In the Southwest Intertribal Court of Appeals for the Nambé Pueblo Tribal Court

BENJAMIN YATES,

Petitioner,

v.

NAMBÉ PUEBLO TRIBAL COUNCIL, *et al.*,

Respondents.

SWITCA No. 05-008-NTC

Writ of Habeas Corpus
Filed September 9, 2005

Petition for a Writ of Habeas Corpus from
the Supreme Court of Nambé Pueblo
Tom Fiorina, Lay Judge

Appellate Judge: Stephen Wall

PROCEDURAL SUMMARY

SUMMARY

Petitioner filed a Petition for Writ of Habeas Corpus challenging the legality and propriety of his conviction for Criminal Sexual Penetration of a Child and Criminal Sexual Contact of a Minor. The Appellate Court considered three of Petitioner's arguments and found that: (1) the Respondent denied the Petitioner his right to due process at the trial court level by a lack of notice; (2) the Respondent denied the Petitioner his right to due process at the trial court level and in the Nambé Court of Appeals and the Nambé Supreme Court by its failure to hold a hearing on motions submitted by the Petitioner and then using ex parte communications to address issues related to those motions; (3) there was no denial of the Petitioner's right to legal counsel; and (4) the Nambé Pueblo Tribal Court had jurisdiction to hear this matter and the lack of actual notice that Petitioner's actions were a violation of Nambé law was not a denial of due process. No federal law specifically limited the Pueblo's authority to adopt New Mexico law to define crimes that fall within the Pueblo's inherent jurisdiction, and the related tribal council resolution was sufficient notice that New Mexico law would define the crimes in this case.

The Court ordered that a Writ of Habeas Corpus be issued if Petitioner were not given a new trial within 90 days. If that condition were not met, then the Petitioner would be released from custody 91 days after the order was signed.

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On 9 February 2005, the Petitioner was found guilty of one (1) count of Criminal Sexual Penetration of a Child and five (5) counts of Criminal Sexual Contact of a Minor in the Nambé Tribal Court. On 31 March 2005, the Petitioner was sentenced to three and one-half (3½) years in the Ute Mountain Detention facility. On 12 April 2005, Presiding Judge Fiorina issued a more complete sentencing order. In that order, Judge Fiorina sentenced the Petitioner to one (1) year in the Ute Mountain Detention facility for each count, however Judge Fiorina suspended (six) months of the jail sentence for each count, resulting in a three and one-half (3½) year jail sentence and three and one-half (3½) years of suspended sentence. The Petitioner was also fined five thousand ($5,000) dollars for each count for a total of thirty thousand ($30,000) dollars. Lastly, the Presiding Judge ordered the Petitioner to report to the probation office upon his release and to undergo tests and assessments to develop a treatment plan which was to be completed as part of the suspended sentence.

The Petitioner filed an appeal with the Nambé Pueblo Court of Appeals on 13 April 2005, and on 27 April 2005, the Nambé Court of Appeals certified the appeal to the Nambé Tribal Council sitting as Nambé Supreme Court. The Supreme Court of the Nambé Pueblo summarily affirmed the decision of the trial court partially due to a tolling of the time limit for review and partially due to the recusal from the case of the majority of the Pueblo's Tribal Council. The decision of the Supreme Court of Nambé Pueblo was formally entered into the Court's record on 29 August 2005.

The Petition for a Writ of Habeas Corpus was filed with the Southwest Intertribal Court of Appeals on 8 September 2005 to challenge the legality and propriety of the conviction and detention of the Petitioner.

The relationship between the SWITCA and Nambé Pueblo is one in which permission must be granted by the Nambé Tribal Council prior to SWITCA accepting a case. A resolution allowing the case to move to SWITCA was passed by the Nambé Tribal Council on 13 October 2005.

On the 20th day of December 2005, SWITCA entered an order based in Rule 24 of the Rules of the Southwest Intertribal Court of Appeals, which vests SWITCA with jurisdiction to hear a Petition for a Writ of Habeas Corpus. SWITCA found that the Nambé Tribal Council vested jurisdiction in SWITCA to hear this matter in Resolution NP 2005-21, and that the petition submitted by the Petitioner substantially complied with the requirements of Rule 24(a) and it appeared that the Petitioner has exhausted his tribal remedies. It was

ordered that the Respondent was to be served with a copy of the petition and submit an answer, the thirty (30) day time frame for the evidentiary hearing under Rule 24(e) was suspended due to the length of time taken to establish authority for this matter, and an evidentiary hearing was to be scheduled and the Petitioner was to remain in custody at the Southern Ute Detention Center pending the outcome of the evidentiary hearing. The evidentiary hearing was scheduled to be held on 17 March 2006.

On March 10, 2006, Petitioner filed a motion for judgment on the pleadings with an accompanying brief. The Respondents filed their answer on March 17, 2006 at the evidentiary hearing.

The evidentiary hearing was held on March 17, 2006, which was a mixed hearing, with the Court considering questions of both fact and law. The Petitioner based his argument on three assertions: a violation of due process of law during the original court hearing and through the appeals process, a violation of due process through the denial of the right to counsel, and a lack of subject matter jurisdiction in the Nambé Tribal Court.

I

The Petitioner asserts that the trial court denied the Petitioner his rights to due process under the Indian Civil Rights Act, 25 U.S.C. § 1302(8), during the original trial and through the appeals process. Prior to examining specific actions to determine if due process rights under the 25 U.S.C. § 1302(8) were violated, the Court must establish a basis for determining the nature of those due process rights and how tribal actions could be construed as violative of those rights. The Petitioner implied in his brief and in oral arguments that the definition of due process should follow the case law flowing from due arguments that the definition of due process should follow the case law flowing from due process cases construing the U.S. Constitution. This implication was made through reliance on precedents that were generally not based in Federal Indian Law. The Respondent made the statement during her oral argument that due process must be defined by Nambé Pueblo's traditions and culture. Both positions have legal authority for support: *United States v. Strong*, 778 F.2d 1393 (9th Cir. 1985) for the proposition that search and seizure provisions of the ICRA are identical to the Fourth Amendment and *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079 (8th Cir. 1975) for the proposition that due process must be applied in regard to the tribal context.

Given the unique context of Nambé Pueblo governance and traditional way of life, to introduce American concepts of due process that are not mediated by sensitivity to the uniqueness of the Pueblo would create undue burden and could create a precedent that is antithetical to the Nambé worldview. On the other hand, there has been no expert testimony entered into the record as to the traditional and customary Nambé law in this regard. Therefore this Court will simply refer to those standards established directly by the language of the Indian Civil Rights Act, 25 U.S.C.A. § 1302, paragraphs 2 thru 7, to establish a standard of review. A review of those sections indicates that at a minimum, due process includes the right to notice and the right to a hearing.

