2022 OK 88

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CHELSEY ANN WREN, on behalf of minor family member T.D.C.,

Plaintiff/Appellee,

v.

ROBERT LEE YATES,

Defendant/Appellant.

Case No. 119,642

Gurich, J., concurring in judgment:

¶ 1 As with my separate writing in *Milne v. Hudson*, 2022 OK 84, __P.3d__, I believe the majority opinion reaches the correct conclusion in this proceeding. Nevertheless, I believe the decision should be limited by its unique facts. Additionally, because the majority summary opinion does not provide necessary background, and every jurisdictional dilemma involving Indian country is dependent on its particular circumstances, I have outlined the pertinent case history below.

¶ 2 Robert Lee Yates is an enrolled member of the Caddo Nation of Oklahoma and a resident of the Chickasaw Nation Reservation. On March 16, 2020, Yates was charged with two counts of child sexual abuse in Stephens County District Court, Case No. CF-2020-57. Defense counsel filed a motion to dismiss, alleging the state court lacked jurisdiction because (1) Yates was an Indian; (2) the alleged criminal acts took place within the boundaries of the Chickasaw Nation Reservation;[1] and (3) the United

[1] Nothing in our record definitively establishes that the alleged criminal acts occurred within the boundaries of the Tribe's Reservation. Much of Stephens County lies within the Reservation, however, a small portion

States had exclusive jurisdiction under the Major Crimes Act.[2] On April 1, 2021, the trial court dismissed the State's criminal case based on the Supreme Court decision in *McGirt v. Oklahoma*.[3] Subsequently, Wren initiated a civil proceeding in Stephens County District Court, requesting issuance of a protective order on behalf of her daughter. Yates filed another motion to dismiss, this time arguing the state court lacked jurisdiction to proceed with any civil matter involving an Indian for acts in Indian country. During oral argument before the trial judge, counsel maintained that exclusive jurisdiction over the matter should lie in either the Chickasaw Nation Tribal Court or the Court of Indian Offences.[4] Similar to the facts in *Milne v. Hudson*, we are faced with acts by a non-member Indian which occurred within Indian country, as defined by 18 U.S.C. § 1151.[5] However, there is nothing in the record to indicate that Wren or her daughter are Indian.

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of the county lies outside the exterior boundary. For purposes of this writing, I will assume the claimed transgressions took place on the Reservation. In his motion to dismiss, Yates claimed to reside within the Chickasaw Reservation; however, the petition for a protective order suggests Yates resided with Wren and her child at the time of the alleged criminal acts. An address for Yates is listed on the petition, but nothing indicates whether it was acquired after the alleged sexual assault.

[2] Codified at 18 U.S.C. § 1153, the MCA provides that the United States has exclusive jurisdiction for certain criminal offenses if committed by an Indian within Indian country.

[3] 591 U.S. ___, 140 S.Ct. 2452, 2482, 207 L.Ed.2d 985 (2020) (holding criminal acts by Indian on the Muscogee (Creek) Reservation fell under the Major Crimes Act and were under exclusive jurisdiction of the federal government); see also 18 U.S.C. §§ 1151 and 1153.

[4] Courts of Indian Offences "operate where Tribes retain jurisdiction over American Indians that is exclusive of state jurisdiction, but where Tribal courts have not been established to fully exercise that jurisdiction." (https://www.bia.gov/CFRCourts). These courts have the authority to issue civil protective orders. 25 C.F.R. § 11.116; https://www.bia.gov/regional-offices/southern-plains/court-indian-offenses, (Protective Order Form Packet PDF).

[5] 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—non-member Indians (those individuals who meet the definition of Indian, but who are not members of the tribe where the civil transaction arose). *Id.*

¶ 3 As a general rule, state courts lack jurisdiction for acts involving member Indians within Indian country absent an express grant of authority from Congress. *See, e.g., Williams v. Lee*, 358 U.S. 217, 220-21, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. . . . Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. State of Georgia* had denied"). When assumption of jurisdiction by the state over reservation transactions serves to undermine the power of tribal courts or infringes on tribal self-governance, it is impermissible. *Id.* at 223. A state's authority is at its lowest and generally inapplicable when applied to on-reservation conduct of tribal members. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). Whether a state may assert authority over the on-reservation activities of non-members presents a more difficult question. "While under some circumstances a State may exercise concurrent jurisdiction over non-Indians acting on tribal reservations, such authority may be asserted only if not preempted by the operation of federal law." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) (internal citation omitted).

