

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 16-6 MJD/LIB

UNITED STATES OF AMERICA,

Plaintiff,

v.

**GOVERNMENT’S RESPONSE TO
DEFENDANT’S OBJECTION TO
REPORT AND RECOMMENDATION**

NODIN MAKWA,

Defendant.

The United States of America, by and through its attorneys, Andrew M. Luger, United States Attorney for the District of Minnesota, and Clifford B. Wardlaw, Assistant United States Attorney, hereby submits its response to defendant’s objection to the Report and Recommendation (“R&R”) (Doc. No. 39) which recommended denying defendant’s motion to dismiss for lack of jurisdiction and improper charging.

The purpose of Title 18, United States Code, Section 111 is to protect federal employees and “federal functions.” United States v. Feola, 420 U.S. 671, 679 (1975). The federal function that is being protected in the present case is law enforcement in Indian country. See United States v. Roy, 408 F.3d 484 (8th Cir. 2005).

The government’s position is that tribal police officers can be covered as a “federal officer” if they are carrying out law enforcement functions delegated to the tribe by the Department of the Interior – Bureau of Indian Affairs through a contract. That is a correct statement of the law in the Eighth Circuit. See United States v. Roy, 408 F.3d 484, 489 (8th Cir. 2005) (Flandreau City Police Officer and Flandreau Santee Sioux tribal officer); United States v. Bettelyoun, 16 F.3d 850 (8th Cir. 1994) (tribal officer under

contract); and United States v. Schrader, 10 F.3d 1345, 350 (8th Cir. 1993) (tribal officer under contract). The existence of a contract between a local law enforcement agency and a federal law enforcement agency can support a finding that a person is a “federal officer.” The Report and Recommendation properly found that there is a contractual relationship exists between the BIA and Red Lake to provide law enforcements services. R&R p. 12-13.

Recently, the Eighth Circuit affirmed the convictions of defendants who assaulted Sherburne County employees who were guarding federal detainees. United States v. Luedtke, 771 F.3d 453 (8th Cir. 2014). The Sherburne County employees were working under a contract from the U.S. Marshal Service to guard the federal detainees. While the presence of a contract is an important fact, it is not required for a conviction. In United States v. Gedman, 208 F.3d 1006 (5th Cir. 2000), a conviction was affirmed for an assault of a local jailer who was watching federal detainees under 18 U.S.C. § 111. Id.

The United States presented the testimony of several witnesses concerning the motion to dismiss. Michelle Paquin works in the legal department of the Red Lake Band of Chippewa Indians. Transcript p. 9. The Reservation is not one sold piece of real estate but a checkerboard holdings of trust land that runs as far north as the Northwest Angle. T. p. 10-11. The Band has casinos on Red Lake but also in Warroad and Thief River Falls, T. p. 11. The Red Lake Band provides many services to its members through a contract with the U.S. Department of the Interior-Bureau of Indian Affairs. T. p. 15-16. Included in these services are public safety services, in part through the tribal police

department. The federal government pays the Red Lake Band for these services. T. P.11-12.

Sergeant Alexandra Dow of the Red Lake Police Department testified that she responded to an assault call at the Buffalo home August 8, 2015. T. p. 20. Sergeant Dow received information that the defendant was armed with sword and a child said that he had one of those, pointing at Sgt. Dow's pistol. T. p. 21. This information was then dispatched to other police units. T. p. 21-22. Sgt. Dow did see the defendant's car as it was leaving the scene. T. p. 22.

Officer Kerry Petschl of the Red Lake Tribal Police Department heard the dispatch and located the defendant's vehicle going south on Highway 89. T. p. 26-27. The defendant's vehicle was just north of the Red Lake Casino going south, going off the reservation. T., p. 28. Officer Petschl was driving a pickup truck and he had difficulty keeping up with the defendant's vehicle. T. p. 29. Officer Petschl did not stop the pursuit until the end. T. p. 31. He was present when the pursuit ended close to Dale's Bar. Id.

Special Agent Christopher Dudley of the FBI was traveling north on Highway 89 when he noticed Officer Petschl drive past him in pursuit going in the opposite direction. T. p. 38. Dudley just passed the Red Lake Casino and assumed that Officer Petschl was responding to an incident at the casino. Id. He turned around and learned from dispatch that Officer Petschl was in active pursuit of a suspect. Id. He was able to monitor Red Lake dispatch on his radio. Id. He called Beltrami County for assistance on his cell phone. The Red Lake Casino is on the tribal boundary and the defendant's vehicle was

going to cross the reservation boundary into Beltrami County. T. p. 43. Dudley was driving a SUV and he had trouble keeping up with the defendant's vehicle. T. p. 42. Dudley did not abandon the pursuit but allowed Beltrami County and the Minnesota Highway Patrol to take over because their police squads could keep up with the suspect's vehicle. T. p. 45-46. Dudley was present when the pursuit ended when he boxed in the defendant's vehicle. T. p. 45-46.

