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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 295087

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ALLEN CLARK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY

The Honorable Jack Burchard

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

A defendant has a right to a trial by jury where jury service is compulsory. This means that State Courts should take all reasonable steps to make sure the jury summonses are valid, legally binding and properly served.

Additionally, the legal precedents require that local law enforcement obtain, or attempt to obtain, a search warrant issued by a tribal court prior to the search of trust land on an Indian reservation.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by not compelling Native Americans living on the Indian reservation to appear for jury service.
2. The trial court erred by not suppressing the search of Mr. Clark's trailer.

C. ISSUES PRESENTED

Does the Constitution require the Superior Courts of Washington to attempt to compulsorily summon Native Americans living on trust land on an Indian Reservation to appear for jury

service when a legal or practical mechanism exists for the court to do so?

Does the Constitution require local police departments to obtain, or to attempt to obtain, a search warrant issued by a tribal court, prior to searching the home of a tribal member living on trust land on an Indian reservation?

D. STATEMENT OF THE CASE

The State charged Michael Clark with Burglary in the 2nd Degree, Theft 1st Degree, and Malicious Mischief in the 3rd Degree. CP 95. The charges stem from the October 13th, 2009 burglary of a Cascade and Columbia Railroad workshop (RP 180) in which tools were stolen. RP 204. Damage was done to the door handle upon entry. RP 181. The railroad workshop is on the Colville Indian Reservation, but it sits on fee land. RP 29-30. Detective Koplín of the Omak Police department sought out Michael Clark to interview him about the burglary. RP 18. Detective Koplín drove over to Mr. Clark's trailer house at 705 Garfield in Omak, Washington. RP 19. The trailer house is on tribal trust land, and is also on the Colville Indian Reservation. RP 27. The detective saw Clark in the doorway, and Clark shut the door. RP 19. The

detective contacted Clark's brother, and the brother went in and talked Clark into coming out, and Clark was thereafter arrested. RP 20-21. The detective then obtained a search warrant for Clark's trailer from Judge Culp, a District Court judge in Okanogan County. RP 27. The detective made no effort to obtain a search warrant from a judge from the Colville Confederated Tribes. RP 28. The detective did not seek assistance from the tribal police either. RP 28. The detective is not cross-commissioned as an officer with the tribe. RP 27. The detective then served the search warrant on Mr. Clark's home and found stolen items from the railroad burglary present in his home. RP 315.

Michael Clark filed a motion to suppress evidence on June 3rd, 2010, arguing that the police should have obtained a warrant from the Colville Tribal Court to search his residence. CP 80-83. A hearing was held and testimony was taken from Detective Koplín (RP 17) and briefly from Michael Clark (RP 42). The trial court denied the defendant's motion to suppress. CP 48-50.

Michael Clark also filed a pre-trial motion entitled "Defendant's Motion to Dismiss Case, or in the Alternative to Reconfigure Jury Venire" on June 14th, 2010 CP 73-79. This motion objected to the fact that Okanogan County Clerk issued

summonses in a manner that were not compulsory for Native Americans living on trust land on the Colville Indian Reservation. The relief sought was that the court should order the county clerk to send the summonses to the Colville Tribal Court for issuance to tribal members living on the reservation. CP 77. This motion was also denied by the trial court. CP 46-47. The judge explained: "I see friends of mine that I know are native that appear on jury panels." RP 55. The Judge explained "there are native people and tribal members who . . . serve on juries here all the time..." RP 55. However, when the case proceeded to the jury trial, the clerk's summonses failed to yield a single Native American to the jury pool (RP 159). Okanogan County's population is 11% Native-American. CP 78-79. At trial, Mr. Clark was acquitted of Burglary and Malicious Mischief, but convicted of Theft in the First Degree. RP 455. He was given a standard range sentence, and a timely appeal followed.

E. ARGUMENT

1. THE CONSTITUTION REQUIRES THE SUPERIOR COURTS OF WASHINGTON TO ATTEMPT TO COMPULSORILY SUMMON ALL JURORS, INCLUDING NATIVE-AMERICANS LIVING ON TRUST LAND ON AN INDIAN RESERVATION,

PARTICULARLY WHEN A LEGAL OR PRACTICAL
MECHANISM EXISTS FOR THE COURT TO DO SO.

The current system in Okanogan County does not properly summon Native Americans living on trust land to appear for jury service. Despite the fact that Okanogan County covers considerable trust land, and one half of the Colville Reservation, most tribal members are not required to appear.

The trial court refused the defense request that the Superior Court of Okanogan issue the summonses in a manner so as to compel Native Americans living on the reservation. The jury summonses of Okanogan County Superior Court are a form of state court civil process. Under the case of North Sea Products v. Clipper Seafood, such state civil matters are unenforceable on Indian Reservations. 92 Wn. 2d 236, 595 P.2d 939 (1979) (invalidating a state-court garnishment). "Traditionally, the courts have held that personal service of process cannot be effected while an Indian is on the reservation." Balyeat Law Offices v. Maiers, 1998 Mont. Dist. LEXIS 769 (Mont. Dist. Ct. 1998) quoting 1973 Utah Law Review 206. Additionally, the punishments under RCW 2.36.170 for failing to report for jury duty do not apply to Indians on

trust or allotted lands.¹ After all, if a tribal member lives on trust land, walks out to his mailbox on trust land, opens the state court jury summons while standing on trust land, and returns to his home and throws the summons away, he cannot be prosecuted in state court because no act occurred on fee land.

