

In the Southwest Intertribal Court of Appeals for the Santa Clara Tribal Court

BIRDELL AND FRED BOURDON,

I

Appellants,

v.

MERTON L. SISNEROS,

Appellee.

SWITCA No. 08-006-SCPC
SCPTC No. CV-08-295

Appeal filed on April 29, 2008

Appeal from the Santa Clara Tribal Court,
H. Paul Tsosie, Judge

Appellate Judge: Mekko M. Miller

OPINION AND ORDER DISMISSING APPEAL

SUMMARY

Appellants appealed the lower court's eviction Order. The Appellate Court determined, after a generous and liberal reading, that Appellants' Notice of Appeal neither stated the alleged errors of the lower court nor indicated the type of relief sought. Finding that severe deficiencies in the Notice of Appeal barred review, the Appellate Court denied the appeal. The Court also noted that it was without jurisdiction to review the Pueblo's cases involving property and tribal membership. Denied and dismissed.

* * *

This matter comes before the Southwest Intertribal Court of Appeals (SWITCA) from the Santa Clara Pueblo Tribal Court, and arises out of a petition seeking eviction from a land assignment within the exterior boundaries of the Pueblo of Santa Clara. Appellee, Merton L. Sisneros, the duly assigned allottee of a parcel of land in Santa Clara Pueblo sought an eviction of Appellants, Birdell and Fred Bourdon occupants of the assigned land based upon disruptive behavior to the community and failure to abide by and adhere to certain conditions of their occupancy. After a hearing, the lower court found in favor of the Appellee and entered an Order indicating the timeframe and manner of Appellants vacating of the premises. Appellants have appealed the lower court's decision.

For the following reasons, this Court denies the Appeal and Orders its dismissal.

As this Court has previously noted the appellate rules of the lower court, in this instance the Santa Clara Pueblo Tribal Court, govern the appeals process inclusive of items such as the timeline, filing fee, and sufficiency of the notice. If, however the lower court does not adopt appellate rules then the appellate rules of the Southwest Intertribal Court of Appeals may be adopted. SWITCARA #1(a)(b) (2001). In this case the Santa Clara Pueblo Tribal Court has chosen to adopt the appellate rules of SWITCA. The foregoing discussion will reflect their application regarding the insufficiency of Appellant's notice of appeal.

It is held by general appellate procedures that the party seeking the appeal must provide to the appellate body certain basic items for which to perfect their appeal. This initial set of items is laid out in what the appellate rules for SWITCA deems a notice of appeal. These basic items assist the Court in reviewing the perceived errors from the lower court record. As an appellate body, SWITCA is not a court of general jurisdiction and is relegated to only that jurisdiction by which the participating Pueblo or tribe conveys to it. In this matter the Pueblo of Santa Clara by and through its Tribal Council has granted only jurisdiction to hear and decide appeals from the Santa Clara Pueblo Tribal Court therefore, serving as an appellate body, SWITCA must determine errors in law and procedure by reviewing the complete record of the lower court and reviewing said record for alleged errors in law and procedure from the proceedings based upon appellant's Notice of Appeal.

As this Court has opined in recent history, one of the unique characteristics generally shared by tribal court systems is the ability of most to not allow for the strictures of procedure and form to dictate the outcome of justice and equitability but instead focus on achieving substantive due process. *Southern Ute Indian Tribe v. In the Interest of Baby Boy Weaver*, 16 SWITCA 10. In the same case, the Court further states that, "It is not simply enough to allege that the trial court erred. It is the duty of appellant to point to specific errors and explain why, as a matter of law, the trial court made a mistake." *Southern Ute Indian Tribe v. In the Interest of Baby Boy Weaver*, 16 SWITCA 10. This Court concurs with the sentiment and believes in the importance of justice and due process in the judicial process and must take all steps necessary to ensure that the integrity of each are being met when reviewing appellants' notices describing the perceived errors in the lower courts' decisions. With the case at hand, this Court has exercised the same care to balance the rights of the appellant with the fundamental procedures of perfecting an appeal and finds severe deficiencies with the appellants' notice that bar the review of the lower court's order by this Court.

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According to SWITCA Rules of Appellate Procedure, Rule 11(e) states as follows:

The notice of appeal **shall**, at a minimum, include:

- (1) the names, titles, addresses, and telephone numbers of the parties taking the appeal and their counsel unless the lower court determines that including the address or telephone number of any person would place that person in physical jeopardy;
- (2) the name of the court rendering the adverse ruling and the date the ruling was rendered;
- (3) **a concise statement of the adverse ruling or alleged errors made by the lower court;**
- (4) **the nature of the relief being sought; and,**
- (5) **a concise statement of the reasons for reversal and modification.**
SWITCARA #11(e) (2001) emphasis added.

The appellants in this case entered with the lower court on April 29, 2008 a handwriting notice of appeal along with a filing fee that contain a lengthy narrative of many perceived wrongs committed against them leading up to and including the lower court's order in this case. Reading the appellants' notice as liberal and generous as possible it is evident that nowhere in the narrative is it neither stated the alleged errors of the lower court nor indicates the type of relief sought. It is therefore void of the aforementioned basic requirements of SWITCA appellate rule 11e, specifically requirements (3), (4), and (5). Without these substantive requirements this Court sitting as an independent appellate body cannot begin to surmise nor will it place itself in the shoes of the appellants to assume it seeks certain relief and the reasons therefore.

As a matter of law, the disagreement by appellants with the lower court's decision and Order simply do not amount to an appealable issue under common law principles, SWITCA rules of appellate procedure or generally held principles of fairness. Without the required information to be provided in the notice of appeal this Court is left with no other alternative than to speculate as to the reason for appeal and relief sought and must dismiss this case accordingly.

II

The Court having dismissed this matter for the above stated reason would also like to briefly discuss and make note to the lower court in this matter that despite the fact that appellants in this matter failed to perfect their notice of appeal the matter would not have been appealable to this Court due to the nature of the real property involved. In accordance with the wishes of the Pueblo of Santa Clara Tribal Council memorialized in Resolution No. 99-25, which adopts and authorizes SWITCA as its court of appeals with the power to review cases from the Santa Clara Pueblo Tribal Court, SWITCA cannot review cases involving real property and tribal membership. Pueblo of Santa Clara Tribal Council Resolution No. 99-25, Santa Clara Law and Order Code Section 36.30. As this exception to the grant of jurisdiction is due to the protection of the Pueblo's inherent ability to self-govern and maintain order within the Pueblo boundaries, this Court believes that the litigants of Santa Clara Pueblo Tribal Court with similar natured cases should and need be placed on notice of this non SWITCA appealable issue.

