ORIGINAL

2022 OK 84

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ANDREA SUE MILNE,

Plaintiff/Appellee,

v.

HOWARD JEFFEREES HUDSON

Defendant/Appellant.

Case No. 119,498

FOR OFFICIAL PUBLICATION

Gurich, J., concurring in judgment:

¶ 1 Although I believe the majority opinion reaches the correct conclusion in this case, I write separately to caution against interpreting the Court's ruling too broadly. To the extent the opinion could be construed as permitting state court jurisdiction over any protective order matter arising in Indian country, irrespective of the parties' statuses as member Indians, such a declaration is contrary to long-standing federal Indian law and I cannot join such a decree.

¶ 2 The domestic violence giving rise to the victim's protective order issued by the state district court took place within the boundaries of the Muscogee (Creek) Reservation;[1] thus, the acts occurred within Indian country. 18 U.S.C. § 1151(a). Both the alleged victim and alleged perpetrator are members of federally recognized Indian tribes. Milne is an enrolled member of the Muscogee (Creek)

[1] *See McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452, 2482, 207 L.Ed.2d 985 (2020) (finding the Muscogee (Creek) reservation never disestablished by Congress).

Nation and Hudson is an enrolled member of the Cherokee Nation. Because Hudson is not a member of the Muscogee (Creek) Nation, the jurisdictional question presented in this case becomes less clear.[2]

¶ 3 Generally speaking, an Indian may bring a civil action against a non-Indian in state court. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 148–49, 104 S.Ct. 2267, 2274–75, 81 L.Ed.2d 113 (1984).[3] This can be true even when part or all the acts giving rise to the suit took place in Indian country. *Id.* Renowned federal Indian law scholar, Felix Cohen, noted that "[i]n matters not affecting either the Federal Government or the tribal relations, an Indian has the same status to sue and be sued in state courts as any other citizen."[4] However, when a civil lawsuit involves only members of a tribe, and the subject of the suit occurs within the boundaries of that tribe's reservation, an action must be maintained in tribal court. *See Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382, 389, 96 S.Ct. 943, 947, 47 L.Ed.2d 106 (1976).

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[2] Historically, issues pertaining to Indian jurisdiction "were conceptually drawn around only two categories of individuals: Indians and non-Indians." Pommersheim, Frank, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 Ariz.L.Rev. 329, 355 (1989). Court decisions, however, have identified a third category of persons who impact the requisite jurisdiction analysis—nonmember Indians (those individuals who meet the definition of Indian, but who are not members of the tribe where the civil transaction arose). *Id.*

[3] However, it should be noted that one factor considered by the Supreme Court was the tribe's inability to assume jurisdiction over a claim against the nonmember defendant. *Id.* at 149. *But see Roe v. Doe*, 2002 ND 136, ¶ 19, 649 N.W.2d 566, 574 (explaining that "nothing in [*Three Affiliated Tribes*] indicates it intended to limit the general rule of allowing state court jurisdiction over claims brought by an Indian against a non-Indian to only those cases in which the tribe was the plaintiff and the tribal court lacked jurisdiction over the claim at the time the suit was instituted").

[4] Felix S. Cohen, *Handbook of Fed. Indian Law*, ch. 19, § 5, at 379 (1942 ed.).

Similarly, a state court would lack jurisdiction to hear a protective order sought by a non-Indian or nonmember against a member Indian, if the acts giving rise to the civil proceeding took place on the member's tribal reservation. *See Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).[5] However, neither *Fisher* nor *Williams* dealt with a civil lawsuit in which the plaintiff is a member Indian and the defendant is a nonmember Indian.

¶ 4 In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Supreme Court found the state could lawfully tax cigarette sales to nonmembers and non-Indians, even though those transactions occurred on reservation land. To reach this decision, the Court effectively found that the tribes and state enjoyed concurrent jurisdiction to tax nonmembers and non-Indians, and that the state's imposition of taxes were neither preempted by federal law nor an infringement on tribal sovereignty. *Id.* at 155-56, 161. In reaching the latter conclusion, the Court explained:

> Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements. We find, therefore, that the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.