The Petitioner's assertion of denial of due process at the trial level is based in an allegation of a lack of notice. The written record of the trial shows that there was a general notice of hearing issued for both a hearing scheduled for 17 November 2004 and the hearing scheduled for 10 February 2005. On their face, these general notices of hearing are not directed to any particular person. They do not have any receipt of notice evidenced by signature of the recipient or other person or other evidence of personal service of the notice. Although the Petitioner and his lay advocate did appear for the 10 February 2005 hearing, it is unknown how they were served. This is in contrast with the initial notice of the charges and arraignment hearing in which the summons was specifically directed to the Petitioner and there was return of service signed by the Petitioner.

The Petitioner also asserts that due process was denied during the appellate level by *ex parte* communications between Governor Talache, the Tribal Council and General Counsel for the Pueblo. Apparently on at least two occasions the Pueblo requested an opinion from their General Counsel to guide the Pueblo through the appeals process in this matter. The Petitioner asserts that these communications are *ex parte* and, therefore, are a violation of the Petitioner's right to due process. The Respondent asserts that these communications are not *ex parte* because of the relationship between the Pueblo and their General Counsel and submits the case of *Jackson v. Fort Stanton Hospital and Training School*, 757 F. Supp. 1231 (D.N.M. 1990), as support for their position. The record indicates that General Counsel for the Respondent did, in fact, stand by as an expert witness in the trial, but was not called to testify.

The Respondents cited *Jackson v. Fort Stanton Hospital and Training School*, *supra*, as authority for the proposition that communication with an expert witness is not automatically considered *"ex parte"* communication. The test put forth was "whether the communications were extrajudicial and resulted in an opinion on the merits on some basis other than what the judge learned from his participation in the case" (Respondents Brief, p. 4). According to the Court record, the issue of *ex parte* communication at the trial level might be controlled by

Jackson. The trial was handled by a Special Prosecutor and the General Counsel had the status of an expert witness and submitted a post-argument legal memorandum at the request of the Special Prosecutor. This communication appears to be within the reading of *Jackson*.

During the trial, the General Counsel acted as an expert witness, on standby to testify as to the nature and extent of tribal law; however, once the opinion of the General Counsel was sought by the governor, acting as Appellate Court Judge as to the power and authority of the Appellate and Supreme Court, the General Counsel was no longer just a witness, but became an advocate for a particular course of action. The record indicates that the communication was, in part, used by the Appellate and Supreme Courts in their determination to hear the appeal. On 25 July 2005, Petitioner filed a Motion to Order Cessation of Ex Parte communications. The Special Prosecutor responded to the motion and the General Counsel submitted an affidavit in support of the response to the motion filed by the Special Prosecutor. There was no hearing on this motion. Neither the Appellate Court nor the Supreme Court provided for a hearing to address the issues raised by the General Counsel as the Appellate and Supreme Courts considered their course of action. Thus the Respondent's actions distinguish *Jackson* in that procedural decisions were made that impacted the rights of the Petitioner based on extralegal communications that resulted in an opinion on the merits concerning the procedures by which this appeal would be disposed.

These are particularly thorny issues. Tribal courts that do not have a complete separation of powers must often grapple with the issue of boundaries between the judicial and executive or legal branches of government. It is not uncommon for the authority of the Tribal Appellate or Supreme Court to be vested in the Tribe's legislative branch and it is not uncommon, especially among the Pueblos, for the executive to be vested with judicial authority. The matter of separation of powers is further complicated when advice is sought from the tribe's General Counsel. Is that advice being given to a tribal leader to assist in making strategic decisions for the tribe or is that communication to the Court which will impact the rights of a defendant? In this case, the Governor solicited an interpretation of law from the General Counsel and that law was applied, without a hearing, to the appellate process in this matter. The Petitioner questioned that course of action, but without a hearing, there was no way for the course of action to be challenged. There can be no one simple rule to apply to resolve this matter or other similar cases. However, it may be incumbent upon the General Counsel to warn tribal officials who play dual roles in the Tribal Court and either executive and legislative branches that a hearing is advisable in order to ensure that the defendant has the opportunity to be heard on matters impacting his rights in cases before the Court.

On 17 March 2006, the Nambé Tribal Court accepted a letter from Mr. Mirabal in reference to the existence of a "Traditional" or "Native" Court in Nambé Pueblo. This seems to be related to the Petitioner's Motion to Dismiss Charges, For a New Trial or to Refer This Matter to the Tribal Council for Restorative Justice filed on 24 February 2005. The record shows that there was no hearing on the Petitioner's motion and no order issued related to the motion. This begs the question of whether the letter from Mr. Mirabal provided the Court with extralegal communications which resulted in an opinion on the merits on some basis other than what the judge learned from his participation in the case. The lack of hearing on this motion and the failure to refer the case to the Tribal Council for restorative justice indicates an apparent reliance by the Court on the letter by Mr. Mirabal.

The Nambé Tribal Court, by its failure to hold a hearing on motions submitted by the Petitioner and then using *ex parte* communications to address issues related to those motions, has violated the Petitioner's rights to due process.

Lastly Petitioner asserts that he was denied due process at the appeals level through the dismissal of the Petitioner's appeal by the Nambé Tribal Council sitting as the Supreme Court. According to the official written record, Document 81, the Supreme Court of Nambé Pueblo "granted the petition of Defendant [Petitioner] for review of the Tribal Court's ruling in this case. Chapter 1, Section 16(b)(1) of the Nambé Pueblo Law and Order Code requires the Supreme Court to render its decision within thirty (30) days of granting review. More than 30 days have elapsed since the Supreme Court granted review of the case and no hearing has been held or decision rendered. Therefore, the decision of the Nambé Pueblo Tribal Court in this matter is summarily affirmed."

The Petitioner contends that since the delay in hearing the case was not the result of the Petitioner's actions the summary affirmation of the lower court decision constitutes a denial of due process. The Respondent countered this argument by pointing out that under Nambé law, there is no right to an appeal. The Nambé Tribal Code, Chapter 1, Section 16(b)(1), indicates that there is no right to an appeal to the Nambé Supreme Court. The aggrieved party may file an appeal from the Nambé Appellate Court to the Tribal Council sitting as the Supreme Court, but the Tribal Council can only grant certiorari.

