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NOV 04 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 295087
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
RESPONDENT,
V.
MICHAEL ALLEN CLARK
APPELLANT.

RESPONDENT'S REPLY BRIEF

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by not compelling Native Americans living on the Colville Indian Reservation to appear for jury service.

2. The trial court erred by not suppressing the search of the Appellant's trailer located on trust land within the interior boundaries of the Colville Indian Reservation.

B. ANSWERS TO ASSIGNMENTS OF ERROR

1. The trial court properly denied the motion to reconfigure jury venire as it was not supported by facts or legal authority.

2. The trial court properly denied the motion to suppress evidence as the Superior Court had jurisdiction to issue a search warrant.

II. STATEMENT OF THE CASE

The Respondent is satisfied that the Appellant's statement of the case provides an adequate outline of the procedural and substantive facts relevant to the issues presented. Pursuant to RAP 10.3(b) the Respondent shall not set forth an additional facts section. The Respondent shall refer to specific areas of the record.

III. ARGUMENT

A. The trial court properly denied the Appellants motion to reconfigure jury venire as it was unsupported by facts or law.

The Appellant argues that the current system of picking a jury in Okanogan County does not properly summon Native Americans living on trust land to appear for jury service. More specifically, the argument is that a superior court jury summons does not compel the attendance of Native Americans living on trust land and, therefore, they are “excluded.” The Appellant’s brief does not cite to the record with regards to the pre-trial hearing on this matter and only briefly cites to the record at trial.

A defendant in a criminal trial has the right to be tried by an impartial 12 person jury. State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 70 (1995). However a defendant has no right to be tried by a particular juror or by a particular jury. Gentry at 615 (citations omitted). Purposeful discrimination in the selection of a jury panel founded upon race must be proven. State v. Aleck, 10 Wn.App. 796, 799, 520 P.2d 645 (1974). The fact that the jury panel contains no non-Caucasion members is insufficient in itself to show discrimination. Aleck at 799.

Juries in superior courts throughout Washington are drawn from a master jury list. Master jury lists are comprised of all

registered voters and holders of drivers licenses residing in the county. R.C.W. 2.36.054. The burden of proof is on the challenger to show the master jury list is not representative, excluding an identifiable population group. State v. Cienfuegos, 144 Wn.2d 222, 231-232, 25 P.3d 1011 (2001)

Where the selection process is in substantial compliance with the governing statutes, the defendant must show prejudice. State v. Tingdale, 117 Wn.2d 595, 599, 817 P.2d 850 (1991). A higher court reviews a trial court's ruling regarding challenges to the venire process for abuse of discretion. Tingdale at 600.

At the pre-trial hearing, the only fact that the Appellant brought to the table was census data showing Native Americans make up 11% of Okanogan County. CP 78. But as the trial court aptly noted, many Native Americans live off the reservation or are not enrolled, or both. RP 53, CP 46-47. There is no statistical information on the percentage of Native Americans that respond as jurors. RP 55, CP 46-47. The Appellant also argued that no enrolled tribal members appeared for the jury pool, but put forth no other facts. RP 159. When looking at the whole of the trial court's findings in light of the evidence put forth by the Appellant, put simply, the Appellant failed then and now to show or even attempt to show the jury selection process was marred by prejudice or discrimination.

With no facts to back his argument, the Appellant attempts to hinge his argument on the premise that the jury summons issued by the Okanogan Clerk's office mail are not valid as to tribal members living on trust land. To support this argument the Defendant relies on North Sea Products v. Clipper Seafood, 92 Wn.2d 236, 595 P.2d 939 (1979). That case is distinguishable.

In North Sea Products the Superior Court of Whatcom County issued a writ of garnishment naming business and political entities of the Lummi Tribe as garnishees asking them to withhold wages of an employee. In ruling for the Lummi Tribe the court noted that Indian tribes have been recognized as possessing the common-law immunity from suit which has been traditionally enjoyed by sovereign powers. This is not a case where the State is attempting to bring a civil action against a political or business entity of the Colville Confederated Tribe, rather the State is issuing a summons for an individual living within the boundaries of Okanogan County.

It is also important to note that it is a criminal offense to intentionally fail to appear for jury duty. RCW 2.36.170. There is no valid argument that can be made that the State does not have criminal jurisdiction over a tribal member who commits a crime off of trust land. The Appellant argues that the tribal member may simply throw the summons away without penalty. However, the crime is committed by failing to appear at the courthouse for jury service, not

throwing the summons away. The Appellant's argument that the summons is unenforceable fails.

