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SEP 27 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

28893-5-III

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KIM E. RICKMAN, JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF GARFIELD COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

GEMBERLING & DOORIS, P.S.
3030 S. Grand Blvd. #132
Spokane, WA 99203
(509) 838-8585

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INDEX

A. ASSIGNMENT OF ERROR1

B. ISSUES1

C. STATEMENT OF THE CASE.....1

D. ARGUMENT.....3

 1. CONGRESS MAY PASS LAWS
 ABROGATING TREATY RIGHTS;
 NO SUCH POWER ACCRUES TO
 THE STATE LEGISLATURES3

 2. WHETHER TREATIES CONFER
 RIGHTS UPON INDIVIDUAL
 INDIANS DEPENDS ON THE
 LANGUAGE OF THE TREATY.....6

E. CONCLUSION.....10

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. MOSES, 79 Wn.2d 104,
483 P.2d 832 (1971)..... 3

STATE V. OLNEY, 117 Wn. App. 524,
72 P.3d 235 (2003)..... 4

STATE V. SATIACUM, 50 Wn.2d 513,
314 P.2d 400 (1957)..... 4

OTHER CASES

STATE V. ARTHUR, 74 Idaho 251,
261 P.2d 135 (1953)..... 2

STATE V. SIMPSON, 137 Idaho 813,
54 P.3d 456 (2002)..... 2

SUPREME COURT CASES

LONE WOLF V. HITCHCOCK, 187 U.S. 553,
23 S. Ct. 216, 47 L. Ed. 299 (1903)..... 4

MENOMINEE TRIBE OF INDIANS V. UNITED STATES,
391 U.S. 404, 88 S. Ct. 1705, 20 L. Ed. 2d 697 (1968)..... 5

MINNESOTA V. MILLE LACS LACS BAND OF
CHIPPEWA INDIANS, 526 U.S. 172,
119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999)..... 9

U.S. V. DION, 476 U.S. 734,
106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986)..... 5

UNITED STATES V. WINANS, 198 U.S. 371,
25 S. Ct. 662, 49 L. Ed. 1089 (1905)..... 8

WASHINGTON V. WASHINGTON STATE COMMERCIAL
PASSENGER FISHING VESSEL ASS'N, 443 U.S. 658,
99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979)..... 4, 9

FEDERAL CASES

U.S. V. THREE WINCHESTER 30-30 CALIBER LEVER ACTION
CARBINES, 504 F.2d 1288 (C.A.Wis. 1974)..... 4 - 7

UNITED STATES V. BURNS, 529 F.2d 114 (9th Cir.1976)..... 6

UNITED STATES V. FOX, 573 F.3d 1050 (Cir 10, 2009) 7, 8

UNITED STATES V. GALLAHER, 275 F.3d 784 (9th Cir.2001) 6, 7

UNITED STATES V. WASHINGTON, 384 F. Supp. 312, (1974)
affirmed 520 F.2d 676 (9th Cir.1975)..... 9

STATUTES

18 USC § 1162..... 5

OTHER AUTHORITIES

NEZ PERCE TREATY OF 1855, Article III 2, 9

A. ASSIGNMENT OF ERROR

1. The Court erred in denying the motion to dismiss the firearms charges. (CP 31)

B. ISSUES

1. Does the application of State statutes of general application restricting or regulating the rights retained by members of an Indian tribe under a treaty with the United States government violate the Supremacy Clause of the United States Constitution?
2. Did the Nez Perce Treaty of 1855 reserve to the individual members of the Nez Perce nation the right to hunt game in open, unclaimed land and to possess the weapons and other paraphernalia associated with such hunting?

C. STATEMENT OF THE CASE

From May 22, 1855 through June 11, 1855, a meeting between the Nez Perce and other Indian tribes, including the Yakimas, and representatives of the United States government was held at the Council Grounds in Walla Walla Valley. Governor Isaac I. Stevens, of the Territory of Washington, and General Joel Palmer, of the Territory of Oregon, represented the Federal Government, and Chiefs and various spokesmen of the tribes represented the Indians. The extended negotiations culminated in the

Treaty of June 11, 1855, whereby the Indians for monetary and other considerations ceded to the United States a vast territory exceeding 16,000 square miles in area.

State v. Arthur, 74 Idaho 251, 255, 261 P.2d 135 (1953).

