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CRIMINAL JURISDICTION: DOUBLE JEOPARDY IN INDIAN COUNTRY

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Criminal jurisdiction in "Indian country"[1] is a complicated and largely unresolved matter. On most reservations, the power to prosecute and try offenders is allocated among federal, state, and tribal courts according to a somewhat inconsistent set of statutory and judicial rules. Whether one or more of these authorities has jurisdiction in a particular case is determined by a combination of factors: the gravity of the offense, where the offense was committed, and whether either the offender or the victim was an Indian. This confusing method of defining and delimiting patterns of law enforcement authority has generated certain procedural problems which are peculiar to Indian defendants.

The most novel of these problems arises when a reservation Indian is threatened with separate criminal sanctions by the different authorities who purport to have jurisdiction over him. This situation usually develops when a federal prosecutor attempts to charge an Indian defendant with an offense under the Major Crimes Act[2] in a federal district court following a tribal court adjudication concerning the same matter. The question raised is whether multiple prosecutions of Indian defendants within this conflicting jurisdictional scheme violate the constitutional guarantee against double jeopardy. This note examines that question and the recent controversy which has surrounded it.

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1. "Indian country" is defined in 18 U.S.C. § 1151 (1970), which provides: "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of the state, and (c) all Indian allotments, the titles to which have not been extinguished, including rights-of-way running through same."

2. Act of Mar. 3, 1885, ch. 341, § 9, Stat. 385. Today, as amended, the Act embodies fourteen offenses and is codified in 18 U.S.C. § 1153 (1976), which provides in part: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

The fifth amendment mandate that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb..."[3] is the basis for the legal theory of double jeopardy. Simply stated, a person once tried cannot be subjected to a second prosecution for the same offense. Moreover, a defendant need not be charged with identical offenses before separate courts for double jeopardy to exist. Jeopardy also attaches where a second charge is a "lesser included offense"[4] of the first, *i.e.*, where every element of one charge necessarily constitutes an element of the other. Accordingly, the principle of collateral estoppel, to the extent it applies in criminal cases, is embodied in the double jeopardy protection.[5]

Despite the apparent breadth of this doctrine, it is well settled that the same act may constitute more than one offense when proscribed by different sovereigns.[6] For example, where the commission of a single act violates both the laws of the United States and those of an individual state, it is deemed two separate offenses.[7] In such cases, a defendant is not protected from successive prosecutions by the different sovereigns.[8] This result is predicated on the belief that both the federal government and the state have separate interests which can be protected only by permitting consecutive prosecutions, even though a defendant is thereby twice tried for the same act.

Because multiple prosecutions of a single defendant for the same act are sometimes justified, the parties to a criminal proceeding must be identified to give effect to the guarantee against double jeopardy. A defendant may successfully invoke fifth amendment protection only when the same sovereign is a party to successive prosecutions[9] or where the courts involved are themselves "arms of the same sovereign."[10]

3. U.S. CONST. amend. V.

4. Blockburger v. United States, 284 U.S. 299, 304 (1932). *See also* Gavieres v. United States, 220 U.S. 338 (1911).; Henry v. United States, 215 F.2d 639 (9th Cir. 1954).

5. Ashe v. Swenson, 397 U.S. 436 (1970). This note considers only the "cause preclusion" aspects of the double jeopardy protection. For an article treating the "issue proclusion" aspects of the guarantee against double jeopardy in the tribal-federal context, *see* Volman, *Criminal Jurisdiction in Indian Country; Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387 (1974).

6. Moore v. Illinois, 55 U.S. (14 How.) 13 (1852). This "exception" to the double jeopardy guarantee has been repeatedly reaffirmed. *See, e.g.*, Abbate v. United States, 359 U.S. 187 (1959) and cases cited therein.

7. 55 U.S (14 How.) 13, 19-20 (1852).

8. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).

9. 359 U.S. 187, 195 (1959).

