

NO. 80215-1
consolidated with 80216-0

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Appellant,

v.

HAZEN GRAHAM SHOPBELL
ANTHONY EDWIN PAUL
Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

The trial court erred when it found that the state's failure to preserve over 1,000 pounds of clams as evidence constituted a due process violation. The clams were not materially exculpatory. Furthermore, to any extent that that evidence was useful and potentially exculpatory, the trial court erred in suppressing it because the law enforcement officer did not act in bad faith.

1. THE DESTROYED CLAMS WERE NOT MATERIALLY EXCULPATORY.

The respondents argue in their briefing that “[t]he defendants’ argument was the state has no jurisdiction over them for clams harvested by tribal fishermen on tribal land.” Br. Resp. at 18. In fact, this was not their argument on the suppression motion to the court below. See generally, Br. App. at 12-15 and citations to the record therein.

Indeed, this jurisdictional argument had previously been made to the trial court in a motion to dismiss, and the trial court rejected the argument. On October 15, 2018, the respondents filed a motion to dismiss for lack of jurisdiction. Supp. CP-AP ___ (sub 21, Defendant Anthony Paul’s Motion to Dismiss for Lack of Jurisdiction). The specific ground was that the state lacked jurisdiction over the respondents because they were tribal members exercising their treaty fishing rights on treaty fishing grounds. After briefing and

argument by the parties, the trial court rejected the respondents' contention and denied the motion to dismiss. Supp. CP-AP ____ (sub 22, Declaration of David H. Smith); Supp. CP-AP ____ (sub 29, Reply of Anthony Paul); Supp. CP-AP ____ (sub 30, Response); Supp. CP-AP ____ (sub 31, minutes); Supp. CP-AP ____ (sub 32, Order Denying Motion).

Because the trial court had already rejected this jurisdictional argument, the destruction of the clams had no bearing on the purported defense "against the state's assertion of jurisdiction."

2. LAW ENFORCEMENT DID NOT ACT IN BAD FAITH.

If the clams were not materially exculpatory, then the only basis for their suppression was if they were potentially useful and if the law enforcement agents acted in bad faith. The trial court did not find that the agents acted in bad faith and there is no basis in the record to find that they did.

Police do not have "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988). Bad faith "requires proof of an official animus or a conscious effort to suppress exculpatory

evidence and necessarily turns on an official's subjective knowledge that the evidence in question had exculpatory value at the time it was lost or destroyed." United States v. Bell, 819 F.2d 310, 318 (7th Cir. 2016) (citations omitted). In other words, a defendant must show that destruction was improperly motivated.

Respondents assert bad faith because, they contend, RCW 69.30 and 77.15 did not authorize the destruction of the bait clams. Br. Resp. at 22-24.

RCW 69.30.050 permits the seizure and destruction of clams. The title of the chapter is "Sanitary Control of Shellfish." RCW 69.30. "The purpose of this chapter is to provide for the sanitary control of shellfish. Protection of the public health requires assurances that commercial shellfish are harvested only from approved growing areas and that processing of shellfish is conducted in a safe and sanitary manner." RCW 69.30.005. Attorneys can argue about whether the seizure and destruction provisions of RCW 69.30 apply to bait claims where there are valid arguments on either side. Indeed, the attorney general on September 6, 2016, opined in a letter to the respondents that RCW 69.30 provided the basis for the seizure and removal of the clams. CP-AP 202. But the fact that there are good faith arguments on both sides of the issue illustrates that there is no bad faith on the part of a fish and wildlife officer believing that she did have the right to destroy the clams pursuant to this section.

RCW 77.15 also authorizes seizure and disposition of the clams. As noted in the respondents' brief, RCW 77.15.100 has since been amended to make explicit that in addition selling or donating seized items, agents are also authorized to otherwise safely dispose of them. The fact that this section has been clarified does not mean that destruction was not implicitly authorized before.

Under RCW 77.15, agents have broad discretion to inspect and search premises without a warrant and broad discretion to seize unlawful shellfish. Prior to the recent amendments, RCW 77.15.100 permitted the disposition of unlawful shellfish in a manner that did not involve preserving those items as evidence nor returning the items to the owner. Whether the seized shellfish were sold or donated, as explicitly authorized, versus taken to the dump, makes no practical difference to the person from whom the illegal items were seized. Either way those items are not available as evidence. For this reason, to the extent that Detective Willette may have relied on RCW 77.15 as the reason for destruction, this reliance should not be the basis of a bad faith finding by this Court.

Respondents also assert bad faith because the Washington Department of Fish and Wildlife (WDFW) was on notice that the respondents wanted their property preserved and returned to them. Br. Resp. at 25. The respondents err in their understanding of the chronology of events.

On August 15, 2016, WDFW Detective Willette put the hold on the unlawful shellfish. CP-AP 2, 392, 531 (Finding of Fact 2). After Willette left, Paul came to the facility to retrieve his clams. He was advised of the hold by the facility at that time. CP-AP 392.

