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1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **Filing Date: December 18, 2014**

3 **NO. 34,487**

4 **STATE OF NEW MEXICO,**

5 Plaintiff-Petitioner,

6 v.

7 **DELVIN CHARLIE,**

8 Defendant-Respondent.

9 **Consolidated with:**

10 **NO. 34,488**

11 **STATE OF NEW MEXICO,**

12 Plaintiff-Petitioner,

13 v.

14 **RUDY NORBERTO,**

15 Defendant-Respondent.

16 **ORIGINAL PROCEEDINGS ON CERTIORARI**

1 **John A. Dean, Jr., District Judge**

2 Gary K. King, Attorney General
3 Jacqueline R. Medina, Assistant Attorney General
4 Santa Fe, NM

5 for Petitioner

6 Jorge A. Alvarado, Chief Public Defender
7 B. Douglas Wood, III, Assistant Appellate Defender
8 Santa Fe, NM

9 for Respondents

10 **DISPOSITIONAL ORDER OF REVERSAL**

11 {1} The above-entitled and numbered appeal having come before the Supreme
12 Court, each member of the Court having read the briefs of the parties, and otherwise
13 having been fully informed on the issues and applicable law as raised and briefed by
14 the parties; and

15 {2} Each Justice having concurred that there is no reasonable likelihood that a
16 decision or opinion would affect the disposition of this appeal or advance the law of
17 the State; therefore,

18 **IT IS ADJUDGED THAT:**

19 {3} Defendants Delvin Charlie and Rudy Norberto are Navajo Nation members.
20 The basic facts of their cases are undisputed. *State v. Charlie*, No. 32,504, mem. op.

1 ¶ 2 (N.M. Ct. App. Dec. 4, 2013) (non-precedential); *State v. Norberto*, No. 32,353,
2 mem. op. ¶ 2 (N.M. Ct. App. Dec. 4, 2013) (non-precedential). In two separate
3 incidents, both Defendants were suspected of driving while intoxicated (DWI) from
4 state land onto the Navajo reservation. They were subsequently stopped on the
5 Navajo reservation by New Mexico State Police officers. *Charlie*, No. 32,504, mem.
6 op. ¶ 2; *Norberto*, No. 32,353, mem. op. ¶ 2. Charlie was stopped by Officer Paul
7 Gonzales and Norberto was stopped by Officer Joseph Schake. *Id.* Upon stopping
8 Defendants, the State Police officers commenced DWI investigations because
9 Charlie and Norberto exhibited signs of intoxication. *See id.*

10 {4} As part of the DWI investigations, both Defendants were transported off the
11 Navajo reservation to the State Police office in Farmington, New Mexico for
12 chemical testing. *Charlie*, No. 32,504, mem. op. ¶ 2; *Norberto*, No. 32,353, mem. op.
13 ¶ 2. Charlie was subjected to a breath alcohol test and Norberto, having refused a
14 breath alcohol test, was subjected to a blood draw. *Id.* After testing, both Defendants
15 were transported back to a Navajo detention center in Shiprock, New Mexico. *Id.*
16 Both were subsequently booked on tribal charges and later prosecuted in state court
17 under state law. *Charlie*, No. 32,504, mem. op. ¶¶ 2-3; *Norberto*, No. 32,353, mem.
18 op. ¶¶ 2-3. In state court, Defendants filed motions to dismiss for lack of personal
19 jurisdiction. Both of them argued that the State Police officers' failure to follow
20 Navajo extradition protocols violated tribal sovereignty so as to preclude state court

1 prosecution. *Charlie*, No. 32,504, mem. op. ¶ 3; *Norberto*, No. 32,353, mem. op. ¶ 3.
2 {5} In response to Charlie’s motion, the State introduced Officer Gonzales as a
3 witness. Officer Gonzales testified that despite being a State Police officer, he was
4 cross-commissioned by the Navajo authorities to enforce Navajo law on the
5 reservation. The State also claimed that the parties stipulated to Officer Gonzales’s
6 cross-commissioning. The defense did not object to this statement. Officer Gonzales
7 explained that as a cross-commissioned officer he was trained by Navajo authorities
8 to transport Navajo suspects off the reservation for chemical testing. Officer Gonzales
9 claimed that the Navajo authorities approved of this practice because: (1) there was
10 a shortage of valid state-certified breath alcohol test machines, and (2) the Navajo
11 reservation did not have facilities that performed blood draws for DWI purposes.
12 Charlie did not challenge any of this testimony. To support Officer Gonzales’s
13 testimony, the State introduced the affidavit of a Navajo police officer, Lieutenant
14 Philip Joe. In this document, Lieutenant Joe testified that “[d]ue to [the] frequent
15 unavailability of Breath Alcohol Testing equipment on the [Navajo] Reservation,
16 cross-commission[ed] New Mexico law enforcement officers conducting DWI
17 investigations were permitted to transport Navajo residents off [the] reservation for
18 the purpose of administering Breath Alcohol tests.” Charlie argued that despite
19 Officer Gonzales’s cross-commission and testimony concerning his training, Officer
20 Gonzales still had to follow the Navajo extradition procedure to transport Navajo

