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IN THE COURT OF APPEALS
OF THE
QUINAULT INDIAN NATION

LESTER DAN
Appellant,

v.

QUINAULT INDIAN NATION,
Respondent.

Case No. AP-15-02

OPINION

October 26, 2015 - Argued
December 24, 2015 - Decided

This matter comes before the Quinault Indian Nation Court of Appeals pursuant to a Notice of Appeal filed by Appellant Lester Dan on June 15, 2015. Mr. Dan appeals a June 5, 2015 decision by the Tribal Court ordering him excluded from the territories comprising the Quinault Indian Nation ("Nation"). The Notice of Appeal was timely filed and oral arguments were held on October 26, 2015. As we find that the Tribal Court's decision was supported by the record, the lower court decision is **AFFIRMED**.

I. Facts and Procedural History

This case involves an order excluding Appellant from the Quinault Reservation, and various exceptions granted over multiple years. Appellant is a non-tribal member.¹ On January

¹ Mr. Dan represents that he is a member of the Musqueam Band from Canada. Appellant's Appeal Brief, at 1.

1 7, 2011, an Order for Protection-Harassment was served on the
2 Appellant to have no contact with a female Nation member. On
3 January 9, 2013, the Nation filed a Petition for Removal and
4 Exclusion with the Tribal Court, seeking to have Appellant
5 removed from the Reservation. On January 22, 2013, a hearing
6 was held on the Nation's request, but Appellant was unable to
attend as he was incarcerated. The Court nonetheless granted
the Nation's request, and issued the First Order for Exclusion
and Removal.

7 On April 4, 2013, Appellant filed a Motion for Reconsideration
8 requesting that he be permitted to return to the Reservation to
9 care for his ailing wife. On May 9, 2013, the Tribal Court
10 held a hearing on the subject. Unlike the previous hearing,
11 the Appellant was in attendance and the Tribal Court issued the
12 first of many amended orders on this subject. The First
13 Amended Order removed the Appellant from the Reservation for a
14 period of five (5) years, but permitted him to utilize the
15 Roger Saux Health Clinic and the Charlotte Kalama Health
16 Clinic, located on the Reservation in Taholah, WA, provided he
17 arranged for a law enforcement escort to do so.

18 On March 14, 2014, the Appellant filed a Motion for Dropping
19 the Exclusion arguing that his family required his presence on
20 the Reservation since his wife passed away earlier in the year.
21 On March 25, 2014, the Tribal Court issued a Second Amended
22 Order of Exclusion and Removal. This Second Amended Order of
23 Exclusion and Removal placed Appellant under house arrest at
24 427 Pine St., Taholah, WA. The Nation opposed the request.

25 On June 5, 2015, the Tribal Court found that the Appellant
violated the terms of the Second Amended Order of Exclusion and
Removal by being in the backyard of a neighboring home. Based
on this finding, the Tribal Court entered a Third Amended Order
of Exclusion and Removal requiring Appellant to be immediately
removed beyond the Reservation boundaries. Appellant timely
filed the Notice of Appeal to this Court of Appeals ten (10)
days later.

1 II. Standard of Review

2 The Appellant bases his appeal on the premise that substantial
3 justice was not done, pursuant to QTC 31.03.010(4), as he was
4 unable to attend the January 22, 2013 hearing resulting in the
5 First Order for Exclusion and Removal due to his incarceration.
6 Appellant also argues that he was not in violation of the March
7 25, 2014 Second Amended Order of Exclusion and Removal.

8 To the extent Appellant raises a constitutional due process
9 claim that substantial justice was not done regarding his
10 inability to attend the January 22, 2013 hearing, that is
11 reviewed *de novo*. The Tribal Court's finding that Appellant
12 violated the Second Amended Order of Exclusion and Removal,
13 however, is a factual finding reviewed for abuse of discretion.
14 Factual findings made by the Tribal Court are binding on the
15 Court of Appeals, so long as they are supported by the record.
16 QTC 31.04.010. Both issues are addressed herein.

17 III. Jurisdiction of Tribal Court

18 The initial matter to examine is the issue of jurisdiction of
19 the Tribal Court over Appellant. Although neither party
20 specifically identified it as a matter for review, the Court
21 may raise issues of jurisdiction *sua sponte*, and questions were
22 posed at oral argument regarding this issue.²

23 Exclusion and banishment powers have a long history in the
24 tribal context. As noted in *Duro v. Reina*, 495 U.S. 676, 696
25 (1990), "The tribes also possess their traditional and
undisputed power to exclude persons whom they deem to be
undesirable from tribal lands." (citing *Brendale v.*
Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S.
422 (1989), and *Worcester v. Georgia*, 6 Pet. 515, 561 (1832)).

