2016 WI 79

# SUPREME COURT OF WISCONSIN



No. 07-11C

**In the matter of review of Wis. Stat. § 801.54, discretionary transfer of cases to tribal court.**

**FILED**

**JUL 28, 2016**

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On Tuesday, November 10, 2015, the court conducted a public hearing as part of a scheduled review of the operation of Wis. Stat. § 801.54, governing the discretionary transfer of civil actions to tribal court. See S. Ct. Order 07-11B, 2011 WI 53 (issued Jul. 1, 2011) (Roggensack, J. dissenting). The Honorable Neal A. Nielsen III, Chair of the Wisconsin State-Tribal Justice Forum (Forum), provided several written submissions advising the court that the Forum seeks continuation of the rule. A number of individuals and entities also submitted written statements and provided testimony at the public hearing.[1]

[1] The public hearing was consolidated with a separate rule petition, 14-02, filed by individual members of the Oneida Tribe of Indians of Wisconsin requesting repeal of Wis. Stat. § 801.54. The court voted to deny rule petition 14-02. See S. Ct. Order 14-02, (issued July 28, 2016) (Roggensack, J., dissenting).

The court discussed the matter at an open rules conference on March 17, 2016. Several questions were raised, including the options available to litigants who might seek to transfer from tribal court to state court. The court took some time to confer with people present at the rules conference and opted to continue the matter, in part pending a meeting of the Wisconsin Tribal Judges Association (WTJA) scheduled for April 2016.

On May 12, 2016, the court discussed the rule matter briefly. The Honorable Eugene L. White-Fish, President of the WTJA, submitted a letter providing information regarding the April WTJA meeting, noting that the WTJA is developing a protocol to assist tribal governments considering provisions to facilitate transfer of cases from tribal court to state or foreign jurisdictions, as appropriate. The court agreed to postpone further discussion in view of Justice Michael J. Gableman's anticipated visits to several of Wisconsin's tribal courts in his capacity as the Wisconsin Supreme Court liaison to the various tribal courts in Wisconsin.

At an open rules conference on June 21, 2016, Justice Gableman shared information with the court regarding the visits. At the conclusion of his report, he moved to continue Wis. Stat. § 801.54, without amendment.

The court briefly discussed United States v. Bryant, 579 U.S. __ (2016), a recent United States Supreme Court decision in which a unanimous Court ruled that the use of tribal-court convictions as predicate offenses in a subsequent prosecution does not violate the Constitution when the tribal-court convictions occurred in proceedings that complied with the Indian Civil Rights Act of 1968

and were therefore valid when entered. The court acknowledged that a long awaited decision, Dollar General Corp. v. Mississippi Band of Choctaw Indians, was still pending before the United States Supreme Court as of the court's discussion.[2] Following some additional discussion, a majority of the court concurred that the rule was operating well and as expected, that the rule shall continue in effect without amendment, and the court would not schedule another review of the rule. Chief Justice Patience Drake Roggensack opposed the motion, stating her continuing concerns about the constitutionality of the rule as set forth in her dissent to this order. Justice Rebecca G. Bradley also opposed the motion to continue the rule on constitutional grounds.

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[2] The Dollar General case implicated whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members. Dollar General Corp. brought an action in federal district court seeking to enjoin John Doe, a member of the Mississippi Band of Choctaw Indians, and other defendants ("tribal defendants") from adjudicating tort claims against Dollar General in the Choctaw tribal court. The district court granted summary judgment in favor of the tribal defendants, concluding that the tribal court may properly exercise jurisdiction over Doe's claims. The United States Court of Appeals for the Fifth Circuit agreed that Dollar General's consensual relationship with Doe gave rise to tribal court jurisdiction over Doe's claims under Montana v. United States, 450 U.S. 544, 564-66, 101 S. Ct. 1245, 67 L.Ed.2d 493 (1981), and therefore affirmed the district court's judgment. The ensuing petition for writ of certiorari was granted and the U.S. Supreme Court held oral argument on December 7, 2015.

On June 23, 2016, two days after the court's open rules conference, the U.S. Supreme Court issued a per curiam opinion stating the Court was equally divided, thereby affirming. Dollar General, 579 U.S. ____ (2016).