1 suspects off the reservation for chemical testing.

2 {6} Norberto’s motion to dismiss rested on the same premise as Charlie’s motion
3 to dismiss. In response, the State introduced Officer Schake as a witness. Officer
4 Schake also testified that he was a cross-commissioned State Police officer who was
5 able to enforce Navajo law on Navajo land. He explained that Navajo authorities
6 cross-commissioned State Police officers to reduce response times to suspected
7 Navajo crimes. Officer Schake also explained that because the Navajo Nation lacked
8 crime investigation resources, transport off the reservation was allowed to further
9 Navajo criminal investigations. Norberto failed to challenge this testimony.

10 {7} The state district courts denied both Defendants’ motions to dismiss. *Charlie*,
11 No. 32,504, mem. op. ¶ 3; *Norberto*, No. 32,353, mem. op. ¶ 3. Both district courts
12 concluded, as a matter of law, that the respective arresting officers were (1) cross-
13 commissioned to enforce Navajo law, and (2) authorized by the Navajo Nation to
14 transport members of the Navajo Nation off the reservation “to complete [their]
15 investigation of . . . Defendant[s]’ possible violation of Navajo Nation law.”
16 Consequently, both courts concluded that tribal sovereignty was not infringed by the
17 failure to follow extradition procedures.

18 {8} In separate appeals, the New Mexico Court of Appeals reversed and remanded
19 both cases back to their respective district courts. *Charlie*, No. 32,504, mem. op. ¶ 13;
20 *Norberto*, No. 32,353, mem. op. ¶ 12. The Court of Appeals held that because cross-

1 commission agreements had to be written, the scope of a waiver of tribal sovereignty
2 cannot be established on either the basis of witness testimony or affidavits. *Charlie*,
3 No. 32,504, mem. op. ¶¶ 11-12; *Norberto*, No. 32,353, mem. op. ¶¶ 10-11. The Court
4 of Appeals remanded both cases to the district courts to analyze the cross-commission
5 agreement to determine the scope of the State Police officers' authority under that
6 agreement. *Charlie*, No. 32,504, mem. op. ¶ 13; *Norberto*, No. 32,353, mem. op. ¶ 12.
7 We granted the State's petition for writ of certiorari in each case to address the
8 question of whether

9 [T]he Court of Appeals err[ed] when it ruled that under the facts of
10 [these] case[s,] the district court[s were] required to review the actual
11 cross-commission agreement between the State of New Mexico and the
12 Navajo Nation prior to deciding whether a cross-commissioned officer
13 had the authority to temporarily transport a member off the Navajo
14 Nation for [chemical testing] intended for use in tribal and state court
15 proceedings.

16 We now reverse the Court of Appeals and remand both cases back to the Court of
17 Appeals to consider other legal issues raised by Defendants.

18 ¶9) As described above, Defendants contested neither the State Police officers'
19 testimonies nor the affidavit offered by the State, which were used to establish both
20 the existence and the scope of the cross-commission agreement between the Navajo
21 Nation and the State Police. Furthermore, in their respective motions to dismiss,
22 Defendants never argued that a written agreement was required to establish either the
23 existence or the scope of a cross-commission agreement.

1 {10} Defendants instead relied on *State v. Harrison*, 2010-NMSC-038, 148 N.M.
2 500, 238 P.3d 869. They correctly noted that “a state officer’s investigative authority
3 in Indian country necessarily is limited by tribal sovereignty.” *Id.* ¶ 20. *Harrison* held
4 that “a determination of whether . . . an exercise of state authority infringes on tribal
5 sovereignty turns on the existence of a governing tribal procedure.” *Id.* ¶ 23 (internal
6 quotation marks and citation omitted). Accordingly, “[w]here a valid extradition
7 procedure exists, the arrest of an Indian on Indian land” by state officers for
8 violations of state law is illegal. *Id.* ¶ 22. Defendants thus appear to rely on *Harrison*
9 for the proposition that irrespective of the State Police officers’ cross-commissioned
10 status, extradition procedures must be followed, even when cross-commissioned
11 officers remove Navajos from Navajo land to pursue Navajo criminal investigations.