10. Waller v. Florida, 397 U.S. 387, 393 (1970).

For the Indian defendant, the requirement that parties to a criminal proceeding be identified is crucial. If tribal courts and federal district courts are considered "arms of the same sovereign" for purposes of double jeopardy, then the disposition of a charge by a tribal court bars relitigation of the matter in the federal courts. If, on the other hand, tribal courts are thought to be sovereign entities, distinct from the courts of the United States, the federal prosecutors are free to relitigate charges against Indian defendants, notwithstanding the determination made by tribal judges and juries in earlier proceedings.

In recent years, this troublesome Indian law issue surfaced a number of times in different federal district courts. Despite such prevalence, a ruling squarely on the matter was generally avoided.[11] Furthermore, a split of authority developed among the few courts that attempted to resolve the issue. Two cases highlight the conflict: *United States v. Wheeler*[12] and *United States v. Walking Crow*.[13]

United States v. Wheeler

On October 16, 1974, Anthony Robert Wheeler, a Navajo Indian, was arrested by tribal police and charged with disorderly conduct.[14] The charge grew out of an incident involving a young female Indian which had earlier taken place on the Navajo Reservation. Two days after his arrest, the defendant pleaded guilty in tribal court to disorderly conduct and to a second charge of contributing to the delinquency of a minor.[15] He was fined and sentenced to jail on each charge.

Over a year later, Wheeler was indicted by a federal grand jury for the District of Arizona for carnal knowledge of a female under the age of sixteen.[16] It was undisputed that the federal charge was based upon the same incident and the same actions for which he had already been punished by the tribal court. Prior to trial, the defendant filed a motion to dismiss the indictment on the basis of

11. In addition to the principal cases discussed in this note, the issue of double jeopardy or collateral estoppel arising out of successive prosecutions in tribal and federal courts was raised in three recent cases. *See generally* United States v. DeCoteau, 516 F.2d 16 (8th Cir. 1975); United States v. Kills Plenty, 466 F.2d 240 (8th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); United States v. Demarrias, 441 F.2d 1304 (8th Cir. 1971). In each instance, the issue was avoided and the case disposed of on other grounds.

12. 545 F.2d 1255 (9th Cir. 1976).

13. 560 F.2d 386 (8th Cir. 1977).

14. Title 17, § 321 of the Navajo Tribal Code.

15. *Id.*, § 351.

16. 18 U.S.C. §§ 1153, 2032 (1970).

his earlier conviction. He argued that to permit a second trial in the federal court would violate his rights under the fifth amendment. The district court judge agreed and granted a motion to dismiss, reasoning that "the defendant [had] already once been placed in jeopardy for the same offense."[17]

In affirming the dismissal, the Ninth Circuit Court of Appeals, in effect, adopted the defendant's position that tribal courts and federal district courts were arms of the same sovereign. To support this theory, the court relied in part on dicta from another Ninth Circuit decision, *Colliflower v. Garland.*[18] There, after reviewing the history of a tribal court system substantially similar to that of the Navajo, the court concluded: "In spite of the theory that for some purposes an Indian tribe is an independent sovereignty, we think that, in light of their history, it is pure fiction to say that the Indian courts . . . are not in part, at least, arms of the federal government."[19]

The circuit court also found support for its conclusion by analogy to two earlier Supreme Court decisions, *Grafton v. United States*[20] and *Waller v. Florida.*[21] Each of those cases involved successive prosecutions before two courts of a single sovereign. In *Grafton*, the Supreme Court held that the double jeopardy guarantee proscribed prosecution in a United States territorial court once the defendant had been tried for the same offense in a federal military court. Similarly, in *Waller*, the Court ruled that parallel prosecutions in state and municipal courts were barred by the fifth amendment.

Noting that the Supreme Court had never applied the "dual sovereignty" rationale outside the federal-state context, the Ninth Circuit emphasized that Indian tribes did not possess the sovereign status of states.[22] Indeed, a distinction was clear: "The federal government has complete, plenary control over the criminal jurisdiction of the tribal courts. It possesses no such control with respect to the states."[23] Accordingly, *Wheeler* was not controlled by the series of cases which had held the doctrine of double jeopardy inapplicable to successive prosecutions by a state and the federal government.[24] A more suitable analogy, in the view of the

17. 545 F.2d 1255, 1256 (9th Cir. 1976). The decision of the district court was unreported.
18. 342 F.2d 369 (9th Cir. 1965).
19. *Id.* at 378, 379.
20. 206 U.S. 333 (1907).
21. 397 U.S. 387 (1970).
22. 545 F.2d 1255, 1257 (9th Cir. 1976).
23. *Id.*
24. *E.g.*, Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).

