IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LORETTA LYNN ERIKSEN, Petitioner.	)	No. 80653-5 EN BANC Filed September 1, 2011

FAIRHURST, J. — We granted reconsideration to again consider whether a tribal police officer who observed Loretta Lynn Eriksen commit a traffic infraction on the Lummi Reservation could validly stop her outside the reservation and detain her until county police arrived. We conclude that the tribe's inherent sovereign powers did not authorize this extraterritorial stop and detention.

I. FACTUAL HISTORY

At approximately 1:30 a.m. on August 10, 2005, Officer Mike McSwain of the Lummi Nation Police Department was driving east on Slater Road within the

Lummi Reservation[1] when he saw a vehicle approaching him with its high beams activated. McSwain flashed his high beams to alert the approaching vehicle that its high beams were on, but the vehicle did not dim its lights in response. McSwain slowed down and prepared to turn around so that he could stop the vehicle for failure to dim its lights.[2] At that point, the approaching vehicle drifted across the center line, "coming within a couple of feet" of McSwain's patrol car. Clerk's Papers (CP) 23. McSwain came to a stop and prepared to swerve if necessary, but the vehicle drifted back into the westbound lane of travel. McSwain then observed a second vehicle following closely behind the drifting vehicle. He turned around, activated his overhead lights, and followed the two westbound vehicles.

Both vehicles stopped at a gas station located off the Lummi Reservation. The second vehicle broke off and drove behind a building, out of sight, while the first vehicle stopped where McSwain could see it. McSwain observed a passenger jump out of the vehicle and run around the front, while the driver moved into the passenger seat. McSwain ordered the driver and passenger to stop moving and then

[1]In the courts below, Eriksen tried to establish that the entire incident occurred outside the Lummi Reservation. The district court held that at least part of the initial incident took place on the reservation, and the superior court affirmed. In this court, Eriksen describes the initial traffic infraction as occurring on the reservation. *E.g.*, Pet. for Review at 3. She also does not assign error to the lower courts' determinations that the incident began within the reservation. We accept unchallenged findings of fact as verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Therefore, we assume the incident began on the reservation.

[2]The Lummi Nation Code of Laws 6.04.050(a), requires drivers to use low beams within 500 feet of oncoming vehicles.

called for a back-up officer.

When a back-up officer arrived, McSwain approached the driver, whom he later identified as Eriksen. He asked her why she had moved into the passenger seat. She responded that she had not been driving. McSwain observed that Eriksen smelled strongly of intoxicants, had bloodshot and watery eyes, and spoke in slightly slurred speech. McSwain determined that Eriksen was not a tribal member, then called for a Whatcom County deputy sheriff.

While waiting for the deputy to arrive, McSwain asked Eriksen to step out of the car. She had difficulty keeping her balance and walking, and she swayed back and forth when asked to stop and face him. Without being asked, Eriksen told McSwain she would not do any sobriety tests. McSwain did not request or perform any. Instead, he detained Eriksen and put her in the back of his patrol car until the Whatcom County deputy sheriff arrived. The deputy arrested Eriksen.

II. PROCEDURAL HISTORY

Eriksen was charged with driving under the influence (DUI) in the Whatcom County District Court. She moved to suppress[3] on the basis that McSwain did not have the authority to stop and detain her off the reservation. The district court denied the motion and Eriksen was convicted as charged. On appeal, the Whatcom

[3]The district court characterized the proceeding as a "[m]otion to [d]ismiss for lack of jurisdiction." CP at 17. The State now characterizes the proceeding as a "motion to suppress/dismiss the case for lack of jurisdiction." Resp't's Br. at 3.

County Superior Court upheld the conviction. We granted review of the superior court's decision.

In 2009, we affirmed Eriksen's conviction. Eriksen moved for reconsideration, and the State joined the motion with regard to our statutory analysis. We granted reconsideration and withdrew our opinion. In 2010, the court again affirmed Eriksen's conviction, and she moved to reconsider a second time. We granted reconsideration and withdrew the second opinion.

