

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,

MOTION TO DISMISS AMENDED
INFORMATION PURSUANT TO CrR
8.3(b)

v.

HAZEN GRAHAM SHOPBELL,

Defendant.

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

I. RELIEF REQUESTED

Pursuant to CrR 8.3(b), Tulalip Tribal member Defendant Hazen Graham Shopbell (“Defendant”) moves to dismiss the Amended Information. The Washington Department of Fish and Wildlife (“WDFW”) engaged in misconduct throughout its investigation by willfully ignoring the requirements of a federal Consent Decree. As a result, Defendant’s right to a fair trial has been prejudiced. Accordingly, Defendant requests that the Court dismiss the Amended Information.

II. STATEMENT OF FACTS

Defendant incorporates by reference the facts set forth in his contemporaneously filed Memorandum in Support of Defendant’s Motion to Dismiss Pursuant to CrR 8.3(c), particularly the facts that:

1 1. The State alleges Defendant committed Counts I and II between December 28, 2015
2 and January 11, 2016, and Counts III through IV between February 11, 2016 and May 9, 2016.
3 Amended Information (June 18, 2019); Motion for Summons (Probable Cause) (June 14, 2018).
4 The five counts did not arise “in Skagit County,” as the State alleges. *See id.* They arose on the
5 Tulalip Reservation, which sits in Snohomish County, or “at the beach” at Tulalip and within the
6 U&A. Galanda Decl., Ex. B at 124, 130-13, 294-295; *id.* Exs. A, C.

7 2. The Rafeedie Consent Decree provides that “violations of tribal shellfish sanitation
8 laws by members of tribes or by tribal licensees shall be prosecuted in tribal courts” to the extent
9 those violations arise on “reservation, any tribal trust lands, or within the tribe’s usual and
10 accustomed areas.” *U.S. v. Washington*, 19 F. Supp. 3d 1126, 1149-1150 (W.D. Wash. 1994).

11 3. In or around September 2016, the Tulalip Tribes opted against charging Defendant
12 for any alleged purchase, sale, or barter of the clam bait. Declaration of Gabriel S. Galanda in
13 Support of Defendant’s Motion Amended Information Due to Bad Faith (“Galanda Decl.”), Ex B;
14 Ex. C at 143-144; Ex. J at 22; *U.S. v. Washington*, 19 F. Supp. 3d at 1150; *see Settler v. Lameer*,
15 507 F.2d 231, 240 (9th Cir. 1974) (affirming tribal court authority over tribal member fishing
16 violations in a tribe’s U&A). In an August 8, 2018, letter to WDFW and the Skagit County
17 Prosecutor, **the Tulalip Tribes made clear they “don’t believe a bait claim violation rises to
18 the level of a felony or that WDFW should be attempting to exercise State jurisdiction” over
19 Defendant.**¹ *Id.*

20 4. In 2017, after the Tribe declined to prosecute Defendant, Det. Willette referred
21 these charges to the Snohomish County for prosecution but its Prosecutor rejected the referral.
22 Galanda Decl., Ex. F. Det. Willette also previously “shopped” these charges to the U.S.

24 ¹ This Court previously reserved ruling on Defendant’s own Treaty-based assertion “that the State prosecution would
25 violate the Point Elliott Treaty” and *U.S. v. Washington*. Findings of Fact and Conclusions of Law Pursuant to
CrR3.6(b) (July 19, 2019) at 3 n.1. That issue is now ripe for this Court to decide.

1 Department of Justice, the Washington State Attorney General, the King County Prosecutor, and
2 the Pierce County Prosecutor. *Id.*, Ex. C at 251; Ex. G. A retired Los Angeles Police Department
3 Detective called Det. Willette’s “prosecutorial ‘shopping’ . . . egregious.”² *Id.*, Ex. H at 6.

4 5. On June 15, 2018, Skagit County filed an Information against Defendant upon Det.
5 Willette’s referral. *See* Motion for Summons (Probable Cause) at 2. When she shopped these
6 charges to Skagit County, Det. Willette knew (a) the Tulalip Tribes had opted not to bring charges
7 against Defendant as the primary enforcement agency and (b) the Tulalip statute of limitations had
8 expired on any alleged clam bait violations, but pursued these charges in Skagit County anyway.
9 *Id.*, Ex. C at 143-144; *id.*, Ex. J at 22; *see* Tulalip Tribal Code (“TTC”) 3.05.080.

10 **III. ISSUE**

11 Should the Court dismiss the Amended Information pursuant to CrR 8.3(b) due to
12 government misconduct and resulting prejudice to Defendant’s right to a fair trial?

