

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAGIT

STATE OF WASHINGTON,

NO. 18-1-00621-29

Plaintiff,

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS AMENDED
INFORMATION DUE TO BAD FAITH

v.

HAZEN GRAHAM SHOPBELL,

Defendant.

Co-Defendant:
ANTHONY PAUL, 18-1-00622-29

I. RELIEF REQUESTED

Pursuant to the Washington State Court of Appeals, Division One’s decision, *State v. Shopbell*, 17 Wash. App. 2d 1013 (2021), Tulalip Tribal member Defendant Hazen Graham Shopbell (“Defendant”) moves to dismiss the Amended Information due to investigatory bad faith. Washington Department of Fish and Wildlife (“WDFW”) Detective Wendy Willette violated a federal Consent Decree by: (1) ignoring the requirement that she defer to the Tulalip Tribes’ primary enforcement responsibility; (2) destroying valuable evidence despite a duty to prevent the destruction of evidence; and (3) refusing to confer with Tulalip law enforcement before taking the irreversible step of destroying evidence. Accordingly, Defendant requests that the Court dismiss the Amended Information.

1 **II. STATEMENT OF FACTS**

2 The Tulalip Tribes are political successors in interest and descendants of one or more
3 signatories to the 1855 Treaty of Point Elliott, which reserved the right to harvest shellfish within
4 usual and accustomed fishing grounds (“U&A”). 12 Stat. 927 (1855). *U.S. v. Washington*, 626 F.
5 Supp. 1405, 1527 (W.D. Wash. 1985), *aff’d*, 841 F.2d. 317 (9th Cir. 1988); *U.S. v. Washington*,
6 459 F. Supp. 1020, 1039 (W.D. Wash. 1978). The Tulalip Tribes’ adjudicated U&A include central
7 Puget Sound marine and freshwater areas east of Whidbey Island, including the area delineated as
8 Region 2 East and Catch Areas 24A through 24D and 26AE on the appended WDFW map. *See*
9 *U.S. v. Washington*, 626 F. Supp. at 1530-32; *Washington*, 459 F. Supp. at 1059 (mentioning
10 Camano Island as part of Tulalip U&A); Declaration of Gabriel S. Galanda in Support of
11 Memorandum in Support of Defendant’s Motion Amended Information Due to Bad Faith
12 (“Galanda Decl.”), Ex A. Tulalip U&A includes the western shores of Camano Island, including
13 Cama Beach. *See id.*

14 WDFW has “formally recognized Tulalip tribal government’s authority as a ‘self-
15 regulating’ tribe” under *U.S. v. Washington*. Galanda Decl., Ex B. Under a Consent Decree entered
16 in *U.S. v. Washington* by U.S. District Court Judge Edward Rafeedie, Tulalip exercises “primary
17 responsibility for enforcement of shellfish sanitation laws against its members and shellfishing
18 permittees within its reservation, any tribal trust lands, or within the tribe’s usual and accustomed
19 areas.” *U.S. v. Washington*, 19 F. Supp. 3d 1126 (W.D. Wash. 1994) (“Rafeedie Consent Decree”);
20 *id.* at 1149. The State of Washington entered into and is bound by the Consent Decree. *See id.*
21 The State’s enforcement promises and duties are carried out by the Washington State Department

1 of Fish and Wildlife (“WDFW”). *Id.* Defendant is not a party to or bound by the Rafeedie Consent
2 Decree.¹ *See id.*

3 Under the Rafeedie Consent Decree, each Treaty tribe “bears primary responsibility for
4 enforcement of shellfish sanitation laws against its members and shellfishing permittees within its
5 reservation, any tribal trust lands, or within the tribe’s usual and accustomed areas.” *Washington*,
6 19 F. Supp. 3d at 1149. If a State officer discovers a violation of shellfish sanitation law by an
7 individual subject to Tribal primary enforcement responsibility, the State is required to contact
8 tribal law enforcement. *Id.* at 1150. If Tribal law enforcement cannot be contacted within a
9 reasonable time, the Rafeedie Consent Decree contemplates that the State officer will “take the
10 minimum action within his or her authority which is needed to protect officer safety and to prevent
11 the loss or destruction of evidence or of forfeitable property.” *Id.* The Rafeedie Consent Decree
12 provides that “violations of tribal shellfish sanitation laws by members of tribes or by tribal
13 licensees shall be prosecuted in tribal courts.” *Id.*