The entire court accepted Justice Gableman's recommendations: that the Wisconsin Supreme Court meet with Wisconsin tribal judges on an annual basis, and that the Chief Judges of Wisconsin's judicial districts that include tribal judges consider arranging a meeting between the tribal judges and state circuit court judges within the district each year, as appropriate. Therefore,

IT IS ORDERED that the court takes no action on Wis. Stat. § 801.54, as adopted by S. Ct. Order 07-11, 2008 WI 114 (issued Jul. 31, 2008, eff. Jan. 1, 2009) (Roggensack, J., dissenting), as amended by S. Ct. Order 07-11A, 2009 WI 63 (issued Jul. 1, 2009, eff. Jul. 1, 2009) (Roggensack, J., dissenting).

IT IS FURTHER ORDERED that notice of the above amendment be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 28th day of July, 2016.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 PATIENCE DRAKE ROGGENSACK, C.J. *(dissenting).* On June 21, 2016, for the fourth time, the Wisconsin Supreme Court has approved denial of access to Wisconsin courts to those litigants who choose to litigate in Wisconsin circuit courts and subsequently are sent to tribal court without their consent. The court has done so through affirmance of provisions in Wis. Stat. § 801.54 that permit circuit courts to transfer litigation begun in circuit court to tribal court without a determination made on the record of the basis for tribal court concurrent jurisdiction over the persons and the subject matter of the dispute.

¶2 The court was told that the transfers were "working well." While I have no basis on which to conclude that quick transfers to tribal court are not efficient, "working well" is not a basis on which to ground concurrent jurisdiction, nor is it a substitute for the constitutional protections that Wisconsin courts provide to litigants. Accordingly, I respectfully dissent from the order of the court.

## I. BACKGROUND

¶3 On July 1, 2008, pursuant to the Wisconsin Supreme Court's amendment of Wis. Stat. § 801.54, the court legislated to facilitate the transfer of cases pending in circuit court to tribal court without consent of the parties. S. Ct. Order 07-11, 2008 WI 114 (iss. Jul. 31, 2008, eff. Jan. 1, 2009). I dissented from that order because: (1) tribal courts rarely have concurrent subject matter jurisdiction over nontribal

members; (2) § 801.54 sets no standards by which a circuit court is to evaluate whether concurrent subject matter exists before transfer can occur; and (3) the court exceeded the legislative authority granted by Wis. Stat. § 751.12(1) when it modified the right of access to Wisconsin courts for litigants who had chosen to proceed in Wisconsin courts. Id., p. 11 (Roggensack, J., dissenting).

¶4 On July 1, 2009, the court again legislated, using its authority under Wis. Stat. § 751.12, to limit the right to litigate in Wisconsin courts. The court did so by giving circuit courts authority to transfer post-judgment child support, custody and placement cases to tribal court without a hearing, when the state is the real party in interest pursuant to Wis. Stat. § 767.205(2). S. Ct. Order 07-11A, 2009 WI 63 (Jul. 1, 2009). I dissented in 2009 as I had in 2008, for many of the same reasons. Id., p. 1 (Roggensack, J., dissenting). Once again, the concerns I raised were ignored by a majority of the court.

¶5 On July 1, 2011, the court decided to continue tribal court transfers under Wis. Stat. § 801.54 and to conduct a review of tribal court transfers in five years. S. Ct. Order 07-11B, 2011 WI 53 (Jul. 1, 2011). Again, I dissented. I was concerned that this court was closing the doors to circuit courts for both tribal and nontribal members who have a constitutional right of access to Wisconsin courts and to the constitutional protections Wisconsin courts provide. I was

concerned with "[w]ho looks out for the unrepresented litigant whose constitutional rights are not represented in tribal court." Id., p. 5 at ¶6 (Roggensack, J., dissenting).

¶6 On July 24, 2015, six members of the Oneida Tribe of Indians of Wisconsin filed rule petition 14-02, asking the court to repeal Wis. Stat. § 801.54. The court set rule petition 14-02 for consideration with rule petition 07-11C, its comprehensive review of tribal transfers under § 801.54, which review the court had committed to undertake in 2011.

¶7 On June 21, 2016, Justice Michael J. Gableman moved the court to continue to permit transfers to tribal courts under Wis. Stat. § 801.54, which by implication denied rule petition 14-02.[1] He spoke of his travels throughout the State of Wisconsin where he visited many tribal courts, some while hearings were on-going. He spoke of the care and concern that tribal courts showed to the litigants and others who participated in the proceedings.

¶8 Justice Gableman said that 90 percent to 95 percent of the cases that have been transferred to tribal courts involved child support. He said that child support case transfers are working well for all participants. The work that Justice Gableman did in visiting the tribes and their courts was of significant assistance to the Wisconsin Supreme Court.

