FILED
Jan 19, 2016
Court of Appeals
Division III
State of Washington

No. 32549-1-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DAVID RANDALL PRIEST,
Defendant/Appellant.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT
Honorable Henry Rawson, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

SUSAN MARIE GASCH
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[1] Requested by the Court pursuant to RAP 9.11(a) in letter dated December 16, 2015.
[2] Submitted pursuant to RAP 10.2(c).

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A. ADDITIONAL ISSUE PRESENTED

The Court has requested supplemental briefing regarding "the issue raised by Mr. Priest in his Statement of Additional Grounds that he is not subject to prosecution because he is an enrolled member of the Colville Confederated Tribe."

B. ANSWER TO ISSUE PRESENTED

The Okanogan County Superior Court lacked jurisdiction over the prosecutions against Mr. Priest for first degree trafficking in stolen property and possession of a stolen motor vehicle, where there is no dispute Mr. Priest is an Indian and the crimes were not proven to occur in essential part on state land or occurred on tribal land within the Colville Reservation.

C. SUPPLEMENTAL FACTS RELEVANT TO JURISDICTION[3]

David Randall Priest is an enrolled member of the Confederated Tribes of the Colville Reservation. *See* Appendix A.

Sometime between December 8 and 22, 2012, burglars stole an enclosed trailer containing four ATVs[4] from private property near Pateros,

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[3] Both parties have previously set forth a statement of facts. Brief of Appellant, pp. 3–9; Brief of Respondent, pp. 3–13. Appellant here submits only those facts relevant to the issue whether there was jurisdiction to prosecute.

[4] "ATV" is a commonly used acronym for all terrain vehicle.

Washington, in Okanogan County. RP 223–26. The trailer made its way to a barn/shop on state land north of Omak. The four ATVs made their way to housing at Rocky River HUD Road, which is located within the Colville Indian Reservation.[5] At trial, the State presented the following relevant evidence.

In January 2013, Charles and Melissa Nodine went to housing at Rocky River HUD Road and purchased two of the stolen ATVs (Honda and Suzuki brands) from "Danny" and Mr. Priest. RP 319, 321, 338, 344, 364–66, 368–71, 374–77, 380–81.

In early February 2013, the other two stolen ATVs (Bombardier and Polaris brands) were seen at Shelly Priest's house at #4116 Rocky River HUD Road. RP 253, 264, 516–18. She is Mr. Priest's ex-sister-in-law. RP 264. Shelly told police Mr. Priest arrived at her house two to three weeks earlier and left the ATVs behind her house covered with a tarp. RP 516. After verifying these were two of the stolen ATVs, police returned and the ATVs were gone. RP 254–55, 268, 300–01. Police recovered the Bombardier at a house at #4111 Rocky River HUD Road. They found the Polaris abandoned elsewhere on the reservation. RP 255,

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[5] Okanogan County Assessor's Land Status Report for Rocky River HUD Road, showing Ownership status: TRIBAL (available at http://okanoganwa.mapsifter.com/Print/Landscape.aspx?key=c0f692b99c3d49eab913808 ....).

265, 269–70, 273; CP 256.

On January 7, 2013, Darren Morris went to the barn/shop (232 Greenacres Road) and picked up the stolen trailer on behalf of his brother who had recently purchased it. Josh Taylor helped him hook it up. Mr. Morris did not see Mr. Priest at the property or have any discussions with him about the trailer. RP 396–98, 401–05; CP 256 (last paragraph) to CP 257 (first paragraph). Evidence showed the trailer had been cut apart in the barn/shop. RP 259–60.

Amanda VanSlyke lived at 232 Greenacres Road. RP 447. She'd met Mr. Priest in December 2012, and thought he was living by the Omak High School. RP 448–49. She rented either a garage or a barn/shop on her property to Mr. Priest to use for working on cars. These were separate buildings. RP 259, 450, 455–56, 458. At some point Mr. Priest had stayed at the property. RP 527–28. VanSlyke never saw him haul anything other than a car to or from her property. RP 461. Mr. Priest introduced VanSlyke to Josh Taylor and Nikki Windsor. RP 451–42. Josh and Nikki thereafter stayed with VanSlyke a couple of times. RP 452. VanSlyke moved away from the Greenacres property in late December 2012/early January 2013. RP 450.

