C.A. No. 07-10379
D.C. No. CR 06-00869-PHX-DGC

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Oleh Rostyslaw Stowbunenko-Saitschenko,

Defendant-Appellant.

Appeal from a Judgment of the United States District Court

District of Arizona

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Other

V. REPLY TO GOVERNMENT'S STATEMENT OF THE CASE

B. Reply to Statement of Facts

The Government indicates that the agents at secondary inspection discovered that the Pembina Nation Little Shell Band of North America "is considered an extremist group" whose "members are known to perpetuate, *inter alia*, insurance fraud schemes and tax evasion." (Brief of Appellee, p. 6)

The source of this information, according to the Government (Brief of Appellee, p. 7), comes from the district court's order denying Stowbunenko's motion for summary judgment (CR71, ER 103) or from paragraph 5 of the Presentence Investigation Report (PSR at ¶ 5). Appellee's brief (Brief of Appellee, p. 6) also directs the court's attention to footnote 3, an NBC investigative report, as a further source for the "extremist group's" fraudulent schemes and tax evasion.

First, the court's order (CR 71, ER 102-107) does not refer to the tribe as being an "extremist group." Nor does the court order label its members as perpetrators of insurance fraud or tax evasion.

Second, the NBC articles, referred to in footnote 3 (Brief of Appellee, p. 6) and provided *in toto* in the brief's addendum, are not of record and inappropriately referred to and included in Appellee's brief. Stowbunenko has filed a motion requesting this Court to strike this footnote and the addendum from the Brief of

Appellee. However, the articles do not brand the entire tribe as an "extremist group" nor does it suggest that all its members are con artists or tax evaders. Rather, it deals with one individual in South Florida who has allegedly bilked immigrants, legal and illegal, into paying money to become a member of the tribe.

Third, it is important to note that the Government dropped its claim that Stowbunenko brought the aliens into or encouraged them to enter the United States for the purpose of financial gain in its Superceding Indictment. The two immigrants who testified on behalf of the Government paid no money to Stowbunenko, nor were they asked by him to pay. Stowbunenko was acquitted by the jury of bulk cash smuggling. The district court at sentencing found that "Stowbunenko was not attempting to persuade individuals to enter the United States for any financial gain on his part." (RT 5/14/07, p. 12, ASER 3)

Fourth, it is true that Stowbunenko's lawyer failed to object to that portion of the PSR that states that at secondary inspection it was discovered that:

> . . . the Pembina Nation Little Shell Band of North America was a government extremist group. . . . Members of this tribe were known to perpetrate insurance fraud schemes and tax evasion.

(PSR, ¶ 5, p. 5)

However, this statement was based upon information the Custom and Border Protection officers learned upon querying an internet search engine regarding the

Pembina tribe. At trial, witnesses testified that the adult occupants presented Pembina Indian tribal documentation to obtain entry. The primary Custom and Border Protection officer, as well as those at secondary inspection, did not recognize the name of the tribe. (RT 3/20/07, pp. 170-171, ASER 5-6) The officers decided to search the internet for information about the tribe. It was there they learned about the allegations of fraud and tax evasion. (RT 3/20/07, p. 252, ASER 8) As one agent admitted on cross-examination, you cannot believe everything you "receive or research" on the Internet. (RT 3/20/07, pp. 251, 259-260, 264, ASER 7, 9-11) No one, at trial, testified that the Pembina nation was an "extremist group" nor that it perpetrated insurance fraud schemes and tax evasion.

The Government notes (Brief of Appellee, pp. 7-8) that Silva-Sandoval "questioned defendant about the notary stamp that was already on the forms, because she thought you had to personally appear in front of a notary for a signature. However, defendant told her it was not necessary, the forms were already signed."

The forms in question are called Identification Certificates (Exhibits 1-2) and appear in Appellant's Excerpts of Record, pp. 144-145. An examination of these certificates, along with the Constructive Notice (Exhibit 3, ER 146) and Affidavit (Exhibit 4, ER 147), indicates that it was Leo Delorme's signature that

was notarized on July 28, 2004. These documents were not designed to have the tribal member's name notarized as claimed by the Government.

The Government agrees (Brief of Appellee, p. 12) that in Stowbunenko's *pro se* summary judgment motion the "[d]efendant's primary argument was that he and his traveling companions were 'legal and lawful Indians, and pursuant to the Treaty of 1863, they have rights that no other Indian tribe has, because they never ceded to the Federal Government any of their Natural, Inalienable and Absolute Rights, including the Right of Free and Unencumbered Border crossings, be it Canada or Mexico.'"

