

In The
UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 11-3718
Criminal

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH JOSHUA JACKSON,

Appellant.

Appeal from the United States District Court for the
District of Minnesota

BRIEF OF APPELLANT

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

On June 7, 2010, appellant Joseph Jackson was indicted on four counts arising from a shooting that occurred on the Red Lake Reservation in Minnesota. On January 20, 2011, Mr. Jackson plead guilty to one count of Assault with a Dangerous Weapon, and one count of Discharge of a Firearm During the Commission of a Crime of Violence. He admitted that he had assaulted Danielle King by kicking her in the head, and by shooting her in the abdomen. The offense occurred near the Redby Garage and Redby Post Office, on the Red Lake Reservation. Pursuant to the plea agreement, appellant reserved the right to appeal the District Court's Order denying his motion to dismiss for lack of subject matter jurisdiction because the offense occurred on private land that is not part of the Indian reservation.

At sentencing, appellant requested a sentence of 120 months, which is the mandatory minimum for the Discharge of a Firearm offense. The District Court sentenced appellant to 150 months in prison, with a 30 month sentence on the Assault charge consecutive to 120 for the Firearm offense. The District Court rejected appellant's contention that the 18 U.S.C § 3553(a) factors justified a lower sentence. Appellant filed a timely notice of appeal, and requests a reasonable time for oral argument.

JURISDICTIONAL STATEMENT

The Honorable Donovan F. Frank, United States District Court Judge for the District of Minnesota, presided at Mr. Jackson's plea and sentencing. The government invoked the jurisdiction of the district court pursuant to 18 U.S.C. § 3231.

The district court entered judgment on November 30, 2012. Mr. Jackson filed a notice of appeal on December 12, 2011. This notice was timely within the meaning of Federal Rules of Appellate Procedure 4(b). Mr. Jackson invokes the jurisdiction of this court pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

STATEMENT OF ISSUES

- I. WHETHER THE DISTRICT COURT ERRED BY DENYING APPELLANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION?

Yankton v. Gaffey, 188 F.3d 1010 (8th Cir. 1999)

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998)

- II. WHETHER THE SENTENCE OF 150 MONTHS WAS GREATER THAN NECESSARY UNDER THE FACTORS IN 18 U.S.C. § 3553(a).

Gall v. United States, 128 S.Ct. 586 (2007)

Kimbrough v. United States, 128 S.Ct. 558 (2007)

STATEMENT OF THE CASE

On June 7, 2010, the appellant Joseph Jackson was indicted on four counts: Assault with Intent to Commit Murder, two counts of Assault with a Dangerous Weapon (for use of a firearm and shod feet), and Discharge of a Firearm during the Commission of a Crime of Violence. The appellant filed pretrial motions, including a motion to dismiss the indictment for lack of subject matter jurisdiction, arguing that the land where the assault occurred was private land and not part of

the Red Lake Reservation, and therefore not “Indian Country.” After the District Court adopted the Magistrate Judge’s findings and order denying this motion, the appellant entered into a plea agreement requiring pleas to two counts of the indictment. Appellant reserved his right to appeal the District Court order regarding jurisdiction.

The plea agreement allowed for consecutive sentencing on one count of Assault with a Dangerous Weapon and one count of Discharge of a Firearm, which carried a mandatory minimum of ten years. Appellant argued that a reasonable sentence would be the ten year mandatory minimum, with no or little time added for the Assault conviction. The District Court disagreed, and sentenced appellant to a consecutive thirty month sentence, for a total sentence of 150 months. The appellant appeals the sentence and the order denying the motion to dismiss the indictment.

STATEMENT OF FACTS

During the early morning hours of April 29, 2010, appellant Joseph Jackson and Danielle King were in the area of the Redby Garage and Redby Post Office on the Red Lake Indian Reservation in Minnesota. (Plea Transcript¹ at 24). Ms. King had

¹ The following abbreviations will be used throughout for references to the record: “Plea Tr.” for Plea Transcript; “Sent. Tr.” for Sentencing Transcript; “Mot. Tr.” for Motions Hearing Transcript; “CR” for Clerk’s Record; “Add.” For Addendum.

been drinking, and appellant had been using drugs. (Plea Tr. at 32-33, 35). During a brief argument, Ms. King struck appellant with a bottle. (CR at 47). Spurred by anger, appellant assaulted Ms. King by kicking her with his feet, and then by shooting at her with a handgun. She was struck in the abdomen and injured.

