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AUG 6 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 280403

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ELON ALEX YALLUP,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE BLAINE GIBSON, JUDGE

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in calculating Appellant Elon Yallup's offender score, by including a 1990 conviction that was more than five years since his last release from confinement?
2. Whether the court imposed a sentence that exceeded the standard range for Yallup's correct offender score?
3. Whether the court improperly imposed a term of community custody as part of the sentence for felony DUI?
4. Whether the State has jurisdiction to regulate the driving privileges of enrolled tribal members within Indian Country, such that the results of Yallup's blood test were admissible under the implied consent statute?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The State concedes error in calculating Yallup's offender score.
2. Because of the scoring error, the State likewise concedes error as to the standard range utilized by the trial court.
3. The trial court did not err in imposing a term of community custody, as such term was expressly required pursuant to the Sentencing Reform Act.

4. The State has jurisdiction to enforce criminal laws pertaining to the driving privileges of enrolled tribal members within the Yakama Indian Reservation, and the court did not err in refusing to suppress the results of the blood test.

II. STATEMENT OF THE CASE

The State adopts the Statement of the Case contained in Yallup's opening brief. RAP 10.3

III. ARGUMENT

1. The State concedes Appellant's first two assignments of error.

In his opening brief, Yallup assigns error to the sentencing court's calculation that he had an offender score of 7, arguing that pursuant to RCW 9.94A.525(2)(e) (effective July 1, 2007), an October 1990 conviction for physical control entered in Yakima County District Court should not have been included in the score. Under that subsection, prior serious traffic offenses are included in the offender score for felony DUI and physical control only if 1) the prior offense occurred within five years of the entry of the last judgment and sentence or release, or 2) within ten years of the arrest on the current offense.

Yallup is correct that the 1990 conviction does not meet either definition. (CP 14) The correct offender score is 6, and this matter

should be remanded to the trial court for resentencing within the standard range.

2. A term of community custody was mandated by the SRA, and the court did not err in ordering it.

Yallup maintains that the court erred in ordering 9-18 months of community custody, since former RCW 9.94A.545 did not authorize community custody. His reliance is misplaced, as that provision only applied to sentences of less than one year.

It is former RCW 9.94A.715(2007) which controls here, requiring community custody for specified offenders who, like Yallup, are sentenced to the custody of the Department of Corrections. These specified crimes include “any crime against persons under RCW 9.94A.411(2)”.

RCW 9.94A.411(2) (effective July 1, 2007) includes among its list of “crimes against persons” both felony DUI and felony physical control while under the influence. Finally, the term of 9-18 months of community custody was determined by authority of RCW 9.94A.850, and published at WAC 437-20-10, also in effect in 2007. The court did not err, as community custody was mandatory under the relevant statutes.

3. The blood test results were properly admitted, as the implied consent statute applies to all drivers licensed to drive on the public roads, even within a recognized Indian reservation.

The admission or exclusion of evidence is reviewed for abuse of discretion. State v. Griswold, 98 Wn. App. 817, 823, 991 P.2d 657 (2000). A court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds, or its discretion is exercised for untenable reasons. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995). A court acts unreasonably if its decision is outside the range of acceptable choices given the facts and the relevant legal standard. Id.

As related in Appellant's opening brief, Public Law 280, passed by Congress in 1953, authorized the states to impose concurrent jurisdiction in Indian lands with or without the consent of the tribes. Public Law 280, Pub.L. No. 85-280, 67 Stat. 588 (1953).

In Washington, civil and criminal jurisdiction was initially extended only within those reservations which requested it. RCW 37.12; Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 471-72, 99 S. Ct. 740, 58 L.Ed.2d 740 (1979).

RCW 37.12 was later amended to include state criminal and civil jurisdiction over Indians and Indian Country, but the jurisdiction "shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation . . .". RCW 37.12.010; State v. Sohappay, 110 Wn.2d 907, 909, 757 P.2d 509 (1988), *cited in* State v. Pink, 144 Wn.

App. 945, 951, 185 P.3d 634 (2008). However, there are eight excepted categories, clearly delineated in the statute, in which the State retains jurisdiction over the whole of the reservation. They are: (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 on the public streets, alleys, roads, and highways. RCW 37.12.010(1)-(8). These categories of full jurisdiction apply “regardless of land status”. Sohappy, 110 Wn.2d at 909.

Indeed, through RCW 37.12.010 the State does not lay claim to the roadways, but since they are open to the public, vehicles being operated on them are subject to State jurisdiction. Makah Indian Tribes v. State, 76 Wn.2d 485, 493, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 316, 90 S. Ct. 1115, 25 L. Ed. 2d 335 (1970).

