ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20010047

McKenzie County Social Service Board,
Appellant,

v.

C.G.,
Appellee.

Supreme Ct. No. 20010047
District Ct. No. 91-R-025

APPEAL FROM THE McKENZIE COUNTY
DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

APPELLANT'S REPLY BRIEF

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I. Introduction.

C.G. and the state disagree on the governing law. We assert that while Congress has authority to resolve this jurisdictional issue, it hasn't spoken on paternity and, therefore, the balancing of interests test applies to determine jurisdiction. C.G., however, argues that the only way the state can have jurisdiction is if Congress affirmatively gives it.

C.G. also argues that state law itself -- N.D.C.C. ch. 27-19 -- prohibits the state from exercising jurisdiction. The state didn't discuss this issue in its opening brief because C.G. didn't raise it below and the district court didn't apply it. Chapter 27-19 provides a means by which tribes can accede to state jurisdiction if they wish to do so. It is not, however, provide the exclusive source of state jurisdiction. Jurisdictional laws of general applicability are also available and give the state jurisdiction.

II. State jurisdiction is not dependent on an affirmative Congressional grant and can exist upon balancing the interests at stake.

The governing precedent, Williams v. Lee, 358 U.S. 217, 220 (1959), states:

> [A]bsent governing Acts of Congress, the question [of state adjudicatory jurisdiction] has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

This standard has often been reaffirmed. E.g., Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 884 (1986); Fisher v. District Court, 424 U.S. 382, 386 (1976).

Williams creates a two-part test. "[A]bsent governing Acts of Congress" is the first. It recognizes that Congress has plenary authority over Indian affairs and can specifically grant or deny state jurisdiction. Thus, the analysis of any

jurisdictional dispute begins by determining if Congress has addressed the subject.

"[A]bsent governing Acts of Congress" doesn't mean, as C.G. contends (C.G. Brief at 11, 13, 14), that Congress must affirmatively give states adjudicatory jurisdiction. C.G. doesn't cite case law supporting this interpretation and state courts that have considered jurisdiction over Indian paternity do not adopt it. They look first for governing federal law, and after finding that Congress hasn't spoken on this subject they then apply the balancing of interests test.

Good examples of this are State v. Medina, 549 N.W.2d 507 (Iowa 1996), and State v. Jojola, 660 P.2d 590, 592-93 (N.M. 1983). Medina stated that "the first part of the [Williams] test" is to determine whether there is any governing federal law. Medina, 549 N.W.2d at 509. Finding none, the courts then "must proceed to determine whether" state court jurisdiction "infringes on" tribal sovereignty. Id.

Jojola stated that "[t]he first part of the Williams test is whether there are any Acts of Congress that govern this area. We have found none..." Jojola, 660 P.2d at 592. The court then discussed the infringement test.

Other decisions that do not resolve jurisdiction as C.G. suggests, that is, they don't require that a federal statute specifically grant state jurisdiction, are listed at pages 17 - 18 of our opening brief. Commentators also disagree with C.G.'s view.

> [B]ecause federal law rarely preempts state law expressly, the analysis is largely one of balancing interests . . . This analysis would allow a state to interfere even with tribal self-government . . . if the state interest proved to be compelling enough.

Nancy Rank, "Beyond the Jurisprudential Midrash: Toward a Human Solution to Title IV-D Child Support Enforcement Problems Across Indian Country Borders,"

33 Ariz. L. Rev. 337, 351-57 (1991). See also Conf. W. Attys. Gen., American Indian Law Deskbook 153-54 (2nd ed. 1998).

But more persuasively, this court's prior Indian paternity decisions don't apply Williams as C.G. asks. The court decided neither McKenzie County Soc. Servs. Bd. v. V.G., 392 N.W. 399 (N.D. 1986), nor In re M.L.M., 529 N.W.2d 184 (N.D. 1995), on the basis that Congress hasn't given the state jurisdiction. Rather, because there is no governing federal law that settles the jurisdictional question, each case was decided by reference to Williams' infringement test, an examination of the facts, and a finding that state jurisdiction unduly interfered with tribal interests.

