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IMLA NEWS
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FEATURED CASE:

10th Circuit Rules §14 of Curtis Act Does Not Grant Jurisdiction to Tulsa Over Municipal Violations by Native Americans

***Hooper v. City of Tulsa*, no. 22-5034 (10th Cir. June 29, 2023).**

The decision highlights the evolving legal terrain of Tulsa's jurisdiction, invalidating the jurisdictional powers vested in the Curtis Act. The act, which had abolished tribal courts, expanded federal jurisdiction in the Native Territory, and bestowed municipalities with authority over municipal ordinance violations, no longer confers jurisdiction over Native People while they are on Native land within Tulsa, Oklahoma.

Background: In August 2018, Justin Hooper (Hooper), a member of the Choctaw Nation and a resident of Tulsa, Oklahoma, received a speeding ticket within the boundaries of the Muscogee (Creek) Reservation. He was cited for driving over the speed limit in violation of City of Tulsa Revised Ordinances. The municipal court found him guilty of the offense and ordered him to pay a citation fee of $150.

After the Supreme Court's decision in *McGirt v. Oklahoma,* which recognized that the Creek Reservation had never been disestablished, Hooper filed an application for post-conviction relief, arguing that the municipal court lacked jurisdiction over his offense because he was a Native committing a crime in Native country.

Tulsa countered that it had jurisdiction over municipal violations committed by its Native inhabitants based on a jurisdictional grant in Section 14 of the Curtis Act, a statute written in 1889: “all inhabitants of such cities and towns, without regard to race, shall be subject to all laws and ordinances of such city or town governments, and shall have equal rights, privileges, and protection therein.”

Proceedings Below: The municipal court agreed with Tulsa and denied Hooper's application for post-conviction relief. Hooper then filed a complaint in federal court, appealing the denial of his application for post-conviction relief and seeking a declaratory judgment that Section 14 is no longer

applicable to Tulsa. Tulsa filed a motion to dismiss, arguing that Section 14 still grants it jurisdiction over municipal violations by all inhabitants. The district court granted Tulsa's motion to dismiss Hooper's declaratory judgment claim, stating that Congress granted jurisdiction to the city based on Section 14. The court also dismissed Hooper's appeal from the municipal court as moot. Hooper appealed the district court's decision to the Tenth Circuit Court of Appeals.

Appeal: The Tenth Circuit began its analysis with a review of the history behind Tulsa's formation as a city. Before Oklahoma became a state, its lands had been divided into the “Native Territory” in the east and the “Oklahoma Territory” in the west: in the late 1880s, the Oklahoma Organic Act established that the Native Territory would be governed by certain laws of the State of Arkansas, while the Oklahoma Territory adopted selected chapters and provisions of the Compiled Laws of the State of Nebraska. Congress then enacted the Curtis Act in 1898, which allowed municipalities in the Native Territory, including Tulsa, to incorporate and operate under the laws of Arkansas, whose statutes were amalgamated in a codification known as “Mansfield’s Digest.”

In subsequent years, Congress passed additional acts facilitating land allotment and curtailing tribal autonomy, ultimately allowing the formation of the State of Oklahoma. In 1907, Oklahoma adopted its Constitution, which granted municipalities the power to create their own charters. Tulsa then adopted a new charter in 1908 under the Oklahoma Constitution, superseding its previous charter which had been authorized under Mansfield’s Digest.

On this history, the Tenth Circuit concluded that the district court erred in dismissing Mr. Hooper's declaratory judgment claim, given that the Curtis Act was no longer applicable to Tulsa. The court analyzed Section 14, noting that it granted jurisdiction to municipalities in the Native Territory that were organized and authorized according to chapter twenty-nine of Mansfield's Digest. The grant of jurisdiction was limited to these municipalities, and the language throughout Section 14 reinforced this limitation:

> Based on its plain text, Section 14 grants a limited set of municipalities jurisdiction over violations of municipal ordinances by all their inhabitants: municipalities in the Indian Territory that are organized and authorized according to chapter twenty-nine of Mansfield’s Digest. This limitation on the grant of jurisdiction is repeated throughout Section 14. . . . Further, rather than stating “after being so authorized and organized,” or “once so authorized and organized,” Congress chose to limit the following grant of power—that municipalities would “possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas”—to “when [municipalities were] so authorized and organized,” conditioning this grant of power on municipalities being authorized and organized according to chapter twenty-nine of Mansfield’s Digest.

