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No. 44654-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Howard Shale,

Appellant.

Jefferson County Superior Court Cause No. 12-1-00194-0

The Honorable Judge Keith Harper

**Appellant's Response to Brief of Amicus
Curiae**

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ARGUMENT

I. THE FEDERAL GOVERNMENT HAS NOT GRANTED WASHINGTON STATE CONCURRENT CRIMINAL JURISDICTION OVER NONMEMBER INDIANS ON THE QUINAULT RESERVATION.

An Indian tribe's "powers of self-government" includes criminal jurisdiction over "all Indians," including nonmember Indians. 25 U.S.C. § 1301; *United States v. Lara*, 541 U.S. 193, 197-98, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004). The state does not have concurrent jurisdiction with tribal courts unless such jurisdiction has been explicitly granted by statute. *State ex rel. Adams v. Superior Court for Okanogan Cnty., Juvenile Court Session*, 57 Wn.2d 181, 186, 356 P.2d 985 (1960). In fact, state courts do not have any criminal jurisdiction in Indian country beyond that provided by federal law. *State v. Jim*, 173 Wn.2d 672, 682, 273 P.3d 434 (2012); *State v. Comenout*, 173 Wn.2d 235, 238, 267 P.3d 355 (2011) *cert. denied*, 132 S.Ct. 2402 (U.S. 2012).

Amicus does not dispute that the Quinault tribal court would have had criminal jurisdiction to charge Mr. Shale for failure to register. *See* Brief of Amicus Curiae, pp. 16-17. And amicus does not point to any authority granting the state concurrent jurisdiction over nonmember

Indians for crimes occurring on the Quinault reservation.¹ See Brief of Amicus Curiae, pp. 16-17. There is no explanation offered to justify why a tribe's inherent power of self-government should provide exclusive jurisdiction in some cases but not others. Brief of Amicus Curiae, pp. 11-17. Still, amicus contends that the state has concurrent jurisdiction to charge Mr. Shale for an offense occurring on the Quinault reservation. Brief of Amicus Curiae, pp. 16-17. This argument is not supported by authority.²

The state's criminal jurisdiction in Indian country is limited in different ways than its civil regulatory authority. There is simply no state jurisdiction over Indians in Indian country, absent a specific federal grant. *Comenout*, 173 Wn.2d at 238. But state's civil regulatory power over

¹ Instead, amicus relies on authority holding that tribal courts qualify as a separate sovereign for double jeopardy purposes. Brief of Amicus Curiae, p. 17. These cases have no bearing on whether the state has concurrent jurisdiction over Mr. Shale.

Amicus also baldly contends that the word "their" in the phrase "Indians when on their tribal or allotted lands" in RCW 37.12.010 refers only to Indians who are members of the tribe upon whose reservation an offense occurs. Brief of Amicus Curiae, p. 14. First, as outlined in Mr. Shale's Opening Brief, this phrase is ambiguous and the ambiguity must be construed in favor of tribal sovereignty. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). Second, the Washington legislature's intent when enacting the jurisdiction assumption statute is not probative of whether the federal government has granted the state concurrent jurisdiction with tribal courts in cases such as Mr. Shale's.

² Amicus suggests that the lack of published cases on the issue indicates that "no nonmember Indian has been exempted from state court prosecution for a crime committed within the exterior boundaries of a reservation." Brief of Amicus Curiae, p. 14. But amicus also fails to locate any authority providing that the state does have criminal jurisdiction over nonmember Indians. This is an issue of first impression. It does not follow that nonmember Indians have regularly been subjected to state prosecution for crimes occurring on Indian reservations.

Indian country turns on analysis into whether the field has been preempted by federal law and whether such authority would infringe on the tribe's right to "make its their laws be and ruled by them."³ *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 1087, 94 L.Ed.2d 244 (1987) *superseded on other grounds as recognized by Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2027 (2014).

Still, amicus argues that the state has jurisdiction to charge Mr. Shale, relying exclusively on cases addressing state and tribal taxation and other regulatory authority over nonmember Indians. *See* Brief of Amicus Curiae, pp. 14-16 (*citing Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980); *Montana v. U. S.*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *Bercier v. Kiga*, 127 Wn. App. 809, 103 P.3d 232 (2004)). Amicus does not point to any authority relevant to whether the state has concurrent criminal jurisdiction over nonmember Indians on the Quinault reservation. Brief of Amicus Curiae, pp. 11-17. Amicus does not address the issue at stake here, which is that federal law has not granted Washington state concurrent jurisdiction with the Quinault tribal court in Mr. Shale's case.

