IN THE
NORTHERN PLAINS
INTER-TRIBAL COURT OF APPEALS

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| SISSETON-WAHPETON SIOUX TRIBE,<br><br>PLAINTIFF-APPELLEE,<br><br>vs.<br><br>VERNON CLOUD,<br><br>DEFENDANT-APPELLANT. | CR-01-01-03<br><br>OPINION OF THE COURT OF APPEALS. |

Appeal before the Northern Plains Intertribal Court of Appeals from a decision entered by the Sisseton-Wahpeton Oyate Tribal Court for the Lake Traverse Indian Reservation in the State of South Dakota. This appeal arises from the conditional guilty plea and conviction of the Defendant-Appellant, Vernon Cloud, a tribal member, of driving while under the influence of alcohol, in violation of S.W.S.T.C. § 27-14-01 et seq., possession of an open container of alcohol in a motor vehicle, contrary to S.W.S.T.C. § 27-13-01 et seq. and failure to wear a safety belt in violation of S.W.S.T.C. § 27C-02-01. The sole issue on appeal is whether or not the Tribe has criminal jurisdiction over the Appellant.

AFFIRMED

Opinion of the Court by Justice David Christensen.

**Facts**

The facts giving rise to the conviction of Appellant, Vernon Cloud, an enrolled Sisseton-Wahpeton Oyate tribal member, are that the tribal police observed a pickup truck being driven erratically on Day County Highway #1, which is within the original

exterior boundaries of the Lake Traverse Indian Reservation established by the Treaty of February 19, 1867. The stretch of highway in question leads from U.S. Highway 12 north to the Tribe's Enemy Swim Housing site and beyond. Day County Highway #1, which Appellant was observed driving over, crosses and abuts tribal land, several Indian allotments and fee patent land.

Upon observing the erratic driving, the tribal police engaged their emergency equipment to stop the vehicle. Appellant continued north for some distance and turned his vehicle east off the highway at the junction of a township road where he then stopped. The township road where Appellant's vehicle came to a stop has an Indian allotment directly to the north and fee land directly to the south. Upon approaching the vehicle the tribal police officer detected a strong odor of alcohol coming from the vehicle and proceeded with a DUI investigation. For purposes of this appeal Appellant does not dispute that he was driving under the influence of alcohol.

**Analysis**

Since time immemorial Indian tribes have had criminal jurisdiction over Indians in Indian Country. In the absence of express federal statutes or treaties to the contrary tribal criminal jurisdictional for all crimes was recognized as exclusive by the U.S. Supreme Court in Ex Parte Crow Dog, 109 U.S. 556 (1883). Today tribal criminal jurisdiction is no longer exclusive as congress passed legislation, such as the Major Crimes Act, conferring jurisdiction over enumerated "major crimes" in "Indian Country" on the federal courts. 18 U.S.C. § 1151 et seq.. Determining what "Indian Country" is has been a matter of contention for years and is at the heart of this appeal.

The definition of "Indian Country" accepted by other courts, has generally been the definition used in the Major Crimes Act, which provides:

> The term "Indian country" as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian title to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. § 1151

This was the definition that the United State Supreme Court used in DeCouteau v. District County Court for the Tenth Judicial District, 420 U.S. 425, 95 S.Ct.1082, (1975) when it held that the State of South Dakota had jurisdiction for crimes committed in the disestablished Lake Traverse Indian Reservation, when some of the crimes were committed on Indian allotments and some were on fee patent land.

I

In the case before us, the Appellant's argument is that because the Supreme Court determined that the Lake Traverse Indian Reservation was disestablished the tribe lacks jurisdiction over crimes not committed on tribally owned lands or crimes committed on individual Indian allotments. Appellant rests his argument primarily on the DeCouteau holding. However, the DeCouteau court was dealing with state court jurisdiction on fee patent land and did not speak to tribal jurisdiction. Specifically it left open the issue when it said:

> "... We note however, that [18 U.S.C.] § 1151(c) contemplates that isolated tracts of "Indian Country" may be scattered checkerboard fashion throughout over a territory otherwise under state jurisdiction. In such situation, there will obviously arise many practical and legal conflicts between state and federal jurisdiction with regard to conduct and parties having mobility over the checkerboard territory. How these conflicts should be resolved is not before us. DeCouteau, at 1085 FN3.

Tribal criminal authority over member's activities within its territorial jurisdiction is viewed as an essential component of self-governance and a way of regulating internal tribal matters. See United States v. Wheeler, 435 U.S. 313 (1978) citing United States v. Antelope, 430U.S. 641, at 643 n.2, Talton v. Mayes, 163 U.S., at 380, Ex Parte Crow Dog, 109 U.S. 556, at 571. A tribes' authority to regulate internal matters was viewed as deriving from its inherent sovereign authority by the Supreme Court in United States v. Wheeler. The Wheeler Court held that the subsequent federal prosecution of a Navajo tribal member after a conviction in the Navajo court arising out of the same incident was not barred by the double jeopardy clause of the U.S. Constitution because the prosecutions were by two separate sovereigns.