McKenzie County, 392 N.W.2d at 401 (quoting Wold Engineering, 476 U.S. at 884), states.

> "Accordingly, we have formulated a comprehensive pre-emption inquiry . . . which examines not only the congressional plan, but also 'the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.'"

The court then proceeded to look at the factual circumstances. While identifying some state interests, it found them "insufficient to permit state court jurisdiction . . . " Id. C.G. misreads the law in asserting that only a specific federal statute can give the state jurisdiction. It is a balancing test.

> In litigation between Indians and non-Indians arising out of conduct on an Indian reservation . . . the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on "whether the state action infringed on the right of reservation Indians to make their own laws . . ."

Fisher, 424 U.S. at 386. As noted above, courts and commentators recognize the balancing of interests test to assess state jurisdiction where Congress has not spoken. Additional authorities are cited in our opening brief. Appellant's Brief at 12 - 13, 16 - 18, 20 - 21.

C.G. asserts that the state identifies Title IV-D as a federal law that gives the state jurisdiction. C.G. Brief at 14. We don't rely on Title IV-D for the proposition that it specifically gives the state adjudicatory jurisdiction, but rather that it is to be weighed in balancing the interests at stake. Appellant's Brief at 19. Title IV-D is an "interlocking . . . cooperative federal-state" program. Blessing v. Freestone, 520 U.S. 329, 333 (1997). It and its deference to states is a key element in weighing the propriety of state jurisdiction.

C.G. also misstates our position by asserting that we seek jurisdiction because there is no tribal forum. C.G. Brief at 25. We recognize not only the tribal court's existence but also its jurisdiction. Appellant's Brief at 6. The state and tribe have concurrent jurisdiction but the facts here do not obligate the state to defer to tribal jurisdiction.

The parties disagree on what tribal law governs domestic relations. We cited Chapter 12 of the Tribal Code. Appellant's Brief at 14. C.G. thinks we overlooked Chapter 5-17 and that it superseded Chapter 12. C.G. Brief at 25 n.5. For this proposition C.G. relies on a tribal resolution. C.G. Addendum at 12. The resolution, however, says that the existing Chapter 5 is repealed but says nothing about Chapter 12. Chapter 12 appears to remain tribal law.

Our references to tribal law come from the two-volume Fort Berthold Tribal Code in the Supreme Court's law library. We understand that the code is kept up to date. It doesn't contain a Chapter 5-17. But while tribal law governing domestic relations is uncertain, the dispute is unimportant. Even if Chapter 5-17 is part of the code and Chapter 12 isn't, Chapter 5-17's provisions still do not comply with all requirements demanded by Title IV-D. For example, it doesn't contain the child support guidelines and genetic testing requirements and the presumptions regarding these matters as Title IV-D mandates. Appellant's Brief at 14-15.

We also disagree with C.G.'s opinion that we have seven years to bring a paternity action in tribal court. C.G. Brief at 26. If Chapter 5-17 is tribal law, it allows "authorities charged with the support of the child" to bring a paternity action. Sec. 5-17-05(3) at C.G. Addendum at 5. Presently there is no "authority" charged with J.C.'s care and, therefore, it is uncertain whether tribal law allows a paternity suit. The tribal court could also apply laches.

III. While Chapter 27-19 provides a mechanism by which tribes can accept jurisdiction, it isn't the exclusive means by which the state can acquire jurisdiction.

A. Chapter 27-19 and the Whiteshield decision.

C.G. argues that state law itself -- Chapter 27-19 -- precludes the state from exercising jurisdiction. This chapter is the result of Public Law 280, enacted in 1953. 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-25, 28 U.S.C. § 1360). Public Law 280 gave a few states criminal and civil jurisdiction over Indian country (Pub. L. 280 §§ 2, 4) and allowed other states the opportunity to acquire jurisdiction through implementing legislation. Pub. L. 280 §§ 6, 7. North Dakota's effort to do so is Chapter 27-19, enacted in 1963. But state jurisdiction is conditioned on tribal consent, N.D.C.C. § 27-19-02, which has not been given by any tribe. Thus, the state doesn't have jurisdiction in this case or any other under Chapter 27-19, or Public Law 280, which Chapter 27-19 implements.

