Ninth Circuit Court of Appeals Number 21-30172
District Court Number 4:20-cr-00030-BMM-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-vs-

ERIC BRUCE FOWLER
Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

HONORABLE BRIAN M. MORRIS
UNITED STATES DISTRICT JUDGE, PRESIDING

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I. ARGUMENT

A. Trooper Moon did not have the authority to perform a Fourth Amendment Search of Mr. Fowler under the Cross-Deputization Agreement

Fowler concedes the first two points made in the Government's Answering Brief – that A) Trooper Moon "had the authority to enforce state laws on Highway 2 against non-Indian travelers." Ans. Br. at 18. Trooper Moon also had the authority to stop Mr. Fowler's truck for a violation of state law when he observed that Mr. Fowler's truck had no license plate. ER-32-33; Ans. Br. at 19.

However, as soon as Trooper Moon made the stop, before he began any investigation, he saw Mr. Fowler step out of his truck and into plain view of

Trooper Moon. Trooper Moon testified that at that moment, he recognized Mr. Fowler and knew him to be a tribal member. ER-36. It is at that moment, the government argues, that Trooper Moon's authority "shifted" from that of a state law enforcement officer to a tribal law enforcement officer under the CDAs. Ans. Br. at 21.

Mr. Fowler does not dispute that Trooper Moon believed he was shifting his authority to that of a tribal law enforcement officer. There in no indication Trooper Moon knew or could have known that the CDAs were legally invalid (in fact, he had never even read them. ER-118). Because they are, though, this is the moment at which Trooper Moon's search became unlawful.

The government provides no authority supporting the tribes' ability to circumvent the statutory and constitutional provisions granting exclusive criminal jurisdiction over Indian County to the federal government. As noted in Appellant's Opening Brief, Indian County is subject to exclusive federal or tribal jurisdiction "[e]xcept as otherwise expressly provided by law." 18 U.S.C. § 1152. "States generally lack jurisdiction over Indian Country. This rule is subject to some exceptions, the most important being a federal statute known as Public Law 280. Public Law 280 explicitly grants six states, including California, authority to enforce criminal laws in Indian Country. 18 U.S.C.S. § 1162(a)." *Los Coyotes*

Band of Cahuilla & Cupeno Indians v. Jewell, 729 F.3d 1025, 1030 (9th Cir. 2013). Montana is not one of those states. This Court has noted that "in non-Public Law 280 states, without federal funding, no law enforcement officer would be available to respond to major crimes in Indian Country." *Id.* at 1031.

Just because "many tribes have entered into cross-deputization agreements with state law enforcement agencies" (Ans. Br. at 20), does not make the Agreements at issue in this case legal. There is another mechanism, aside from PL 280, by which states can legally assume criminal jurisdiction over Indian Country, briefly referenced in Appellant's Opening Brief. That mechanism is set forth in 25 USCS §§ 1321 et seq., titled Constitutional Rights of Indians, Jurisdiction Over Criminal And Civil Actions. It provides:

§ 1321. Assumption by State of criminal jurisdiction.

(a) Consent of United States.

(1) In general. The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(2) Concurrent jurisdiction. At the request of an Indian tribe, and after consultation with and consent by the Attorney General, the United States shall accept concurrent jurisdiction to prosecute violations of sections 1152

> and 1153 of title 18, United States Code, within the Indian country of the Indian tribe.

The statute further provides:

> **§ 1326. Special election.**
> State jurisdiction acquired pursuant to this title [25 USCS §§ 1321 et seq.] with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

The state and the government do not cite this section as authority for the CDAs, and there is no evidence of a special election called by the Secretary of the Interior to adopt such jurisdiction1.

Fowler recognizes that this section is not wholly applicable to the type of jurisdiction the CDAs attempt to bestow upon state law enforcement – the CDAs do not purport to allow the state to assume jurisdiction over Indians to enforce *state* laws upon Indian people. The point is that these statutes are the only mechanisms, under the laws of the Unites States and the Montana Constitution, art.

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1 Counsel recently received, on March 24, 2022, a letter from Tribal Lay Advocate Mary Cleland, who wished the Court to know that no such special election has been held during her tenure or her lifetime. While not a legal argument, it does seem important that the Court be aware of tribal members represented by Ms. Cleland, who vehemently oppose and do not agree to be subject to the CDAs. The letter is attached hereto as Exhibit A.

