FORMAL OPINION
2001-F-01

DATE ISSUED: February 14, 2001

REQUESTED BY: Ronald W. McBeth
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QUESTIONS PRESENTED

I.

Whether the state has exclusive criminal jurisdiction over non-Indians who commit victimless crimes in Indian country.

II.

Whether the state, to further its Indian country criminal jurisdiction, has authority to issue search warrants to be executed in Indian country by state law enforcement officers.

ATTORNEY GENERAL'S OPINIONS

I.

It is my opinion that the state has extensive but not exclusive criminal jurisdiction over non-Indians who commit victimless crimes in Indian country.

II.

It is my further opinion that the state, to further its Indian country criminal jurisdiction, has authority, but not unbridled authority, to issue search warrants to be executed in Indian country by state law enforcement officers.

ANALYSES

I.

Law enforcement issues in Indian country can be a "jurisdictional maze." Robert N. Clinton, "Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze," 18 Ariz. L. Rev. 503, 504 (1976). The subject is complicated because it is "governed by 'a complex patchwork of federal, state, and tribal law.'" State v. Hook, 476 N.W.2d 565, 566 (N.D. 1991) (quoting Duro v. Reina, 495 U.S. 676, 681 n.1 (1990)).

While a number of criminal law issues must be addressed without the benefit of clear congressional or judicial guidance, the lines of tribal, federal, and state prosecutorial authority over non-Indians are clear. Tribes do not have criminal jurisdiction over a non-Indian who commits a crime in Indian country, no matter what the crime may be. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). If a non-Indian's victim is an Indian, only the federal government has jurisdiction. United States v. Chavez, 290 U.S. 357, 365 (1933); Donnelly v. United States, 228 U.S. 243, 271-72 (1913); State v. Kuntz, 66 N.W.2d 531, 532-33 (N.D. 1954). Where the crime involves only non-Indians, then the state has jurisdiction. Duro v. Reina, 495 U.S. 676, 681 n.1 (1990). See also United States v. Wheeler, 435 U.S. 313, 325 n.21 (1978); United States v. Antelope, 430 U.S. 641, 642-43 nn.1, 2 (1977).

This rule of state jurisdiction applies not only when the non-Indian has a non-Indian as a victim, but also when the non-Indian commits a victimless crime. Unless a federal criminal statute is at issue, it is well-established that the state has jurisdiction over victimless crimes committed by non-Indians in Indian country. Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984) (dictum); Ross v. Neff, 905 F.2d 1349, 1353 (10th Cir. 1990); Conf. of W. Attys. Gen., American Indian Law Deskbook 90, 100 (2nd ed. 1998); U.S. Dep't of Justice, Office of Legal Counsel, "Memorandum to Benjamin R. Civiletti Deputy Att'y General: Jurisdiction over Victimless Crimes Committed by Non-Indians in Indian Country" (Mar. 21, 1979) (reprinted in 6 Ind. L. Rptr. K-1 (1979)) (hereafter "DOJ Memo").

There is, however, some ambiguity in defining a "victimless" crime. E.g., United States v. Bruder, 945 F.2d 167, 171 n.2 (7th Cir. 1991). In general, a crime that does not have a "direct" victim but only affects society at large is a victimless crime. United States v. Cousens, 942 F.2d 800, 805 (1st Cir. 1991); People v. Severns, 30 Cal.Rptr.2d 297, 300 (Cal. Ct. App. 1995). The United States Department of Justice has concluded that only where the non-Indian's conduct involves a "direct and immediate threat" to the safety of

Indian interests is it no longer a "victimless" crime and, therefore, one that the federal government rather than the state should prosecute. DOJ Memo at K-6.

In a number of decisions, involving a number of different crimes, courts have confirmed state jurisdiction over victimless crimes committed by non-Indians in Indian country. On-reservation possession of marijuana by non-Indians is subject to state jurisdiction. State v. Jones, 546 P.2d 235, 235 (Nev. 1976) (per curiam). Similarly, in State v. Herber, 598 P.2d 1033 (Ariz. Ct. App. 1979), state officers pursued Herber onto a reservation where he was arrested for possession of marijuana. Since Herber was a non-Indian, the court found no infringement upon tribal sovereignty and upheld his state conviction. Id. at 1035.

