JUDGE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

KEVIN MICHAEL BELL

Plaintiff,

v.

CITY OF LACEY; Police Chief DUSTY PIERPOINT individually; Police Commander JOE UPTON individually; City Attorney DAVID SCHNEIDER individually; Mayor ANDY RYDER individually, City Manager SCOTT SPENCE individually; DOEs 1-25 individually; NISQUALLY TRIBE; Nisqually CEO JOHN SIMMONS individually and Nisqually CFO ELETTA TIAM individually.

Defendants.

NO. 3:18-cv-05918-RBL

Plaintiff's Supplemental Brief on the applicability of Ex Parte Young jurisdiction.

I. This Court has jurisdiction under Ex Parte Young.

In 1991, the doctrine of Ex Parte Young was extended to tribal officials. "[T]ribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation

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of federal law." Burlington Northern R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation, 924 F.2d 899, 902 (9th Cir. 1991).

Minnesota Attorney General Young, much like the individual municipal and tribal officials in the instant case, attempted to violate the Constitutional rights of private parties by using his official status and state court procedures. Ex Parte Young, 209 U.S. 123, 124-25 (1908). Much like the administration of the Nisqually Jail Services Agreement, this was illegal:

> The attempt of a State officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the State [or tribe] in its sovereign or governmental capacity, and is an illegal act, and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to its officer immunity from responsibility to the supreme authority of the United States.
>
> When the question of the validity of a State statute with reference to the Federal Constitution has been first raised in a Federal court, that court has the right to decide it to the exclusion of all other courts.
>
> It is not necessary that the duty of a State officer to enforce a statute be declared in that statute itself in order to permit his being joined as a party defendant from enforcing it; if, by virtue of his office, he has some connection with the enforcement of the act, it is immaterial whether it arises by common general law or by statute.
>
> While the courts cannot control the exercise of the discretion of an executive officer, an injunction preventing such officer from enforcing an unconstitutional statute is not an interference with his discretion.
>
> Id. at 124.

For his illegal attempt to apply an unconstitutional state law in defiance of an injunction, Young was detained by federal marshals. The Supreme Court denied his habeas petition. Id. at 168. Young was subjecting mere railroad property and profits to unconstitutional machinations. Here, the tribal DOE defendants, Simmons, Tiam, and municipal defendants are dangerously and sometimes fatally violating the individual civil liberties of all who reside in the jurisdictions

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operating under unconstitutional jail contracts. When the merits are reached, any official attempting to continue enforcing this unconstitutional scheme should, a fortiori of Young, be detained by the U.S. Marshals until it ceases.

II. The merits need not be reached at this time.

The tribal defendants spend pages arguing the merits. Dkt. #49, pp. 3-5. Next, they attempt to relitigate a previous emergency motion and embed a summary judgment motion on justiciability.[1] Id. Neither the merits nor justiciability is relevant to the jurisdictional question posed by this Court. This tactic is little more than an attempt to run out the clock before Plaintiff can bring a motion to compel removal of the 60 redactions in the defendants' initial disclosures. The redacted production contains smoking gun evidence of negligence, causation, and objective deliberate indifference, but all the names are hidden.

However, if this Court does consider the merits under the defendants' plausibility argument, it should start with Congress. Defendants believe it is implausible that a non-tribal American interred in a tribal jail has had his Constitutional rights violated. The Congressional "powers to legislate in respect to Indian tribes…have [been] consistently described as 'plenary and exclusive.'"

[1] This case does not yet have a trial schedule and Plaintiff should not be required to defend a justiciability summary judgment motion in five pages. Nonetheless, it is necessary to point out that the defendants have misconstrued Los Angeles v. Lyons, 461 U.S.S 95 (1983); Dkt #49 at 7. The injunction sought in Lyons was against an unofficial choke hold policy and depended in part upon future police interaction. Here, we have an official policy enshrined in contract and imminent future judicial interaction with the City whose only jail is tribal. This was briefed more fully at Dkt #20 at 13-18. Moreover, Plaintiff will prefer to relocate his family, including three school children, to another jurisdiction if the human trafficking ploy is not enjoined. This satisfies the justiciability requirements of Friends of the Earth v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 181-84 (2000). See also Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1500-1501 (9th Cir. 1996) (e.g. "Lyons could have established a case-or-controversy for injunctive relief if he asserted 'that the city ordered or authorized police officer' to impose chokeholds on suspects."; ""Specific findings of a persistent pattern of misconduct supported by a fully defined record can support broad injunctive relief.").

