

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	)	Criminal No. 16-006 (MJD/LIB)
	)	
v. Plaintiff,	)	
	)	<b>MEMORANDUM IN SUPPORT OF</b>
NODIN MAKWA,	)	<b>OBJECTION TO REPORT AND</b>
	)	<b>RECOMMENDATION</b>
Defendant.	)	

The defendant, Nodin Makwa, through his counsel, Douglas Olson, objects to the Report and Recommendation in this case, and requests that the Court not adopt its findings and recommendations. The defendant requests that the Court issue an order dismissing the case for lack of jurisdiction and for failure to appropriately charge a federal offense.

**FACTS**

On August 7, 2015, Red Lake Officer Petschl overheard a radio dispatch of an assault at a Red Lake residence. T. 27. Via dispatch, he heard a description of vehicle, and as he encountered a vehicle matching that description, of the suspect, and he turned around, activated his lights, and pursued the vehicle. T. 27-28, 37. As he pursued the vehicle with his lights activated, FBI Agent Dudley was driving onto the Red Lake reservation, headed to the public safety center investigating other matters. T 47. Dudley saw that Petschl's squad had its lights activated; he did a u-turn, and followed, thinking that there might be a disturbance at the nearby casino. T. 37-38. Dudley then learned over the dispatch that Petschl was pursuing a suspect that was in an assault and might be armed.

T. 39.

Dudley then called the Beltrami Sheriff's Department on his cell phone and asked for assistance as the suspect vehicle was leaving the Reservation and was traveling into Beltrami County. T. 40-41. The suspect car turned off County Road 61 south of the reservation at the intersection of Granger road, at which time officers with the Beltrami County Sheriff's Office and the Minnesota State Highway Patrol attempted to stop it using stop sticks; the car avoided the stop sticks and the Beltrami County officers and Highway Patrol took over main pursuit of the fleeing suspect. T. 42-43, 55. Both Petschl and Dudley then backed off in the pursuit, because neither had a car equipped to conduct a high speed chase. T. 30-31, 42-43. The matter was thus over to local law enforcement (Beltrami County Sheriff's Department and Minnesota Highway Patrol) to chase and pursue the fleeing vehicle, with Beltrami County and the Highway Patrol becoming "primary" and Dudley "secondary" on the pursuit. T.44-45, 50-51.

Several Beltrami County Sheriff and State Highway Patrol vehicles then pursued the vehicle for over ten miles on county roads. T. 43-44. The chase ended when a Beltrami Sheriff's squad conducted a "pit" maneuver in rural Beltrami County; Mr. Makwa's vehicle was spun around and was temporarily stopped. T.58-59. Officer Hart was on the scene at this time (the second car) and got out of his squad and ran toward the vehicle. As he ran up to the front passenger side of the car, he was hit as the car reversed, and injured. T. 58-59, 64. The car reversed into the ditch, and the car was pinned in by Dudley (who had arrived on the scene after the pit maneuver) and another squad, and Mr. Makwa was apprehended. T. 41-42, 45.

At the motions hearing, Michelle Paquin, who works for the Red Lake Tribe legal department, testified that in the 1990's Red Lake entered into an agreement with the BIA and that the Red Lake Tribe assumed the law enforcement functions on the Red Lake Reservation. T.15. She testified that they had entered into a series of five-year agreements with the BIA. T. 16. She testified that Red Lake police officers are employed through the Red Lake Band. T. 17. She testified that since the 1990's Red Lake had assumed self-governance and that after that the tribe assumed the functions of law enforcement on the Red Lake Indian Reservation. T. 17-18.

### **ARGUMENT**

The Report and Recommendation should not be adopted by the Court. The indictment should be dismissed because Beltrami County Sheriff Deputy Hart is not a federal law enforcement officer nor was he "assisting" other federal officers, as that term has been defined, at the time that he was injured in such manner as to bring this case within the purview of the federal assault/resisting arrest statute. Mr. Makwa is charged in a one count indictment with violating Title 18, United States Code, Sections 111(a)(1) and 111(b). The indictment alleges that Mr. Makwa:

Did forcibly assault, resist, oppose, impede, intimidate and interfere with Beltrami County Deputy Sheriff David Hart who was assisting Special Agent Christopher Dudley of the Federal Bureau of Investigation and Officer Keary Petschl of the Red Lake Police Department, while they were engaged in the performance of official duties, and the defendant used a deadly and dangerous weapon, to-wit: a Ford automobile, and inflicted bodily injury upon Deputy David hart, all in violation of Title 18, United States Code, Sections 111(a)(1) and 111(b).

Beltrami Officer Hart is a Beltrami County law enforcement officer and was

performing the regular duties of a State Police Officer when he was injured during the apprehension of Mr. Makwa and that he does not bring him, as a State Police Officer, under the purview of the involved federal statute. 18 U.S.C § 111(a) provides:

(a) In general. – Whoever –

(1) Forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; [is subject to the penalties of the following subsections].