The Order issued by the Nambé Supreme Court filed on 29 August 2005, indicated that the Supreme Court "granted the petition of the Defendant for review of the Tribal Court's ruling in this case." On 27 April 2005, the Nambé Pueblo Court of Appeals issued an order transferring the matter to the Supreme Court of Nambé. Together these orders indicate that certiorari has been granted.

The Respondent has argued that the certiorari clause in the Nambé Tribal Code does not create a right to an appeal and this certainly is the appropriate reading of the clause. But once certiorari is granted, which rights attach to the Petitioner? Are all due process rights held in abeyance simply because certiorari was granted rather than the Petitioner having a right to appeal? While certiorari provides for discretion in accepting the appeal, it does not, without some written authorization, limit the due process rights once the appeal is accepted. Looking back to the standards for review, at a minimum the Petitioner needs to have notice and a hearing. Neither was afforded by the Nambé Supreme Court, even though certiorari was granted.

II

Petitioner asserts that the Nambé Pueblo Tribal Court violated his right of due process through the denial of right to counsel. At arraignment the Petitioner informed the Court that Carlos Vigil would be representing him at trial, however no entry of appearance for Carlos Vigil was found in the written court record. The next reference to counsel for the Petitioner was a brief requested by the Court and filed by Roland Vigil, lay counsel for the Petitioner. While no entry of appearance for Roland Vigil was found in the written court record, it is clear that the Petitioner was represented by Roland Vigil at trial. When the Petitioner was found guilty of the charges, he then hired David Henderson, an attorney licensed in the State of New Mexico, who made an entry of appearance on 16 February 2005.

The right to counsel is limited in tribal courts by the wording of the Indian Civil Rights Act, 25 USCA § 1302(6). Counsel is not a matter of right, but is available at the expense of the defendant. Thus, if the Petitioner did not have the financial means or did not want to hire an attorney, there is no structural defect in the trial proceedings which would require the issuance of the writ based on denial of right to counsel.

SWITCA cannot address the issue of the Petitioner's financial means. However, the question of whether the Petitioner made a knowing waiver of his right to hire an attorney remains. The affidavit of Marti Rodriguez, the arraigning judge, dated 6 March 2006, indicates that, as was her standard practice, she advised the Petitioner of his right to counsel at his own expense. The affidavit further stated that the Petitioner indicated that he would be represented by Carlos Vigil. This was corroborated by the arraignment document dated 19 August 2004 which also indicated that the Petitioner stated that he would be represented by Carlos Vigil. It appears to SWITCA that the Petitioner made a conscious decision to have lay counsel as opposed to an attorney. It is not SWITCA's purview to determine the reasoning behind such a decision. During the evidentiary hearing the Petitioner pointed out case law that requires counsel in certain classes of cases to protect the defendant from his own bad decisions; however these cases were related to defendants acting *pro se*. In this matter, the Petitioner was not acting *pro se*, but had identified an advocate to represent him in the trial. The Court finds no denial of counsel and therefore finds no denial of due process for lack of counsel.

III

Lastly, the Petitioner advances the argument that the Nambé Tribal Court did not have jurisdiction in this matter since the adoption and incorporation of the New Mexico Criminal Law and Traffic Law Manual into the Nambé Pueblo Tribal Code was insufficient. The crux of the Petitioner's argument for lack of jurisdiction is that Resolution 96-28 is a reaffirmation of a prior enactment and there is no evidence of a prior enactment and no evidence of publication. The Petitioner further argues that the introduction of the Resolution incorporating state law into the Nambé Tribal Code during the Court proceedings was done outside the rules of evidence. The Respondent did not address the issue of the introduction of the Resolution as evidence at the trial level, but did address the issue of the sufficiency of the incorporation and the Tribal Court's jurisdiction.

SWITCA must reject the position advanced by the Petitioner that the Nambé Tribal Court does not have the subject matter jurisdiction to hear cases defined by the New Mexico Criminal Law and Traffic Law Manual. The line of reasoning as to the jurisdiction of Nambé Pueblo set forth by the Petitioner is based in a wrong assumption of the nature of tribal authority.

In American constitutional law the basic assumption is that a government must be given authority through some organic document prior to the government exercising a governmental power, i.e., jurisdiction over certain kinds of cases. However, the assumptions based in American constitutional law do not form the basis for analyzing whether a Tribe or Pueblo has the authority to exercise a particular governmental power. It is a well known principle in federal Indian law that the United States

Constitution is not binding upon Indian Tribes and Pueblos since they do not get their authority to govern from the Constitution. *Talton v. Mayes*, 163 U.S. 376, 16 Sup. Ct. 986, 41 L.Ed. 196 (1897). "In sum, Indian Tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978). These cases and hundreds of others are based in the assumption that Indian Tribes have all governing powers not specifically taken away from them. Thus the starting point for an analysis for tribal authority is not whether the exercise of a specific governmental power is provided for, but whether it has been specifically taken away. Among the host of Federal laws intruding into tribal subject matter jurisdiction there does not seem to be any law that specifically limits the authority of the Tribes or Pueblos to adopt any particular statute to define crimes that fall within the Tribe's or Pueblo's inherent jurisdiction. Thus Nambé Pueblo had the authority to adopt the New Mexico Criminal Law and Traffic Law Manual into the Nambé Pueblo Tribal Code to define crimes not provided for under the Nambé Tribal Code.

This issue, then, is not a question of jurisdiction, but rather one that goes to the sufficiency of notice. Is there sufficient publication of the law for the Petitioner to have either actual or constructive notice that certain actions were a violation of Nambé law and that certain consequences would result from a violation of those laws? From the evidence in the Court record, it appears that the Nambé Tribal Court uses the New Mexico Criminal Law and Traffic Law Manual to define actions occurring within the exterior boundaries of the Nambé Pueblo Indian Reservation as crimes. The authority for the application of state law is Nambé Tribal Council Resolution 96-28. The question then becomes whether Resolution 96-28 provided sufficient notice. On its face, the resolution is a reaffirmation of a previously enacted ordinance or resolution. Resolution 96-28 does not specifically identify the citation to the previously enacted resolution or ordinance, but it does identify that the New Mexico Criminal Law and Traffic Law Manual was adopted and is to be used in those instances in which there is no established law in either the Nambé Tribal Code or the Code of Federal Regulations. The resolution 98-26 is sufficient for a reasonable person to know what law would be defining the crime being brought before the Court.

IV

The Southwest Intertribal Court of Appeals finds:

1. That the Respondent has denied the Petitioner his right to due process at the trial court level by the lack of notice.

2. That the Respondent has denied the Petitioner his right to due process at the trial court level and in the Nambé Court of Appeals and the Nambé Supreme Court by its failure to hold hearing on motions submitted by the Petitioner and then using *ex parte* communications to address issues related to those motions.