As a recommendation, this Court highly advocates for the development by the lower court a process by which or in the least that would place would-be appellants on notice of certain appealable issues before SWITCA to avoid any further confusion and to strengthen the overall mission and service to the Pueblo of Santa Clara and its citizenry.

III

ACCORDINGLY, IT IS THE ORDER OF THIS COURT THAT THIS MATTER SHOULD BE AND IS HEREBY DISMISSED.

August 4, 2005

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

**SOUTHERN UTE INDIAN TRIBE
DIVISION OF SOCIAL SERVICES,**

Appellee,

v.

**IN THE INTEREST OF
RICHARD HERRERA,**

Appellant.

**SWITCA No. 07-001-SUTC
Case No. 07-AP-62 / 06-GS-260**

Appeal filed April 23, 2007

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

Appellate Judge: Bethany Berger

ORDER DENYING MOTION TO REMAND FOR TRIAL *DE NOVO* AND MOTION TO DISMISS AND REJECTING PETITION FOR DISCRETIONARY APPEAL

SUMMARY

Appellant appealed tribal Protection Order finding Appellant to be an at-risk adult in need of long term protection, granting legal guardianship to the Division of Social Services, and ordering the Division to plan and deliver services to Appellant. The Appellate Court denied Appellant's Motion for Trial De Novo determining that the existing transcript and recording, while incomplete, were sufficient to determine much of the evidence presented below, and Appellant's Notice of Appeal did not involve questions of fact requiring a more complete record. The Court also denied the Appellee's Motion to Dismiss the Notice of Appeal and Amended Notice of Appeal finding that the notice was sufficient to meet both the tribal code and SWITCA rules. Additionally, the Court found that Appellant had not failed to timely file a brief. Finally, the Court exercised its discretion not to accept the appeal under the tribal code. Finding that the Notice of Appeal did not raise important legal questions, the Appellate Court denied Appellant's petition for discretionary appeal.

* * *

This appeal arises from the April 6, 2007 Protection Order of the Southern Ute Tribal Court finding Appellant Richard Herrera an at-risk adult in need of long-term protection, granting the Division of Social Services legal guardianship over Appellant, and ordering the Division to plan and

deliver services providing the least restrictive means to satisfy his needs.

Pursuant to SWITCA Rule of Appellate Procedure 1(b), the Court looks primarily to Southern Ute law in deciding this appeal, applying the SWITCA rules as a supplement when they do not conflict with Southern Ute law.

On April 19, 2007, Appellant filed a Notice of Appeal with the Southern Ute Court of Appeals, supplementing it with an Amended Notice of Appeal on April 20, 2007. A transcript of the taped recordings was timely requested, although there were significant delays in its preparation a delivery to the parties. A response to the Notice of Appeal was not filed until August 22, 2007. On February 29, 2008, the Appellant filed a Motion for Remand for Trial *De Novo* pursuant to SWITCA Rule of Appellate Procedure 18 due to the gaps in the transcript because of the poor quality of the audio recording. On April 10, 2008, Appellee Southern Ute Tribe Division of Social Services filed a Motion to Dismiss the Appeal due to alleged inadequacies of the Amended Notice of Appeal and the failure of Appellant to file a brief on the appeal. A teleconference with the parties regarding these motions and the justification for accepting the appeal was held on May 6, 2008.

This Court having considered the parties' respective motions, finds that they are ill-founded and rejects both. The Court nevertheless finds that there is insufficient justification to rule on the substantive grounds for appeal, and therefore exercises the discretion granted by the Southern Ute Tribal Code § 3-1-102(3) to deny the petition to appeal.

Appellant's Motion for Trial *De Novo*

Appellant moves to dismiss on the grounds that the record of the proceedings below is inadequate. Although the transcript of the proceedings has numerous gaps because of inaudible portions of the taped recording, a transcript is not a mandatory part of the record. Nevertheless a recording of the proceedings is an important part of the record of appeal, Southern Ute Tribal Code § 3-1-107; SWITCA Rule of Appellate Procedure (SWITCARA) 16(a), and the gaps in the transcript reflect the inadequacy of this taped recording. Although inadequacy of the record below is a discretionary ground to remand for a hearing *de novo*, SWITCARA 18, the Court finds that such a remand is not necessary. Rule 17, which sets forth procedures to stipulate to proceedings below when there is no recording or transcript, suggests that a verbatim recording is not always necessary. The existing transcript and recording of the proceedings, while incomplete, are sufficient to determine much of the evidence presented below, and more important, the Appellant's Notice of Appeal involves no questions of fact that would require a more complete recording.

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Appellant's motion for Trial *De Novo* is therefore denied.

Appellee's Motion to Dismiss

The Appellee moved to dismiss the appeal on the following grounds: the Notice of Appeal and Amended Notice of Appeal were not minimally sufficient to comply with SWITCARA 11; and the Appellant has not yet filed a brief in support of the appeal. Both motions are denied.

First, together the Notice of Appeal and Amended Notice are sufficient to meet both Southern Ute Tribal Code § 3-1-104 and SWITCARA 11. They notify the Court of a number of alleged errors made by the trial court and inform the court of the order appealed from, the parties and their legal counsel, and the remedy requested. Should the Court grant the discretionary appeal, the alleged reasons for requesting dismissal of the case or reversal would be clear.

Second, the Appellant has not failed to timely file a brief in this case. Under the Southern Ute Tribal Code § 3-1-107(2), the Appellant has the option "at any time twenty (20) days after delivery" of the record of appeal, "appellant may submit a supplemental memorandum of legal authority supporting his position." It is not clear from this language whether the supplemental memorandum should be submitted *within* 20 days after the filing of the record of appeal (in which case Appellant would have missed the deadline), or *at least* 20 days after the filing of the record of appeal, in which case any supplemental memorandum would still be timely. In any case, the filing of such memoranda is optional, and does not rule out any additional briefs or require dismissal if not filed. See *SUIT v. Williams*, 6 SWITCA Rep. 10, 11 (Southern Ute Tribe 1995). SWITCARA 26 provides that the Appellant shall file a written brief in support of the appeal "within 30 days after being served notice that the court of appeals has accepted the appeal." As this Court has not yet filed a notice that the appeal is accepted, this timeline has not yet begun, and cannot serve as a basis for dismissal.