The question thus is, whether Chapter 27-19 is the exclusive source of state jurisdiction, as C.G. asserts, or whether the state can have jurisdiction under jurisdictional rules of general applicability?

In re Whiteshield, 124 N.W.2d 694, 696, 698 (N.D. 1963), articulated the proposition that Chapter 27-19 is a complete disclaimer of jurisdiction over actions arising in Indian country unless the tribe has accepted state jurisdiction.

This interpretation is incorrect and if the case has not already been overruled, it should be.

B. Whiteshield misinterprets Public Law 280 and Chapter 27-19: Wold Engineering decisions.

In the first Wold Engineering decision this court ruled that a tribe couldn't sue a non-Indian in state court because Chapter 27-19, which implements Public Law 280, is a complete disclaimer of state jurisdiction over Indians. Three Affiliated Tribes v. Wold Engineering, 321 N.W.2d 510, 512 (N.D. 1982). The Supreme Court, however, stated that North Dakota misunderstood Public Law 280. Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 141, 153 (1984). Public Law 280 "was intended to facilitate rather than impede the transfer of jurisdictional authority to the States." Id. at 150. Since this was its purpose, North Dakota was wrong in interpreting it as a disclaimer of jurisdiction, at least where an Indian sought access to state courts.

The Court also reviewed Chapter 27-19 and North Dakota's 1958 constitutional amendment intended to allow for implementation of Public Law 280. "On their face, both . . . appear to *expand* preexisting state jurisdiction over Indian country rather than contract it." Id. at 144. In sum, the Court ruled the North Dakota had read both Public Law 280 and Chapter 27-19 too restrictively. Id. at 151 n.11,153-55.

As a result of the Supreme Court's decision, this court recognized that there could be some state jurisdiction over Indian affairs -- a step back from Whiteshield -- and, therefore, Public Law 280 and Chapter 27-19 were not absolute disclaimers of jurisdiction. Three Affiliated Tribes v. Wold Engineering, 364 N.W.2d 98, 100 (N.D. 1985). But when the court still required tribal consent under 27-19, id. at 103-04, the Supreme Court granted review.

It again stated that Public Law 280 was not meant to restrict state jurisdiction, but to expand it. Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 885-86 (1986). Public Law 280 was a part of the then federal Indian policy seeking "the gradual assimilation of Indians into the dominant American culture and easing" federal involvement in Indian affairs. Id. at 886.

We recognize that Wold Engineering could be limited to instances in which Indians want access to state court. Even so, the Supreme Court's ruling that North Dakota misunderstood the import of Public Law 280 calls into question Whiteshield. Indeed, Whiteshield turns Public Law 280 on its head. The law "was intended to facilitate, not to impede, the transfer of jurisdictional responsibility to the States." Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 490 (1979). And yet Whiteshield finds that Public Law 280 and its implementing state law, Chapter 27-19, not only impede state jurisdiction but entirely disclaim it. The foundation for Whiteshield's restrictive rule is flawed.

C. Whiteshield misinterprets the disclaimer of jurisdiction provisions: State v. Hook.

At issue in State v. Hook, 476 N.W.2d 565 (N.D. 1991), was a 1946 federal law granting the state misdemeanor jurisdiction on the Spirit Lake Reservation. The court had first considered this in State v. Lohnes, 69 N.W.2d 508 (N.D. 1955), and ruled that the disclaimer of jurisdiction provisions in the state's Enabling Act and constitution constituted a complete relinquishment of state jurisdiction over Indian country and, therefore, the 1946 jurisdictional grant could not take effect. Id. at 568. But Hook overruled this interpretation. It ruled that the disclaimer of jurisdiction provisions were disclaimers of proprietary interests in Indian land and not disclaimers of governmental powers. Hook, 476

N.W.2d at 570. Therefore, nothing prevented the state from exercising jurisdiction granted under the 1946 law. Id. at 571.