At sentencing, Stowbunenki did move to set aside the verdict and for a new trial based on the ineffective assistance of his appointed attorney as pointed out in Appellee's brief. (Brief of Appellee, p. 12.) Stowbunenko stated: "He's a nice personality, but he failed to produce any evidence at the trial. He failed to disclose some evidence at trial. He failed to produce or summon or subpoena witnesses for the trial as requested by defendant. So therefore the trial–if I were a juror I would have maybe found myself guilty, definitely. A totally, totally ineffective defense." (RT 5/14/07, p. 9, ASER 2)

VII. REPLY TO GOVERNMENT'S ARGUMENTS

A. Reply to Government's Argument that the District Court Properly Denied Defendant's Motion to Dismiss for Lack of Jurisdiction

2. Analysis

Contrary to the Government's argument (Brief of Appellee, p. 17), Stowbunenko does not challenge the jurisdiction of the district court or the appellate court in this appeal. (Appellant's Opening Brief, Statement of Jurisdiction, pp. 1-2)

Contrary to the Government's suggestion (Brief of Appellee, p. 17), a person can be a member of an Indian tribe and also be a citizen of a country. Just because Silva-Sandavol and Carrillo-Hidalgo admitted they were Mexican citizens does not extinguish their claim to be members of the Pembina Nation Little Shell Band. All North American Indians have "dual citizenship," to the extent they are citizens of Canada, the United States or Mexico and also members of their tribe.

The Border Protection officers did not challenge Stowbunenko's naturalized U.S. citizenship because he claimed to be a sovereign member of the tribe. They admitted Stowbunenko to enter because of his citizenship. The two are not mutually exclusive.

As to the notarization of the documents (Exhibits 1-4, ER 144-147), contrary

to the Government's argument (Brief of Appellee, pp. 17-18), they are not "fraudulent on their face." The notarization relates to the signature of Leo Delorme, Chairman General Council, and not to the signatures of Silva-Sandoval or Carillo-Hidalgo. The documents are "fill in the blank" forms and the authenticating signature of the chairman is part of the printed form. This becomes obvious when viewing the Constructive Notice (Exhibit 3, ER 146) and Affidavit (Exhibit 4, ER 147), documents that do not contain the new naturalized members signatures. Each document speaks for itself.

Nor does Stowbunenko claim on appeal, contrary to the Government's argument (Brief of Appellee, p. 18), that his membership in the tribe relieves him of all criminal liability. Instead, he argues that tribal members enjoy an aboriginal right of free passage across the Canadian and Mexican border.

The Government acknowledges (Brief of Appellee, p. 20) that the original inhabitants of the United States enjoyed an aboriginal right of free passage. This right was acknowledged in Article III of the Jay Treaty, entered into in 1794 between Great Britain and the United States, establishing the then boundary line between the United States and Canada.

> It is agreed that it shall at all times be free to his majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to

> pass and repass by land or inland navigation into the respective territories and countries of the two parties, on the continent of America.

McCandless v. United States, 25 F.2d 71, 72 (3rd Cir.1928).

Congress later enacted 8 U.S.C. § 1359 which states:

> Nothing in this subchapter shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.

This statute clarifies that nothing in the subchapter dealing with immigration restrictions should be construed to affect the right of Canadian born Indians to freely pass the borders of the United States. At the same time, Congress extinguished the right of aboriginal free passage of Canadian born American Indians of less than 50 per centum of blood of the American Indian race. Akins v. Saxbe, 380 F.Supp. 1210, 1219 (D.C.Me. 1974).

Likewise, nothing in this subchapter dealing with immigration restriction should be construed to affect the right of Mexican born American Indians to freely pass the borders of the United States.

"Aboriginal title can be extinguished only by Congress or with the authority of Congress. *Dann II*, 706 F.2d at 928-29." United States v. Dann, 873 F.2d 1189, 1196 n. 5 (9th Cir.1989). Congress has not legislated on blood content

requirements for Mexican born American Indians. It has not extinguished the right in this regard to Mexican born American Indians of less than 50 per centum blood of the American Indian race.

Contrary to the Government's claim (Brief of Appellee, p. 20) it is not clear that the tribe need "establish *continuous* exercise of the right [aboriginal fishing rights] since before treaty times. *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176, 180 n.2 (*sic*) (9th Cir.1981) (emphasis added)." The appellate court assumed that the Wahkiakum Band of Chinook Indians possessed an aboriginal fishing right. In footnote 12, in *dictum*, the court opined that "[w]hether or not an aboriginal right exists would be a question of fact to establish continuous exercise of the right since before pre-treaty times." *Id.* at 180. Since the court determined that the claimed aboriginal fishing rights were extinguished, since the band held title to no lands and is not a signatory on any ratified treaty, it was unnecessary for the appellate court to reach the question of continuity.