In the case before us, the Sisseton-Wahpeton Sioux Tribe necessarily has inherent sovereign authority over member activities as opined in Wheeler. The signatory Sisseton-Wahpeton bands apparently recognized their self-governance as being as critical to managing their affairs as the Wheeler court did later, because they expressly reserved to themselves the authority to regulate their internal matters in the Treaty of February 19, 1867. Article X of the treaty provides:

> The chiefs and the headmen located upon either of the reservations set apart for said bands are authorized to adopt such rules and regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the government, to organize a force sufficient to carry out all such rules, regulations for the government of said Indians, as may be prescribed by the Interior Department: Provided that all rules, regulations, or laws adopted or amended by the chiefs and headmen on either reservation shall receive the sanction of the agent. 15 Stat. 505, as amended 15 Stat. 509.

The tribe still views self-governance issues as critical to its survival because it addressed the issue of exercising jurisdiction on the disestablished reservation in the Sisseton-Wahpeton Oyate Constitution, which says:

> The jurisdiction of the Sisseton-Wahpeton Oyate shall extend to lands lying in the territory within the original confines of the Lake Traverse Reservation as described in Article III of the Treaty of February 19, 1867. Revised Constitution and by-laws of the Sisseton-Wahpeton Oyate, Article I- Jurisdiction (2002)

The Tribe is exercising its reserved Article X treaty authority as well as inherent sovereign powers within a defined geographic area. The self-governance powers expressly reserved in Article X of the treaty were not extinguished by the disestablishment of the reservation in DeCouteau. Tribal Treaty rights exist until congress expresses its clear intent to repeal them. It is well understood that Congress may abrogate treaty rights. But when doing so it must clearly express its intent to do so. United States v. Dion, 476 U.S. 734, (1986), Menominee Tribe v. United States, 391 U.S. 404, (1968). Most recently in Minnesota et al.v. Mille Lacs Band of Chippewa Indians, et al. No. 97-1337 (1999) the Supreme Court determined that tribal treaty rights existed on ceded lands independently of land ownership, even though the tribe had sold those lands.

The Tribes Article X jurisdiction still exists in the defined ceded area regardless of federal "Indian Country" jurisdiction. In Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974) the Court of appeals held that the Yakima Tribal Court had jurisdiction to punish tribal members who committed violations in exercise of their off-reservation treaty fishing rights.

As discussed above, DeCouteau left the issue of crimes occurring across the checkerboard areas, like those at issue in this case unresolved. DeCouteau only addressed

state court jurisdiction on fee patent lands in the disestablished area. Because the state has jurisdiction in these areas does not mean that the tribe doesn't. This is wholly consistent with the Wheeler decision, where the court determined federal and tribal authority stem from two separate sources.

II

Even if we did not determine that the tribes Article X jurisdiction were lost by the disestablishment of the reservation we would still find that the tribe had jurisdiction over this matter. Appellant's argument that the crimes at issue were not committed within "Indian Country" fails to recognize that in the commission of the crimes he drove across the rights-of-way on several Indian Allotments and finally stopped on the border of an allotment. His argument seems to be premised upon the underlying assumption that the offenses of Driving Under the Influence, Open Container, and Failure to Wear a Seat Belt occurred only at one specific location, that location being where Appellant's vehicle came to a stop. This argument ignores the facts of the cases that Appellant crossed over Indian land as well as fee patent land and has no merit. Appellant's brief dedicates considerable argument attacking the evidence gathered by the tribal police at the location of the arrest. However, the Appellant plead guilty to the above offenses and reserved only his jurisdictional argument for the appeal.[1] In order to find that the tribal court lacked jurisdiction over Appellant for the offenses we would have to ignore the plain language

[1] We find South Dakota courts position on this issue persuasive when they said:

> "This Court has consistently followed the general rule that a voluntary and intelligent plea of guilty waives a defendant's right to appeal all non-jurisdictional defects in the prior proceedings." State v. Crow, 504 N.W. 2d 336, 338, (S.D. 1994) State v. Grosh, 387 N.W.2d 503 (S.D. 1986)

of 18 U.S.C. 151(c) where an Indian allotment is "Indian Country". The crimes were committed in "Indian Country". This case is analogous to cases from other jurisdiction which held that police officers from municipalities, in the scope of their jobs, who observed criminal activity in their jurisdiction and followed and arrested the parties outside the jurisdiction and prosecution was lawful. See Wisconsin v. Haynes, 638 N.W.2d 82 (Wis. App. 2001), State v. Snider, 522 N.W.2d 815 (Iowa 1994), State Department of Public Safety v. Nystrom, 217 N.W. 2d 201, (Minn. 1974) State v. Bunde, 556 N.W. 2d 917 (Minn. App. 1996)

For the forgoing reasons the conviction of Vernon Cloud by the Sisseton-Wahpeton Sioux Tribal Court of driving under the influence of alcohol under S.W.S.T.C. § 27-14-01, possession of an open container in a motor vehicle, S.W.S.T.C. § 27-13-01 and failure to wear a seat belt, S.W.S.T.C. § 27C-02-01 is AFFIRMED.

Dated this 20th of May, 2005.

Paul Godtland
Justice Paul Godtland

David S. Christensen
Justice David S. Christensen

Justice LeRoy Greaves