¶ 4 The fundamental questions we must ask in any dispute involving application of state law in Indian country are: (1) whether the exercise of jurisdiction by an Oklahoma state court would infringe on a tribe's right to make its own laws and be ruled by them; and (2) whether the exercise of jurisdiction by a state court is preempted by operation

of federal law.[6] *Bracker*, 448 U.S. at 142-43. 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." *Id.* at 143.

¶ 5 As to the first question, exercise of jurisdiction by the Stephens County District Court in this case would not substantially infringe on the right of the Chickasaw Nation or Caddo Nation to govern themselves. To determine if state law would constitute an infringement on tribal self-governance, courts have utilized a three-part examination—who are the parties involved (Indian, non-Indian, or non-member Indian); where did the civil action arise (Indian country vs. state lands); and what is the subject of the dispute. *Chino v. Chino*, 90 N.M. 203, 206, 561 P.2d 476, 479 (N.M. 1977) (criteria relevant to the infringement test are: "(1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the Indian reservation, and (3) what is the nature of the interest to be protected") (citation omitted).[7]

¶ 6 Neither Wren nor Yates is a member of the Chickasaw Nation, and the minor child victim is not an Indian child. Under the infringement test, tribal courts ordinarily have exclusive jurisdiction when either: (1) a non-Indian or non-member asserts a claim against an Indian for conduct occurring on that Indian's reservation; or (2) parties to the suit are members of the same Indian tribe and the subject of the action involves

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[6] It is my belief that the majority in *Milne* gave undue weight to cases such as *Montana v. United States*, 50 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), *United States v. Cooley*, 593 U.S. ___, 141 S.Ct. 1638, 210 L.Ed.2d 1 (2021), and *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001). Although seminal decisions in federal Indian law, they provide very little guidance to the issue presented in this case because each dealt with whether a tribe lacked jurisdiction to act.

[7] *See also Jackson County By and Through Child Support Enforcement Agency ex rel. Jackson v. Swayney*, 319 N.C. 52, 352 S.E.2d 413, 417-18 (N.C. 1987); *O'Connell v. Hamm*, 267 N.W.2d 839, 841 (S.D. 1978).

conduct occurring on the members' reservation. *See Roe v. Doe*, 2002 ND 136, ¶ 8, 649 N.W.2d 566, 569 (citing *Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382, 387-89, 96 S.Ct. 943, 947, 47 L.Ed.2d 106 (1976) and *Williams*, 358 U.S. at 223). Indian tribes also have "exclusive jurisdiction over wholly internal tribal subject matter, such as membership disputes, divorce actions between members domiciled on the reservation, and certain probate actions." *Id.* The Chickasaw Nation has its own laws and court system designed to protect victims of domestic violence.[8] Under the Chickasaw Nation Code, the Tribal District Court may issue a protective order in favor of any person which stems from conduct on Indian country of the Chickasaw Nation. CNC § 5-1201.2(A). This tribal enactment is expressly authorized through congressional delegation under the Violence Against Women Act (VAWA).[9] Despite ostensibly having the power to issue a protective order in this case, the Chickasaw Nation has no real interest in the outcome other than the alleged sexual assault occurred within the Tribe's Reservation. Because the proceeding does not involve a member Indian or encroach on the Tribe's right to govern itself, the exercise of concurrent state court jurisdiction in this case does not infringe on the Chickasaw Nation's sovereignty.[10]

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[8] Chickasaw Nation Code, title 5, ch. 12 (§§ 5-1201.1 to 5-1201.10).

[9] 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); Violence Against Women Act Reauthorization Act of 2022 (VAWA), Pub. L. No. 117-103, 136 Stat. 49.

