s wife did not “assist” him within the meaning of “assistance” in the Nisqually Tribal Code or in RCW 77.15.570.

The Nisqually Indian Tribe states in its *amicus* brief that at trial, “Mr. Guidry testified that he and his wife work together in the preparation and processing of the fish” that Guidry catches. [AB 3] However, at trial, Mrs. Guidry testified that she helps her husband smoke and prepare the fish “occasionally,” and when asked if this

means “not very much,” she assented by shaking her head. [RP 212].

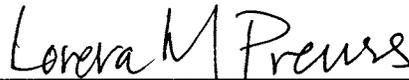
Furthermore, Guidry’s attorney affirmed that on December 18 and 19, 2005, Mrs. Guidry “was en route to Oregon, got stuck somewhere, and . . . did not get back until December 19.” [RP 45] This signifies she was not even present on the reservation during Guidry’s violations of RCW 77.15.570 in Counts 3 and 4 of the Information against him, for which he was convicted. During the four days the State surveilled Guidry, December 18 through 21, 2005, none of the State’s fish and wildlife officers nor any of the NOAA special agents saw anyone fishing with Guidry or helping him to unload the fish. [RP 71, 75, 91, 92, 104, 108, 111-112, 114] Therefore, the trial court did not abuse its discretion in holding that the Nisqually Tribal Code is consistent with RCW 77.15.570, and that his wife was not assisting Guidry within the meaning of the code and the state law. [RP 264-65; FF 11; CL 4]

C. CONCLUSION

This case is a criminal case against Guidry, and the Nisqually Indian Tribe’s treaty fishing rights do not preclude the application of state law against Guidry. *State v. Price* is dispositive of the Tribe’s arguments, and *Price* holds that the *Boldt* decision

and analogous federal regulations support the State's presence requirement in RCW 77.15.570. *State v. Price*, 87 Wn. App. 424, 432, 942 p.2d 377 (1997). The Nisqually Tribal Code does not relieve Guidry from his obligation to comply with state law. The Nisqually Tribe cannot expand the scope of the Tribe's treaty right. The State's presence requirement in RCW 77.15.570 is consistent with Nisqually Tribal Code. Guidry' did not "assist" the defendant within the meaning of "assistance" in the Nisqually Tribal Code or in RCW 77.15.570. Guidry is bound by state law when he participates in a treaty tribal fishery, and he violated this law and the others for which he was found guilty by the trial court. The State requests that this Court affirm the trial court's decision.

Respectfully submitted this 9th day of April 2009.



Loreva M. Preuss, WSBA# 33045
Special Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Response to Brief of Amicus Curiae, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

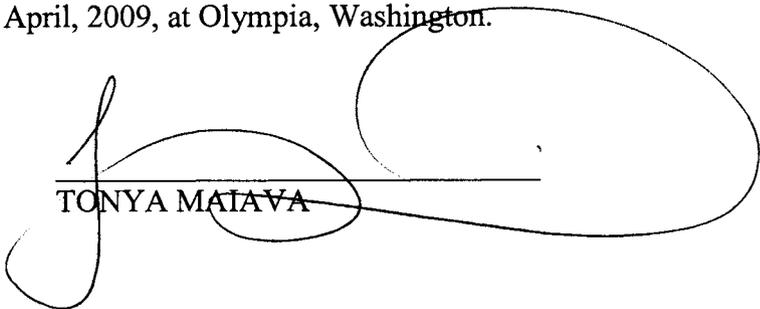
TO: Bill Tobin
Attorney at Law
PO Box 1425
Vashon WA 98070-1425

Thomas Edward Doyle
Attorney at Law
PO Box 510
Hansville WA 98340-0510

COURT OF APPEALS
STATE OF WASHINGTON
09 APR 10 PM 12:44
BY DEPUTY

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 9th day of April, 2009, at Olympia, Washington.



TONYA MAIAVA