The Appellee's Motion to Dismiss is denied.

Petition for Discretionary Appeal

Under the Southern Ute Tribal Code only criminal defendants sentenced to sentences in excess of 10 days in jail or \$200, or parties in civil suits required to pay damages in excess of \$500 are entitled to appeal as of right. Southern Ute Tribal Code § 3-1-102(2). For all other appeals, granting an appeal is in the discretion of the appeals judge. Southern Ute Tribal Code § 3-1-102(3). This Court exercises its discretion not to accept the appeal.

The order of protection was not appealed on the grounds that Appellant's needs do not warrant guardianship, and in any case, the need for continued protection must be

reviewed every 6 months, or earlier upon motion of an interested party. Southern Ute Tribal Code § 8-4-123. The only reason to accept the appeal, therefore, is to review important legal questions that are well presented by the facts below and will have a meaningful impact for either Appellant or future individuals. Importantly, the fact that Appellant here has requested a remand for trial *de novo* suggests that even Appellant believes that resolution of the legal grounds presented in the Notice of Appeal will not significantly impact him at this time. To give guidance in future proceedings, however, the separate grounds of appeal are reviewed below to explain why none of them is appropriate for a discretionary appeal at this time. Because the petition for appeal is denied, this portion of the decision is without precedential value and does not comprise the law of the case in future proceedings in the Herrera matter.

The first ground for appeal, whether the Tribal Court erred in proceeding upon a Petition that was not verified, is a technical question whose decision will not affect Appellant. The Tribal Court revisited the question of guardianship for the Appellant in April 2008 and determined that his circumstances still warranted guardianship. An appellate ruling on an alleged technical irregularity at the first guardianship hearing will not affect Appellant's current status or have a significant impact for future subjects of protection petitions, who may raise such questions before the trial court.

The second ground for appeal, whether the trial court erred in finding that it has jurisdiction over all enrolled members for purposes of guardianship regardless of residence of domicile, is an important question of law with a potentially significant impact on future subjects of protection orders, but is not well presented by this appeal. First, the court below made no factual finding as to whether Appellant resided or was domiciled on the reservation, but simply held that this fact was irrelevant. More important, the relevance of residence or domicile is not clearly presented in this case, as the evidence is at best conflicting regarding Appellant's domicile and residence at the time the protection order was sought. In particular, there is substantial evidence that at the time of the incident that led to the protective order Appellant was domiciled on the reservation, in the sense that it was the center of his social, political and economic life. Before the incident that led to the protective order, for example, Appellant had received services from the Southern Ute Division of Social Services on a voluntary basis between 2004 and 2006, only lived off the reservation in late 2006 in order to attend a residential treatment facility as a client of the Southern Ute Division of Social Services, had worked repeatedly for the Southern Ute Tribe, and one of his complaints about his residential living facility was that it is not nearer to the reservation town of Ignacio where his relatives live. Particularly for an individual such as Appellant, who has substantial emotional, social, and economic connections to the reservation, this is not a close

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question deserving of appellate review. As the trial court noted, the Southern Ute Tribal Code § 8-1-101(2) provides that the tribal court has jurisdiction to appoint guardians for members of the Southern Ute Tribe, regardless of their residence. In addition, previous decisions from other courts have held that tribes have jurisdiction over their members with regard to important matters such as social welfare and custody without limitation as to territorial jurisdiction. *See John v. Baker*, 982 P.2d 738, 758 (Alaska 1999). While there may be an issue deserving of review with respect to an individual who lacks Appellant's ties to the reservation, it is not presented here by the tribal court's order.

The third ground for appeal, "whether the Department of Social Services, a non-person may be designated as a guardian" under Southern Ute Tribal Code § 8-4-103(6), may raise interesting technical issues, but is not alone sufficient to justify appellate review here. The fourth ground for appeal, whether the standards articulated in the Southern Ute Elder and At-Risk Adult Protection Code are sufficient under the Indian Civil Rights Act, is an important question with implications for other individuals, but is not well presented by this case, in which there was substantial evidence that the protective order was sought because Appellant was at serious risk of endangering his own life, health, and safety. Finally, the question of whether the trial court erred in limiting inquiry regarding whether less restrictive options than guardianship is misplaced. The order of guardianship itself does not determine to the restrictiveness of the environment within which Appellant will be placed, but simply who has the authority to decide that environment. The trial court determined that Appellant was incapable of making those decisions without posing a significant risk to his own health. As the trial court ordered, the guardian must place Appellant in the least restrictive environment appropriate to his needs.

Because the Notice of Appeal raises no important legal questions that are well presented by the facts of this case, because Appellant himself has requested that the case be remanded for a trial *de novo*, and because a *de novo* review of the need for the protective order is already provided for by the Southern Ute Tribal Code, the petition for discretionary appeal is denied without prejudice to any of the legal issues raised therein.

SO ORDERED.

May 22, 2008

SOUTHERN UTE INDIAN TRIBE,

Appellee,

v.

RALLY IN THE ROCKIES, INC.,

Appellant.

**SWITCA No. 07-002-SUTC
No. 06-CV-160**

Appeal filed June 25, 2007

Appeal from the Southern Ute Tribal Court
Suzanne F. Carlson, Judge

Appellate Judge: Steffani A. Cochran

DISMISSAL ORDER

SUMMARY

The Appellate Court dismissed Appellant's appeal for failure to post the required appeal bond. The Court notes that an appeal bond serves to discourage frivolous appeals which waste limited resources of the Court and parties. Dismissed.

* * *

THIS MATTER having come before the Southwest Intertribal Court of Appeals ("SWITCA") upon an appeal taken by Appellant in the above-styled cause and this Court having issued an Order to Show Cause on June 9, 2008 as to why this appeal should not be dismissed for Appellant's failure to post the required appeal bond. The Appellant filed no response to the Order to Show Cause.

