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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2015AP002555

State of Wisconsin
Plaintiff-Respondent,
v.
Steven J. Schaefer,
Defendant-Appellant.

On Appeal From A Judgment of the Circuit Court
For Forest County, Case No. 15-CM-88
Honorable Leon D. Stenz, Presiding

Reply Brief of Appellant

KENNEDY LAW OFFICE
Robert A. Kennedy, Jr.
Attorney for Appellant
State Bar No. 1009177
209 E. Madison Street
Crandon, WI 54520
(715)478-3386

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ARGUMENT

I. TRIBAL SELF-DETERMINATION LIMITED THE IMPLIED ACCESS TO THE HOME TO ONLY THE PAVED AREAS.

The State supports the Circuit Court's decision as a factual determination which combined the paved and offshoot sections. (R.B. 6-10). The State is correct that Vanessa Tuckwab and Steven Schaefer are both equally subject to OWI enforcement. State v. St. Germaine 150 Wis.2d 171, 442 NW2d 53 (Ct. App.1989). Public Law 280 is the first of the two step process in determining the existence of tribal self-determination as to Officer Tanner being a trespasser. St. Germaine v. Chapman 178 Wis. 2d 869, 872, 505 NW2d 450 (Ct. App. 1993).

There is no facial preemption through Public Law 280 of tribal housing decisions due to the interaction of 25 USC §4101 (7).

The specific treaty right to obtain firewood in LCO IV is authoritative. State v. Matthews 248 Wis.2d 78, 94, 635 NW2d 601, 2001 WI App 243 ¶30 (Ct. App.2011).

The existence of self-determination is a federal question. Iowa Mut. Ins. Co. v. LaPlante 480 U.S. 9, 15, 107 S.Ct. 971, 94 L.Ed 2d 10(1987). Wisconsin's interest in criminal law enforcement must be balanced against the Tribe's interest in defining trespass to tribal property. Elliot v. White Mountain Apache Tribal Court 566 F.3d 842, 849 (9th Cir. 2009).

The Circuit Court did not consider self-determination when combining the paved and offshoot parcels. The State claims harmless error in that Mr. Schaefer is not a tribal member therefore not benefited by self-determination.

Mr. Schaefer has lived with Vanessa Tucktab for fourteen years at 3170 State Highway 55. This constitutes living within the borders of the reservation. Wisconsin v. EPA, 266 F.3d 741, 746 (7th Cir. 2001). The lease renewal for 2015-2016 is based upon a tenant information sheet (A-Ap 108) which says: "Household composition Vanessa Tuckwab, Steven Schaefer." The Tribe renewed the lease knowing Mr. Schaefer was living there.

There was a consensual relationship between the tribe and Schaefer without the need for a signature based upon actions for 14 years. Plains Commerce Bank v. Long Family Land and Cattle Company, Inc. 554 US 316, 128 S.Ct. 2709, 2724, 171 L.Ed 2d 457 (2008). A lease is a recognized form of contract with a non-member to which self-determination can apply. Montana v. United States, 450 US 544, 565-66, 101 S.Ct. 1245, 67 L.Ed 2d 493 (1981). Montana's context of leases being commercial has been broadened to include consumers. Smith v. Salish Kootenai College 434 F.3d 1127, 1132 (9th Cir.2006 en banc). The housing lease (A-Ap 108) is the type of consensual land use agreement by a nonmember that could be governed by Tribal self-determination.

Schaefer as a tenant can make a claim for trespass based upon the lease. Gunsolus v. Lormer 54 Wis. 630, 633, 12 NW 62 (1882). Such a claim by definition is entitled to nominal damages. Jacobs v. Major 139 Wis.2d 492, 530, 407 NW2d 832 (1987).

The State claims there is no legal nexus between Schaefer (a non-tribal member) and treaty rights to firewood (R.B.-12).

Tribal self-determination would be frustrated if housing authorities were unable to either rent to non-members or enforce leases with nonmembers. Many tribal households include nonmembers. Bifurcating the ambit of NAHASDA among members and nonmembers is unreasonable. Congress would not have intended to limit NAHASDA to only households consisting of tribal members.

