American Indian Law Review

Volume 23 | Number 2

1-1-1999

Cases: United States v. Weaselhead; Dawavendewa v. Salt River Project Agricultural Improvement and Power District; Austin's Express, Inc. v. Arneson;

RECENT DEVELOPMENTS

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TRIBAL COURTS: Double Jeopardy

United States v. Weaselhead, 25 Indian L. Rep. 2195 (8th Cir. Sept. 9, 1998)

Robert Lee Weaselhead, Jr., an enrolled member of the Blackfeet Tribe, pled no contest to one count of first degree sexual assault in Winnebago Tribal Court.[1] On the same day Weaselhead pled no contest in tribal court, he was indicted by a federal grand jury on three counts of having sex with a minor, Count III of which was the same for which he had been tried in tribal court.[2] Weaselhead moved to dismiss Count III on double jeopardy grounds but the motion was denied in district court.[3] A panel of the Eighth Circuit held that the power of a tribe to try non-member Indians in its court system was a congressional delegation of power and thus subject to double jeopardy protections.[4] Based on this, the court reversed the order denying Weaselhead's motion on Count III.[5]

To reach this decision, the Eighth Circuit panel explored the history of tribal criminal jurisdiction. Primary authority limiting tribal jurisdiction is *Oliphant*.[6] Since the earliest Europeans arrived here, Indians have been regarded as inferior in the courts and legislatures of the United States. The Supreme Court reaffirmed this in *Oliphant* by making it doctrine that whites should not be subject to a tribe's criminal jurisdiction.

The Eighth Circuit panel also cited *Duro*[7] in its reasoning. In *Duro*, the Supreme Court sought to avert the appearance of racism in *Oliphant*. The Court in *Duro* stated that, when the first whites stepped onto the continent, the tribes not only lost the power to try whites, but also lost the power to try Indians who were not members of the tribe asserting jurisdiction.[8]

Congress, with the *Duro* decision, finally attempted to halt the Supreme Court's attack on tribal sovereignty. Congress affirmed a tribe's inherent sovereign right to criminally try any Indian by amending the Indian Civil

1. United States v. Weaselhead, 25 Indian L. Rep. 2195, 2195 (8th Cir. Sept. 9, 1998).
2. *Id.*
3. *Id.*
4. *Id.* at 2198.
5. *Id.*
6. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
7. Duro v. Reina, 495 U.S. 676 (1990).
8. *Weaselhead*, 25 Indian L. Rep. at 2196-97.

Rights Act.[9] The Eighth Circuit panel held this amendment to be a delegation of power by Congress thus implicating the Fifth Amendment.[10]

All of these cases create interesting and potentially explosive questions. Since "the authority to govern is derived from the consent of the governed,"[11] can the native peoples of North America withdraw their consent to be governed by the United States and thus return to independence? Does this series of cases mean that a resident of one state cannot be tried in another state because that resident has not consented to being governed in the other state? Finally, does this holding mean that, for example, if a Navajo were to leave the Navajo Reservation and enter Arizona that Arizona could not prosecute that Navajo for a criminal offense? The answer to all of these questions is no. The Supreme Court has made it clear that these rules only apply when an inferior race attempts to assert jurisdiction over a superior race.

The *Oliphant*, *Duro*, and *Weaselhead* decisions all show that there is considerable confusion on the topic of tribal criminal jurisdiction. En banc, the Eighth Circuit split evenly on the subject of double jeopardy and thus the district court ruling that there was no double jeopardy was affirmed.[12]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EMPLOYMENT: National Origin Discrimination Based on Tribal Membership

Dawavendewa v. Salt River Project Agricultural Improvement and Power District, 25 Indian L. Rep. 2200 (9th Cir. Sept. 14, 1998).

A private employer on the Navajo reservation entered into a lease with the tribe in 1969.[13] The lease required the employer to give preference to Navajo tribal members.[14] The plaintiff, a Hopi, sued the employer claiming that he had been discriminated against based on national origin as he was denied this preference.[15]

The Ninth Circuit held that this preference did discriminate against the plaintiff based on his national origin.[16] Citing numerous cases, the court stated that precedence indicated that national origin included the origin of one's ancestors and that the current existence of a nation was not required for

9. Indian Civil Rights Act of 1991, 25 U.S.C. §§ 1301-1303 (1994).

10. *Weaselhead*, 25 Indian L. Rep. at 2198.

11. *Id.* at 2197.

12. United States v. Weaselhead, 165 F.3d 1209 (8th Cir. 1999).

13. Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 25 Indian L. Rep. 2200, 2200 (9th Cir. Sept. 14, 1998).

14. *Id.*

15. *Id.*

16. *Id.* at 2203.

the purpose of defining national origin.[17] Based on this, the Ninth Circuit reversed the lower court's dismissal of the plaintiff's case.[18]

It seems that in this era of Indian affairs, many in power have sought ways to erode tribal sovereignty. Any benefit or advantage that a tribe may have is subject to attack. With this case, the Ninth Circuit has found a way to chip away at what little power remains with the Navajo Nation.

