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CASE DIGEST
State v. Shale

No. 90906-7
Supreme Court of the State of Washington
Opinion Filed March 19, 2015

IN A NUTSHELL

Howard Shale, an enrolled member of the Yakama Nation, was convicted in 1997 in the Western District of Washington of raping a child under 12, in violation of 18 U.S.C. §2241(c). After his release from Federal Prison, Shale resided in Seattle and registered as a sex offender with the King County Sheriff.

In 2012, a detective in Jefferson County (on the Olympic Peninsula of Washington), started an investigation in to Mr. Shale's whereabouts. She suspected that he had relocated to Jefferson County without registering as a sex offender. As a result of the investigation, officials found that Mr. Shale had been maintaining two residences—one in Clallam County and the other on the lands of the Quinault Indian Reservation, where he lived with extended family members. The portion of the Quinault Indian Reservation where Mr. Shale lived is located in Jefferson County.

Mr. Shale was charged with a state offense of failure to register as a sex offender, in violation of RCW § 9A.44.130(a)(1).

TRIBAL & STATE JURISDICTION

Mr. Shale's defense at trial was that, as an enrolled member of an Indian Tribe whose offense was committed solely in Indian Country, he was not subject to the criminal jurisdiction of the state court. The opinion turned on the interpretation of a state law which has its roots in a complicated federal statutory and regulatory history.

The Quinault Indian Reservation was created by way of a Treaty signed in 1855[1] and ratified in 1859, prior to Washington State's admission to the Union in 1899. As with other tribal jurisdictions, criminal jurisdiction on the Quinault Indian Reservation "evolved from early acknowledgement of exclusive tribal jurisdiction over persons within [tribal] territories, to a gradual assertion of paramount federal authority over crimes involving tribal members and non-Indians."[2]

During the 'termination era' of the early-to-mid-20th century, the U.S. Government developed policies which sought to terminate portions of its "government-to-government relationship with Indian Tribes."[3] Up until this time, states had virtually no involvement in law enforcement in Indian Country. However, as part of these 'termination' initiatives, P.L. 280 was passed in 1953.[4]

P.L. 280 required six states to assume criminal jurisdiction over certain federally-recognized Indian tribes within their borders. Washington State was not among those listed in P.L. 280 as 'mandatory' PL-280 states. However, another portion of P.L. 280 authorized unlisted states (such as Washington) to unilaterally assert criminal jurisdiction over Indian Country within their borders, if they wished to do so.

In 1963, Washington State did make such a nonconsensual (*i.e.* the tribes within Washington State did not consent to the action) assertion of criminal jurisdiction, which is codified in RCW § 37.12.010. This decision was shortly thereafter reconsidered, and in response to a request from the Quinault Indian Nation, in 1965 the Governor of Washington sought to withdraw state jurisdiction over the Quinault Indian Nation and return such jurisdiction to the Federal Government.

This process of asserting state jurisdiction over tribal lands and then seeking to return such jurisdiction to the federal government is known as "retrocession" and the process to do so was codified in 1968.[5] In 1969, the Department of the Interior accepted a *conditional* retrocession of jurisdiction over Quinault Indian Nation from Washington.

However, the regulatory language accepting partial retrocession limited it as follows: the federal government "accept[ed]. . . retrocession to the United States of all jurisdiction exercised by the State of Washington over the Quinault Indian Reservation, *except as provided under [RCW §§ 37.12.010-.060]*."[6] As enacted in 1963, RCW §37.12.010 states, in pertinent part, that Washington assumed criminal jurisdiction over "Indians and Indian Territory . . . *but such assumption of jurisdiction shall not apply to Indians when on <u>their</u> tribal lands*."

Because the *initial* assumption of criminal jurisdiction by Washington *did not include* crimes committed by Indians "*when on <u>their</u> tribal lands*," that criminal jurisdiction was *<u>not</u> retroceded* to the federal government in 1969, and continues to lodge *exclusively with the tribe*. However, *all* other criminal jurisdiction over crimes on tribal lands *was retained* by the state.

In addition, notwithstanding the state laws mentioned above, under federal law tribes *do* retain criminal jurisdiction over any person who is a member of a federally-recognized tribe, regardless of whether that person is a member of the tribe upon whose lands the crime was committed.[7]

The Court in *Shale* held that, even though Mr. Shale *was* a member of a federally-recognized tribe (Yakama Nation) and his crimes were committed wholly on the lands of the Quinault Indian Reservation, *because he was not on the lands <u>of the tribe where he was a member</u>, he was subject to state criminal jurisdiction, <u>and</u> could also be subject to a (Quinault) tribal charge for failure to register as a sex offender*.[8]

POLICY IMPLICATIONS

The policy implications of the *Shale* case affect three different stakeholders: 1) the State of Washington and its subsidiary law enforcement agencies; 2) Tribal governments *in Washington State* and their subsidiary law enforcement and/or sex offender registration offices; and 3) sex offenders who live, work, or attend school on tribal lands in Washington.

First, Washington State is now free to prosecute a failure to register case for any person who lives, works, or attends school on tribal lands, so long as that person is <u>not</u> a member of the tribe upon whose lands the offense was committed. For example, a member of the Makah Tribe living on the lands of Lower Elwha K'lallam Tribe who fails to register with the state could be prosecuted in state court for a failure to register.

Second, tribes in Washington State that have developed, or are in the process of developing, a sex offender registration and notification program pursuant to SORNA, should now notify any such non-member offender of their responsibility to dual-register with the State.

Third, it should be made clear by both state and tribal courts and law enforcement in Washington State that such non-member sex offenders will be subject to a dual-registration responsibility.

In essence, the decision mandates *dual registration with the state* for all offenders living, working, or attending school on tribal lands in Washington, unless they are a member of the tribe upon whose lands they live, work, or attend school.

We encourage Washington and her Tribes to work diligently—both together and separately—to address the above-mentioned issues so that sex offenders in the state, regardless of location, are given clear guidance as to their responsibilities under the respective state and tribal sex offender registration and notification codes.

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[1] TREATY WITH THE QUINAIELT, ETC, 1855, <u>http://digital.library.okstate.edu/kappler/Vol2/treaties/qui0719.htm</u>.
[2] Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 922 (2012).
[3] *Id.* at 930.
[4] Codified as amended at 18 U.S.C. § 1162.
[5] 25 U.S.C. § 1321, *et. seq.*
[6] Notice of Acceptance of Retrocession of Jurisdiction, 34 Fed. Reg. 14288 (Aug. 30, 1969).
[7] U.S. v. Lara, 541 U.S. 193, 210 (2004).
[8] Because he resided in Indian Country, Shale could also have been prosecuted under 18 U.S.C. §2250, the federal failure to register statute.