Two months after the theft, a cell phone registered to Mr. Priest

was found under snow at the scene of an unrelated January 2013 burglary in Okanogan County. RP 551–554, 573. After a ten month-treatment in a bucket of rice, police activated the phone and discovered a number of text messages made mostly from a phone registered to Nikki Windsor to Mr. Priest's phone. The recovered texts began on December 10, 2012, and ended on December 13, 2012. A .wav file (voice recording) identified as Mr. Priest's voice was attached to a December 13 text message made from his phone. In response, four pictures of some ATVs were sent to Mr. Priest's phone from Nikki's phone. RP 563–64, 566–69, 582–92, 592, 634–36, 637–640, 643–44. The earliest phone call still showing on the call log was an outbound call from Mr. Priest's phone on December 14, 2012. RP 578. The last received call was an inbound call to Mr. Priest's phone on December 17, 2012. RP 577. The State presented no evidence that Mr. Priest made or received a phone call from Okanogan County in which he agreed with the burglars to traffic stolen property.

Mr. Priest was convicted by a jury of two counts of possession of a stolen motor vehicle (counts 4 and 5 (Bombardier and Polaris)) and three counts of first degree trafficking in stolen property (count 1 (trailer) and counts 2 and 3 (Honda and Suzuki)). CP 4, 27–28, 264–66. The charging

period for the five counts was "[o]n or between December 9, 2012 and February 4, 2013." CP 264–66.

D. ARGUMENT

THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION TO CONVICT MR. PRIEST.

1. With the exception of only eight subject-matter areas, the State does not have jurisdiction over Indians on the Colville Reservation.

In 1889, the federal government required that the several territories then seeking statehood disclaim any and all jurisdiction over Indian territory as a precondition to statehood. See *Makan Indian Tribe v. State*, 76 Wn.2d 485, 486, 457 P.2d 590 (1969). Washington responded by adopting an article in its Constitution to that effect. *See id.* at 487. In 1953, the United States Congress retreated from this position and enacted Public Law 280[6] (Pub.L. 83-280, 67 Stat. 588 (August 15, 1953)), which gave five enumerated states immediate criminal and civil jurisdiction over Indian country, and allowed other states the option of assuming all or some of such jurisdiction. *State v. Hoffman*, 116 Wn.2d 51, 66, 804 P.2d 577 (1991).

The Washington Legislature responded by enacting RCW 37.12.010. Laws of 1957, ch. 240, p. 941. As amended in 1963, the

[6] Codified at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321–1326; 28 U.S.C. § 1360.

statute prohibits the State from assuming jurisdiction over Indians on tribal lands, unless the tribe specifically asks the State to do so under RCW 37.12.021. RCW 37.12.010. Even for tribes that do not request State jurisdiction, the State retains jurisdiction over eight subject matter areas. *Id.* The full text of the statute provides:

> **Assumption of criminal and civil jurisdiction by state.**
> 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: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if *chapter 36, Laws of 1963 had not been enacted.

RCW 37.12.010 (emphasis added). By unambiguous language, RCW 37.12.010 "shall not apply to Indians when on their tribal lands or allotted

lands within an established Indian reservation and held in trust the by United States."

25 U.S.C. §1323 authorizes states to effectuate retrocession of criminal and civil jurisdiction to the United States. Washington's procedure for retrocession is set forth at RCW 37.12.120. Another section of the statute explains its purpose:

> It is the intent of the legislature to authorize a procedure for the retrocession, to the ... Colville Confederated Tribes of Washington and the United States, of criminal jurisdiction over Indians for acts occurring on tribal lands or allotted lands within the ... Colville Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States.