The Government concludes (Brief of Appellee, pp. 20-21) that the "lineal descendants of the Pembina Indians were no longer even organized as a band or tribe." The Government supports this argument relying on Delorme v. United States, 354 F.3d 810, 812 (8th Cir.2004). This Eighth Circuit opinion cites the following Indian Commission languange. "In 1951, the Commission decided that

the Pembina Indians could pursue their claims even though they were no longer organized as a band. *See Red Lake, Pembina and White Earth Bands, and Minnesota Chippewa Tribe v. United States*, 1 Ind. Cl. Comm. 575, 588 (Ind.Cl.Comm.1951)." Delorme v. United States, 354 F.3d 810, 812 (8th Cir.2004). However, the language of the Indian Claims Commission referred to by the Eighth Circuit opinion allowed the descendants of the original members of the tribe to sue. "Although said Pembina Indians are not presently recognized as an organized band of Indians, its members or their descendants are an identifiable group of American Indians . . ." who were entitled to have their claim heard by the commission. Red Lake, Pembina and White Earth Bands, and Minnesota Chippewa Tribe v. United States, 1 Ind. Cl. Comm. 575, 576, 588 (Ind.Cl.Comm.1951).

American Indian groups may be called tribes or bands. "'[B]and can have no precise definition. Although it generally signifies cohesion and inter–action between families that constitute a group of permanent membership, it may range in size from a few families that are closely related to many families which include some not related, or it may be structured on unilineal or bilateral principles, and interaction between the families may take many forms.'" Steward, The Foundations of Basin-Plateau Shoshonean Society, in Languages and Cultures of Western North

America 113, 115 (E. Swanson ed. 1970). *See* United States v. Dann, 470 U.S. 39, 43 n. 8, 105 S.Ct. 1058, 1061 n. 8 (1985). Appellant's Opening Brief, n. 6, p. 21.

In Delorme v. United States, 354 F.3d 810, 812 (8th Cir.2004), Ronald Delorme, the Hereditary Chief of the Little Shell Band Indians and its Grand Council, lacked standing to sue, for an accounting of funds distributed pursuant to federal appropriations statutes, not because the lineal descendants of the Pembina Indians were no longer organized as a band or tribe as the Governmnet brief suggests. The suit failed because Delorme lacked constitutional standing. His pleadings failed to state the nature of any injury suffered, failed to show his connection to any of the three Little Shell groups, failed to show who actually suffered the injury or whether he was acting on behalf of the tribe or for his individual interests. The case itself had nothing to do with the issue of aboriginal right of free passage.

Finally, the Government forfeited it's ability to raise the "continuous exercise of the right" argument on appeal since it failed to raise the argument below in opposing Stowbunenko's motion. [CR 56, ER 20-25] United States v. Olano, 507 U.S. 725, 732, 113 S.Ct. 1770, 1777 (1993). Nor did the court deny Stowbunenko's motion based upon this claim. [CR 71, ER 102-107]

CONCLUSION

The court erred in denying Stowbunenko's motion for summary judgment. It failed to rule on that portion of the motion requesting dismissal, as a matter of law, for the reason that Silva-Sandoval and Carrillo-Hidalgo, naturalized members of Pembina Nation Little Shell Band, enjoyed an aboriginal right of free passage across the United States border and were wrongfully denied admission into the United States. Resultingly, Stowbunenko's convictions for assisting their entry into the United States should be vacated and the case dismissed with prejudice.

Stowbunenko, in his motion for summary judgment and his objection during the discussion of jury instructions, repeatedly urged the right of aboriginal right of free passage. The instructional error was instrumental to his conviction on both counts and substantially affected his right to a fair trial. Both convictions for assisting the two tribal members illegal entry into the United States should be vacated and the case dismissed with prejudice.

The Government agrees that Stowbunenko is entitled to a resentencing, that the offense should be designated as a misdemeanor and the judgment in his case be amended to reflect that count 1 is a misdemeanor, not a felony, offense.

Dated this 23rd day of June, 2008.

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Form 8. Certificate of Compliance Pursuant to Fed.R.App. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 07-10379

(see next page) **Form Must Be Signed By Attorney or Unrepresented Litigant *Attached to the Back of Each Copy of the Brief***

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6/23/08
Date

Nancy Himelhoch
Signature of Attorney or
Unrepresented Litigant

CERTIFICATE OF SERVICE

I certify that on June 23, 2008, I served an original and fifteen copies of Appellant's Reply Brief and five copies of Appellant's Supplemental Excerpts of Record by mailing them via Federal Express, postage prepaid, to Clerk at the U.S. Court of Appeals, 95 Seventh Street, P.O. Box 193939, San Francisco, CA, 94119-3939.

I certify that on June 23, 2008, I served two copies of Appellant's Reply Brief and one copy of Appellant's Supplemental Excerpts of Record by mailing them via Federal Express, postage prepaid, to Linda Boone, Assistant United States Attorney, counsel for plaintiff-appellee, Office of the United States Attorney, Two Renaissance Square, 40 North Central Avenue, Suite 1200, Phoenix, Arizona 85004-4408.

I certify that on June 23, 2008, I mailed one copy of Appellant's Reply Brief and one copy of Appellant's Supplemental Excerpts of Record, via U.S. mail, postage prepaid, to Oleh Rostyslaw Stowbunenko-Saitschenko, P.O. Box 348205, Sacramento, California 95834.

Dated this 23rd day of June, 2008.

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