No. 24-2798

In the United States Court of Appeals

for the Eighth Circuit

BRENDAN LABATTE,

Plaintiff - Appellant,

v.

KAREN GANGLE, PROSECUTOR FOR THE SWO, IN THEIR OFFICIAL CAPACITY; GARY GAIKOWSKI, CHIEF OF POLICE FOR SWO, IN THEIR OFFICIAL CAPACITY; HON. RUTH BURNS, JUDGE FOR THE SWO TRIBAL COURT, IN THEIR OFFICIAL CAPACITY; HON. MICHAEL SWALLOW, JUDGE FOR THE SWO TRIBAL COURT, IN THEIR OFFICIAL CAPACITY,

Defendants - Appellees.

On Appeal from the United States District Court
for the District of South Dakota
No. 1:24-cv-01014
Hon. Eric C. Schulte

APPELLANT'S BRIEF

Robert Doody
Doody Law Office
PO Box 307
Sisseton, SD 57262
Ph 605-698-3060
robert@doodylawoffice.com

Attorney for Plaintiff - Appellant
Brendan LaBatte

ORAL ARGUMENT REQUESTED

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

"What has the Tribe ever done for me? Except throw me in jail and take my kids" Brendan LaBatte. According to the Sisseton-Wahpeton Oyate the tribe can assert criminal and civil jurisdiction over tribal members on fee, non-Indian land within the exterior boundaries of the Lake Traverse Treaty of 1867. LaBatte is a victim of this extraterritorial policy as he was charged with committing a DUI on fee land in tribal court. LaBatte challenged jurisdiction in tribal court and again challenges it here. LaBatte argues that on fee land only the State of South Dakota has criminal jurisdiction to prosecute crimes. There is no such thing as "concurrent" jurisdiction based upon fundamental principles of law.

The District Court for the Northern District of South Dakota dismissed LaBatte's petition for a Preliminary Injunction under Federal Rules of Civil Procedure 12(b)(1). According to the District Court it does not have jurisdiction to hear the case because (1) the United States Constitution does not apply to the tribe and; (2) the Indian Civil Rights Act provides no relief except habeas corpus. LaBatte and other tribal members are regularly kidnapped off of state land and held for ransom by a foreign entity. LaBatte now brings his challenge before this Court. LaBatte request oral argument with 15 minutes allotted to both sides as this is a novel issue.

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JURISDICTIONAL STATEMENT

The district court entered a dismissal of LaBatte Motion for a Preliminary Injunction based upon Federal Rules of Civil Procedure 12(b)(1) for lack of jurisdiction on August 30, 2024 . The district court found that the United State Constitution and the Indian Civil Rights Act applied did not apply to this case. LaBatte filed his Notice of Appeal in a timely manner on August 30, 2024. See Fed. R. App. P. 4(a)(1)(a). This Court has appellate jurisdiction to review the district courts order under 28 U.S.C. section 1291.

STATEMENT OF ISSUES

I. LABATTE IS AN AMERICAN CITIZEN AND DESERVES THE SAME CONSTITUTIONAL PROTECTIONS AS HIS ALLEGED CRIME OCCURRED ON FEE LAND AND NOT ON TRIBAL LAND.

Most Apposite Authority.

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Indian Citizenship Act.

II. THE COURT HAS JURISDICTION TO HEAR THIS CASE AS CRIMINAL JURISDICTION IS A FEDERAL QUESTION

Most Apposite Authority.

28 U.S.C. § 1331.

III. THE TRIBES INHERENT SOVEREINTY DOES NOT MEAN THEY CAN EXERCISE EXTRATERRITORIAL CRIMINIAL JURISDICTION OVER MEMBERS.

Most Apposite Authority.

Cherokee Nation v. Georgia, 30 U.S. 1, 4 (1831).

Talton v. Mayes, 163 U.S. 376 (1896).

U.S. v. Wheeler, 435 U.S. 313 (1978).

IV. ONLY ONE COURT HAS FOUND THAT TRIBES CAN ASSERT EXTRATERRITORIAL CRIMINAL JURISDICTION BUT LIMITED.

Most Apposite Authority.