3. That there is no denial of the Petitioner's right to legal counsel.

4. That the Nambé Pueblo Tribal Court had jurisdiction to hear this matter and there was no denial of due process for the lack of notice that the Petitioner's actions were a violation of Nambé law.

It is hereby **ORDERED** that a Writ of Habeas Corpus shall be issued if the following conditions are not met:

> The Petitioner shall be granted a new trial within 90 days. The trial shall be conducted in accordance with the Nambé Tribal Code and if there are no provisions in the Nambé Tribal Code to direct criminal procedure, the Nambé Tribal Court shall rely on 25 C.F.R. Part 11, Subpart C, Criminal Procedure.

It is further **ORDERED** that if the Petitioner is not given a new trial within 90 days, he will be promptly released from the custody of the Southern Ute Detention Center 91 days after this order is signed.

March 31, 2006

In the Southwest Intertribal Court of Appeals for the Southern Ute Tribal Court

SEAN WHEELER,

Appellant,

v.

SOUTHERN UTE INDIAN TRIBE,

Appellee.

SWITCA No. 04-002-SUTC
SUTC No. 2001-TR-230

Appeal Filed March 8, 2004

Appeal from the Southern Ute Tribal Court
M. Scott Moore, Judge

Appellate Judge: Melissa L. Tatum

DECISION

SUMMARY

Appellant appealed the trial court's decision to revoke his one-year probation sentence. Prior to sentencing, Appellant failed to appear at a review hearing, which led the trial court to issue an arrest warrant. Appellant was arrested two years later. Thereafter, Appellee filed its motion to revoke. Appellant argued that the trial court had no jurisdiction to revoke his probation because the one-year sentence had expired. The Appellate Court held that the warrant tolled the running of the probation term, so the trial court had jurisdiction. Remanded.

***

This matter comes before the Southwest Intertribal Court of Appeals from the Southern Ute Tribal Court, and arises out of the trial court's decision to revoke Defendant's probation. Defendant has appealed, challenging the jurisdiction of the trial court. For the reasons set forth below, this Court affirms the decision of the court.

I. Background

On March 12, 2002, the trial court sentenced Wheeler to 20 days in jail, suspended that sentence, and imposed one year of probation. On May 1, 2002, Wheeler failed to appear at a scheduled review hearing, and the court issued a bench warrant for his arrest.

Wheeler was eventually arrested two years later, in February 2004. The Tribe filed a motion to revoke Wheeler's probation. Wheeler argued that the court lacked jurisdiction to revoke his probation, as it had expired a year earlier. The trial court ruled that the probation period was tolled by the issuance of the bench warrant, that the court therefore did possess jurisdiction, and revoked the probation. Wheeler now appeals, contending that the lower court erred in finding it possessed jurisdiction.

II. Analysis

On appeal, Wheeler argues that a term of probation automatically expires at the conclusion of the stated term, and that the court must take affirmative action to toll the running of the probationary period. Wheeler argues that merely issuing a bench warrant is not enough; revocation proceedings must be started during the probationary period.

The vast majority of courts considering this issue have concluded that the issuance of a bench warrant is sufficient to toll the running of the probationary period when the probationer has voluntarily absented himself from the court's jurisdiction. In the words of the Third Circuit:

> It is well-settled that when probation violations take place within the five-year period, and formal revocation proceedings are commenced (by arrest warrant or otherwise) within the five year period, probation can be revoked, even if the revocation hearing starts and the actual revocation takes place after the end of the five year period.

U.S. v. Bazzano, 712 P.2d 826, 835 (3rd Cir. 1983). The Western District of Texas declared:

> It would be unreasonable to conclude that a probationer could violate conditions of probation and keep the clock running at the same time, thereby annulling both the principle and the purpose of probation.

U.S. v. Green, 429 F. Supp. 1036, 1038 (W.D.Tex. 1977). In *State v. Adams*, the Washington Court of Appeals declared:

> Other cases have reached similar conclusions, on the same theory--that the offender was unavailable for supervision. The common thread in these cases is frustration of the purpose of supervision. Probation in lieu of incarceration is a privilege; its aim is rehabilitation. When an offender eludes supervision, he eludes rehabilitation as well. If his absence does not toll the court's jurisdiction, he escapes punishment all together.

88 P.3d 1012, 1013-14 (2004). See also *Spokane v. Marquette*, 43 P.3d 502 (Wash.2002); *People v. Peretsky*, 616 P.2d 170 (Colo. Ct.App. 1980).

The few cases finding otherwise, requiring more than a bench warrant, did so based on explicit statutory requirements. No such requirement exist in the present case. This Court therefore adopts the reasoning of the courts quoted above.

Wheeler absconded from the jurisdiction and violated his probation. His wrongful actions, coupled with the fact that he was able to elude arrest for over a year, should not be enough to override the basic responsibility to comply with the terms of probation. The issuance of the bench warrant was sufficient to toll the running of Wheeler's probation, and the tribal court thus possessed jurisdiction to revoke that probation. This case is remanded to the lower court for proceedings consistent with this opinion.

IT IS SO ORDERED.

June 9, 2006

DYLAN POBLANO,

Appellant,

v.

PUEBLO OF ZUNI,

Appellees.

SWITCA No. 04-005-ZTC
ZTC No. CR-2004-0038

Appeal Filed June 23, 2004

Appeal from the Zuni Pueblo Tribal Court
Sharon Begay, Judge

Appellate Judges: Elizabeth C. Callard, Roman J. Duran, and Neil T. Flores

OPINION

SUMMARY

Appellant filed a notice of appeal and motion for stay of judgment and release pending appeal on his conviction for driving under the influence of intoxicating liquor and for other offenses. Appellant argued that (1) the prosecutor did not prove his guilt beyond a reasonable doubt, (2) the burden of proof was shifted to him by the introduction of evidence of his refusal to submit to chemical testing, and (3) another individual had been acquitted by the same court on "the same" set of facts that resulted in his conviction. The Appellate Court concluded that the evidence was sufficient to support the trial court's verdict and that the trial court committed no error. The assertion that another individual was acquitted on the "same facts" was irrelevant to the Court's determination that the evidence was sufficient.

