IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 09-3913

UNITED STATES OF AMERICA,

APPELLEE,

vs.

PATRICK WHITE MOUNTAIN,

APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION

The Honorable Karen E. Schreier
United States Chief Judge

APPELLEE'S BRIEF

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SUMMARY AND WAIVER OF ORAL ARGUMENT

Patrick White Mountain was indicted on May 22, 2008, for a series of offenses relating to his flight, while armed, from a traffic stop in the Badlands National Park. On July 24, 2009, he pled guilty to count III of the indictment which charged him with assaulting a federal officer in violation of 18 U.S.C. §§ 111(a)(1) and 111(b). He was sentenced on November 30, 2009, to 24 months imprisonment. He appeals his conviction arguing that the court below lacked subject matter jurisdiction.

The United States opposes this argument. The United States also believes the issue before the Court can be resolved without oral argument. If oral argument is allowed, the United States requests equal time to that which is granted to White Mountain.

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JURISDICTIONAL STATEMENT

District court jurisdiction is based upon 18 U.S.C. § 3231 as White Mountain was indicted for an offense against the laws of the United States. Following his plea, the district court imposed sentence upon White Mountain on November 30, 2009, with a written judgment entered on December 1, 2009. White Mountain timely filed his notice of appeal on December 9, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

References to the record will be made as follows: Appellant's Brief "AB," followed by the appropriate page number; Statement of Factual Basis "SFB," followed by the appropriate page number; Plea Agreement "PA," followed by the appropriate paragraph number; Plea Hearing "PH," followed by the appropriate page number; Sentencing Hearing "SH," followed by the appropriate page number; and "PSR," followed by the appropriate paragraph number.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT HAD JURISDICTION OVER AN ASSAULT ON A FEDERAL OFFICER THAT OCCURRED OUTSIDE OF INDIAN COUNTRY NOTWITHSTANDING THE "BAD MEN" PROVISION OF THE 1868 FORT LARAMIE TREATY.

United States v. Drapeau, 414 F.3d 869 (8th Cir. 2005)

United States v. Blue, 722 F.2d 383 (8th Cir. 1983)

United States v. Lawrence, 51 F.3d 150 (8th Cir. 1995)

United States v. Cotton, 535 U.S. 625 (2002)

STATEMENT OF THE CASE

On May 22, 2008, a federal grand jury indicted Patrick White Mountain for a series of violations of Title 18 United States Code, including assaulting a federal officer pursuant to 18 U.S.C. §§ 111(a)(1) and 111(b).[1] White Mountain pled guilty to that charge pursuant to a written plea agreement. On November 30, 2009, the district court sentenced White Mountain to 24 months imprisonment. White Mountain appealed on December 9, 2009. On January 12, 2010, the United States filed a motion to dismiss the appeal which the court granted on January 26, 2010. This Court then *sua sponte* reversed its own order on January 27, 2010.

STATEMENT OF THE FACTS

On October 1, 2007, White Mountain was a passenger in a van that was stopped in the Badlands National Park by Park Service rangers. PSR ¶ 8.[2] In the course of the stop, White Mountain was instructed to restrain several aggressive and agitated dogs. *Id.* Instead of restraining them, White Mountain dropped the dogs' leashes and they subsequently bit two United States Park Service rangers. PSR ¶¶ 12,

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1 White Mountain claims in his brief that the trial court's jurisdiction was based on 18 U.S.C. § 1153, "offenses committed within Indian Country." AB 2. This is factually inaccurate. Neither the charge to which he plead nor any other count of the indictment was alleged to have occurred within Indian Country or to be predicated on § 1153.

2 Because this issue is presented for the first time in appeal, there appears to be no formal record evidence that White Mountain is an Indian. His history of tribal arrests suggests that he is believed to be. PSR ¶¶ 37, 44.

13. White Mountain then fled into the Badlands. PSR ¶ 12. Two officers of the Oglala Sioux Tribal police department located White Mountain on tribal lands some hours later, at which time White Mountain was in possession of marijuana and a firearm. PSR ¶ 15. They took him into custody on the federal charges and turned him over to the Park Service rangers. PSR ¶ 16.

SUMMARY OF THE ARGUMENT

The district court below had subject matter jurisdiction over the offense charged. The offense to which White Mountain pled is a matter of general federal jurisdiction which occurred entirely outside of Indian Country, and no provision of the Fort Laramie Treaty imposed a "notice" obligation upon the United States. Even if such a notice provision were read into the Treaty, that notice provision was abrogated by Congress.

White Mountain was properly held to answer charges that he assaulted a federal officer in violation of Title 18 of the United States Code. The Fort Laramie Treaty of 1868 does not place an affirmative burden upon the United States to notify the tribe where a tribal member is to be charged with an offense occurring entirely outside of Indian Country in order for the United States to perfect jurisdiction.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION OVER AN ASSAULT ON A FEDERAL OFFICER THAT OCCURRED OUTSIDE OF INDIAN COUNTRY NOTWITHSTANDING THE "BAD MEN" PROVISION OF THE 1868 FORT LARAMIE TREATY.

A. STANDARD OF REVIEW.

This Court reviewed subject matter jurisdiction *de novo*. *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995).

B. THE PLAIN LANGUAGE OF THE FORT LARAMIE TREATY OF 1868 DOES NOT CREATE AN OBLIGATION ON THE PART OF THE UNITED STATES TO PROVIDE "NOTICE" TO A TRIBE PRIOR TO ARRESTING AN INDIAN PERSON FOR A VIOLATION OF FEDERAL LAWS.

