

Opinion No. 92-07

July 20, 1992

OPINION OF: TOM UDALL, Attorney General

BY: Fred Nathan, Assistant Attorney General

TO: The Honorable Stephen D. Stoddard, New Mexico State Senate, 326 Kimberly Lane Los Alamos, NM 87544

QUESTIONS

Whether Indian tribal and pueblo traffic citations which are issued to a non-Indian driving on state and interstate public highways that traverse Indian lands may require that payment be made to tribal court?

CONCLUSIONS

No. Under NMSA 1978, § 29-1-11(C) (6) (Cum. Supp. 1991), traffic citations issued by commissioned tribal, pueblo or BIA law enforcement officers to a non-Indian are payable to a magistrate court of New Mexico.

FACTS

A non-Indian driver on a public highway that runs through the San Ildefonso Pueblo was issued a citation for a traffic violation. The citation directed that payment be made directly to the San Ildefonso Pueblo Tribal Court.

ANALYSIS

A traffic citation is a criminal offense and jurisdiction over such misdemeanor offenses lies with the magistrate court. **See** Motor Vehicle Code, NMSA 1978, §§ 66-8-7 and 66-7-3 (Repl. Pamp. 1987).

Indian tribal courts do not have inherent criminal jurisdiction to try and punish non-Indians and hence may not assume such jurisdiction unless specifically authorized to do so by Congress. **Oliphant v. The Suquamish Indian Tribe**, 435 U.S. 191 (1978).¹ **Oliphant** arose from habeas corpus petitions filed under the Indian Civil Rights Act by two non-Indians who were charged with misdemeanor criminal offenses in tribal court proceedings arising from on-reservation conduct. Rejecting the tribe's claim that the prosecutions were appropriate exercises of its "retained inherent powers of government." 435 U.S. at 196, the Court gave "considerable weight" to "the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians." The Court reasoned that "tribes are prohibited from exercising both those powers that are expressly terminated by

Congress and those powers "inconsistent with the United States' "solicitude that its citizens be protected ... from unwarranted intrusions on their personal liberty" and concluded that, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes ... necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."²

It is not clear whether the citation in question here was lawfully issued by a commissioned law enforcement officer. State law authorizes tribal and pueblo law enforcement officers and law enforcement officers employed by the Bureau of Indian Affairs ("BIA") in New Mexico to act as New Mexico peace officers and to "have all the powers of New Mexico peace officers to enforce state laws in New Mexico, including but not limited to the power to make arrests for violation of state law." NMSA 1978, § 29-1-11(A) (Cum. Supp. 1991). Such officers must be commissioned by the chief of the New Mexico State Police pursuant to NMSA 1978, § 29-1-11(B) (Cum. Supp. 1991), which requires a written agreement between the New Mexico State Police and the tribe or pueblo or the appropriate federal official. However, the Department of Public Safety reports that the San Ildefonso Pueblo has not entered into an agreement under NMSA 1978, § 29-1-11 (Cum. Supp. 1991) with the New Mexico State Police. Thus, in order for the citation to have been lawful, it should have been issued by a commissioned BIA officer, pursuant to NMSA 1978, § 29-1-11(A) (Cum. Supp. 1991).

Even assuming that the citation was lawfully issued by a commissioned BIA officer, enforcement could not legally be referred to tribal court, but should have been referred to state magistrate court. NMSA 1978, § 29-1-11(C) (6) (Cum. Supp. 1991) states: "[A]ny citation issued pursuant to a commission authorized by this section shall be to a magistrate court of New Mexico; except citations issued to Indians within the exterior boundaries of an Indian reservation shall be cited to a tribal court." Here, the citation was issued to a non-Indian and under the statute only Indians cited within Indian reservations are to be cited to tribal court.

ATTORNEY GENERAL

TON UDALL Attorney General

GENERAL FOOTNOTES

ⁿ¹ In **Duro v. Reina**, 110 S. Ct. 2053 (1990), the United States Supreme Court held that Indian tribes also lack misdemeanor criminal jurisdiction over non-member Indian defendants who commit crimes on the reservation. However, Congress recently re-established tribal misdemeanor criminal jurisdiction over non-member Indians. Act of October 28, 1991, Pub. L. No. 102-137, § 1, 105 Stat. 646 (1991).

ⁿ² **Id.** at 210. **Oliphant**, however, does not prohibit an arrest of a non-Indian. As the New Mexico Court of Appeals has noted, "**Oliphant** tacitly acknowledges that such an arrest may be made, so long as the Indian authorities 'promptly deliver up any non-Indian offender, rather than try and punish him themselves'." **State v. Ryder**, 98 N.M.

453, 455, 649 P.2d 756, 758 (Ct. App.), **aff'd**, 98 N.M. 316, 648 P.2d 774 (1982)
(quoting **Oliphant**, 435 U.S. at 208).