The relationship between Officer Tanner and 3170 State Highway 55 is nonconsensual, although both Schaefer and Tanner are on leased property. Self-determination should be as broad as to non-members (Tanner) as Tribal adjudicative powers. Strate v. A-1 Contractors 520 US 438, 453, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). The Fifth Circuit in Dolgencorp v. Mississippi Band of Choctaw Indians 732 F3d 409 (5th Cir.2013) was affirmed by an equally divided U.S. Supreme Court on June 23, 2016. The Fifth Circuit allowed a tort claim on leased tribal land to be heard in tribal court.

The trespass issue is related to the land. Elliott v. White Mountain Apache Tribal Court 566 F.3d 842, 849-850 (9th Cir. 2009).

The Ninth Circuit in Elliott held a claim of trespassing to tribal land against a non-member could be decided in tribal court under Montana v. United States.

"The tribe seeks to enforce its regulations that prohibit, among other things, trespassing onto tribal lands, setting a fire without a permit on tribal lands, and destroying natural resources on tribal lands. The Supreme Court has strongly suggested that a tribe may regulate nonmembers' conduct on tribal lands to the extent that the tribe can "assert a landowner's right to occupy and exclude." Hicks, 553 U.S. at 359, 121 S.Ct. 2304 (quoting Strate, 520 U.S. at 456, 117 S.Ct. 1404). The tribal regulations at issue stem from the tribe's "landowner's right to occupy and exclude." Trespass regulations plainly concern a property owner's rights to exclude, and regulations prohibiting destruction of natural resources and requiring a fire permit are related to an owner's right to occupy. See Hicks, 553 U.S. at 359, 121 S.Ct. 2304 (discussing a landowner's right to occupy and exclude); Strate, 520 U.S. at 456, 117 S.Ct. 1404 (same). Accordingly, the tribe's ownership of the land may be dispositive here. See Hicks, 553 U.S. at 359, 121 S.Ct. 2304 ("[T]ribal ownership is a factor in the *Montana* analysis, and a factor significant enough that it may sometimes be dispositive." (alteration and internal quotation marks omitted)); *id.* at 359, 121 S. Ct. 2304 (suggesting strongly that regulations concerning a "landowner's right to occupy and exclude" are permissible against nonmembers).

Given the U.S Supreme Court's June 23, 2016 per curiam decision, claims for nominal damage for trespass would be within the ambit of tribal court domains.

There is no difference between Officer Tanner being a trespasser for purposes of Florida v. Jardines 133 S.Ct 1409, 1415, 185 L. Ed 2d 495 (2013), and tribal housing authority's property management powers codified by NAHASDA.

The Circuit Court erred by failing to apply the tribal demarcation of the pavement as private. When States infringe on tribal self-determination, State action violates tribal sovereignty and is void. Iowa Mut. Ins. Co. v. LaPlante 480 U.S. 9, 15, 107 S.Ct. 971, 94 L.Ed 2d 10(1987).

Officer Tanner was a trespasser prior to learning the driver's identity. The suppression motion should have been granted.

CONCLUSION

This case should be remanded with directions to grant the suppression motion and refund the \$1000 cash bond.

Respectfully submitted this 25th day of July, 2016.

/s/ Robert A. Kennedy, Jr.

Robert A. Kennedy, Jr.

Attorney For Appellant

State Bar No. 1009177

209 East Madison Street

Crandon, WI 54520

(715)478-3386

FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a brief produced using the Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other three sides. The length of this brief is six (6) pages.
Dated: July 25, 2016

/s/ Robert A. Kennedy, Jr.

Robert A. Kennedy, Jr.
Attorney For Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of §809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: July 25, 2016.

Kennedy Law Office

/s/ Robert A. Kennedy, Jr._____
Robert A. Kennedy, Jr.
Attorney For Appellant

CERTIFICATE OF MAILING

I certify that this brief was deposited in the United States mail at Crandon, Wisconsin for delivery to the Clerk of Court of Appeals by first-class mail on this day 25th of July, 2016. I further certify that the brief was correctly addressed and postage was prepaid.

I further certify three copies thereof were simultaneously served by mail as follows:

Charles Simono

200 East Madison Ave.

Crandon, WI 54520

Dated: July 25, 2016.

/s/ Robert A. Kennedy, Jr.
Robert A. Kennedy, Jr.
Attorney for Appellant