When a judgment is appealed, a bond is usually required to guarantee that if the appeal is unsuccessful, funds would be available to pay the original judgment as well as costs of the appeal. This serves to discourage frivolous appeals which ultimately waste the limited resources of the courts and parties as has occurred here. The "(f)ailure to post an appeal bond is an extremely serious matter" warranting dismissal of the appeal. *Pinnecoose v. Pinnecoose*, 14 SWITCA 6 (2003). Thus, the appeal is dismissed.

IT IS SO ORDERED.

July 28, 2008

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

K. R., Minor Child,

Defendant-Appellant,

AND CONCERNING:

**MELISSA REED,
MOTHER OF K.R.,**

v.

BENNETT THOMPSON,

Petitioner-Appellee.

**SWITCA Case No. 07-005-SUTC
Tribal Case 07-AP-220/07-CV-149**

Appeal filed December 11, 2007

Appeal from the Southern Ute Tribal Court
Suzanne F. Carlson, Judge

Appellate Judge: Mekko M. Miller

OPINION AND ORDER DENYING MOTION TO REMAND FOR TRIAL DE NOVO

SUMMARY

Appellant, a minor child, appealed the lower court's Order Regarding Exclusion of Appellant from the Southern Ute Indian Reservation. The Order did not exclude the Appellant entirely from the reservation and included exceptions that allowed Appellant to remain in the family residence and attend scheduled appointments. The Appellate Court affirmed the lower court's Order Regarding Exclusion, finding that the tribal court did not err in: (1) making a factual determination of Appellant's membership status based on tribal law; (2) determining that certain provisions of the tribal constitution were inconsistent with other provisions of the tribal constitution; (3) determining that the tribal constitution did not require a preliminary finding by the tribal council before an exclusion proceeding could begin in tribal court; and (4) finding that certain sections of the tribal constitution did not violate double jeopardy and equal protection assurances under ICRA. Further, the Appellate Court also found that the evidence presented to the lower court was sufficient to warrant a finding of facts by the court. The Appellate Court denied the Appellant's Motion to Remand for Trial De Novo, finding that although the record contained certain gaps and sections of inaudible testimony, it was sufficient to determine the soundness of applied law to fact in the case.

Introduction

This matter comes before the Southwest Intertribal Court of Appeals (SWITCA) from the Southern Ute Tribal Court, pursuant to Tribal Resolution No. 90-86 (July 24, 1990) of the Southern Ute Tribal Council on behalf of the Southern Ute Indian Tribe and pursuant to the Appellate Code of the Southern Ute Indian Tribe and arises out of a complaint from Appellee seeking exclusion of Appellant from the Southern Ute Indian Reservation under the provisions of the Southern Ute Indian Tribal Code (SUITC) Title X.

Appellee, Bennett Thompson, an enrolled member of the Southern Ute Indian Tribe sought the exclusion of the non-tribal member, minor child K.R., Appellant from the Southern Ute Indian Tribe Reservation based upon the grounds for exclusion as outlined in SUITC §10-1-102 namely, interference with tribal ceremonies, shrines or religious affairs, and repeated acts which threaten to place the health, safety, and welfare, or peace of the tribe in jeopardy. Upon a hearing and review of evidence, the lower court found in favor of the Appellee and entered an *Order Regarding Exclusion of [K.R.]* from the Southern Ute Indian Reservation. The Order does not exclude the Appellant entirely from within the exterior boundaries of the Southern Ute Indian Reservation but does include exceptions for the Appellant to continue to remain at his family's residence and to attend certain scheduled appointments for court ordered activity or for scheduled appointments at the local Indian Health Service facility. Appellant has appealed the lower court's decision based on numerous allegations of errors in law and their application to the lower court's Order and further motions this Court for a Remand with Trial *de Novo* based upon the alleged inadequacy of the lower court's record of proceedings.

For the following reasons, the Court denies Appellant's Motion to Remand for Trial De Novo and affirms the lower court's Order Regarding Exclusion of K.R.

Standard of Appellate Review

As this Court is now reviewing the lower court's *Order Regarding Exclusion of [K.R.]* and the potential for legal or procedural error, the Court will apply the usual standard of an appellate body and give deference to the factual findings of the lower court and all inferences and ambiguities will be construed in favor of the person filing the complaint, in this instance Appellee, Mr. Thompson, *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1168-69 (10th Cir. 1992). Further, the Court through customary practice has adopted and will apply the rule that it will consider only those issues that were properly raised in the lower court and those not raised nor relied upon during the lower court proceeding will not be given any weight. *Shoshone Business Council v. Skilling, et al.*, 20 Indian L. Rep. 6001 (Shos. and Arap. Ct. App., 1992).

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Discussion

Appellant's Notice of Appeal to the Court alleges several issues of appeal and the Court will address each or combine where pertinent, the issues as presented by Appellant.

A. Tribal Court's finding that a defendant is a non-member of the Southern Ute Indian Tribe and subject to an Exclusion Order.

Appellant questions the authority of the tribal court's ability to determine tribal members from that of non-members and the application of tribal law to them. In this case, the Southern Ute Indian Tribe enacted for itself a Constitution by which to outline certain duties and responsibilities of its leadership and Tribal Council. One such responsibility of the Tribal Council is the ability to enact tribal membership ordinances and subsequently for the creation of a tribal court system to administer and enforce the various ordinances and codes for the overall protection of its members safety, property, and general welfare. *Constitution of the Southern Ute Indian Tribe*, Article II §§2-3, Article VII §1(e). As the tribal court has been lawfully created and organized under the tribal Constitution and having been empowered with the authority to administer and enforce tribal ordinances and codes, barring the determination of membership which is the exclusive jurisdiction of the Tribal Council, the tribal court need only make a factual finding of the membership status of the Appellant by inquiring with the appropriate enrollment committee or tribal agency charged with the care of and administration of tribal enrollment. Upon this factual finding, the tribal court merely applied the facts of the case to the tribal law as stated under SUITC Title X. Therefore, as a duly authorized and Constitutionally created institution of the tribal government the Southern Ute Tribal Court has committed no error with the factual finding of a "non-member" status for a defendant and the application of the pertinent law to the circumstance, in this instance, Article X of the SUITC.

B. The Tribal Court's finding that the provisions of SUITC Article X are inconsistent with other portions of the SUITC so as to give one of those sections no effect.

