No. 80653-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

LORETTA ERIKSEN,

Petitioner.

APPEAL FROM THE SUPERIOR COURT FOR WHATCOM COUNTY

THE HONORABLE CHARLES SNYDER

PETITIONER'S ~~APPELLANT'S~~ REPLY BRIEF

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TABLE OF CASES

Page(s)

STATUTES

COURT RULES

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. LORETTA ERIKSEN, Defendant.	)	NO. 80653-5 APPELLANT'S REPLY BRIEF

COMES NOW the defendant, LORETTA ERIKSEN, by and through her attorney, WILLIAM JOHNSTON and respectfully submits the following reply brief.

A. & B. The scope of review pursuant to RAP 4.2 is limited to the issue of whether inherent tribal authority authorizes a tribal law enforcement officer to pursue, stop and detain motorists for traffic infractions after they leave the reservation.

In its answer to petitioner's Statement of Grounds for Direct Review, the state argued only that this case did not merit direct review. The state recognized that the issue of review was whether tribal authority as enunciated in the Washington Supreme Court

decision of State v. Schmuck, 121 Wn2d 373, 850 P.2d 1332 (1993) authorized tribal police to engage in fresh pursuit of motorists for traffic infractions after they leave the reservation; see State's Answer to Statement of Grounds for Direct Review, page 3.

Likewise, in its Answer to Petitioner's Motion for Discretionary Review, the state's response was to argue that petitioner's motion did not merit review. The state did not cross appeal and argue that in the event the court granted discretionary review, the court should review issues other than the issue of whether inherent tribal authority as enunciated in the Washington Supreme Court decision of State v. Schmuck, 121 Wn2d 373, 850 P.2d 1332 (1993) authorized tribal police to engage in fresh pursuit of motorists for traffic infractions after they leave the reservation.

Now in its respondent's brief, the State has asserted as issue 2 in this review, "Officer McSwain (the tribal officer) made a valid citizen's arrest." To preserve this option, petitioner asserts that the state should have either sought cross review of this issue of whether the tribal officer made a valid citizen's arrest in its answer to petitioner's Statement of Grounds for Direct Review, or its Answer to Petitioner's Motion for Discretionary Review, or complied with RAP 5.1 (d) and filed a separate motion for discretionary

review raising this new issue of whether the tribal officer made a valid citizen's arrest.

RAP 2.4 (a) deals with scope of review. The instant case arises out of the local District Court and review as a matter of right concluded with the Superior Court decision affirming petitioner's conviction. This court accepted review directly and granted petitioner's motion for discretionary review.

The review accepted pursuant to RAP 2.4 (a) was the decision sought to be reviewed in petitioner's motion: " The appellant court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3 (e) in the notice for discretionary review."

This court's order of March 5, 2008 granted petitioner's motion for discretionary review, which raised only the inherent tribal sovereignty issue for review.

Therefore petitioner argues that the court should not consider the issue of whether the actions of tribal officer McSwain could be legally justified under the theory of citizen arrest.

D. 1. Petitioner's Response to Respondent's Argument that the Tribal Officer Had Authority to Stop and Detain a Non Tribal Member off the Reservation When Contact Began on the Reservation.

Petitioner in its opening brief surveyed those decisions of the United States Supreme Court in which the court considered the application of the doctrine of inherent tribal authority. From these cases, petitioner distilled two principles, which operate to defeat any extension of State v. Schmuck to authorize pursuit by tribal law enforcement off reservation to stop, detain and arrest motorists who may have committed traffic infractions or traffic crimes and driven off the reservation.

The first principle is that the assertion of tribal authority over land outside the boundaries of an Indian Reservation is not only unprecedented but also falls within the category of external relations, an aspect of sovereignty given up by the tribe when it signed a treaty with the United States Government. The state in its brief does not address the question of how this inherent sovereignty doctrine of the tribe can apply outside of the boundaries of its reservation and not constitute an unlawful extension of tribal sovereignty into the area of external relations.

The second principle is that inherent tribal sovereignty cannot be a valid basis upon which to nullify the legitimate exercise of the sovereign power of a state to regulate its affairs on its property outside of the confines of an Indian reservation. Only in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation 492 U.S. 408, 106 L.Ed2d 343 109 S. Ct. 2994 (1989) did tribal sovereignty nullify the application of state zoning authority but only in the context of land inside an Indian Reservation in an area of the reservation, which was overwhelmingly tribal trust land, with little fee land impacted by the ruling.

In this case, the state is arguing for carte blanche authority to pursue, stop and detain any motorist who commits a traffic infraction or criminal traffic offense on an Indian Reservation off the reservation without limitation, notwithstanding the fact that tribal officers possess no authority under Washington State law to do so. Furthermore, in enacting RCW 10.93.120, the legislature of Washington has expressly exercised its sovereign powers over its land and roads to prohibit such conduct and limit pursuit of fleeing motorists on state roads to those law enforcement officers authorized to do so under Washington law. The decision of the Superior Court and the position urged by the State in this case is to

endorse the nullification of Washington State law in favor of an extension of tribal sovereignty outside of the confines of an Indian reservation.

