WHERE DOES THIS CASE BELONG ANYWAY? AN INTRODUCTION TO TRAFFIC SAFETY IN INDIAN COUNTRY

J. Matthew Martin*

Traffic safety in Indian Country, the lands of the indigenous peoples of the United States, is both very similar to traffic safety in the state and federal systems, while, at the same time, much more complicated. This article attempts to articulate some of the barriers to delivery of traffic safety best practices in Indian Country. Primarily, the barriers are jurisdictional in nature. The jurisdiction of Indian Tribes has waxed and waned over the centuries as Congress and the federal courts have grappled with understanding how Indian Tribes fit within the concept of “Our Federalism,” particularly when they clearly were not understood to be part of the constitutional network at the time of the ratification of the Constitution. Two traffic related cases, one criminal, one civil, are illustrative guides to this cobbled together jurisdictional framework, the likes of which most practitioners and judges never see.

The Qualla Boundary, Cherokee

In State v. Kostick, the defendant challenged the jurisdiction of the courts of the state of North Carolina to try him for driving while subject to an impairing substance on the Qualla Boundary, commonly referred to as the reservation of the Eastern Band of Cherokee Indians (EBCI). On the evening of April 24, 2010, the defendant, a non-Indian, was detained at a checkpoint by Cherokee Police Officer Dustin Wright after leaving the Cherokee Harley Rally, a local event for motorcycle enthusiasts. Upon approaching driver’s window, Officer Wright noticed a strong odor of an alcoholic beverage and observed two open cans of beer in the car’s center console. Officer Wright called for assistance and North Carolina Highway Patrol Trooper Jim Hipp responded and then took over the investigation at the request of Officer Wright.

Trooper Hipp undertook his own investigation of the scene, conducted four field sobriety tests and then arrested the defendant on suspicion of impaired driving. He transported the defendant off of the Qualla Boundary to the Swain County Jail, where the defendant blew a 0.15 on the breath alcohol sensing device. The defendant made multiple procedural challenges to his prosecution, two of which related to Indian Country. First he argued that the road upon which he was driving was not a state maintained road, and thus Trooper Hipp had no jurisdiction to operate there, much less arrest him. The North Carolina Court of Appeals found that, because the EBCI specifically authorized the N.C. Highway Patrol to police the streets and highways of the Qualla Boundary and that the two entities had entered into a mutual aid compact specifically with regard to the Cherokee Harley Rally, Trooper Hipp did indeed have jurisdiction to effectuate the defendant’s arrest.

The defendant’s next argument was more subtle. In Oliphant v. Suquamish Tribe the Supreme Court of the United States held that Indian Tribes may not exercise criminal jurisdiction over non-Indian citizens of the United States, as this practice would be inconsistent with the Tribes’ status as dependent sovereign nations. The defendant contended that North Carolina could not extend its criminal laws over him where his alleged impaired driving occurred in Indian Country. Thus, he argued, neither the EBCI nor the state had subject matter jurisdiction over him.

In practice, the uncertain state of the law leaves many places in Indian Country effectively lawless as to non-Indians. In Mr. Kostick’s case, however, the North Carolina Court of Appeals reasoned that the authorization by the EBCI for the North Carolina Highway Patrol to exercise North Carolina’s police power over the Qualla Boundary ipso facto authorized the courts of North Carolina to prosecute those cases.

The Supreme Court of North Carolina denied review of Kostick. For now, it seems that the issues of whether the N.C. Highway Patrol can lawfully police the highways of the Qualla Indian Boundary is settled.

When considering traffic safety, we often think of criminal and prohibitive statutes. But the civil law also plays a significant role in traffic safety, as liability concerns can drive public policy regulations and private insurance requirements. This is the framework within which our second case for review is contained.

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The Navajo Nation

Many spectacular vistas and areas of magnificent beauty are located within the boundaries of the Navajo Nation, the Indian Tribe with the largest geographical land base. Naturally many people want to visit these sites, so the Navajo Nation has established a formalized permitting system to regulate the traffic of commercial touring entities and their tour buses entering Tribal trust land. All commercial touring entities entering the Navajo Nation are required by Navajo law to secure a permit, pay an annual fee, provide proof of liability insurance and execute a Tourist Passenger Service Agreement. The Tourist Passenger Service Agreement requires that the commercial touring company submit to the jurisdiction of the Navajo courts.