III. ANALYSIS

As a general rule, "a valid arrest may not be made outside the territorial jurisdiction of the arresting authority." Cohen's Handbook of Federal Indian Law § 9.07, at 763 (2005) (citing Wayne R. LaFave et al., Criminal Procedure § 1.3(e) n.2 (West 3d ed. 2000)). This principle of territorial jurisdiction has long been accepted in Washington State. *See, e.g., State v. Barker*, 143 Wn.2d 915, 920-21, 25 P.3d 423 (2001); *City of Wenatchee v. Durham*, 43 Wn. App. 547, 549-50, 718 P.2d 819 (1986); *Irwin v. State*, 10 Wn. App. 369, 371, 517 P.2d 619 (1974).

Barker illustrates how law enforcement officers may be limited by territorial jurisdiction. In *Barker*, an Oregon police officer observed a driver speeding, making unsafe lane changes, and following too closely in Oregon near the Washington State border. 143 Wn.2d at 918. The officer pursued the driver into

Washington, where the officer stopped and detained the driver until Washington police arrived and arrested him for DUI. *Id*. We held that the stop and detention were "'without authority of law'" under article I, section 7 of the Washington State Constitution[4] because the Oregon officer was not authorized by statute or common law to act outside her jurisdiction. *Barker*, 143 Wn.2d at 922 (quoting Const. art. I, § 7). The exclusionary rule required suppression of the fruits of the unlawful stop and detention. *Id*.

Here, although McSwain's stop and detention of Eriksen took place outside the Lummi Nation's territorial jurisdiction, the State argues the stop and detention were justified by the tribe's inherent sovereign authority. Indian tribes possess a "unique and limited" sovereignty that exists unless withdrawn by treaty, statute, or as a necessary result of the tribes' dependence on the United States. *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978). Indian tribes retain the inherent sovereign power to promulgate criminal laws and enforce them against tribal members. *Id*. at 322; *see also Strate v. A-1 Contractors*, 520 U.S. 438, 459, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997). Tribes also retain the right to create a traffic code and enforce it on the reservation against tribal members. *See Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th

[4]Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Cir. 1991).

In *State v. Schmuck*, 121 Wn.2d 373, 850 P.2d 1332 (1993), we held that a tribe's inherent authority allowed a tribal officer to stop a non-Indian driver on a public road within the reservation and detain him until state officers arrived. We reasoned that the tribe's inherent authority included the ability to stop the driver because:

> Only by stopping the vehicle could [the tribal officer] determine whether the driver was a tribal member, subject to the jurisdiction of the Tribe's traffic code. The alternative would put tribal officers in the impossible position of being unable to stop any driver for fear they would make an unlawful stop of a non-Indian. Such a result would seriously undercut the Tribe's ability to enforce tribal law and would render the traffic code virtually meaningless. It would also run contrary to the "well-established federal policy of furthering Indian self-government."

Id. at 383 (internal quotation marks omitted) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)). The ability to detain was supported in large part by a treaty provision requiring the tribe to deliver "'offenders against the laws of the United States'" to the authorities for trial and the tribe's traditional authority to exclude unwanted persons from tribal land. *Schmuck*, 121 Wn.2d at 383-90 (quoting Treaty between the United States and the Dwámish, Suguámish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, art. IX, 12 Stat. 927, 929 (hereinafter Treaty of Point

Elliott)).

In *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974), the Ninth Circuit held that a tribe retained the inherent authority to arrest tribal members at usual and accustomed fishing sites outside the reservation for violation of tribal fishing regulations. A treaty explicitly secured to the tribe "'the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.'" *Id*. at 232 (quoting Treaty with the Yakama Nation, June 9, 1855, art. III, 12 Stat. 951, 953). The Ninth Circuit reasoned that the tribe's explicit treaty power to regulate fishing contained the right to arrest tribal members at usual and accustomed fishing sites for violating the regulations, because "[t]he power to regulate is only meaningful when combined with the power to enforce." *Id*. at 238.