[1] Justice Shirley S. Abrahamson seconded Justice Michael J. Gableman's motion.

¶9 After a thorough discussion, the court voted to continue Wis. Stat. § 801.54 transfers to tribal courts and to deny rule petition 14-02, with two justices dissenting. I am a dissenting justice, and I now address some of my reasons for dissenting.

## II. DISCUSSION

¶10 Our rule-making, through which we created transfers to tribal courts, is a limited grant from the legislature that permits the court to legislate in regard to pleading and practice so long as the rules the court creates do not "abridge, enlarge, or modify the substantive rights of any litigant." Wis. Stat. § 751.12(1). In my view, the court exceeded the authority the legislature granted when the court enacted, and continues to authorize, tribal transfers under Wis. Stat. § 801.54 because transfers to tribal court affect litigants' substantive right of access to Wisconsin courts and litigants' substantive right to the constitutional protections that our courts provide to all.

¶11 As Justice Kennedy recognized, "[t]he political freedom guaranteed to citizens by the federal structure is a liberty both distinct from and every bit as important as those freedoms guaranteed by the Bill of Rights." United States v. Lara, 541 U.S. 193, 214 (2004) (Kennedy, J., concurring). The same liberty interest is present in access to Wisconsin courts and the structure they afford to litigants.

¶12 Wisconsin Stat. § 801.54 provides in relevant part:

> (1) Scope. In a civil action where a circuit court and a court or judicial system of a federally recognized American Indian tribe or band in Wisconsin ("tribal court") have concurrent jurisdiction, this rule authorizes the circuit court, in its discretion, to transfer the action to the tribal court under sub. (2m) or when transfer is warranted under the factors set forth in sub. (2). This rule does not apply to any action in which controlling law grants exclusive jurisdiction to either the circuit court or the tribal court.

A plain reading of Wis. Stat. § 801.54 shows that before a transfer to tribal court may be made, the circuit court must determine that the tribal court to which transfer is contemplated has concurrent jurisdiction over all parties and over the subject matter of the action.

¶13 Tribal court jurisdiction is established by federal laws and by United States Supreme Court precedent. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851-52 (1985). Therefore, whether a tribal court has adjudicative authority over nontribal members is a federal question; it is not decided by state law or by tribal law. See Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 324 (2008). "If the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void." Id. Therefore, this primary determination is required of the circuit court before the provisions of Wis. Stat. § 801.54 can be engaged.

¶14 Tribal court concurrent jurisdiction over nontribal members is extremely limited. Montana v. United States, 450 U.S. 544, 565-66 (1981). As the United States Supreme Court

held in Plains Commerce Bank, tribal jurisdiction over nonmembers for conduct that occurred off tribal land is almost nonexistent, having been upheld in only one circumstance. Plains Commerce Bank, 554 U.S. at 333.

¶15 However, on June 21, 2016, prior to re-authorizing Wis. Stat. § 801.54 transfers to tribal courts, the court did not address which federal law provided concurrent jurisdiction over nontribal litigants. This unaddressed question, which circuit courts are required to answer before employing Wis. Stat. § 801.54, is extremely complicated and for which there is little guidance.

¶16 Furthermore, an additional concern with tribal court transfers is the lack of review of tribal court decisions by nontribal courts. As United States Supreme Court Justice Souter has explained, "[T]here is no effective review mechanism in place to police tribal courts' decisions on matters of non-tribal law, since tribal-court judgments based on state or federal law can be neither removed nor appealed to state or federal courts." Nevada v. Hicks, 533 U.S. 353, 385 (2001) (Souter, J., concurring).

¶17 Few appellate cases have challenged circuit court transfers to tribal courts; therefore, we do not know if circuit courts are determining that tribal courts have concurrent jurisdiction over the parties and the controversy before transfer is ordered. Only one case has made its way to us,

Kroner v. Oneida Seven Generations Corp., 2012 WI 88, 342 Wis. 2d 626, 819 N.W.2d 264.

¶18 Kroner involved a transfer by Brown County Circuit Court to Oneida Tribal Court without John Kroner's consent.[2] Kroner was not a tribal member. The lead opinion acknowledged that "[t]his case and others like it should focus on the substantive rights of the litigants." Id., ¶64. The lead opinion went on to explain that "one of the parties in this case chose to file suit in Brown County Circuit Court and paid a filing fee to accomplish this objective. Transfer deprives the party of that forum." Id., ¶66. However, the lead opinion did not address the merits of Kroner's right of access to Wisconsin courts. Id., ¶69.