Ninth Circuit, was the relationship existing between territorial courts and other courts of the federal government.[25]

Alluding to *Grafton*, the court of appeals concluded that the defendant "could not be tried for the offense that he was previously convicted of in the Navajo tribal court without violating the Double Jeopardy Clause of the Fifth Amendment."[26]

United States v. Walking Crow

In early February, 1976, John Walking Crow, a member of the Sioux Tribe, was arrested on a tribal warrant charging him with simple theft. He had allegedly committed the offense on the Rosebud Sioux Reservation against another Indian, Thomas Standing Soldier. When brought before the tribal court, the defendant pleaded guilty and received a misdemeanor punishment.

Shortly over a month later, Walking Crow was indicted for robbery under the Major Crimes Act[27] by a federal grand jury for the District of South Dakota. He filed a motion to dismiss the indictment, claiming that since he had been convicted of theft in the tribal court and since the theft and the alleged robbery arose from the same incident, the felony prosecution was prohibited on double jeopardy grounds. The motion was denied and after a bench trial, Walking Crow was found guilty and sentenced to three years imprisonment.[28]

On appeal, the Eighth Circuit acknowledged that the defendant's position was fully sustained by the earlier case of *Wheeler*, but expressly declined to follow that decision.[29] Instead, it held that tribal courts and federal district courts were not arms of the same sovereign for purposes of double jeopardy.[30]

The circuit court based its conclusion, in part, on the holding in *Iron Crow v. Oglala Sioux Tribe*,[31] a case it had decided more than twenty years before. *Iron Crow* stood for the proposition that tribal courts were not creations of the Constitution or of the federal statutes; rather, they were products of inherent tribal sovereignty. While Congress had removed jurisdiction over certain matters from the tribal courts, the jurisdiction left to those

25. 545 F.2d 1255, 1257-58 (9th Cir. 1976).
26. *Id.* at 1258.
27. 18 U.S.C. § 1153 (1970).
28. 560 F.2d 386, 388 (8th Cir. 1977). The decision of the district court was unreported.
29. *Id.*
30. *Id.* The Eighth Circuit reaffirmed its conclusion that tribal courts and federal district courts were arms of different sovereigns in United States v. Elk, 561 F.2d 133 (8th Cir. 1977).
31. 231 F.2d 89 (8th Cir. 1956).

courts was both inherent and original.[32] Such "residual jurisdiction," in the view of the appellate court, was not compromised merely because the United States retained plenary control over the Indian courts.[33] Accordingly, the Eighth Circuit found no application of the same-sovereign theory to the facts of *Walking Crow*.[34]

The circuit court disapproved of Walking Crow's position from a practical standpoint as well. In rejecting the suggestion that Indian courts were adjudicatory arms of the federal government, the court noted that "the felony jurisdiction conferred on the federal courts . . . could in instances be frustrated by relatively minor prosecutions in the tribal courts."[35] Indian defendants, it was apparently feared, would invariably elect to stand trial in tribal courts to avoid the potential of a stiffer federal sentence under the Major Crimes Act.[36] Such a situation, the court concluded, would be undesirable, and "might lead to still further congressional encroachment on the jurisdiction of the Indian Courts."[37]

The Supreme Court's View

Late in 1977, to resolve the inter-circuit conflict, the Supreme Court granted a government petition for certiorari in *Wheeler*.[38] Five months later, the Court handed down its decision.[39] In a unanimous opinion, through Justice Stevens, the Court held that the Ninth Circuit had erred in its finding of double jeopardy; tribal courts and federal district courts were not adjudicatory arms of the same sovereign.