Tulsa unsuccessfully argued that Section 14's jurisdictional grant still applies to the city based on Article 18 § 2 of the Oklahoma Constitution, which preserves municipalities' preexisting rights and powers. The Circuit rejected this argument, stating that the Oklahoma Constitution cannot amend an act of Congress, and Congress had the power to change the limitations on the jurisdictional grant. The court also rejected Tulsa’s admonitions that “reversing the district court’s decision would lead to an ‘unworkable’ and ‘counterintuitive’ system where municipal laws would apply only to some inhabitants, but not others, depending on a complex algorithm with variables based on tribal membership of a defendant as well as discrete geographies within the City limits.” The court cited the Creek Nation amicus brief which countered that “[t]he Nation presently exercises highly effective criminal law enforcement throughout its Reservation—including in traffic matters—in close cooperation with other governments” and “[r]eversing the district court’s decision will allow that cooperative enforcement to continue to flourish.” The court also cited to *McGirt*, observing that “if the system in place in Oklahoma proves untenable, ‘Congress remains free to supplement its statutory directions about the lands in question at any time.’”

Based on this analysis, the Tenth Circuit concluded that the district court erred in granting Tulsa's motion to dismiss Mr. Hooper's claim for declaratory judgment. Additionally, the court determined that the district court lacked jurisdiction over Mr. Hooper's appeal of the municipal court's denial of his petition for post-conviction relief. The court vacated the dismissal of Mr. Hooper's appeal as moot and directed the district court to dismiss the appeal for lack of jurisdiction on remand.

Hooper v. Tulsa

SHORT SUMMARIES:

4th Circuit – First Amendment – Fourth Amendment- Protesters

Speaking of protest litigation, the 4th Circuit recently reversed a decision to deny QI to a police officer faced with handling a protest at Maryland's State Capitol. The officer evaluated the situation involving a very small group of protesters and concluded that the protesters created a safety hazard by protesting on the sidewalk of the State House and asked them to move to Lawyer's Mall a park across the street about 15 feet away. They refused and were arrested and ticketed with a misdemeanor. Subsequently, additional misdemeanors were added, but for whatever reason the prosecutor chose to dismiss which, of course, led to this suit. The panel recognized the particularly delicate balance between the right to protest at the very location where protesting might have the greatest impact versus the safety of the people working at the capitol, including legislators and employees. The court concluded: "Capitol police officers are asked to preserve a delicate balance between protest and order. Neither that balance nor the officers who maintain it should ever be taken for granted."

Hulbert v. Pope

As an aside, the streets of Annapolis are old and narrow. The city is a gem and the Maryland State House a treasure. Walking in and around the State House as well as driving in the area can be a difficult bit of navigation. So, safety considerations are a large part of the capitol police job.

4th Circuit – Notice

This case involves procedure rather than substantive law. A woman sued over an arrest. She represented herself despite apparently being a lawyer. As is practice, in the federal courts she was advised to keep her contact information current. She did not. As a result, she did not receive notice of a Magistrate's decision to recommend dismissing her claims. Having not challenged the report, the District Court, dismissed the suit. She googled the case and learned just before the deadline for appeal of the action and filed an appeal. Because she mailed the appeal shortly before the deadline, the court did not receive it within the time for appeal. The Defendants moved to dismiss. At about the same time, she asked the court to extend the time for appeal. It did. And she filed her appeal. The question before the Circuit was "what it means to "receive notice" for purposes of a Federal Rule of Appellate Procedure 4(a)(6) motion to reopen the time to note an appeal to this Court." The panel answered by concluding receipt means actual receipt. BTW, I googled the Plaintiff's name and assuming I've got the right person, there's likely more to her situation at the bar than disclosed in the case.

