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TULALIP TRIBAL COURT

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IN THE TULALIP TRIBAL COURT
TULALIP INDIAN RESERVATION
TULALIP, WASHINGTON

HAZEN GRAHAM SHOPBELL,
enrolled Tulalip Tribal member, et. u x.,

Plaintiffs,

v.

STATE OF WASHINGTON
DEPARTMENT OF FISH AND
WILDLIFE; JIM UNSWORTH, Director,
State of Washington Department of Fish
and Wildlife; WENDY WILLETTE,
Detective, State of Washington Department
of Fish and Wildlife; JOHN DOES 1-6, Law
Enforcement Officers, State of Washington
Department of Fish and Wildlife,

Defendants.

Case No. TUL-CV-GC-2016-0278

RULING ON DEFENDANTS'
MOTION TO DISMISS FOR LACK
OF JURISDICTION

THIS MATTER came before the Court on November 18, 2016, on the State of Washington Department of Fish and Wildlife's ("WDFW") motion to dismiss for lack of jurisdiction. The Court having considered the briefs, supporting documents, court file, arguments of counsel and the applicable law, and now issues the following:

BACKGROUND

On June 13, 2016, four WDFW officers executed a search warrant at the residence of Hazen Shopbell.¹ Mr. Shopbell is a Tulalip Tribal member.² In addition to

¹ Affidavit of Tia Anderson in Support of Motion for Entry of Order and Judgment of Default, filed 10/17/2016, pg. 1, line 23.

² Declaration of Hazen Graham Shopbell in Support of Writ of Replevin and Motion for Order Directing Return of Personal Property, dated 07/11/2016, pg. 1, line 20.

the WDFW officers were several tribal police, plain clothed, and drug task force members.³ The residence searched is located on 21st Avenue, Tulalip, Washington, on Tulalip Tribal trust land within the exterior boundaries of the Tulalip Reservation.⁴ WDFW officers searched the home and seized property that included digital phones, tablets and notebooks belonging to family members.⁵ One of the items seized was a black Galaxy Samsung tablet belonging to one of the children.⁶ WDFW documented seizing a black Samsung tablet.⁷ On September 27, 2016, WDFW returned property seized from the Shopbell home on June 13, 2016.⁸ WDFW did not return the black Samsung tablet.⁹

The search warrant authorizing the search of the Shopbell residence was obtained by WDFW from the Tulalip Tribal Court.¹⁰ The affidavit for the search warrant filed by WDFW sets forth the search for evidence of crimes under Washington state law and the Tulalip Tribal law, Title 3, Chapter 30, Section 060-Theft.¹¹

As of November 18, 2016, no criminal charges have been filed against the plaintiff. Plaintiff sought return of the items seized in Thurston County Superior Court with the result that all items were returned, except the black Samsung tablet. The return of the tablet is disputed. Plaintiff brings three causes of action for the following relief: (1) declaratory judgment, (2) injunctive relief, and (3) return of seized property.

TULALIP TRIBAL COURT JURISDICTION

The Tulalip Tribes grants the Tulalip Tribal Court jurisdiction over “all persons natural and legal of any kind and to ... all subject matters...and tribal territorial jurisdiction shall extend, except as limited by Federal statutory law or Tulalip Tribal

³ Declaration of Tia Anderson in Support of Writ of Replevin and Motion for Order Directing Return of Personal Property, dated 7/11/2016, pg. 1, line 26.

⁴ Affidavit of Tia Anderson in Support of Motion for Entry of Order and Judgment of Default, filed 10/17/2016, pg. 1, line 24.

⁵ Id. at pg. 2, line 2.

⁶ Id. at pg. 2, line 5.

⁷ Washington Department of Fish and Wildlife Law Enforcement Program Search Warrant Service Return – Notification of Items Seized, Case #: WA-15-007473, Date of Service 06/13/2016.

⁸ Affidavit of Bree R. Black Horse in Support of Motion for Entry of Default Judgment, filed 10/17/2016, pg. 2, line 17 - 22.

⁹ Id. at pg. 2, line 23.

¹⁰ The full address of the Tulalip residence may be found in the Affidavit for Search Warrant, WDFW Case #15-007473, in support of the search warrant issued by the Tulalip Tribal Court, not dated, pg. 2.