Deputy David Hart of the Beltrami County Sheriff's Office testified that he was dispatched to assist the Red Lake Police and the FBI in a pursuit that was departing the reservation. T. p. 54-55. He set up stop sticks about ten miles south of the reservation boundary. T. p. 55. The defendant drove around the stop sticks. T. p. 55-56. Deputy Hart then joined the pursuit and took the primary position because his squad was pursuit capable and since the chase was now in Beltrami County it was standard practice for Beltrami County to take the lead. T. p. 55, 61-62, 63. Deputy Hart was present when the pursuit ended. T. p. 58-59. He got out of his squad to arrest the defendant. The defendant backed up and struck him. Id.

The Red Lake Indian Reservation contracts with the Department of the Interior-Bureau of Indian Affairs to provide law enforcement services. The Federal Bureau of Investigation has the responsibility to investigate violent crimes on the Red lake Indian Reservation. There is a federal interest in this case. The Beltrami County Sheriff was called into the chase at the direction of the FBI to assist the FBI in the high speed chase.

The record at the motions hearing established that the tribal police officer and the FBI agent were active part of the pursuit. The pursuit was initiated on the Red Lake

Reservation in response to a disturbance call and that the defendant was armed. As Red Lake is a federal reservation there was a federal law enforcement interest and that Beltrami County was assisting federal agents.

The issue of whether Deputy Hart was under the protection of Title 18, United States Code, § 111 is a factual issue for the jury to decide. See United States v. Janis, 810 F.3d 595, 597 (8th Cir. 2016). Janis was a case that involved a tribal police officer under a 638 contract. The defense filed a motion to dismiss the Indictment because they argued the tribal officer was not a federal officer. Id. at 597-98. The district court properly denied the motion. The defense also argued that the district court improperly ruled that the tribal police officer was a federal officer as a matter of law. Id. The Eighth Circuit agreed and ruled that whether the victim was a federal officer was a factual issue that the jury should decide. Id. The same result is warranted here. The issue is heavily fact dependent. A jury should decide the issue after the prosecution has had the opportunity to establish the federal interest.

The Report and Recommendation properly cited the case United States v. Smith, 296 F.3d 344 (5th Cir. 2002). R&R p. 13-14. Smith was bank robbery case in which local police were fired upon by the suspects. Id. at 345. The chase was eventually taken over by two Dallas police officers and two FBI agents. Id. at 345-46. The Fifth Circuit held that the convictions for various charges, including assault of federal officers, was supported by the evidence in the case. Id. at 346. The federal investigation had been commenced by the time that the Dallas police joined the chase and assisted the FBI in

apprehending the bank robbers. Id. at 346-47. The Report and Recommendation properly found that Smith was more similar to the facts of the present case.

A nearly identical case is United States v. Williamson, 482 F.2d 508 (5th Cir. 1973). Williamson is a drug case in which federal narcotics agents called for the arrest of a drug suspect after a controlled buy. Local law enforcement received the call and attempted to arrest the defendant. The defendant drove his car into a local law enforcement officer who was assisting the federal agents and struck him. Id. Under those facts the defendant's federal conviction was affirmed. In United States v. Smith, 296 F.3d 344 (5th Cir. 2002), Dallas police officers were assisting FBI agents in a bank robbery case. During the pursuit, the defendants fired at the police officers. The convictions for violation of 18 U.S.C. § 1114 were affirmed because the Dallas police officers were assisting the FBI. Id. at 347; see also United States v. Hooker, 997 F.3d 67 (5th Cir. 1993).

Other circuits have reached the identical result. In United States v. Chunn, 347 F.2d 717, 720-21 (4th Cir. 1965), a state employee who was working with IRS officials was found to be under the protection of § 111. In United States v. Torres, 862 F.2d 1025 (3rd Cir. 1988) a local police officer working on a DEA task force was found to be a federal officer.

The defendant's reliance on United States v. Reed, 375 F.3d 340 (5th Cir. 2004), is misplaced. Reed is a bank robbery case in which a Dallas police officer initiated a chase of the suspect. Id. at 341. The Dallas officer chased the suspect on foot after the suspect stopped his car in a residential area. Id. The suspect shot or attempted to shoot at the

pursuing police officer. Id. at 341-42. The pursuing officer shot back and the suspect finally surrendered after the police officer shot at him for the third time. Id. at 342. The FBI special agent and the task force officer did not arrive on the scene until after the chase was over and the suspect was already in custody. Id. The FBI special agent and the task force officer were not part of the pursuit or present during the gunfight. Id. The entire chase and arrest were conducted by the Dallas police officer. That is not the case in the present prosecution.

It is important to note that the legal issue in Reed is sufficiency of the evidence. Id. at 343. “Whether the evidence before the jury which we have described above, is sufficient to support a finding that the Dallas police officer, Hubner, was ‘assisting’ the FBI agent, Joyce, for the purposes of § 111 and § 1114 before or during the time that Reed assaulted and attempted to kill Hubner.” Id. The decision does not stand for the proposition that a motion to dismiss should be granted. The case went to the jury and the district judge and the Fifth Circuit were reviewing the trial record.

Dated: April 18, 2016

Respectfully Submitted,

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