In State v. Snyder, 807 P.2d 55, 57 (Idaho 1991), the court ruled that while it wasn't certain whether driving under the influence within a reservation was a victimless crime, it isn't a crime against an individual Indian or the general Indian populace and, therefore, is subject to state jurisdiction. See also State v. Warner, 379 P.2d 66, 68-69 (N.M. 1963).

In State v. Burrola, 669 P.2d 614, 615 (Ariz. Ct. App. 1983), possession of a deadly weapon by a non-Indian was subject to state jurisdiction. Gambling, operating an overweight vehicle, failing to report a car accident, and violating pawnbroker laws are all subject to state jurisdiction if the offender is non-Indian. State v. Montana Ninth Judicial District Court, 851 P.2d 405, 408 (Mont. 1993); State v. Vandermay, 478 N.W.2d 289, 290 (S.D. 1991); State v. Thomas, 760 P.2d 96, 98 (Mont. 1988); State v. Schaeffer, 781 P.2d 264, 266 (Mont. 1989). Other instances in which state jurisdiction over victimless crimes has been confirmed involve adultery, violating game and fish laws, and manufacturing liquor. State v. Campbell, 55 N.W. 553, 554 (Minn. 1893); Ex Parte Crosby, 149 P. 989, 990 (Nev. 1915); State v. Lindsey, 233 P. 327, 328-29 (Wash. 1927).

But the state's jurisdiction is not absolute. It is possible that the conduct in question doesn't violate a state law but is a victimless crime under federal law. For example, illegal use of the words "United States," mailing obscene material, interstate transportation for prostitution, and possession of an unregistered gun are all victimless crimes under federal law. 18 U.S.C. §§ 712, 1461, 2421; 26 U.S.C. § 5861(d). If these crimes are committed in Indian country by non-Indians, then it is the federal government, not the state, that has jurisdiction to prosecute.

In summary, the state has extensive jurisdiction over victimless crimes committed by non-Indians in Indian country. But state jurisdiction is not absolute. The federal government has jurisdiction if the offense violates federal law.

II.

Criminal jurisdiction isn't confined to just prosecution. It includes such policing powers as investigations, searches, and arrests. State authority to exercise in Indian country law enforcement powers that are incidental to the right to prosecute has received less attention by Congress, courts, and commentators. Consequently, the governing law is unsettled. Two decisions, however, address, to some degree, the authority to issue search warrants to be executed in Indian country.

In Sycuan Band of Mission Indians v. Roache, 788 F.Supp. 1498 (S.D. Cal. 1992), aff'd on other grounds, 54 F.3d 535 (9th Cir. 1994), county deputies executed a state search warrant on the reservation at the tribe's casino. But because the United States had exclusive jurisdiction to prosecute, the search warrant was invalid. Id. at 1508. "A state is without authority to engage in preliminary law enforcement activities if the state is without jurisdiction to prosecute a violation." Id. at 1507. By implication, however, the decision stands for the proposition that if the state has prosecutorial jurisdiction, it could then execute a state search warrant on the reservation. And, as discussed above, the state does have jurisdiction to prosecute non-Indians who commit victimless crimes and who commit crimes against non-Indian victims.

In Kaul v. Stephan, 83 F.3d 1208 (10th Cir. 1996), the court ruled that because the state had criminal jurisdiction over the defendant it also had the related authority to execute a search warrant on the reservation against the defendant. Id. at 1218-19. In other words, the state's criminal jurisdiction would be largely meaningless without the ability to exercise customary law enforcement powers. Along with the power to prosecute come incidental policing powers. William C. Canby, Jr., American Indian Law in a Nutshell 169 (3rd ed. 1998).

The North Dakota Supreme Court used this rationale when it considered the scope of the state's Indian country jurisdiction over a related law enforcement issue. In Fournier v. Roed, 161 N.W.2d 458 (N.D. 1968), the court ruled that a sheriff may enter a reservation and without a warrant arrest an Indian for a felony committed off the reservation. The court found that the sheriff's actions did not interfere with tribal self-government. Id. at 467. It stated: "what is involved is whether the state courts will be able to be effective in performing their functions, or whether they will become helpless when an offense is committed off the reservation by an Indian who escapes to the reservation before he is apprehended." Id. at 465.

While I am uncertain whether the court would rule the same way if again presented with the question of state authority to arrest Indians on a reservation, the court's rationale remains

instructive. Its rationale is that the state should have some degree of on-reservation authority to effectuate the criminal jurisdiction that it holds. When the state asserts that authority over non-Indians on non-Indian land within the reservation, the interference with tribal government will usually be minimal. Searching non-Indian property for the purpose of exercising jurisdiction over a non-Indian is less intrusive than the activity in Fournier, which condoned arresting an Indian and removing him from the reservation.

