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No. 34563-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

GERALD CAYENNE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR GRAYS HARBOR COUNTY

The Honorable David Foscue

BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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A. ASSIGNMENTS OF ERROR

The trial court exceeded its authority in ordering a condition of his sentence that Mr. Cayenne, a member of the Chehalis Tribe, not possess gill nets on or off the reservation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Because of the rights regarding on-reservation fishing reserved the Chehalis Tribe in the Executive Order creating its reservation, the State cannot limit exercise of those rights other than for limited and necessary conservation measures. As a condition of his sentence, the trial court barred Mr. Cayenne from owning gill nets on or off the reservation. Did the trial court exceed its authority.

C. STATEMENT OF CASE

Mr. Cayenne was arrested after officers with the Washington Department of Fish and Wildlife observed him twice setting a gill net in the Chehalis River in an area off the Chehalis Reservation. 2/28/06 RP 7-17.

Mr. Cayenne is an enrolled member of the Chehalis Tribe. 2/28/06 RP 22. Gill nets are sold "by the bail[]" by tribe for use on the Chehalis Reservation. 3/1/06 RP 5.

The State charged Mr. Cayenne with two counts of first degree unlawful use of nets to take fish. CP 8-9. A jury convicted him of one count but was unable to reach a verdict on the second. CP 14-15.

D. ARGUMENT

THE CONDITION OF SENTENCE THAT MR. CAYENNE NOT POSSESS GILL NETS IS CONTRARY TO CONTROLLING FEDERAL LAW

1. As a condition of the sentence the trial court barred Mr. Cayenne from owning gill nets on and off the Chehalis Reservation. The Judgment and Sentence provides that as a condition of his sentence Mr. Cayenne "shall not own any gill net." In it oral ruling the court elaborated "I am going to prohibit you from having a net as a condition of this. No gill nets." 3/1/06 RP 5. When defense counsel sought clarification of whether that prohibition applied on the Chehalis reservation as well, the court responded

> I am going to make it a condition that he have no gill nets period. I don't know that they are going to catch him on the reservation. I don't know what I would do with - - I don't think he should have a gill net. I think he has forfeited the right to do that.

Id.

2. The sentencing court exceeded its authority by prohibiting Mr. Cayenne's possession of gill nets on the Chehalis Reservation.

Because all sentencing authority is derived from and limited by statute, a sentencing court cannot impose a sentence in excess of that authority. In re the Personal Restraint of Fleming, 129 Wn.2d 529, 919 P.2d 66 (1996); In re the Personal Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Where a sentence exceeds the court's authority, the defendant is entitled to be resentenced. In re the Personal Restraint of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002); Carle, 93 Wn.2d at 33.

Unlike many other reservations in Washington created by treaties, the Chehalis Reservation was created by two executive orders, one in 1864 and the second in 1886. See, Confederated Tribes of the Chehalis Reservation, et al. v. United States, 96 F.3d 334, 338-39 (9th Cir. 1996), cert denied, 520 U.S. 1168 (1997); State v. Stritmatter, 102 Wn.2d 516, 519, 688 P.2d 499 (1984) (citing 1 Indian Affairs, Laws, and Treaties, 901-04 (Kappler ed. 1904)). Most of the treaties contained language guaranteeing the signatory tribes the "right of taking fish at usual and accustomed grounds and stations . . . in common with the all citizens of the territory." Stritmatter, 92 Wn.2d at 942 (citing Treaty with the Nisqually &c. Other Tribes, art. III, Dec. 26, 1854, 10 Stat 1132, 1133 (Treaty of Medicine Creek)); see also, Stritmatter, 92 Wn.2d

at 942 n.1 (citing treaties with other Washington tribes containing similar language). The United States Supreme Court has interpreted this language as permitting such treaty-tribes the right to take up to 50% of the anadromous fish at there "accustomed" sites both on and off their reservation free of government regulation except for conservation based restrictions. Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 658, 682, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979).

The Chehalis, as a non treaty-tribe, do not enjoy the off-reservation right to fish. Confederated Tribes of the Chehalis Reservation, 96 F.3d at 343. However, language in the 1886 executive order creating the Chehalis Reservation provides that the land forming the reservation is "set apart . . . for the use and occupation" of the tribe. Stritmatter, 102 Wn.2d at 520 (citing Indian Affairs, Laws, and Treaties, at 904). The Supreme Court has interpreted such language in other similar executive orders as reserving an exclusive on-reservation fishing right. Alaska Pac. Fisheries v. United States, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918); Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). The nature of this right is defined by

its exercise prior to creation of the reservation. Stritmatter, 102 Wn.2d at 520-21.

Because the Chehalis Tribe has historically fished for both subsistence and commercial purposes, Stritmatter concluded the State's ability to regulate the tribe's exclusive on-reservation rights was extremely limited and "must be a necessary conservation measure and must also be the least restrictive means available for preserving area fisheries from irreparable harm." 102 Wn.2d at 522 (citing United States v. Michigan, 653 F.2d 277, 279 (6th Cir.), cert. denied, 454 U.S. 1124 (1981)). Moreover, the State bears the burden of proving any regulation of commercial fishing by Native Americans is a necessary conservation measure. Antoine v. Washington, 420 U.S. 194, 207, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975). Finally, the fact the Stritmatter reversed the criminal conviction of a tribal member, convicted for violating a regulation which the Court found improperly infringed upon the tribe's fishing rights, demonstrates that the exclusive right to fish is a personal right of individual tribal members and not just of the tribe collectively.

3. Because Mr. Cayenne's sentence is in excess of the trial court's authority, the Court must reverse the sentence. The trial court's order barring Mr. Cayenne's use of gill nets had nothing to do with conservation. Instead, the court imposed this broad prohibition simply as punishment, finding Mr. Cayenne "has forfeited his right to do that." 3/1/06 RP 5. Because it was not limited to conservation purposes, the court's restriction is "invalid exercise of the State's power as it operate[s] against the Chehalis Tribe's on-reservation fishing." Stritmatter, 102 Wn.2d at 522.

Because the court lacked the authority to restrict Mr. Cayenne's on-reservation fishing rights, the prohibition that he not possess gill nets on or off the reservation is improper. This condition of Mr. Cayenne's sentence must be reversed. Goodwin, 146 Wn.2d at 869; Carle, 93 Wn.2d at 33.

E. CONCLUSION

For the reasons above the Court should reverse Mr. Cayenne's sentence.

Respectfully submitted this 19th day of July, 2006.

GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

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DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 34563-3-II
	)	
GERALD CAYENNE,	)	
	)	
APPELLANT.	)	

DECLARATION OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 19TH DAY OF JULY, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	HAROLD S. MENEFEE, DPA GRAYS HARBOR CO. PROSECUTOR'S OFFICE 102 W. BROADWAY AVENUE, ROOM 102 MONTESANO, WA 98563-3621	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	GERALD CAYENNE 411 N NEWTON OAKVILLE, WA 98568	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF JULY, 2006.

X_____

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