1 sec. 1, by which state law enforcement officers have any authority over Indian people on Indian land. The law clearly states that the "general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States…shall extend to the Indian Country," and that exceptions that must be "expressly provided by law." 18 U.S.C. § 1152. Aside from these non-applicable statutes, there is no other exception by which state law enforcement can gain authority over Indian people. Even if the Tribe itself wanted to enter the CDAs (Fowler does not dispute that it did, as evidenced by the resolutions provided by the government), the Tribe and the state are precluded from doing so because of exclusive federal jurisdiction.

The government emphasizes the tribes' "'inherent sovereign authority to address conduct [that] threatens or has some direct effect on…the health and welfare of the tribes.'" Ans. Br. at 24 and 25, citing *Cooley v. United States*, 141 S.Ct. 1638, 1641 (2021). Aside from that vague statement and a law review article, the government cites no *authority* for that authority – no mechanism or procedure or law establishing to how a state law enforcement officer is to accomplish that for the tribe. *Cooley* provides no guidance either, as that case involved the exercise of tribal authority over a non-tribal member. *Id.*

The second case cited by the government for the proposition that "tribes may employ police officers to aid in the enforcement of tribal law and in the exercise of tribal power" is misleading in the context of the Answering Brief. Ans. Br. at 24, citing *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975). *Ortiz-Barraza* addressed the authority of the Papago Indians to establish their own "tribal court and police force." *Id.* at 1179. The Court upheld the tribe's authority to establish a tribal police force and employ tribal police officers. *Id.* The officer was employed solely by the tribe. *Id.* It is not disputed that tribes may establish their own laws and employ their own police officers to enforce those laws within the bounds of the reservation. In no way does *Ortiz-Barraza* provide guidance as to the legality of cross deputization agreements nor address state police officers enforcing tribal law, and it certainly does not supply authority for the same.

Fowler acknowledges that his Tribe is not the only Tribe that has enacted Cross-Deputization Agreements with state law enforcement agencies. However, just because something is common, does not make it legal. Because the CDAs grant state law enforcement agencies the power to enact tribal laws, when the federal government is the only entity other than the tribe itself with the constitutional and legal ability to enact authority over Indian people, and without

express exception which Fowler has demonstrated does not exist, the CDAs are illegal.

The government accuses Fowler of confusing the CDAs with SLECs. Fowler addressed this in his Opening Brief (p. 14-15). Fowler does not claim that the CDAs are equivalent to or serve the same purpose as SLECs. The BIA's declination to recognize or validate the CDAs is significant in that it demonstrates that the CDAs do not meet the legal requirements for non-tribal law enforcement to enforce tribal law. SLEC is one way to do so, albeit for federal law enforcement. Fowler acknowledges that the CDAs were not intended to enforce federal law; however he cannot ignore the facts that 1) the tribe still made the BIA a party to the CDAs thus conditioning the CDAs upon its approval; and 2) the BIA disavowed the CDAs because the very authority cited within the Agreements, the Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801-2804, grants approval authority to the Secretary of the Interior. ER-94, 111. The government opines that "the mere existence of the BIA SLEC program or other federal deputization statute does not signify an intent by Congress to divest the Tribes of their inherent authority to regulate conduct on the reservation…" Ans. Br. at 28-29. Maybe not, but the CDAs' citation to 25 U.S.C. §§ 2801-2804 signifies an intent by the drafters of the CDAs to condition their approval upon the Secretary of the Interior,

which they failed to obtain. ER-94, 111. The irony is that ultimately, Fowler did end up subject to federal jurisdiction and law as a result of Trooper Moon's investigation.

B. The failure to provide Trooper Moon with an ID Card undermines the integrity of the entire CDA and should trigger suppression.

It is undisputed that the CDAs require all cross-deputized troopers to carry ID cards with very specific information, and that Trooper Moon did not carry such an ID card. ER-103, 122. Fowler need not show that the absence of an ID card would constitute a violation of tribal law; however, if we are to adopt the government's reasoning that the CDAs "constitute a provision of the Tribe's governing law, equivalent to a section of the United States Code or the Montana Code," (Ans. Br. at 24), and the CDAs require the issuance and carrying of ID cards, and Trooper Moon failed to be issued or carry an ID card, then that failure is a violation of "the Tribe's governing law, equivalent to a section of the United States Code or the Montana Code."

