44-CR-24-293
Filed in District Court
State of Minnesota
03/03/2025

STATE OF MINNESOTA
COUNTY OF MAHNOMEN

DISTRICT COURT
NINTH JUDICIAL DISTRICT

STATE OF MINNESOTA
Plaintiff,

vs.

TODD JEREMY THOMPSON,
Defendant.

ORDER AND MEMORANDUM

Court File: 44-CR-24-293

This matter came before the Honorable Seamus P. Duffy, Judge of District Court, on November 19, 2024, for a motion hearing held in the virtual courtroom. Todd Jeremy Thompson (hereinafter Thompson) appeared and was represented by Claire Glenn. The State of Minnesota was represented by Mahnomen County Attorney Jason Hastings. Thompson moves for dismissal of the sole count of the Complaint, arguing that the State lacks jurisdiction to prosecute the case. No testimony was offered. No discovery materials were filed with the Court. After a briefing schedule, this matter was taken under advisement on January 10, 2025.

Based on the arguments of the parties and the file and record herein:

IT IS HEREBY ORDERED:

1. Thompson's motions to dismiss for lack of jurisdiction are **DENIED**.
2. An uncontested omnibus hearing shall be held via Zoom on **Tuesday, April 22, 2025 at 9:30 a.m.** Mahnomen County Court Administration shall send out a separate notice of the hearing.
3. The attached memorandum is expressly made a part of this Order.

BY THE COURT:

Digitally signed by Duffy, Seamus
Date: 2025.03.03 16:47:11 -06'00'

Seamus P. Duffy
Judge of District Court
Mahnomen County, Minnesota

Electronically Served
3/5/2025 11:10 AM
Mahnomen County, MN

MEMORANDUM

Thompson is a Native American and an enrolled member of the White Earth Band of Ojibwe. He is the owner and operator of Asema Tobacco & Pipeshop, LLC, located in the City of Mahnomen on the White Earth Reservation. The tobacco shop was formed and is authorized under the regulatory laws of the White Earth Reservation Business Committee/Tribal Council to sell tobacco products only. Sometime in July 2023, White Earth Police Department learned that Thompson was offering cannabis flower and marijuana wax for sale to the general public out of his shop. Based on this information, law enforcement applied for two search warrants: one for Thompson's business and one for his home also in the City of Mahnomen.

On August 2, 2023, law enforcement executed the search warrants. Inside the tobacco shop, the officers found three employees, multiple mason jars on the front counter that contained cannabis flower, nearby digital scales and plastic baggies, and $1,958 in cash. In total, law enforcement located 3,405 grams (or approximately 7.5 pounds)[1] of cannabis flower in the tobacco shop.[2] Thompson's home was also searched but no controlled substances were located in his home.

On April 17, 2024, the State charged Thompson with one count of Cannabis Possession in the First Degree – Possession of More than Two Pounds but Not More than 10 Kilograms of Cannabis Flower. Minn. Stat. § 152.0263, Subd. 1(1).

Now, Thompson moves for dismissal, arguing that the State lacks jurisdiction to prosecute this case because: (1) the matter is civil-regulatory in nature under Public Law 280, and (2) marijuana possession is a sovereign right reserved in the 1855 Treaty between the Ojibwe and United States.

ANALYSIS

Thompson argues that Minnesota lacks subject matter jurisdiction to enforce marijuana-possession offenses on reservations, asserting that pursuant to federal and state case law, Minnesota's current marijuana-possession laws are regulatory in nature. *See* California *v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987) (holding

[1] There are 28.35 grams in a one ounce and 16 ounces in a pound. Therefore, a pound is approximately 453.6 grams.
[2] Law enforcement also seized approximately 433 grams of marijuana wax from the shop. However, Thompson is not charged with possession of this substance.

that states have subject matter jurisdiction with respect to criminal/prohibitory laws, but not civil/regulatory laws, on certain reservations pursuant to Public Law 280); *State v. Stone*, 572 N.W.2d 725, 728 (Minn. 1997). Further, Thompson contends that district court lacks personal jurisdiction over him because marijuana possession is a usufructuary right reserved in the 1855 Treaty between the Ojibwe and the United States. Thompson argues that subject-matter and personal jurisdiction are lacking.

1. Subject Matter jurisdiction under Public Law 280.

The determination of subject-matter jurisdiction is a question of law. *State v. R.M.H.* 617 N.W.2d 55, 58 (Minn. 2000). Absent federal authorization, a state may not assert jurisdiction over Indian Tribes. *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 392 (1976). In Public Law 280, Congress expressly authorized and granted Minnesota broad criminal jurisdiction and limited civil jurisdiction over reservations within the State of Minnesota with the exception of the Red Lake Reservation. *State v. Folstrom*, 331 N.W.2d 231, 233 (Minn. 1983); 18 U.S.C. § 1162(a). Thus, in order for a state law to be enforceable on the reservation it must be criminal not civil.