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THIS MATTER COMES BEFORE THE SOUTHWEST INTERTRIBAL COURT OF APPEALS from the trial court for the Pueblo of Zuni (hereafter "the Pueblo") and arises out of criminal complaints filed against the Appellant, Dylan Poblano. Mr. Poblano was convicted at trial of the following violations of the Zuni Traffic Code, on April 16, 2004: driving under the influence of intoxicating liquor (§6-1-6); a speed limit violation (§6-1-128); refusal to submit to chemical testing, a driver's license violation (§6-1-2C); and operating a vehicle with an expired registration (§6-1-135A). Mr. Poblano has exercised his right to appeal those convictions. Mr. Poblano filed a Notice of Appeal and Motion for Stay of Judgment & Release Pending Appeal in accordance with law.[1] The Appellant's Motion for Stay of Judgment & Release Pending Appeal, although opposed by the prosecution, was granted by the trial court. This Court has received the Appellant's Statement of the Case, filed by Mr. Poblano on June 23, 2004, and the Appellee's Reply Brief for the Pueblo of Zuni, filed on November 1, 2005.[2] The record has been reviewed by

[1] The Appellant was initially represented in this appeal by Eldred Bowekaty, who filed this appeal on the Appellant's behalf. The appellate panel has recently been informed that Mr. Bowekaty was disbarred by the Zuni Tribal Court for a period of six months. Although the letter informing the Court of Mr. Bowekaty's disbarment was dated October 11, 2005, it does not state the effective date of Mr. Bowekaty's disbarment. Mr. Bowekaty must be admitted to practice before the Zuni Tribal Court in good standing in order to practice before this Court in connection with the appeal of a ruling of the Zuni Tribal Court. At this stage of these proceedings, this Court will treat the Appellant's pleadings as having been filed by the Appellant pro se, considering the arguments raised on appeal on the merits but allowing Mr. Bowekaty to have no further involvement in the appellate process.

[2] Peter C. Tasso, prosecutor for the Pueblo of Zuni, filed a motion to withdraw as counsel of record on October 5, 2005, giving the reason that he was no longer employed by the Pueblo of Zuni at that time. William Johnson, Mr. Tasso's replacement, promptly entered his appearance for

the appellate panel. The panel has reviewed the record and the law and finds that the lower court did not err in convicting the Appellant of the offenses charged. Accordingly, this Court affirms the rulings of the lower court and remands the case for such further proceedings as may be necessary.

I. Background

The Appellant, Mr. Poblano, was convicted of driving under the influence of intoxication liquor, a speed limit violation, refusal to submit to chemical testing, and operating a vehicle without registration on April 16, 2004. Mr. Poblano received the following sentence:

> DUI: $500 fine, 20 days CSW, 60 days in jail (allow 2-1) Driver License suspended for 1 yr., alcohol evaluation, probation for 1 year after jail term and Victim Impact Panel. Speeding: $92.00 fine, DL Requirement: $25.00, Evidence of Registration: $25.00, Court Cost: $25.00, totaling $667.00; cash bond forfeit to fine and remaining payment in 60 days. Jail Term to begin on April 21, 2004 at 8:00 A.M. [sic]

The imposition of judgment and sentence was stayed pending the outcome of this appeal. Mr. Poblano has appealed only his conviction for driving under the influence of intoxicating liquor.

II. Arguments of the Parties on Appeal

Mr. Poblano argues simply that the Pueblo did not prove beyond a reasonable doubt that he was guilty of the offense of driving under the influence of intoxicating liquor, because the Pueblo did not establish that Mr. Poblano was impaired to a degree that rendered him incapable of driving safely. Mr. Poblano argues further that the burden of proof was shifted to him by the introduction of evidence of his refusal to submit to chemical testing. He also states that another individual was acquitted by the same court on "the same" set of facts that resulted in his conviction.

The Pueblo argues that the trial court findings are amply supported by the evidence and that consideration of a defendant's refusal to submit to chemical testing is permitted by law and does not operate to shift the burden of proof.

III. Legal Analysis

The primary question for this Court is whether the evidence, taken as a whole, supports the convictions entered by the trial court. Mr. Poblano's contention that the burden of proof was improperly shifted to him is without merit, as is his argument that this Court should consider the acquittal of another defendant when evaluating the sufficiency of the evidence in this case. This Court finds that the evidence in the record is sufficient to support the trial court's findings that Mr. Poblano is guilty of the offenses charged.

The trial court judge, during a trial to the court, is the sole adjudicator in making decisions on the credibility of the witnesses and the weight given to evidence presented at trial. *See Matter of Laurie R.*, 760 P.2d 1295 (N.M. App.1988) (An appellate court will not substitute its judgment for that of the trial court. It is for the trier of fact to weigh the evidence, determine credibility of witnesses, reconcile inconsistent or contradictory statements of witnesses and determine where the truth lies.); *see also State v. Bankert*, 875 P.2d 370 (N.M. 1994) (The test is whether substantial evidence exists to support a verdict of guilt beyond a reasonable doubt when the reviewing court views the evidence in the light most favorable to upholding the verdict.).

Clearly, Mr. Poblano would have preferred that the trial court judge weigh the evidence differently than she did. The trial court judge did not clearly err, however, in believing and giving weight to the evidence of Mr. Poblano's guilt; nor did she commit error in finding that the evidence established Mr. Poblano's guilt beyond a reasonable doubt. There was testimony that Mr. Poblano was accelerating away from an intersection and exceeding the speed limit and that he was contacted and observed to be unsteady on his feet. Mr. Poblano admitted to drinking alcohol, and it was the arresting officer's opinion that he was intoxicated. Mr. Poblano refused to submit to chemical testing as required by law, and the Court is permitted to consider that fact, together with all the other evidence, in assessing Mr. Poblano's guilt. Because there was no chemical test to establish whether or not Mr. Poblano was intoxicated, the trial court relied on the physical observations of the arresting officer to determine that Mr. Poblano was incapable of driving safely. Although Mr. Poblano clearly disagrees with the trial court's assessment of the evidence, nothing in the record would support a finding by this Court that such evidence was incredible as a matter of law. The fact that there may be some inconsistencies is not determinative, given the record before the trial court, and Mr. Poblano's assertion that another individual was acquitted on "the same" facts is irrelevant to this Court's determination that the

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the Appellee and filed the Appellee' Reply Brief. No prejudice resulted to the Appellee as a result of the substitution of counsel.

evidence before the trial court in this case supports Mr. Poblano's conviction.

IV. Conclusion

For the foregoing reasons, this Court finds that the trial court committed no error in entering judgment of conviction against Mr. Poblano for driving under the influence of intoxication liquor. The decision of the trial court is affirmed, and this matter is remanded to the trial court for further proceedings to implement the judgment of conviction and imposition of the sentence.

THE APPELLATE PANEL FULLY CONCURS. IT IS SO ORDERED.