¹¹ Id. at pg. 1.

law.”¹²

The Tulalip Tribes’ long-arm jurisdiction is exercised when “a person, including any entity...submits to the jurisdiction of the Tribal Court by doing any of the following acts...accepting a privilege from the Tribes, or entering a consensual relationship or commercial transaction with a member, relating to the exercise of Tribal fishing or hunting rights.”¹³ The Constitution of the Tulalip Tribes provides that: “The jurisdiction of the Tulalip Tribes shall extend to the territory within the original confines of the Tulalip Reservation as set forth by Executive order of December 23, 1873, in pursuance of Article III of the Treaty of Point Elliott, January 22, 1855 (12 Stat. 927), and to such other lands as may be hereafter added thereto under any law of the United States, except as otherwise provided by law.”¹⁴

RULING

WDFW moves to dismiss this case for lack of jurisdiction based on Washington’s sovereign immunity. WDFW relies on *Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1997), that “the tribe’s ability to subject other sovereigns, including states to suit in tribal court was never an aspect of tribal sovereignty, and that Montana’s sovereign immunity barred the suit.”¹⁵ WDFW asserts that absent waiver the State of Washington is immune from suit in Tulalip Tribal Court.”¹⁶

1. Return of Seized Property.

The applicable issue in *Gilham* was whether the State of Montana was subject to an unconsented tort action filed by an individual plaintiff in Blackfeet Tribal Court. Plaintiff’s claim for return of seized property is distinguishable from *Gilham* in two significant ways. First, *Gilham* was a tort action filed by an individual in the Blackfeet Tribal Court in which the plaintiff was seeking monetary damages from Montana. Here, the Plaintiff is not seeking monetary damages from the WDFW in a tort action, but the return of his property seized by the WDFW pursuant to a Tulalip Tribal Court search warrant. Second, in *Gilham* the plaintiff initiated a tort action in tribal court without the

¹² TTC 2.05.020(1). Jurisdiction.

¹³ TTC 2.05.020(2)(g). Long-Arm Jurisdiction.

¹⁴ Article I of the Constitution and Bylaws for the Tulalip Tribes of Washington.

¹⁵ *Gilham*, 133 F.3d at 1133, 1137-38.

¹⁶ Defendants’ Motion to Dismiss and Memorandum in Support, filed 10/13/2016, pg. 4.

consent of Montana. In this case, WDFW initiated the legal process of obtaining a search warrant from the Tulalip Tribal Court.

The Tulalip Tribal Court may authorize searches under two circumstances.¹⁷ First, TTC 2.25.030(1) authorizes the Court to issue search warrants. The search warrant must be in writing, in the name of the Tribes, signed by a judge of the Tulalip Tribal Court, particularly describe the premises, property, place, or person to be searched and the instruments, articles, or items to be seized, and is directed to a law enforcement officer commanding the officer to search for and seize the person or property designated in the warrant and bring the person or property before a judge.

Second, the Court is authorized to endorse a search warrant issued by a foreign jurisdiction. TTC 2.25.030(7) sets forth the procedures for execution of state, county, municipal or other tribal search warrants where a search and/or seizure is performed within the boundaries of the Tulalip Reservation, on any trust, or Tulalip Tribal member or Tulalip Tribally owned land or buildings, vehicles or vessels, for a crime committed within the jurisdiction of the issuing court. The search and/or seizure must substantially comply with the procedural search and seizure requirements of Tulalip Tribal law and is governed by the process set forth in TTC 2.25.030(7)(a).¹⁸

WDFW applied for a search warrant directly from the Tulalip Tribal Court pursuant to TTC 2.25.030(1). The affidavit for search warrant was prepared in writing by WDFW Detective Wendy Willette to search for evidence of crimes under Washington state law and Tulalip Tribal law.¹⁹ The affidavit for search warrant caption is titled with the name of the Tulalip Tribal Court. The affidavit for search warrant was reviewed by a Tulalip Tribal Court judge for a probable cause determination and then signed by a

¹⁷ The Tulalip Tribal Codes are accessible on the internet.

¹⁸ TTC 2.25.030(7) (a) Tulalip Tribal Court Approval. The State, County, municipal or other Tribal law enforcement officer shall provide a copy of their judicially approved search warrant and probable cause affidavit, along with any other supporting documents to a law enforcement officer from the Tulalip Police Department prior to the execution of the warrant. The Tulalip law enforcement officer shall prepare an affidavit stating that he or she has received and is incorporating the State, County, municipal or other Tribal law enforcement officer's affidavit and judicially approved search warrant for presentation to a Tulalip Tribal Court judge. The Tulalip Tribal Court judge shall review the State, County, municipal or other Tribal warrant and if the Tribal Court finds the warrant was issued with proper jurisdiction and substantially complies with the procedural search and seizure requirements of Tulalip Tribal law, shall endorse the warrant for execution.

¹⁹ The Affidavit for Search Warrant submitted to the Tulalip Tribal Court cited violation of Title 3, Chapter 30, Section 060 – Theft, pg. 1.

Tulalip Tribal Court judge. WDFW then executed the Tulalip Tribal court issued search warrant within the boundaries of the Tulalip Tribes' reservation at a Tulalip Tribal member residence located on tribal trust land.

Now, Plaintiff seeks return of his seized property from the WDFW in the court that authorized the search and seizure. In *Gilham* the Ninth Circuit recognized that “[f]inding a forum to resolve disputes is problematic, for each sovereign naturally defends the jurisdictional reach of its own courts and resists being “dragged before” the courts of the other.”²⁰ Here, WDFW sought out the forum of the Tulalip Tribal Court and applied for and obtained a search warrant that was issued according to Tulalip Tribal law. The Plaintiff was alleged to have committed a violation of Tulalip Tribal law in the affidavit for search warrant. The Tulalip Tribal Court retains jurisdiction over the items seized and the disposition of the same.²¹ The lawful authority by which WDFW seized Plaintiff's property derived from the Tulalip Tribal court according to the laws of the Tulalip Tribes.