To ascertain whether the state law should be categorized as criminal law or civil law for the purposes of Public Law 280 (hereinafter PL 280), the Supreme Court of the United States adopted the *Cabazon* test:

> "[I]f the intent of a state law is generally to prohibit certain conduct, it falls within [PL 280]'s grant of criminal jurisdiction. But, if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and [PL 280] does not authorize its enforcement on an Indian Reservations. The shorthand test is whether the conduct at issue violates the State's public policy."

Cabazon at 209. The Court recognized that some state statutes are "not so easily categorized" and that it is "not a bright-line rule…". *Id.* at 208.[3]

In *State v. Stone*, 572 N.W.2d 725, 728 (Minn. 1997), the Supreme Court of Minnesota further adopted a two-step test. First, a court must determine whether to analyze the broad conduct or the narrow conduct at issue. Generally, the broad conduct will be the focus unless the narrow conduct at issue in the case "presents a substantially

[3] *See, e.g., Quechan Indian Tribe v. McMullen*, 984 F.2d 304, 307 (1933) (finding that fireworks laws were criminal even though they were codified as a civil enactment and were referred to by the California Attorney General as 'regulatory").

different or heightened public policy concern." *Id.* at 730. The second step is to determine if the conduct is generally permitted subject to regulation (civil) or is generally prohibited (criminal). According to the Supreme Court's formulation in *Stone*, if a law generally prohibits a specific conduct, it is criminal. *Id.* In close cases, the court may look at state public policy factors to determine whether the statue may be considered criminal. *State v. Robinson*, 572 N.W.2d 720, 723 (Minn. 1997).

While no factor is dispositive, and the list is non-exhaustive, four factors have been outlined when determining whether a statutory violation is also a breach of the state's public criminal policy: "(1) the extent to which the activity directly threatens physical harm to person or property or invades the rights of others; (2) the extent to which the law allows for exceptions and exemptions; (3) the blameworthiness of the actor; and (4) the nature and severity of the law's potential penalties." *Id.* at 723. Public policy may also be identified from the legislative purpose or intent behind the enactment. *See*, *e.g., State v. Ndikum*, 815 N.W.2d 816, 819 (Minn. 2012); *Nordling v. Ford Motor Co.*, 42 N.W.2d 576, 581 (Minn. 1950).

Possession of marijuana has been considered 'clearly criminal' on two prior occasions. First, in *State v. St. Clair*, 560 N.W.2d 732, 734 (Minn. App. 1997), the felony fifth-degree possession of marijuana was determined to be a criminal offense and that state courts had jurisdiction under PL 280 to enforce the criminal offense on the White Earth Reservation. *See also* Minn. Stat. § 152.025, Subd. 2(1) and 3(a) (1996). Later, in *State v. Larose*, 673 N.W.2d 157 (Minn. App. 2002), the Court of Appeals the Court re-affirmed its prior ruling in *St. Clair*. However, this time, the court's analysis went further and specifically applied *Cabazon* and *Stone* in the context of marijuana possession.

The holding in *Larose* was that Minnesota had a "heightened public policy" against the possession and use of illegal drugs including marijuana "even though the penalties are not quite as severe as for other drugs." *Id*. Additionally, the court found that possession of marijuana violated the state's "public criminal policy." Central to that finding, was "marijuana possession [was] not permitted in any place in Minnesota" at that time (finding that possession of even small amounts was a petty misdemeanor against the laws of Minnesota). *Id.* Thus, the court found that "possession of marijuana, like other illegal drugs in Minnesota, [was] criminal/prohibitory, not civil/regulatory" and

that “Minnesota ha[d] the authority to enforce drug laws [in Indian Country] pursuant to [PL] 280.” *Id.*

Given these prior cases, Thompson’s argument is that *St. Clair* and *Larose* should be overturned in light of the passage of the Minnesota Adult Use Cannabis Act (hereinafter the Act) in 2023. *See Defense Brief*, filed 1/8/25, at 5 (“These sweeping legislative changes render previously controlling case law no longer applicable…”). The Act made it legal for adults over 21 to possess marijuana up to prescribed amounts in public places and in private homes. Minn. Stat. § 342.09. This same statute which authorizes “personal adult use cannabis” also states that “a person who violates the provisions [listed above including the weight limits] is subject to any applicable *criminal* penalty.” Minn. Stat. § 342.09, Subd. 6 (emphasis added). The criminal statute at issue, Minn. Stat. § 152.0263, Subd. 1(1), was also a creation of the Act, is just such a ‘criminal penalty’. So, while the Act authorizes possession of personal, recreational amounts of marijuana it also made clear that it was still illegal to possesses non-personal, non-recreational amounts of marijuana.

While the Court recognizes recent changes in the law, the Court cannot ignore controlling case law. *Larose*’s finding of a heightened public policy and use of the narrow (rather than broad) conduct of marijuana possession is therefore not only persuasive but authoritative. As to the second prong, whether the conduct is generally permitted subject to regulation or generally prohibited, the Court finds that the possession non-personal, non-recreational amounts of marijuana in public is generally prohibited. Nevertheless, given the new legislation this is much closer case than in the past and has become one of those alluded to statutes that is ‘not so easily categorized’ within the dichotomy of *Cabazon/Stone*. In close cases, the court may look at state public policy factors to determine whether the statue may be considered criminal. *State v. Robinson*, 572 N.W.2d 720, 723 (Minn. 1997).