A district court has jurisdiction "of all crimes cognizable under the authority of the United States." *United States v. Cotton*, 535 U.S. 625, 631 (2002)(holding that defects in an indictment do not deprive a district court of subject matter jurisdiction). This assault on a federal officer, which occurred outside of Indian Country, is such a crime and a defendant cannot negate the jurisdiction of the United States by his actions after the offense.

White Mountain's offense occurred entirely outside of Indian Country, in the Badlands National Park. PSR ¶¶ 12, 13. White Mountain cites no authority for the proposition that his subsequent flight, post-offense, onto reservation lands would in any way affect the jurisdiction of the federal court over himself and his offense. This

Court has long held that the jurisdictional rules governing federal jurisdiction in Indian Country "do not extend or restrict the application of general federal criminal statutes to Indian reservations." *United States v. Blue*, 722 F.2d 383, 384 (8th Cir. 1983).

White Mountain points to the Fort Laramie Treaty of 1868 and suggests that the "bad men" provision "establishes particular procedural requirements to perfect federal jurisdiction." AB 15. That section reads:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent, and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws . . .

Treaty with the Sioux, April 29, 1868, US-Sioux, art. I, 15 Stat. 635.

In *United States v. Drapeau*, 414 F.3d 869, 878 (8th Cir. 2005), this Court held that the Fort Laramie Treaty of 1868 "does not say that the United States must give notice to an Indian tribe before the government may arrest and prosecute a tribal member who has violated the federal drug trafficking laws." 414 F.3d 868, 878 (8th Cir. 2005). The defendant had argued that "the jurisdiction of the federal courts under 18 U.S.C. §§ 1152 and 1153 is valid only if, in a given case, that statutory jurisdiction complies with the jurisdictional prerequisites of the 1868 Fort Laramie Treaty." *Drapeau*, 414 F.3d at 869. *Drapeau* cited to the same "bad men" provision

relied upon by White Mountain in this case. *Id.*

While noting that neither § 1152 nor § 1153 were involved in the case since a drug trafficking offense is a "general federal criminal statute," this Court noted that "the plain language of the Treaty, moreover, does not create the sort of 'notice' requirement that Drapeau envisions": *Id.*

> The Treaty does not say that the United States must give notice to an Indian tribe before the government may arrest and prosecute a tribal member who has violated the federal drug trafficking laws. Rather, the Treaty imposes *an obligation on the tribe* to 'deliver up the wrongdoer to the United States,' upon proof and notice to the tribe.

Id. (emphasis in original).

White Mountain suggests that the Treaty requires notice to the tribe but that the *Drapeau* decision "declines to say just who is responsible for giving the tribe notice." AB 25. As the foregoing quote makes clear, however, *Drapeau* unequivocally rejects the idea that there is a notice requirement placed on the United States. White Mountain also suggests that *Drapeau*'s conclusion "fails to give effect to the bad men clause," essentially asking a panel of this Circuit to overrule the prior holding of a previous panel. The argument contravenes the prior panel rule which provides, "[i]t is a cardinal rule in our Circuit that one panel is bound by the decision of a prior panel." *United States v. Betcher*, 534 F.3d 820, 823-24 (8th Cir. 2008).

Even if the Treaty were construed to impose a notice and request obligation

upon the United States, this Court ruled that 8 U.S.C. § 1401(a)(2), which granted citizenship to Indians, abrogated or modified any Treaty provision requiring such notice and request. *Drapeau*, 414 F.3d at 869 (citing Pub. L. No. 95-432, § 3, 92 Stat. 1046 (1978); 8 U.S.C. § 1401(a)(2)(now § 1401(b)). That statute made Indian persons "subject to all restrictions to which any other American citizen is subject." *Id.* This Court reasoned that "the legislative history and the language of the statute itself are sufficient expression of a clear Congressional intent to abrogate or modify any Treaty provisions to the contrary." *Id.* (citing *United States v. Consolidated Wounded Knee Cases*, 389 F. Supp. 235, 243 (D. Neb. 1975). This Court therefore concluded that the defendant in *Drapeau* was "subject to arrest for violation of the federal drug laws just as is any other American citizen." *Id.*

Here, the same analysis applies. The appellant's jurisdictional claim is precluded by well-established precedent and no meaningful distinction between *Drapeau* and White Mountain can be found in this record.

CONCLUSION

Based upon the foregoing, the United States respectfully requests that this Court affirm White Mountain's conviction in all respects.

Respectfully submitted this 1st day of April, 2010.

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CERTIFICATE OF SERVICE

I, Mark A. Vargo, hereby certify that I served two true and correct copies of the above and foregoing Appellee's Brief on Gary G. Colbath, Assistant Federal Public Defender, 703 Main Street, 2nd Floor, Rapid City, SD 57701, by first class mail, postage prepaid, this 1st day of April, 2010.

Mark A. Vargo

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Corel WordPerfect X3 and is 1429 words in proportional spacing in 14-pt. type and is therefore in compliance with Fed. R. App. P. 32(a)(7). I further certify that I have provided to the Court a CD containing the full text of the brief and to each party separately represented by counsel a CD containing the full text of the brief. The CDs have been scanned for viruses using Trend Micro OfficeScan Version 6.5 and are virus free.

Mark A. Vargo