The basis for the Court's holding, and a recurrent theme throughout the opinion, is that the power of Indian tribes to enforce tribal laws is in no way attributable to a delegation of federal authority.[40] On the contrary, such power is inherent, although "it exists only at the sufferance of Congress and is subject to complete

32. 560 F.2d 386, 388 (8th Cir. 1977).
33. *Id.* at 389.
34. *Id.*
35. *Id.*
36. 18 U.S.C. § 1153 (1970).
37. 560 F.2d 386, 389 (8th Cir. 1977).
38. 434 U.S. 816 (1977).
39. 435 U.S. 313 (1978).
40. In footnote 28 to the opinion, the Court cryptically suggested that the result might be different were it faced with the question of federally delegated tribal power: "By emphasizing that the Navajo Tribe never lost its sovereign power to try tribal criminals, we do not mean to imply that a tribe which was deprived of that right by statute or treaty and then regained it by Act of Congress would necessarily be an arm of the Federal Government. That interesting question is not before us, and we express no opinion thereon." *Id.* at 328 n.28.

defeasance."[41] When a tribe exercises its power to punish tribal offenders, "it does so as part of its retained sovereignty, and not as an arm of the Federal Government."[42] The Court thus distinguished *Wheeler* from *Grafton*[43] and *Waller*,[44] two cases on which the Ninth Circuit had relied: "What differentiated those cases . . . was not the extent of control exercised by one prosecuting authority over the other, but rather the ultimate source of power under which the respective prosecutions were undertaken."[45]

By refusing to limit the dual sovereignty principle to the federal-state relationship, the Supreme Court acknowledged the significance of tribal self-determination. Implicit in the Court's holding is a recognition that the justice dispensed by the Indian courts is often greatly influenced by the customs and mores of the Indian people.[46] Such recognition was apparently deemed necessary by the Court to insure the preservation of tribal culture.[47]

Finally, in finding that the source of tribal power is inherent tribal sovereignty, the Court avoided the "undesirable consequences"[48] which might otherwise result if successive tribal and federal prosecutions were barred. Because sentences and fines in tribal courts are restricted,[49] it was possible that Indian defendants could commit serious crimes and receive relatively light sentences.[50] Likewise, it was possible that a friendly tribal court could acquit or render a light sentence to foreclose federal prosecution. Were this to occur, the Court feared "important federal interests in the prosecution of major offenses on Indian reservations would be frustrated."[51]

Conclusion

Despite its value as an affirmation of tribal self-determination, the *Wheeler*[52] decision leaves unresolved the dilemma of a jurisdic-

41. *Id.* at 323.
42. *Id.* at 328 (footnote omitted).
43. 206 U.S. 333 (1907).
44. 397 U.S. 387 (1970).
45. 435 U.S. 313, 320 (1978).
46. *Id.* at 332, n.34.
47. *Id.* at 332.
48. *Id.* at 330.
49. Tribal courts can impose no punishment in excess of six months' imprisonment or a $500 fine. 25 U.S.C. § 1302 (7) (1976).
50. The Court noted that Wheeler faced the possibility of a federal sentence of fifteen years in prison but received a tribal sentence of no more than 75 days and a small fine. 435 U.S. 313, 330 (1978).
51. *Id.* at 331 (footnotes omitted).
52. 435 U.S. 313 (1978).

tional scheme which causes the rights of individual criminal defendants to be put at odds with principles of tribal sovereignty. Through its plenary power, the federal government, which has historically protected the Indians as its wards, can also protect its own interests without depriving Indian defendants of the constitutional safeguard against double jeopardy. One means of doing so would be by congressional enactment of legislation restricting to special circumstances the subsequent federal prosecution of Indian defendants. "Special circumstances" might exist only where a strong federal interest in law enforcement on the reservation could not be, or had not been vindicated by earlier tribal court proceedings. Legislation of this type would permit flexible standards of affording Indian tribes greater authority over criminal matters originating in their courts. Such a result is desirable inasmuch as "the basic goal of both the Indian tribes and the federal government is to protect the public from the criminal acts of Indians in Indian country."[53]

53. 466 F.2d 240, 248 (8th Cir. 1972), *cert. denied,* 410 U.S. 916 (1973) (dissenting opinion).