12 {11} We conclude that the Court of Appeals’s opinion exceeded the scope of review
13 in these cases. *See* Rule 12-216(A) NMRA. Preservation of a question for review
14 requires that “a ruling or decision by [a] district court [be] fairly invoked.” *Id.* Here,
15 Defendants did not argue that a written cross-commission agreement had to be
16 entered into the record to properly establish said agreement’s scope. Defendants did
17 not contest either the existence or the scope of the cross-commission agreement.
18 Instead, they relied on *Harrison* for the proposition that even cross-commissioned
19 officers investigating Navajo crimes had to follow extradition procedures before
20 transporting Navajos off Navajo land for chemical tests. Consequently, reversing and

1 remanding the district courts' orders for the courts to conduct an analysis into the
2 scope of the cross-commission agreement is improper.

3 {12} The only remaining question is whether extradition protocols had to be
4 followed in the cases at bar. The Navajo Nation Code states that “[a]ny person
5 lawfully arrested for violating Navajo National criminal law(s) or detained by Navajo
6 Nation Court order shall not be released to any other jurisdiction, including the
7 federal government, except pursuant to formal extradition procedures as set forth in
8 17 [Navajo Nation Code] § 1951 *et seq.*” Navajo Nation Code Ann. tit. 7, § 607
9 (2003). Here, Defendants do not dispute that (1) the cross-commissioned officers
10 were investigating violations of Navajo law when they transported Defendants off the
11 reservation for chemical tests, or (2) after the chemical tests were completed,
12 Defendants were returned to the reservation and booked into a Navajo detention
13 center. *Charlie*, No. 32,504, mem. op. ¶ 2; *Norberto*, No. 32,353, mem. op. ¶ 2. Thus,
14 Defendants were never released into the custody of another jurisdiction.
15 Consequently, extradition was not implicated.

16 {13} Our conclusion is strengthened by an analysis of Navajo extradition
17 procedures. The Navajo Nation Code provides that

18 Whenever the President of the Navajo Nation is informed and
19 believes that a person has committed a crime outside of Indian Country
20 and is present in Navajo “Indian Country” and using it as an asylum
21 from prosecution by the state, the President of the Navajo Nation may
22 order any Navajo police officer to apprehend such person and deliver

1 him or her to proper state authorities at the Reservation boundary.

2 Navajo Nation Code Ann. tit. 17, § 1951 (2000). Here, Defendants were never
3 delivered to authorities who were acting as state officers. At the time of Defendants'
4 transport, both arresting State Police officers were acting pursuant to their roles as
5 enforcers and investigators of Navajo law. *Charlie*, No. 32,504, mem. op. ¶ 2;
6 *Norberto*, No. 32,353, mem. op. ¶ 2.

7 {14} Therefore, there was no need to follow Navajo extradition procedures because
8 Defendants were not transported off the reservation for delivery into the custody of
9 state officials. They were transported as part of an investigation of Navajo crimes and
10 were subsequently booked at a Navajo detention facility. Defendants' argument to the
11 contrary is erroneous as a matter of law.

12 {15} In summary, the testimony that the Navajo Nation enabled cross-commissioned
13 State Police officers to transport Navajos off the reservation for chemical testing to
14 investigate Navajo Code violations was unopposed. Defendants instead argued that
15 in spite of this testimony, extradition protocols had to be followed. They erred as a
16 matter of law because no extraditions occurred. In addition, because Defendants' only
17 argument for lack of jurisdiction erroneously relied on the purported need to follow
18 Navajo extradition procedures, the Court of Appeals erred in reversing the district
19 court decisions on bases that exceeded the scope of review. As a result, we reverse
20 the Court of Appeals.

1 {16} However, Defendants raised other arguments on appeal. *Charlie*, No. 32,504,
2 mem. op. ¶ 12; *Norberto*, No. 32,353, mem. op. ¶ 11. We therefore remand these
3 cases to the Court of Appeals to address the remaining contentions in a manner that
4 is consistent with our disposition.

5 {17} **IT IS SO ORDERED.**

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BARBARA J. VIGIL, Chief Justice

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PETRA JIMENEZ MAES, Justice

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RICHARD C. BOSSON, Justice

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EDWARD L. CHÁVEZ, Justice

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CHARLES W. DANIELS, Justice