

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 29 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

EDWARD J. STEINER,

Plaintiff-Appellant,

v.

BRENT KEMPSTER, Officer, La Push
Police Department; et al.,

Defendants-Appellees,

QUILEUTE TRIBE,

Real-party-in-interest-
Appellee.

No. 23-35445

D.C. No. 3:22-cv-05526-RJB
Western District of Washington,
Tacoma

ORDER

Before: BADE, LEE, and VANDYKE, Circuit Judges.

The district court certified that this appeal is not taken in good faith and revoked leave to proceed in forma pauperis. *See* 28 U.S.C. § 1915(a). On July 19, 2023, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the opening brief, and the responses to the July 19, 2023 order, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 8) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EDWARD J. STEINER ,

Plaintiff,

v.

BRENT KEMPSTER,

Defendant.

Case No. C22-5526-RJB-SKV

REPORT AND RECOMMENDATION

INTRODUCTION

This is a civil rights action proceeding under 42 U.S.C. § 1983. Plaintiff Edward J. Steiner is a state prisoner who is currently confined at the Washington State Penitentiary in Walla Walla, Washington. Plaintiff alleges Defendant Brent Kempster, a police officer with the La Push Police Department (“LPPD”),¹ violated Plaintiff’s Fourth Amendment rights by using excessive force to detain him on August 22, 2021, in the Lonesome Creek Store² in La Push, Washington. Dkt. 7 at 4–5. On April 4, 2023, Defendant Kempster filed the present Motion to

¹ Defendant Kempster is now employed as a police officer with the Suquamish Police Department. Dkt. 35 ¶ 2.

² In the Amended Complaint, Plaintiff refers to the store where the alleged incident of excessive force occurred as both the “Lone Creek Store” and the “Lonesome Creek Store.” See Dkt. 7 at 4–5. The “Lonesome Creek Store” is the correct name. See Dkt. 40 ¶¶ 2–3, 5.

1 [Plaintiff's] injuries" and Plaintiff "was relieved a bit[,]” *id.* at 7. Per Plaintiff, the “transporting
2 officer” took Plaintiff to the hospital. *Id.* at 8.

3 At the time of the alleged incident, Defendant Kempster was on duty as a LPPD police
4 officer, was wearing a LPPD police uniform, and was driving a marked LPPD vehicle. Dkt. 35
5 ¶ 6. The Lonesome Creek Store is wholly owned and operated by the Quileute Tribe and is
6 located within the boundaries of the Quileute Reservation, on land held in trust by the United
7 States for the tribe. Dkt. 40 ¶¶ 2–7. At the relevant time, there existed no cross-deputization or
8 cooperative law enforcement agreement between LPPD and the State of Washington, Clallam
9 County, or the City of Forks. Dkt. 35 ¶ 9; Dkt. 36 ¶ 6; Dkt. 37 ¶¶ 6–7; Dkt. 38 ¶¶ 3–4.

10 Defendant Kempster detained Plaintiff under Section 13.7.4 of the Quileute Tribe’s Law
11 & Order Code. Dkt. 35 ¶ 18. Following this detention, a Clallam County sheriff’s deputy
12 arrived and transported Plaintiff to Clallam County Jail. Dkt. 40 at 10–12. Plaintiff was
13 charged, prosecuted, and convicted in Clallam County Superior Court with Assault in the Third
14 Degree—Law Enforcement Officer and Harassment (Bodily Injury). *Id.* ¶ 8; *id.* at 14–18.

15 On April 4, 2023, Defendant Kempster filed the present Motion to Dismiss, arguing
16 (among other things) that the Court lacks subject-matter jurisdiction over this case because
17 Defendant Kempster was acting under color of tribal law, not state law, at the time of the alleged
18 incident.

19 DISCUSSION

20 A. Legal Standards

21 To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must show: (1) he suffered a
22 violation of rights protected by the United States Constitution or created by federal statute, and
23 (2) the violation was proximately caused by a person acting under color of state law. *See*

1 When a defendant raises a factual challenge to the court's subject-matter jurisdiction, as
2 Defendant Kempster does here, the Court "need not presume the truthfulness of the plaintiff's
3 allegations," *White*, 227 F.3d at 1242, and its consideration of evidence beyond the complaint
4 does not convert the motion into one for summary judgment, *Safe Air*, 373 F.3d at 1039. In such
5 instances, "the plaintiff must support her jurisdictional allegations with 'competent proof,' under
6 the same evidentiary standard that governs in the summary judgment context." *Leite*, 749 F.3d at
7 1121 (internal citation omitted). "The plaintiff bears the burden of proving by a preponderance
8 of the evidence that each of the requirements for subject-matter jurisdiction has been met." *Id.*
9 "[I]f the existence of jurisdiction turns on disputed factual issues, the district court may resolve
10 those factual disputes itself." *Id.* at 1122.

11 B. Defendant Kempster's Motion to Dismiss

12 To establish subject-matter jurisdiction over Plaintiff's § 1983 claim, Plaintiff must
13 demonstrate that Defendant Kempster was acting under color of state law at the time of the
14 alleged incident of excessive force. *West*, 487 U.S. at 49. In other words, Plaintiff must
15 demonstrate that Defendant Kempster was exercising power granted to him by the state. *See*
16 *Johnson*, 113 F.3d at 1117. Because the undisputed evidence demonstrates that Defendant
17 Kempster was exercising power granted to him by the tribe, and not the state, Plaintiff has failed
18 to make such a showing.