On August 22, 2016, Willett returned to the facility where she documented, seized, and disposed of the clams. Her report indicates, “We sorted through each of the totes, consolidating clams into two totes, and various other types of bait into the two other totes. The other types of bait were squid, mackerel, a single butcher-wrapped piece of red meat, and sardines. I located a single dyed butter clam that was a slight bluish green in the tote with weight 1175. I took a representative sample of horse and butter clams from each of the totes. There was one cockle clam in the tote with weight 1175. This was placed in the sample bag for that tote with the butter and horse clams.” CP-AP 177-178. But for the representative sample, the illegal clams went to the dump **on that date**. CP-AP 178 (emphasis added).

On August 24, 2016, the respondents’ attorney wrote the attorney general and acknowledged that they were aware of the August 22, 2016, seizure. CP-AP 180-181. The attorney also provided a written notice of intent to serve a subpoena duces tecum for records on the cold storage facility in five days (August 29, 2016). The subpoena was in regard to a civil matter ongoing in Thurston County Superior Court. CP-AP 181, 184-190.

On August 29, 2016, consistent with the notice of intent, the subpoena for records was served on the cold storage facility and Willette was advised of that service. CP-AP 392. It should be noted that Detective Willette's report creates the impression that she received a copy of the subpoena on the same date that she put a hold on the clams. However, this is not possible. Her report states that cold storage "forwarded me the first page of a subpoena for records in a civil case against WDFW from PAUL and SHOPBELL that she had received from them on 08/29/15." CP-AP 392. The date of this subpoena is from the prior year, not 2016 which is when the seizure of clams occurred. So either this was a subpoena that was a year old or Willette's report contains a typo as to the year of the subpoena and cold storage received the subpoena on 8/29/**2016**. It makes more sense that the subpoena was served on cold storage 8/29/16 rather than an entire year prior. If that is the case, then Willette did not receive notice of the subpoena until at least a week after the clams were already destroyed. Either way, the notice for documents (not clams) did not provide notice to Willette that the respondents did not want her to destroy the clams.

On August 30, 2016¹, the respondents' attorney sent a written letter to WDFW, with a copy to the attorney general, demanding a hearing regarding

¹ Respondents indicate this letter's date was August 16. Br. Resp. at 6. This is not what the record reflects.

the August 22 seized items. This was eight days beyond the date that the clams had been seized and destroyed. CP-AP 193-194.

So between August 15, when respondent Paul learned of the hold on the clams, and August 22, when the clams were seized and destroyed, there was no notice provided to WDFW that the respondents wanted the clams preserved.

As to other indicia of bad faith, the respondents point to what they call Willette's "attitude and disrespect for Paul and Shopbell's constitutional rights". Br. Resp. at 27. They claim she "arranged for the arrest of Paul and Shopbell without a warrant or probable cause on the opening day of crab season." Br. Resp. at 27. What the record actually reflects is that she told other officers to transport them for interviews. While the respondents were being transported, law enforcement supervisors clarified that that the respondents should not be transported unless they were in agreement with being interviewed. They were not, so they were immediately transported back to the scene of initial contact. CP-AP 38.

The respondents indicate that Willette improperly seized other property and attempted to forfeit it, filed a baseless report of the Paul family to CPS, and filed a baseless report to the Department of Revenue. Br. Resp. at 27-28. There is no evidence in the record that these actions were "baseless." What the record does show is that Willette obtained judicial authorization for

her searches and seizures. The record shows that while she did make a report to CPS and to the Department of Revenue, there is no indication in this record what the reasons were. That does not mean there were no reasons; it means that the reasons are not in this record. With regard to the Department of Revenue, the record does show that the respondents' company had been delinquent in taxes since the year 2013. CP-AP 183. Also in the record is a letter from the attorney general indicating that "Tulalip Police, working jointly with WDFW, requested that Detective Willette refer child welfare concerns for the Paul children directly to DSHS CPS. Given the information she had, caution taken by Detective Willette was appropriate and consistent with her authority and mandate to do so. See RCW 26.44.030. In addition, as part of her ongoing investigation, Detective Willette learned that Puget Sound Seafood may have failed to meet certain state tax obligations. Consistent with her duty as a general authority law enforcement officer, she also passed information on to DOR." CP-AP 199-200.

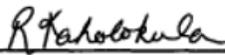
Bad faith "requires proof of an official animus or a conscious effort to suppress exculpatory evidence and necessarily turns on an official's subjective knowledge that the evidence in question had exculpatory value at the time it was lost or destroyed." Bell, 819 F.3d at 318. There is no indication in this record of animus, of any conscious effort to suppress exculpatory evidence, that the evidence had any exculpatory value, or that

Willette would have been aware of any exculpatory value that may have existed. The trial court did not find any bad faith and there is no basis in the record for this Court to find bad faith. Because there was no bad faith, the trial court erred in suppressing evidence based on its potential usefulness to the respondents.

B. CONCLUSION

For the foregoing reasons and for the reasons articulated in the appellant's opening brief, this Court should reverse the trial court's order of suppression and remand for further proceedings.

DATED this 20th day of July, 2020.



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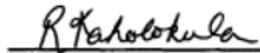
DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the document to which this declaration is affixed/attached, was filed *via* Electronic Portal in the Court of Appeals – Division One under the above captioned case number and a true copy was delivered to the following attorney(s) or party/ies of record in the following manner: *electronically via email and via Court of Appeals portal.*

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DATED this 20th day of July, 2020,



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