Kelsey v. Pope, 809 F.3d 849 (6th Cir 2016).

State v. Owen, 2007 S.D. 21 (2007) *(Owen).*

STATETMENT OF THE CASE

The Sisseton-Wahpeton Oyate entered into a treaty with the United States called "The Treaty of Lake Traverse" in 1867[1]. This treaty was partially awarded to them as they acted as scouts for the U.S. Army as they hunted down the starving Mdewakanton who were fleeing Minnesota because of the uprising of 1862. Gabrielle Renville, head of the scouts, was also named "Chief for life" because of his major role in hunting down the Mdewakanton.[2] The scouts were also to receive pay for their less then laudable actions against their own people.

Then, in 1889, a delegation from Washington DC arrived to discuss the termination of the reservation and allotment of lands to individuals. Gabriele Renville, lead the Sisseton-Wahpeton's in their discussions with the representatives. The discussions were dominated by Gabriel and Michael Renville. Gabrielle Renville was fairly direct that he did not want the reservation to continue as quoted in the local papers and in the U.S. Supreme Court decision in *DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425 (1975). Renville is quoted as saying, "We never thought to keep this reservation for our lifetime" *id.* at 433. And furthermore, "…Now that South Dakota has come in as a state we have

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[1] Interestingly the Wahpkute band never signed the 1867 Treaty of Lake Traverse although they were signatures of previous treaties the last being the Treaty of Mendota in 1851.

[2] The Mdewakanton are one of the four bands that make up the easter Santee Dakota people.

someone to go to, to right our wrongs. …We don't expect to keep reservation. We want to get the benefit of the sale." *Id.* And to further fan the flames of termination Gabriel Renville stated, "We are now citizens and can talk with you as such, and do not care to talk about shoe pacs, etc. but cash. We can buy for ourselves what we need if payment is made in cash, *and then we do not care to have an agency here after the surplus lands have been sold." Id.* at fn. 16. (emphasis added)

And thus, by an act of Congress in 1891 the Lake Traverse Reservation was terminated. And reaffirmed by the United States Supreme Court, "Thus, in finding a termination of the Lake Traverse Reservation,…" *DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.*, 420 U.S. at 449. The remaining lands that were allotted to individual members maintained in trust status but no boundaries or tribal government existed until recent history.

Currently the Tribe now known as the Sisseton-Wahpeton Oyate exert criminal jurisdiction "…within the exterior boundaries of the Lake Travers Reservation of 1867." (App. pp. 10–16, R. Doc. 1–1 at pp. 1–6.) In short, if a tribal member commits a crime on fee land "within the exterior boundaries" of the 1867 reservation the tribe will charge the member with a crime even though the State clearly has jurisdiction. The tribe believes it still has concurrent jurisdiction on fee land within

the exterior boundaries of the reservation. (App. pp. 20–21, R. Doc. 1–3 at pp. 1–2) The tribe believes it has extraterritorial jurisdiction over its members Thus, enters Mr. LaBatte and the case before you.

On October 15, 2022 LaBatte was driving within the city limits of Sisseton, South Dakota. Which is fee land and not held in trust. Officer Megan Lively of the Sisseton Police Department noticed LaBatte driving a Blue Durango that swerved into the officer's lane of traffic. LaBatte quickly turned and almost hit another vehicle. Officer Lively followed in pursuit of LaBatte. The vehicle LaBatte was driving came to a stop at 7th Ave E. Chestnut in Sisseton, again this all occurring on fee land. (App. pp. 22–24, R. Doc. 1–4 at pp. 1–3) LaBatte pushed officer lively and ran to the nearby Sisseton Housing which is considered a "Dependent Indian Community" for jurisdictional purposes.