As has been noted by the Court in the past, tribal courts exist for the administration of justice and must act within certain limits as described by their rules of procedure but all the while maintaining the virtue of judicial integrity. The ability to rule on the equity and validity of laws is one such responsibility of a court system in the overall administration of justice. As an independent institution that understands the implications and improper application of certain laws to a group or individual the tribal court is in an ideal position to observe what laws should or should not be given effect in

certain circumstances for the overall integrity of justice and well being for the greater community. In this case, and from review of the record, the Court can find no error in the tribal court's application of SUITC Title X and in no way does it appear that the tribal court prejudiced the Appellant by such interpretation and application. The tribal court in this instance relied upon its duty to the overall protection and adherence to the Southern Ute Indian Tribe's Constitution, legislative intent of the SUITC and administration of justice in a fair and equitable manner.

C. The Southern Ute Tribal Constitution does not require a finding of the Tribal Council prior to an exclusion proceeding nor does the reading and interpretation of one section of the SUITC grant the Tribal Court the ability to offer another section no effect in this instance.

Appellant alleges that according to the Southern Ute Indian Tribal Constitution before an exclusion proceeding begins that the individual being sought to be excluded must have a preliminary "finding" of some fashion by the Tribal Council in order for the civil action of exclusion as described in SUITC Title X can proceed in tribal court. The Appellant proffers no valid argument to be found in the SUITC or tribal Constitution as authority for this assertion. The Southern Ute Indian Tribal Constitution however does speak to the converse of this assertion in Article VII, which states that the Tribal Council shall be empowered to: "provide by ordinance, subject to the approval of the Secretary of the Interior, or his authorized representative, for the removal or **exclusion** for the reservation of any **nonmembers** whose presence may be found by the Tribal Council to be injurious to members of the tribe." *Constitution of the Southern Ute Indian Tribe*, Article VII §1(g) (emphasis added). Appellant appears to have a strict textual reading of the tribal Constitution and does not appear to read the Constitution in a comprehensive nature as does the Court. In the tribal Constitution it is repeated and inferred from the adjacent Articles that the Tribal Council is granted the authority to enact ordinances and codes for the protection of its members and is further authorized to establish a tribal court system that is responsible for the adjudication of such ordinances and codes. *Constitution of the Southern Ute Indian Tribe*, Article II §§2-3, Article VII §1(e). If in fact, the reading of the tribal Constitution was practiced by the Appellant's reading and interpretation, the Tribal Council would cease to function as a governing legislative arm of the tribal government but instead would be constantly in session acting as the role of a sitting tribal court for the fulfillment of its role to "govern the administration of justice" as described in Article VII. *Constitution of the Southern Ute Indian Tribe*, Article VII §1(e). The practical implications of the Tribal Council to sit as a tribal court in each and every proceeding would call for the entire day to day business of

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the government of the Southern Ute Indian Tribe to cease and in fact would then place the Tribal Council in potential violation of its other mandated roles under the tribal Constitution. The belief held by appellant that a “finding” by the Tribal Council before an exclusion proceeding may begin in tribal court is without merit in both the pertinent sections of the tribal Constitution and relevant sections of the SUITC.

As has been previously noted, it is of utmost importance that a tribal court sitting as a body of first instance for a proceeding to understand and apply the correct body of law to a particular set of factual circumstances for the integrity of justice to be maintained. With the case at hand, the reading and interpretation of the tribal court of relevant portions of the SUITC as it applies to juveniles and exclusion proceedings was appropriate and in no way appears to prejudice or give rise to unfair treatment to Appellant. The Court finds no authority in the tribal Constitution nor tribal code to believe that the tribal court acted outside its scope of authority and administering justice with the facts as presented in this matter.

D. Alleged violations of the Indian Civil Rights Act (ICRA) as it pertains to the Appellant in the matter at hand.

For the purposes of brevity and discussion, Appellants’ alleged violations of the ICRA as it pertains to this proceeding will be combined and given a brief discussion as to their dismissal for lack of relevancy.

Appellant alleges several violations of the ICRA and its detrimental effect towards the outcome of the proceeding against him. The Court affirms the tribal court’s ruling that the proceedings of this matter and the application of certain sections of the SUITC do not violate the ICRA.

Congress passed the Indian Civil Rights Act in 1968 as a way to place upon tribal governments certain restrictions and protections afforded by the U.S. Constitution that other governments within the jurisdiction of the federal government were compelled to adhere to by the U.S. Constitution’s Bill of Rights. Among the ICRA’s several protections afforded are two of relevance to this matter, the protection from double jeopardy and assurance of equal protection under the law and due process. 25 U.S.C. §§ 1301 *et seq.* Appellant, without supplying a full briefing of his allegation, implies that a violation of the double jeopardy and due process provision of the ICRA were committed by the tribal court’s process in the proceedings. The principle of the government or state to not prosecute a person a second time for a crime that he has already been tried for is an age old concept having origins in ancient Greek ideology but one that the Court holds to be as inviolate and important to the integrity of a judicial system today as it was believed

to be in ancient times. Appellant’s allegation of a violation of this particular ICRA provision is flawed however given the civil nature of the exclusion proceeding. It is generally and historically been held in jurisprudence that the allegation of abuse of the “double jeopardy” provision be confined to criminal proceedings by which a defendant is at risk of losing his liberty as to being confined to a jail cell or other liberty punitive consequence. In this matter, Appellant is not being charged with a crime but is answering to a civil complaint as outlined under a civil provision of the SUITC. Therefore, the Court finds no error of the ICRA provision 25 U.S.C. §1302(3) in the tribal court’s process as alleged in Appellant’s Notice of Appeal.

The ICRA provision of equal protection of laws and due process is another concept held in western thought as being of equal importance to the equitable administration of justice. The concept of due process unlike its sister “double jeopardy” provision is a more nebulous concept that does not have certain definable parameters. It does however, grounded in history and precedent, have basic elements to ensure a fair proceeding. The notion of due process, at a minimum, must include a notice and the opportunity to be heard in a meaningful manner. *Matthews v. Eldridge*, 424 U.S. 319 (1976). From the record in this case, albeit sparse and incomplete, there is every indication given that the tribal court afforded every opportunity to Appellant to state his case and in fact present witnesses to attest to his cases’ validity. Appellant has failed to provide any reasonable indication that would have the Court find otherwise that the equal protection of laws and due process provision of the ICRA was violated by the tribal court to necessitate a finding of error by the Court. Therefore the Court finds no error or merit to Appellant’s allegation concerning this issue.

