

90906-7

No. 44654-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Howard Shale,

Appellant.

Jefferson County Superior Court

Cause No. 12-1-00194-0

The Honorable Judge Keith Harper

Appellant's Supplemental Brief

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SUPPLEMENTAL ISSUES AND ASSIGNMENTS OF ERROR

1. The state's exercise of authority, requiring Mr. Shale to register as a sex offender while living on the Quinault reservation, violated the supremacy clause and the federal government's plenary power over Indian affairs.
2. The state does not have civil regulatory jurisdiction to require persons living on the Quinault reservation to register as sex offenders.

ISSUE 1: The federal government has granted states the authority to regulate sex offender registration in Indian country, but only when a tribe elects not to do so itself under the Sex Offender Registration and Notification Act (SORNA). The Quinault Nation has elected to create a tribal sex offender registry under SORNA, and Mr. Shale complied with tribal registration requirements. Did the state lack civil regulatory authority to require Mr. Shale to register as a sex offender while living on the Quinault reservation?

3. The Washington legislature has not assumed civil regulatory jurisdiction over sex offender registration in Indian country.

ISSUE 2: The Washington legislature has assumed civil jurisdiction over eight enumerated topics in Indian country, none of which include sex offender registration. Here, the state charged Mr. Shale with failing to register as a sex offender with the Jefferson county sheriff's department while living on the Quinault tribal reservation. Does the state lack civil regulatory authority over sex offender registration on tribal land because it has not enacted a statute assuming such authority?

SUPPLEMENTAL FACTS AND PRIOR PROCEEDINGS

Mr. Shale is an enrolled member of the Confederated Tribes and Bands of the Yakama Nation. RP (02/08/13) 4; Ex. 1. He lives with his grandmother on the Quinault reservation. RP (03/08/13) 25. Mr. Shale is registered as a sex offender with the Quinault tribal sex offender registry. CP 4.

The state charged Mr. Shale with failure to register as a sex offender. The charge arose because he did not register with Jefferson County. CP 1-2. The state did not dispute that the alleged offense took place on the Quinault tribal reservation. RP (02/08/13) 8; CP 8-12.

Mr. Shale moved to dismiss the case for lack of state jurisdiction. RP (02/08/13) 4-5; CP 3-7. The court denied his motion. CP 16-19.

Mr. Shale stipulated to the police reports and the court found him guilty at a bench trial. RP (03/08/13) 23; CP 20. Mr. Shale reserved his right to appeal the jurisdictional question. RP (03/08/13) 18. He timely appealed. CP 29.

A Court of Appeals commissioner denied his appeal. *See* Commissioner's Ruling. Mr. Shale filed a Motion to Modify, and the court granted the motion. Order Granting Motion to Modify.

ARGUMENT

THE STATE LACKS JURISDICTION TO IMPOSE CIVIL REGULATIONS ON SEX OFFENDERS LIVING WITHIN THE QUINAULT RESERVATION.

A. Standard of Review.

Whether a state has jurisdiction over Indian country is a question of law reviewed *de novo*. *State v. Jim*, 156 Wn. App. 39, 41, 230 P.3d 1080 (2010).

B. Under federal law, the state does not have civil regulatory jurisdiction over sex offender registration on the Quinault reservation.

Both the Indian commerce clause and the supremacy clause of the constitution, as well as the federal government's plenary power over Indian affairs, serve to limit the states' authority in Indian Country. U.S. Const. Art. VI, cl. 2, Art. I, § 3, cl. 8, Art. I, § 8, cl. 3; *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 481, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *Bryan v. Itasca Cnty., Minnesota*, 426 U.S. 373, 376, n. 2, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976). Indian tribes also have sovereign power over both their members and their territory. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

The federal government has granted some states, including Washington, limited jurisdiction over some legal areas on Indian

reservations through Public Law 280 (PL 280). *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-08, 107 S.Ct. 1083, 1087, 94 L.Ed.2d 244 (1987) *superseded on other grounds as recognized by Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2027 (2014); *Jim*, 156 Wn. App. at 42. But PL 280 did not grant states civil regulatory authority over Indian country. *Cabazon*, 480 U.S. at 207-08. This is because state civil regulatory power would impermissibly “effect total assimilation of Indian tribes into mainstream America” and would “result in the destruction of tribal institutions and values.” *Id.*¹

¹ The fact that Mr. Shale is a registered member of the Yakama Nation and not of the Quinault Nation does not change this analysis. As outlined in Mr. Shale’s Opening Brief, the federal definition of “Indian” has always included both members of the tribe upon whose reservation the conduct occurs (member Indians) and members of other tribes while on the reservation (non-member Indians). 25 U.S.C. § 1301; 136 Cong. Rec. H13556-01, 1990 WL 206923. Thus, even if the state were prohibited only from regulating sex offender registration by Indians in Indian country, its jurisdiction still would not reach Mr. Shale, a non-member Indian on the Quinault reservation.

Additionally, the *Cabazon* court rejected the argument that the state had jurisdiction to regulate the conduct at issue even though it was undertaken primarily by non-Indians. *Cabazon*, 480 U.S. at 216-17. This was so because the field was preempted by federal regulation on the issue. *Id.* at 217. Unlike the traditional preemption inquiry, analysis into whether federal law preempts state jurisdiction over Indian country is much more likely to find preemption, even when the federal government has not enacted any law on an issue. *See e.g. Bracker*, 448 U.S. at 143-44; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983).

Similarly, states have no civil regulatory authority in Indian country – even over non-Indians -- when such authority would infringe on the tribe’s right to “make their own laws and be ruled by them.” *Bracker*, 448 U.S. at 142; *Cabazon*, 480 U.S. at 216-17; *Mescalero*, 462 U.S. at 337-38.

