

Oneida Tribal Judicial System

Onayote ? aka Tsi? Shakotiya? Tolé hte

Ron Kelly,
PETITIONER,

v.

Case No. 13-TC-036

Oneida Conservation
Harvey Kosowski,
RESPONDENTS

Decisions Denying in Part and Granting in Part Respondents' Motions to Dismiss and for Summary Judgment

This case has come before the Oneida Tribal Judicial System, Trial Court. Judicial Officers, Mary Adams, Sandra L. Skenadore, and Leland Wigg-Ninham, presiding.

History

On May 28, 2013, a hearing was held where both parties appeared with counsel. A Scheduling Order was handed out detailing the date for a next hearing, among other things, the discovery deadlines and dispositional motions deadline.

On May 8, 2013, Respondents filed a Motion to Dismiss. On June 24, 2013 Respondents filed a Motion for Summary Judgment. Respondents claim Officer Kosowski was acting in his official capacity as a Conservation Officer employed by the Tribe. Therefore, Respondents argue he is immune from damages unless there has been a waiver of the Tribe's sovereign immunity, whether or not he was acting within his scope of authority.

On July 2, 2013 Petitioner filed a Demand for Discovery.

Petitioner had until July 15, 2013 to file his answer to Respondents' Motion for Summary Judgment. Respondents' asserts even if the OTJS deemed any of Respondents' actions to be

outside the scope of his authority, Petitioner would still not be entitled to any relief because none of these actions are ongoing.¹ To this date Petitioner has not filed a response to either of Respondents' Motion.

The parties identified the following question to argue at trial; Did Warden Kosowski exceed his lawful authority to issue Mr. Kelly a citation and then confiscate his gun?

Facts

We construe the facts in favor of the non-moving party. On November 18, 2012 Mr. Kelly was hunting within tribal lands. On the same day or shortly thereafter, Mr. Kelly was issued a citation from Warden Kosowski for violation of Chapter 45.16 (violation #127) and Mr. Kelly's weapon was seized. This violation is described as trespassing in a wildlife area, park or bow hunting area during the nine (9) day gun deer season, without giving notice. A hearing was scheduled at the Environmental Resources Board for January 17, 2013, but was rescheduled for February 21, 2013. On February 21, 2013 Mr. Kosowski did not appear and the ERB dismissed the citation and returned Mr. Kelly's weapon to him. Mr. Kelly then filed this action.

On May 8, 2013 Respondents filed a Motion to Dismiss on the following grounds:

1. The Conservation Dept and Officer Kosowski are protected by the Tribe's Sovereign Immunity and are immune from damages claims for actions taken within their representative capacities.
2. The Conservation Dept and Officer Kosowski are protected by the Tribe's Sovereign Immunity and are immune from declaratory and injunctive relief for actions taken within their scope of authority. Respondents' claims according to 46.16, Officer Kosowski had the right to confiscate Petitioner's weapon.

Analysis

Chapter 14 of the Tribe's laws addresses sovereign immunity. Section 14.4-2 states:

¹ The argument that none of the violations are ongoing suggests that Respondents are relying on the *Ex Parte Young* doctrine. 209 U.S. 123 (1908). Under the *Ex Parte Young* doctrine, state sovereign immunity does not prevent federal courts from issuing injunctive relief against state officials for violations of federal law. The U.S. Supreme Court has stated in dicta that tribal officials are not protected by sovereign immunity with a citation to *Ex Parte Young*. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). We are not aware of any Oneida Tribal Judicial System cases that have applied *Ex Parte Young* to Oneida tribal officials under Chapter 14.

No suit or other proceeding, including any tribal proceeding, may be instituted or maintained against a Tribal Entity unless the Tribe or the Tribal Entity has specifically waived sovereign immunity for purposes of such suit or proceeding. No suit or other proceeding, including any tribal proceeding, may be instituted or maintained against officers, employees or agents of a Tribal Entity for actions within the scope of their authority, unless the Tribe or the Tribal Entity has specifically waived sovereign immunity for purposes of such suit or proceeding.

