21-0616-cv

United States Court of Appeals

for the

Second Circuit

DAVID T. SILVA, GERROD T. SMITH, JONATHAN K. SMITH,
Members of the Shinnecock Indian Nation,

Plaintiffs-Appellants,

– v. –

BRIAN FARRISH, JAMIE GREENWOOD, EVAN LACZI, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE, BASIL SEGGOS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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REPLY ARGUMENT

I. Appellees merely seek to underplay Judge Kuntz's decision in *Unkechaug*.

The State Appellees underplay the contrary result below in *Unkechaug Indian Nation v. N.Y.S. Dep't of Envtl. Conservation*, No. 18-cv-1132, 2019 WL 1872952 (E.D.N.Y. Apr. 23, 2019) as "an unreported district court decision" which they intend to challenge again below in that case. (Brief of State Appellees, p. 39). The Brief of County Appellees did not argue this issue or *Unkechaug* at all.

Fed. R. App. P. 32.1 requires all circuits to permit litigants to cite unpublished opinions issued after January 1, 2007. This Court has held "District court decisions, unlike the decisions of States' highest courts and federal courts of appeals, are not precedential in the technical sense: they have collateral estoppel, res judicata, and 'law of the case' effects, but create no rule of law binding other courts." *ATSI Communications, Inc. v. Shaar Fund, Ltd*., 547 F.3d 109, 112 (2nd Cir. 2008). That being said, the *ATSI Communications* Court noted the persuasive authority of district court decisions, citing *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991) ('Where a second judge believes that a different result may obtain, independent analysis is appropriate.'). *Id.* at 1371 fn 4. Here, Judge Feuerstein did not write an independent analysis of its different result, but only glossed over *Unkechaug*. The State Appellees do not dispute the contrary result or the lack of anindependent analysis below. The Eighth Circuit has held the

distinction between published and non-published decisions makes no difference. See, *Anastasoff v. U.S.*, 223 F.3d 898, 899 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054, (8th Cir. 2000) (*en banc*), ("We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'")

Adding to the State Appellees' evaluation of the *Unkechaug* opinion as a "failure," their argument is disingenuous that there is "no future threats of enforcement … that might support characterizing the relief they seek as "prospective" and federal violations are not ongoing. (Brief of State Appellees, p. 40). In arguing that the undisputed facts of actual prosecutions of Appellants does not give rise to a threat of further prosecutions beyond that moment in time, the State Appellees are asking this Court to find the Sun rises in the West.

A. Jonathan and Gerrod have standing.

The State Appellees baldly contend without more, in contrast to *Unkechaug*, "Gerrod Smith and Jonathan Smith make no concrete assertions here, nor do they point to any evidence … to substantiate any future plans." (Brief of StateAppellees, p. 46-47). The Brief of County Appellees does not argue this issue. State Appellees do not reconcile how the nearby Unkechaug established standing by pleading threatened prosecution, and showed standing, when Appellees plead actual

prosecutions and did not, and both parties seek to continue exercising their aboriginal fishing rights. It's again a case of the sun rising in the West. Like Appellees here, in *Unkechaug*, "Plaintiffs' intent to fish in Reservation and customary fishing waters is evident from their Complaint, such that they possess 'concrete plans' that could be subject to criminal prosecution by Defendants…." *Unkechaug*, at 12.

State Appellees do not mention or argue a different application of *Herrera v. Wyoming*, S.Ct., Slip Op., 17-532 (May 20, 2019) (Sotomayor, J.). (Holding in favor of the Crow Tribe's hunting rights, "Congress 'must clearly express' any intent to abrogate Indian treaty rights", p. 14) or *McGirt v. Oklahoma*, 18-9526, p. 24 (July 9, 2020)(Gorsuch, J.) ("To be fair, Oklahoma is far from the only State that has overstepped its authority in Indian country. Perhaps often in good faith, perhaps sometimes not, others made similar mistakes in the past. But all that only underscores further the danger of relying on state practices to determine the meaning of the federal MCA. See, e.g. … Cohen §6.04(4)(a) ('Before 1942 the state of New York regularly exercised or claimed the right to exercise jurisdiction over the New York reservations, but a federal court decision in that year raised questions about the validity of state jurisdiction').

B. The *Ex Parte Young* exception to the Eleventh Amendment applies.

State Appellees failed to discuss or reconcile *Unkechaug*'s ruling that *Ex Parte Young,* 209 U.S. 123 (1908) applied, with Judge Feuerstein's decision here thatit did not under basically the same set of facts. (SeeBrief of State Appellees, p. 40). The Brief of County Appellees does not arguethis issue. The best that State Appellees can do is to parse and isolate the prosecutions of Appellants with the unavailing argument that the dots cannot be connected as an "ongoing violation of federal law" with words like "not enough" and "insufficient." *Id.* The Unkechaug plead threat of prosecution to show standing, but Appellants plead more, actual prosecutions.