Shuler v. Orangeburg County Sheriff's Department

4th Circuit (Unreported)- Employment Law – Due Process – Burden of Proof

Although unreported, this case gives a nice discussion of some issues associated with terminations and burden of proof that may prove insightful. An employee of the prosecutor used systems involving confidential information outside the parameters of permitted use. She was caught and told to appear for an interview. She failed to appear. She was suspended and ultimately fired for both refusing to appear as directed and for the violation of policy. She was given an opportunity pre-termination to respond to the charges and sought and received a termination hearing that lasted two days. The County policy provided that she had the burden of proof as to why she should not be terminated. On appeal to the 4th Circuit from a lower court decision rejecting her claims, the court found that the hearing board had found that the employer had presented a preponderance of evidence sufficient to justify the termination. In a footnote the panel observed that had she been required to shoulder the burden of proof that might well be sufficient for due process.

Smith v. St. Mary's County

Learning lesson: The key to supporting a termination must be due process. Whether due process requires the employer to shoulder the burden of proof or the employee ought not to be the question, but rather whether due process is satisfied under either burden. See the footnote.

6th Circuit – Wrongful Conviction – Immunities absolute and qualified

As the court noted at the outset of the opinion, this is a case for the silver screen. A man apparently wanted a three-way and things didn't turn out quite the way he expected. Instead, he was found blindfolded, tied to a bed, and shot. Ouch. The investigation did not go well and as time passed, the officers heard from a snitch who told them varying stories. Accepting some of those stories a true despite later denials, the officers eventually arrested a guy. As the prosecution moved forward, the defense sought some information from one of the witnesses and the local prosecutor told her to destroy it. Ouch again. The short version of this story is that the prosecutor got absolute immunity and the officer got qualified immunity. The court didn't take kindly to the prosecutor's actions, nor should we:" That said, immunity from suit does not immunize badly behaving prosecutors from other forms of accountability—they can be subjected to court sanctions, removal from office, and criminal charges, among other ramifications."

Price v. Montgomery County

7th Circuit – Retaliation – Sheriffs – First Amendment

A deputy sheriff filed to run for the high office of Sheriff. Subsequent to filing for the office, the department discovered that the deputy failed to disclose when applying for the job of deputy a criminal arrest record. When asked shortly thereafter about criminal history, including prior contacts with law enforcement, including arrests, the deputy again failed to disclose the prior arrest and when asked about the arrest refused to answer any questions about it. The Sheriff and Chief Deputy sought to fire the candidate for dishonesty and the candidate deputy resigned. The election took place and the candidate's luck did not improve as he lost to another deputy. As with most things when life doesn't go as planned and you don't want to blame yourself, the deputy sued. His luck did not improve.

Dereen vs. Anderson

7th Circuit – Qualified Immunity – Sexual Assault

A seventeen year old took a ride-along with a police officer as part of a school requirement. Things strayed from the noble concept to the seedy when the officer sexually assaulted the young woman and offered her to another officer for sex. Bear in mind these are the pleadings. She sued and the lower court granted the chief and the officer immunity. The panel affirmed as to the chief, but made it pretty clear that officers should know that sexually assaulting a woman while on duty is not constitutionally protected conduct. (Hard for me to understand why the District Court didn't think so too, but who am I.)

Hess v. Garcia

9th Circuit – Homelessness – 8th Amendment – Sleeping/Camping Bans

IMLA participated as an amicus in this matter on a request for review of a previously absurd decision. The 9th Circuit, being the 9th Circuit, didn't walk away from its basic holding regarding public camping/sleeping bans, but at least cabined the injunctive relief to a more reasonable limit. Basically, the court held: "Pursuant to *Martin*, it is an Eight Amendment violation to criminally punish involuntarily homeless persons for sleeping in public if there are no other public areas or appropriate shelters where those individuals can sleep." [From the syllabus.] Because the case is long and the judges prolix, I'll leave it to those with interest to read the decision. Hopefully, the Supreme Court will take the issue up. But on a local, state, and national level all of us need to balance the sanctity of peaceful living in a community [*Village of Belle Terre vs Borass*] and the necessity that communities address the problems of addiction, mental health and economic homelessness or we'll all be left with urban decay. Sorry for the rant.