E. The evidence presented at the lower court proceeding was sufficient to warrant a finding of the facts and the Tribal Court committed no evidential error.

Appellant makes a blanket allegation that the tribal court proceedings were insufficient in rendering a determination of the factual findings as it did. As stated in the Standard of Appellate Review section of this Opinion, the Court will give deference to the lower court’s factual findings. The purpose behind this notion is that absent the record’s display of a clear and gross procedural or evidentiary violation, this Court will not step into the role of fact finder. Simply stated, the tribal court is in a much better vantage point in order to determine the credibility of evidence as presented from witnesses than the Court is. Substance such as body language, vocalization, eye movements, respect for the proceedings, appearance, et al., can be best judged by the tribal court’s first hand witness of these items as they occur. Far better than the review of a written transcript or tape recording of the proceedings as read and listened to by the

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Court. Barring any appearance or clear indication of bias or ex-parte communication on behalf of the tribal court, the Court will not attempt to judge the credibility of witnesses and evidence presented without a more specific allegation of error on the part of Appellant. Appellant has failed to indicate such a specific allegation and is merely wishing to have the Court sit in review of the entire proceeding, a notion the Court will not entertain for no good cause shown by Appellant.

Appellant further contends that the trial court erred in violation of the SUITC Title IV by allowing improper evidence as outlined under that title. After reviewing the transcript of the proceedings at which both parties presented witnesses it appears to the Court that the tribal court placed and made all necessary statements to the pertinent witnesses to ensure that no prohibited and non allowable testimony or evidence as outlined under Title IV be given or considered in the proceeding. Appellant has failed to once again provide to the Court any specific allegation as to this issue and as discussed above the Court will not place itself in the position of reviewing the entire tribal court proceeding and does not find any merit to this allegation.

F. Motion to Remand for Trial *De Novo*

Appellant as an amendment to his original Notice of Appeal further moves to have this matter remanded for trial *de novo* due to the inadequacy of the tribal court's record of proceedings. Upon review and consideration of the transcript as presented before the Court, and has been noted above, it is evident that the transcript of the proceeding does contain gaps and sections of inaudible testimony, however it nonetheless is sufficient to determine the soundness of applied law to fact in this matter. As the Court has recently held in a similar matter from the Southern Ute Tribal Court, although the transcript of a proceeding is an important part of the lower court's record it is not mandatory. *Southern Ute Indian Tribe v. In the Interest of Richard Herrera*, SWITCA 07-001-SUTC (2008). The Court in that particular case as in this matter, determined that Appellant's arguments were predominately premised on questions of law and not that of factual determination and therefore did not require a more complete and thorough transcript or recording of the tribal court proceeding. The appellate rules of the Southern Ute Tribal Court are silent as to the grounds for a remand for hearing *de novo*, however SWITCA Rules of Appellate Procedure state that the inadequacy of the record below are grounds for granting a remand for a trial *de novo* but at the discretion of the reviewing Court. SWITCARRA #18 (2001). After careful review of the transcript, nature of Appellant's allegations and issues for appeal coupled with the aforementioned reasons the Court finds no affirmative reason to grant Appellant's motion for a Remand for a Trial *De Novo* and is therefore denied.

Conclusion

The Court having denied Appellant's Motion to Remand for Trial *De Novo* for the aforementioned reasons would like to briefly discuss and make note to the lower court in this matter that despite the fact that Appellant's motion was denied, the issue of securing a complete recording and transcript of the lower court's proceedings is not a matter to take lightly. As the Court stated, although the transcript or recording is not a mandatory piece of the record it is a vital component thereof and the lower court processes should not fail to recognize this. In today's age of technology it seems only rational and expected that most if not all court systems be able to secure a technological means of accurately reproducing the proceedings of the court to ensure the completeness and adequacy of the record. Bearing in mind that the Court is fully aware of the many budgetary shortfalls that exist within the tribal court systems throughout Indian country and tribal government but firmly believes that by securing the ability to accurately capture the proceedings will not only strengthen the overall integrity and professional nature of the court but more importantly will ensure to litigants that their issues for appellate review will be accurately and independently dealt with. Thus, saving all involved parties inefficiencies and delay in the appeals process.

As a recommendation, this Court highly advocates for the securing of recording equipment or personnel in the Southern Ute Tribal Court to accurately and efficiently reproduce its proceedings and other pertinent judicial processes to avoid further unjustified appeals seeking remand based upon incomplete transcripts and inaudible recordings and to strengthen the overall mission and service to the Southern Ute Indian Tribe and its citizenry.

Accordingly, it is the Order of this Court that the Appellant's Motion to Remand for Trial *De Novo* is denied and affirms the Tribal Court's Order Regarding Exclusion of K.R..

IT IS SO ORDERED.

September 2, 2008

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

MICHAEL WOLF, SR.,

Appellant,

v.

PUEBLO OF ZUNI,

Appellee.

**SWITCA No. 08-001-ZTC
Case Nos. CR-2007-2077 / CR-2008-0163**

Appeal filed February 6, 2008

Appeal from the Zuni Pueblo Tribal Court
Sharon Begay-McCabe, Judge

Appellate Judges: Stephen Wall,
Georgene Louis and Mekko Miller

OPINION

SUMMARY

Appellant appealed a Default Judgment of guilt entered by the lower court after the Appellant failed to appear for a pre-jury conference. The Appellate Court dismissed the judgment, finding that the Order was a violation of the Appellant's rights under the tribal code and ICRA since there was no specific authorization for conducting a pre-jury conference on the same terms as the pre-trial conference. The Court also determined that the Order violated Appellant's rights under the tribal code and ICRA by infringing on Appellant's rights without a knowing waiver by the Appellant. Finally, the Appellate Court found that the Order represented an abuse of discretion by the judge who failed to weigh her discretion against the intent of the tribal rules of civil procedure and Appellant's rights under the tribe's rules of criminal procedure and ICRA. The case was remanded to the lower court for jury trial.

* * *

Presiding Judge Stephen Wall, writing for the Southwest Intertribal Court of Appeals:

This matter came before the Southwest Intertribal Court of Appeals by way of direct appeal from a decision of the Zuni Tribal Court. The appeal was filed on February 6, 2008 after Judge Begay-McCabe denied a motion to set aside a judgment and order after having entered a default judgment against the Appellant on January 22, 2008.