B. The trial court properly denied the Appellant's motion to suppress as the Superior Court had authority to issue a search warrant for property located on trust land but containing evidence of an off-reservation crime.

The Appellant argues that local law enforcement have a duty to seek a Tribal court warrant when executing a search on trust land. The Appellant fails to provide any law or reasonable argument to change current law in support of that contention.

As noted in the trial court's findings, the facts relevant to this issue are uncontested. CP 48 The Appellant is a tribal member of the Colville Confederated Tribes. RP 42, CP 48. The crime he was convicted of was committed on fee land, not trust land. RP 29-30, CP 49. The search warrant was issued for property sited on trust land within the boundaries of the Colville Indian reservation, and that property was owned by a tribal member. RP 27, CP 48. The trial court concluded the State had jurisdiction over the crime and, flowing from that, had jurisdiction to issue a search warrant for tribal trust property. CP 49.

Generally, the superior court has original jurisdiction in all criminal felony cases and in all proceedings in which jurisdiction has not been vested exclusively in some other court. Wash. Const., art. IV, § 6. In 1963, with regards to reservation lands the Washington Legislature

extended its jurisdiction to include state criminal and civil jurisdiction over all non-Indians in Indian country, Indians on fee-patented land on reservations, and Indians on tribally-owned or individually allotted lands held in trust by the federal government. RCW 37.12.010, Quinault Tribe of Indians of Quinault Reservation in State of Wash. v. Gallagher, 368 F.2d 648, 651-52 State v. Sohapp, 110 Wash.2d 907, 909, 757 P.2d 509 (1988). (emphasis added).

To be clear, the Appellant is not challenging criminal jurisdiction over the crime. Rather he is arguing that a warrant issued by a tribal court is needed to execute a search warrant on the reservation. That argument contradicts the law as set out in by the U.S. Supreme Court in Nevada vs. Hicks, 533 U.S. 353, 121 S.Ct. 2304 (2001) as well as the ruling of the court in the Idaho case of State v. Mathews cited by the Appellant.

In Hicks the State of Nevada and State officials brought action against member of Fallon Paiute-Shoshone Tribe and Fallon Tribal Court, seeking declaratory judgment that Tribal Court lacked jurisdiction over tribal member's civil rights and tort action filed against State officials in their individual capacities arising from execution of search warrant on allotted land within reservation for evidence of off-reservation poaching crime. Ruling that state courts have jurisdiction to issue the warrants, the Supreme Court concluded that tribal authority to regulate state officers in executing process

related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations-to "the right to make laws and be ruled by them." Hicks at 364. The Court also noted that State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government. Hicks at 364.

The Appellant relies on the pre-Hicks case of State v. Mathews, 133 Idaho 300 (1999) to support his argument, noting that the case stands for the proposition that 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. Appellant's Brief 12. However, Mathews also states that where a state court has jurisdiction over the underlying crime which was committed on an Indian reservation, the state court has jurisdiction to issue a warrant to search an area within the exterior boundaries of the reservation. Mathews at 364.

Of course neither of these propositions were particularly helpful to the Mathews court as that case, just as in Hicks and this case, involved issuance of a search warrant for a crime the state did have jurisdiction over a crime committed off the reservation. Noting that the matter hadn't been addressed by federal statute or the U.S. Supreme Court, the Mathews court applied a preemption analysis

and ultimately came to the same conclusion as the Hicks court, upholding the state issued warrant.

Hicks is clearly the controlling law in this instance and is clearly supports the trial courts conclusion that the Superior Court had jurisdiction to issue the search warrant. Putting the discussion of the usefulness of Mathews, an Idaho case, aside, the ruling in that case supports the State's position.

IV. CONCLUSION

The trial court appropriately denied the Appellants motion to suppress as the Court clearly had jurisdiction to issue the warrant in connection with an off-reservation crime. The trial court also appropriately denied the Appellants motion with regards to jury venire as the Appellant utterly failed to show any prejudice or discrimination in jury selection. For these reasons the State respectfully requests that the Appellant's conviction be upheld.

Dated this 3rd day of November, 2011

Respectfully Submitted by:



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