18 U.S.C. § 1114, in turn, provides:

Whoever kills or attempts to kill any officer or employee of the United States or if any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance [is subject to the listed penalties].

The indictment should be dismissed because, as a matter of law, Officer Hart was not an “officer or employee of the United States” nor was he “assisting such officer or employee in the performance of such duties” at the time he was injured.

As an initial matter, the defense objects to and disagrees with the conclusion of the R & R that Red Lake Police Officer Petschl is “an officer or employee of the United States or of any agency in any branch of the United States Government. . . .” For purposes of this statute, Red Lake police are not “officers or employees of the United States” or any branch or agency of the Federal Government. Red Lake is a sovereign Indian Nation, and employs its own law enforcement. Red Lake police officers are simply not federal officers or employees. The involvement of the BIA in tribal matters and funding does not make their law enforcement personnel “officers or employees of

the United States.” The R & R and government rely on a series of cases construing the BIA contracts for officers on South Dakota Indian Reservations, *see United States v. Roy*, 408 F.3d 484, 489 (8th Cir. 2005), *United States v. Janis*, 810 F.3d 595, 597 (8th Cir. 2016); *United States v. Young*, 85 F.3d 334, 335; (8th Cir. 1996); *United States v. Schrader*, 10 F.3d 1345, 1350 (8th Cir. 1993), and the defendant maintains that the contractual relationship for Red Lake Officers is different and that those cases do not address the unique status of Red Lake as an independent sovereign nation. The defendant objects to that portion of the Report and Recommendation and states that it should be overruled.

Moreover, regardless of the Court’s resolution of the issue concerning the status of the Red Lake tribal officers, Officer Hart was not “assisting” either Officer Petschl or FBI Agent Dudley, as that term has been defined, **at the time** he was injured. Hart and other local law enforcement officers had taken over the primary function of pursuing the suspect who was located within their territorial jurisdiction. Officer Hart was engaged in a normal local law enforcement function – the pursuit, apprehension, and arrest of a suspect that was in his jurisdiction (Beltrami County) - when he was injured. Pursuing and apprehending fleeing suspects is a local law enforcement function, regardless where the call or request for assistance originates. At the time of injury, Officer Hart was not “assisting” another law enforcement agency, he was doing exactly what he as a law enforcement officer is supposed to do, part of his duties and responsibilities as a law enforcement officer; he and the other local officers were “primary” on the pursuit and apprehension of Mr. Makwa, and at the moment of injury

he was not “assisting” other law enforcement, he was performing a local law enforcement function.

This case is closer to the situation in *United States v. Reed*, 375 F.3d 340, 344-45 (5th Cir. 2004), in which the court reversed a conviction based on an assault of a state law enforcement officer where the state officer was assisting an FBI agent in the pursuit of a bank robbery suspect; the state officer was later shot at during the course of the pursuit. The court ruled that at the moment of the shooting, the officer was not “assisting” the FBI agent and ruled the evidence insufficient to support the conviction. *Id.*

This case is also markedly different from those cases where state or local police are operating under either a federal contract, such as the Sherburne County jailers assaulted in *United States v. Luedtke*, 771 F.3d 453, 455 (8th Cir. 2014), who were acting pursuant to a federal-state contractual agreement. Nor was Officer Hart involved in a joint state-federal investigation such that they were “acting in cooperation with and under control of federal officers.” *United States v. Williams*, 482 F.2d 508, 512 (5th Cir. 1973). Additionally, this case has never involved a federal crime or federal investigation, such as a bank robbery, or federal drug investigation. Officer Hart simply joined in as he was engaged in the daily performance of state law enforcement at the time of his injury, even if the origins of the call for assistance in the pursuit was initiated by Red lake police or the FBI. Once the car was in Beltrami County, and needed to be stopped and the driver apprehended, Hart was not “assisting” a federal agency, he was assisting other state/county officers in doing a purely local

law enforcement function – the pursuit, stop, and apprehension of a fleeing driver.

At the time of injury, it made no difference who informed them of the exigency, in this case it was an FBI agent, he and other local law enforcement would have done the same thing after a call from any other law enforcement agency or official. In short, the FBI and tribal police involvement in this matter was clearly ancillary at the point of injury here, both Petschl and Dudley had backed off on the pursuit at the moment of injury. Thus, to the extent there is any federal connection with the alleged assault of the state officer, it is far too incidental and attenuated to support the charge of assaulting a federal officer here.

Finally, the issue here is somewhat similar to the pretrial motion heard and ruled upon in *United States v. Leudtke*, 771 F.3d 453 (8<sup>th</sup> Cir. 2014), which involved a similar jurisdictional challenge concerning the status of the Sherburne County jailers, and the issue was properly determined in a pretrial motion. Unlike the officers involved at the Sherburne County jail operating under a joint contract, there is no such contract here. Officer Hart is not a federal officer, nor was he assisting a federal officer at the moment of injury, therefore the case should be dismissed.

Dated: April 12, 2016

Respectfully submitted,

*s/Douglas Olson*

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