14 In December 2015 and January 2016, Jamie Torpey, Puget Sound Seafood Dist., LLC
15 (“PSSD”)’s licensed fish buyer, allegedly purchased 4,531 pounds of clam bait from three Tulalip
16 fisherman. Amended Information (June 18, 2019) at 1-2; Motion for Summons (Probable Cause)
17 (June 14, 2018) at 2. Those purchases occurred at Tribal member Carnegie Hayes’ home on the
18 Tulalip Indian Reservation. Galanda Decl., Ex. C at 130-131. Between February and May 2016,
19 Torpey allegedly sold 877.75 pounds of clam bait. *Id.* Those sales occurred “at the beach” at
20
21

22 ¹ The Rafeedie Consent Decree imposes certain shellfish sanitation protocols that are not prescribed by Tulalip Tribal
23 law. For example, the Consent Decree requires that clam bait be dyed. *U.S. v. Washington*, 19 F. Supp. 3d at 1157.
24 Tribal law does not. Tulalip Tribal Code Ch. 8.05. Because that requirement comes from the Rafeedie Consent Decree
25 and not a criminal statute, Defendant cannot be constitutionally prosecuted for violating it. *See, e.g., State v. Richmond*,
102 Wash. 2d 242, 243 (1984) (“Due process under U.S. Const. amend. 14 and Const. art. 1, § 3 requires that penal
statutes be drawn with sufficient specificity so that persons of common understanding will be on notice of the activity
prohibited by the statutes.”).

1 Tulalip and within the U&A. Galanda Decl., Ex. C at 124, 294-295; *see also id.* Exs. A, D. Clam
2 bait is not intended for human consumption. *See U.S. v. Washington*, 19 F. Supp. 3d at 1157.

3 On the morning of August 15, 2016, WDFW Detective Wendy Willette visited Marine
4 View Cold Storage (“MVCS”) and inspected PSSD’s Treaty harvested clam, mackerel, and squid
5 bait totes. *State v. Shopbell*, 17 Wash. App. 2d 1013, 2021 WL 1530261, at *2. Despite knowing
6 the clam bait was harvested from within Tulalip’s U&A and therefore subject to Tulalip’s primary
7 enforcement responsibility, Det. Willette returned to MVCS on August 22, 2016 and disposed of
8 the Treaty harvested clam bait in a county landfill. *Id.* She destroyed the clam bait without any
9 warrant, without seeking advice from the Attorney General’s Office, and without affording notice
10 to the Tulalip Tribes² or Defendant, in violation of state and federal law, most notably the Rafeedie
11 Consent Decree. *Id.*, Ex. C at 136-37. Det. Willette refused to either “prevent the loss or
12 destruction” of the clam bait or “contact a law enforcement officer” at Tulalip before destroying
13 that evidence. *U.S. v. Washington*, 19 F. Supp. 3d at 1150.

14 In or around September 2016, the Tulalip Tribes considered whether “the initial harvest of
15 the bait clams” by the three Tulalip fisherman was criminal, but “exercised prosecutorial discretion
16 based on a number of factors” and did not file any charges against them in Tribal Court as
17 contemplated by the Rafeedie Consent Decree. Galanda Decl., Ex. B; Ex. C at 143-144; Ex. J at
18 22; *U.S. v. Washington*, 19 F. Supp. 3d at 1150; *see Settler v. Lameer*, 507 F.2d 231, 240 (9th Cir.
19 1974) (affirming tribal court authority over tribal member fishing violations in a tribe’s U&A).
20 The Tribes opted against charging Defendant for any alleged purchase, sale, or barter of the clam
21 bait. *Id.* In an August 8, 2018, letter to WDFW and the Skagit County Prosecutor, **the Tulalip**
22 **Tribes made clear they “don’t believe a bait claim violation rises to the level of a felony or**