The validity of executing state search warrants on a reservation can also be examined by applying general Indian law principles. The first principle is that the reservation boundary is not an absolute bar to state jurisdiction. "Congress has to a substantial degree opened the doors of reservations to state law." Organized Village of Kake v. Egan, 369 U.S. 60, 74 (1962). See also White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214-15 (1987).

Further, the Supreme Court's "recent cases have established a 'trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption.'" Rice v. Rehner, 463 U.S. 713, 718 (1983) (quoting McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 (1973)). Under the pre-emption analysis "[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." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983). See also State v. Hook, 476 N.W.2d 565, 567 (N.D. 1991).

"Unquestionably, the state has a strong interest in bringing to justice violators of state law. . . ." Judith V. Royster and Rory SnowArrow Fausett, "Fresh Pursuit onto Native American Reservations," 59 Univ. Colo. L. Rev. 191, 270 (1988). If the search warrant is directed solely to the property of the non-Indian under suspicion, such as the non-Indian's home, land, or vehicle, there is little interference with tribal sovereignty and the right of the tribe to govern its members.

There can, however, be situations in which a state search warrant exceeds state jurisdiction. If there is evidence of a non-Indian's crime in a tribal official's office, at a tribal business, or on tribal land, tribal sovereignty is implicated. State search warrants have limits. So long as they are confined to non-Indian property those limits are less likely to be exceeded. When tribal or other Indian property is involved, to better protect the search's legality, state law enforcement officers should involve tribal law enforcement officials. The greater their cooperation and role in obtaining and executing the warrant, the less likely the warrant will be found invalid as interfering with tribal interests. And if a tribal court issues

the warrant independently of, or in conjunction with, the state court, then most concerns about the legality of the on-reservation search will be put to rest.

In sum, because the state has jurisdiction to prosecute and punish non-Indians for their on-reservation victimless crimes and crimes against other non-Indians, the state has the law enforcement powers -- including issuing and executing search warrants -- necessary to effectively carry out that jurisdiction. But this authority is not unlimited. If the search is to involve property owned by a tribal member, then tribal officials should become involved to better protect the validity of the search. This need for cooperation by tribal officials becomes imperative if tribal property is to be searched.[1]

While the above discussion sets forth the general jurisdictional rule, there can be exceptions. Congress has plenary authority over Indian affairs, including the ability to limit tribal sovereignty. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); State v. Hook, 476 N.W.2d 565, 571 (N.D. 1991). Indeed, the sovereignty retained by a tribe "exists only at the sufferance of Congress and is subject to complete defeasance." United States v. Wheeler, 435 U.S. 313, 323 (1978). Thus, "Congress has the power to define the nature of federal, state, and tribal criminal jurisdiction within Indian country." State v. Mathews, 986 P.2d 323, 334 (Idaho 1999) (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987)).

And Congress has enacted a law addressing criminal jurisdiction on the Spirit Lake Reservation. In 1946 it gave the state misdemeanor jurisdiction over the reservation, including jurisdiction over crimes by and against Indians. Act of May 31, 1946, ch. 279, 60 Stat. 229; State v Hook, 476 N.W.2d at 568-69. The law thus significantly expands the scope of state criminal jurisdiction on the Spirit Lake Reservation. Consequently, the state has more authority to issue and execute search warrants on this reservation than it does elsewhere in Indian country.

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[1] Courts have often ruled that the involvement of tribal law enforcement officers in the investigation and detention of non-Indians will not compromise a state prosecution of the non-Indians. State v. Pamperien, 967 P.2d 503, 504-06 (Or. Ct. App. 1998); State v. Haskins, 887 P.2d 1189, 1195 (Mont. 1994); Primeaux v. Leapley, 502 N.W.2d 265, 270 (S.D. 1993); State v. Schmuck, 850 P.2d 1332, 1337-40 (Wash. 1993); State v. Ryder, 649 P.2d 756, 759-60 (N.M. Ct. App. 1982), aff'd on other grounds, 648 P.2d 774 (N.M. 1982). Any other result "would be to subvert a substantial function of Indian police authorities and produce a ludicrous state of affairs which would permit non-Indians to act unlawfully, with impunity, on Indian lands." Id. at 759.

EFFECT

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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