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[5] *See also Roe*, 2002 ND 136, ¶ 8, 649 N.W.2d at 569 (citing *Fisher*, 424 U.S. at 387-89 and *Williams*, 358 U.S. at 223).

Id. at 161; *see also Wacondo v. Concha*, 117 N.M. 530, 873 P.2d 276 (N.M. Ct. App. 1994). *Wacondo* presents facts and legal issues strikingly similar to those in the present dispute. Ms. Wacondo and Ms. Salas filed a lawsuit in state court against Mr. Concha for personal injuries arising out of a shooting on the Jemez Pueblo in New Mexico. Ms. Wacondo was a member of the Jemez peoples and resident of the Jemez Pueblo. Ms. Salas was a member of the Zia peoples, but she resided outside of the boundaries of any pueblo. Mr. Concha was a member of the Taos Pueblo, however, there is no mention of his residence in the opinion. Defendant Concha moved to dismiss the action, arguing the state court lacked jurisdiction because the plaintiffs' cause arose on tribal lands and involved members of federally recognized tribes. On review, the appellate court considered one issue—whether Indian sovereignty or federal law would require the state courts to recognize exclusive jurisdiction in the Jemez courts because all of the parties were Indian and the subject of the suit occurred on the Jemez Pueblo. Finding that nothing foreclosed a member Indian from bringing suit against a non-member Indian in state court, the court opined:

> The facts here compel the conclusion that the "nonmember" Defendant cannot require Plaintiffs to forego their option of seeking redress in state district court. Nothing in our decision implies the Jemez Pueblo is in any way limited in providing a forum or remedies in this dispute. Our holding is merely that neither federal law nor tribal sovereignty precludes Indian plaintiffs from pursuing their state remedies against a nonmember Indian in state court.

Id. at 534. Ultimately, the New Mexico Court of Appeals found the state district court had concurrent jurisdiction to hear the matter and reversed the dismissal order. *Id.*

¶ 5 It is my belief that the majority gives undue weight to cases such as *Montana v. United States*, 50 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981),[6] *United States v. Cooley*, 593 U.S. ___, 141 S.Ct. 1638, 210 L.Ed.2d 1 (2021),[7] and *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001).[8] These decisions provide very little guidance to the issue presented in this case because each dealt with whether a tribe lacked jurisdiction to act.[9] There is no dispute in

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[6] The sole question in *Montana* was whether the Crow Tribe lacked power to prohibit hunting and fishing by nonmembers on non-Indian fee land within the reservation. In concluding there was no authority, the Supreme Court opined "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes." *Id.* at 564.

[7] *Cooley* merely affirmed a tribal police officer's authority to detain and search non-Indians traveling on public rights-of-way running through a reservation for potential violations of state or federal law. *Id.* at 1641.

[8] In *Hicks*, the Supreme Court found that a tribal court lacked jurisdiction to adjudicate tort claims and an action under § 1983 against state officials. *Id.* at 364, 366-69.

[9] *See, e.g.*, *Hinkle v. Abeita*, 283 P.3d 877, 879-84 (N.M. Ct. App. 2012)(discussing in depth, the inapplicability of the *Montana* rule to a question of state court jurisdiction [not tribal] for a cause arising in Indian country). I believe reliance on *Lewis v. Sac and Fox Tribe of Okla.*, 1994 OK 20, 896 P.2d 503, is likewise misguided. Therein, the majority concluded an Oklahoma state court had jurisdiction to adjudicate a real property dispute between a tribal member and the Sac and Fox Tribe of Oklahoma Housing Authority (SFTOHA). The decision is clearly distinguishable from the present matter. First, the Indian housing authority system adopted by Oklahoma had been created under the authority of the United States Housing Act of 1937, which specifically authorized the formation of tribal housing agencies under the umbrella of state law. *Id.* ¶ 3, 896 P.2d at 506. Second, the SFTOHA operated as a state agency, and the Sac and Fox Tribe explicitly authorized the housing agency to conduct business and exercise powers under Oklahoma law. *Id.* at 4, 896 P.2d at 506. Third, the Court concluded that the subject property was not located within Indian country at the time the transaction took place. *Id.* ¶ 24, 896 P.2d at 513.

this case—the Muscogee (Creek) Nation clearly had jurisdiction to enter a protective order.[10] Instead, the proper questions for resolution in this case are: (1) whether the exercise of jurisdiction by an Oklahoma state court would infringe on the right of the Muscogee (Creek) Nation to make its own laws and be ruled by them;[11] and (2) was the exercise of jurisdiction in state court preempted by federal law.[12] These two barriers are independent, and either "standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." *Bracker*, 448 U.S. at 143.