The extensive federal regulation under the Sex Offender Registration and Notification Act (SORNA), outlined below, similarly preempts here. Additionally, fact that the Quinault tribe has established its own sex offender registry further demonstrates that state jurisdiction over sex offender registration on the Quinault reservation would interfere with tribal sovereignty. Thus, even if Mr. Shale were a non-Indian, the state would still lack civil

Sex offender registration requirements are civil regulations, not criminal laws.² *Smith v. Doe*, 538 U.S. 84, 105, 123 S.Ct. 1140, 1154, 155 L.Ed.2d 164 (2003); *State v. Ward*, 123 Wn.2d 488, 496-507, 869 P.2d 1062 (1994). Accordingly, PL 280 did not grant the states authority to regulate sex offender registration within Indian country. *Cabazon*, 480 U.S. at 207-08.

The federal Sex Offender Registration and Notification Act (SORNA) establishes an extensive scheme for the regulation of sex offender registration. 42 U.S.C. § 16911 *et seq.* SORNA grants Indian tribes jurisdiction over sex offender registration within their reservations, if they elect to enact a tribal registry. 42 U.S.C. § 16927. SORNA grants state authority over sex offender registration within a reservation only if the tribe fails to create a tribal registry within a year of SORNA's enactment date. 42 U.S.C. § 16927(a)(2)(B).

regulatory jurisdiction to require him to register as a sex offender while living on the Quinault reservation.

² A state law is a civil regulation -- over which the state has no jurisdiction in Indian country -- if it merely places constraints on conduct that the state generally permits. *Id.* at 209. The fact that a civil regulation is enforceable by criminal laws does not convert it into a criminal law. *Id.* at 211.² It is not illegal to be a sex offender who has already completed his/her sentence. Sex offender registration requirements merely regulate certain persons by constraining their ability to move without informing the sheriff of their whereabouts. Accordingly, sex offender registration laws are civil, despite the criminal penalties attached to failure to register.

The Quinault Nation elected to create a tribal registry under SORNA. The Nation complied with the timeframe set forth in SORNA. *See* Quinault Tribal Code §§ 12.11.101 – 12.11.703; *see also* Department of Justice, *Tribal Resolutions under the Adam Walsh Child Protection and Safety Act of 2003* (including the Quinault tribe in a list of those that have elected under SORNA to create a tribal sex offender registry within the allotted time).³ Because the tribe created a sex offender registry as required by SORNA, the federal government has not granted Washington state jurisdiction to regulate sex offender registration within the Quinault reservation. 42 U.S.C. § 16927(a)(2)(B).

Mr. Shale was living on the Quinault reservation when his alleged offense took place. RP (02/08/13) 8; CP 8-12. He registered as a sex offender with the Quinault tribal registry. CP 4. The state had no jurisdiction to require him to register as a sex offender with the state registry as well. *Cabazon*, 480 U.S. at 207-08; 42 U.S.C. § 16927(a)(2)(B).

Under SORNA, the state has no civil regulatory authority over sex offenders on Indian reservations. It lacked the power to require Mr. Shale to register as sex offender with the state while he was living on the Quinault reservation. *Cabazon*, 480 U.S. at 207-08; 42 U.S.C. §

³ Available at: http://ojp.gov/smart/pdfs/trigovt_elections.pdf

16927(a)(2)(B). Mr. Shale's failure to register conviction must be reversed.

C. Even if federal law permitted state jurisdiction over sex offender registration in Indian country, the Washington legislature has not assumed such jurisdiction on the Quinault reservation.

PL 280 granted Washington state the option of assuming limited jurisdiction over Indian country. *Jim*, 173 Wn.2d at 679. Washington has leeway to decide whether to accept the jurisdiction authorized by PL 280. *Id.*

Pursuant to PL 280, the Washington legislature adopted jurisdiction over eight specific areas of civil regulation in Indian country:

(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...

RCW 37.13.010.

Sex offender registration is a civil matter. *Smith v. Doe*, 538 U.S. 84, 105, 123 S.Ct. 1140, 1148, 155 L.Ed.2d 164 (2003); *Ward*, 123 Wn.2d at 496-507. Under the canon of *expressio unius est exclusio alterius*, a statute enumerating certain areas must be read to intentionally exclude everything not specified by the legislature. *Ellensburg Cement Products, Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014).

The legislature did not include sex offender registration in the list of assumed civil jurisdiction under PL 280. RCW 37.13.010. Because of this, the state has not assumed regulatory authority over sex offender registration in Indian country. *Id.*; RCW 37.13.010. Thus, the state has no power to require Mr. Shale to register as a sex offender while living on the Quinault reservation.

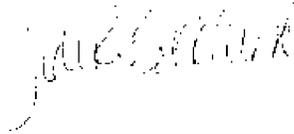
Even if PL 280 had granted Washington civil regulatory authority over sex offender registration in Indian country, the state has not assumed such jurisdiction by statute. RCW 37.13.010. Accordingly, the state had no authority to require Mr. Shale to register as a sex offender while living on the Quinault reservation. RCW 37.13.010. Mr. Shale's failure to register conviction must be reversed.

CONCLUSION

Under federal law, Washington State does not have civil regulatory authority to require persons living on the Quinault reservation to register as sex offenders. In the alternative, even if the state had the option of assuming authority over sex offender registration in Indian country, the Washington legislature has never enacted legislation assuming such authority. Mr. Shale's failure to register conviction must be reversed.

Respectfully submitted on July 24, 2014.

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CERTIFICATE OF SERVICE

I certify that on today's date:

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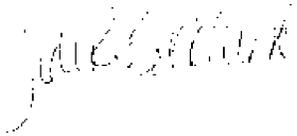
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I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 24, 2014.



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