No. 80653-5

OWENS, J. (dissenting) -- This case concerns an Indian tribe's authority to detain a non-Indian who threatens the health and welfare of a tribe and its members until state law enforcement officers arrive. The general power of a tribe to do so is well established. *See, e.g.*, *State v. Schmuck*, 121 Wn.2d 373, 390-91, 850 P.2d 1332 (1993). The unique aspect of this case is that, in the process of pulling over the driver who threatened the tribe's health and welfare, the driver and tribal law enforcement officer crossed the reservation's border. Under my reading of applicable precedent, the tribe possesses authority to detain a non-Indian driver who violated the law while on the tribe's reservation and whose conduct continues to directly threaten the health or welfare of the tribe. *See Montana v. United States*, 450 U.S. 544, 566, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981); *Schmuck*, 121 Wn.2d at 391. The majority disagrees.

Accordingly, I respectfully dissent.

I. Facts

The facts set forth by the majority are accurate as far as they go, but several additional facts are relevant. Slater Road lies entirely within, and constitutes the northern boundary of, the Lummi Reservation. While patrolling this area of the reservation in the early hours of August 10, 2005, Officer Mike McSwain of the Lummi Nation Police Department was driving east on Slater Road. After an oncoming car failed to dim its high-beam lights in response to Officer McSwain flashing his own high-beam lights, Officer McSwain prepared to make a U-turn and contact the driver of the vehicle. As he did so, the oncoming vehicle drifted across the center of the road and came within several feet of Officer McSwain's police car before drifting back into the appropriate westbound lane. At this point Officer McSwain discovered that a second vehicle was following the first. Officer McSwain then turned around, activated his car's overhead lights, and caught up to the vehicles as they approached the intersection of Slater Road and Elder Road. This intersection forms a T; Elder Road runs north from Slater Road, which continues both east and west from that point. On the northwest corner of the intersection is a gas station and minimarket. The two vehicles pulled off the road to the right (i.e., north) and into the gas station's parking lot, which is immediately adjacent to Slater Road. Officer McSwain pulled in behind the first vehicle while the second vehicle pulled around the side of the gas station out

of Officer McSwain's view. Immediately thereafter, the driver of the first vehicle, Loretta Eriksen, moved from the driver's seat, over the center console, and into the passenger seat while the passenger attempted to run around the front of the car to the driver's seat. Officer McSwain ordered Eriksen and the passenger to put their hands on the dashboard and the hood, respectively, while he waited for additional units to respond.

After additional Lummi officers arrived and verified that the second vehicle had left the scene, Officer McSwain approached Eriksen. While talking to Eriksen, Officer McSwain smelled an odor of alcohol on her and observed that her eyes were bloodshot and watery, her speech was slurred, and she staggered as she walked. Upon discovering that Eriksen was not a tribal member, Officer McSwain requested that Whatcom County send a deputy sheriff. In the meantime, Officer McSwain informed Eriksen that she would be detained until the deputy arrived.

II. The Lummi Nation's Inherent Authority Justified Eriksen's Detention

An Indian tribe possesses authority to stop vehicles that violate tribal laws while on the tribe's reservation. *Schmuck*, 121 Wn.2d at 380. This authority flows from the tribe's inherent "power to prescribe and enforce internal criminal and civil laws" and applies even where the driver of the vehicle stopped turns out to be a non-Indian. *Id.* If the driver does turn out to be a non-Indian, the tribe lacks jurisdiction to prosecute

the driver, *see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978), but may detain the driver until "he or she can be turned over to state authorities," *Schmuck*, 121 Wn.2d at 392; *accord United States v. Terry*, 400 F.3d 575, 580 (8th Cir. 2005).

A tribe's power to detain a non-Indian derives from two sources. First, that power is a component of the tribe's inherent authority to exclude trespassers. *Schmuck*, 121 Wn.2d at 389-90 (quoting *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975)). Second, and more relevant to the present case, the power to detain is, in certain instances, a component of the tribe's inherent authority to regulate conduct of non-Indians that "threatens or has some direct effect on the . . . health or welfare of the tribe." *Montana*, 450 U.S. at 566. This is commonly referred to as the "second *Montana* exception." In *Schmuck*, this court recognized that drunk driving threatens a tribe's health and welfare and therefore held that tribal police officers had inherent authority to detain a person suspected of drunk driving until state authorities arrived. 121 Wn.2d at 391-92.