² The Court also notes that Appellant is acting *pro se*. We echo the sentiments of the U.S. Federal Courts on this subject: "We have long recognized that a *pro se* petitioner's pleadings should be liberally construed to do substantial justice." *United States v. Garth*, 188 F.3d 99, 108 (3d Cir. 1999).

1 Despite this distinguished history, exclusion of non-tribal
2 members from a reservation has been addressed only
3 intermittently in published court opinions. A brief review of
4 relevant decisions is appropriate.

5 The governing case addressing tribal jurisdiction over non-
6 members is *Montana v. United States*, 450 U.S. 544 (1981).
7 Indeed, *Montana* was described by Justice Ginsburg as "the
8 pathmarking case concerning tribal civil authority over non-
9 members." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).
10 *Montana* held that there are two exceptions to the general
11 presumption that tribal courts do not have civil jurisdiction
12 over non-member activities occurring on-reservation.

13 Under the first exception, known as the "consensual
14 relationship" exception, tribes have inherent power to regulate
15 through taxation, licensing, or other means, non-member
16 activities that have a nexus to some consensual relationship
17 between the non-member and the tribe or its members. *Montana*,
18 at 565. The power to regulate gives tribal courts subject
19 matter jurisdiction to adjudicate issues that have such a nexus
20 to the consensual relationship.

21 Under the second exception, tribes retain inherent power to
22 exercise civil authority over the conduct on non-members on fee
23 lands within the reservation when that conduct threatens or has
24 some direct effect on the political integrity, economic
25 security, or health and welfare of the tribe. *Id.* at 566.

Montana was interpreted in several subsequent U.S. Supreme
Court and Ninth Circuit opinions.³

³ This Court is aware that the potentially seminal case of *Dollar General v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014) is before the U.S. Supreme Court, and an opinion is expected in the near future. (No. 13-1496). In *Dollar General*, Dollar General leased land from the Choctaw Tribe for a store. The General Manager of the store agreed to participate in a tribal youth training program. In a tribal court tort action, a tribal youth claimed the manager sexually molested the youth at the store. Dollar General appealed the Fifth Circuit's determination that the tribal court had jurisdiction over the tort claim under the *Montana* consensual relationship exception.

1 The Ninth Circuit, in *Water Wheel Camp Recreation v. LaRance*,
2 642 F.3d 802 (9th Cir. 2011) reaffirmed the power to exclude as
3 an independent basis for the exercise of tribal court subject
4 matter jurisdiction over non-members. *Water Wheel Camp*
5 *Recreation* involved an action by the Colorado River Indian
6 Tribes in tribal court to evict a non-member lessee of tribal
7 land when the lease ended and the lessee failed to make
8 payments. The lower court held that this case fell within the
9 Montana consensual relationship exception, but, on appeal, the
10 Ninth Circuit held that the tribe had regulatory jurisdiction
11 over the non-member defendant, independent of *Montana*, based on
12 its inherent power to exclude the defendant from tribal land.
13 *Id.* at 804.

9 Earlier cases, such as *New Mexico v. Mescalero Apache Tribe*,
10 462 U.S. 324 (1983), described the power as an ability to
11 exclude non-members from the reservation, implying the power
12 included fee lands and public roads within the reservation.
13 This characterization of the power was cited in *Hardin v. White*
14 *Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985). The *Hardin*
15 court, however, pulled back from a broad affirmation of the
16 scope of the power, noting that:

14 Under the special circumstances of this case, where a
15 nonmember entered the reservation under a lease in which
16 the Tribe had specifically reserved its power of exclusion
17 ... we conclude the Tribe acted within it is civil
18 jurisdiction when it ordered Hardin's removal.

18 *Id.* at 479. In dicta in *South Dakota v. Bourland*, 508 U.S.
19 679, 688 (1993), the U.S. Supreme Court noted that tribes lose
20 their inherent power to exclude non-members from fee land and
21 recent District Court cases have adopted this reasoning. In

21 After the molestation claim came to light, the Choctaw Tribe excluded the
22 General Manager from the reservation. On appeal, Dollar General does not
23 challenge the exclusion and acknowledges that the Choctaw Tribe retained its
24 traditional power to exclude non-members (Petitioner's Opening Brief, p.
25 11,17, 43). *Dollar General* likely will not impact the ruling in this appeal
because, as discussed below, the outcome in this appeal turns on our
interpretation of the second *Montana* exception and the tribal power to
exclude.

