Opinion No. 62-06

January 17, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Marvin Baggett, Jr., Assistant Attorney General

TO: Hon. Walter R. Kegel, District Attorney, First Judicial District, Santa Fe, New Mexico

QUESTION

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May the Division of Motor Vehicles revoke or suspend the driver's license of an Indian because of conviction in a tribal court of driving while under the influence of intoxicating liquor on Indian land?

CONCLUSION

No, unless the licensee is an habitually reckless or negligent driver.

OPINION

ANALYSIS

After a thorough study of our Motor Vehicle Code, it appears obvious that our Motor Vehicle Code, enacted in 1955, did not anticipate the 1958 decision in **State v. Begay,** 63 N.M. 409, 320 P. 2d 1017. The Court held in that case, as you are aware, that the State of New Mexico has no jurisdiction over Indian lands and that a state highway constructed through Indian country on an easement granted by the United States is still Indian land for purposes of jurisdiction.

Certainly, had the Legislature been aware of the possibility or probability of a decision of that nature, it could have written the Motor Vehicle Code in such a manner as to encompass the situation described in your question.

Left with our law as it exists, we find it difficult to apply the actions and records of tribal courts to the license revocation procedures provided for by our Code insofar as driving while intoxicated charges are concerned.

There are three statutory provisions for revoking or suspending a resident driver's license because of improper driving.

Section 64-13-59, N.M.S.A., 1953 Comp., provides that "The division shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such

operator's or chauffeur's conviction of any of the following offenses, **whether such offense he had under any state law or local ordinance,** when such conviction has become final." (Emphasis added). Driving while under the influence of intoxicating liquor is one of the listed offenses. But tribal laws are neither state nor local law, and this section cannot apply to convictions in a tribal court.

Further, Section 64-13-58, N.M.S.A., 1953 Comp., provides for the manner in which the Division receives the record of conviction from the trial court. In Subsection (b) of that section, it is required that **"Every court having jurisdiction over offenses committed under this act,** or any other act of this state or municipal ordinance regulating the operation of motor vehicles on highways, shall forward to the Division a record of the conviction of any person in said court for a violation of any said laws other than regulations governing overtime parking . . ." (Emphasis added).

Under the two sections, then, it is mandatory that the Division revoke the license of a driver who has been convicted in a court having jurisdiction of offenses listed under the Act of driving while intoxicated. A tribal court has no state conferred jurisdiction over offenses committed under the Laws of the State of New Mexico, since, by Article VI, Sec. 1, of our Constitution.

"The judicial power of the state shall be vested, in the senate when sitting as a court of impeachment, a Supreme Court, district courts, probate courts, Justices of the peace, and such courts inferior to the district courts as may be established by law from time to time in any county or municipality of the state, including juvenile courts."

and a tribal court is not a court thus enumerated or established by state law.

We conclude, then, that the Division is under no mandatory duty to revoke the license of one convicted in a tribal court of driving while intoxicated. But, does the Division have the discretionary authority to revoke under such circumstances?

Section 64-13-57, N.M.S.A., 1953 Comp., authorizes the Division to suspend or revoke license of a New Mexico resident upon "receiving notice of the conviction of such person in another state of an offense therein which, if committed in this state, would be grounds for the suspension or revocation of the license of an operator or chauffeur." We do not feel that an Indian reservation in New Mexico may be considered a "state" within the purview of this statutory provision. The two common meanings of the word "state" are:

"(1) One of the states of the United States of America. **Barta v. Oglala Sioux Tribe of Pine Ridge Reservation of S.D.,** C.A.S.D., 259 F.2d 553. An Indian tribe is not thus a state. **Cherokee Nation v. State of Georgia,** 5 Pet. 1, 8 L. Ed. 25; **Barta v. Oglala Sioux Tribe of Pine Ridge Reservation of S.D.,** C.A.S.D., 259 F.2d 553.