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United States v. Lara, 541 U.S. 193, 200 (2004) (citations omitted). Defendants can point to no federal statute affirming such inter-sovereign commerce of the American corpus. Instead, they falsely claim Plaintiff must bear the burden of negating such authority. Dkt #49 at 3-5. Plaintiff need not cite authority prohibiting this Draconian practice because a seizure "beyond the authority of a tribal officer" is a Fourth Amendment violation. United States v. Cooley, 919 F.3d 1135, 1143 (9th Cir. 2019). The same is true when an arrest is made pursuant to a warrant issued "in excess of [a judge's] jurisdictional authority…." Id. at 1146 (citing United States v. Henderson, 906 F.3d 1109 (9th Cir. 2018)). A challenger need not cite authority for the lack of authority.

Next, this Court should look to the common law. It is settled law that a non-tribal citizen accused of a criminal act on tribal land cannot be subjected to tribal criminal authority. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). It is unreasonable, then, to conclude that a non-tribal citizen accused of a criminal act outside tribal land can be dragged onto tribal land and locked up in tribal jail.

There is inherent tension between domestic dependency and sovereignty. Dependency was the basis for Oliphant's holding –'We the People outside the tribe retain sovereignty over our own non-tribal citizens.' Sovereignty is the basis for the tribal power to exclude non-tribal citizens – 'We the People inside the tribe can forcibly exclude nonmembers.' See e.g. Lara, supra. These conflicting forces result in case-by-case analyses, typically, of whether a tribal officer has released promptly enough a non-tribal detainee upon learning of non-tribal citizenship.

For instance, in Bressi v. Ford, the court found that detention of a non-Indian by Indian law enforcement officers at a roadblock had matured to the point of being unreasonable. 575 F.3d 891,

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895-97 (9th Cir. 2009). The point of unreasonableness was demarcated by the moment the Indian officers learned Bressi was a non-Indian. Id. At that point, the tribal officers had only two choices: (i) if the detention was based only upon tribal law, let Bressi go; (ii) if the officer observed an obvious state law violation, hold Bressi only for "delivery to state officers." Id. at 897.[2]

The second option should guide a future ruling on the merits. Another example is found in United States v. Terry, 400 F.3d 575 (8th Cir. 2005). Terry, a non-Indian, was arrested on tribal land by a tribal officer. Id. at 578. The tribal officer realized Terry was non-Indian while transporting him to the tribal jail. Id. at 578-79. The officer contacted the adjacent county's sheriff, who asked the officer to keep Terry overnight. Id. at 579. In finding the overnight seizure reasonable, the court considered the extenuating circumstances that

> the sheriff was at home…eighty miles from the…Reservation[,] …[and] asked [the tribal officer] to hold Mr. Terry overnight until he could pick him up the next morning. It was not unusual for [the sheriff] to ask the tribal police to hold a suspect for up to eight hours because, at the time, he had only one patrol car and a single part-time deputy. …[Moreover, the arrest occurred] on a rainy night [when the] only deputy was unavailable.
>
> Id. at 578, 580.

Kevin Bell's non-tribal status would have been inferable the moment he was tendered to Nisqually by a City of Lacey police officer on August 7, 2016. If not, it certainly would have been apparent when his first 'kite' demanding his medicine was filed on August 11. The 'kite' form

[2] In United States v. Cooley, the court better explained why tribal officers can only seize non-tribal citizens for 'obvious' crimes. 919 F.3d 1135 (9th Cir. 2019). The court applied the canon that "the Fourth Amendment 'must provide at a minimum the degree of protection it afforded when it was adopted.'" Id. at 1146 (quoting United States v. Henderson, 906 F.3d 1109 (9th Cir. 2018) (citation omitted)). "At the time of the Fourth Amendment's adoption, private individuals who personally observed the commission of a felony could lawfully seize the perpetrator. Officers had this same power when operating outside their sovereign's jurisdiction." Id. (citing 4 William Blackstone, Commentaries at 293 and 2 David S. Garland & Licius P. McGehee, The American and English Encyclopaedia of Law 863 (2d ed. 1896)).

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contains a query for tribal affiliation, to which Mr. Bell answered, "no." Decl. Millikan Ex. A. Therefore, Mr. Bell's Fourth Amendment rights were violated by the tribal defendants on either August 7 or 11, 2016.

III. The Simmons Declaration about Defendant Simmons is irrelevant.

The defendants attempt another sleight of hand by having Pauline Simmons claim that John Simmons is no longer an official. This is precisely why Fed. R. Civ. P. 25(d) was promulgated:

> An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

It matters not whether Simmons, Tiam, another Simmons, or one of the DOE defendants is the official against whom prospective injunctive relief is sought. Plaintiff hopes this Court will indeed choose to order that the Tribe provide the appropriate name for a substitution. Plaintiff has already begun to satisfy the 'meet and confer' prerequisite of Fed. R. Civ. P. 37 as to the DOE defendants and will accomplish the same as to Simmons and Tiam during the week of July 8, 2019. Immediately thereafter, Plaintiff will file a motion to compel removal of the redactions that undoubtedly hide the most appropriate substitute identity.

Respectfully submitted this 9th day of July, 2019 by

/s/Jackson Millikan

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