

Filed
7/5/2011
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IN THE SNOQUALMIE TRIBAL COURT
FOR THE SNOQUALMIE INDIAN RESERVATION
SNOQUALMIE, WASHINGTON

SNOQUALMIE INDIAN TRIBE,

Plaintiff,

v.

ARLENE VENTURA,

KANIUM VENTURA,

Defendants.

NO. SNO-CR-0022-2010

SNO-CR-0021-2010

ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS AND
DENYING PLAINTIFF'S MOTION FOR
RECONSIDERATION

These cases came before the undersigned Judge of the Snoqualmie Tribal Court on March 31, 2011 for hearing on Defendant Arlene Ventura's and Kanium Ventura's Motions to Dismiss ("Defendants Motions"), and again on April 22, 2011 for oral argument of Plaintiff's Motion for Reconsideration of the Tribal Court's oral ruling granting Defendants Motions. The Court, having heard argument, considered the following pleadings:

- Tribe's Response to Defendant's Second Motion for Bill of Particulars and Motion to Compel (filed December 13, 2010);

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- Tribe's Response to Defendant's Supplemental Demand for Discovery (filed February 7, 2011);
- Defendant Kanium Ventura's Motion to Dismiss;
- Defendant Arlene Ventura's Joinder in Kanium Ventura's Motion to Dismiss;
- Tribe's Response to Defendant's Motion to Dismiss;
- Defendant Arlene Ventura's Reply in Support of Motion to Dismiss;
- Defendant Kanium Ventura's Reply in Support of Motion to Dismiss;
- Defendant Kanium Ventura's Supplemental Motion to Dismiss Based on Prosecutorial Misconduct;
- Tribe's Response to Defendant's Motion to Dismiss For Prosecutorial Misconduct;
- Defendant Kanium Ventura's Motion to Dismiss Based on Due Process Violations;
- Tribe's Response to Defendant's Motion to Dismiss Based on Due Process Violations;
- Defendant Arlene Ventura's Supplemental Motion to Dismiss on Ethical, Equal Protection and Selective/Malicious Prosecution Grounds;
- Tribe's Response to Defendant's Supplemental Motion to Dismiss;
- Addendum to Defendant Arlene Ventura's Supplemental Motion to Dismiss on Ethical, Equal Protection and Selective/Malicious Prosecution Grounds;
- Tribe's Response to Addendum to Supplemental Motion to Dismiss;

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- 1 • Defendant Arlene Ventura's Supplemental Motion to Dismiss on Legislative
- 2 Immunity Grounds;
- 3 • Defendant Kanium Ventura's Supplemental Motion to Dismiss on Legislative
- 4 Immunity Grounds;
- 5 • Defendant Arlene Ventura's Supplemental Motion to Dismiss on Spoliation of
- 6 Evidence Grounds;
- 7 • Declaration of Ernest C. Barth, CLI in Support of Defendant Arlene Ventura's
- 8 Supplemental Motion to Dismiss;
- 9 • Tribe's Motion for Reconsideration;
- 10 • Defendant Arlene Ventura's Response to Tribe's Motion for Reconsideration;
- 11 • Defendant Kanium Ventura's Response to Tribe's Motion for Reconsideration;
- 12 • Tribe's Reply to Defendants' Answers to Tribe's Motion for Reconsideration;
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15 and having considered the arguments of counsel, and being fully advised in the premises,
16 makes and enters the following:

17 **FINDINGS OF FACT**

- 18 1. Defendants Arlene Ventura and Kanium Ventura (herein collectively
- 19 "Defendants") are duly elected members of the Snoqualmie Tribal Council (the
- 20 "Council") and Arlene Ventura is the Council's Secretary. Both have served in that
- 21 capacity at all times from December, 2008 until the present;
- 22
- 23 2. The Council is the Snoqualmie Tribe's sole legislative body;
- 24
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- 1 3. During an August 12, 2010 Council meeting (the "Meeting"), Tribal Prosecutor
2 Cynthia Tomkins (the "Prosecutor") made a presentation regarding the status of various
3 matters she was investigating, including the prosecution of Defendants;
4
5 4. During the Prosecutor's presentation, she discussed potential charges, and her
6 philosophy on charging decisions. The Prosecutor remarked that she was "likely to file
7 charges" and that "I don't bring a charge that I think I can't win.";
8
9 5. During the Meeting, Tribal Police Services Unit Supervisor Fuzzy Fletcher
10 ("Mr. Fletcher") made a presentation to the Council asking it to take no action against
11 Tribal Administrator Matt Mattson ("Mr. Mattson") for making unauthorized charges to
12 Tribal credit cards;
13
14 6. Council Secretary Arlene Ventura protested that the issue was presented without
15 notice and objected to Mr. Fletcher's request that the Council take no action regarding
16 the unauthorized charges. Despite Arlene Ventura's objection, the Council took no
17 action to investigate Mr. Mattson's unauthorized use of Tribal credit cards;
18
19 7. The Prosecutor was present when Mr. Mattson's unauthorized use of Tribal
20 credit cards was discussed by the Council and was aware of the issue;
21
22 8. The Prosecutor made no effort to investigate Mr. Mattson's alleged
23 unauthorized use of Tribal credit cards;
24
25 9. On November 8, 2010, the Prosecutor caused an amended criminal complaint to
26 be filed against Defendant Arlene Ventura, charging her with the following offenses:

- a. Charge 1 – Official Misconduct under Tribal Code Act 7, Section 13.3,
 a class "D" offense;

- 1 b. **Charge 2 – Conspiracy to Commit Official Misconduct under Tribal**
2 Code Act 7, Section 16.6, a class “C” offense;
3 c. **Charge 3 – Obtaining a Signature by Deception or Duress under Tribal**
4 Code Act 7, Section 9.4, a class “B” offense;
5 d. **Charge 4 – Conspiracy to Obtain a Signature by Deception or Duress**
6 under Tribal Code Act 7, Section 16.6, a class “C” offense; and
7 e. **Charge 5 – Conspiracy to Commit Forgery under Tribal Code Act 7,**
8 Section 9.12, a class “C” offense.
9

10 10. On November 8, 2010, the Prosecutor caused an amended criminal complaint to
11 be filed against Defendant Kanium Ventura alleging the following offenses:

- 12 a. **Charge 1 – Official Misconduct under Tribal Code Act 7, Section 13.3,**
13 a class “D” offense;
14 b. **Charge 2 – Conspiracy to Commit Official Misconduct under Tribal**
15 Code Act 7, Section 16.6, a class “C” offense;
16 c. **Charge 3 – Conspiracy to Obtain a Signature by Deception or Duress,**
17 under Tribal Code Act 7, Section 16.6, a class “B” offense; and
18 d. **Charge 4 – Conspiracy to Commit Forgery under Tribal Code Act 7,**
19 Section 9.12, a class “C” offense.
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21 11. The Prosecutor’s theory of the case is explained in the Tribe’s Response to
22 Defendant’s Second Motion for Bill of Particulars and Motion to Compel, filed
23 December 13, 2010, and the Tribe’s Response to Defendant’s Supplemental Demand for
24 Discovery, filed February 7, 2011;
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1 12. On November 13, 2010, General Council Resolution 02-2010 ("G.C.
2 Resolution") was passed which suspended the Defendants from the Tribal Council stating
3 that "these [Defendants] have refused to accept responsibility for their actions..." The
4 G.C. Resolution also prohibited Defendants from entering the Tribal Administration
5 building where their offices were located. Defendants were subsequently prohibited from
6 entering the Tribal Administration building under threat of arrest by the City of
7 Snoqualmie Police Department;

8
9 13. On November 26, 2010 the Council issued a Resolution which purported to
10 "recuse" the Tribal Court Clerk from her duties, rendering the Court unable to proceed
11 with these cases until December 13, 2011, when a new Tribal Court Clerk was appointed;

12 14. On December 21, 2010, the Tribal Court issued an oral order allowing
13 inspection of Arlene Ventura's office. The Prosecutor was aware of the order;

14 15. On December 22, 2010, Defendants' counsel submitted a proposed order for
15 inspection of the Tribal Secretary's office to the Prosecutor for review. The next day,
16 December 23, 2010, the Tribal Court issued a written order allowing the inspection. The
17 Prosecutor received a copy of the order the same day;

18 16. On December 30, 2010, the Council passed Resolution 304-2010 which
19 purported to remove the presiding Tribal Court Judge from the related civil cases;

20 17. On or about December 30, 2010, the Tribe's General Counsel, Peter Connick
21 ("Mr. Connick"), filed a motion asking the presiding Tribal Court Judge to recuse herself
22 from the criminal charges filed against the Defendants;

1 18. On December 31, 2010, the presiding Tribal Court Judge removed herself from
2 hearing both the civil and criminal cases in response to the actions of the Council and
3 Mr. Connick. In recusing herself from both actions, the Tribal Court Judge explained:

4 [T]he Court has two pending Motions to Dismiss in both the civil and
5 criminal matters. If the Court were to grant the Motion to Dismiss in the
6 criminal matters, that ruling could easily be viewed as a ruling made in response
7 to the Court's removal from the civil matters. If the Court were to grant the
8 Motion to dismiss in the civil matters, that ruling could easily be viewed as a
9 ruling made to appease the Tribal Council. The intervention of the Tribal
10 Council into these matters has created a perception that makes it impossible for
11 the Court to act without creating the perception that it is subject to inappropriate
12 outside influences.