State Appellees also fail to explain why proposed Exhibits 43 and 44 are not irrefutable proof that the State Appellees follow NY Department of Environmental Conservation Policy 42 ("CP-42") when they want to, and those exhibits show the exact thing Appellants, and Unkechaug, sought in their complaints – recognition of an indigenous use right in traditional indigenous waters. Further, State Appellees fail to show why a plain reading of Appellants' complaint, like Judge Kuntz's plain reading of the *Unkechaug* complaint, does not show both parties seek similar injunctive relief based on similar aboriginal rights. Lastly, State Appellees fail to reconcile *Unkechaug* where Judge Feuerstein read into the complaint the notion of un-plead fee simple, and Judge Kuntz did not mention it at all.

C. Taobi's claims are not precluded under the *Younger* abstention doctrine.

State Appellees again fail to reconcile *Unkechaug* and fail to persuade that Judge Feuerstein's ruling was correct that the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) applies. The Brief of County Appellees does not argue this issue.

Appellants argued that both Appellees ignored CP-42 and the Bengel and Kreshic emails show illegal racial profiling of Shinnecock people, Native Americans, and the bad faith exception applies. Moreover, the lack of a pending state proceeding at the time of Judge Feuerstein's decision, a required prongof the test, means the *Younger* test failed. State Appellees fail to discuss and argue *Dombrowski v. Pfister*, 380 U.S. 479, 487-489 (1965), a limited exception to *Younger v. Harris*, 401 U.S. 37, 54 (1971). (The abstention doctrine is inappropriate where a statute is justifiably attacked on its face, or as applied for the purpose, as here, of discouraging protected activities.).

Regarding CP-42, State Appellees contend its own policy does not apply here because "Silva is not a tribal official, and there is no indication that he was acting on behalf on behalf of the Shinnecock Tribe…." (Brief of State Appellees, p. 43). This contention is without merit. State Appellees fail to point to any legal authority, or

language in CP-42, to support the preposterous and erroneous proposition that CP-42 only applies some of the time.

Next, State Appellees contend the subject internal DEC emails do not show badfaith. (Brief of State Appellees, p. 44). But their argument is jingoism. The Appellees take no position here on whether the Shinnecock are a protected race, the crux of Appellants' bad faith argument that the emails show illegal racial profiling.

Lastly, in *Unkechaug*, Judge Kuntz held there was a threat of state prosecution, although none was actually pending, so *Younger* was not an issue. Here, this Court need go no further than to note no state proceeding was pending at the time of the lower court decision. State Defendants opine that *Younger* has essentially a state court exhaustion requirement. There is no legal support for such a requirement as part of the *Younger* test. There was no such argument made in or part of *Unkechaug*. State Appellees cite *Huffman v. Pursue,Ltd.,* 420 U.S. 592 (1975), but *Huffman* held that *Younger* applied to civil proceedings as well as criminal cases, and does not contain language extending *Younger* to include a state court exhaustion requirement. State Appellees also cite *Miller v. Silbermann*, 951 F. Supp. 485 (S.D.N.Y.), but *Miller* did not rest on *Younger*.

II. The lower court erred in granting summary judgment as to Count II (Continuing Pattern of Illegal Racial Discrimination in Violation of 42 U.S.C. §§ 1981 and 1982 of the 1866 Civil Rights Act, as amended)

A. Appellees fail to take a position on whether "Shinnecocks" are a protected Native American race.

The State Appellees work-around the core race issue and completely avoid responding to or taking a position of whether the "Shinnecocks" are a protected Native American race under 42 U.S.C. §§ 1981 and 1982 of the 1866 Civil Rights Act, as amended. (See Brief of State Appellees, pp. 59-61. The Brief of County Appellees fails to address this issue or illegal race discrimination at all.

The State Appellees' work-around is unpersuasive. They are correct that the prosecution of "non-Indian fishing companion Salvatore Ruggiero was treated in the exact same manner as Smith" (Brief of State Appellees, p. 60), but miss the point that both Ruggiero and Smith were prosecuted for exercising Shinnecock fishing rights together on the same boat. The State Appellees are correct that "[t]he agency's policy [CP-42] of promoting cooperation with and respect for Native American tribes cannot reasonably be construed as evidence of racial animus" (Brief of State Appellees, p. 60), but again miss the point that the repeated prosecutions of Appellants for exercising their Shinnecock fishing rights without consultation or otherwise following the requirements of CP-42 *is* evidence of racial animus. Lastly, the State Appellees again argue that the internal DEC emails cannot be construed as

showing racial animus, (Brief of State Appellees, p. 61), but that contention is unpersuasive because Appellees continue to flatly decline to directly admit, deny, or even touch on, that the word "Shinnecocks" in the Bengel email means a protected Native American race, and if yes, explain why the targeting of a protected race for prosecution in the Bengelemail is not illegal and bad faith.