The Appellant was charged with domestic violence as a result of an incident involving his daughter. At his arraignment on November 6, 2007, the Appellant entered a

plea of not guilty to domestic violence, Cause No. 2007-2077. The matter was scheduled for a pre-trial conference on November 13, 2007 according to Rule 14(E) of the Zuni Rules of Civil Procedure. The Appellant was personally served at the time of arraignment. The Appellant secured counsel and his counsel entered his notice of appearance on November 13, 2007.

A second pre-trial conference, specifically a pre-jury conference, was scheduled for January 22, 2008. Neither the Appellant nor his counsel appeared in Court and Judge Begay-McCabe entered a default judgment against the Appellant in accordance with Rule 14(F) of the Zuni Rules of Criminal Procedure which provides for a default judgment or a charge of "Disobedience to Lawful Orders of the Court" in situation when the defendant fails to appear. Appellant's counsel filed a number of motions, including the motion to set aside the default judgment. The motion to set aside the judgment was denied. On January 29, Judge Begay-McCabe entered an order to the Appellant for jail time, a fine, counseling and a term of probation, resulting in this appeal being filed.

The Appellant identified the issues in this appeal to be 1) whether a default judgment of guilt is allowed under Article III of the Constitution of the Pueblo of Zuni, the Zuni Rules of Criminal Procedures or the Indian Civil Rights Act, 2) whether the default judgment of guilt and the denial of the Appellant's motion to set aside the judgment represented an abuse of discretion by the Zuni Tribal Court judge, and 3) whether the Zuni Tribal Court judge was disqualified from hearing this matter after the pre-trial hearing under ZRCR P Ruled 14(M).

I

For purposes of discussion, issues 1 and 2 can be combined. First we need to look at the circumstances in which this default judgment was entered. The Appellant was personally served with notice of the November 13 hearing at the time of his arraignment. The Appellant appeared at the required time for the pre-trial conference. He reiterated his not guilty plea and was ordered to appear at the January 22 pre-jury hearing and to submit his witness list, exhibits and jury instructions. Appellant's counsel filed an entry of appearance on November 13, the same day as the Appellant's first pre-trial conference, but the record is silent as to whether Appellant's counsel attended the first pre-trial conference. On January 22, the pre-jury conference was held as scheduled. Neither the Appellant nor his counsel appeared. The default judgment was entered for the Appellant's failure to appear at the pre-jury conference. It must be noted that the Appellant was properly and personally served. He had secured counsel, but the record is silent as to whether his counsel received notice of the pre-jury hearing from the Court. Appellant cannot say that lack of notice was the cause for the absence from Court.

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The question then becomes whether the entry of the default judgment is allowed under Zuni or federal law. Zuni Rules of Civil Procedure, Rule 14, establishes the pre-law conference and also contains provisions that make the pretrial conference applicable in criminal cases. This combining of criminal and civil processes under the Rules of Civil Procedure is problematic for two reasons. First, the nature of consequences in civil and criminal cases is vastly different. In civil cases, it is rare, if at all, that a person loses their liberty; whereas in criminal cases, that is the assumption from which most criminal procedures are developed. Criminal procedure assumes that a person found guilty will lose property, freedom and in cases of the death penalty, their life. Thus criminal procedures are much more stringent in terms of notice, acknowledgment of the rights of the accused and sentencing for those found guilty. Second, having a major tenet of the Tribe's criminal procedures buried in the Rules of Civil Procedure may be construed as a "hidden" or "unknown" law. If people are not aware of the law, how can they be expected to adjust their behavior to comply with the law? Having a rule that allows for a finding of guilt and being subject to sentencing that includes the loss of freedom and not locating that rule in the Rules of Criminal Procedure, Title III of the Zuni Tribal Code, raises the question of adequacy of notice.

Rule 14 of the Zuni Rules of Civil Procedure is a long, multi-faceted rule with a number of sections that purport to encourage and control the use of pre-trial conferences to allow the resolution of cases in an informal, culturally responsive manner. Sections D and E, respectively separate the pre-trial conferences into civil and criminal conferences. The Rule 14(E) criminal pre-trial conference is required in all cases in which a not guilty plea has been entered and is designed to "further the resolution of the case and the proper disposition of the defendant should guilt be admitted". Rule 14(F) indicates that if a person fails to appear at the pre-trial conference "[they] shall be subject to being charged for failing to obey a lawful order of the Court and/or, if party to an action, having the case summarily determined against him." Rule 14(L) indicates that there is protection for the criminal defendant from self-incrimination. Under this Rule, the judge has the responsibility to explain to the defendant the extent to which an admission of guilt would affect his rights and to indicate that an admission of guilt at the pre-trial conference would have the same effect as an admission of guilt at the arraignment proceedings.

When read as whole we can see that the intent of the criminal aspects of Rule 14 is to encourage the possibility that the defendant could plead guilty prior to going into trial. This raises two issues: 1) was the November 13 pre-trial conference the mandatory Rule 14 hearing and 2) is a pre-jury conference properly designated as a Rule 14 pre-trial conference? Clearly the Appellant was present for the mandatory pre-trial conference that was scheduled for 13 November and according to the record, that conference was

conducted according to the spirit and intent of Rule 14(E) and (L). Now the January 22 pre-jury conference could be construed as a Rule 14(E) mandatory pre-trial conference, but Rule 14(E) does not specifically include pre-jury conferences. In fact, pre-jury conferences are not provided for in the Zuni Rules of Criminal Procedure or in the Zuni Rules of Civil Procedure. Thus, a pre-jury conference cannot be construed to be a Rule 14 conference, with the attendant sanctions.