On October 21, 2004, a tour bus operated on U.S. Highway 160 near Kayenta, Arizona on the Navajo reservation by EXC, Inc., a commercial touring company, crashed head on into a 1997 Pontiac occupied by three members of the Navajo Nation, a husband and wife, Butch Johnson and Jamien Jensen, and their son. Butch Johnson died at the scene. Ms. Jensen and her son were seriously injured. Ms. Jensen was pregnant and suffered a miscarriage as a result of her injuries. EXC, Inc. had neither obtained a permit nor executed the Tourist Passenger Service Agreement, and thus was operating unlawfully on the Navajo reservation.

The plaintiffs sued in Kayenta District Court, the Navajo Tribal Court, in 2006. The defendants, all non-Indian people and corporations, moved to dismiss, arguing that the Tribal Court had no jurisdiction to entertain this wrongful death/personal injury case. The District Court denied the motion and the case was appealed to the Navajo Supreme Court.

On September 15, 2010, the Navajo Supreme Court ruled that the Navajo courts did have jurisdiction over the issues in the case. On October 11, 2011, over a year later, the defendants filed a complaint in the United States District Court for the District of Arizona in EXC, Inc. v. Jensen, seeking to enjoin the Navajo courts from hearing the case.

The case primarily turned on two Supreme Court cases: Montana v. United States and Strate v. A-1 Contractors. In Montana, the Court held that an Indian tribe's regulatory jurisdiction did not extend to parcels owned by non-Indians, even when those parcels were within the contiguous boundaries of a reservation. Strate held that, where a tribe grants an easement to a state for the purposes of building and maintaining a highway, that land is converted, through a kind of judicial alchemy, into the equivalent of a non-Indian owned parcel for the purposes of determining whether a tribal court has jurisdiction under Montana. Montana then applies a two part test: First, does the non-Indian defendant have some contractual relationship with the Tribe, or second, does the activity complained of threaten or have a direct effect on the political integrity, economic security, or health or welfare of the tribe? If the answer to both of these questions is no, then the tribal court has no jurisdiction. In Strate, the Supreme Court indicated that a routine automobile negligence case involving a non-Indian defendant does not impact the second Montana prong, because, if it did, the “exception would severely shrink the rule.”

EXC argued that the case was controlled by Strate and that neither of the Montana prongs apply. The Jensens contended that the plaintiffs should have had a contractual relationship with the Navajo Nation and that their failure to comply with Navajo commercial touring permit regulations both threatens and has an impact on the economic security, health and welfare of the Tribe.

On August 9, 2012, the United States District Court for the District of Arizona agreed with EXC, entering a declaratory judgment, holding that the Navajo courts had no jurisdiction to entertain the case and enjoining the Jensens from filing further pleadings in the Tribal Court. The case is currently pending in the United States Court of Appeals for the 9th
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Circuit and is the type of case that might receive serious consideration for certiorari by the Supreme Court.

Although Kostick solved the issue of the Highway Patrol’s authority within Indian Country in North Carolina and Jensen will soon resolve the question of whether Strate applies within the context of the Navajo tour company licensing scheme, many other issues linger, as each Indian Tribe is different. Ongoing confusion will no doubt bring more litigation.

This confusion could not be more troubling. We know that the leading cause of death for people under age 44 is unintentional injury.20 We know that motor vehicle collisions are the primary cause of unintentional injury related deaths.21 When compared to other groups, American Indians and Alaska Natives experience the highest per capita rate of unintentional injury related deaths.22 Thus, the need for traffic safety outreach in Indian Country could not be greater. And yet, despite our knowledge and despite the obvious needs, before we can even grapple with that outreach, we must first ascertain which jurisdictions have jurisdiction. With 566 federally recognized Indian Tribes, each with a different history of federal and state relationships, this is a daunting task. Until Congress acts and simplifies the jurisdictional barriers, traffic safety in Indian Country will continue to be hindered by unnecessarily confusing legal constructs.

VERMONT’S RAPID REFERRAL PROGRAM PREVENTS CRIME

Hon. Ben W. Joseph, (Ret.), Vermont Superior Court, Judicial Outreach Liaison for the Vermont Governor’s Highway Safety Program.

