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Case No. 87376-3


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IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ALLEN CLARK

Petitioner.

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

**BRIEF OF APPELLANT
ANSWERING AMICUS
CURIAE WASHINGTON
ASSOCIATION OF
PROSECUTING ATTORNEYS**

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A. INTRODUCTION

Appellant Michael Clark writes to answer the amicus brief of the Washington Association of Prosecuting Attorneys (“WAPA”). While the elected prosecuting attorneys of Washington have prosecuting authority, the prosecuting attorneys are also the legal representatives of the county commissioners, which have traditionally asked courts to take narrow views of Indian sovereignty in their power struggles over civil regulatory authority and issues of taxation. See e.g., *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992) (County officials unsuccessfully argued that counties can collect excise tax for fee land sold by Indians.) See also *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989) (County was a party arguing against Indian authority over zoning.) *Lummi Indian Tribe v. Whatcom County, Wash.*, 5 F.3d 1355, 1357 (9th Cir. 1993) (Arguing unsuccessfully as to the taxation of Indian land.) There is a delicate balance between the Indian tribes and county governments in this State. WAPA argues that involving the Tribal Courts in search warrants would

present theoretical problems for such things as jury summonses and subpoenas. We disagree. The consequence of the holding they suggest would greatly diminish the existence of our Indian Courts, and the sovereignty of the Native peoples of the Northwest.

B. ARGUMENT

1. The Law Does Not Support the Arguments Advanced by Washington Association of Prosecuting Attorneys.

WAPA cites to the fact that the Colville Tribes have apparently made a revision to their code governing search warrants. We can infer that the change was an effort by the Colville Confederated Tribes to make it abundantly clear that they are willing to have their judges consider search warrants presented by law enforcement of the State of Washington.

However this change was unnecessary because the Tribal Code section 1-1-102 was already in effect, which read:

All judges and personnel of the Tribal Bar shall cooperate with all branches of the BIA, with all federal, state, county and municipal agencies, when such cooperation is consistent with the Code, but shall ever bear in mind that their primary responsibility is to people of the Tribes.

It is remarkable that the Tribes had this unilateral provision. Washington State does not have such a provision in its laws pledging cooperation with other entities. For the City of Omak to ignore this provision entirely shows their unwillingness to work with the Tribes. WAPA points out that 2-1-35 of the previous search warrant code only authorized warrants when there is an “offense against the Tribes.” This is correct. However, burglary¹ and theft are both illegal under Tribal law.

3-1-41 Burglary. Any person who shall enter or remain unlawfully in a building, structure, or vehicle with the purpose of committing an offense therein, unless he is licensed or privileged to enter, shall be guilty of Burglary. Burglary is a Class A offense.

3-1-55 Theft. Any person who shall take the property of another person with intent to steal shall be guilty of Theft. Theft is a Class B offense.

There was absolutely no impediment prohibiting the city police in Omak from obtaining a tribal search warrant. WAPA asks this court to adopt a rule that essentially allows the City of Omak to pretend like the reservation does not exist when it comes to search warrants. This view that sovereignty should be diminished (in place of cooperation) would be a dangerous precedent, and it is not consistent with cases prior to, or subsequent to, *Nevada v. Hicks*.

¹ Clark was acquitted of the burglary.

WAPA relies on dicta in the case of *Nevada v. Hicks*, 533 U.S. 353, 356, 121 S. Ct. 2304, 2308, 150 L. Ed. 2d 398 (2001). WAPA cites the case of *State v. Harrison*, 148 N.M. 500, 238 P.3d 869, 878 (2010) (WAPA Br. at 8) for the proposition that the language of *Hicks* is not dicta. However, *Harrison* is talking about different language within *Hicks*; in *Harrison*, the Supreme Court of New Mexico said that the *Hicks* language about the ability of officers to enter the reservation was not dicta. *Id.* at 878. The *Harrison* case has nothing to do with search warrants. The case was about a motion to suppress field sobriety tests because the state officer followed the defendant onto the reservation and detained him. *Id.*, 148 N.M. 500, 503, 238 P.3d 869, 872.

