

ORIGINAL

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON

Plaintiff,

vs.

JENNIFER YOUDE

Defendant.

No. 11-1-00384-6

ORDER QUASHING SUBPOENA
DUECES TECUM ISSUED AUGUST
26, 2011

The Defendant Jennifer Youde has been charged with delivery of a controlled substance arising out of an arrest that took place within the boundaries of the Tulalip Tribes on February 6, 2010. As Ms. Youde is not Native American, the case was prosecuted via the Cooperative Law Enforcement agreement between Snohomish County and the Tulalip Tribes by the Snohomish County Prosecutor's Office.

Mr. Kradel, counsel for Ms Youde, requested and obtained a subpoena *duces tecum* ("the Subpoena") from this court on August 26, 2011 following a hearing on August 23, 2011. Present at that hearing were Deputy Prosecuting

1 Attorney Sedgwick and Mr. Kradel. Counsel for the Tulalip Tribes did not attend.

2 No objection to the Subpoena was filed at that time.

3
4 The Subpoena required the Tulalip tribes to provide the following: (1) a
5 copy of the recording of the telephonic application for the search warrant, (2)
6 copies of any Tulalip Police Department policies in written or digital form regarding
7 buy/bust operations in general and specifically those targeting individuals who
8 provide medical marijuana, and (3) copies of any and all communications whether
9 in writing by email, text message, or other electronic means between members of
10 the Tulalip Tribal Police Department and other members of that department or of
11 the Tulalip Tribes' Legal Department in regards to medical marijuana and its status
12 on tribal lands.
13

14 The Tribes filed an objection to the Subpoena on September 9, 2011. The
15 defendant filed a response brief on September 16, 2011. A hearing was set for
16 September 23, 2011, at which time the Tulalip tribes filed a formal response to the
17 Subpoena and a Notice of Limited Appearance. In the response, the Tribes,
18 without conceding their right to object to jurisdiction, responded to Parts (1) and (2)
19 of the Subpoena. As to Part (1), the Tribes indicated that they could not respond
20 because the digital record was no longer in existence. As to Part (2), the Tribes
21 responded by indicating that they do not have responsive documents relevant to
22 the case, as the only policy they have regarding buy/bust operations is related to
23 confidential informants and this case had no confidential informant. The Tribes

1 objected to part (3) on the basis that this request was related to attorney client
2 privilege, unduly burdensome, likely to compromise other police investigations,
3 and unlikely to lead to discovery of admissible evidence. The Tribes further
4 argued that the request exceeded the scope of discovery per CrR 4.7 and CrR
5 4.7(e)(1). At the hearing, the Tribes also asserted that they did not have to
6 respond to the Subpoena based on the doctrine of tribal sovereign immunity. This
7 Court took the matter under advisement.

8
9 "As 'domestic dependent nations,' American Indian tribes 'exercise inherent
10 sovereign authority over their members and territories.'" *Foxworthy v. Puyallup*
11 *Tribe of Indians Association*, 141 Wn. App. 221 (2007) (citing *Okla. Tax Comm. v.*
12 *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905,
13 112 L.Ed.2d 1112 (1991)). This inherent sovereignty provides immunity from suit
14 unless there is a clear waiver by the tribe or congressional abrogation. *Santa*
15 *Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S. Ct. 1670, 56 L. Ed. 2d 106.
16 (1978); *Mudarri v. State*, 147 Wn. App. 509 (2009).

17
18 In *Foxworthy*, Court of Appeals described the historical origins of the
19 doctrine of tribal sovereign immunity:
20

21 [u]pon initial contact between indigenous Indian tribes and foreign
22 colonists, even before the formation of the United States,
23 governments recognized tribal sovereignty. Indian tribes retained
their inherent sovereign immunity when the United States formed.
Since its formation, the United States government has acknowledged
Indian tribes. Distinguishing Indian tribes from foreign states, the
Supreme Court more than a century ago described Indian tribes as

1 "domestic dependent nations," engaging in government-to-
2 government relationships with the United States. Federal common
3 law created the doctrine of tribal sovereign immunity. In *United*
4 *States v. United States Fid. and Guar. Co.*, the United States
5 Supreme Court held that, inherent in their retained sovereignty,
6 Indian tribes enjoy an affirmative defense of sovereign immunity.
7 309 U.S. 506, 512-13, 60 S. Ct. 653; 84 L. Ed. 894 (1940). A tribe's
8 sovereign immunity extends to tribal commercial and governmental
activities both on and off the tribe's reservation, and it provides a
defense to suits filed against them in state and federal courts. *Kiowa*
Tribe of Okla. v. Mfg. Techs., 523 U.S. 751, 754-55, 760, 118 S. Ct.
1700, 140 L. Ed. 2d 981 (1998).

9 *Foxworthy*, 141 Wn. App. At 225-26.