A pre-trial treatment program imposed by trial judges in Chittenden County Vermont, has been shown to dramatically reduce crime rates among defendants who have completed drug or alcohol treatment while they are on bail. The Rapid Referral Program began in January, 2009. Under Vermont’s bail laws, a judge presiding during a defendant’s arraignment on criminal charges has a general power to impose conditions of release (also known as pre-trial conditions) that the judge determines are reasonably necessary to assure the appearance of the defendant and/or to protect the public. Specifically, Vermont law gives a judge the power to impose a condition of release that requires a defendant to undergo treatment for substance abuse. 13 V.S.A. § 7554(a) (1) and (2). Starting in early 2009, judges in the Chittenden County Superior Court, Criminal Division, who were presiding at arraignments began imposing a pre-trial condition that required defendants in DUI alcohol cases who had a reported BAC of .15% or more when arrested and defendants in drug related cases that involved heroin and/or opiates to undergo an assessment by a licensed and/or certified drug and alcohol counselor. Occasionally, a treatment order was entered if a defendant with a BAC of less than .15% was reported to have engaged in especially dangerous driving while impaired - such as driving the wrong way on an Interstate highway. The purpose of the assessment order was to determine if there was a need for a defendant to engage in substance abuse treatment while his/her criminal case was pending. The court order for a pre-trial assessment required that all information disclosed by the defendant during the assessment be held in confidence and that only the counselor’s recommendation concerning treatment be forwarded to the court. The arraignment judge then decided whether or not to accept the recommendation. (Not all the assessments recommended...
treatment). There were not enough treatment resources available to order assessments in all alcohol and drug related cases.

This process came to be known as the Rapid Referral Program and was described in detail in two articles published by the Vermont Bar Journal in its 2011 Winter Edition. ("Drug Treatment as a Condition of Release") and the 2013 Winter Edition ("Treatment Prevents Crime – the Rapid Referral Program"). Today, as a result of the Rapid Referral process, hundreds of defendants in Chittenden County have gone through pre-trial treatment – most of them with counselors working for two local social service agencies - Spectrum Youth & Family Services (defendants between 16 and 23 years of age) and the Howard Center (defendants 23 years of age and older when they first referred for treatment.)

Most of the defendants who were ordered into treatment at Spectrum were placed in an out-patient program that required them to attend a minimum of 6 weekly counseling sessions with a licensed and/or certified drug and alcohol counselor. The participants were given weekly homework assignments in which they were obliged to discuss their abuse of drugs and/or alcohol and the reasons for that behavior. At the same time, they were subject to weekly urinalysis tests during their regularly scheduled appointments. If a test showed that a defendant had been using drugs and/or alcohol, he or she had to continue counseling until the test results were consistently negative indicating that the person had "sampled sobriety". It is important to state that not just any treatment will do. The key to this program's great success was the treatment program organized by Spectrum's then Associate Director, Annie Ramniceanu. Ms. Ramniceanu is now an independent consultant and has agreed to provide information about treatment to anyone interested in starting a Rapid Referral program. She can be reached at (802) 363-0611.

On October 22, 2012, a report was released which shows the recidivism rate for the first 171 defendants who had completed court-ordered pre-trial treatment at Spectrum during 2009. Recidivism was defined as an arrest and conviction for any crime which was committed in the three-year period after the completion of a defendant's pre-trial treatment. The three-year recidivism rate for defendants who had completed treatment was 18.7% - while the three-year recidivism rate for defendants who had not completed treatment was 84.3%. The report has been described by Judge Amy Davenport, the Administrative Judge for the Vermont courts, as “eye-popping”.

The report demonstrates that untreated defendants commit crimes at a much higher rate than defendants who have completed substance abuse treatment. It should be kept in mind that Rapid Referral probably has not only saved money for the judiciary, law enforcement, the prosecutor's office, and the Department of Corrections, but it has also saved money that the State would have spent on foster care for the children of addicted parents who abused or neglected them. Certainly, the program does involve some additional expenses. If a defendant refuses to show up for assessment and/or treatment, the prosecutor may move for a condition violation hearing to force compliance with the court order. However, the biggest expense of the program is the cost of providing treatment. The treatment cost was borne by the defendant's insurance company and any copay was the responsibility of the defendant. Currently, the Affordable Care Act (ACA) builds on the Mental Health Parity and Addiction Equity Act of 2008 to extend federal parity protection to 62 million Americans. The parity law aims to ensure that, when coverage for mental health and substance abuse conditions is provided, it is generally comparable to coverage for medical and surgical care. The ACA builds on the parity law by requiring coverage of mental health and substance abuse problems for millions of Americans whose coverage did not previously comply with those requirements. In addition, Vermont uses its Federal Substance Abuse Prevention and Treatment Block Grant to fund a preferred provider system that includes the Spectrum counseling program. Should a defendant still not be covered by insurance, there are funds in the Block Grant that Vermont can use to cover treatment costs for the uninsured.

Ideally, law enforcement should expedite the consideration of the treatment option by bringing defendants to court for arraignment as soon as possible. In a typical Vermont case, a defendant is cited to appear for arraignment 4 to 6 weeks after arrest. However, there is a procedure called flash-citing which allows a defendant to be brought to court within days of his/her arrest. Addicts and counselors all say that it is beneficial to start treatment as soon as possible after an arrest.