The State of South Dakota charged LaBatte with several things including reckless driving and simple assault on law enforcement. The Sisseton-Wahpeton Oyate charged him with resisting arrest and DUI. The DUI if it occurred would have occurred on land that is wholly fee land with state jurisdiction.[3] LaBatte in tribal court sought a motion to dismiss based on the DUI occurring on state fee land. (App. p. 26, R. Doc. 1–7 at p. 1) The court never did make a ruling on the matter as to

[3] The tribal charge of resisting arrest occurred in Sisseton Housing isn't really at issue here unless the Sisseton-Wahpeton Oyate is to be terminated.

jurisdiction. However the written law and previous tribal Supreme Court decisions all indicate the court would find they have jurisdiction. (App. pp. 10–19, R. Doc. 1–1 at pp. 1–7 & R. Doc. 1–2 at pp. 1–3) Ultimately LaBatte plead guilty in state court for simple assault on law enforcement and received a penitentiary sentence. (App. p. 83, R. Doc. 1–6 at p. 1)

In July of 2024, with the tribal court charges pending, LaBatte brought suit against the prosecutor, the tribal court judges and the chief of police. LaBatte seeks injunctive and declaratory relief to stop extraterritorial criminal jurisdiction over him. A Complaint and Motion for Preliminary Injunction were filed on July 11, 2024 in the District Court of South Dakota, Northern Division. (App. pp. 83–85, R. Doc. 1–6 at pp. 1–3) A Motion to Dismiss based on lack of jurisdiction was filed on the 8th of August, 2024. A hearing was held on August 14, 2024 where argument was heard. An Order dismissing the case under Federal Rules of Civil Procedure 12(b)(1) with the court finding the United States Constitution apply nor the Indian Civil Rights Act and therefore the Court had no jurisdiction. (App. 114, R. Doc. 32 at p. 9)

On appeal LaBatte is challenging three things; (1) Does the tribe have extraterritorial criminal jurisdiction over members; (2) Since the Tribe is going on to state fee land does that not mean he has constitutional protections; (3) The Court has Jurisdiction as it is a

federal question. (4) A Tribe's inherent authority does not allow to exercise extraterritorial jurisdiction. Notice of Appeal was filed with the Court of Appeals with the 8th Circuit.

SUMMARY OF THE ARGUMENT

A broad-based exertion of criminal jurisdiction over tribal members on fee land violates the tribal members Due Process rights as they are American citizens, and the assertion of power is extraterritorial. The Federal Court has jurisdiction to determine a Tribes criminal jurisdiction as that question is federal to determine the extent of the treaty and what is demeaned Indian Country. The Tribes extraterritorial assertion of criminal jurisdiction on fee land is does not flow retained inherent authority. Finally, only one Court has ruled Tribes have extraterritorial jurisdiction and a South Dakota Supreme Court has found the direct opposite.

ARGUMENT

STANDARD OF REVIEW

"The standard of review of a district court's decision under Fed. R Civ. P. 12(b)(1) depends on whether the district court resolved a facial attack or a factual attack on subject matter jurisdiction. *Stalley v. Cath. Health Initiatives*, 509 F.3d 517, 520–521 (8h Cir 2007) *(Stalley)* citing

to *Osborn v. U.S.*, 918 F.2d 724, 729 n 6 (8th Cir 1990). "…our standard of review is the same standard we apply to 12(b(6) cases *Stalley*, at 521 citing to *Mattes v. ABC Plastics inc.*, 323 F.3d 695, 697–98 (8th Cir. 2003). The appellate standard for this case is *De Novo* as in Federal Rules of Civil Procedure 12(b)(6) dismissals.

I. LABATTE IS AN AMERICAN CITIZEN AND DESERVES THE SAME CONSTITUTIONAL PROTECTIONS AS HIS ALLEGED CRIME OCCURRED ON FEE LAND AND NOT ON TRIBAL LAND.

All American Indians are considered citizens of the United State after the passage of the Indian Citizenship Act of 1924. (43 Stat. 253). The act states,

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

Of note is that the Act in no way interferes with Tribal members ownership as to property. It is entirely silent as to what rights Indian tribes have over their members. It is well settled law that Indian tribes are not under the United States Constitution. Neither does the Indian Civil Rights Act give anything meaningful by way of rights. See *Santa*

Clara Pueblo v. Martinez, 436 U.S. 49. But *Santa Clara* can be factually distinguished for the current case before the Court. Namely, the lawsuit was over membership decisions and not about criminal jurisdiction and certainly not extraterritorial jurisdiction. *Id.* at 51. *Santa Clara* was about determining membership and if a member can challenge the tribe under the Indian Civil Rights Act. *Id.* at 52–53.