Indians are 11% of the county population according to the U.S. census. (CP 78-79). The exclusion of this body invalidates the whole process. Who comes to serve, and who does not come to serve, must be random. One case on point is Brady v. Fibreboard Corp., 71 Wn. App. 280, 857 P.2d 1094 (1993), review denied, 123 Wn.2d 1018, 871 P.2d 599 (1994). In Brady, the court of appeals reversed a jury verdict because of procedural irregularities. When several jurors on the list did not appear, plaintiff's counsel asked why, and "the judge responded that they had never been called in." Id. at 282. Other judges had excused the jurors, and the court of appeals reversed the verdict and explained:

The procedures used here abridge the statutory mandate of random selection. It is undisputed that the initial panel of 90 was randomly selected. However, the randomness of the panel was

¹ RCW 37.12.010 provides that the "... state of Washington hereby obligates and binds itself to assume criminal . . . jurisdiction over Indians and Indian territory, . . . but such assumption of jurisdiction shall not apply to Indians when on their trust lands or allotted lands within an established Indian reservation..."

destroyed when 14 of the 90 were eliminated by the process employed here.

Id. at 283. Likewise, in the case at bar, invalid summonses compromise the whole process. Like the 14 missing jurors in Brady, many native jurors will have "never been called in." Aside from the constitutional precepts violated, this clear statutory violation will mandate reversal. "When statutory jury selection procedures are materially violated, the claimant need not show actual prejudice; rather, prejudice is presumed." Id. at 283.

The circumstances in the case at bar are similar to the facts in the case of Taylor v. Louisiana, 419 U.S. 522 (1975). In that case, Louisiana's method of drawing jurors to court was found to be unconstitutional. Louisiana summoned men to appear, but made women's attendance optional or voluntary. The court in Taylor v. Louisiana visited earlier cases and explained:

A unanimous Court stated in Smith v. Texas, 311 U.S. 128, 130 (1940), that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." To exclude racial groups from jury service was said to be "at war with our basic concepts of a democratic society and a representative government."

We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard

against the exercise of arbitrary power - to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. Duncan v. Louisiana, 391 U.S., at 155 -156. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.

Id. The court struck down a murder conviction due to the failure to compulsorily include women in jury pools. Likewise, Michael Clark, before trial, requested the court to take steps to compel the attendance of on-reservation Indians for jury service.

The best solution would have been to ask the Federal Courts or the Colville Tribal Court to issue the jury summonses to the Indians living on the reservation. Unlike a mailed state-court jury summons, a summons of a Federal Court or Tribal Court will compel attendance. It is, of course, a crime to ignore a court order or summons under Federal² and Tribal³ law. "...[A] federal subpoena is as fully and independently operative within the reservation as without..." United States v. Juvenile Male 1, 431 F. Supp. 2d 1012, 1014 (D. Ariz. 2006). The Federal Court clearly

² See 28 U.S.C. Sec. 1864(b).

³ Section 2-1-123 of the Colville Tribal Code provides in part: "Any person who shall willfully disobey any lawful order, subpoena, or warrant of the Tribal Court or any officer thereof, shall be guilty of Disobedience of a Lawful Court Order." The code is online at <http://codeamend.colvilletribes.com/current.htm>.

can enforce, or re-issue State Court process on reservations.

Admittedly, federal courts are limited by FRCP 69(a) from enforcement of state court process in other states. Federal civil process cannot enforce state court process via the federal courts in another state; merely because process is entitled to full faith and credit does not create federal jurisdiction over the matter.

However, in light of the traditions of federal court involvement in Indian lands, the same restrictions do not apply to federal court enforcing state court civil process on Indian reservations. See e.g. Annis v. Dewey County Bank, 335 F. Supp 133 (D.S.D. 1971).

As to the Colville Tribal Courts, their cooperation with State Court process is largely discretionary under Section 1-1-102 of their code.⁴ The Okanogan County Superior Court Judge could order the Okanogan County Clerk to send all on-reservation summonses to the Colville Tribal Court for compulsory lawful services under tribal law. This was not done, and Michael Clark's right to a fair trial was violated.

We would distinguish the case at hand from the case of United States v. Raszkiewicz, 169 F.3d 459, 463 (7th Cir. Wis.

⁴ 1-1-102 of the Colville Tribal Code provides: "All judges and personnel of the Tribal Court shall cooperate with all branches of the BIA, with all federal, state, county and municipal agencies, when such cooperation

1999). In that case, Raszkievicz complained that the federal district in which he was tried did not contain any of the state of Wisconsin's Indian reservations. The court rejected his claim. However, in the case at bar, there is only one district in Okanogan, and that "district" is the whole county.