April 17, 2006

MAYA BAKER,

Petitioner-Appellee,

v.

SOUTHERN UTE DEPARTMENT OF JUSTICE HEARING DIVISION,

Respondent-Appellant.

SWITCA No. 04-008-SUTC
SUTC No. 04-AP-106

Appeal Filed January 18, 2005

Appeal from the Southern Ute Tribal Court
Elizabeth C. Callard, Judge

Appellate Judge: Melissa L. Tatum

DECISION

SUMMARY

Appellant Hearing Division revoked Appellee's driving privileges after her arrest for driving under the influence. The trial court reversed the revocation. Appellant argued on appeal that there was reasonable suspicion to stop Appellee's vehicle. Appellee argued that the Appellate Court lacked jurisdiction because Appellant failed to timely file the appeal. Due to a lack of notice of a rule change, Appellant relied on a prior version of the SWITCA filing rule that was posted on the trial court's website, so due process demanded that the Appellate Court use the prior version to conclude that it had jurisdiction. The Appellate Court reversed the trial court's decision because there was reasonable suspicion to stop Appellee's vehicle. The Appellate Court noted that the trial judge's evidentiary demands exceeded the standard for reasonable suspicion, which requires a showing considerably less than a preponderance of the evidence. Remanded with instructions to reinstate the revocation.

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This matter comes before the Southwest Intertribal Court of Appeals from the Southern Ute Tribal Court, and arises out of the trial court's reversal of the Hearing Officer's decision to revoke Baker's driving privileges. The Hearing Division has appealed. For the reasons set forth below, this Court reverses the decision of the trial court.

Timeliness of Appeal

Before addressing the substance of the appeal, this Court must first address a preliminary procedural issue concerning the timeliness of the appeal.

Under the rules of this Court, the Appellate Code of the Southern Ute Indian Tribe governs this action (Southern Ute Indian Tribal Code §§ 3-1-101 through 3-1-112). The SWITCA rules serve to supplement the Southern Ute's Appellate Code. SWITCARA #1(b) (2001). The rules require that the notice of appeal be filed within fifteen days of the entry of final judgment. S.U.I.T.C. § 3-1-104(1). This requirement is jurisdictional. SWITCARA #11c (2001).

This Court originally dismissed this appeal as untimely filed under the 2001 amendments to the SWITCA rules. On January 18, 2005, however, the Court granted the Hearing Division's motion to reinstate the rules, as it was clear that the Hearing Division never received notice of the change in the rules and the Court had the old version of the rule posted on its website.

In her Response Brief, Baker argues that because the rule regarding when the notice of appeal must be filed is jurisdictional, and since the Hearing Division's notice was not filed in accordance with that rule, this Court lacks jurisdiction.

Over and above the language of the court rules, this Court must follow the guiding principle of due process. At its essence, due process demands notice and a chance to be heard. On January 18, 2005, this Court found that the Hearing Division did not receive notice of the rule change, and since the incorrect version of the rule was posted on the Court's own website, it was reasonable for the Hearing Division to rely on the old rule. Thus, due process demands that the Court use the prior version of

the rule in determining whether the appeal was timely filed. Since the Hearing Division's notice of appeal did comply with the requirements of the old rule, this Court does possess jurisdiction and will address the merits of the appeal.

Factual Background

The parties have raised only one issue on appeal, and that centers around whether Officer Naranjo possessed reasonable suspicion to stop Baker's vehicle. The Hearing Officer found that reasonable suspicion did exist. The trial judge ruled that the Hearing Officer's decision was legally incorrect and therefore reversed it.

Because the facts themselves are not in dispute, but rather at issue is the inferences to be drawn from those facts, this Court will use the findings of fact from the Hearing Officer's decision. Indeed, the trial judge ruled that those facts were supported by competent evidence.

On March 25, 2004, at about 10:35 p.m., SUPD Officers Chris Naranjo and Amber Garcia were patrolling the area immediately south of Ignacio known as "Rock Creek." The Southern Ute Animal Control Division uses this area of tribal land to hold impounded animals. Officer Naranjo knew the dog kennels had been vandalized many times in the past. He personally took many police reports concerning the vandalism there. On one occasion, impounded animals were killed. As a result, the Lead Animal Control Officer, Claire Wingfield, has asked SUPD officers to patrol the area for suspicious activity. He testified that no reports of vandalism had been received that night, although SUPD had received a report in the relatively recent past.

As Officer Naranjo patrolled the area, he noticed headlights near the dog kennels. He knew that no one should be at the dog kennels at 10:35 p.m. and found this activity to be "very suspicious." He turned his vehicle around with the intention of investigating. Upon approaching the kennel area, he noticed a vehicle turning north from the kennel entrance onto Goddard Avenue. As he followed it he noticed it weaving across the center line and then hugging the fog line. He turned on his emergency lights and stopped the vehicle, which stopped abruptly in [the] turn lane onto Cedar Street.

The remaining facts relate what happened after the stop, and not what led to the stop. As a result of the stop, Baker was arrested for DUI.

Analysis

In their briefs, both parties focus on whether the officers had reasonable suspicion to stop Baker's vehicle. In doing so, they cite several cases and parse the facts in light of those cases. Neither party, however, has focused on the most pivotal case from the U.S. Supreme Court pertaining to these facts.

In *Illinois v. Wardlow*, 528 U.S. 119 (2000), the U.S. Supreme Court discussed how to analyze reasonable suspicion, what constitutes reasonable suspicion, and the relevance of the suspect's location in a reasonable suspicion analysis. The U.S. Supreme Court's decision carries great weight with this Court, in light of the Indian Civil Rights Act and Southern Ute's directive to use Anglo American common law as a basis for decision unless its statutes state otherwise.

In *Wardlow*, the U.S. Supreme Court stated that:

> In *Terry*, we held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has reasonable, articulable suspicion that criminal activity is afoot. While "reasonable suspicion" is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch' " of criminal activity.
>
> . . . An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, we have previously noted the fact that the stop occurred in a "high crime area" among the relevant contextual consideration in a *Terry* analysis. . . . Thus, the determination of reasonable suspicion must be based on common sense judgments and inferences about human behavior.

528 U.S. 123-125 (citations omitted).

In the present case, it is clear that the officers possessed specific and articulable suspicion, and not just a mere "hunch." The articulated facts are:

1) Officer Naranjo saw headlights near the kennel area late at night, at a time he knew no one should be at the kennel.

2) The kennel had suffered a number of instances of vandalism, including an incident in which animals were killed.

3) Animal Control requested increased patrols by the police department.

4) Baker's car pulled out of the road that leads to the kennel.