The majority suggests that the tribe's inherent authority to detain a non-Indian disappears the moment the non-Indian crosses the boundary of the reservation, notwithstanding that a violation of the law took place on the reservation and notwithstanding the continuing existence of a threat to the tribe's health and welfare.

The present case is illustrative. While on the Lummi Reservation, Eriksen came within several feet of colliding with Officer McSwain's car, which was already pulled to the side of the road in preparation for a U-turn. In response to Officer McSwain's activation of his car's overhead lights, Eriksen pulled into a gas station immediately adjacent to Slater Road. She did not leave the area. Had Officer McSwain been unable to detain her, nothing would have prevented Eriksen from simply returning to Slater Road (i.e., the reservation), at which point Officer McSwain could have again activated his overhead lights and begun the process anew. Though I understand the majority's desire for a bright-line rule, its proposed standard is untenable.

A hypothetical further illustrates the absurdity of the majority's proposed rule. Suppose a tribal law enforcement officer observes an arsonist attempting to set a fire in a wooded area of the reservation. The officer commands the would-be arsonist to "Stop in the name of the law!" The arsonist flees across the border of the reservation and immediately begins setting fire to the same forest, a fire that will inevitably and quickly spread to the reservation, sweeping through Indian homes and land. Must the tribal law enforcement officer stand on the reservation side of the boundary and fiddle with his radio while the reservation burns? According to the majority's interpretation of inherent tribal authority, it appears so.

The better rule is that, under the second *Montana* exception, where an

individual (1) violates the law while on an Indian reservation and (2) continues to pose a direct and immediate threat to the health or welfare of the tribe, the tribe may stop and detain that individual, notwithstanding that he or she may have traveled beyond the reservation's border. The instances in which this rule will justify off-reservation detention are apt to be few and far between. If an individual has crossed the reservation's border and is driving away from the reservation, the danger that individual poses to the tribe's health or welfare will generally be neither immediate nor direct. It will therefore not justify an off-reservation detention. Here, however, a dangerous and inebriated driver remained in her car immediately adjacent to the reservation. The tribe had inherent authority under the second *Montana* exception to detain Eriksen based on the direct and immediate threat she posed to the health and welfare of the tribe.[1]

The majority suggests that a contrary interpretation of the tribe's inherent power is necessary in order to avoid abrogating the State of Washington's statutory scheme governing fresh pursuit. While I disagree that allowing a tribe to detain

[1] The majority's implication that this approach is a "judicial distortion of the doctrine of inherent sovereignty," majority at 11, substantially misses the mark. *See, e.g.*, Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. Rev. 48, 50 (2010). ("[T]he [United States Supreme] Court changed direction sharply and became increasingly inimical to tribal sovereignty, especially in regard to tribal authority over non-Indians.") The doctrine of inherent sovereignty, as interpreted by the United States Supreme Court, does not yet preclude tribes from protecting the health and welfare of their members by briefly detaining non-Indians in the circumstances present in this case.

persons threatening the health and welfare of the tribe abrogates the State's statutory scheme, this is, in the end, irrelevant. We should not be interpreting the tribe's inherent authority in the light of state statutes; to the contrary, we should be interpreting state statutes in light of a tribe's inherent authority. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."). Only Congress can deprive tribes of their sovereign authority. *Schmuck*, 121 Wn.2d at 393.

Ultimately, the majority's holding undermines our decision in *Schmuck*. Under the majority's rule, the Lummi Tribe is effectively unable to stop vehicles traveling west on Slater Road, no matter how great the danger they pose, because the moment the vehicles pull over to the right they will have crossed the border of the Lummi Reservation. I do not find this absurd result to be compelled by federal or state case law interpreting a tribe's inherent authority.

I respectfully dissent.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Justice Charles W. Johnson

Justice Tom Chambers