1 Otter Tail Power Co. v. Leech Lake Band of Ojibwe, 2011 U.S.
2 Dist. LEXIS 67377 (D.Minn. 2011) the Leech Lake Band of Ojibwe
3 attempted to stop the construction of an electric transmission
4 line across the reservation on the grounds that the tribe had
5 regulatory authority over the utility and tribal consent was
6 required to locate the transmission line within the
7 reservation. The Otter Tail court found that, since the route
8 of the transmission line did not touch upon or cross any
tribal-owned or tribal allottee trust lands, tribal authority
was governed by *Montana*. *Id.* at *13-*16. Citing *Nevada v.*
Hicks, 533 U.S. 353, 359 (2001), the Otter Tail court then
found that the tribe's assertion of regulatory authority did
not satisfy either of the *Montana* exceptions. *Otter Tail Power*
Co., at *13-*16.

9 In *United States v. Steven Nichols*, 2014 U.S. Dist. LEXIS
10 116303 (D.S.D. 2014), the Rosebud Sioux Tribe issued an
11 exclusion order against Nichols, a non-member. While the order
12 was in effect, Nichols was observed driving on a public highway
13 within the reservation. When charged by the U.S. with criminal
trespass, he claimed the tribe did not have authority to
exclude him from using a public road within the reservation.
Id. at *8.

14 The *Nichols* court held that, once tribal land has been conveyed
15 to a non-Indian, the tribe loses the right of exclusive use as
16 well as regulatory jurisdiction over a non-member's use of the
17 land, subject however, to the *Montana* exceptions. The court
18 held the burden was on the tribe to establish that one of the
19 exceptions allowed for tribal authority to regulate this non-
member activity on non-Indian land, and that the tribal court
should be allowed to decide, in the first instance, the factual
and legal basis for any challenge to the tribe's jurisdiction.
Id. at *11.

20 This survey indicates that case law recognizes broad tribal
21 civil jurisdiction over non-members under the right to exclude,
22 but this jurisdiction is likely limited to trust lands. A
23 tribe may exercise jurisdiction over non-member activities on
24 other lands within the reservation only if one of the *Montana*
exceptions applies. Tribal courts are entitled, in the first
25 instance, to determine the facts and law relative to this
determination.

1 In this case, the Tribal Court had jurisdiction, under the
2 power to exclude, to exclude Appellant from trust lands within
3 the Reservation. See e.g. *Water Wheel Camp Recreation supra*.
4 Moreover, this case is not distinguishable under *Bourland* as no
5 argument was presented, and there is nothing in the record,
6 that indicates Appellant owns fee land on the Reservation. In
7 addition, the facts of this case support exercise of
8 jurisdiction under the second *Montana* exception to exclude
9 Appellant from other lands and public roadways within the
10 Reservation. As such, jurisdiction by the Tribal Court was
11 proper.

12 IV. Constitutional Due Process Claim

13 The next matter for review is the potential due process
14 violation presented by these facts. Specifically, Appellant
15 claims he was denied the ability to attend the January 22, 2013
16 hearing that issued the First Order of Exclusion and Removal.
17 This raises a constitutional due process question for this
18 Court's review.

19 Both the Quinault Indian Nation Constitution and the Indian
20 Civil Rights Act of 1968 (25 USC 1301 *et seq*) guarantee
21 procedural and substantive due process. The fundamental
22 requirements for due process include "opportunity to be heard
23 at a meaningful time and in a meaningful manner." *Brady v.*
Gebbie, 859 F.2d 1543, 1554 (9th Cir. 1988) (citing *Mathews v.*
Eldridge, 424 U.S. 319, 333 (1976)). U.S. Federal Court cases
have addressed the issue of due process in the context of
hearings conducted *in absentia* on multiple occasions. In
Ibrahim v. U.S. Immigration & Naturalization Service, 821 F.2d
1547, (11th Cir. 1987), for example, an alien was ordered
deported at a hearing where he was not present. The *Ibrahim*
court observed that "Due process is satisfied only by a full
and fair hearing...To prevail, however, on a due process
challenge to a deportation proceeding, an alien must show
substantial prejudice." *Id.* at 1550.