Overall, these factors favor a criminal classification. First, the Court finds that Thompson’s act did not directly threaten physical harm to other or property or invade the rights of others. Second, Minn. Stat. § 152.0263 contains no exceptions. It is a generally appliable prohibition on the possession of marijuana over delineated amounts. While the Act has an exception, namely licensure, the existence of this mechanism

outside the statue does not automatically convert a criminal statute into a civil issue. *State v. Folstrom*, 331 N.W.2d 231 (Minn. 1983) (in a case decided before *Cabazon*, it was held that permit requirement did not convert statute prohibiting carrying a pistol without a permit into a civil licensing issue). Third, Thompson has a high degree of blameworthiness. He possessed a large quantity of marijuana well over the limit for public places. Moreover, he did so in a tobacco shop where those over 18 but under the required age of 21 would have had access in direct violation of the age limit under the Act. The sheer quantity possessed, the cash confiscated, the baggies, scales, and the arrangement of the marijuana in the shop are suggestive of additional blameworthiness. Moreover, these facts along with the tip received by law enforcement in July 2023 show that Thompson's conduct predated the August 1, 2023, effective date of the Act thereby increasing his blameworthiness. Fourth, the criminal charge of Cannabis Possession in the First-Degree is part of the criminal code and the nature and severity of the potential penalties include a felony conviction, up to five years in prison, a $10,000 fine, or both. Minn. Stat. § 152.0263. This is commensurate with the felony fifth-degree possession charges addressed in *St. Clair* and *Larose*.

Based on the above factors, the statute at issue is criminal and violates state public policy. Public safety shall be given full consideration. Minnesota has the authority to enforce violations in Indian County pursuant to PL 280. *See*, e.g., *State v. Robinson*, 572 N.W.2d 720, 724 (Minn. 1997). Thompson's first motion is therefore denied.

2. Personal Jurisdiction and Treaty Rights.

Thompson argues that marijuana possession is a usufructuary right reserved in the 1855 Treaty between the Ojibwe and the United States. Notably, no copy of the Treaty was filed by either party. Nevertheless, Thompson argues the retained rights in the Treaty included "ceremonial smoking and use of tobacco and other medicinal plants." *Defense Brief*, filed 12/13/24, at 6. Thompson argues that marijuana one of these "other medicinal plants" and that smoking marijuana, "has likewise become a modern way to exercise Anishinaabe culture and spiritual beliefs around asemaa." *Id. at 7.* At the same time, Thompson acknowledges that marijuana in this manner was "not an active practice until the 1960s…". *Id.* at 8. Ultimately, Thompson argues that the charge against him must be dismissed because "[t]o date, neither treaty nor federal law

purports to divest Anishinaabe people of their sovereign usufructuary rights." *Id.* at 10. This argument fails for three reasons.

First, "treaties with the Indians 'gave no vested rights to individuals' because the government dealt with the tribes and all promises were made to the tribes." *State v.* Shabaiash, 485 N.W.2d 724, 726 (Minn. App. 1992) (quoting *Sac and Fox Indians (Iowa) v. Sac and Fox Indians (Oklahoma)*, 220 U.S. 481, 483 (1911)). Thus, the rights, which Thompson argues have been abridged, belong to the Tribe as a whole and not to any individual member. *State v. Roy*, 761 N.W.2d 883, 887 (Minn. Ct. App. 2009) (referencing hunting rights). Minn. Stat. § 152.0263 has no effect on the rights of the Tribe as a whole. Instead of limiting the Tribe's right to regulate marijuana on their land, the Act acknowledges the sovereign right of Minnesota Tribal Governments, including the White Earth Band, to regulate and address matters of marijuana within their jurisdictions. See, e.g., Minn. Stat. § 3.9224, Subd. 2(a); Minn. Stat. 3.9228, Subd.2(a).

Second, Thompson has not shown that marijuana was envisioned with any of the reserved rights at the time of the Treaty. Again, *St. Clair*, *supra.*, at 735, is instructive. St. Clair sought dismissal of the charge arguing, in part, that the court lacked personal jurisdiction over him under the United States-Mississippi Band of Chippewa Indians Treaty of 1867. The Court of Appeals denied this argument. In analyzing the Treaty rights, the Court indicated that St. Clair had failed to show that any Indians at the time of the Treaty's signing understood the terms to encompass marijuana possession (here St. Clair argued that "agricultural pursuits" protected in the treaty shieled him from prosecution for criminal possession of marijuana). The same holds true here.

Third, through its plenary power, Congress can abrogate Treaty provisions unilaterally without the consent of the Tribes. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 594 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). Therefore, even if the Treaty's protections somehow encompassed possession of marijuana, they would conflict with Minnesota law prohibiting such possession, and "to the extent of the conflict, would be abrogated through [PL] 280." *St Clair*, supra., at 735.

For these reasons, Thompson's second motion to dismiss is denied.

S.P.D.