FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BISHOP PAIUTE TRIBE, in its official capacity and as a representative of its Tribal members; Bishop Paiute Gaming Corporation, d.b.a. the Paiute Palace Casino,	)	No. 01-15007
Plaintiffs-Appellants,	)	ORDER AMENDING OPINION AND DENYING THE PETITION FOR REHEARING AND THE SUGGESTION FOR REHEARING EN BANC
v.	)	
COUNTY OF INYO; Phillip McDowell, individually and in his official capacity as District Attorney of the County of Inyo; Daniel Lucas, individually and in his official capacity as Sheriff of the County of Inyo,	)	
Defendants-Appellees.	)	
_____	)	

Filed May 20, 2002

Before: PREGERSON and RAWLINSON, Circuit Judges, and WEINER,[1] District Judge.

The opinion filed January 4, 2002, 275 F.3d 893 (9th Cir. 2002), is amended as follows:

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[1] Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennslyvania, sitting by designation.

Starting at page 910, delete Section VII in its entirety and replace it with the following:

"VII. THE DISTRICT ATTORNEY AND THE SHERIFF ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

The Tribe further asserts claims against the District Attorney and the Sheriff in their individual capacities. The Eleventh Amendment does not bar § 1983 claims against county officers sued in their individual capacities. Hafer v. Melo, 502 U.S. 21, 25-27 (1991); Demery v. Kupperman, 735 F.2d 1139, 1146 n.3 (9th Cir. 1984).

The District Court correctly held that neither the District Attorney nor the Sheriff are entitled to absolute immunity. However, the District Court erroneously concluded that the District Attorney and Sheriff were entitled to qualified immunity.

Qualified immunity "shield[s] [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Behrens v. Pelletier, 516 U.S. 299, 305 (1996) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Our analysis of whether the defendants are entitled to qualified immunity follows a two-part test: (1) whether the facts taken in the light most favorable to the plaintiff would establish a violation of the Fourth Amendment; and, if so (2) whether the law was clearly established at the time such that a reasonable officer faced with the same circumstances would have known that the challenged conduct was unlawful. See

Robinson v. Solano County, 278 F.3d 1007, 1013 (9th Cir. 2002) (en banc) (citing Saucier v. Katz, 121 S. Ct. 2151, 2156 (2001)). We conclude, taking the facts in the light most favorable to the Tribe, that the search violated the Fourth Amendment, and that the law in this Circuit was clearly established at the time the search was executed such that it would have been clear to the District Attorney and Sheriff that their conduct was unlawful.

The Tribe has alleged a violation of the Fourth Amendment based on the District Attorney's and Sheriff's execution of a search warrant to seize tribal property (employee records) on tribal land. The Tribe contends that the search was unlawful because it was executed beyond the District Attorney's and Sheriff's jurisdiction. James is the leading case in our Circuit involving seizure of tribal property. 980 F.2d at 1319. In James, we held that a U.S. district court did not err when it quashed a subpoena ordering a tribe to release its documents because the tribe possessed tribal immunity. Id. Our holding in James was based on the conclusion that "Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the [federal] court . . . ." Id. Accordingly, we found no "jurisdictional grant" from Congress which would require the tribe to produce documents in a criminal prosecution against an individual Indian.[2]

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[2] In James, the federal officers had authority to prosecute an individual Indian for violations of federal criminal laws under 18 U.S.C. § 1153. In the instant case,

In James, we did not need to reach the issue whether the subpoena was lawful because it was never executed. Instead, we affirmed the district court's decision not to enforce the subpoena on the ground that the officers had no jurisdictional authority over the tribe. James, 980 F.2d 1319. In the present case, the search warrant was executed but, as in James, the officers still had no jurisdictional authority to do so. Thus, based on the principles set forth in James, we conclude that the search warrant was in violation of the Fourth Amendment because the officers acted beyond their authority when they executed the search warrant against the Tribe and in excess of their jurisdiction.