23 _____
24 ² Had Det. Willette conferred with the Tribes, as required by federal law, she would have likely learned that PSSD
25 had never committed an illegal seafood landing according to the Tribes—not in 2015 or 2016—not ever. *Id.*, Ex. K.
According to Tulalip Tribal Shellfish Manager Mike McHugh: “We have no record of any illegal sales between Tulalip
fishers and Puget Sounds Seafood . . . Tulalip records do not identify any transactions as illegal.” *Id.*

1 **that WDFW should be attempting to exercise State jurisdiction” over Defendant.**³ *Id.* In
2 correspondence with the Skagit County Prosecutor, Det. Willette dismissed the Tribes’ stated
3 position under the Rafeedie Consent Decree as a “tactic.” Galanda Decl., Ex E.

4 On June 15, 2018, Skagit County filed an Information against Defendant upon the referral
5 of Det. Willette. In 2017, after the Tribe declined to prosecute Defendant, Det. Willette referred
6 these charges to the Snohomish County for prosecution but its Prosecutor rejected the referral.
7 Galanda Decl., Ex. F (Det. Willette: “They will not review the affidavit, they will not participate
8 in meetings, they will not provide any legal counsel moving forward . . .”). Det. Willette also
9 previously “shopped” these charges to the U.S. Department of Justice, the Washington State
10 Attorney General, the King County Prosecutor, and the Pierce County Prosecutor.⁴ *Id.*, Ex. C at
11 251; Ex. G. A retired Los Angeles Police Department Detective called Det. Willette’s
12 “prosecutorial ‘shopping’ . . . egregious.” *Id.*, Ex. H at 6.

13 When she shopped these charges to Skagit County, Det. Willette knew (a) the Tulalip
14 Tribes had opted not to bring charges against Defendant as the primary enforcement agency and
15 (2) the Tulalip statute of limitations had expired on any alleged clam bait violations, but pursued
16 these charges in Skagit County anyway. *Id.*, Ex. C at 143-144; *id.*, Ex. J at 22 (Det. Willette: “I
17 think in regard to the shellfish matter, there was a potential tribal law violation; however, the statute
18 of limitations had expired according to Tulalip Tribal Code. . . . I believe it was violation of them
19 purchasing clams that were harvested outside of a commercial tribal harvest.”). As her deposition
20

21 _____
22 ³ Although Defendant has not previously challenged this prosecution on the grounds that the State violated the
23 Rafeedie Consent Decree, he did generally assert “that the State prosecution would violate the Point Elliott Treaty”
24 and *U.S. v. Washington*. See Findings of Fact and Conclusions of Law Pursuant to CrR3.6(b) (July 19, 2019) at 3 n.1.
25 This Court previously reserved ruling on that challenge. *Id.* It is now ripe for this Court to decide.

⁴ The Pierce County Prosecutor also filed state trafficking charges against co-Defendant Anthony Paul but summarily
dismissed them when he “learned additional information about the circumstances of the case” that, as with Skagit
County, Det. Willette never saw fit to share exculpatory information with Pierce County—information that supported
Mr. Paul’s “complete defense in the case.” *Id.*, Ex. G at 2. The Prosecutor also cited WDFW’s failure to “bring cases
that involve tribal members to the Tribe’s Prosecutor.” *Id.* at 1; see also *U.S. v. Washington*, 19 F. Supp. 3d at 1150.

1 testimony reflects, Det. Willette knew that alleged shellfish crimes arising on a “reservation, any
2 tribal trust lands, or within the tribe’s usual and accustomed areas,” need be prosecuted in tribal
3 court—not state court. *See id.*; *U.S. v. Washington*, 19 F. Supp. 3d at 1149-1150.

4 Det. Willette was not oblivious to any of these procedural requirements under the Rafeedie
5 Consent Decree, admitting: “I have been trained on what usual and accustomed areas are. Been
6 trained on the Rafeedie decision and the consent decree. I've been trained on the Boldt decision.”
7 Galanda Decl., Ex. I at 40-41; *see also id.*, Ex. J at 86 (Det. Willette: “What I will say in regard to
8 sanitation rules specific to shellfish, I know that the Tulalip Tribe is a signing member to the
9 consent decree, the Rafeedie decision in 1994.”). But Det. Willette openly defied Rafeedie’s
10 explicit requirements. She behaved in bad faith.

