

STATE V. NORBERTO

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
RUDY NORBERTO,
Defendant-Appellant.

No. 32,353

COURT OF APPEALS OF NEW MEXICO

December 4, 2013

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY, John A. Dean, Jr.,
District Judge

COUNSEL

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JUDGES

LINDA M. VANZI, Judge. WE CONCUR: JONATHAN B. SUTIN, Judge, J. MILES HANISEE, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Judge.

{1} This appeal raises the threshold question of whether a member of the Navajo Nation may be temporarily transported outside of the Navajo Nation by a cross-

commissioned state law enforcement officer to conduct DWI testing without violating the Navajo Nation's tribal sovereignty or extradition procedures. The parties agree that a cross-commission agreement existed between the State of New Mexico and the Navajo Nation at the time of the investigation. However, in the proceedings below, neither of the parties introduced the cross-commission agreement into evidence. As a result, the district court did not have the opportunity to review the cross-commission agreement in order to assess the legal effect of the agreement itself on the scope of authority of cross-commissioned officers. Such a legal determination is essential. Because the cross-commission agreement may contain information necessary for an informed and reasoned legal analysis under the circumstances of this case, we reverse and remand to allow the district court to consider the terms of the cross-commission agreement in effect at the time of the investigation to decide as a matter of law how that agreement affects Officer Schake's scope of authority under the facts of this case and for any further proceedings consistent with this Opinion.

BACKGROUND

{2} The parties do not dispute the basic facts of this case. Officer Joseph Schake, a cross-commissioned state police officer, stopped Defendant Rudy Norberto, a member of the Navajo Tribe, on Navajo Nation land after receiving an "[a]ttempt to [l]ocate" call from New Mexico dispatch regarding a suspected DWI in Farmington, New Mexico. During the stop, Officer Schake had Defendant undergo standardized field sobriety tests, which Defendant could not perform, and Defendant acknowledged he had consumed five shots of vodka. Officer Schake placed Defendant under arrest for driving under the influence, driving without a license, and possession of alcohol, all under Navajo law. Officer Schake then transported Defendant off the reservation to the New Mexico State Police office in Farmington for chemical testing. There was no dispute that the Intoxilyzer on the Navajo Nation, "if even present," was of "questionable reliability" and that the hospital on the Navajo Nation "will not draw blood for alcohol content testing." When Defendant refused to give a breath sample at the police station, Officer Schake consulted with a San Juan County assistant district attorney, obtained a warrant through a state district court, and obtained a blood sample at San Juan Regional Medical Center. While at the police station, Officer Schake also read Defendant his *Miranda* rights, and Defendant admitted that he bought alcohol in Farmington, had been drinking in Farmington, and had driven in Farmington and outside of the Navajo Nation. Afterward, Officer Schake took Defendant to the detention center in Shiprock, New Mexico, where he was booked on the tribal charges. Officer Schake subsequently drafted an arrest warrant for prosecution of the state charges. The arrest warrant was served approximately two years later when Defendant was back on state land.

{3} In the state district court prosecution that followed, Defendant filed a motion to dismiss for lack of personal and subject matter jurisdiction, or in the alternative to suppress the blood test results, contending (1) that there was no admissible evidence that the alleged DWI occurred outside the Navajo Nation and as such that the criminal information should be dismissed, and (2) that the blood test results and statements he made should be excluded because he was removed from the Navajo Nation without

being extradited in violation of tribal sovereignty. The State countered that (1) Officer Schake was cross-commissioned by the Navajo Division of Public Safety and therefore was authorized to investigate and arrest Defendant for DWI, (2) the Navajo extradition procedure did not apply because Defendant was booked into the Shiprock Detention Center in the Navajo Nation; (3) the evidence of Defendant's blood alcohol test results were admissible for the crimes he committed both on and off Navajo land; (4) the evidence demonstrated that Defendant committed driving-related offenses in Farmington; and (5) Defendant was not arrested on the warrant for the crimes he committed in Farmington until two years later. After a hearing on the motion, the district court denied Defendant's motion, the case proceeded to trial, and Defendant was convicted. Defendant appeals the district court's denial of his motion to dismiss, challenging the district court's personal and subject matter jurisdiction or, in the alternative, challenging the admission of his blood alcohol test results.