RCW 37.12 has been held constitutional, and is in compliance with Public Law 280. Yakima Indian Nation, 439 U.S. at 473-74.

Yallup argues that the State of Washington has no jurisdiction to regulate his right to drive on roadways within the boundaries of the Yakama Reservation, and that it thus lacks authority to subject Yallup to a collection of a blood sample pursuant to the implied consent statute. He is incorrect.

Pursuant to RCW 46.20.001, all drivers on the public roadways are required to have a valid driver's license on their person when driving.

RCW 46.20.001. A prerequisite for a driver's license is implied consent to submit to a breath test if arrested for an alcohol-related offense. RCW 46.20.308. If incapable of refusing due to a medical condition, and the person is being treated in a hospital or clinic, a person is deemed not to have withdrawn the consent and a blood test may be administered. RCW 46.20.308(2); (4).

Yallup's reliance on Confederated Tribes of Colville Reservation v. Washington, 938 F.2d 146 (9th Cir. 1991), is misplaced. There, the court distinguished between "criminal/prohibitory" law and "civil/regulatory" offenses, holding that the State retained jurisdiction over the latter, but with respect to the civil traffic infractions in RCW 46.63, the State had no such power. Id., at 147. The court was so persuaded due to the fact that the Washington State Legislature had decriminalized several traffic offenses in 1979, distinguishing them from a long list of criminal offenses such as reckless driving or driving while intoxicated. Id., At 148.

The inquiry adopted by the court in Confederated Tribes focused on whether the state law in question absolutely prohibits certain acts, or whether the law generally permits certain conduct, but subject to regulation. " ' The shorthand test is whether the conduct at issue violates

the State's public policy.' " Id., quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987).

The importance of detecting the crime of driving under the influence is amply demonstrated by the public policy statement of the Legislature in amending RCW 46.20.308 and 46.61.506, pertaining to the admissibility of breath or blood alcohol tests and refusals to submit to such tests:

The legislature finds that previous attempts to curtail the incidence of driving while intoxicated have been inadequate. The legislature further finds that property loss, injury, and death caused by drinking drivers continue at unacceptable levels. This act is intended to convey the seriousness with which the legislature views the problem. To that end, the legislature seeks to ensure swift and certain consequences for those who drink and drive.

Laws of 2004, ch. 68, s. 1.

Implied consent is thus not civil/regulatory, but part and parcel of the State's criminal enforcement of its traffic laws. Mr. Yallup, in driving a motor vehicle on the public roadways, was not exempt from those laws.

Yallup also maintains that the State of Washington has no jurisdiction to regulate his driving on the public roadways within the boundaries of the reservation, since such regulation would conflict with his right to travel as set forth in The Yakama Treaty of 1855. In support of his argument, he cites two federal cases interpreting that treaty,

Yakama Indian Nation v. Flores, et al., 955 F. Supp. 1229 (1997), and United State v. Smiskin, 487 F.3d 1260 (2007). Neither are on point, and are not dispositive of the issues on appeal here.

It is true that the Treaty of 1855 memorializes a right to travel:

And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Treaty with the Yakamas, Art. III, 12 Stat. 951, 952-53 (1855)

The text of a treaty must be construed as the members of the tribe would naturally have understood it at the time of the treaty. Smiskin, 487 F.3d at 1264 (9th Cir. 2007). (citations omitted) Since the Yakamas would have understood the treaty to have allowed the right to transport goods to market without payment of fees for that use, the Court of Appeals held that enrolled members were exempt from prosecution under the Contraband Cigarette Trafficking Act, 18 U.S.C. s. 2342(a). Id., at 1265, *citing* Cree v. Flores, 157 F.3d 762, 769, (9th Cir. 1998) (“Cree II”, affirming Flores, *supra*.)

“Cree II” similarly interpreted the treaty right of free travel with respect to state vehicle taxes and permits for logging trucks used to transport timber out of the reservation, and held that the State of Washington’s application of such fees to the tribal members violated the

“right to transport goods to market over public highways without payment of fees for that use.” Cree, 157 F.3d at 769.

Neither of the cases cited addresses the public interest the State of Washington retains in maintaining safe travel across all of its public roadways through enforcement of criminal laws. Further, using the test set forth in Smiskin, the Yakamas cannot be said to have understood, at the time of the treaty, the need to regulate, and license, operators of modern motor vehicles.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions.

Respectfully submitted this 5th day of August, 2010.


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