WAPA argues: “Notably, the State does not need title to a residence or factory to serve process. Private ownership does not remove a home from Washington’s governmental interest or territory.” WAPA Br. at 9. This comparison reduces Indian tribes to polities with no sovereignty. The Indian tribes of Washington are not just private land owners, real estate developers, or public development authorities. They are sovereign governments by treaty or by executive order. It has even been said that tribes have “a status higher than that of states.” Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959).

WAPA cites the unpublished federal court case of *Confederated Tribes and Bands of the Yakima Nation v. Holder*, No CV-11-3028-RMP, 2012 U.S. Dist. Lexis 35304 (Mar. 15, 2012). WAPA Br. at 10. The court in that case rejected a temporary restraining order that would prohibit law enforcement agencies from entering the Yakima Nation to search for, or arrest, enrolled members. While this is a different issue than the case at bar, it is interesting to read the judge ruling at the end of the opinion. Judge Peterson writes:

...the Court's unwillingness to enter an injunction should not be construed as an invitation to the County to ignore the jurisdictional concerns raised by the Nation in the materials supporting this motion. It appears that the parties have the capacity to resolve many of their concerns by finding common ground through their shared interest in investigating and punishing crime. To that end, an agreement or memorandum of understanding respecting the jurisdictional authority of both parties could clarify what the County refers to as a "jurisdictional maze."

Id. The denial of a temporary restraining order is not a final adjudication on the merits. The opinion does not seem to support the rule of law that WAPA is asking this court to adopt, i.e. that state law enforcement officers are free to ignore the tribal warrant procedures and pretend like they do not exist.

WAPA cites the case of *State ex rel. Suthers v. Cash Advance & Preferred Cash Loans*, 205 P.3d 389, 402-03 (Colo. App. 2008). WAPA Br. at 11. That case is distinguishable. In *Suthers*, the court upheld the

validity of State subpoenas on an Indian reservation, but explained that the “Attorney General’s investigation concerns off-reservation activity...” and the “subpoenas do not authorize state agents to *invade the territory of the reservation* to obtain documents. Rather, they require production of documents in court, outside the reservation.” *Id.*, 205 P.3d 389, 403. “In the case at bar, Clark was suspected of burglarizing a railroad depot on the reservation, and the Omak city police not only “invaded the territory of the reservation” but they entered into his home on trust land.

2. The Public Policy Arguments Advanced by Washington Association of Prosecuting Attorneys Should Be Rejected.

WAPA argues that recognizing the need for a search warrant signed by a tribal judge would have harmful effects on the judicial system, and would harm the validity of subpoenas, summonses, and protection orders. However, the law is already somewhat convoluted on this subject. This is clear from reading all the legal precedents cited by all parties. The issues can be fought out in the courts and decided on a case-by-case basis. However, there is also the solution of intergovernmental cooperation as envisioned by section 1-1-102 of the Colville Tribal Code, and as suggested by Judge Peterson in the Yakima federal case cited by WAPA. WAPA is correct in that entering into such agreements is the choice of “state and local

legislative or executive branches...” WAPA Br. at 17. However, WAPA should not argue that confusion will ensue if this court adopts a holding similar to the holding in *State v. Mathews*, 133 Idaho 300 (1999).

It is illustrative to look at the way the City of Omak and Okanogan County work with the Colville Tribes on land use issues. In 1989, the U.S. Supreme court arguably created confusion when it created a hazy legal test and recognized that part of tribal sovereignty was allowing tribes to have limited civil regulatory jurisdiction over land use activity by non-tribal members on fee land. See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989). However, rather than creating legal confusion, many tribes, cities, and counties entered joint land use agreements. For example, the City of Omak and Okanogan County entered into a cooperative land use agreement with the Colville Tribes in 1992. See Omak City Resolution 32-92.²

Extinguishing Tribal sovereignty is not an appropriate solution to these jurisdictional issues. It should be noted that issues of subpoena power, summonses, protection orders, and search warrants are similarly complex when dealing between state lines of the 50 states. No one is suggesting that we do away with Idaho’s and Oregon’s jurisdictional sovereignty in relation

² See “Land Use Planning Agreement” (listed 7th item down) at http://www.omakcity.com/interlocal_agreement.html (last visited on January 9th, 2013.)

to our state. WAPA might bemoan the jurisdictional complexities of conducting law enforcement on a patchwork jurisdiction of fee and trust land of an Indian reservation. However, it could be said that it was the State of Washington that created this “problem.” The State had the option of assuming full criminal jurisdiction under Public Law 280³, but instead decided not to have jurisdiction over crimes on trust land as now embodied in RCW 37.12.010.