The treaty reserved to tribal members certain rights to hunt, fish, and gather food off of the reservation:

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory, and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

State v. Simpson, 137 Idaho 813, 814, 54 P.3d 456 (2002) *quoting* Nez Perce Treaty of 1855, Article III.

Kim Rickman was hunting with friends in the Umatilla National Forest in August 2009. (CP 20-21) He was sitting in the backseat of a pickup truck when a wildlife officer approached the truck and asked the occupants if their hunting rifles were loaded. (CP 21-22) The officer examined a rifle that was lying on the floor in front of where Mr. Rickman was sitting, and found that it was loaded. (RP 21)

Mr. Rickman initially gave the officer his brother's name, but later acknowledged his correct name and told the officer that he had a prior conviction for manslaughter. (RP 22) The State charged Mr. Rickman

with unlawful possession of a firearm and two misdemeanors related to the giving of the false name and having a loaded weapon in a vehicle. (CP 47-49)

Defense counsel moved to dismiss the firearms charges, arguing they violated Mr. Rickman's hunting rights under the 1855 treaty. (CP 36-39) The court denied the motion and Mr. Rickman was convicted on all charges following a bench trial. (CP 31, 9-16)

D. ARGUMENT

Evanescent as the morning mists on the shimmering waters of Puget Sound is the law of Indian treaties. One moment it is there, soon to vanish in a swirl of conflicting, diverging and incomprehensible precedents. Decisions*105 intended to declare the meaning and to describe the effect and operation of Indian treaties tend in time to generate a system of judicial vapor trails which obscure more often than elucidate the treaties under consideration.

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

1. CONGRESS MAY PASS LAWS ABROGATING TREATY RIGHTS; NO SUCH POWER ACCRUES TO THE STATE LEGISLATURES.

The 1855 treaty between the federal government and the Nez Perce nation "gave the Indians the right to hunt on unclaimed lands in common with non-Indians. . . . [T]his Treaty, like other federal laws, supersedes any conflicting provisions of State laws" *State v.*

Satiacum, 50 Wn.2d 513, 516, 314 P.2d 400 (1957). This is because “[a] treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.” *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979); *citing, e. g., Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903).

‘[A] treaty with Indians is the supreme law of the land and is binding on the State until Congress limits or abrogates the treaty.’ *Id.* at 201, 978 P.2d 1070 (citing U.S. CONST. ART. VI; *Antoine v. Washington*, 420 U.S. 194, 201, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); *State v. McCormack*, 117 Wash.2d 141, 143, 812 P.2d 483 (1991), *cert. denied*, 502 U.S. 1111, 112 S.Ct. 1215, 117 L.Ed.2d 453 (1992)).

State v. Olney, 117 Wn. App. 524, 527, 72 P.3d 235 (2003).

Whether and how the federal government may pass laws that supersede treaty rights has been a matter of debate with which this court need not concern itself. *See U.S. v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288, 1291-1292, n.8 (C.A.Wis. 1974). *Three Winchester Carbines* held “a federal statute of general applicability is applicable to the native American unless there exists some treaty right which exempts the Indian from the operation of the particular statutes in question.” *Id.* at 1291.

More significant, for the present case, is that state governments cannot pass laws that supersede treaty rights, without special federal authorization, and then only to the extent so authorized. *U.S. v. Dion*, 476 U.S. 734, 740, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986). Only congress can abrogate the provisions of treaties; statutes only operate to abrogate treaty rights if congress considers the conflict between treaty rights and the statute and chooses to abrogate the treaty rights. *Id.* 476 U.S. at 740. In passing the Major Crimes Act congress abrogated provisions of Indian treaties to the extent they conflicted with certain specified federal criminal laws. 18 USC § 1162-1163. These statutes do not apply to the enforcement of State laws. 476 U.S. at 740.

In *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406, 88 S. Ct. 1705, 1707, 20 L. Ed. 2d 697 (1968), the Supreme Court held the State of Wisconsin could not extinguish the hunting and fishing rights of the Menominee Indians through the enforcement of its hunting and fishing regulations. The basis for this holding was that the state lacked authority to regulate hunting and fishing rights established by treaty. *Id.*; see *Three Winchester Carbines*, 504 F.2d at 1292.

“[F]ederal criminal statutes apply to Indians ‘unless there exists some treaty right which exempts the Indian from the operation of the

particular statutes in question.” *United States v. Burns*, 529 F.2d 114, 117 (9th Cir.1976).