24 In this case, the Appellant claims he was harmed by the
25 inability to attend the January 22, 2013 hearing that issued
the First Order of Exclusion and Removal. The record

1 demonstrates, however, that he was able to attend the
2 subsequent April 4, 2013 hearing on the same subject via a
3 motion for reconsideration. As a result, Appellant had the
4 requisite notice and an opportunity to be heard in this matter.
5 Moreover, there is no claim of any prejudice suffered by
6 Appellant, much less the "substantial prejudice" suggested by
7 *Ibrahim*.⁴ Consequently, there is no unconstitutional
8 deprivation of liberty.

9
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11 V. Violation of Second Amended Order of Exclusion and Removal

12 Appellant also claims that he was not in violation of the March
13 24, 2015 Second Amended Order of Exclusion and Removal. This
14 is a factual determination of the Tribal Court reviewed for
15 abuse of discretion.

16 Here, the Tribal Court excluded Mr. Dan from the territories of
17 the Quinault Indian Nation, subject to two exceptions: He could
18 use the public roads to access the Roger Saux Health Clinic and
19 the Charlotte Kalama Clinic, and:

20 House Arrest and limited to Pine Street in Taholah.
21 Respondent cannot be outside after dark. House arrest at
22 the residence 427 Pine street, Taholah, WA 98587.

23 Second Amended Order of Exclusion, at 3. The ruling is
24 supported by a hand-drawn map submitted by the Tribe as well as
25 the Tribal Court's finding that the Appellant was in violation
of the Second Amended Order of Exclusion and Removal. This is
minimal information to review. We find it is sufficient,
however, to support the Tribal Court's finding in this matter
pursuant to QTC 31.04.010.

Oral argument revealed apparent confusion regarding the meaning
of the Tribal Court's Second Amended Order of Exclusion and

⁴ We need not, and do not, resolve here the question of whether "substantial
prejudice" is required under these circumstances in the Quinault judicial
system. *Ibrahim* merely reflects the principle that at least some prejudice
must be demonstrated. Here, none has been offered.

1 Removal. The order is clear: it restricts the Appellant to his
2 home at 427 Pine Street and "limited to Pine Street in
3 Taholah." In this case, the record indicates that Appellant
4 set up his chair in the back yard of another home on 5th Street.
5 By any measure, this violates the Tribal Court's order.

6 VI. Exceptions to Exclusion Order

7 Finally, the parties addressed at oral argument the power of
8 the Tribal Court to issue the various exceptions to the
9 exclusion order in this matter. On its face, QTC 30.24 does
10 not have provisions permitting the Tribal Court to issue
11 exceptions to an exclusion order. Indeed, the record indicates
12 that the various exceptions granted by the Tribal Court over
13 the past few years were vigorously opposed by the Tribe.

14 QTC 30.24.010(c) provides that, if the Tribal Court determines
15 that cause exists to exclude someone from the Reservation, or
16 if the person subject to the potential removal fails to appear
17 at the hearing, the Tribal Court "shall issue an order
18 excluding the person from all or any part of the Quinault
19 Indian Reservation or permitting such person to remain on the
20 Quinault Indian Reservation under such circumstances as
21 specified in the order." Here, although denominated as an
22 "exception" to the earlier orders requiring exclusion, the
23 various orders of the Tribal Court may properly be considered
24 as permitting Mr. Dan to remain on the Reservation "under such
25 circumstances as specified in the Order." As the record
supports the Tribal Court's conclusion that Appellant violated
that order, the Tribal Court is equally within its authority to
revise the order to require exclusion.

21 Finally, at oral argument, the Tribe observed that the various
22 exceptions over the years were specifically requested by the
23 Appellant. That ameliorates any potential harm in this matter.

1 VII. Conclusion

2 The ability to remove individuals from the territory of the
3 Tribe is integral to the Tribe's sovereignty. Based on the
4 record presented, we find no error with the Tribal Court's
5 decision below.

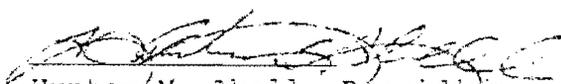
6 NOW THEREFORE IT IS ORDERED:

7 The Tribal Court decision is affirmed.

8 Done this 24th day of December, 2015.

9 For the Panel

10
11 Bruce Davies, App. Judge
12 Christine Pomeroy, App. Judge

13 
14 Hunter M. Abell, Presiding
15 Quinault Court of Appeals
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