10 The *Foxworthy* court also outlined the broad scope of tribal sovereign
11 immunity:

12 Courts have long recognized that tribal immunity is a matter of
13 federal law and is not subject to diminution by the States. . . .
14 Accordingly, Congress maintains the ultimate authority to decide
15 whether, how, and where American Indian tribes may be sued,
16 including the circumstances in which tribes may assert the affirmative
17 defense of sovereign immunity. . . . Modern Congresses have
18 generally continued to promote sovereign immunity for Indian tribes
19 and tribal officials. . . . Waiver of tribal sovereign immunity can arise
20 in only two ways: from a tribe's express waiver or through a
21 Congressional statute expressly abrogating tribal immunity. . . .
Because Congress has been reluctant to revoke tribal sovereignty,
as a practical matter, the tribes themselves generally determine
whether they will waive their sovereign immunity. See Indian Civil
Rights Act, 25 U.S.C. §§ 1321-1322 (requiring tribal consent before a
state can assume criminal or civil jurisdiction over actions involving
an Indian tribe or its members).

22 *Foxworthy*, 141 Wn. App. At 226-27.

23 In this case, the Tribes, have not expressly waived their tribal sovereign
immunity with respect to the Subpoena. The Tribes maintain in their response to

1 part (3) of the Subpoena that the release of this information would impede
2 governmental function of agencies of Tribal government, the Tulalip Police
3 department and Tribal Legal Department.
4

5 This position is consistent with the Ninth Circuit Court of Appeals' ruling in
6 *U.S. v James*, 980 F.2d 1314 (9th Cir. 1992). In *James*, the defendant made a
7 request for records in a criminal case to a Tribal governmental agency. *Id.* at
8 1319. The defendant maintained that the district court erred in quashing the
9 subpoena to the Quinault Indian Nation based upon sovereign immunity. *Id.* The
10 district court had issued a subpoena *duces tecum* and an order to produce
11 documents directed toward Richard Martinez, Director of Social Services of the
12 Quinault Indian Nation. *Id.* The documents requested were related to the victim's
13 alleged alcohol and drug problems which were in the possession of the Quinault
14 Indian Nation Department of Social and Health Services. *Id.* The defendant
15 believed that these documents would help to form the basis of one of his
16 defenses. *Id.* On motion by the Quinault Indian Nation, the district court quashed
17 the subpoena based on tribal sovereign immunity. *Id.*
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19

20 In upholding the quashing of the subpoena the Ninth Circuit indicated that

21 [i]t is clear that Indian tribes' immunity from suit remains intact
22 "absent express and unequivocal waiver of immunity by the tribe or
23 abrogation of tribal immunity by Congress." *Id.* Section 1153(a) does
not provide an "express and unequivocal waiver of immunity." Tribal
immunity is just that: sovereign immunity which attaches to a tribe
because of its status as a dependent domestic nation. *See United*
States v. Wheeler, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d

1 303 (1978). Tribal immunity does not extend to the individual
2 members of the tribe. See *Puyallup Tribe, Inc. v. Washington Game*
3 *Dept.*, 433 U.S. 165, 173, 97 S.Ct. 2616, 2621, 53 L.Ed.2d 667 (1977). By
4 making individual Indians subject to federal prosecution for certain
5 crimes, Congress did not address implicitly, much less explicitly, the
6 amenability of the tribes to the processes of the court in which the
prosecution is commenced. Thus, we conclude that the Quinault
Tribe was possessed of tribal immunity at the time the subpoena
was served, unless the immunity had been waived.

7 *Id.*

8 The waiver of sovereign immunity must be a clear and express waiver and
9 may not be implied. *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*,
10 130 Wn.2d 862, 876 (1996). The defense argues that the Cooperative Law
11 Enforcement Agreement between the Tulalip Tribes of and Snohomish County
12 amounts to an implied waiver by the Tulalip Tribes of its sovereign immunity
13 because it created a shared jurisdictional plan for prosecution of crimes committed
14 on the Tulalip Tribes. However, a close examination of the Agreement
15 demonstrates that this is not the case. On page 3 of the Agreement, both the
16 Tribes and the County expressly state that both sides respect the sovereignty and
17 political integrity of each other. The agreement refers to the Tribes and the County
18 as being called a "full government to government relationship" in regard to criminal
19 jurisdiction on the Reservation. Nowhere in this agreement do the Tribes either
20 expressly or implicitly waive their right to control the policies and procedures of
21 either their Police agency or Legal Department. In fact, the opposite is true.
22 There is only one express waiver of Tribal Sovereign Immunity, on pages 12- 13 of
23

1 the Agreement, in which the Tribes agree to indemnify the County in the event of
2 any insurance claims. The mere fact that the Tribes and the County have chosen
3 to share jurisdiction of the prosecution of crimes does not confer any implied
4 waiver of sovereign immunity on the part of the Tribes.
5

6 The effect of the Tribes' invocation of sovereign immunity is dispositive of
7 the issues before the Court. The Court finds that the Tribes have not expressly or
8 implicitly waived their right to assert sovereign immunity with respect to the
9 subpoena *duces tecum*. The Tribes' objection to Part 3 of the Subpoena implies
10 that, by ordering the response, a vital governmental activity, i.e., the regulation of
11 Tribal police procedures, will be compromised. As a result, the Court will quash
12 the subpoena *duces tecum*. Because the Tribes have successfully invoked
13 sovereign immunity, there is no need to address any of the other issues raised by
14 either party.
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17 Dated this 10th day of October, 2011.
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20 JUDGE RICHARD T. OKRENT
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