19 It is undisputed that the LPPD is the police department for the Quileute Tribe—a
20 sovereign tribal entity. Dkt. 35 ¶ 7; Dkt. 36 ¶ 5. It is further undisputed that Defendant
21 Kempster was acting in his capacity as a LPPD police officer when detaining Plaintiff, Dkt. 35
22 ¶¶ 6–11; Dkt. 36 ¶¶ 8–9, that the incident occurred on tribal land, Dkt. 40 ¶¶ 2–7, and that
23 Defendant Kempster detained Plaintiff exclusively under the Quileute Tribe's Law and Order

1 Finally, Plaintiff argues that Defendant Kempster charged him with violations of
 2 Washington law. Dkt. 42 at 9. While it is true that Plaintiff was tried and convicted under
 3 Washington law, it was Clallam County—not Defendant Kempster, the LPPD, or the Quileute
 4 Tribe—that charged and prosecuted him. Dkt. 40 at 8–25. Defendant Kempster only detained
 5 Plaintiff under Quileute tribal law. Dkt. 35 ¶¶ 17–18; Dkt. 36 ¶¶ 8–9.

6 Because the evidence demonstrates that Defendant Kempster acted under color of tribal
 7 law, not state law, Plaintiff cannot maintain a § 1983 claim against him.⁴ As a result, this matter
 8 should be dismissed for lack of subject-matter jurisdiction. Plaintiff’s pending Motion for All
 9 Video, Photos, Audio, Property, Booking Sheet, Clothes, and Court Recordings, Dkt. 18; Motion
 10 for All Video, Audio, and Property, Dkt. 23; and Motion for Expert Witness Video and Audio,
 11 Dkt. 29, should be denied as moot.

12 CONCLUSION

13 Based on the foregoing, this Court recommends that this matter be dismissed for lack of
 14 subject-matter jurisdiction. Further, Plaintiff’s pending Motion for All Video, Photos, Audio,
 15 Property, Booking Sheet, Clothes, and Court Recordings, Dkt. 18; Motion for All Video, Audio,
 16 and Property, Dkt. 23; and Motion for Expert Witness Video and Audio, Dkt. 29, should be
 17 denied as moot. A proposed order accompanies this Report and Recommendation.

18
 19 ⁴ Beyond this, the undisputed evidence demonstrates that Plaintiff was not deprived of any right
 20 under the United States Constitution, as required to state a claim under § 1983. The Court has concluded
 21 that Defendant Kempster acted exclusively under color of tribal law. Because tribes are not constrained
 22 by the Constitution, “no action under 42 U.S.C. § 1983 can be maintained in federal court for persons
 alleging deprivation of constitutional rights under color of tribal law.” *R.J. Williams Co. v. Fort Belknap*
Hsg. Auth., 719 F.2d 979, 981–82 (9th Cir. 1983). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49,
 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as
 unconstrained by those constitutional provisions framed specifically as limitations on federal or state
 authority.”).

23 Defendant Kempster also argues that, in the alternative, the Court should dismiss this action for
 failure to exhaust tribal court remedies. Dkt. 34 at 13–15. However, because the Court has determined
 that it lacks subject-matter jurisdiction for the reasons stated above, it does not reach this issue.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EDWARD J. STEINER ,

Plaintiff,

v.

BRENT KEMPSTER,

Defendants.

Case No. C22-5526-RJB-SKV

ORDER

Having reviewed the Report and Recommendation of the Honorable S. Kate Vaughan,
United States Magistrate Judge, any objections or responses, and the remaining record, the Court
finds and ORDERS:

(1) The Court ADOPTS the Report and Recommendation;

(2) This action is dismissed for lack of subject-matter jurisdiction under Fed. R. Civ.

P. 12(b)(1);

///

///

///

///

United States District Court

WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EDWARD J. STEINER ,

Plaintiff,

v.

BRENT KEMPSTER,

Defendant.

JUDGMENT IN A CIVIL CASE

Case No. C22-5526-RJB-SKV

 Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

 X **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT:

The Report and Recommendation is approved and adopted. This case is dismissed for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

Dated this _____ day of _____, 2023.

RAVI SUBRAMANIAN

Clerk of Court

Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EDWARD J. STEINER,

Plaintiff,

v.

BRENT KEMPSTER,

Defendant.

CASE NO. 22-5526-RJB-SKV

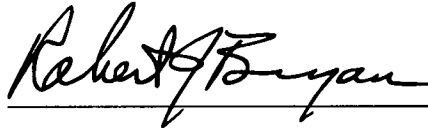
ORDER ADOPTING REPORT AND
RECOMMENDATION AND
DISMISSING CASE

This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge S. Kate Vaughn. Dkt. 44. The Court has considered the Report and Recommendation, Plaintiff's Objections to the Report and Recommendation, Defendant's Response to the Objections and the remaining file.

On May 10, 2023, the Report and Recommendation (Dkt. 44) was filed recommending that the Defendant's motion to dismiss (Dkt. 34) be granted and Plaintiff's claims be dismissed for lack of subject matter jurisdiction. Dkt. 44. The Report and Recommendation also recommends that all remaining motions be stricken and the case be dismissed. *Id.*

1 The Clerk is directed to send uncertified copies of this Order to Magistrate Judge
2 Vaughn, all counsel of record, and to any party appearing pro se at said party's last known
3 address.

4 Dated this 22nd day of June, 2023.

5 
6

7 ROBERT J. BRYAN
8 United States District Judge
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24