[10] 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 that tribes and states enjoy concurrent jurisdiction to tax non-members and non-Indians, and that a state's imposition of taxes was neither preempted by federal law nor an infringement on tribal sovereignty. Id. at 155-156, 161; *see also Wacondo v. Concha*, 117 N.M. 530, 873 P.2d 276 (N.M. Ct. App. 1994) (New Mexico Court of Appeals found the state district court had

¶ 7 We must also examine whether Oklahoma's exercise of jurisdiction in this case is preempted. In *Mescalero Apache Tribe*, 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." 462 U.S. at 334. 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*, at 143. Additionally, an express congressional statement of preemption is not required. *Id.* at 144 (citing *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965)).[11] As I explained in *Milne*, to properly evaluate whether state jurisdiction is preempted, I would consider the matter in light of the Enabling Act of 1906, Public Law 280,[12] Okla. Const. art I, § 3, and VAWA. I do not believe VAWA preempts Stephens County from assuming jurisdiction in this case; instead it removes any question regarding a tribal court's authority to issue an enforceable protective order when the tribe otherwise has jurisdiction over the parties and subject matter.[13] Preemption, when considered in light of P.L. 280, the Enabling Act of 1906, treaties between tribes and the U.S., and the

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concurrent jurisdiction to hear a civil dispute occurring on the Jemez Pueblo between member Indian plaintiffs and non-member Indian defendant).

[11] Even if state jurisdiction is not expressly preempted, it may nevertheless be prohibited under the *Bracker* balancing test. *Video Gaming Tech., Inc. v. Rogers Cnty. Bd. of Tax Roll Corr.*, 2019 OK 83, ¶¶ 27, 43, 475 P.3d 824, 830-31, 834 (applying *Bracker* test to conclude a county ad valorem tax preempted).

[12] Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588.

[13] 18 U.S.C. § 2265(b) & (e). As we know from *Montana* and its progeny, tribal court authority over non-members and non-Indians has routinely been a subject of uncertainty.

Oklahoma Constitution, elicits a more difficult debate.[14] *See Okla. v. Castro-Huerta*, ___ U.S. ___, 142 S.Ct. 2486, 213 L.Ed.2d 847 (2022) (Gorsuch, J., dissenting). Yates addressed P.L. 280 in his appellate brief; however, he did not raise it in either his motion to dismiss or during oral argument before the trial judge. Further, Yates did not raise preemption under *Bracker* in either the trial court of this appeal. Consequently, I am not inclined to examine the preemption issue in this appellate proceeding. *See Bane v. Anderson, Bryant & Co.*, 1989 OK 140, ¶ 24, 786 P.2d 1230, 1236 ("Parties will not be permitted to raise issues before this court which were not raised in the trial court").

[14] Congress conditioned Oklahoma's admission to the Union by requiring a repudiation of any interest over tribal lands and a concession that tribal lands "remain subject to the jurisdiction, disposal, and control of the United States." See Enabling Act of 1906, June 16, 1906, 34 Stat. 267, 270. Oklahoma obliged by including a constitutional provision, disclaiming jurisdiction over Indian territories in favor of the United States. Okla. Const., art I, § 3. Public Law 280 was a 1953 federal law, which vested certain states with jurisdiction to adjudicate civil and criminal matters for acts involving Indians occurring within Indian country. P.L. 280 was amended in 1968 to require tribal consent before additional states could exercise jurisdiction over Indian country within their borders. Act of Apr. 11, 1968, § 401, 82 Stat. 78, 80, § 406 (25 U.S.C. §§ 1322(a), 1326). To facilitate the implementation of P.L. 280, Congress also included a provision in the 1968 amendment, which bestowed states with the power to "amend, where necessary, their State constitution or . . . statutes." § 404, 82 Stat. 79 (25 U.S.C. § 1324). This section further noted that until states "appropriately amended their State constitution or statutes," they could not assume jurisdiction under P.L. 280. *Id.* Oklahoma has neither amended its constitution in conformity with P.L. 280 nor obtained tribal consent to assume jurisdiction over tribal lands. If Oklahoma has inherent authority to exercise concurrent jurisdiction in Indian country it is certainly plausible to question whether the passage of P.L. 280 (and its amendments) was in vain. Now if we also consider the aforementioned limitations together with the various treaties entered between tribes and the United States (treaties which assured Indians they would be free from state jurisdiction), it becomes increasingly apparent why application of state law in Indian country might offend tribal sovereignty. *See* Treaty of Pontotoc Creek, Oct. 20, 1832 Preamble; Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Preamble, Art. IV, 7 Stat., 333; Treaty with the Cherokee, Preamble. Art. 5, Dec. 29, 1835, 7 Stat. 478.