RCW 37.12.100. Although the Colville Tribes originally invoked the provisions of RCW 37.12.021 and ceded full civil and criminal jurisdiction over Tribal trust lands to the State of Washington, that jurisdiction was retroceded to the federal government under RCW 37.12.120 and 25 U.S.C. §1323, effective March 18[7], 1987. *See* Appendix B. Accordingly, the State lacks jurisdiction over Indians for "crimes committed on trust or allotment land within reservation borders." RCW 37.12.010; *State v. Clark*, 178 Wn.2d 19, 25, 308 P.3d 590, 593 (2013).

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[7] *State v. Hoffman*, 116 Wn.2d 51, 70, 804 P.2d 577 (1991).

2. Mr. Priest is an enrolled member of the Confederated Tribes of the Colville Reservation.

The Confederated Tribes of the Colville Reservation is federally-recognized under 25 U.S.C. § 479a-1 as a tribe "eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 78 Fed. Reg. 26384-02, *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs* (List current as of publication on May 6, 2013). Tribes have the exclusive right to determine their own membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Mr. Priest is an enrolled member of the Confederated Tribes of the Colville Reservation. *See* Appendix A. Under *Santa Clara*, the Tribes' determination is binding upon the State.

3. The State's proof of possession of stolen motor vehicle did not establish possession occurred on non-tribal lands.

To be guilty of possession of a stolen motor vehicle, a person must knowingly "receive, retain, possess, conceal, or dispose of" a stolen motor vehicle. RCW 9A.56.068(1); RCW 9A.56.140(1).[8] Possession may be

[8] "The instruction incorporates the definition of "possessing stolen property" from RCW 9A.56.140. Although the Legislature did not expressly incorporate this definition into the crime of possession of stolen motor vehicle (compare with RCW 9A.56.310, which expressly incorporates this definition into possession of a stolen firearm), the Legislature must have intended this definition to apply. This definition applies to the other crimes relating to possessing stolen property in RCW Chapter 9A.56, and the definition is the

actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). To find actual possession, the property must be in one's personal custody. *Id.* at 29. In contrast, constructive possession requires dominion and control over the property or the premises on which it is found. *Id.* at 29–31.

The stolen ATVs listed in counts 4 and 5 (Bombardier and Polaris) were recovered on tribal lands. As such, Mr. Priest's alleged actual or constructive possession of these ATVs necessarily took place on tribal lands. The fact that the theft of the ATVs occurred on state land is not relevant to the issue of possession. *See State v. Stearman,* 187 Wn. App. 257, 268 fn. 7, 348 P.3d 394 (2015). The State did not have jurisdiction to prosecute Mr. Priest in Okanogan County Superior Court for the crimes of possession of a stolen motor vehicle.

The State also lacked authority to prosecute Mr. Priest under RCW 37.12.010(8). An ATV is a motor vehicle. In *State v. Pink*, the passenger defendant, a tribal member, was charged with unlawful possession of a firearm discovered in a car during a traffic stop on a state highway running through a reservation. 144 Wn. App. 945, 947–948, 185 P.3d 634 (2008).

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source of the mens rea element for all these possession offenses. If the definition did not apply, the Legislature would have created a strict liability offense for simple possession." 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 77.21, Comment, at 178 (3d ed.2008).

The charges were dismissed because the State lacked authority to prosecute the crime since it did not involve the operation of a motor vehicle on a public highway under RCW 37.12.010(8). *Id.* at 949, 956. Similarly, the exception listed under RCW 37.12.010(8) does not apply to Mr. Priest, because he was not charged with offenses pertaining to the operation of the ATVs. The State lacked authority to prosecute Mr. Priest for possession of the two stolen ATVs occurring on tribal lands. *Pink*, 144 Wn. App. at 956.

4. The State's proof of trafficking in stolen property did not establish trafficking occurred on non-tribal lands.

First degree trafficking can be proven in one of two ways: (1) knowingly initiating, organizing, planning, financing, directing, managing, or supervising the theft of property for sale to others, or (2) knowingly trafficking in stolen property. RCW 9A.82.050. "Trafficking" as proscribed by part (2) means "to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person." RCW 9A.82.010(19). RCW 9A.82.050(1) thus describes only two alternative means of trafficking in stolen property: first, facilitating or participating in the theft of property so that it can be sold; and second,

transferring possession of property known to be stolen. *State v. Owens*, 180 Wn.2d 90, 98–99, 323 P.3d 1030 (2014).