2. THE CONSTITUTION REQUIRES LOCAL POLICE DEPARTMENTS TO OBTAIN, OR TO ATTEMPT TO OBTAIN, A SEARCH WARRANT ISSUED BY A TRIBAL COURT, PRIOR TO SEARCHING THE HOME OF A TRIBAL MEMBER LIVING ON TRUST LAND ON AN INDIAN RESERVATION.

A Tribal warrant is needed to execute a search warrant on Indian land. See United States v. Baker, 894 F.2d 1144 (10th Cir. Colo. 1990). In that case, the court explained:

Defendant contends that the search warrant was void as beyond the issuing state court's jurisdiction pursuant to 18 U.S.C. §§ 1151-1153, because it purports to authorize a search for evidence of criminal activity on property rented by an enrolled member of the Southern Ute Tribe and located within the exterior boundaries of Southern Ute tribal lands. Since it is undisputed that defendant's property was located within Indian country and Colorado has never obtained an extension of its jurisdiction to include such lands, we must agree with defendant that the La Plata County District Court acted beyond its authority in issuing

is consistent with this Code, but shall ever bear in mind that their primary responsibility is to the people of the Tribes.

the search warrant for evidence of suspected criminal activity on defendant's property.

Id. 894 F.2d 1144, 1146.

Under the laws of the Major Crimes Act, codified as amended at 18 U.S.C. Sec 1153 (1982), the U.S. has exclusive jurisdiction over any Indian who has allegedly committed within Indian country any of 14 enumerated crimes, including murder. That Act, as amended, provides in pertinent part:

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, **burglary**, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. (Emphasis added)

The Supreme Court has expressly ruled that state criminal jurisdiction in Indian country is limited to crimes committed "by non-Indians against non-Indians . . . and victimless crimes by non-Indians." *Solem v. Bartlett*, 465 U.S. 463, 465 n.2, 79 L. Ed. 2d 443, 104 S. Ct. 1161 (1984).

The police sought the search warrant to investigate Michael Clark's involvement in the suspected burglary of a structure belonging to Columbia River Railroad at 901 Omak Avenue, an address also within the Colville Indian Reservation. A "...state court may not issue a warrant to search an area within Indian country where the state does not have jurisdiction over the underlying crime." State v. Mathews, 133 Idaho 300, 313 (1999). In Michael Clark's case, the police should have availed themselves of the procedures under the Colville Tribal Code to properly search the residence in question. If the Tribe provides a legal channel to seek the State's goal, then courts are slow to allow a State process that would disrupt this tribal process. As stated in State v.

Mathews:

Other courts addressing this issue in similar contexts have focused their analysis on the existence of a tribal procedure addressing the execution of state process pursuant to state court jurisdiction over the underlying crime. In State ex rel. Merrill v. Turtle, 413 F.2d 683 (9 Cir. 1969), cert. denied, 396 U.S. 1003, 24 L. Ed. 2d 494, 90 S. Ct. 551 (1970), the court reviewed the validity of a state's extradition of an Indian defendant from the reservation. The court in Merrill recognized that the validity of the state's exercise of jurisdiction within Indian country "must be determined in light of whether such exercise would 'infringe on the right of reservation Indians to make their own laws and be ruled by them.'" 413 F.2d at 685 (citing Williams v. Lee, 358 U.S. 217, 220, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959)). The Ninth Circuit, applying this analysis, held

that the state's exercise of jurisdiction infringed on the Indians' right to self-government where the tribe had an established extradition procedure which was not followed by the state. However, in State ex rel. Old Elk v. District Court of Big Horn, 170 Mont. 208, 552 P.2d 1394, 1398 (Mont. 1976), the court held that the execution of a state arrest warrant for an Indian within Indian country was valid in the absence of tribal court procedure governing extradition. Thus, the courts addressing the exercise of state arrest jurisdiction within Indian country have found that a determination of whether such an exercise of state authority infringes on tribal sovereignty turns on the existence of a governing tribal procedure.

State v. Mathews, 133 Idaho 300, 314 (Idaho 1999). The Colville

Tribal Code provides as follows:

2-1-35 Search Warrants

Every judge of the Court shall have authority to issue warrants for search and seizure of the premises and property of any person under the jurisdiction of the Court. However, no warrant of search and seizure shall be issued except upon a presentation of a written or oral complaint based upon probable cause, supported by oath or affirmation and charging the commission of an offense against the Tribes. No warrant for search and seizure shall be valid unless it contains the name or description of the person or property to be searched and seized and bears the signature of a judge of competent jurisdiction. Service of warrants of search and seizure shall be made by an officer.

1-1-102 Judicial Cooperation All judges and personnel of the Tribal Court shall cooperate with all branches of the BIA, with all federal, state, county and municipal agencies, when such cooperation is consistent with this Code, but shall ever bear in mind

that their primary responsibility is to the people of the Tribes.

Thus it is clear that the police could have sought a Tribal warrant, but did not.

F. CONCLUSION

We respectfully request that Mr. Clark's conviction be overturned for a new trial, and that Okanogan County be directed to properly summon in Native American jurors. In the event that this court finds the search warrant invalid, we would ask that the conviction be overturned and the case dismissed with prejudice.

Respectfully submitted this 29th day of July 2011



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