

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

STATE OF WASHINGTON,

Plaintiff,

v.

HAZEN GRAHAM SHOPBELL,

Defendant.

Co-Defendant:

ANTHONY EDWIN PAUL, 18-1-00622-29

CASE NO. 18-1-00621-29

REPLY ON DEFENDANT HAZEN
SHOPBELL'S SUPPLEMENTAL
MOTION TO DISMISS PURSUANT TO
CrR 8.3(c)

The State makes fatal admissions in its Response to Defendants' Pretrial Motions (Jan. 2, 2021) ("Response"). Dismissal of Counts I through V is now required.

A. The State Now Admits Counts I and II Arose on the Tulalip Reservation.

Counts I and II concerns alleged **purchased** clam bait. The State now admits that "the situs of these crimes was on the reservation." Response at 6. "[S]tates . . . lack . . . criminal jurisdiction over Indians within Indian country, absent federal legislation specifying to the contrary." *State v. Comenout*, 173 Wash.2d 235, 238 (2011) (quoting Felix S. Cohen, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04[1], at 537 (2005)).¹ There is no federal legislation that authorizes the State to prosecute Defendant Hazen Graham Shopbell, a Tulalip Tribal member ("Defendant"),

¹ The Prosecution misrepresents that Mr. Shopbell "sites [sic] no case or law in support of this assertion" of bedrock Indian law. Response at 10; *see e.g.*, Defendant's Motion to Dismiss Pursuant to CrR 8.3(c) (Sept. 16, 2021) at 4.

1 for Counts I or II. Therefore, dismissal of Counts I and II is required. *Seymour v. Superintendent of*
2 *Wash. State Penitentiary*, 368 U.S. 351, 359 (1962).

3 **B. The State Further Admits Mr. Shopbell Did Not Violate RCW 77.15.630(2), As**
4 **Originally Alleged in Counts I and II.**

5 Again, in its December 30, 2021, Bill of Particulars, the State abandoned its prior contention
6 that Mr. Shopbell “instructed [Ms. Torpey] to not document the purchases with fish receiving tickets.”
7 Fifth Galanda Decl., Ex. A at 2. The State claims only that he “instructed Torpey to buy these clams,”
8 which is not a crime. *Id.* In its Response, the State claims “Torpey committed the criminal act . . .
9 because Shopbell implicitly told her to do so.” Response at 6. Accomplice liability under RCW
10 9A.08.030(3), as the State cites in its Bill of Particulars, says a “person is an accomplice of another
11 person in the commission of a crime if . . . he or she: Solicits, commands, encourages, or requests
12 such other person to commit it.” Criminality, let alone accomplice liability, does not “implicitly”
13 attach by an instruction to “buy clams.” *See generally State v. Cronin*, 142 Wn.2d 568, 578–79, 14
14 P.3d 752 (2000). Mr. Shopbell must be dismissed from Counts I and II.

15 **C. The State Also Admits It Does Not Know and Cannot Prove “The Exact Situs” of**
16 **Counts III Through V.**

17 Counts III through V concerns alleged **sold** clam bait. It is the *State’s*—not Mr. Shopbell’s—
18 burden to establish jurisdiction, specifically that those allegedly criminal sales occurred “within the
19 state of Washington.” *State v. L.J.M.*, 129 Wash.2d 386, 392 (1996); Response at 8. Having conceded
20 in its December 30, 2021, Bill of Particulars that: “The State does not have information as to the time
21 or locations of the sale or bartering,” the State now also admits: “The exact situs of where this
22 trafficking occurred is unknown.” Fifth Galanda Decl., Ex. A at 3; Response at 8.

23 The State absurdly claims “it can be inferred that the crimes occurred in the State of
24 Washington.” Response at 10. Inference is insufficient to carry the State’s burden; evidence is
25 required. *L.J.M.*, 129 Wash.2d at 393 (“the State meets this burden by presenting **evidence** that any
26 or all of the essential elements of the alleged offense occurred ‘in the state.’”) (emphasis added).
When given yet another chance, through its Bill of Particulars, to step forward with a scintilla of

1 evidence with which to establish that Counts III through V occurred “within the state of Washington,”
2 the State fails. *L.J.M.*, 129 Wash.2d at 392. Therefore, dismissal of Counts III through V is also
3 required. *Seymour*, 368 U.S. at 359.