This is important because in Whiteshield the court stated that the constitution's disclaimer of jurisdiction provision, as well as Chapter 27-19, constitute a complete disclaimer of adjudicatory authority. Whiteshield, 124 N.W.2d at 696. But Hook reinterprets the disclaimer of jurisdiction provisions and in doing so further erodes the foundation of Whiteshield.

D. Whiteshield has been inconsistently applied.

While some later decisions reaffirm Whiteshield's absolute rule, e.g. Wold Engineering, 321 N.W.2d at 512; White Eagle v. Dorgan, 209 N.W.2d 621, 623 (N.D. 1973)(extending Whiteshield to state regulatory jurisdiction), others decisions do not. Because of the court's inconsistency there is further doubt about the continued precedential value of Whiteshield and whether Chapter 27-19 is indeed a complete disclaimer of state jurisdiction.

Just five years after Whiteshield the court rejected the Whiteshield analysis. In Fournier v. Roed, 161 N.W.2d 458 (N.D. 1968), the court allowed the state to exercise on a reservation criminal jurisdiction over a tribal member. The court discussed Public Law 280 -- which allowed for acquisition of not only civil jurisdiction but also criminal jurisdiction -- and the state's implementation of it through Chapter 27-19. Id. at 463-65. Without mentioning Whiteshield the court ruled that it "will not infer a prohibition against" state jurisdiction, id. at 465, although that is just what it did in Whiteshield. Rather than infer limits on the state's sovereignty the court stated that it would

> require that we be shown that the State is prohibited from exercising such power by some specific provision of the Constitution or laws or treaties of the United States before we will hold that the State does not have such power.

Id.

This is exactly right. North Dakota has jurisdiction over all people and land in the state unless some specific law limits the state's ability to exercise its sovereign powers. Granted, there are many limits on state authority over Indians and Indian country, but those limits exist by federal law and additional limits on North Dakota's sovereignty should not be inferred or implied. Rather than apply Whiteshield's rule, Fournier applied the infringement test, id. at 466-67, and found that this particular exercise of state criminal jurisdiction on the reservation did not interfere with tribal self-government. Id. at 467.

Whiteshield's rule of "no state jurisdiction" wasn't applied in the court's two Indian paternity cases, McKenzie County and M.L.M. In both cases the parties were tribal members and conception occurred on the reservation. But rather than apply Whiteshield's bright line test, the court examined the facts to determine if state jurisdiction would infringe on tribal interests.

Whiteshield also wasn't applied in Byzewski v. Byzewski, 429 N.W.2d 394 (N.D. 1988), a divorce action brought by a non-Indian husband against his Indian wife. The couple and their children lived on the reservation, though the father moved off of it shortly before the divorce. While paying lip service to Chapter 27-19, id. at 401, the facts were considered and the infringement test was applied. Id. at 397-400.

Under Whiteshield, however, there should have been no need for the court to consider the facts in McKenzie County, M.L.M., and Byzewski and to consider whether state jurisdiction interfered with tribal sovereignty. Whiteshield purports to adopt a strict rule of no state jurisdiction without Chapter 27-19 tribal consent. In these three cases the court seemingly could have applied Whiteshield to summarily decide them. By failing to do so, Whiteshield was implicitly overruled or at least called into question.

Another instance in which the court could have but didn't apply Whiteshield is State v. Hook. As discussed, at issue was whether a 1946 federal law granting the state criminal jurisdiction on the Spirit Lake Reservation could actually be implemented. The court didn't even discuss Chapter 27-19. Since the state had not acquired criminal jurisdiction under Public Law 280, as it could have (Pub. L. 280 §§ 6, 7), Whiteshield could have been applied in Hook to summarily disallow state jurisdiction under the 1946 grant. But the court cited Williams v. Lee. Hook, 476 N.W.2d at 567. It then found the 1946 law to be a governing Act of Congress and allowed the state to exercise jurisdiction under it. Id. at 571.