DISCUSSION

Standard of Review

{4} When the relevant facts as to the issue of jurisdiction are not in dispute, a challenge to the district court's jurisdiction is reviewed de novo. *State v. Nysus*, 2001-NMCA-023, ¶ 3, 130 N.M. 431, 25 P.3d 270. In addition, "[t]he authority of state officers to investigate off-reservation crimes in Indian country is a question of law, which we review de novo." *State v. Harrison*, 2010-NMSC-038, ¶ 9, 148 N.M. 500, 238 P.3d 869.

{5} Our Supreme Court has stated that "[w]hen a crime occurs both inside and outside of Indian country, state courts acquire concurrent jurisdiction with tribal and federal courts." *Id.* ¶ 13. "New Mexico has historically held that it has jurisdiction over crimes that begin in Indian country and continue into [s]tate territory." *Id.* (alterations, internal quotation marks, and citation omitted). However, although "the state has jurisdiction over off-reservation crimes committed by Indians[,] . . . a state officer's investigative authority in Indian country necessarily is limited by tribal sovereignty; i.e., the right of reservation Indians to make their own laws and be ruled by them." *Id.* ¶ 20 (internal quotation marks and citation omitted).

{6} None of our cases deal with the scope of authority of a cross-commissioned officer as a matter of law, or with the ability of a cross-commissioned officer to remove an Indian defendant from Indian land as part of an investigation for violations of either state or tribal law. As a general matter, however, "[m]ost courts that have addressed a state officer's authority to conduct criminal investigations in Indian country also have found that a determination of whether such an exercise of state authority infringes on tribal sovereignty turns on the existence of a governing tribal procedure." *Id.* ¶ 23 (internal quotation marks and citation omitted). Where "there is a Navajo tribal procedure for dealing with the suspect[, f]ailure to follow that procedure violates tribal sovereignty." *City of Farmington v. Benally*, 1995-NMCA-019, ¶ 8, 119 N.M. 496, 892 P.2d 629. This is because a state's exercise of this choice "challenges the [t]ribe's right to make and enforce laws for Navajo citizens on Navajo land, which goes to the heart of

the right of self-government.” *Id.* ¶ 5. Moreover, due to the unique nature of tribal sovereignty, we have held that when state authorities choose not to follow a governing tribal procedure, the state court is deprived of jurisdiction to hear the case. See *id.* ¶¶ 2-3, 14 (holding that when a Navajo tribal member was pursued from state land into Navajo land, arrested, and removed to the state for state prosecution, and county law enforcement officers did not follow the relevant Navajo extradition treaties, the state court never acquired jurisdiction).

{7} We have noted that intergovernmental agreements to facilitate cooperation between law enforcement officers are available and that they can help facilitate, for example, extradition between governments. *Id.* ¶ 9 n.1. To this end, both the State of New Mexico and the Navajo Nation have enacted legislation that permits their agencies that have and maintain peace officers to enter into agreements with one another with respect to law enforcement. See NMSA 1978, §§ 29-8-1 to -3 (1971); Navajo Nation Code Ann. tit. 17, § 102 (1977). “Cross-commission agreements are consistent with this [s]tate’s venerable tradition of cooperation and comity between state and tribal governments[.]” *Harrison*, 2010-NMSC-038, ¶ 29.

{8} In this case, neither party denies the importance of the fact that Officer Schake was cross-commissioned. Nor do the parties refute that the cross-commission agreement serves as a governing tribal procedure whose terms dictate the scope of the authority of cross-commissioned officers dealing with Navajo defendants on Navajo land and who are also suspected of committing crimes on state land.