In June, 2010, appellant was indicted on four charges arising from the assault. (CR at 1-3). At the motions hearing in July, 2010, appellant moved for dismissal of the indictment, arguing that the offense occurred on privately owned land within the exterior boundaries of the reservation, and that neither the reservation nor the court had jurisdiction over the land. (Mot. Tr. at 10-11). The appellant produced several exhibits to prove that the land was privately owned. (Id. at 8-10). After briefs were filed, the magistrate judge denied the motion to dismiss. (CR at 4-9). The District Court later adopted the magistrate's Report and Recommendation. (CR at 34-35).

Appellant entered a conditional plea to two counts of the indictment on January 20, 2011. As part of the plea agreement, appellant reserved the right to appeal the earlier ruling on the motion to dismiss for lack of jurisdiction. (CR at 41). The plea agreement anticipated a mandatory minimum ten year sentence on count four of the indictment, with a consecutive sentence on count two, with an anticipated guideline range at the high end of 37 – 46 months. (CR at 39).

Prior to sentencing, appellant presented argument that a reasonable sentence under the sentencing statute, 18 U.S.C § 3553(a), would be the 120 month mandatory minimum, with no or little additional time for the second count. (CR at 43-48). Appellant's character and history were discussed at length, and letters were later provided to the court which illustrated appellant's value to his family and community. The court learned that appellant had suffered abuse as a youth, and was forced at a young age to become the man in his family. In addition, at the time of sentencing, the court heard that appellant put himself and his family at risk by providing information that the government later deemed insufficient to warrant a 5K motion. (Sent. Tr. at 27). Despite compelling reasons to grant appellant's request for a substantial reduction from the guideline range, the court instead sentence him to thirty months consecutive to the mandatory minimum ten year sentence. (CR at 56-61). Appellant now appeals the sentence and the order denying his motion to dismiss.

SUMMARY OF ARGUMENT

The Major Crimes Act (MJA) extends federal criminal jurisdiction over offenses committed within Indian country. The appellant is charged with several offenses listed in the MJA, but he should not be forced to defend himself in

criminal court. The land where the offense occurred was removed from the Red Lake Reservation under authority of the Congressional Act of February 8, 1905. In that Act, Congress allowed railroad companies to take title to the land for a railroad line. The land is currently owned privately, and not by the reservation. It is clear that the intent of congress was to diminish the land held by the reservation, and therefore the federal courts do not have jurisdiction over offenses on that land. The case should be remanded for dismissal of the indictment, and the case can be prosecuted in state court.

At sentencing, the district court improperly focused on two factors - promoting respect for the law and providing deterrence – in deciding that the offenses justified a 30 month consecutive sentence. The court failed to properly consider the other factors under 18 U.S.C. § 3553 (a) that supported a lesser sentence, including the appellant’s character and history, and his cooperation with authorities. If the case is not remanded for dismissal of the indictment, it should be remanded for resentencing.

ARGUMENT

I. **THE OFFENSE OCCURRED ON LAND THAT WAS NOT PART OF THE RED LAKE RESERVATION, AND THEREFORE THE INDICTMENT SHOULD HAVE BEEN DISMISSED FOR LACK OF JURISDICTION.**

A. **Standard of Review.**

A challenge to the court's jurisdiction over criminal cases occurring in Indian Country is reviewed de novo. See United States v. Thunder Hawk, 127 F.3d 705, 706 (8th Cir. 1997).

B. **The District Court erred by adopting the Report and Recommendation to deny the motion to dismiss the indictment for lack of jurisdiction.**

In 1905, Congress authorized the Minneapolis, Red Lake, and Manitoba Railway Company to take title to up to 320 acres of land near the southern shore of Lower Red Lake, as well as a corridor of land leading up to that shore, for use in support of a rail line. Act of Feb. 8, 1905, 33 Stat. 708. It was on this land that the Railway Company plotted the town of Redby, at the northern terminus of its railway line at the southern shore of Lower Red Lake. The Act provided that the federal laws prohibiting alcohol in Indian country would remain in effect in the transferred land. Id., sec. 5, Stat. 708. It was on this land, where today the Redby garage and Redby Post Office are, that appellant committed the offense giving rise to the indictment. During his plea, appellant acknowledged that the offense

“occurred near the Redby Garage and the Redby Post Office.” (Plea Tr. at 24).