This case also opens avenues of attack that no reasonable person would accept. If an Oklahoman denies employment to a Texan, Texas having been a sovereign nation, the Texan would have a "national origin" claim. This would also be true for other citizens of states that were formerly nations such as California and Hawaii. Finally, this decision opens the door to attack all Indian preference hiring procedures. Now, a non-Indian denied employment in an "Indian preference" position can sue based on a national origin vice a race cause of action. Under the court's reasoning in *Dawavendewa*, the plaintiff would prevail. This panel of the Ninth Circuit has set a very dangerous precedent with its decision.

(Based on a phone call with attorneys for the Navajo Nation, the *American Indian Law Review* learned that this case has been appealed for an en banc hearing before the Ninth Circuit but no information about the status of the appeal was available as of late January 1999.)

MONTANA DISTRICT COURT

JURISDICTION: Limits on Tribal Civil Jurisdiction

Austin's Express, Inc. v. Arneson, 25 Indian L. Rep. 3187 (D. Mont. Mar. 12, 1998)

On the surface, *Arneson* is a simple negligence case. However, when reviewed in light of recent federal court decisions, it is another statement of the federal judiciary's contempt for Indian courts.

On October 24, 1995, Dallas Dust, a Crow tribal member, was struck and killed while walking on part of the Interstate 95 right-of-way that traverses the Crow Reservation.[19] His estate sued in Crow tribal court.[20] The defendant moved for summary judgement based on lack of subject matter jurisdiction.[21] The motion was denied whereupon, the defendant filed a motion in federal district court seeking a declaration that the tribal court did not have jurisdiction.[22] The United States District Court for the District of Montana

17. *Id.* at 2200-01.

18. *Id.* at 2203.

19. Austin's Express, Inc. v. Arneson, 25 Indian L. Rep. 3187, 3187 (D. Mont. Mar. 12, 1998).

20. *Id.*

21. *Id.*

22. *Id.*

granted the motion and permanently enjoined the plaintiffs from proceeding further in tribal court.[23]

The district court relied on two other cases to reach its decision. In order to defeat the plaintiff's claim that an injury to a tribal member would give the tribe jurisdiction as an exception to the *Montana* rule,[24] the court cited *Wilson v. Marchington.*[25] In *Wilson*, a member of the Blackfeet Indian Tribe, was struck by another vehicle while attempting to exit U.S. Highway 2 on the Blackfeet Indian Reservation.[26] Wilson won in tribal court and then registered the judgment in the federal system in the District of Montana.[27] On appeal, the Ninth Circuit held that the tribal court judgment was invalid and comity was not required.[28]

The Ninth Circuit in *Wilson* quoted Justice Ginsberg's dicta from *Strate*[29] to reach its conclusion. In Justice Ginsberg's opinion, the possibility of reckless drivers injuring tribal members was not significant enough to trigger the *Montana* exception regarding something that would "imperil the political integrity, the economic security, or the health and welfare of the Tribe."[30]

Strate was also cited by the district court in *Austin's Express* in order to hold that the highway was not Indian country. In *Strate*,[31] the Supreme Court, in a decision that is obviously erroneous, completely ignored the statute defining Indian country[32] which the Court itself frequently cites. Even though the statute clearly states that Indian country includes rights-of-way, the Court ignored this to find a way to limit tribal jurisdiction. The land under the right-of-way was still held in trust for the tribe[33] but the Court, arbitrarily, likened it to alienated fee land.[34]

Relying on *Strate*, the district court held that the right-of-way was not Indian country.[35] With both of the plaintiff's contentions defeated, the district court granted Austin's Express' motion for summary judgment.[36]

Tribal courts have been looked down upon as a lesser judicial entity by most non-Indian judiciaries. The Anglo courts of the land are content to let the tribes handle petty actions in civil and criminal cases. However, the courts

---

23. *Id.* at 3189.
24. Montana v. United States, 450 U.S. 544 (1981).
25. 127 F.3d 805 (9th Cir. 1997).
26. *Id.* at 807.
27. *Id.*
28. *Id.* at 815.
29. Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997).
30. *Wilson*, 127 F.3d at 815.
31. Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997).
32. 18 U.S.C. § 1151 (1994).
33. *Strate*, 117 S. Ct. at 1413.
34. *Id.*
35. Austin's Express, Inc. v. Arneson, 25 Indian L. Rep. 3187, 3188 (D. Mont. Mar. 12, 1998).
36. *Id.* at 3189.

draw the line when an important matter arises or when whites may be hailed into the courts of red men. From *Oliphant*[37] through *Strate*,[38] the Supreme Court has taken every opportunity to limit, if not destroy, tribal court jurisdiction over whites. Until the tribes are recognized as truly sovereign nations and accorded the corresponding authority and respect, their court systems will always be considered second-rate.

37. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
38. Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997).