(2) . . . a body of people living in a territory who are not subject to any external rule, but who have the power within themselves to have any form of government which they

choose and have the power to deal with other states." **United States v. Kusche,** 56 F. Supp. 201, 208, D.C.E.D.N.Y. (1944). An Indian tribe or nation is not an international political state. **Cherokee Nation v. State of Georgia,** supra. **Public Service Commission v. Edwards Motor Transit Co.,** 39 N.Y.S. 2d 119, 179 Misc. 343.

By use of the term "another state", we believe the Legislature has equated the word "state" to that political status occupied by the State of New Mexico. If an Indian reservation is not a "state", then the Division cannot revoke or suspend a license under this section even though the tribal court sends a record of a conviction to the Division.

Finally, Section 64-13-60, N.M.S.A., 1953 Comp., authorizes the Division to suspend an operator's license upon a "showing by its records or other sufficient evidence" that the licensee falls within seven prescribed categories. Only four of these are pertinent to our question, and involve situations where the licensee:

(1) Has committed an offense for which mandatory revocation of license is required upon conviction;

(3) Has been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways;

(4) Is an habitually reckless or negligent driver of a motor vehicle;

(7) Has committed an offense in another state which if committed in this state would be grounds for suspension or revocation.

Section 64-13-59, N.M.S.A., 1953 Comp., sets forth the offenses upon the final conviction for which the Division "shall forthwith revoke" a license. It provides that the offense may be had under either **"any state law or local ordinance".** A conviction in tribal court is not a conviction for an offense defined under either state law or local ordinance, and Sec. 64-13-60 (1) cannot apply.

Section 64-13-60 (7) cannot apply because the offense is not committed in "another state", where the act occurs on Indian land within New Mexico.

Section 64-13-60 (3), it could be argued, would apply to our situation, although it would seem to be directed at the driver who violates **either state law or local ordinances** which cover offenses, the seriousness of which lies somewhere between the actions for which revocation is mandatory and those involving mere parking violations. But even if it does apply, we feel that it has practically the same significance as Sec. 64-13-60 (4), since it appears to be directed at the habitually reckless or negligent driver.

Section 64-13-60 (4), we feel, is the only statutory authorization for the revocation of an Indian's driver's license because of his driving habits on state highways on Indian land. Since it does not provide that a person need be convicted of traffic offenses, it appears

clearly within the discretion of the Division to act if it has "sufficient evidence" tending to show that the driver is habitually reckless or negligent.

What constitutes "sufficient evidence" is, of course, left to the discretion of the Division, subject to court review. We feel it necessary to point out, however, that records of convictions in tribal courts may not, standing alone, afford the Indian driver the same degree of protection which the ordinary citizen of New Mexico enjoys.

Tribal courts and legislative bodies are not bound by any of our state Constitutional guarantees regarding due process because they are not subject to our jurisdiction. Neither are Indians afforded the protection of the Federal Constitution in certain areas of importance.

". . . The Indian tribes are not, however, states and these Constitutional limitations [Fifth and Fourteenth Amendments] have no application to the actions, legislative in character, by Indian tribes, Neither may the Fifth Amendment be invoked as against any legislative action of the Indian tribes. Talton v. Mayes, 163 U.S. 376, 16 S. Ct. 986, 41 L. Ed. 196. The matter is quite fully discussed in Cohen's Handbook of Federal Indian Law (1942) at page 124 where it is said:

'Where, however, the United States Constitution levies particular restraints upon federal courts or upon Congress, these restraints do not apply to courts or legislatures of the Indian Tribes. (United States v. Seneca Nation of New York Indians, 274 F. 946; (D.C.W.D.N.Y., 1921); Memo. Sol. I.D., Aug. 8, 1939 (Lower Brule Sioux), Likewise, particular restraints upon the states are inapplicable to Indian Tribes.'"

And at page 181 it is said:

"Many important prohibitions, including the Bill of Rights of the Federal Constitution, are limitations only on the power of the Federal Government. Other provisions limit the activities of state Governments only, or of the federal and state government, and hence are inapplicable to Indian tribes, which are not creatures of either the federal or state governments. (citing cases)

The provisions of the Federal Constitution protecting personal liberty and property rights do not apply to tribal action . . . (citing cases and authority)." **Barta v. Oglala Sioux Tribe of Pine Ridge Reservation of S.D.,** supra.