The District Court conceded for the purpose of argument that the offense occurred near the Redby Garage, as stated by appellant, and that the land continued to be privately owned. (CR at 17).

The fact that a parcel of land on a reservation is owned by a non-Indian does not extinguish tribal or federal subject matter jurisdiction over that parcel. Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 357-58 (1962).

Instead, a parcel of land within the exterior boundaries of a reservation remains Indian country unless an act of Congress removes that parcel from the reservation.

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998). States acquire

jurisdiction over land that is “freed of its reservation status....” Id.(quoting Solem

v. Bartlett, 465 U.S. 463, 467 (1984)). The “touchstone to determine whether a

given statute diminished or retained reservation boundaries is congressional

purpose.” Id. While statutory language is most probative of an intent to diminish a

reservation, the court may “also consider the historical context surrounding the

passage of (an act) and, to a lesser extent, the subsequent treatment of the area in

question and the pattern of settlement there.” Id. at 344. Ambiguities are resolved

“in favor of the Indians” and diminishment is not to be found lightly. Id.

The clear purpose of the Congressional Act of February 8, 1905 was to diminish the Red Lake Reservation by the 320 acres and the additional corridor of land needed for the Railway Company. The Railway Company had “the right to select and take from the lands of the Red Lake Indian Reservation grounds adjacent to its northern terminus...” 33 Stat. 308. By that language, Congress shows an intent to diminish the reservation boundaries. This language is distinguishable from language of an earlier act, in 1894, that opened surplus reservation land to “settlement, entry, and purchase,” and which the Supreme Court found did not evince intent to diminish the reservation. South Dakota, 522 U.S. at 345. Taking “from the lands” of the Reservation, on the other hand, infers a clear intent to remove the land from reservation status.

Further evidence of congressional intent to diminish the reservation is found in the provision of the act stating that the railway land would remain part of the reservation for the purpose of the federal prohibition of alcohol on reservations. Act of Feb. 8, 1905, sec. 5, 33 Stat. 708. The United States already prohibited alcohol on reservation lands. Act of July 23, 1892, 27 Stat. 260; Rosebud Sioux Tribe v. Kneip 430 U.S. 584, 613 (1977). Therefore, Congress did not need to explicitly state that the prohibition would remain in effect, unless there was an understanding that the act diminished the reservation. A sound statutory

construction will not needlessly make an entire section of a statute redundant. See United States v. Stanko, 491 F.3d 408, 413 (8th Cir. 2007)(“The Court will avoid an interpretation of a statute that renders some words altogether redundant, and should avoid a statutory construction that would render another part of the same statute superfluous.” (internal quotations and citations omitted)). Congress added the section about prohibiting alcohol on the lands ceded to the Railway Company because that land was being removed from the reservation.

The historical context of the Act of 1905 adds further support to the argument that Congress intended to diminish the reservation. The Dawes Act, authorizing allotment of tribal lands, had been passed 17 years earlier and allotment efforts were underway in 1905. In 1904, Congress specifically authorized allotment for Red Lake Reservation lands. Act of Feb. 20, 1904, art. IV, 33 Stat. 46. The purpose of allotment was to eliminate reservations and thereby assimilate Native Americans into the majority white society. South Dakota, 522 U.S. at 355. Against this background it is likely that Congress intended to transfer title of the land to the Railway Company as a diminishment of the reservation.

The history behind the Act of 1905 distinguish this case from the facts in Seymour. The Court in Seymour addressed the validity of MCA jurisdiction over land within a reservation that was privately owned by non-Indians. Seymour, 368

U.S. at 357-58. After determining that the non-Indian land was still on the reservation, the Court determined that the land was subject to federal jurisdiction. Id. The Court relied on the language in 18 U.S.C. § 1151 that said “all land within the limits of any Indian reservation...”, even if owned by non-Indians, is Indian country subject to federal criminal jurisdiction. Id. The Red Lake Reservation, like the reservation in Seymour, has not been disestablished by an act of Congress. However, this case is distinguishable from Seymour because the railroad land in Redby was extracted from the reservation lands for a particular use by the Railroad Company. It was not merely opened to private settlement, as was the land in Seymour. A specific act of Congress was needed to remove that land from the reservation.