Substance abuse causes terrible damage to defendants, their families, and the community as a whole. We will never know the exact number of criminal acts that were not committed because of pre-trial treatment in Vermont, but we now know, for sure, that a substantial number of crimes have been prevented in Chittenden County by the Rapid Referral Program. As a result, many of our fellow citizens and businesses have not been victimized. Treatment works to prevent crime, improve health, and create economic and social well being.

TAKING DWI TREATMENT COURTS TO SCALE:
THE MICHIGAN REGIONAL DRIVING WHILE IMPAIRED PROJECT
Hon. Patrick C. Bowler, (Ret.)
Michigan State Judicial Outreach Liaison
Success in saving lives is a well-accepted fact for our Driving While Intoxicated (DWI) Treatment Courts. However, availability for participation in a DWI court for all those eligible is severely limited. The challenge for many of our states is how to increase the availability of these courts to all prospective participants while continuing to maintain the effectiveness of the intervention.

It is impractical to expect that every court in every jurisdiction in each of our states has the interest or the resources to implement a DWI treatment court. In Michigan, like other states, many of the jurisdictions that do not operate DWI courts are located in rural areas with caseloads of repeat drunk drivers that are too low to justify a dedicated program. In addition, some courts have utilized their resources to develop a different type of specialty court. Some states have responded by easing the transfer of individual cases, or their supervision, from a non-DWI court to a court with a DWI program.
While that improves availability for some individuals, it is not practical when an individual must drive hundreds of miles to the nearest sobriety court.

The challenge of taking DWI courts to scale has been taken on by Michigan and the early results are very positive. A first step was the creation of a Judicial Outreach Liaison (JOL) position in Michigan, which was supported through funding by the National Highway Traffic Safety Administration and the Michigan Office of Highway Safety Planning. Working in partnership with the State Court Administrative Office a primary goal of the state JOL was to advance the development of regional driving while impaired courts.

A survey of all present DWI courts in Michigan (54 stand alone and/or hybrid programs) revealed four geographical areas of the State, each made up of approximately four or five counties that did not have a single DWI court. By direct contact in each region solicitations were made to find a centrally located court willing to implement a program. Grants were authorized by state government to assist in funding the new courts. Memoranda of Understanding and Administrative Orders were developed for use among all the jurisdictions in each region allowing for the centrally located RDWI to supervise eligible participants throughout the region.

A major factor in allowing the RDWI to work in Michigan was legislation establishing the ignition interlock program. The program allows DWI court judges to offer a restricted driver’s license to DWI court participants who are in good standing and who install an ignition interlock device on all of their vehicles. Besides the obvious safety factor, the ignition interlock device has the benefit of being utilized as a breathalyzer to monitor sobriety 24 hours a day. That benefit is especially helpful as the RDWI court includes a larger area than a typical jurisdiction.

The availability of DWI treatment courts offers significant benefits to our communities and particularly to eligible participants. However, when only those in DWI court jurisdictions benefit while other equally qualified individuals are denied, issues of equal protection and fundamental fairness arise. The RDWI project addresses those issues. The 2014 plan includes expansion into four additional regions, on the way to the ultimate goal of having the availability of a DWI Court within reach of every eligible individual in the State of Michigan.
UPCOMING PROGRAMS OF INTEREST:

October 31  Halloween
            “Buzzed Driving is Drunk Driving”

November 27  Thanksgiving Holiday Travel
            “Buckle up – Every Trip, Every Time”

November 28  Pre-Holiday Season

December 9   “Buzzed Driving is Drunk Driving”

December 10  Holiday Season

December 31  “Drive Sober or Get Pulled Over”

CONTACT INFO continued

State Judicial Outreach Liaisons:
Delaware:  Hon. Richard Gebelein:
Richard.Gebelein@state.de.us

Georgia: Hon. Kent Lawrence:
klawrence@gohs.ga.gov

Indiana: Hon. Tim Oakes:
in.jol.tim@gmail.com

Michigan: Hon. Patrick Bowler:
pcbowler@gmail.com

Mississippi: Hon. Samac S. Richardson:
smcrson@gmail.com

Montana: Hon. Audrey Barger:
Audrey@audreybarger.com

Oklahoma: Hon. Carol Hubbard:
hubbardranch@msn.com

Pennsylvania: Hon. Michael Barrasso:
mbarrasse@gmail.com

South Carolina: Hon. J. Mark Hayes, II:
mhayesj@sccourts.org

Texas: Hon. Laura Weiser:
lweiser@yourhonor.com

Vermont: Ben W. Joseph:
bwjdisputes@hotmail.com

Washington: Hon. Scott Bergstedt:
scott@bergstedtlaw.com