4 **D. The State Misrepresents the *Rafeedie* Consent Decree As To Counts III Through V.**

5 The *Rafeedie* Consent Decree makes clear: “Each tribe **shall** bear primary responsibility for
6 enforcement of shellfish sanitation laws against its members . . . within its reservation, any tribal trust
7 lands, or within the tribe’s usual and accustomed areas.” *U.S. v. Washington*, 19 F. Supp. 3d 1126,
8 1149 (W.D. Wash. 1994) (emphasis added). Further, under the *Rafeedie* Consent Decree,
9 “notwithstanding the existence of comparable laws of the State of Washington . . . violations of tribal
10 shellfish sanitation laws by members of tribes or by tribal licensees **shall** be prosecuted in tribal
11 courts.” *Id* (emphasis added).² Unlike other parts of the *Rafeedie* Consent Decree, its “Enforcement”
12 Section VI is not contingent upon any federal action.³ *U.S. v. Washington*, 19 F. Supp. 3d at 1149.

13 Mr. Shopbell has offered evidence that Ms. Torpey allegedly sold the clam bait “at the beach”
14 at Tulalip and within Tribal U&A. Defendant’s Motion to Dismiss Pursuant to CrR 8.3(c), Appendix
15 A, at p. 124; *see also id.* 294-295; *id.*, Appendix B; Galanda Decl. (Sept. 16, 2021), Ex. A (Bates No.
16 000439-000457) (Indian Treaty Fish Receiving Tickets and clam bait receipts showing sales in Treaty
17 Marina Areas within the Tulalip U&A). Mr. Shopbell has produced evidence “which could, assuming
18 its truth, show that the alleged crime occurred on trust property” or in the U&A. *Id.*; *L.J.M.*, 129
19 Wash.2d at 395. In response, the State has offered **no evidence** that Counts III through V arose
20 beyond Tulalip reservation lands or U&A—i.e., “within the state of Washington.”
21
22

23 ² Consistent with *Rafeedie* Consent Decree, Washington Department of Fish and Wildlife (“WDFW”)’s Regulation 5.90
24 – Tribal Fishery Enforcement provides: “If violations occur within the tribe’s U&A, the Officer should report the
25 violations to tribal authorities.” Supplemental Galanda Decl. (Sept. 9, 2021), Ex A at 2.

26 ³ There is a process for the Tribes to “undertake sole responsibility” as a shellfish sanitation control agency in accordance
with the National Shellfish Sanitation Program Manual and Food and Drug Administration laws, but what is at issue here
is Tulalip “primary responsibility” over enforcement activities involving tribal members in Treaty shellfish commerce in
Tulalip territories. *Compare U.S. v. Washington*, 19 F. Supp. 3d at 1140 with *id.* at 1149. The State continues to unethically
obscure this distinction.

1 Admitting the State “does not have information as to the . . . locations of the sale or bartering”
2 and further admitting “[t]he exact situs of where this trafficking occurred is unknown,” this Court
3 must now conclude that the State has failed to carry its burden to establish that Counts III through V
4 occurred “within the state of Washington.” *L.J.M.*, 129 Wash.2d at 392. Again, dismissal of Counts
5 III through V is also required. *Seymour*, 368 U.S. at 359.

6 DATED this 2nd day of January 2022.

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8 GALANDA BROADMAN, PLLC

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11 _____
12 Gabriel S. Galanda, WSBA# 30331
13 8606 35th Ave. NE, Suite L1
14 PO Box 15146, Seattle, WA 98115
15 (206) 557-7509 Fax: (206) 299-7690
16 Email: gabe@galandabroadman.com

17 Attorneys for Defendant Hazen Shopbell
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19
20
21
22
23
24
25
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1 **CERTIFICATE OF SERVICE**

2 I, Gabriel S. Galanda, 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 above-
5 entitled action, and competent to testify as a witness.

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

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

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 of
25 Washington and is true and correct.

26 Signed at Seattle, Washington, this 2nd day of January 2022.