United States v. Gallaher, 275 F.3d 784 (9th Cir.2001) held that a member of the Colville Confederated Tribes could be convicted under federal law of being a felon in possession of ammunition. *Gallaher* is not, however, authority for convicting a member of a treaty tribe under state law. Appellant has found no authority that would grant a state court jurisdiction to apply a state law that supersedes rights granted under the 1855 treaty when applied to a member of the Nez Perce nation.

2. WHETHER TREATIES CONFER RIGHTS UPON
INDIVIDUAL INDIANS DEPENDS ON THE
LANGUAGE OF THE TREATY.

In applying a law of general application to a member of a treaty tribe, *Gallaher* relied on *Three Winchester Carbines* for the proposition that the treaty-created right to hunt belongs to the tribe, not to the individual, and thus prosecution of the individual for a firearms offense does not infringe any treaty rights. 275 F.3d at 789.

But the treaty at issue in *Three Winchester Carbines* made no provision for individual hunting or fishing:

The treaty provides that the Indians are to be ceded a tract of land lying upon the Wolf River ‘to be held as Indian lands are held’ *Id.* The Supreme Court has interpreted

this language to mean that the Menominee Indians retain the right to hunt and fish upon the ceded land.

U.S. v. Three Winchester, 30-30 Caliber Lever Action Carbines, 504 F.2d at 1292.

The treaty at issue in *Gallaher* likewise made no reference to the rights of Indians as individuals: “the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.’ Colville Treaty, May 9, 1891, Art. 6, reprinted in 23 Cong. Rec. 3837-40 (1892).” *Gallaher* at 788.

In *United States v. Fox*, the federal court rejected the claim that hunting rights created by treaty belonged only to the Navajo tribe and not to the individual members. *United States v. Fox*, 573 F.3d 1050, 1053 (Cir 10, 2009).

But while such treaties are the product of negotiations with tribes as collective entities, there can be little doubt that they endow individual tribal members with rights and responsibilities. As the Supreme Court commented in *McClanahan v. State Tax Comm’n of Arizona*, 411 U.S. 164, 181, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), ‘[w]e cannot accept the notion that it is irrelevant whether [the law] infringes on (appellant’s) rights as an individual Navajo Indian.... To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all,

composed of individual Indians, and the legislation confers individual *1054 rights.’ (quotation and citation omitted).

Id. at 1053-54. The federal court relied on the Supreme Court’s opinion that the rights reserved by treaty belong to the individual members of the tribe:

[T]he treaty [creating a reservation] was not a grant of rights to the Indians, but a grant of right from them--a reservation of those not granted.... Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. *They reserved rights, however, to every individual Indian, as though named therein.*

Id. at 1054, quoting *United States v. Winans*, 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089 (1905) (emphasis added).

The *Fox* court concluded that the defendant could be properly convicted under state law, not because the Navaho treaty did not create individual rights, but because it expressly provided for individual members who committed crimes were thereby deprived of their rights under the treaty. *Id.* at 1054-55.

The Nez Perce treaty of 1855 contains language expressly granting Indians, as individuals, the right to hunt on open lands outside the reservation: “The exclusive right of taking fish . . . is further secured to

said Indians . . . *together with the privilege of hunting . . . upon open and unclaimed land.*” Nez Perce Treaty of 1855, Article III (emphasis added).

Treaties are to be interpreted in favor of Indians; treaty ambiguities are to be resolved in Indians’ favor; and treaties are to be interpreted as Indians would have understood them: “we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999).

Indians may employ modern hunting aids such as modern lighting, firearms, and the like. *United States v Washington*, 384 Fed Supp 312, (WD Washington 1974) *affirmed* 520 F.2d 676 (9th Cir.1975). The State may not ban the Indian’s use of tools and implements used for fishing and hunting. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. at 682-683.

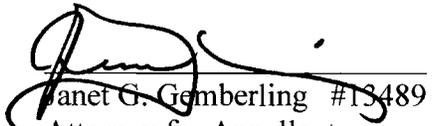
It is not disputed that Mr. Rickman is a member of the Nez Perce nation. His right to hunt on open lands, and to possess weapons appropriate for the purpose is protected by treaty, and cannot be abrogated by Washington State law.

E. CONCLUSION

Mr. Rickman's firearm convictions should be reversed and dismissed.

Dated this 27th day of September, 2010.

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