The State argues that *Schmuck* establishes the Lummi Nation's inherent sovereign power to stop and detain offenders on the reservation, while *Settler* shows that this enforcement power may extend beyond reservation boundaries. We disagree.

The inherent sovereign power identified in *Schmuck* does not logically extend beyond reservation boundaries. The State is correct that preventing tribal police from stopping and detaining drivers off the reservation would "undercut the Tribe's ability to enforce tribal law" by encouraging drivers to race for the reservation

border and escape detention. *Schmuck*, 121 Wn.2d at 383. While this is troubling on a policy level, the concept of territorial jurisdiction necessarily limits any sovereign's ability to fully enforce its laws. For example, Oregon's ability to enforce its traffic code was undercut when we held that an Oregon officer could not stop and detain an offender who crossed the state border. *Barker*, 143 Wn.2d 915. That impediment to enforcement alone did not mean that Oregon's sovereignty was compromised. Rather, the limitation on Oregon's authority to enforce its laws flowed necessarily from Oregon's own geographic boundaries.

While *Settler* did allow for certain off-reservation arrests, it does not justify a tribal officer's traffic stop on ordinary state land. The *Settler* court noted that:

> Our holding that the Yakima Indian Nation may enforce its fishing regulations by making arrests and seizures off the reservation is a very narrow one. Off-reservation enforcement is limited strictly to violations of tribal fishing regulations. The arrest and seizure of fishing gear must be made at "usual and accustomed places" of fishing.

507 F.2d at 240. Here, the stop and detention were made on ordinary state land, over which the Lummi had no special legal rights.

Moreover, *Settler* relied on an express treaty provision giving the tribe the right to regulate fishing at usual and accustomed off-reservation fishing sites. *Id.* at 231. In contrast, the Treaty of Point Elliott, which created the Lummi Reservation, does not explicitly grant the tribe the right to regulate or enforce traffic laws beyond

its borders.[5] The Treaty of Point Elliott does state that the "tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial." Treaty of Point Elliott, art. IX, 12 Stat. 927, 929. We have said that this provision "appears to reflect a common concern of the federal government during treaty negotiations in the mid-1800's to prevent non-Indians from hiding out on reservations in the mistaken belief that they would be free from prosecution for their crimes." *Schmuck*, 121 Wn.2d at 385 (citing H.R. Rep. No. 474, at 98 (1834)). While that concern was implicated in *Schmuck*, which dealt with the tribe's detention of offenders on the reservation, Article IX bears no relation to detaining persons who leave the tribe's territorial jurisdiction and are fully subject to state prosecution. Eriksen was off the reservation when McSwain stopped her. Article IX is irrelevant.

The dissent cites the second exception of *Montana v. United States*, 450 U.S. 544, 566, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), as a source of the tribe's inherent authority to stop and detain Eriksen. Dissent (Owens, J.) at 4, 6. *Montana* held that tribes retain the inherent authority to exercise civil regulatory authority over the conduct of non-Indians on fee lands within the reservation when the

[5]Like the treaty in *Settler*, the Treaty of Point Elliot contains an explicit provision giving tribes "[t]he right of taking fish at usual and accustomed grounds and stations." Treaty of Point Elliott, art. V, 12 Stat. 927, 928. This provision is clearly not at issue here, where no fishing was involved.

conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. *Montana* delineated the scope of a tribe's civil regulatory jurisdiction within the reservation. The rules applicable in that context do not naturally extend to Eriksen's case, which involves the powers of tribal law enforcement officers outside the reservation. We conclude that the Lummi Nation did not have inherent authority to stop and detain Eriksen on ordinary state land outside the reservation, beyond the limits of the tribe's territorial jurisdiction.