¶ 6 As to the first question, exercise of jurisdiction by the McIntosh County District Court in this case would not substantially infringe on the right of the Muscogee (Creek) Nation to govern itself. Although the Tribe has its own laws and court system designed to protect victims of domestic violence, there is no significant infringement of tribal sovereignty through the voluntary state court forum selection by Milne. Further, issuance of the protective order only placed legal

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[10] The Violence Against Women Act (VAWA), Pub.L. 103-322, Title IV, § 40221(a), Sept. 13, 1994, 108 Stat. 1930 (amended by PL 106–386, October 28, 2000, 114 Stat 1464) specifically affords "full civil jurisdiction to issue and enforce protection orders involving ***any person***. . . . in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151)." 18 U.S.C. § 2265(e) (emphasis added). Thus, Congress has seen fit to bestow tribes with authority to adjudicate matters of domestic violence within tribal boundaries. Further, the Muscogee (Creek) Nation has enacted provisions within the Muskogee Creek Nation Code allowing the Nation's Tribal Court to issue protection orders "regardless of the Indian or non-Indian status of petitioners and respondents." Muscogee (Creek) Nation Code Ann. tit. 6, § 3-401 (West 2010), as amended by Act of March 28, 2016, NCA 16-038, sec. 3, § 3-401, at 30–31, available at http://www.creeksupremecourt.com/wp-content/uploads/NCA-16-038-part-2.pdf.

[11] *Williams*, 358 U.S. at 220.

[12] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

restrictions on the nonmember, Hudson. And as the majority notes, the Muscogee (Creek) Nation's interests are aligned with its tribal member obtaining the quickest and most efficient remedy to ensure her safety. If such protection can best be obtained by seeking relief in state district court, this best serves the Nation and Milne. Also noted by the majority, Milne is not only a member of the Muscogee (Creek) Nation, but she is also an Oklahoma citizen. Therefore, nothing should preclude an Oklahoma citizen from seeking redress against a nonmember or non-Indian in our state courts, lest they be denied equal protection of the law and/or deprived of access to this State's judicial system. OKLA. CONST. art. II, §§ 6 & 7. However, as noted above, I do believe the assumption of jurisdiction by Oklahoma courts under different facts could offend tribal sovereignty.

¶ 7 In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983), the Supreme Court noted "[s]tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." Concepts of sovereignty over a tribe's reservation and members "must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." *Bracker*, 448 U.S. at 143. An express congressional statement of preemption is not required. *Id.* at 144 (citing *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965)). To properly assess preemption in this case, at least two federal enactments are at issue—Public Law

280 and the Violence Against Women Act, *supra* note 10, at 5. I agree with the majority that VAWA does not expressly preempt an Oklahoma court from exercising civil jurisdiction in this instance; however, I believe the outcome is limited to the unique facts presented. Public Law 280,[13] on the other hand, presents a closer call. *See Oklahoma v. Castro-Huerta*, ___ U.S. ___ , 142 S.Ct. 2486, 213 L.Ed.2d 847 (2022) (Gorsuch, J., dissenting). However, because the appellant failed to address preemption under P.L. 280, I reserve my consideration of the matter for another day. *Bane v. Anderson, Bryant & Co.*, 1989 OK 140, ¶ 24, 786 P.2d 1230, 1236.

¶ 8 Although I agree with the majority that the McIntosh County District Court could exercise civil jurisdiction over this matter, it was only proper under the unique facts presented. I cannot fully accede in the majority's pronouncement.

[13] Public Law 280, ch. 505, 67 Stat. 588 (1953).