

Insights: Alerts

Unanimous Supreme Court Confirms and Expands Tribal Government Powers

June 2, 2021

Written by **Rob Roy Edward Stuart Smith** and **Bree R. Black Horse**

The United States Supreme Court held unanimously in *United States v. Cooley*, 593 U.S. ____ (2021), that Indian tribes possess inherent authority to detain temporarily and to search non-Indian persons traveling on public rights-of-way running through a reservation for potential violations of state or federal law. The Court based its decision on the uncommonly applied second exception set forth in *Montana v. United States*, 450 U.S. 544 (1981), which provides a basis for tribal jurisdiction over non-members on non-Indian land within a reservation where the conduct of the non-member threatens the health and safety of the tribe and its members. The Court concluded that denying a tribal police officer the authority to temporarily detain and search non-Indians the tribal officer believes may commit or has committed a crime threatens the health or welfare of the Indian tribe, thus Indian tribes possesses the inherent authority to do so.

This case stems from an encounter between a law enforcement officer of the Crow Indian Tribe and a non-Indian motorist that occurred on a U.S. highway, a public right-of-way within the Crow Reservation in the State of Montana. Late one night, the Crow officer approached a vehicle that was parked on the shoulder of the highway believing that the occupant may need assistance. The Crow officer questioned the driver, Joshua Cooley, who appeared to the Crow officer to be non-Indian. During his conversation with Cooley, the Crow officer observed that he had watery, bloodshot eyes, and that he had two semiautomatic firearms in the front passenger seat as well as a small child in the back seat. Fearing violence, the Crow officer ordered Cooley out of the vehicle and conducted a search of Cooley and his vehicle, which yielded a glass pipe and a bag of methamphetamine. The Crow officer requested back up, and a federal BIA agent and a state law enforcement officer responded to the scene. The Crow officer was directed to conduct a plain view search of the vehicle and discovered more methamphetamine. The Crow officer then transported Cooley to the Crow Police Department, where the BIA and state officers questioned Cooley further.

A federal grand jury indicted Cooley on drug and firearms charges. The U.S. District Court for the District of Montana granted Cooley's motion to suppress the drug evidence, reasoning that the Crow officer lacked the authority to investigate non-apparent violations of state or federal law by a non-Indian on a public right-of-way crossing the reservation. The Ninth Circuit affirmed, holding that Indian tribes "cannot exclude non-Indians from a state or federal highway" and "lack the ancillary power to investigate non-Indians who are using such public right-of-ways." The Ninth Circuit also explained that a tribal law enforcement officer could nonetheless stop and hold for a reasonable time a non-Indian suspect, but only if (1) the officer first attempted to determine whether "the person is an Indian" and if the person turns out to be a non-Indian, (2) it is "apparent" that the person has

violated state or federal law.” The United States Supreme Court granted certiorari in order to decide whether a tribal police officer has authority to detain temporarily and to search non-Indians traveling on public rights-of-way running through a reservation for potential violations of state or federal law.

The Court began its opinion by recognizing that because no treaty or statute has explicitly divested Indian tribes of the policing authority at issue, the Court would look to “precedent to determine whether a tribe has retained inherent sovereign authority to exercise that power.” In answering this question, the Court relied upon the second *Montana* exception applicable to non-Indian conduct that threatens the health or welfare of a tribe. Specifically, the second *Montana* exception provides that an Indian “tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” The Court observed that the second *Montana* exception fit this case “almost like a glove,” explaining that denying a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats, which could include “non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation.”

The Court recognized that it and other state and federal courts have long recognized the authority of tribal police officers to detain temporarily and search non-Indians traveling on public rights-of-way running through a reservation for potential violations of state or federal law. The Court also noted that the Ninth Circuit's standard was likely unworkable and would present incentive to lie. The Court concluded that there was no evidence “that Congress sought to deny tribes the authority at issue, authority that rests upon a tribe's retention of sovereignty as interpreted by *Montana*, and in particular its second exception.”

Prior to the Ninth Circuit's decision in *United States v. Cooley*, most jurisdictions understood that tribal police officers possessed the authority to temporarily detain and search non-Indians traveling on public rights-of-way within a reservation for potential violations of federal or state law. The U.S. Supreme Court's decision in *Cooley* returns to this well-settled standard and practice, and makes clear that tribal police officers do in fact possess that inherent authority. Tribal police officers may now resume temporary detentions and searches of non-Indians traveling on rights-of-way through reservations when that tribal officer believes the non-Indian has committed or will commit a state or federal crime.

The U.S. Supreme Court's decision also has implications for future application of *Montana*'s second exception applicable to non-Indian conduct that threatens the health or welfare of an Indian tribe. Prior decisions of the Court illustrate that in order for the second *Montana* exception to apply, the non-member conduct must impact tribal lands and “do more than injure the tribe, it must imperil the subsistence of the tribal community. One commentator has noted that the elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.” *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 341 (2008) (internal quotations and citations omitted). Because the Court and lower courts have imposed such a high standard, relatively few cases have found tribal jurisdiction under the second *Montana* exception. Here, the Court's opinion lacks the limiting language included in prior Court decisions analyzing the second exception, and applies the exception with ease and simplicity to non-Indian criminal conduct. In reaching its holding, however, the Court conflated the principles and precedent underlying tribal civil jurisdiction with those governing tribal criminal jurisdiction. By relying on *Montana* and its

progeny, the Court has indicated that it is permissible to look to cases addressing tribal civil jurisdiction to define the boundaries of tribal criminal authority.

This decision is a significant step in ensuring the safety of the millions of Indians and non-Indians across the United States who reside within the exterior boundaries of a reservation. If the Court affirmed the Ninth Circuit's opinion, it would have incentivized non-Indian criminals to conduct their illegal affairs on reservations based on the very limited authority of tribal law enforcement officers. Following *Coolley*, tribal law enforcement officers—often the only law enforcement officers present in vast rural areas—may lawfully stop non-Indians based on reasonable suspicion, and temporarily detain and search non-Indians based on probable cause, consistent with the standard under the Fourth Amendment.

Related People



Rob Roy Edward Stuart Smith

t 206.224.2868

rrsmith@ktslaw.com



Bree R. Black Horse

t 206.626.7748

brblackhorse@ktslaw.com