Pursuant to RCW 9A.04.030(1), the State has criminal jurisdiction over "[a] person who commits in the State any crime in whole or in part." The State charged Mr. Priest with trafficking stolen property under both alternative means. As to the second means, the State's proof of trafficking in stolen property did not establish Mr. Priest acquired with the intent to sell or transferred *any* possession of the trailer. His sale of the stolen Honda and Suzuki to the Nodines occurred exclusively on tribal land.

Under the first means of trafficking in stolen property, there was no evidence the elements knowingly "initiated, organized, planned, financed, directed, managed, or supervised" occurred on state land and not tribal land. In *State v. Dodson*, 143 Wn. App. 872, 878, 182 P.3d 436 (2008), the court held that "[a]n offense is committed 'in part' in Washington when an essential element of the offense has been committed in the State." There, the defendant, who was convicted of driving under the influence and reckless driving, was arrested in an area of federal jurisdiction, Fort Lewis, to which he had driven after leaving a state highway. Noting that driving is an essential element of both offenses, the court reasoned, "[t]o have driven the wrong way down the I–5 entrance ramp, Dodson had to

drive on I–5, which is without dispute within the State's jurisdiction." *Id.* The court concluded "the district court had jurisdiction to hear Dodson's case because an essential element of both offenses was committed within an area of state jurisdiction." *Dodson*, 143 Wn. App. at 878.

Here, unlike in *Dodson*, there was no proof an essential element of the first means of trafficking in stolen property—namely, "initiat[ing], organiz[ing], plann[ing], financ[ing], direct[ing], manag[ing], or supervis[ing]" a theft for sale to others—occurred on state land. There was no evidence Mr. Priest made plans while on state land, alone or with others, to commit a theft of property for sale to others. That the thefts occurred on state land is not relevant because the charge is trafficking, not theft.

The State introduced evidence of a series of text messages allegedly exchanged between Nikki Windsor and Mr. Priest during a timeframe consistent with when the trailers and ATVs could have been stolen. The content of the text messages suggests some collusion or some amount of agreement between the senders. However the evidence fails to establish Mr. Priest made or received the text messages while in Okanogan County.

The recent decision in *State v. Stearman,* 187 Wn. App. 257, 348 P.3d 394 (2015), is instructive. There, Div. II considered whether an exchange of text messages alone could establish that venue for trafficking and conspiracy offenses was proper in Pierce County where the burglary occurred in Pierce County, and before trial the State made an offer of proof that the defendant made or received a phone call from Pierce County shortly after the burglary, during which he agreed with the burglars to traffic firearms from his residence in King County, but the State did not present any such evidence at trial. *Spearman*, supra. The defendant admitted to exchanging text messages with one of the burglars shortly after the burglary, including receiving a photograph of the guns that had been stolen. *Stearman,* 187 Wn. App. at 260. The court held the trial court abused its discretion by failing to reconsider venue upon the defendant's motion at the close of the State's evidence. *Stearman,* 187 Wn. App. at 263, 268–69. In reaching its decision, the court concluded the State "failed to produce any evidence that any of [the defendant's] acts occurred in Pierce County. … The evidence established only that [the defendant] exchanged text messages with the burglars; there was no evidence of the location of the burglars during these exchanges." *Stearman,* 187 Wn. App. at 269–70.

By analogy, under *Spearman* to prove jurisdiction in state court the State would have to show the texts were made or received from the county where the theft occurred, Okanogan County. Receiving a photo of recently stolen property as an attachment to a text message does not provide evidence of the sender's location. *Stearman,* 187 Wn. App. at 270. The State produced no cell phone record evidence to establish the location of Mr. Priest or Nikki Windsor during these exchanges.

To prosecute Mr. Priest for trafficking, at least some of the essential elements had to occur in Okanogan County. The State failed to show the elements knowingly "initiated, organized, planned, financed, directed, managed, or supervised" and/or "trafficked in stolen property" occurred outside tribal land. The State lacked authority to prosecute Mr. Priest for first degree trafficking in stolen property.