Does Chapter 14 protect Officer Kosowski, an employee, and the Conservation Department, a tribal entity, from suit? As to the Conservation Department there is no question it is protected by sovereign immunity under Chapter 14, specifically Section 14.4-2, quoted above. There is no specific waiver for the Conservation Department. Therefore, the Conservation Department is dismissed as a party.

As to Officer Kosowski, the language above only prohibits suits or proceedings against employees for actions "within the scope of their authority." Here, Mr. Kelly asserts that Officer Kosowski went beyond the scope of his authority. We agree that Officer Kosowski's confiscation of Mr. Kelly's weapon, in this instance, was beyond the scope of his authority. However, we reserve ruling on whether and what type of damages, if any, are available in light of our finding. The issue of damages is not before us as the Respondents have filed a Motion to Dismiss and a Motion for Summary Judgment.

The Oneida Hunting, Fishing and Trapping Law specifically identifies the situations when a warden can confiscate or seize game or weapons. See secs. 45.6-2 (antlered deer may be confiscated); sec. 45.16 (#9)(unlawfully possessed game and fish may be confiscated); sec. 45.16 (#46)(seize weapon of a juvenile hunting alone); (#47)(seize weapon where knowingly allowing a juvenile to hunt along); (#74)(seizure of weapon for failure to accompany deer prior to registration); (#76)(seizure of weapon on third offense for failure to wear blaze orange); (#77)(seizure of weapon on third offense for failure to have 360 degrees of blaze orange on hunting blind during deer gun or muzzle loading seasons.)

These very specific designations of when a weapon can be seized support the conclusion that they are the *only* time when weapons can be confiscated. There is no general authority given in the ordinance for seizure of weapons by a Warden. Therefore, under the Hunting, Fishing and Trapping Ordinance, Officer Kosowski was acting outside the scope of this authority when he

confiscated Mr. Kelly's weapon for a violation in which the ordinance does not authorize seizure or confiscation.

We are aware that in some jurisdictions the inquiry on scope of authority is distinct from whether a government official acted lawfully. See *Sims v. Metro. Dade County*, 972 F.2d 1230, 1236 (11th Cir.1992)(rejecting contention that "any time a government official violates clearly established law he acts beyond the scope of his discretionary authority" as "untenable" and explaining that "the question of whether the defendants acted lawfully [is distinct from] the question of whether they acted within the scope of their discretion"). The inquiry on scope of authority is not simply whether Officer Kosowski was authorized to commit an illegal act. See *O'Rourke v. Hayes*, 378 F.3d 1201, 1205-06 (11th Cir.2004); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265-66 (11th Cir.2004); *Maggio v. Sipple*, 211 F.3d 1346, 1350-51 n. 2 (11th Cir.2000); *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1282-83 (11th Cir.1998). Framed that way, the inquiry is no more than an untenable tautology. *Holloman*, 370 F.3d at 1266 (quoting *Harbert Int'l, Inc.*, 157 F.3d at 1282).

The question is whether in general Officer Kosowski was acting within his capacity. Courts "look to the general nature of the defendant's action, temporarily putting aside the fact that it may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances." *Id.* (noting "we do not ask whether police have the right to use *excessive* force We instead ask whether they have the power to attempt to effectuate arrests"); accord *O'Rourke*, 378 F.3d at 1205 ("we do not ask whether [a police officer] has the right to engage in unconstitutional searches and seizures, but whether engaging in searches and seizures in general is a part of his job-related powers and responsibilities") (quoting *Holloman*, 370 F.3d at 1266).

However, even under this more generous scope-of-authority analysis we are not convinced that Officer Kosowski was within the scope of his authority. The Hunting, Fishing and Trapping Ordinance is so clear and specific that we do not believe it is plausible to say that in general confiscating weapons from alleged illegal trespassers is a part of his job-related powers and responsibilities.