Even though a driver's license is considered a privilege rather than a right, in New Mexico, one obviously may, and generally does, lose his license because of court convictions which also affect his personal liberty and property by virtue of fines and imprisonments.

We have no assurance that Indian courts and Indian law adhere to the principles of our constitutional form of government. We are aware that the Navajos, for example, forbid attorneys-at-law to practice before their tribal courts.

When a driver loses his license because of a conviction in a state or local court of New Mexico, at least the Division knows the licensee has had the opportunity for representation and advice of counsel, knows that he has had a fair trial, has exhausted his appeals, and that the Supreme Court of our State was available as a final reviewer of the law and the sufficiency of the evidence. To force, or even allow, the Division to base their administrative actions solely upon the decision upon the tribal laws, which in turn may or may not define the crime in the same manner as the State of New Mexico, and which may or may not require the same procedural and substantive due process provisions be afforded the defendant that a citizen would receive in our state or local courts, could, we think, result in a double standard.

By provisions of the Assimilative Crimes Act, 18 U.S.C.A., Sec. 13, all state criminal laws are the Federal law of Indian lands, except those state laws which define crimes already determined by Congress to be Federal crimes. Offenses are triable exclusively in the Federal courts. This incorporation by reference does not apply where the crime involves an offense committed by an Indian against another Indian, or where the Indian has been punished according to tribal law. (18 U.S.C.A., Sec. 1152).

As the Arizona court pointed out in Application of Denetclaw, 83 Ariz. 299, 320 P. 2d 697, "It is a further well known fact that the federal officers neither police nor attempt to prosecute traffic violations by Indians on our highways under the Assimilative Crimes Act, although unquestionably the federal courts would have jurisdiction over such offenses." This statement is predicated upon the assumption that the offender is not punished under tribal law.

It is true that most Indian nations now have substantial budgets for law enforcement. It is a common sight to see tribal police on the state highways running through reservations in New Mexico. But patrolling the highways does not solve the problems regarding Indian-land traffic offenders and the licensing control by the state.

It is commonly agreed that a tribe may not try a non-Indian for offenses committed in Indian country. (Cohen, op. cit. supra, at various chapters). This conclusion is fortified by the wording of 18 U.S.C.A., Sec. 1152, which, as we have seen, makes Federal law prevail in Indian country except where the offense is committed by an Indian against another, or where the Indian offender has been punished by local tribal law.

This section contains a third exception pertaining to those instances where the exclusive jurisdiction of the offense has been, by treaty, secured to the Indian tribe. In general, treaty grants of jurisdiction pertain to trespass and similar offenses. Indeed, considering the dates at which treaties were signed with the Indians, it would not be expected that either party contemplated traffic offenses and we are aware of no such provisions in the treaties concerning any Indian tribe or pueblo in this State. Considering the section as a whole, it appears clear that the Federal courts have jurisdiction of all traffic offenses committed in Indian country, except where the Indian offender is punished in the tribal court.

Our court, in the **Begay** case, supra, pointed out that the State has no jurisdiction over highways on Indian lands.

We have no exact figures available, but doubt that anyone familiar with our State would question the statement that by far the majority of vehicular traffic upon all our highways involves non-Indians.

Since neither the Indians nor the State can try a non-Indian for driving while intoxicated upon the public highways of the State where the offense occurs within Indian lands, a deplorable and dangerous state of affairs exists.

Federal officers could prosecute all offenders. New Mexico could amend its Constitution and acquire civil and criminal jurisdiction over Indian lands (Act of Aug. 15, 1953; 67 Stat. 590). But, as the Arizona Court concluded in its opinion in the **Denetclaw** case, supra:

"The Congress could readily solve this hiatus by an amendment of the Act defining 'Indian Country' so as to exclude therefrom -- insofar as state court jurisdiction is concerned -- areas covered by rights of way."

This would assure Indians and non-Indians alike the same treatment under the law for offenses committed on our highways and the State would be able to protect the safety and interests of all users of the highways.