³ As argued in Mr. Shale's supplemental brief, under these standards, the state does not have civil regulatory authority to require persons living on the Quinault reservation to register as sex offenders.

II. AMICUS CURIAE’S ARGUMENTS REGARDING THE SITUS OF FAILURE TO REGISTER OFFENSES ARE IRRELEVANT TO WHETHER THE STATE HAS JURISDICTION TO CHARGE MR. SHALE.

Mr. Shale was living on the Quinault reservation and registered with the Quinault tribal sex offender registry. CP 4, 16. Still, amicus claims that Mr. Shale’s offense took place off-reservation, arguing that the situs for all failure to register offenses is the sheriff’s office. Brief of Amicus Curiae, pp. 17-20. This argument is misplaced for three reasons.

First, amicus’s position would vitiate all tribal sex offender registries. As outlined in Mr. Shale’s Supplemental Brief, the federal Sex Offender Registration and Notification Act (SORNA) grants tribes jurisdiction to create and regulate sex offender registration within their reservations. 42 U.S.C. § 16927. The state only has regulatory authority over sex offender registration on an Indian reservation if the tribe fails to create a registration scheme within the required timeframe. 42 U.S.C. § 16927(a)(2)(B).

Under amicus’s argument, however, all failure to register offenses would occur off-reservation at the county sheriff’s office. Accordingly, all Indian sex offenders would be subject to state prosecution for failure to register with the county sheriff even if they were living on the reservation associated with the tribe of which they were a member. This would be true even if the Indian sex offender was registered with the tribe and had

never left the reservation. Amicus's argument is foreclosed by SORNA's limitation on the state's authority over sex offenders on Indian reservations. 42 U.S.C. § 16927.

Second, amicus depends on authority holding only that an offense is sited in a certain county or district for venue purposes.⁴ Brief of Amicus Curiae p. 18 (*citing Johnston v. United States*, 351 U.S. 215, 76 S.Ct. 739, 100 L.Ed. 1097 (1956); *United States v. Clines*, 958 F.2d 578 (4th Cir. 1992); *McKinney v. State*, 282 Ga. 230, 647 S.E.2d 44 (2007)). Mr. Shale does not dispute that venue would be proper for his case in Jefferson County if the state had jurisdiction charge him. But the fact that the offense took place in Jefferson County is irrelevant to whether the state has jurisdiction when he was also living on the Quinault reservation and registered with the Quinault tribal sex offender registry.

Third, amicus contends that the situs of an offense is the place where the person failed to perform a required act. Brief of Amicus Curiae, pp. 17-20. But, as amicus points out, sex offenders can also register with the sheriff by mail. RCW 9A.44.130(5)(b). Accordingly, there is no set location at which a person is required to register. The sheriff's office is

⁴ Amicus does not cite to any authority holding that the situs of a failure to register offense is the sheriff's office. Brief of Amicus Curiae, pp. 17-20. The court can assume that amicus was unable to locate such authority after diligent search. *In re Griffin*, No. 42012-1-II, --- Wn. App. ---, 325 P.3d 322, 325 (May 6, 2014).

not necessarily the location at which a failure to register offense takes place.

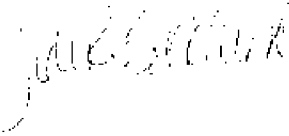
Amicus's arguments regarding the situs of a failure to register offense lack merit and immaterial to the issues in Mr. Shale's case.

CONCLUSION

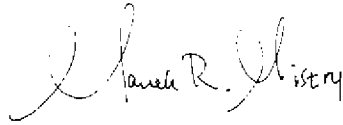
For the reasons set forth above and in Mr. Shale's other briefing, the state did not have jurisdiction to charge Mr. Shale with failure to register while he was living on the Quinault reservation. The state also lacked civil regulatory authority to require him to register with the sheriff while he was living on the reservation. Mr. Shale's conviction must be reversed.

Respectfully submitted on September 2, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Response, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

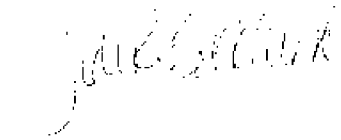
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I filed the Appellant's Response electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 2, 2014.



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September 02, 2014 - 11:41 AM

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