11 The State amended the Information on June 18, 2019. The State alleges in Counts I and II
12 that “[o]n or about and between December 28, 2015 and January 11, 2016, in the County of Skagit,
13 State of Washington,” Defendant directed Torpey to illegally purchase 4,531 pounds of clam bait.
14 Amended Information at 1-2; Motion for Summons (Probable Cause) at 2. Again, that clam bait
15 was purchased by a PSSD employee from Tulalip fishers on the Tulalip Reservation. Galanda
16 Decl., Ex. C at 130-131. The State alleges in Counts III through V that “[o]n or about and between
17 February 11, 2016 and May 9, 2016, in the County of Skagit,” Defendant sold 877.75 pounds of
18 illegally harvested clams for bait. Amended Information at 2-3; Motion for Summons (Probable
19 Cause) at 2. Again, that clam bait was sold to Tribal fishers by a PSSD employee “at the beach”
20 at Tulalip and within the U&A. Galanda Decl., Ex. C at 124, 294-295; *id.* Exs. A, C.

21 No Treaty harvested clam bait should have ever been destroyed—it was expressly required
22 to be preserved. *U.S. v. Washington*, 19 F. Supp. 3d at 1149-1150. Tulalip Tribal law enforcement
23 should have been notified so the Tribes could assume primary enforcement and investigatory
24 responsibility. *Id.* Any shellfish charges should have been referred to the Tulalip Tribal Prosecutor

1 and filed in Tribal Court—not the Skagit County Prosecutor and Superior Court. *Id.* WDFW
2 breached the Rafeedie Consent Decree in multiple ways. WDFW committed bad faith.

3 **III. ISSUE**

4 Should the Court dismiss the Amended Information because of investigatory bad faith?

5 Yes.

6 **IV. EVIDENCE RELIED UPON**

7 Defendant’s Motion relies upon the Declaration of Gabriel S. Galanda in Support of
8 Defendant’s Motion Amended Information Due to Bad Faith, the exhibits attached thereto, and the
9 pleadings on file in this case.

10 **V. LAW AND ARGUMENT**

11 “To comport with due process, the prosecution has a duty to disclose material exculpatory
12 evidence to the defense and a related duty to preserve such evidence for use by the defense.” *State*
13 *v. Wittenbarger*, 124 Wn.2d 467, 475 (1994). “Whether destruction of evidence constitutes a due
14 process violation depends on the nature of the evidence and the motivation of law enforcement.”
15 *State v. Groth*, 163 Wash. App. 548, 557 (Wash. Ct. App. 2011). In determining whether evidence
16 has been destroyed in bad faith, the Court of Appeals of Washington has considered whether a
17 government agency followed “explicit policy and procedures.” *Id.* at 559.

18 In this instance, “explicit policy and procedures” include the Rafeedie Consent Decree,
19 which delineates clear roles for State and tribal law enforcement to play in investigating and
20 prosecuting alleged violations of shellfish sanitation laws. The question of which entity—the State
21 or the Tulalip Tribes—possesses primary enforcement responsibility under the Rafeedie Consent
22 Decree depends on where an alleged violation occurs. *Id.* at 1149–50. If a violation is committed
23 on a “reservation, any tribal trust lands, or within the tribe’s usual and accustomed areas”—as
24 here—the Tribes are the primary enforcer. *Id.* at 1149. In that scenario, the State’s role is

1 extremely limited. Its officers must “contact a law enforcement officer of the entity primarily
2 responsible,” meaning tribal law enforcement, which will then “take such action regarding the
3 offender and any associated evidence or forfeitable property as he or she deems appropriate.” *Id.*
4 at 1150. If tribal law enforcement cannot be contacted “within a reasonable time,” the State’s
5 officers shall “take the minimum action within his or her authority which is needed to protect
6 officer safety and to prevent the loss or destruction of evidence or of forfeitable property.” *Id.*