E. CONCLUSION

For the reasons stated, the state court's exercise of jurisdiction was improper. This Court should dismiss Mr. Priest's convictions for lack of jurisdiction.

Respectfully submitted on January 19, 2016.

s/Susan Marie Gasch, WSBA #16485
Gasch Law Office, P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
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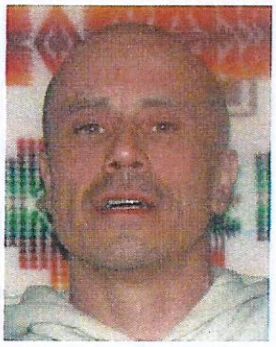
APPENDIX A

Certificate of Indian Blood

Name: **David R. Priest**

Photo



Date of Birth: **11/15/1968**

Enrollment Status: **Enrolled**

Resolution Number:

Enrollment Number: **3994**

Resolution Date:

BIA ID Number: **101P009058**

Mother: **Donna Mae Priest**

Father:

Address (Mailing): **POB 1345**

City: **Omak, WA 98841-3495**

County/Borough: **Okanogan**

Address (Street): **119 S. Cedar**

City: **Omak, WA 98841-3495**

County/Borough: **Okanogan**

Ethnic Affiliation/Blood Quantum

Total Quantum All Tribes: **5/16**

Ethnic Group: **Confederated Tribes of the Colville Reservation - (R)**

Blood Quantum: **5/16**

Affiliation: **Arrow Lakes**

Brenda Condon

Brenda Condon, Enrollment Officer

Authorizing Signature

APPENDIX B

Triangle Park, NC 27708, (telephone: (919) 541-3991 or FTS 629-3991).

Written or verbal comments on the FY 1986 Annual Plan are requested and welcome. These should be addressed to Dr. Larry Hart, Assistant to the Director, National Toxicology Program, P.O. Box 12233, Research Triangle Park, NC 27709 (telephone: (919) 541-3971 or FTS 629-3971).

Dated: March 10, 1987.

David P. Rall, M.D., Ph.D.,

Director, National Toxicology Program.

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[FR Doc. 87-5666 Filed 3-16-87; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Colville Indian Reservation, Washington; Acceptance of Retrocession of Jurisdiction

March 9, 1987.

Pursuant to the authority vested in the Secretary of the Interior by Executive Order No. 11435 of November 21, 1968 (33 FR 17339) and redelegated to the Assistant Secretary—Indian Affairs by 209 DM 8, I hereby accept at 12:01 a.m. PST, the day following publication of this notice in the **Federal Register**, retrocession to the United States of all criminal jurisdiction exercised by the State of Washington over the Colville Reservation, which was acquired by the State of Washington pursuant to Pub. L. 83-280, 67 Stat. 588, 18 U.S.C. 1162, 28 U.S.C. 1360, except as provided in Revised Code of Washington 37.12.010 and Chapter 267, Washington Laws of 1986.

The retrocession herein accepted was offered by the State of Washington on July 1, 1986, by Washington Proclamation No. 86-94 of the Governor of Washington pursuant to Chapter 267, Washington Laws of 1986, passed by the Legislature of Washington in the Forty-ninth Legislature, Regular Session, on March 11, 1986. Washington Proclamation No. 86-04 was transmitted by the Governor of Washington to the Secretary of the Interior on July 1, 1986.

By Tribal Resolution No. 1986-245 dated May 19, 1986, the Colville Business Council of the Confederated Tribes of the Colville Reservation requested that the Secretary of the Interior accept the retrocession offer of the State of Washington.

Ross O. Swimmer,

Assistant Secretary, Indian Affairs.

[FR Doc. 87-5661 Filed 3-16-87; 8:45 am]

BILLING CODE 4310-02-M

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 19, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of supplemental brief of appellant:

David Randall Priest (#951702)
Airway Heights Corrections Center
PO Box 2049
Airway Heights WA 99001

E-mail: laurachuang@gmail.com
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