5) Baker's car was weaving across the center line and the fog line.

Common sense dictates that when someone is seen late at night in an area where no one is supposed to be, and that area has been subject to a number of instances of vandalism, that another act of vandalism may be afoot. That is the very essence of "reasonable suspicion."

In finding that the Hearing Officer was erroneous in finding that reasonable suspicion existed, the trial judge declared that:

> The cases relied upon by the [Hearing Division] rely at least on some minimal act on the part of a defendant. In this case, there was no act committed by Ms. Baker other than her presence. There was no evidence that there had been any recent report of vandalism or any other crime. There was no evidence that Ms. Baker was unlawfully in the area in which she was stopped. There was no evidence that Ms. Baker reacted to seeing the officer's vehicle. There [was] no evidence at all that Ms. Baker did anything that could be characterized as suspicious other than her mere presence.

Order Reversing Hearing Officer's Decision p. 4.

The trial judge's decision contains two analytical errors that caused the judge to reach an incorrect decision. First, the judge ignored two key facts. Fact one, Baker's car emerged from the road leading to the kennel immediately after the officers spotted headlights near the kennel and before the officers could themselves turn down the road to the kennel. Fact two, the officers knew that no one should be at the kennel at that hour. Baker's car was not just traveling in the vicinity of the kennel or down a public highway near the kennel. *It was coming from a kennel late at night that had suffered a rash of vandalism when no one should be at the kennel*. That is more than "mere presence."

Second, the trial judge's evidentiary demands exceeded the standards for "reasonable suspicion" Reasonable suspicion requires a showing considerably less than a preponderance of the evidence. The facts as found by the Hearing Officer support a finding that Officers Naranjo and Garcia possessed reasonable suspicion to stop Baker's car.

The decision of the trial court is reversed and this case is remanded to the lower court with instruction to reinstate the Hearing Officer's decision.

IT IS SO ORDERED.

May 11, 2006

ELI SAM,

Defendant-Appellant,

v.

SOUTHERN UTE INDIAN TRIBE,

Plaintiff-Appellee.

SWITCA No. 05-004-SUTC
SUTC No. 05-TR-521

Appeal Filed February 17, 2005

Appeal from the Southern Ute Tribal Court
Scott Moore, Judge

Appellate Judge: Anita H. Frantz

OPINION

SUMMARY

Defendant-Appellant, a non-Member, appealed the lower court ruling that denied him a jury selected from a jury array that included non-Members in the pool of potential jurors. The Appellate Court, finding error, reversed the lower court's decision.

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This matter comes before the Southwest Intertribal Court of Appeals from the Southern Ute Indian Tribal Court, and arises out of a criminal case in which Eli Sam was convicted by jury of Driving while Ability Impaired and Drug Abuse. Eli Sam is a Native American but not an enrolled member of the Southern Ute Indian Tribe. Mr. Sam appealed a decision of the Southern Ute Tribal Court ("Tribal Court") requiring that all jurors summoned to hear his case be enrolled members of the Southern Ute Indian Tribe. Prior to the trial, the Defendant filed a

motion in Tribal Court seeking to quash the jury array. The Tribal Court denied Mr. Sam's motion.

Eli Sam filed a notice of appeal with this Court. This Court accepted jurisdiction and issued an order establishing a schedule for filing briefs. The issue before this Court concerns the composition of the jury summoned to hear Appellant's case. The issues presented on appeal are (1) whether a criminal defendant who is not a Southern Ute Tribal Member is entitled to have their case heard by a representative cross-section of the entire community under the Southern Ute Tribal Code, and (2) whether the Tribal Court's decision to exclude reservation residents who are not Southern Ute Tribal Members from jury duty violates rights guaranteed to criminal defendants by the Indian Civil Rights Act.

FACTS

Eli Sam is a Navajo Indian residing within the exterior boundaries of the Southern Ute Indian Reservation. On October 26, 2004, the Southern Ute Police Department arrested and charged Mr. Sam with driving while ability impaired, and drug abuse. Mr. Sam timely requested trial by jury. After plea negotiations proved unsuccessful, the Court summoned prospective jurors to hear Mr. Sam's case. The pool from which the prospective jurors were summoned included only enrolled Tribal Members. Mr. Sam objected to the pool of prospective jurors, and filed a motion with the Tribal Court asking that the entire array be quashed. Mr. Sam argued that, since he is not a Tribal Member, he is entitled to have included in his pool of prospective jurors not only Tribal Members living on the Reservation, but also non-Members living on the Reservation. The Tribal Court denied Mr. Sam's motion. In reaching its decision the Tribal Court relied exclusively on a statute in the Criminal Procedure Title of the Tribal Code which states that one of the basic qualifications for jury duty is to be a Tribal Member. The Tribal Court decided not to apply the statute found in the General Provisions Title of the Tribal Code giving non-Member defendants (such as Mr. Sam) the right to have other non-Members included in their pool of prospective jurors. The Tribal Court ruled that in all criminal cased filed in the Southern Ute Tribal Court, the pool of prospective jurors is to be comprised only of Tribal Members, regardless of the Defendant's tribal affiliation.

DISCUSSION

Title 1 of the Southern Ute Tribal Code discusses jurors and eligibility for jury duty. It appears to this court that when the Tribal Council adopted Title 1, it distinguished cases involving Tribal Members from cases involving non-Members. According to §1-1-116(1), if the defendant is a Tribal Member, then the jury pool is to include only other Tribal Members. If the defendant is a non-Member, then "the list of potential jurors shall include persons from a list of nonmembers of the Tribe living within the exterior boundaries of the reservation." §1-1-116(2). When read in its entirety, §1-1-116 is quite specific that the pool from which prospective jurors are summoned varies depending on the Defendant's tribal affiliation.

Title 4, like Title 1, discusses the qualifications of jurors. According to §4-1-121(1), one of the basic qualifications of a juror is to be a Tribal Member. §4-1-121(1) does not distinguish between cases involving Tribal members and those involving non-Members. In addition §4-1-121 does not discuss the pool from which prospective jurors are to be drawn, as does §1-1-116. However, because §4-1-121 is found in the Criminal Procedure title, and §1-1-116 is found in the General Provisions title, the Tribal Court found §4-1-121 to be more specific than §1-1-116, and therefore the only statute to be applied when determining eligibility for jury duty. The Tribal Court found §4-1-121(1) limits the pool of prospective jurors to Tribal Members only. This decision was in error.