Not every problem is amenable to a judicially fashioned solution. The state's argument and the Superior Court decision is based upon its extension of the dicta found in State v. Schmuck cited by the State in its brief at page 10. This unwarranted extension of State v. Schmuck is driven by the policy consideration that but for this grant off authority to pursue traffic offenders off reservation, DWI drivers would simply drive off the reservation; see also Superior Court oral opinion at page 11 where the court stated, "detention was valid on the basis that there must be some level of inherent authority for the tribal officers to do that off the reservation in order to make their ability to detain on the reservation a functional policy; page 11 oral opinion, lines 13-17.

This contention may have merit in a political sense but it is not supported by decisions of the United States Supreme Court applying the inherent tribal authority doctrine. The problem arising from the lack of capacity of tribal law enforcement to pursue and detain motorists off reservation stems from the failure of the political process to accommodate these policy considerations of protecting

the tribe's interests as perceived by the State and the court. But it is not for the courts to judicially impose solutions to these problems especially under the construct of the misapplied legal principle of inherent tribal authority. The solution lies in the hands of the elected Sheriff of Whatcom County who can deputize tribal law enforcement, if he chooses to do so, or else in the hands of the legislative branch of government.

Recently the legislature has acted in passing RCW 10.92 to empower tribal police officers with authority to pursue and arrest off reservation. This legislation addresses the concern that was the reason why Lummi tribal law enforcement were not granted deputy status by the elected Sheriff of Whatcom County, namely the liability consequences of authorizing Lummi Law Enforcement to engage fresh pursuit as well as legal authority to arrest non tribal members off reservation. As a condition of obtaining authority to act as a general authority Washington peace officer, the powers of which are defined in RCW 10.93.070, RCW 10.92 sets up a process by which the sovereign tribal authority posts insurance to cover any tort liability incurred by its tribal officers exercising their power as a general authority Washington peace officer under this statute.

RCW 10.92 is significant from petitioner's perspective because it supports the proposition that tribal law enforcement officers possess no inherent authority to act under Washington law or within the confines of Washington State. A decision by this court upholding the decision of the Superior Court that tribal law enforcement possess as a matter of inherent tribal authority the power to pursue traffic and criminal traffic offenders off reservation would endorse such off reservation pursuit without the tribe's concession to be accountable for any tortious conduct of its officers in the course of the pursuit. Such a decision would also obviate the need for the tribes to comply with RCW 10.92 and to provide liability coverage for any tortious acts committed by their agents.

In conclusion, there is no case precedent for extending the authority of law enforcement officers of an Indian tribe to act outside the confines of the reservation under the doctrine of the tribe's inherent authority and in so doing to abrogate the law of the state in which the action takes place.

D. 2. The detention and arrest of Eriksen cannot be sustained upon the theory of a citizen arrest for the crime of reckless driving.

Having said that this issue has not been preserved for review by the State, in the alternative, petitioner has the following to say about this issue.

At trial in the District Court, the state argued that the crimes observed by the tribal officer justified him in making an arrest under the citizen arrest theory for DUI or 4th degree assault, which was consistent with the tribal officer's testimony; see transcript on motion to dismiss, page 57. On appeal to the Superior Court, the state switched its theory to justify a citizen's arrest for the different crime of reckless driving. In fact, the state's recitation of the testimony of the tribal officer found at page 17 of its brief in this court is identical to the testimony cited at pages 10 and 11 of its brief in the Superior Court.

In response to this argument in her reply brief in the Superior Court, Eriksen pointed out that this theory was not argued below and could not be raised on appeal in the Superior Court; see appellant's Reply Brief in the Superior Court, page 6 at the bottom.

The Superior Court's response to this argument is found at pages 32 and 33 of his oral opinion, a copy of which is attached to this brief as Appendix 1. Significant is that the Superior Court assessed the driving in question as "a car crossing the center line." Page 32, line 5,6.

To reach the state's argument this case would require this court to review the record and reverse the Superior Court's characterization of the driving, and make a finding as to whether the evidence presented constituted reckless driving, driving while under the influence and/or domestic assault. Each of these different crimes requires a completely independent analysis as to whether that particular crime constituted a breach of the peace. In addition, the cases cited by the state all involve instances in which state or municipal police officers acting outside of their particular jurisdictions engage in hot pursuit of a suspected DUI driver. That issue is different from the circumstance at bar which involves the actions of a tribal police officer who has no authority to act in Washington absent compliance with Washington law.

There is no authority in this state for a citizen to engage in hot pursuit of another motor vehicle to effect a citizen's arrest for DUI or 4th degree assault. And there are sound public policy

reasons for a trial court to reject the state's invitation to create such a common law right of hot pursuit of motor vehicles, especially by tribal law enforcement officers who are immune from suit.