13 Yes.

14 **IV. EVIDENCE RELIED UPON**

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

18 **V. LAW AND ARGUMENT**

19 This Court, “in the furtherance of justice, after notice and hearing, may dismiss any
20 criminal prosecution due to arbitrary action or governmental misconduct when there has been
21 prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.”
22 CrR 8.3(b). Thus, “[t]wo things must be shown before a court can require dismissal of charges

24 ² This Court also previously reserved ruling regarding the fact that “WDFW and the Washington State Attorney
25 General’s Office shopped various potential charges” against Defendant to those three other counties. Findings of Fact
and Conclusions of Law Pursuant to CrR3.6(b) at 3 n.2. That issue is now ripe for this Court to decide as well.

1 under CrR 8.3(b).” *State v. Michielli*, 132 Wash.2d 229, 239 (1997). First, “a defendant must show
2 arbitrary action or governmental misconduct.” *Id.* (citing *State v. Blackwell*, 120 Wash.2d 822,
3 831 (1993)). “Governmental misconduct, however, ‘need not be of an evil or dishonest nature;
4 simple mismanagement is sufficient.’” *Id.* (quoting *Blackwell*, 120 Wash.2d at 831). “The second
5 necessary element a defendant must show before a trial court can dismiss charges under CrR 8.3(b)
6 is prejudice affecting the defendant’s right to a fair trial.” *Id.* at 240. “Such prejudice includes the
7 right to a speedy trial.” *Id.*

8 Starting with the first prong—governmental misconduct—WDFW has failed to follow the
9 requirements of the Rafeedie Consent Decree at every turn, culminating in this prosecution before
10 the wrong court. Under the Rafeedie Consent Decree, WDFW was required to contact Tribal law
11 enforcement because the alleged violations occurred on a “reservation, any tribal trust lands, or
12 within the tribe’s usual and accustomed areas.” *United States v. Washington*, 19 F. Supp. 3d at
13 1149-50. WDFW was entitled only to “take the minimum action within [its] authority which [was]
14 needed to protect officer safety and to prevent the loss or destruction of evidence or of forfeitable
15 property.” *Id.* at 1150. Finally, under the Rafeedie Consent Decree, “notwithstanding the existence
16 of comparable laws of the State of Washington . . . violations of tribal shellfish sanitation laws by
17 members of tribes or by tribal licensees **shall be prosecuted in tribal courts.**” *Id.* (emphasis
18 added). Taken together, WDFW’s actions show “simple mismanagement,” *Michielli*, 132 Wash.2d
19 at 239, and a disregard for the Rafeedie Consent Decree.

20 The second prong—prejudice to the right to a fair trial—is also met. As discussed above,
21 “prejudice includes the right to a speedy trial.” *Id.* at 240. “Where the Sixth Amendment’s Speedy
22 Trial Clause does not apply,” because a defendant is not subject to actual restraints on his liberty
23 such as incarceration or bail, “the defendant’s protection against overly stale criminal charges and
24 oppressive delay is provided primarily by the applicable statute of limitations.” *State v. Boseck*, 45

1 Wash. App. 62, 66 (Wash. Ct. App. Div. 1 1986). Here, the applicable statute of limitations should
2 have been that of the Tulalip Tribal Court, given that the Rafeedie Consent Decree requires these
3 charges to have been referred to Tribal law enforcement and brought in Tribal Court. *United States*
4 *v. Washington*, 19 F. Supp. 3d at 1149-50; *see* TTC 3.05.080.

5
6 **VI. CONCLUSION**

7 For the foregoing reasons, Defendant seeks dismissal of all charges contained in the
8 Amended Information.

9 DATED this 16th day of September 2021.

10 GALANDA BROADMAN, PLLC

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Gabriel S. Galanda, WSBA# 30331
15 8606 35th Ave. NE, Suite L1
16 PO Box 15146, Seattle, WA 98115
17 (206) 557-7509 Fax: (206) 299-7690
18 Email: gabe@galandabroadman.com
19 Attorneys for Defendant Hazen Shopbell
20
21
22
23
24

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:

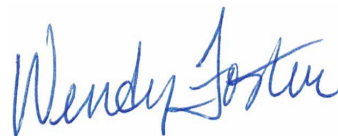
7 Edwin N. Norton
8 Skagit County Prosecuting Attorney
9 605 S. Third Street
10 Courthouse Annex
11 Mount Vernon, WA 98273
12 Tel: (360) 416-1600
13 Fax: (360) 416-1648
14 EdWinn@co.skagit.wa.us
15 Attorneys for Plaintiff

16 and served via email on the following:

17 David H. Smith
18 Garvey Schubert Barer
19 1191 Second Ave., Suite 1800 Seattle, WA 98101
20 Tel: (206) 464-3939
21 Fax: (206) 464-0125
22 dsmith@gsblaw.com
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