At issue here is does the 4th Amendment protect a tribal member from the assertion of extraterritorial criminal jurisdiction when the tribal member is on unquestionable fee land in the State of South Dakota, United States of America. The exercise of extraterritorial criminal jurisdiction violates the Sovereignty of the State of South Dakota and of the United States. LaBatte, being on fee land has the full protections against foreign government intruding on State land and denying a citizen the basic rights of a citizenship of the Sovereign South Dakota and the United. States. If, on American soil held on fee land the Constitution cannot protect a tribal member they'vd become second class citizens.

LaBatte contends he does have a 4th Amendment right from being captured on fee land by the Sisseton-Wahpeton Oyate. The assertion of extraterritorial criminal jurisdiction if allowed would fundamentally alter the rights of LaBatte as an American citizen on fee land. The District Court erred in finding the United States Constitution doesn't apply to LaBattes .

II. THE COURT HAS JURISDICTION TO HEAR THIS CASE AS CRIMINAL JURISDICTION IS A FEDERAL QUESTION

As plead in the Complaint under Jurisdiction the ultimate question posed was one of the criminal jurisdiction of the tribe. (App. p. 3, R. Doc. 1 at p. 3). This is strictly a federal question and one reviewable by the District Court. 28 U.S.C. § 1331. The District Court erred when they found they have no jurisdiction over the case.

III. THE TRIBES INHERENT SOVEREINTY DOES NOT MEAN THEY CAN EXERCISE EXTRATERRITORIAL CRIMINIAL JURISDICTION OVER MEMBERS

The tribe has legislatively and adjudicative the decision that it can assert criminal jurisdiction with the territory of the terminated Lake Traverse Reservation of 1867. Essentially, the tribe can assert jurisdiction wherever a member might be. For the tribe the ability to exercise criminal jurisdiction is based on membership not membership plus territory which is the usual case. Rather the Tribe has some form of free floating criminal jurisdiction not bound by territory.

Territory is the foundation of authority for any sovereign. Restatement (Third) of Foreign Relations Law Sec. 402. In *Cherokee Nation* set forth the description of their status "sovereign and independent state; possessing both the exclusive right to their territory, and the exclusive right of self-government *within that territory*.

Cherokee Nation v. Georgia, 30 U.S. at 4 (emphasis added) The Treaty of Lake Traverse recognized a border, and that the tribe can regulate tribal members within the reservation. Article X Treaty of Lake Traverse 1867. Tribal Sovereignty, "centers on the land held by the tribe and on tribal members within the reservation". *Plains Com. Bank v. Long Fam. Land 7 Cattle Co.*, 554 U.S. 316, 328 (2008)

In an early U.S. Supreme Court case the court discussed the relationship between membership and territory in *Talton v. Mayes*, 163 U.S. 376. The Court looked at, "powers of local self-government enjoyed by the Cherokee Nation that existed prior to the constitution." *Id.* at 384. The Court held that the retained power was the "power to make laws defining offenses and providing for the trial and punishment of those who violate them when the offenses are committed by one member of the tribe against another one of its members *within the territory of the Nation*. *Id.* at 380–381. (emphasis added) The Court made great strains to show that the assertion of criminal jurisdiction is "purely local."

The tribe, in its Supreme Court decision in the *Vernon Cloud* relied heavily on *U.S. v. Wheeler*, 435 U.S. 313. The tribe in *Cloud* used *Wheeler* as one of it' primary bases for holding that the tribe's inherent authority grants extraterritorial criminal jurisdiction over members. There is no such language in *Wheeler* to indicate this. In *Wheeler* "The question presented to us is whether the Double Jeopardy Clause of the

Fifth Amendment bars the prosecution of an Indian in a federal district court under the Major crimes act 18 U.S.C. 1153 when he previously convicted in tribal court of a lesser included offense arising out of the same incident." *U.S. v. Wheeler*, at 314. The Court went on to find that "It is evident that sovereign power to punish tribal offenders has never been given up by the Navajo Tribe and that tribal exercise of that power today is therefore the continued exercise of retained tribal sovereignty." *Id.* at 323–324.