This controlling case for jurisdiction in this case is Yankton v. Gaffey, 188 F.3d 1010 (8th Cir. 1999). In that case, the Court held that where the boundaries of a reservation are diminished through congressional action, the resulting non-Indian owned lands existing outside the diminished reservation are no longer Indian country within the meaning of § 1151. Id. at 1030. As already noted, the Act of 1905 did diminish the boundaries of the Red Lake Reservation, and the resulting land outside of the new boundaries is not subject to federal jurisdiction.

Appellant produced evidence at the motions hearing to show that the land where the offense occurred was part of the land extracted from the reservation by the Act of 1905. (Mot. Tr. at 7-10). The court below assumed for the purpose of the argument that the offense did occur where the defense alleged, but nonetheless held that there was no clear congressional intent to diminish the reservation by the Act of 1905. Appellant respectfully requests that this Court reverse that decision and order that the indictment be dismissed due to lack of jurisdiction.

II. THE SENTENCE IMPOSED WAS GREATER THAN NECESSARY UNDER THE FACTORS IN 18 U.S.C. § 3553(a).

a) Standard of Review

The district court's sentence is reviewed for an abuse of discretion. Gall v. United States, 128 S.Ct. 586, 597 (2007); see also United States v. Austad, 519 F.3d 431, 434 (8th Cir. 2008). The court must first examine whether there was a significant procedural error, such as "failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range." Gall, 128 S.Ct. at 597. If the sentence is found to be procedurally sound, the court then reviews "the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. Id. "A sentence within

the Guidelines range is accorded a presumption of substantive reasonableness on appeal.” United States v. Robinson, 516 F.3d 716, (8th Cir. 2008).

b) The sentence imposed by the court was unreasonable.

The appellant requested a sentence of 120 months, which was the statutory mandatory minimum for Discharge of a Firearm during Commission of a Crime. (CR at 48). The District Court rejected that request, stating that anything less than a consecutive 30 month sentence for the Assault conviction “would not promote respect for the law...and provide a deterrence.” (Sent. Tr. at 37). The Court further stated that “I don’t believe there is any circumstance under which I would go less than 30 months, and promote respect for the law and provide a deterrence.” Id. Appellant urges this court to find that the district court failed to properly consider all of the factors in 18 U.S.C. § 3553(a), and that the sentence imposed was therefore unreasonable.

Appellant put forth many reasons for a sentence substantially less than the guidelines. His childhood was filled with neglect and abuse, and he was forced at an early age to take on a role of responsibility for his mother and sisters. He suffered some depression and anxiety, yet did well in school, and tried to be a supportive member of his community, volunteering to help where he could. He had a niche for working with children, and was respected by many for overcoming

his difficulties and becoming a respected young man on the reservation. Unfortunately, he began to make bad decisions and to associate with bad people, and that led him to the night of the offense. He did not go out that evening looking to hurt someone, and did not act out until he was struck by a bottle. Nonetheless, he accepted responsibility for his actions, and has been remorseful about the harm he caused to Ms. King.

Appellant's background certainly supported some consideration in sentencing, as did his cooperation. The government conceded that appellant's cooperation was a factor in a plea in another federal prosecution. (Sent. Tr. at 27). In addition, they noted that appellant provided information regarding "other potential crimes and individuals" that did not lead to prosecution. (CR at 53). This cooperation has put appellant and his family in danger. Despite the government's unwillingness to make a 5K motion on his behalf, the appellant deserved one for sitting down on multiple occasions and speaking with investigators. The cooperation reflected on appellant's character, and supported a finding that he was less likely to commit other crimes when he is released. The court should have taken into consideration his cooperation when determining his sentence. See United States v Fernandez, 443 F.3d 19 (2d Cir. 2006)(court should consider cooperation even if it did not yield a government motion for a departure). By its comments, the court indicated

that nothing anyone said about cooperation, including the government, would have changed the sentence that was imposed. Those comments indicate that the court relied on some specific factors of 18 U.S.C. § 3553(a), and disregarded others.

Moreover, the district court's reliance on the guidelines to formulate a sentence ignored the inherent inadequacies of the guidelines in determining sentences.