E. Summary.

Our final criticism of Whiteshield is that its ruling is made in conclusory fashion. It doesn't discuss either Indian jurisdictional principles or principles of state sovereignty. It doesn't discuss the legislative history or purposes of either 27-19 or the law it implements, Public Law 280. And indeed, nothing in either law says anything about being the exclusive source of state jurisdiction or about being a disclaimer of state jurisdiction, let alone a "complete" disclaimer.

Whiteshield made a sweeping rule that the state is without jurisdiction -- criminal, civil, and regulatory -- over large portions of the state. The ruling is suspect because it comes without any supporting analysis, and the court in such decisions as Hook and Fournier has correctly declined to apply it or its analysis. Furthermore, Whiteshield misinterprets Public Law 280, Chapter 27-19, and the disclaimer of jurisdiction provisions, and has been applied inconsistently. In sum, Chapter 27-19 is not the sole source of state jurisdiction over Indian country.

> [T]he failure of a state to acquire Public Law 280 authority is not determinative of a lack of state jurisdiction altogether; the court can look to the Williams [v. Lee] test. Hence Public Law 280 is essentially a separate consideration from the Williams test approach.

Rank, 33 Ariz L. Rev. at 354.

IV. Recent case law supports state jurisdiction over C.G.

Last month South Dakota decided two cases that illustrate the importance of a reservation residence in considering state jurisdiction. In State v. Mills, 2001 SD 65, __ N.W.2d __ (May 23, 2001), the mother and Mills were tribal members living on the Pine Ridge Reservation. Id. at ¶ 2. Conception of their child occurred on the reservation. Id. at ¶ 7. The mother applied for public assistance but sometime prior to the state's suit against Mills for paternity and child support he moved to Rapid City. Id. at ¶¶ 3,4. He was served in Rapid City but argued that the state didn't have jurisdiction. He said that because conception occurred on the reservation and all parties were tribal members, state jurisdiction would infringe upon tribal sovereignty. Id. at ¶¶ 4,5. C.G. makes the same argument.

The court rejected Mills' arguments. When Indians leave the reservation they become subject to state law and tribal sovereignty is not threatened. Id. at ¶ 9. Consequently, "state and tribal courts enjoy concurrent jurisdiction, and the case may be adjudicated by whichever court first obtains valid personal jurisdiction." Id.

State jurisdiction under similar facts was again confirmed in State v. Keckler, 2001 SD 68, __ N.W.2d __ (May 30, 2001), a child support case. All parties were tribal members and the mother and child lived on the reservation but the father lived in Santa Fe. Id. at ¶¶ 2, 3. The state court had concurrent jurisdiction with the tribal court. Id. at ¶7, 9.

V. Summary.

C.G. admits that he is the father of J.C. C.G. Brief at 2. Yet he wants to be free of a father's obligations. C.G. left the reservation two years before suit was brought and did not return for another two years. Id. at 3. Yet he wants the protections of reservation residence. Jurisdictional protections apply to reservation Indians but not to Indians who leave the reservation.

C.G. suggests that the court, if it sides with the state, will go where no court has ever gone. C.G. Brief at 19, 21, 38. This is hyperbole. C.G. is also mistaken in arguing that the court is being asked to upset 40 years of consistent state jurisprudence. C.G. Brief at 38. The jurisprudence hasn't been consistent and more recent decisions from this court and the Supreme Court require re-evaluation of Whiteshield.

We ask the court to apply the balancing of interests test as articulated by the Supreme Court and as applied by state courts. When the interests are balanced, particularly in light of C.G.'s absence from the reservation and the interlocking state/federal interests in administering Title IV-D, the district court properly exercised jurisdiction in 1991.

Dated this 11th day of June, 2001.

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