Within the list of 130 violations and potential sanctions, seizure of weapons or game is only permitted in six of the violations. It is rare and specifically identified when weapons may be

seized. Therefore, it is not as though it is common for Oneida Game Wardens to seize weapons or game or within their broad general scope to seize and confiscate. Therefore, it is not as though seizure of a weapon is a common occurrence and one where a warden, as here, may have exceeded his or her discretion. There is no discretion. Rather, under Oneida law, seizure of weapons is a specific and limited power and Officer Kosowski crossed a bright line by seizing the weapon in a situation where it was clearly not authorized.

Further support for our conclusion is the type of violations that authorize seizure of weapons and the presumed rationale behind the sanctions. Two of them relate to seizure of a handgun from a juvenile. Sec. 45.16 (violation #46 and 47). The safety concerns here are obvious. The next one is the failure to accompany deer prior to registration. Sec. 45.16 (violation #74). Presumably the weapon seizure here would be related to poaching. The final two violations where seizure of a weapon is allowed is on the third violation relating to failure to display sufficient blaze orange. Sec. 45.16 (violation #75 and 76). Presumably here the concern is that by the third time a person cannot comply with these important safety regulations, they should not be in the woods with a weapon.

The type of violation is relevant because Officer Kosowski could arguably have been within the scope of his authority if he had seized the weapon for one of the reasons for which other seizures are authorized (safety or poaching). In such a case, there would have at least been an argument that even though Officer Kosowski might have acted unlawfully, he was within the scope of his authority with respect to promoting safety and preventing poaching. However, here Mr. Kelly's weapon was seized for a trespassing violation which appeared to be a misunderstanding on the part of Mr. Kelly. The nature and severity (or lack thereof) of the offense do not support or indicate concerns that would otherwise justify seizure. Therefore, the nature and circumstances of the violation also weigh against Officer Kosowski's argument that he was acting within the scope of his authority.

Mr. Kelly's alleged violation was for trespassing in a wildlife area or park without giving notice. The Tribe has decided that while this conduct should be prohibited, it is not serious enough to warrant seizure of the violator's weapon.

Therefore Chapter 14 does not support Respondent's motions nor does it prohibit this case from going forward. However, we reserve ruling on two issues: 1) whether there are any other legal

limitations which may protect Officer Kosowski; 2) the scope and extent of the remedies, if any, that may be available to Mr. Kelly in light of our ruling that the Conservation Department is dismissed and Officer Kosowski remains as a party.

Decision

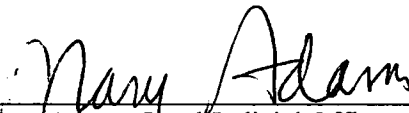
The Respondents' Motions to Dismiss and Motion for Summary Judgment are granted in part and denied in part. The Motion to Dismiss the Conservation Department is GRANTED. The Motion to Dismiss Officer Kosowski is DENIED. Respondent Kosowski's Motion for Summary Judgment is DENIED as he is not entitled to judgment as a matter of law. Respondent Conservation Department's Motion for Summary Judgment is moot as that party is dismissed from the action.

The Scheduling Order remains in effect and this matter is scheduled for trial on August 9, 2013.

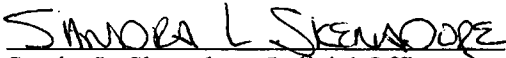
IT IS SO ORDERED.

By the authority vested in the Oneida Tribal Judicial System pursuant to Resolution 8-19-91-A of the General Tribal Council it is so held on the hearing date of 28th day of May, 2013, in the matter of Ron Kelly v. Oneida Conservation Department and Harvey Kosowski, Docket No. 13-TC-036.

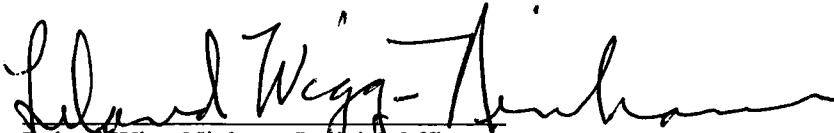
Signed on this 29th day of July, 2013.



Mary Adams, Lead Judicial Officer



Sandra L. Skenadore, Judicial Officer



Leland Wigg-Ninham, Judicial Officer