13 19. Subsequent to the Tribal Court Judge's recusal, the Tribal Court remained
14 without a judge for a period of approximately two weeks, until the appointment of the
15 current presiding Judge. During this period, the Tribal Court was rendered essentially
16 nonfunctional;

17 20. Following passage of the G.C. Resolution, Council Member Nina Repin was
18 allowed to occupy the Tribal Secretary's office. At the time Ms. Repin began her
19 occupancy, she was the subject of a deferred prosecution agreement with the Prosecutor
20 on several criminal charges, including official misconduct. As part of her deferred
21 prosecution agreement, Ms. Repin admitted she had hidden or destroyed official Tribal
22 records;

23 21. On November 23, 2010, the Prosecutor sent a letter to Mr. Fletcher notifying
24 him of the Tribe's duty to preserve evidence relevant to the charges filed in these cases;

25 22. Counsel for Arlene Ventura sent letters to the Prosecutor on November 19, 2010
26 and December 13, 2010 stating the importance of preserving evidence located in the

1 Tribal Secretary's office and on her desktop computer, and requesting the opportunity
2 to be present when the Tribal Secretary's office was entered;

3 23. Despite the Prosecutor's knowledge of the Tribal Court's December 23, 2010
4 order, the Prosecutor did not intervene when the Tribe refused to allow Defendants to
5 inspect the Tribal Secretary's office;

6 24. The Defendant's offices were entered on various occasions by Tribal Council
7 officials, without notice being provided to Defendants, and the Tribal Prosecutor was
8 present for this entry on at least one occasion;

9 25. On March 16, 2011, the Tribal Court, pursuant to additional discovery motions
10 filed by Defendants, granted defense motions for issuance of subpoenas duce tecum for
11 documents, including e-mails on Arlene Ventura's desktop computer, and inspection of
12 the Tribal Secretary's office;

13 26. Pursuant to these orders, Defendants joint computer forensics expert, Allison
14 Goodman ("Ms. Goodman"), determined that Arlene Ventura's desktop computer was
15 accessed several times following issuance of the December 23, 2010 inspection order.
16 Ms. Goodman also determined that e-mails and other evidence located on Arlene
17 Ventura's computer was tampered with or destroyed;

18 27. On the same day as Ms. Goodman's inspection, Ernie Barth ("Mr. Barth"), a
19 private investigator employed by Defendants, inspected the Tribal Secretary's office
20 with defendants. Mr. Barth determined that Official Council files, documents and
21 records had been removed or altered since November 13, 2010;

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1 28. The Court finds that material, potentially exculpatory, evidence originally
2 located in the Tribal Secretary's office and on Arlene Ventura's desktop computer has
3 been removed, altered, or destroyed and cannot be restored or repaired;

4 29. The Prosecutor knew of the importance of this evidence to the defense and
5 failed to take necessary steps to prevent its destruction, alteration or loss; and
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7 30. The Court finds that the Tribal Council repeatedly interfered with the trying of
8 this case through dismissal of court personnel rendering the Tribal Court effectively
9 non-functioning, engaging in inappropriate pretrial publicity, and sanctioning and
10 actively engaging in different prosecution procedures for different defendants, including
11 Mr. Mattson. The Court concludes, based on the Tribal Council's interference, that this
12 case has been political since its inception. Based on the forgoing Findings of Fact, the
13 Court now makes and enters the following:
14

15 CONCLUSIONS OF LAW

16 *A. Legislative Immunity*

17 1. The doctrine of legislative immunity applies to the legislative acts of all Council
18 members, including Defendants Arlene Ventura and Kanium Ventura;

19 2. Where the doctrine of legislative immunity applies, it affords each Council
20 member with substantive immunity as well as a complimentary evidentiary privilege;
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22 3. The protections afforded by the doctrine of legislative immunity extends to all
23 legitimate legislative acts of a Council member;
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1 4. The doctrine of legislative immunity prohibits the Prosecutor and this Court
2 from inquiring into those things said or done by a Council member while he or she was
3 engaged in legislative acts;

4 5. In order to determine the legitimacy of Resolution 2003-2008, a legislative act,
5 this Court must first determine its facial validity and may not inquire further into the
6 internal legislative operations of the Council, provided the act is facially valid;

7 6. Based on the statements made by the Prosecutor at oral argument and in the
8 Tribe's Response to Defendants Motions for Bill of Particulars, all of the charges
9 specified in these cases relate to Defendants' legislative acts;

10 7. Three Council members recalled voting in favor of Resolution 2003-2008 and
11 the then Council Chair recalled signing it. Other Council members did not recall voting
12 on the Resolution or claimed it was never passed. The evidence offered by the
13 Prosecutor fails to establish that Resolution 2003-2008 was facially invalid;