Moreover, the exercise of criminal jurisdiction over an Indian person within the bounds of the reservation by a non-Indian law enforcement agent is unreasonable under the United States and Montana constitutions without the proper authorization. *See* Opening Brief at 15. Trooper Moon did not properly exercise that authority even if he legally possessed it. Fowler agrees with the government

that exclusionary rule should be reserved for situations in which police conduct is sufficiently deliberate that exclusion can meaningfully deter it…" *United States v. A. Nasser*, 555 F.3d 722, 726 (9th Cir. 2009). The failure of the Tribe and MHP to issue a legally mandated ID card to Trooper Moon, and the failure to require Trooper Moon to even read the Agreement or be familiar with its provisions and limitations, is sufficiently "flagrant" to trigger the rule. *Herring v. United States*, 555 U.S. 135, 140 (2009).

The government argues that nowhere in the record is it established that Fowler asked to see Trooper Moon's ID card during the stop and investigation, which is true. The government extrapolates this fact to infer that since Fowler did not ask to see the ID card, no harm was caused by Trooper Moon's failure to carry one or the failure of the MHP to issue one. Ans. Br. at 30. The CDAs do not require that anyone ask to see an ID card. They require that ID cards be issued and carried, regardless of whether they are ever requested or required to be produced: "All commissioned law enforcement officers must wear their insignia, if issued, and carry the identification cards with them at all times while acting under the authority of the commissioning agency." ER-103, 122.

Similarly, Fowler need not show that Trooper Moon's investigative conduct violated the Fourth Amendment when he had no authority to conduct the

investigation in the first place, for two reasons: 1) the illegality of the conferring instrument, the CDAs; and 2) the failure to comply with the mandated rules of cross deputization. It is well established that an arrest made outside of the arresting officer's jurisdiction violates the Fourth Amendment and is analogous to a warrantless arrest without probable cause. *See Beck v. Ohio*, 379 U.S. 89 (1964). Absent exigent circumstances, such an arrest is presumptively unreasonable. *Michigan v. Summers,* 452 U.S. 692, 700 (1981). Trooper Moon's search of Mr. Fowler was presumptively unreasonable, and whether he, the Tribe, or the Montana Highway Patrol is at fault for failing to issue him an ID card, it is a matter of critical procedure that was blatantly disregarded, and for which the remedy is suppression.

II. CONCLUSION

For these reasons, Mr. Fowler respectfully requests this Court find that the District Court erred in denying his Motion to Suppress, remand, and allow Mr. Fowler to withdraw his plea.

Respectfully submitted April 8, 2022.

ERIC BRUCE FOWLER

By: Megan M. Moore
WATSON LAW OFFICE P.C.
Counsel for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed.R.App.P. Rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, this Reply Brief complies with the type-volume limitations of Fed.R.App.P. Rule 32(a)(7)(B) because it contains 2,236 words, excluding parts of the brief exempted by Fed.R.App.P. Rule 32(a)(&)(B)(iii). (A Reply Brief must not exceed 7,000 words, excluding tables and certificates).

This brief complies with the typeface requirements of Fed.R.App.P. Rule 32(a)(5) and the type style requirements of Fed.R.App.P. Rule 32(a)(6) because this brief has been prepared in a proportionally spaced type face using Microsoft Word, in Times New Roman 14.

RESPECTFULLY SUBMITTED this 8th day of April, 2022.

ERIC BRUCE FOWLER

By: Megan M. Moore
WATSON LAW OFFICE P.C.
Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE
Fed.R.App.P. 25

I hereby certify that on April 8, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

Eric Bruce Fowler
Defendant-Appellant

By: Megan M. Moore
WATSON LAW OFFICE P.C.
Counsel for Defendant-Appellant

To: Megan Moore, Attorney at Law

From: Mary G. Cleland, Fort Peck Tribal Court Lay Advocate

Date: March 24, 2022

Subject: Compliance with 25 USC Sec. 1326, Apr. 11, 1968

Dear Attorney Moore,

I am a licensed Lay Advocate in the Tribal Court since 2010. If called to testify in U.S. District Court, I do state I am not aware of the Fort Peck Assiniboine and Sioux Tribes complying with 25 USC Sec 1326 Special Election for any type of State Jurisdiction to be applicable within the exterior boundaries of the Ft. Peck Indian Reservation, wherein the Secretary of Interior implemented any such rules or regulations. I am an enrolled member of the Ft. Peck Assiniboine and Sioux Tribes, and have NOT voted to accept any type of State Jurisdiction. In the U.S. Constitution Laws cannot conflict, the 2010 Laws in Indian Country is in Conflict with 25 USC Sec 1326, due to the 25 USC Sec 1326 is not held in abeyance in the 2010 Law and Justice Act for State Jurisdiction to function in Indian Country

Sworn and Subscribed by:

Mary G. Cleland

406-478-7414