Whether the execution of a search warrant against tribal property is constitutional was addressed in Sycuan Band of Mission Indians v. Roache, 788 F. Supp. 1498, 1508 (S. D. Cal. 1992), aff'd on other grounds, 54 F.3d 535, 543-44 (9th Cir. 1995). In Sycuan Band, the San Diego County Sheriff's deputies executed a search warrant on the Sycuan, Barona, and Viejas Reservations and seized gaming devices, cash, and records owned by the tribes. Sycuan Band, 788 F. Supp. at 1501.[3]

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the county officers had authority to prosecute the individual Indians for violation of state welfare laws under Public Law 280. Under neither of these statutes did prosecutorial jurisdiction extend to tribes as sovereign entities. See Sect. B.II.

[3] As in the present case, the search warrant was executed against the tribes in order to obtain information as part of a criminal investigation against individual Indians. In Sycuan Band and the present case, the officers had authority to enforce criminal law against individual Indians under Public Law 280, but did not have authority to enforce those criminal laws against tribes as sovereign entities.

The district court held that the search warrants were invalid because the state did not have jurisdiction over the tribes and "the defendants, therefore, acted beyond their authority by executing the . . . search warrants." Id. at 1508. In reaching its conclusion, the district court affirmed the general principle that "a judicial officer's writ cannot run outside the officer's jurisdiction." Id. (citing United States v. Strother, 578 F.2d 397, 399 (D.C. Cir. 1978)).

Our conclusion that the county officers' conduct was in violation of the Fourth Amendment is buttressed by a closely analogous case from the Tenth Circuit. In United States v. Baker, 894 F.2d 1144 (10th Cir. 1990), a county sheriff executed a search warrant on tribal property. The court held that because it was undisputed that the property was on tribal land and the state had never obtained jurisdiction over such lands, the search warrant was in violation of the Fourth Amendment. Id. at 1147.

In light of James and Sycuan Band, and the Tenth Circuit's conclusion in Baker, we hold that the District Attorney and Sheriff violated the Fourth Amendment when they executed the search warrant to seize tribal property held on tribal land because both the Tribe's property and land were outside the District Attorney's and Sheriff's jurisdiction. We further hold that this Fourth Amendment violation may merit relief under § 1983.[4]

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[4] Our conclusion that the Tribe may bring a 42 U.S.C. § 1983 action against the District Attorney and the Sheriff based on a search warrant executed in excess of

Having concluded that the Tribe has alleged a violation of the Fourth Amendment, we turn to consider whether it would have been clear to the District Attorney and Sheriff at the time the warrant was executed that their conduct was unlawful. The conduct occurred in 2000, and so the law at that time must be our guide. Robinson, 278 F.3d at 1015.

As the foregoing discussion reflects, at the time the District Attorney and Sheriff obtained and executed a warrant, the law was clear in this Circuit that there was no jurisdictional grant authorizing county officers to search and seize tribal property as part of a criminal prosecution of an individual Indian. See James, 980 F.2d at 1319. Indeed, the only court in this Circuit to address the precise question whether the execution of a search warrant against tribal property is constitutional held that it was not. See Sycuan Band, 788 F. Supp. at 1508. Moreover, the only circuit to address this issue concluded–seemingly without debate–that such a warrant would violate the Fourth Amendment. See Baker, 894 F.2d 1144. Accordingly, we find that no reasonable officer could have concluded that he had jurisdiction to search and seize tribal property as part of a criminal prosecution of an individual Indian, and no

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the county officers' jurisdiction, is not precluded by Hoopa Valley Tribe v. Nevins, 881 F.2d 657 (9th Cir. 1989). Hoopa Valley held that the right to tribal self-government is not a protected interest under § 1983. The present case involves protection from an unlawful search and seizure. Here, the county officers had no jurisdiction to execute the search warrant and seize tribal property and, therefore, the search warrant violated the Fourth Amendment.

reasonable officer could have concluded that the lack of jurisdiction was a mere technicality.

We hold as a matter of law that a reasonable county officer would have known, at the time the warrant was executed against the Tribe, that seizing tribal property held on tribal land violated the Fourth Amendment because the property and land were outside the officer's jurisdiction. Thus, the District Attorney and Sheriff are not entitled to qualified immunity."

With this amendment, the panel has voted to deny the petition for rehearing. Judges Pregerson and Rawlinson vote to deny the suggestion for rehearing en banc and Judge Weiner so recommends.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are denied.