Johnson v. City of Grants Pass

9th Circuit – First Amendment

Oregon's two party consent wiretap law struck down due to violation of the First Amendment.

Project Veritas v. Schmidt

10th Circuit – Sheriffs – Off-duty – Knuckleheads

This case involves an off-duty sheriff's deputy who while travelling with a child strapped legally in a child seat began an aggressive driving road rage act that ultimately led to this federal case and a denial of qualified immunity. The off-duty officer taking umbrage at something with another car chased the car to its eventual destination and declined back-up support. The driver was legally armed and carrying. As one might imagine, the driver, not knowing who the heck was chasing him, got out of his car with his handgun in his pocket. Things escalated with the deputy shouting at the other driver but without shots being fired. Once the deputy identified himself as law enforcement the

driver put the gun back in the vehicle. Long story short, the officer was fired and convicted of child endangerment and assault in state court. The lower court granted qualified immunity to the now former officer for unreasonably pointing his gun at the plaintiff because the driver was armed. The panel concluded that no reasonable officer would have acted as did the defendant and therefore no qualified immunity. As pointed out to me about a previous squib – these cases often rest on the allegations of the Plaintiffs alone and the real facts may be different, so don't shoot the messenger as I try to make sense of some of these crazy cases.

Rosales v. Bradshaw

11th Circuit – Qualified Immunity – Corporations –Racial Discrimination – Code Enforcement

I got this case and thank Bennett Bryan from DeKalb County for it. Nice Win Bennett! I'll copy his analysis –

The plaintiff is a minority-owned corporation that operates an Ethiopian restaurant. In 2016, fire and code enforcement officials inspected the club and found several code violations, so they revoked its permits and ordered the plaintiff to shut down until the restaurant came into compliance. The plaintiff filed suit, alleging that the officials conspired to shut down the club in violation of every constitutional amendment under the sun. Those claims were dismissed on res judicata grounds.

The plaintiff also filed racial discrimination claims under 42 USC Secs. 1981 and 1985(3), which are the subject of the opinion. We filed a motion to dismiss those claims on qualified immunity grounds, arguing that the application of 1981 and 1985(3) to corporate plaintiffs is not clearly established in light of the Supreme Court's opinion in *Village of Arlington Heights v. MHDC*, 429 U.S. 252, 263 (1977) where the Court explained that corporations have no racial identity and cannot be the direct target of racial discrimination. The district court disagreed, but the Eleventh Circuit reversed and granted qualified immunity. In an unpublished opinion, the panel held that the law is not clearly established concerning whether corporations can pursue racial discrimination claims in the first instance.

Although it's unpublished, the opinion may be helpful in qualified immunity cases. In my experience, developers / property owners / nightclubs often sue local government officials, and those plaintiffs often tack on insubstantial racial discrimination claims because they know district courts generally prefer to resolve subjective intent issues at summary judgment (or trial), which puts pressure on local officials to settle insubstantial claims. This opinion may help weed out some of those claims at the MTD stage.

Sheba Ethiopian Rest., Inc. v. DeKalb County

Washington Court of Appeals (Division 1) – Preemption – Affordable Housing – Density

Throughout the country cities are abandoning single family zoning in an effort to increase density and the housing supply for affordable housing. In Washington State the legislature passed a measure precluding administrative and judicial review of certain land use decisions by cities that increase density. While such an appeal was proceeding before the Growth Management Board, the City moved to dismiss but the Board denied the motion concluding the law did not apply to those proceedings. The Washington Court of Appeals upheld a lower court decision reversing the Board. In short, the state has preempted review of certain city actions involving land use that increase density.

City of Olympia v. Western Washington Growth Management Board

Ohio Court of Appeals (3rd District)– Fighting Words

Apparently, calling a neighbor “a redheaded bitch” in the context of this case did not amount to fighting words. The Ohia court did a great job analyzing what could be and what might not be “fighting words” and its analysis might be a good teaching tool for police. As we know, disorderly conduct often results in large damage awards without much benefit in terms of de-escalation.

State v. Gibson