The Supreme Court noted that the “(t)he Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics. Matters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction, employment history, lack of guidance as a youth, family ties, or military, civil, charitable, or public service are not ordinarily considered under the Guidelines. See U.S.S.G. MANUAL §§ 5H1.1-6, 11, and 12 (Nov. 2006). These are, however, matters that § 3553(a) authorizes the sentencing judge to consider.” Rita v. United States, 127 S.Ct. 2456, 2473 (2007). This is particularly important when a court is imposing a sentence consecutive to a mandatory minimum sentence. In this case, appellant was subject to a ten year mandatory minimum mandated by Congress and totally unrelated to the policies of fair sentencing. The district court then compounded the unreasonableness of the sentence by relying on the guideline range for the consecutive

sentence for assault as the starting point of his analysis in determining the length of the overall sentence.

In this situation, the guidelines should have no part of the analysis as to what is a reasonable sentence. The court's focus should be on the "overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to achieve the goals of sentencing." Kimbrough v. United States, 128 S.Ct. 558, 570 (2007). To that end, the ten year mandatory minimum is a sufficient sentence. Ten years would provide just punishment and deter others, and would be reflective of the character and history of appellant, including his cooperation. In addition, a ten year sentence would have avoided unfair sentencing disparities among defendants with similar criminal backgrounds. Appellant urged the district court to consider similarly situated defendants in Minnesota state courts. (CR at 47-48). A person with no criminal history points, being sentenced on an assault resulting in great bodily harm, would face a presumptive prison sentence of 86 months. The use of a firearm would not necessarily increase that sentence. Here, because of appellant's status as an Indian committing a crime in Indian Country, he starts off at 120 months, and can only go up in months. The court should have considered this disparity in sentencing appellant.

Mr. Jackson is a man who is a father, a son, and a brother. His young children will now spend many years without his care and comfort. He is paying a price for his mistake. During his term of imprisonment, he will be in continual fear that his family will suffer harm because of his cooperation. The certainty of his punishment is more important than the length of his punishment. There is no reasonable basis for choosing a sentence of 150 months instead of 120 months. In either case, there is just punishment and fulfillment of the § 3553(a) factors. Given all of the considerations, he should have been sentenced closer to 120 months, or slightly above that. The district court erred in imposing the sentence of 150 months.

CONCLUSION

The district court erred by not dismissing the indictment for lack of jurisdiction. The land on which the offense occurred was not in Indian Country, and therefore could not be prosecuted by the United States under the Major Crimes Act. The Red Lake Reservation had been diminished by an act of Congress, and the privately owned land by Redby is no longer part of the reservation. The Court should remand to the District Court for dismissal of the indictment.

In the alternative, the district court erred by imposing an unreasonable sentence, and the defendant respectfully requests that his sentence be reversed and the case remanded for further hearing regarding the reasonableness of his sentence..

Dated: February 20, 2012

Respectfully Submitted,

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In The
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For the Eighth Circuit

United States of America,)	
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Appellee,)	
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v.)	Appeal No. 11-3718
)	
)	Certificate of Compliance
)	
Joseph Joshua Jackson,)	
)	
Appellant.)	

Julius A. Nolen, after being first duly sworn, states:

1. The electronic version of this brief is virus-free and addendum has been scanned for viruses is is virus-free.
2. Appellant’s Brief in this matter is 19 pages in length, excluding the Certificate of Service and Certificate of Compliance, which complies with the page limit option found at Fed. R. App. P. 32(a)(7)(A).
3. Appellant’s Brief in this matter was prepared using Microsoft Word, with a 14-pt, proportionally-spaced Times New Roman font face, in compliance with Fed. R. App. P. 32(a)(5).

Dated: February 20, 2012

By s/Julius A. Nolen

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NO. 11-3718

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Appellee,

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JOSEPH JOSHUA JACKSON,
Appellant.

Certificate of Service

Julius A. Nolen, after being first duly sworn states:

- 1) He is the attorney for the Appellant herein.
- 2) I hereby certify that on February 20, 2012, I electronically submitted for filing the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I

certify that all participants in the case are registered CM/ECF users and that service will be accomplished pursuant to Rule 28A(d) of the Local Rules of the United States Court of Appeals for the Eighth Circuit.

Dated: February 20, 2012

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