No. 80653-5

FAIRHURST, J. (dissenting) — This case presents the difficult question of whether tribal police have the authority to stop and detain a non-Indian for a violation of tribal and state law on a reservation after the alleged offender has evaded tribal police and left reservation boundaries. I join that part of the majority's analysis that finds, pursuant to inherent tribal sovereignty, that Lummi Nation Tribal Police Officer Mike McSwain had authority to stop Loretta Eriksen outside the reservation to determine whether she was a tribal member over whom McSwain had jurisdiction. However, because I cannot find any applicable authority under which McSwain had the power to detain Eriksen once he determined she was not a tribal member, I am ultimately forced to dissent.

The majority finds two sources of law that it claims authorized McSwain to detain Eriksen until Whatcom police arrived: the common law doctrine of fresh pursuit and the Treaty of Point Elliott. Treaty between the United States and the Dwámish, Suguámish, and other allied and subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, art. 9, 12 Stat. 927 (hereinafter Treaty of Point Elliott). A careful examination leads me to the conclusion that neither provides

McSwain with the authority necessary to detain a non-Indian outside the reservation for offenses committed within the reservation's boundaries. I am mindful that, as the majority points out, this result is ludicrous. However, it is also a result compelled by the applicable law.

Fresh pursuit is inapplicable to this case. McSwain did not have authority to stop or detain Eriksen pursuant to *statutory* fresh pursuit because he is not a general authority Washington peace officer. *See* RCW 10.92.020; RCW 10.93.070(6), .120. Thus, any fresh pursuit authority must come from the common law. However, at common law, fresh pursuit was available only for suspected felonies. *See State v. Barker*, 143 Wn.2d 915, 921, 25 P.3d 423 (2001); *City of Wenatchee v. Durham*, 43 Wn. App. 547, 550-51, 718 P.2d 819 (1986). Driving under the influence (DUI) is not a felony.[1] RCW 46.61.502(5) (DUI is a gross misdemeanor); *accord* Lummi Nation Code of Laws Criminal Traffic Code 6A.01.020(a)(2); 6A.02.090(d) (DUI is a class B offense subject to 30-90 days in jail and a fine of $250-$1,250). That RCW 10.93.120 expanded the definition of *statutory* fresh pursuit has no bearing on

[1]According to the statute in effect at the time of Ericksen's incident, a driver who "willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop" is guilty of a class C felony. Former RCW 46.61.024(1) (2003). However, the record contains no factual findings concerning Eriksen's manner of driving after McSwain signaled her to pull over. Without a finding that Eriksen drove recklessly after McSwain signaled for her to stop, Eriksen could be convicted only of failure to obey a police officer, which is a misdemeanor. RCW 46.61.022.

the common law definition, under which McSwain had no authority to stop or detain Eriksen.

The majority claims that article 9 of the Treaty of Point Elliott requires Lummi Nation tribal police to detain a nontribal offender outside the reservation until an officer with jurisdiction arrives. Treaty of Point Elliott, *supra*, 12 Stat. 929. That is not the case. Article 9 reads in part, "And the said 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." *Id*. "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." *State v. Schmuck*, 121 Wn.2d 373, 385, 850 P.2d 1332 (1993) (citing H.R. Rep. No. 474, 23d Cong., 1st Sess., at 98 (1834)). As Eriksen was already off the reservation when McSwain stopped her, the fear of offenders hiding out on reservations was not directly implicated.

It is true that treaties are to be interpreted liberally, and ambiguities resolved in favor of the tribes. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195 n.5, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999). However, that liberal construction is supposed to determine how the Indians would have interpreted a

treaty provision *at the time the treaty was signed*. *Tulee v. Washington*, 315 U.S. 681, 684-85, 62 S. Ct. 862, 86 L. Ed. 1115 (1942). It is not a blank check to rewrite the language of a treaty, even to avoid injustice. *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353, 65 S. Ct. 690, 89 L. Ed. 985 (1945). At the time of the treaty's signing, I find it highly unlikely that anyone would have read article 9 as the majority does. In fact, article 9 opens with the express premise that "[t]he said tribes and bands acknowledge their dependence on the government of the United States." Treaty of Point Elliott, *supra*, 12 Stat. 929. The article was meant to *limit* tribal authority, and to read article 9 as an affirmative acknowledgment of tribal authority outside the reservation is to effectively rewrite it.

We, as a state court, do not have the power to imbue a treaty between an Indian tribe and the federal government with a meaning it never had. Article 9 of the Treaty of Point Elliott does not address tribal authority outside the reservation's boundaries, and not detaining Eriksen would not "shelter" or "conceal" her from the laws of the United States or the state of Washington--she would clearly remain subject to stop and arrest by local police. *Id.* McSwain certainly had the authority, perhaps even the duty, to notify the Whatcom County Sheriff's Office that an

individual who appeared to be impaired was driving a car fitting the description of Eriksen's car in the vicinity of the location in which Eriksen was first stopped. However, the treaty does not contain the authority necessary for McSwain to detain her until Whatcom police arrived.

I again stress that I am as troubled by this case as the majority. It is ludicrous that a suspected drunk driver who has been stopped outside a reservation's boundaries by a tribal police officer must be allowed to get back on the road if she is not a tribal member. It creates perverse incentives for non-Indians to evade tribal police who attempt to stop them for traffic offenses within the reservation's boundaries. However, I cannot avoid my duty to faithfully interpret the law, and I can find no source of law under which McSwain had authority to detain Eriksen in this case.

To avoid similar results in the future, several approaches might be taken. The most obvious is that tribal police departments could participate in the program outlined in chapter 10.92 RCW, which provides a mechanism by which tribal police officers can be authorized to act as general authority Washington peace officers, including the power to engage in statutory fresh pursuit. The legislature may also choose to expand statutory fresh pursuit authority to include tribal police officers

regardless of a tribe's participation in the chapter 10.92 RCW program. However, I do not believe that any existing source of law authorizes the result reached by the majority.

I regret that I must dissent. Although McSwain had authority to determine whether Eriksen was a tribal member, he did not have authority to detain her once he learned she was not a tribal member. Under the facts of this case, it is unclear when McSwain knew or should have known that Eriksen was a not tribal member. Observations McSwain made after he knew or should have known that Eriksen was not a tribal member are inadmissible and should have been suppressed.

I would reverse and remand for further proceedings.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:
Chief Justice Barbara A. Madsen

Justice Gerry L. Alexander