In addition, Eriksen asserts that a tribal law enforcement officer who acts in excess of his jurisdiction cannot have his conduct justified by any theory based upon the state common law such as a citizen' s arrest. There is no basis to apply such a theory in this case where Officer McSwain was in uniform and driving a marked police car and effected the stop by use of his emergency lighting equipment. In addition, there is another reason not to superimpose a citizen's arrest authority upon a tribal officer acting on duty, and that is, he is completely immune from civil liability for his actions. A citizen who engages in hot pursuit and causes civil liability based upon negligent conduct is accountable and civilly liable for the consequences of his actions. A tribal law enforcement officer is protected by blanket immunity.

Lastly, Eriksen argues that a tribal law enforcement officer who acts in excess of his jurisdiction cannot have his conduct justified by any theory based upon the state common. Lummi Tribal Officer McSwain cannot take action, which is illegal under

federal law, and have it justified by state law because of the supremacy clause of the United States Constitution:

> 25 U.S.C.A. § 1302, United States Code provides as follows:
>
> No Indian tribe in exercising powers of self-government shall--
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
> (3) subject any person for the same offense to be twice put in jeopardy;
> (4) compel any person in any criminal case to be a witness against himself;
> (5) take any private property for a public use without just compensation;
> (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
> (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
> (9) pass any bill of attainder or ex post facto law; or

> (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

This section applies to non Indians, Dry Creek Lodge, Inc. v. United States 515 F.2d 926 (10th Cir. 1975). In this case, the dispositive question is whether Lummi Tribal Officer McSwain is acting under colorable authority of the Lummi Tribe, which to this counsel seems self-evident inasmuch as he is working for the tribe, wearing its uniform and using its police car. 25 U.S.C.A. § 1302 prohibits the Lummi Tribe and its agents from violating the rights of any person including the petitioner Eriksen. Eriksen argues that the court should enforce 25 U.S.C.A. § 1302 like any other federal law and not adopt the state's argument, which asks the court to endorse the Lummi Tribe and its agents' violation of 25 U.S.C.A. § 1302.

25 U.S.C.A. § 1302 does not contain an exemption which authorizes tribal law enforcement to violate the rights of non tribal members off reservation and allow the tribal law enforcement officer to act beyond his jurisdiction as limited by federal law. The state's argument that Lummi Tribal Law Enforcement Officer McSwain can while working as a tribal officer make arrests off

reservation as a citizen under Washington law or effectuate unlawful arrests off reservation of non tribal members and non Native Americans fails because such argument undermines federal law and is and should be preempted by federal law.

CONCLUSION

Petitioner Eriksen was pursued off reservation by a tribal law enforcement officer who lacked the authority to pursue and detain her off reservation. There is no basis under the doctrine of inherent tribal authority to empower tribal agents to act outside the confines of their reservation and in so doing to abrogate the sovereign right of the state to enact laws controlling conduct within its border. Ms. Eriksen's pursuit, detention and arrest were unlawful under Washington State and federal law and the unlawful fruits of said actions should have been suppressed.

Eriksen urges this court to hold that tribal law enforcement do not have the authority to engage in hot pursuit of motor vehicles off reservation in the absence of their deputization by the Whatcom County Sheriff or their participation in an Mutual Aid Pact under State law, or now by compliance with the recently enacted RCW 10.92. This court should reverse the decision of the Superior Court

and remand with instructions to enter an order suppressing any and all evidence derivative of the unlawful stop of Ms. Eriksen.

Date this 30th day of January, 2009

WILLIAM JOHNSTON WSBA 6113
Attorney for Petitioner ERIKSEN

appropriate citizen's arrest.

MS. STODOLA: Right.

THE COURT: My reading of Schmuck and my reading of other cases leads me to believe at this point that on this record, there isn't sufficient basis for a citizen's arrest, a car crossing a center line. Certainly, an officer could pull a person over for a civil infraction or something to that extent, but I don't think that it constitutes a breach of the peace that leads us to a citizen's arrest. My sense is that one is off the table, and I think in view of the policies enunciated in Schmuck, that would be more consistent with that as well; that the basis for the Lummi officer operating here should be that he is a law enforcement officer of a sovereign entity, not that he is just a citizen who sees something that evening he should arrest for, and frankly, I don't think that it reaches to the level of the necessary breach of the peace. So I think that when you get down to the color of law argument, it would not be sufficient for that.

The question then becomes is this person actually acting in the context of a citizen's arrest. I think not. I think this officer was acting in the belief that he was detaining someone under his

authority as a tribal police officer, detaining them for the appropriate authority to appear, and so therefore, I don't think that it constitutes a citizen's arrest. He's operating under color of law, and in so doing, detaining this person.

Now, as to the more interesting question which is that of the boundary, I think what I would have to say about the process is that Judge Grant's taking of testimony probably is not consistent with the way reconsideration is generally done, and with the way the rule anticipates reconsideration, and I think the case that Ms. Stodola cites has a very good argument on that point and says reconsideration is not to give you a chance to return and argue new ideas as they come up with new evidence, but to ask the court to reconsider what it has already decided based on the material that it used to make that decision, and go to the court and say to the judge, you missed it. You were wrong on the law. I think that's what reconsideration is about.

Having said that and having had an opportunity now to see Mr. Whitcomb's letter, his testimony really doesn't say much more, other than add some detail to the context of what the letter says. So I think what Judge Grant had before him was the opinion of the