¶19 I wrote in concurrence in Kroner to explain that Wis. Stat. § 801.54 transfers to tribal court required circuit courts to assure that transfer would not abridge, enlarge or modify substantive rights of litigants. Id., ¶70 (Roggensack, J., concurring). I explained that separation of church and state was one of the foundational principles of our federal and state constitutions, but that tribal courts may incorporate religious

[2] John Kroner was not a member of the Oneida Tribe, but he had served as the chief executive officer of Oneida Seven Generations Corporation (Seven Generations), which is a tribally owned real estate and holding company. Kroner v. Oneida Seven Generations Corp., 2012 WI 88, ¶2, 342 Wis. 2d 626, 819 N.W.2d 264. He was terminated and sued Seven Generations in Brown County Circuit Court, claiming wrongful discharge and breach of contract. Id.

values as custom and tradition that affect tribal courts' views of the law. Id., ¶96 (Roggensack, J., concurring).

¶20 United States v. Bryant, 136 S. Ct. 1954 (2016), is the most recent United States Supreme Court decision that discusses proceedings in tribal court. Bryant is not on point with all potential transfers because it involves a tribal member, Michael Bryant, and a criminal proceeding in federal court. Id. at 1963. However, the court's discussion of differences between tribal court protections and protections afforded under the United States Constitution is informing.

¶21 Bryant was convicted in federal district court of domestic assault as an habitual offender based in part on prior tribal court convictions for domestic assault. Id. at 1958. The tribal court convictions were employed as a predicate offense in federal court. Id. at 1959. Bryant appealed his federal conviction, challenging the use of prior tribal court convictions because he had been unrepresented in tribal court. Id. at 1958.

¶22 In examining Bryant's contentions, the court explained that "[t]he Bill of Rights, including the Sixth Amendment right to counsel, therefore, does not apply in tribal-court proceedings." Id. at 1962. The court further explained that although the Indian Civil Rights Act (ICRA) affords some protections in tribal court, it is not coextensive with the rights secured by the United States Constitution. Id. However, because the Sixth Amendment did not apply in tribal court and

ICRA was in place in Bryant's tribal court proceedings, no violation of his tribal court rights occurred. Id. at 1966. Also, Bryant was punished only for crimes adjudicated in federal court where he was represented by counsel; therefore, his federal convictions were upheld. Id.

¶23 Furthermore, it is important to note that in order to exercise jurisdiction over nontribal persons, "[t]he burden rests on the tribe to establish one of the exceptions to Montana's general rule" that precludes tribal court jurisdiction over nontribal members. Plains Commerce Bank, 554 U.S. at 330. Therefore, determining whether concurrent jurisdiction exists, particularly with regard to nontribal litigants, is an extremely complex problem for which we have given circuit courts no guidance. However, a contention that the tribal court lacked subject matter jurisdiction may be raised at any time, even after judgment. See Arbaugh v. Y&H Corp., 546 U.S. 500, 506-07 (2006); see also Fed. R. Civ. P. 12(b)(1).

¶24 And finally, in accommodating the wishes of Native American Tribes of Wisconsin, a majority of this court contravenes the oath of office that each justice took to protect the Constitution of the United States and the Constitution of the State of Wisconsin. Although I have great respect for Native American Tribes of Wisconsin and I recognize the extremely valuable services they provide, my respect cannot overcome my constitutional obligations to citizens or expand the authority granted by the legislature in Wis. Stat. § 751.12.

Accordingly, I must respectfully dissent from the order of the court herein.

## III. CONCLUSION

¶25 A majority of the Wisconsin Supreme Court has once again approved denial of access to Wisconsin courts to those litigants who choose to litigate in Wisconsin circuit courts and subsequently are sent to tribal court without their consent. The court has done so through affirmance of Wis. Stat. § 801.54, which permits circuit courts to transfer litigation begun in circuit court to tribal court without a determination made on the record of the basis for tribal court concurrent jurisdiction over the persons and the subject matter of the dispute.

¶26 The court was told that transfers to tribal court were "working well." However, "working well" is not a basis on which to ground concurrent jurisdiction, nor is it a substitute for the constitutional protections that Wisconsin courts provide to litigants. Accordingly, I respectfully dissent from the order of the court.

¶27 I am authorized to state that Justice REBECCA G. BRADLEY joins this dissent.