Generally, search warrant procedures follow these steps: applying for the warrant; executing the warrant; returning the warrant and inventory to the court; and disposition of the seized property. WDFW should have reasonably foreseen that the search warrant request initiated in the Tulalip Tribal Court would have additional procedural requirements after obtaining the search warrant, such as complying with the terms of the warrant and responding to an action to return the seized property in the jurisdiction authorizing the search and seizure. Tulalip Tribal law provides a procedural mechanism for Plaintiff to seek return of his seized property.²² The Plaintiff is requesting that the Court complete the final step of the search warrant procedures; disposition of the seized property. It is a denial of Plaintiff's due process rights to deny him the opportunity to be heard in the same court and applying the same laws that authorized the search and seizure of his property.

None of the protective purposes of sovereign immunity are implicated by the Plaintiff's action to seek return of his property in the Tulalip Tribal Court. Immunity is

²⁰ *State of Montana v. Gilham*, 133 F.3d 1133, 1135 (Cir. 1997) (referencing *Wippert v. Blackfeet Tribe*, 260 Mont. 93, 859 P.2d 420 (1993)).

²¹ TTC 2.25.030(1).

²² See TTC 2.15.010(2).

intended to protect public funds and services from liability.²³ Here, Plaintiff is not seeking monetary damages from the State. The Plaintiff is seeking return of his property from the WDFW in the same forum that originally authorized the seizure. The WDFW is not being “dragged” into the Tulalip Tribal Court. The WDFW applied for a search warrant in the Tulalip Tribal Court seeking the authority of the Court to search and seize the property of the Plaintiff. On the contrary, WDFW seeks to “drag” the Plaintiff into state court to seek the return of Plaintiff’s property in a state forum applying state law to property seized under Tulalip Tribal law.

In *Gilham* the Ninth Circuit recognized that “as coexistent sovereigns, conflicts between States and tribes cannot be resolved judicially without one of them giving up sovereign immunity.”²⁴ Here the conflict is between the State and an individual tribal member seeking to have the State return his property in an action brought in the Tulalip Tribal Court. The Tulalip Tribal Court retains jurisdiction over the property seized pursuant to the search warrant. The State has possession of the Plaintiff’s property, because WDFW was authorized to seize Plaintiff’s property by the Tulalip Tribal Court. The jurisdiction of the Tulalip Tribal Court cannot be removed from the equation and at the same time the State have lawful possession of Plaintiff’s property. To conclude otherwise would undermine the laws and sovereignty of the Tulalip Tribes and the authority of the Tulalip Tribal Court. Therefore, the Defendant’s motion to dismiss Plaintiff’s claim to seek return of his property in the Tulalip Tribal Court should be denied.

2. Claims for Declaratory Judgment and Injunctive Relief.

Plaintiff also seeks a declaratory judgment and a preliminary and permanent injunction against the WDFW. Although these claims arise from the search and seizure of the Plaintiff’s residence, these claims do not concern actual seized property by which the Tulalip Tribal Court retains jurisdiction.

The WDFW asserts that Washington has not waived its immunity from suit in tribal court.²⁵ The Ninth Circuit Court of Appeals concluded that the States have retained their historic sovereign immunity from suits by individuals and that nothing in the

²³ NAFCO, 7 NICS App. 88.

²⁴ *Gilham*, 133 F.3d at 1136.

²⁵ Defendant’s Motion to Dismiss and Memorandum in Support, filed 10/13/16, pg. 5.

inherent retained powers of tribes abrogates that immunity.²⁶ If the WDFW has immunity through the State's sovereign immunity, then the WDFW's employees acting in their official capacities and within the scope of their authority named in this action have the same immunity as the WDFW.²⁷

Plaintiff bears the burden of showing a clear waiver of sovereign immunity by the State of Washington.²⁸ Although Plaintiff's argue that the WDFW is not entitled to sovereign immunity in the Tulalip Tribal Court, the Plaintiffs have not shown a clear waiver of sovereign immunity by the State of Washington. Therefore, the claims for a declaratory judgment and preliminary and permanent injunctions should be dismissed by virtue of the State of Washington's sovereign immunity.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Defendants motion to dismiss for lack of jurisdiction the Plaintiff's claim for return of property seized from the Plaintiff's residence on June 13, 2016 is DENIED.
2. The Defendants motion to dismiss for lack of jurisdiction the Plaintiff's claims for declaratory judgment and injunctive relief is GRANTED.

DATED THIS 21st day of December 2016.



JUDGE PRO TEM RANDY A. DOUCET

²⁶ *Gilham*, 133 F.3d at 1137.

²⁷ See *NAFCO*, 7 NICS App. at 88.

²⁸ *Id.*