The Lummi Nation stresses the limited nature of the power to stop and detain offenders off-reservation until State authorities arrive, describing this power as merely "assisting the State in asserting *its* regulatory and adjudicatory authority." Br. of Amicus Curiae Lummi Nation at 9. This characterization ignores the fact that Washington recently established certain training and liability requirements for tribal officers to become general authority Washington peace officers, with the power to arrest in fresh pursuit on Washington land. *See* RCW 10.92.010; RCW 10.93.070(6), .120. Creating a doctrine of fresh pursuit based only on a tribe's inherent authority would effectively abrogate this statutory scheme, undermining Washington's sovereign authority to regulate arrests in the state. Certainly, Washington's sovereignty cannot extinguish the Lummi Nation's sovereign powers.

Rather, we simply note that the unwarranted extension of the Lummi Nation's powers would not be an enhancement of Washington's sovereign rights, but an impingement of them.

While the territorial limits on the Lummi Nation's sovereignty create serious policy problems, such as the incentive for intoxicated drivers to race for the reservation border, the solution does not lie in judicial distortion of the doctrine of inherent sovereignty. Instead, these issues must be addressed by use of political and legislative tools, such as cross-deputization or mutual aid pacts, to ensure that all law enforcement officers have adequate authority to protect citizens' health and safety in border areas. We urge the Lummi Nation and Whatcom County to work together to solve the problems made evident by this case; but if they can or will not do so, we will not manipulate the law to achieve a desirable policy result.[6]

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[6]The problematic policy implications of today's holding, while significant, are likely far narrower than the dissent implies. The dissent offers a hypothetical in which an arsonist flees across the reservation border and, while a police officer helplessly observes, sets a fire that threatens Indian land and lives. Dissent (Owens, J.) at 5. At common law, police officers could stop and arrest outside their territorial jurisdiction when in fresh pursuit of one who had committed a felony. *See, e.g., Barker*, 143 Wn.2d at 921. Arson is a felony. RCW 9A.48.020(2) (first-degree arson is a class A felony), .030(2) (second-degree arson is a class B felony). Assuming the continuing validity of the common-law doctrine, the officer would be empowered to stop and arrest the arsonist in fresh pursuit.

Amicus Lummi Nation raised the doctrine of fresh pursuit as a source of McSwain's authority to stop and detain Eriksen. Br. of Amicus Curiae Lummi Nation at 12-20. The State has never advanced the doctrine of fresh pursuit in this case, and it concedes that Eriksen's stop and detention were not authorized under any Washington fresh-pursuit statute. Resp't's Br. at 6-7. We need not address issues raised only by amici. *Accord State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988). We therefore decline to reach the fresh-pursuit argument except to note that, unlike arson, Eriksen's DUI conviction was a misdemeanor. Former RCW 46.61.502(5) (1998) (DUI is a gross misdemeanor); Lummi Nation Code of Laws 6A.02.090(d),

The State contends that even if the Lummi Nation's inherent sovereign authority did not justify McSwain's stop and detention of Eriksen, the doctrine of citizen's arrest does. In its oral decision, the superior court concluded that McSwain's detention of Eriksen was not a valid citizen's arrest. Verbatim Report of Proceedings at 2-3. The State did not seek cross review of this determination or mention the issue of citizen's arrest in its answer to Eriksen's motion for discretionary review. In *Barker*, we declined to reach the State's citizen's arrest argument when the State did not file an answer to the defendant's petition for review. 143 Wn.2d at 919-20. Similarly, we decline to reach the tardily-raised citizen's arrest issue here.

IV. CONCLUSION

The Lummi Nation's inherent sovereign powers do not include the authority to stop and detain outside the tribe's territorial jurisdiction for a traffic infraction. Accordingly, McSwain's stop and detention of Eriksen were invalid. We reverse the superior court's decision and remand to the district court for proceedings consistent with this opinion.

6A.01.020(a)(2) (DUI is a class B offense subject to 30-90 days in jail and a fine of $250-$1,250).

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:
Chief Justice Barbara A. Madsen

Justice James M. Johnson

Justice Debra L. Stephens

Justice Charles K. Wiggins