Title 1 and Title 4 must be read together. These sections define the qualifications for jurors who also are Tribal Members, for indeed, Tribal Members are eligible to serve as jurors in all cases. §4-1-121 does not, however, limit the pool of prospective jurors to only Tribal Members. If the Defendant is a non-Member, then §1-1-116(2) requires that the pool of prospective jurors include non-Members, and defines the qualifications for these non-Member prospective jurors.

The jury provisions of Title 4 are not more specific than the jury provisions of Title 1. To the contrary, §1-1-116 appears to be more specific than §4-1-121 because §1-1-116 discusses the distinct juror qualifications for cases involving Tribal Members, and for cases involving non-Members. Title 1 supplements Title 4 by enlarging the pool of prospective jurors in cases involving non-Members, and further explains Title 4 by discussing the juror qualifications for both Tribal Member prospective jurors, and non-Member prospective jurors.

The issue on appeal is not one of Tribal sovereignty. As a sovereign, the Southern Ute Indian Tribe has the right to enact its own laws, including laws related to juror qualifications. The issue on appeal is not whether the Tribal Court had jurisdiction over a non-Member Indian. There is no question that it did. The inherent power of an Indian Tribe includes the power to exercise criminal jurisdiction over non-Member Indians. This inherent power is also not a question before this Court. The issue

on appeal concerns the composition of the jury summoned to hear Mr. Sam's case. The Tribal Code itself grants Mr. Sam the right to have his case heard by other non-Members. Appellee argues that the relevant Tribal Code §1-1-116 does not apply to criminal proceedings as a whole. However, §1-1-116 expressly states that it applies to all cases.

One would have to question why the Tribal Council enacted §1-1-116(2) if the Tribal council had not meant to include non-Members to the pool of prospective jurors in cases involving non-Members. By failing to recognize the express provisions of §1-1-116(2), the Tribal Court declined to give effect to the specific mandates of this statute. This was in error, and resulted in a jury array inconsistent with that required by the Tribal Code.

The Tribal Court in denying Mr. Sam's motion to quash the jury array did not address the argument that it is a violation of the Indian Civil Rights Act to summon a jury that does not represent a significant cross-section of the community. The Appellate Court finds sufficient error to reverse the Tribal Court ruling based on the arguments set out in appellant's first issue. The Appellate Court, therefore, will not rule on the appellant's second issue presented in its grounds for appeal.

CONCLUSION

The Tribal Court erred when it found that §1-1-116(2) does not apply to criminal proceedings, and thus found that non-Members have no right to have other non-Members included in their pool of prospective jurors. This decision was in error because the Tribal Code at §1-1-116(2) specifically grants the right to have non-Members included in their pool of prospective jurors in all cases. For this reason the decision of the Tribal court is reversed. The Defendant-Appellant's conviction at trial is overturned and the case is dismissed.

IT IS SO ORDERED.

November 27, 2006

AL GRIEGO, JR.,

Appellant,

v.

PUEBLO OF ZUNI,

Appellee.

SWITCA No. 06-002-ZTC
ZTC No. CR-2005-2335

Appeal Filed February 21, 2006

Appeal from the Zuni Tribal Court
Sharon M. Begay, Judge

Appellate Judges: Elizabeth C. Callard,
Roman J. Duran, and Neil T. Flores

JURISDICTIONAL AND BRIEFING ORDER

SUMMARY

Appeal dismissed due to Appellant's failure to timely file his brief as required by the Zuni Rules of Civil Procedure. Remanded for further proceedings in accordance with the conviction and sentence.

***

This matter comes before the Southwest Intertribal Court of Appeals for the Zuni Pueblo pursuant to Resolution #M70-99B059 of the Zuni Council appointing the Southwest Intertribal Court of Appeals as the Zuni Pueblo's Appellate Court, and pursuant to the appellate rules of the Zuni Pueblo, Title III, Rule 28 of the Criminal Procedure Code and Title II, Rule 38 of the Civil Procedure Code, and the rules of the Southwest Intertribal Court of Appeals, hereafter referred to as "SWITCA", as well as the Court's inherent authority to manage its business.

The SWITCA rules (SWITCARA) require that this Court abide by the Pueblo's appellate rules; SWITCARA apply only in the absence of tribal rules, but may be used to supplement existing rules in order to fill in gaps in the tribe's appellate law or rules. SWITCARA #1(b). If the Zuni Pueblo's code does not provide guidance, this Court will then look to the SWITCARA.

Before this Court may consider the appeal, it must determine that it has jurisdiction over the matter being appealed.

June 5, 2006

1. JURISDICTION

SWITCA has been lawfully appointed the Zuni Pueblo's appellate court. Resolution #M70-99B059. In addition, Zuni Rule of Criminal Procedure 28(a) provides that: "The Defendant has the right to appeal from the following: (a) A final judgment of conviction". The rule does not set any limits on the subject matter which may be appealed, other than in subsection (f), referring to the Zuni Rules of Civil Procedure, which require that the appellant provide a short statement of the reasons or grounds for the appeal. So long as the appellant states some reasonable grounds for appeal, this Court will accept the statement, provided that the appeal meets the time limit set out in Zuni Rule of Criminal Procedure 28(c), which is 10 days from the entry of the judgment. The final order of the Zuni Pueblo Tribal Court (the trial court) was entered January 12, 2006. The Notice of Appeal was filed in the trial court on January 20, 2006, within the time limits set by the Zuni rules.

Based upon the foregoing reasons, the Court determines it has jurisdiction to hear this appeal which shall be allowed to proceed.

2. DISMISSAL

Rule 28 of the Zuni Rules of Criminal Procedure provides that the Appellant shall file a Notice of Appeal within ten days of the entry of the final judgment. Except as otherwise provided in Rule 28, the appeal shall be handled under the Zuni Rules of Civil Procedure. Rule 38 of the Zuni Rules of Civil Procedure, subsection (h), provides that within thirty days of the filing of the Notice of Appeal, the Appellant shall file a written brief, unless the time for filing has been extended by this Court. The Appellant herein has failed to file an appellate brief, and more than thirty days have passed since he filed his Notice of Appeal. The Appellant has not requested an extension of time to file his written brief, and no extension of time has been granted by this Court on its own motion. The Appellant has failed to comply with the procedural requirements established by the Zuni Tribal Code. This appeal should be dismissed.

THEREFORE, IT IS ORDERED THAT THIS APPEAL SHALL BE AND IS HEREBY DISMISSED. THIS MATTER SHALL BE AND IS HEREBY REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THE JUDGMENT OF CONVICTION AND THE SENTENCE IMPOSED BY THE TRIAL COURT.

IT IS SO ORDERED AND AGREED TO BY THE APPELLATE PANEL.