The Tribal courts of this state are perfectly capable of reviewing search warrant affidavits and issuing warrants. This function that a court performs is exceedingly simple compared to the other functions of a tribal court such as child custody issues, criminal trials and sentencing, enrollment issues, and zoning and permitting issues.

WAPA argues that “[t]ribal courts, at least as they are now composed, did not exist when either the federal or state constitutions were adopted.” WAPA Br. at 15. However, the Colville Indian Reservation was established by President Grant in 1872 before Washington was even a state. *Antoine v. Washington*, 420 U.S. 194, 197, 95 S. Ct. 944, 947, 43 L. Ed. 2d 129 (1975). As one scholar has explained:

[T]he inaccurate perception of most Europeans and Euro-Americans toward tribal nations was that they were largely lawless, anarchical societies lacking even rudimentary systems of law and order. ... The

³ 25 U.S.C.A. § 1321

reality, however, is that tribes have had their own very effective systems of law and order since long before European contact.

David E. Wilkins & Heidi Kiiwetinepinesiik Stark, *American Indian Politics and the American Political System* 73 (3d ed. 2011). The Indian tribes are not new to handling criminal cases. The federal government has no common law jurisdiction over criminal offense on the reservations. *See In re Crow Dog*, 109 U.S. 556 (1883). “The principle that a State has not criminal jurisdiction over offenses involving Indians committed on an Indian Reservation, unless such jurisdiction has been granted by Congress, is well established by a line of cases that reaches back to the earliest years of the Republic.” Fred A Seaton & Elmer Bennett, *Federal Indian Law*, 446 (2008).

WAPA argues that there are practical problems with obtaining tribal search warrants because the court rules, codes, and constitutions for all tribes are not online. WAPA explains that there may be difficulty in ascertaining ownership, that judge may not be available for telephonic search warrants, may have limited hours, there may be non-lawyer judges, and there may not be an ability to seal documents to protect investigations. We don't know this to be true at all. The Colville Code provides:

1-1-144 Means to Carry Jurisdiction Into Effect: When jurisdiction is vested in the Court, all the means necessary to carry into effect are also given and in the exercise of this jurisdiction, if the course of proceeding is not specified in this Code, any suitable

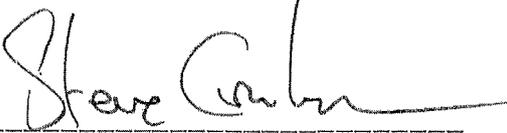
process or mode of proceeding may be adopted which appears most conformable to the spirit of Tribal Law.

The day-to-day life of a law enforcement officer is not going to involve more than two or three Indian reservations, and in the case of the City of Omak, just one. All court rules and codes may not be online, but this is also true of other governments of Washington. There is no requirement that governmental entities in Washington have their codes online. Local prosecutors should already have these codes in their libraries, or their county libraries.

C. Conclusion.

In conclusion, we would ask that this court overturn the decision of the Court of Appeals.

DATED this 10th day of January, 2013.

By 
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I, Stephen Graham, swear under penalty of perjury under the laws of the State of Washington that I served a copy of Appellant's Supplemental Brief by postage paid, first class, U.S. Mail, on the following persons:

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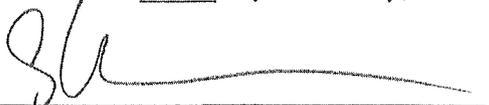
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Dear Clerk of Supreme Court,
Please accept the attached brief of Michael Clark answering the amicus WAPA for filing.
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