7 Any violations committed by Defendant occurred on a “reservation, any tribal trust lands,
8 or within the tribe’s usual and accustomed areas,” rendering the Tulalip Tribes, and not the State,
9 the primary enforcer under the Rafeedie Consent Decree. *Id.* at 1149–50. Counts I and II charge
10 first-degree Unlawful Fish and Shellfish Catch Accounting in violation of RCW 77.15.630(2).
11 The situs for that offense is where “title or control of the fish or shellfish is transferred or
12 conveyed.” RCW 77.15.630(4). Counts III through V charge second-degree Unlawful Trafficking
13 in Fish, Shellfish or Wildlife in violation of RCW 77.15.260(1). “‘Trafficking’ means ‘offering,
14 attempting to engage, or engaging in sale, barter, or purchase of fish, shellfish, wildlife, or
15 deleterious exotic wildlife.’” *State v. Yon*, 159 Wash. App. 195 (2010) (quoting RCW 77.08.010).

16 Here, all of the clam bait at issue was allegedly sold, bartered, or purchased on the Tulalip
17 Reservation or “at the beach” at Tulalip and within Tulalip’s U&A. Galanda Decl., Ex. C at 124,
18 130-131; *id.*, 294-295 (“Q. [D]o you have any reason to believe that the clams contemplated in . .
19 . Counts III, IV, or V are different than the clams contemplated by Counts I and II? A. No.”); *id.*,
20 Ex D. Again, as the State cannot show that the purchase occurred beyond Tulalip Indian country,
21 this Court must dismiss Counts III through V too. *See Pink*, 144 Wash. App. at 952. The State’s
22 role thus should have been extremely limited. *U.S. v. Washington*, 19 F. Supp. 3d at 1150.

23 Quite simply, WDFW was required to (1) “contact a law enforcement officer of the entity
24 primarily responsible”—in other words, a tribal police officer—and (2) take steps “to prevent the

1 loss or destruction of evidence or of forfeitable property.”⁵ *Id.* (emphasis added). WDFW did
2 neither of those two things, in bad faith.⁶

3 **VI. CONCLUSION**

4 For the foregoing reasons and those that will be developed during the evidentiary hearing
5 on September 29, 2021, Defendant seeks dismissal of all charges contained in the Amended
6 Information.

7 DATED this 16th day of September 2021.

8 GALANDA BROADMAN, PLLC

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22

⁵ The Tribes, as the primarily responsible “regulatory authority,” could have subjected the bait shellstock to
23 “immediate seizure and destruction,” but WDFW was required to “prevent the loss or destruction” of such evidence
in the course of contacting Tulalip law enforcement. *U.S. v. Washington*, 19 F. Supp. 3d at 1150, 1157.

24 ⁶ As detailed in Defendant’s companion Motion to Dismiss Pursuant to CrR 8.3(b), this prosecution is likewise
25 contrary to the State and Tribes’ express agreement in the Rafeedie Consent Decree that alleged shellfish violations
arising on a “reservation, any tribal trust lands, or within the tribe’s usual and accustomed areas,” shall be prosecuted
in tribal court—not state court. *Id.*, at 1149-1150. This broken promise is yet another example of WDFW’s bad faith.

1 **CERTIFICATE OF SERVICE**

2 I, Wendy Foster, declare as follows:

3 1. I am now and at all times herein mentioned a legal and permanent resident of the
4 United States and the State of Washington, over the age of eighteen years, not a party to the
5 above-entitled action, and competent to testify as a witness.

6 2. Today, I caused the above document to be electronically filed in the above-
captioned court and served via hand delivery on the following:

7 Edwin N. Norton
8 Skagit County Prosecuting Attorney
9 605 S. Third Street
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15 Attorneys for Plaintiff

16 and served via email on the following:

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23 Attorneys for Defendant Anthony Paul

24 The foregoing statement is made under penalty of perjury and under the laws of the State
25 of Washington and is true and correct.

Signed at Seattle, Washington, this 16th day of September 2021.



Wendy Foster