Interestingly the *Wheeler* Court cites to the *Talton* decision, "The conclusion that an Indian tribes power to punish tribal offenders is part of its own retained sovereignty is clearly reflected in a case decided by this Court more than 80 years ago, *Talton v. Mayes,* 163 U.S. 376." However the *Wheeler* Court missed the important piece of *Talton* that the Tribe has criminal jurisdiction as the *Talton* Court said "…within the territory of the Nation." *Talton v. Mayes*, 163 U.S. at 381. Therefore, *Wheeler* is not a case that confirms the ability of a tribe to exercise extraordinary jurisdiction. The crime committed in *Wheeler* was committed on tribal land and it cannot be divorced from territorial jurisdiction. As nicely summed up by the Brief of the Appellee in *Kelsey v. Pope*, 809 F.3d 849,

> "Even if the defendant to an extraterritorial prosecution is a tribal member, the fact that the alleged crime took place outside tribal territory means that it took place within another sovereign's territory. Such external assertions of

sovereignty are limited by domestic dependent status. See *Lara* 541 U.S. at 205 (finding restoration of tribes' criminal jurisdiction over non-member Indians within tribal territory consistent with domestic dependent status because it "'involves no interference with the power or authority of any State'"[4]

IV. ONLY ONE COURT HAS FOUND THAT TRIBES CAN ASSERT EXTRATERRITORIAL CRIMINAL JURISDICTION BUT LIMITED.

Only one federal Court has addressed the issue of extraterritorial jurisdiction and that was in the 6th Circuit in *Kelsey v. Pope*, 809 F.3d 849. The *Kelsey* case, however, differs factually from the case before this Court. First, the Tribe in *Kelsey* only asserted extraterritorial jurisdiction in limited situations. *Id.* at 853. Second, the crime involved a Tribal politician and a sexual assault on another tribal member. *Id.* Third, it occurred on fee land that was owned by the Tribe. *Id.* Here, the alleged DUI happened wholly on State fee land.[5] The crime of DUI is not as serious as sexual assault and LaBatte is not a tribal leader. Furthermore, the South Dakota State Supreme Court has found that the Tribe lacks criminal jurisdiction on fee lands. See *Owen*, 2007 S.D. at 39–44; *Citing to* 18 U.S.C.A. § 1511 for the definition of Indian country. LaBatte he was wholly on fee land when the alleged DUI occurred, and the Appellees never denied the facts of the case.

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[4] Brief of Appellee *Kelsey v. Pope*, 809 F.3d 849.

[5] The factual allegations have not be challenged by the defendants.

The South Dakota Supreme Court stated that the situation in *Owen* did include trust or allotted lands. As in the town of Peever where the crime in the *Owen* committed. The town of Sisseton is not on allotted or on trust land. *Owen*, 2007 S.D. at 40. *Citing* to *DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.*, 420 U.S. at 445. (Citations Omitted)

CONCLUSION

Wherefore, the Appellant is requesting that this case be remanded back to the Federal District Court of South Dakota with a finding that the Federal District Court has jurisdiction and to deny Federal Rules of Civil Procedure 12(b)(1).

Doody Law Office
Respectfully submitted,

Dated: November 4, 2024

By: /s/ Robert Doody

Attorney for
Plaintiff - Appellant
Brendan LaBatte

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **3,186 words**, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, **14-pt Century Schoolbook**, using TypeLaw.com's legal text editor.

3. This brief complies with the electronic filing requirements of Eighth Circuit Rule 28A(h) because this brief and addendum have been scanned for viruses and are virus-free.

Dated: November 4, 2024 By: /s/ Robert Doody

Certificate of Service

I hereby certify that I electronically filed the foregoing **APPELLANT'S BRIEF AND APPENDIX** with the Clerk of the Court by using the Appellate CM/ECF system on **November 4, 2024**. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Doody Law Office

Respectfully submitted,

Dated: November 4, 2024

By: /s/ Robert Doody

Attorney for
Plaintiff - Appellant
Brendan LaBatte