14 8. The Court therefore concludes that Resolution 2003-2008 is facially valid and
15 the Prosecution cannot inquire into the voting of individual Council members based on
16 the doctrine of legislative immunity;

17 9. In order to prove charges against Defendant, the Prosecutor would have to
18 introduce evidence of the Council's internal operations surrounding Resolution 2003-
19 2008, and make inquiries into communications between Council members regarding the
20 same, all of which is privileged under the doctrine of legislative immunity;

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1 10. Based on the charges filed in this case, the doctrine of legislative immunity
2 prohibits the Prosecutor from prosecuting Defendants Arlene Ventura and Kanium
3 Ventura for actions taken in connection with passage of Resolution 2003-2008;

4 11. The doctrine of legislative immunity provides grounds for dismissing all charges
5 against Defendants with prejudice; and
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7 12. As an alternative basis for dismissing the charges alleging Conspiracy to
8 Commit Forgery and/or Obtaining a Signature by Deception or Duress, the Court
9 concludes the Tribe lacks a factual basis to establish forgery, deception or duress as the
10 former Council Chair previously stated he signed Resolution 2003-2008 with the
11 understanding the Tribal Council had voted for it. The Court concludes, based on
12 evidentiary privileges, the Tribe is prohibited from compelling Council members to
13 testify concerning their votes on this issue. Therefore, the Prosecutor cannot establish
14 the elements of deception or forgery.
15

16 ***B. Prosecutorial Misconduct***

17 1. The Prosecutor engaged in unintentional misconduct when she discussed the
18 prosecution of Defendants at the August 10, 2010 Council meeting where Defendants
19 and potential witnesses were present;

20 2. The Tribal Court's December 23, 2010 inspection order was clear and
21 appropriate;
22

23 3. Counsel for Defendants made reasonable and appropriate efforts to advise the
24 Prosecutor to preserve the evidence located in the Tribal Secretary's office and on
25 Arlene Ventura's desktop computer;
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- 1 4. The Prosecutor had a duty to preserve the Tribal Secretary's office until
2 Defendants had an adequate opportunity to investigate the same;
- 3 5. The crimes as alleged by the Prosecutor occurred while Arlene Ventura was
4 serving as Tribal Secretary, and therefore any evidence to support or defend against
5 those allegations would necessarily be found in the Tribal Secretary's office;
- 6 6. Material, potentially exculpatory, evidence formerly located on Arlene
7 Ventura's desktop computer and in the Tribal Secretary's office has been removed,
8 altered or destroyed and its removal or loss is prejudicial to the Defendants;
- 9 7. The Prosecutor's failure to protect the evidentiary materials in the Tribal
10 Secretary's office and Arlene Ventura's desktop computer constitutes willful, flagrant,
11 and blatant misconduct;
- 12 8. The Prosecutor's disregard of the Tribal Court's December 23, 2010 inspection
13 order constitutes willful, flagrant and blatant misconduct;
- 14 9. The Prosecutor's willful, flagrant and blatant misconduct has materially
15 prejudiced Defendants and has unduly prejudiced their right to a fair trial;
- 16 10. The Court finds the Prosecutor's misconduct was willful and flagrant as defined
17 in *U.S. v. Chapman*, 524 F.3d 1073, 1085 (9th Cir. 2008); this misconduct provides
18 independent grounds for dismissing all charges against Defendants with prejudice;
- 19 11. As alternative grounds for granting Defendants' Motions to Dismiss, the Court
20 finds that the Tribal Prosecutor's misconduct has unduly prejudiced Defendants' ability
21 to receive a fair trial. No lesser sanction than dismissal will rectify the violation of
22 Defendants' rights; and
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1 12. The Defendants' Motions to Dismiss pertaining to prosecutorial misconduct,
2 based on due process violations, are denied.

3 NOW, THEREFORE, based on the forgoing Findings of Fact and Conclusions of Law:

4 It is ORDERED that the Tribe's Motion for Reconsideration is DENIED and Defendants
5 Motions to Dismiss are hereby GRANTED. IT IS FURTHER ORDERED that all charges in
6 the above-captioned matters against Defendants Kanium Ventura and Arlene Ventura are
7 DISMISSED WITH PREJUDICE.
8

9 DONE IN OPEN COURT this 5th day of July, 2011.

10 Richard Woodrow
11 The Honorable Richard Woodrow

12 Presented By:

13 GARVBY SCHUBERT BARER

14 WILLIAMS, KASTNER & GIBBS, PLLC

15 By: David H. Smith
16 David H. Smith,
17 Member# STC201023
Attorney for Defendant Arlene Ventura

15 By: Quanah M. Spencer
16 Quanah M. Spencer,
17 Member#STC201021
Attorney for Defendant Kanium Ventura

18 By: _____
19 Cynthia Tomkins,
20 Snoqualmie Tribal Prosecutor

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