Lastly, State Appellees opine that the dismissal in favor of Appellee, DEC Commissioner Seggos,was correct because there is "no evidence of Commissioner Seggos's (sic) personal involvement or direct connection." (Brief of State Appellees, p. 63). This Court is reminded that Appellees' motions for summary judgment were converted from motions to dismiss and granted, and has been no discovery in this case. Appellee Seggos was not dismissed from *Unkechaug.* State Appellees fail to reconcile the difference when he was sued in both cases for the same reason. Appellee Segos is the Commissioner of the DEC and has the final authority for internal enforcement of CP-42 and enforcement decisions against Native Americans.The enforcement actions taken by the DEC in violation of CP-42 or otherwise lie at the DEC Commissioner's door. "[I]f 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." *Ex parte Young*, at 124.

B. The statute of limitations was tolled for Jonathan and Gerrod under the continuing violation exception.

State Appellees contend Appellants "point to no 'proof of specific ongoing

discrimination polic[ies] or practices' at DEC", or "a single discriminatory act as to them within the limitations period." (Brief of State Appellees, p. 62). The Brief of County Appellees again makes no argument. State Appellees' argument is unavailing. As Appellants pointed out in their opening brief, "systematic, under - the - (CP-42) radar, civil rights violating conduct that was, and is continuing. Because of the history of actual enforcement against them, none of the Appellants can presently fish under their aboriginal use rights without fear of criminal prosecution. Therefore, those past acts "will be timely even if they would be untimely standing alone." *Chin v Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 155-56 (2d Cir. 2012)."

The prosecution of Taobi by the State and County Appellees was ongoing at the time this case was filed and there had been a decade of prosecution in violationof CP-42. "Most recently on April 20, 2017, Silva was stopped" (A-20), " On June 17, 2010 [Jonathan Smith's litigation over his oyster farm in Shinnecock Bay]" (A-20), "On October 14, 2009" [Gerrod Smith's litigation over fishing in Shinnecock Bay] (A-20), and "On January 28, 2009" [Salvatore Ruggiero's litigation over fishing with Gerrod Smith in Shinnecock Bay] (A-19).

The aforesaid acts plead couldn't show more of a pattern: Appellants plead at paragraph 16 of their Complaint: "Over the last decade, the Defendants have ticketed, seized fish and fishing equipment, and prosecuted the Plaintiffs for alleged criminal offenses in alleged violation of New York State law involving fishing and

raising shellfish in Shinnecock Bay and its estuary waters, which are adjacent to the lands of the Shinnecock Indian Reservation. Each of the prosecutions failed. Yet, the Defendants persist and continue to ticket and threaten prosecution. The Plaintiffs are in fear of exercising those same usual and customary aboriginal fishing rights secured and retained for them by their ancestors when Shinnecock territory was ceded to the English." (A-19).

Furthermore, Appellants plead in paragraph 25 of their Complaint, "The Defendants'aforesaid acts against the Plaintiffs constitute a continuing pattern and practice of purposeful acts of discrimination based on their race as Native Americans inviolation of Plaintiffs' civil rights to equal security of the laws and to exercise their lawful federally protected rights to use waters, fish, take fish, and hold their fish without interference, without seizure of person and property, and without prosecution by the Defendants." (A-21).

The repeated violations of the consultation and other requirements of CP-42 and the internal Bengel email is proof backing up their allegations that the Appellants (the "Shinnecocks") were targeted and prosecuted because of their race and exercise of their aboriginal fishing rights.

CONCLUSION

For the foregoing reasons, Appellants respectfully submit the lower court erred in granting summary judgment in favor of the Appellees on all counts. Appellants respectfully request this Court to reverse and vacate the lower court's order and judgment, and remand and assign this case for further proceedings before the Hon. William Kuntz II, the presiding judge in the related case of *Unkechaug Indian Nation v. N.Y.S. Dep't of Envtl. Conservation*, No. 18-cv-1132 (E.D.N.Y.)

Dated: New York, New York
October 13, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with U.S. Court of Appeals for the Second Circuit Local Rule 32.1(a)(4)(B) which requires that the reply brief contain no more than 7,000 words, because it contains 2,543 words, exclusive of the sections that do not count towards the limitation pursuant to Fed. R. App. P. 32(a)(7)(B). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Times New Roman font size 14.

Dated: October 13, 2021

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