{9} Although the parties argue about what the cross-commission agreement allowed Officer Schake to do under the facts of the case, neither party introduced the agreement itself into evidence or discussed the agreement’s specific terms. Rather, the sole evidence that the parties presented and the district court heard on this issue was Officer Schake’s testimony regarding his understanding of the scope of his authority as a cross-commissioned officer, which appears to be based primarily on what was written on his cross-commission card. Officer Schake testified that his cross-commission card, which was not entered into evidence, states, “This presents that Joseph T. Schake is a law enforcement officer of the Navajo Division of Public Safety and is authorized to exercise law enforcement powers pursuant to all Navajo Nation and other applicable federal and state laws.” Based on this evidence, the district court concluded:

By authorizing Officer Schake “to exercise law enforcement powers pursuant to all Navajo Nation laws,” the *Navajo Tribe implicitly authorized Officer Schake to temporarily remove . . . Defendant from the [r]eservation to Farmington in order to complete his investigation of ... Defendant’s possible violation of Navajo Nation law*. Especially when the Nation does not have the resources to provide the tools required to investigate violations of the law it commissioned Officer Schake to enforce. There has been no evidence that a Navajo Tribal Court has ruled that Officer Schake’s investigative methods exceeded the scope of his authority granted by the Navajo Nation itself. Extradition, as . . . Defendant argues, was therefore not required for Officer Schake to temporarily remove . . . Defendant

from the [r]eservation to Farmington. This [c]ourt cannot conclude that the results of Officer Schake’s authorized investigation of . . . Defendant’s on-[r]eservation driving, while apparently beneficial to the State of New Mexico in its prosecution of . . . Defendant for his off-[r]eservation driving, were obtained illegally. Suppression of the blood test results or . . . Defendant’s statements to Officer Schake is therefore not required.

(Alteration omitted.) (Emphasis added.) On this reasoning, the district court denied Defendant’s motion to dismiss or, in the alternative, to suppress.

{10} Insofar as Officer Schake’s testimony was the only evidence presented below about the cross-commission agreement, the district court was unable to conduct a reasoned, legal analysis of the agreement’s terms and effects. Instead, the district court appears to have viewed the scope of the cross-commissioned officer’s authority as a factual determination, which could permissibly be established by witness testimony or lay interpretation. This was improper.

{11} As we previously noted, “[t]he authority of state officers to investigate off-reservation crimes in Indian country is a question of law[.]” *Id.* ¶ 9. Moreover, we have held that the Legislature intended that mutual aid agreements be written and that witness testimony is insufficient in this context. *Cf. State v. Branham*, 2004-NMCA-131, ¶¶ 4, 7, 16, 136 N.M. 579, 102 P.3d 646 (refusing to allow “a verbal agreement between the BIA and/or the Mescalero tribal police and the New Mexico state police, and a lack of objection to such an agreement on the part of the Mescalero tribal leaders, [to be] legally sufficient to confer upon the New Mexico state police the authority to enforce tribal traffic ordinances on tribal land[.]” even when testimony about the agreement came from the chief of police for the Mescalero Tribe). Accordingly, finding an implicit waiver of tribal sovereignty based on witness testimony interpreting the powers of a cross-commissioned officer is inappropriate. Defendant’s motion should not have been denied based on Officer Schake’s testimony, but rather, the district court should have considered the legal significance of the cross-commission agreement itself with regard to the authority that agreement conferred on Officer Schake under the facts of this case. Therefore, on remand, the district court must consider the terms of the written agreement itself and engage in a reasoned legal analysis about their meaning. *Cf. Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 27, 150 N.M. 398, 259 P.3d 803 (classifying contract interpretation as a matter of law). Because we conclude that resolution of this threshold issue is necessary in the analysis of the case as a whole and may be dispositive, we do not reach Defendant’s remaining arguments.

CONCLUSION

{12} We reverse and remand to the district court to conduct an analysis of how the cross-commission agreement between the State and the Navajo Nation in effect at the time of the investigation affects the scope of Officer Schake’s authority under the facts of this case and for any further proceedings consistent with this Opinion.

{13} IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

J. MILES HANISEE, Judge