Lastly, it appears that the Court has the discretion to apply a summary judgment or charge the non-appearing party with "Disobedience to Lawful Orders of the Court" in the event of non-appearance for the pre-trial conference. Rule 14(F) does not discern between sanctions for civil and criminal cases. This judicial discretion provided for under Rule 14(F) must be exercised in light of several factors: 1) Rule 14 itself, 2) Rule 3 of the Zuni Rules of Criminal Procedure and 3) The Indian Civil Rights Act. The criminal provisions of Rule 14 are predicated solely on the possibility of the defendant admitting guilt. The fact that Rule 14(L) requires that the defendant be shielded from self-incrimination and requires a knowing waiver of rights held by the defendant acknowledges that the defendant must make an affirmative acknowledgment of guilt. There is no language in Rule 14 authorizing the judge to enter a finding of guilt, absent an admission by the defendant. Rule 3 of the Zuni Rules of Criminal Procedure provides for a number of procedural rights held by a defendant in a criminal case. Since these rights exist as a matter of law, they can only be taken away through a knowing waiver by the defendant. The record is silent as to the extent that the Judge explained the Appellant's rights during the November 13 pre-trial conference. However the transcript of the January 29 judgment and order indicates that there was no discussion of rights that the Appellant may have waived. There is nothing in the record that indicates that the Appellant knowingly waived his Rule 3 rights. The Indian Civil Rights Act, 25 U.S.C. 1302, *et seq.*, requires that defendants in criminal trials in tribal courts be accorded certain rights. Again, like the Rule 3 rights, those rights cannot be infringed upon or taken away except by a knowing waiver by the defendant. There is nothing in the record that shows that the Appellant made a knowing waiver of his rights under the Indian Civil Rights Act. Any discretion held by the judge under Rule 14(F) to impose a sanction for failing to appear for pre-trial conference must be weighed against the rights held by the defendant under Rule 3 of the Zuni Rules of Criminal Procedure and the Indian Civil Rights Act and the intent of Rule 14(F) and (L). In this case, the judge had the discretion to impose either a charge of Disobedience to Lawful Orders of the Court or enter a summary judgment. Given the intent of Rule 14, the applicability and lack of waivers of rights under Rule 3 and the Indian Civil Rights Act, the presiding judge abused her discretion by imposing a summary judgment in this matter.

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II

The SWITCA panel found no merit in Issue 3 of the Appellant's brief.

III

The Court in this matter has entered an order for summary judgment against the Appellant. This order is a violation of the Appellant's rights under the Rule 14 since there is no specific authorization for conducting a pre-jury conference on the same terms and conditions as a pre-trial conference. Further, the order violated the Appellant's rights under Title III, Rule 3 of the Zuni Tribal Code and the Indian Civil Rights Act by infringing on rights held by the Appellant without a knowing waiver by the Appellant. Lastly, the issuance of the order represents an abuse of discretion by the presiding judge by failing to weigh her discretion against the intent of Rule 14 and the rights held by the Appellant. It is ordered that the judgment in CR 2007-2077 issued against the Appellant on January 29 be vacated and CR 2007-2077 be remanded to the Zuni Tribal Court for jury trial and that CR 2008-0163 be dismissed.

IV

Lastly, this matter could easily have been avoided had the Title II, Rules of Civil Procedure not been written to include aspects of criminal procedure. By including criminal procedures in the civil rules, confusion is created. This situation will continue to be the case as long as those specific provisions applicable only in criminal cases are included in the rules for conducting civil matters. It is highly recommended that those provisions specifically applicable to criminal proceedings be removed from Title II of the Zuni Tribal Code and place those provisions in Title III, Rules of Criminal Procedure. Since this case rests, to a degree, on the misplacement of the provisions, a similar case in the future could negatively impact the Zuni Tribal Court or the Tribe itself since the Court is now aware of this issue.

SO ORDERED.

July 15, 2008

ALLISON HANNAWEEKE,

Defendant-Appellant,

v.

PUEBLO OF ZUNI,

Prosecutor-Appellee.

**SWITCA No. 08-002-ZTC
Tribal Case No. CR-2007-1906**

Appeal filed March 21, 2008

Appeal from the Zuni Pueblo Tribal Court
Sharon Begay-McCabe, Judge

Appellate Judges: Stephen Wall,
Steffani Cochran and Mekko Miller

ORDER

SUMMARY

Appellant filed three separate Notices of Appeal. The first Notice of Appeal was filed after the Appellant was found guilty on several criminal charges. The second Notice of Appeal was filed after the lower court imposed the Appellant's sentence and assessed court costs and fines. The third Notice of Appeal was filed after the lower court held a separate restitution hearing at which the Appellant was found liable for damages to the victims and Appellant agreed to pay restitution. The Appellate Court determined that the third Notice of Appeal, containing seven grounds for appeal, was the only appropriate Notice of Appeal filed. On the first four grounds, the Appellate Court found that: (1) the lower court did not fail to establish its jurisdiction; (2) nothing in the record indicated that the judge's finding that a crime had been committed was in error; (3) the fact that the Appellant was incarcerated pending the separate civil restitution hearing on the criminal matter did not deny her right to due process nor support a finding of reversible error; and (4) the bail set by the trial judge was not excessive and was within the discretionary authority of the judge. With regard to the last three grounds pertaining to the restitution hearing, the Appellate Court found that the tribal rules of civil procedure created confusion in the matter, specifically the rule controlling pretrial conferences which provided that the pretrial process be made available in both civil and criminal cases. The Appellate Court stated that this gave the impression that issues such as restitution in this case are civil rather than criminal. The Court found this to be problematic particularly in light of the nature of rights that attach to a defendant in all hearings related to a criminal action. The case was remanded to the lower court

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

with specific instructions for resolving the issue of restitution.

* * *

Presiding Judge Stephen Wall, writing for the Southwest Intertribal Court of Appeals:

PROCEDURAL SUMMARY

This matter came to Southwest Intertribal Court of Appeals ("SWITCA") by way of appeal from the Zuni Tribal Court. The Appellant had been found guilty of Aggravated Assault, Criminal Conspiracy, Criminal Mischief, and Aggravated Weapons Offense on November 14, 2007. Lay Counsel for the Appellant filed a motion to appeal the guilty findings on November 21st. The Zuni Tribal Court sentenced the Appellant on February 5, 2008. The Appellant was sentenced to one hundred twenty (120) days in jail and a six Tribal Court assessed court costs and fines in the amount of nine hundred fifty (\$950) dollars. The Appellant's counsel filed another notice of appeal on February 6th. A civil restitution hearing was scheduled to address the losses of the victims. On February 20, 2008, the Zuni Tribal Court held a restitution hearing at which the Appellant was found to be liable for damages to the victims' vehicles and agreed to pay six hundred twenty dollars and ninety-two cents (\$620.92) in restitution. Counsel for the Appellant filed the last notice of appeal on February 29, 2008.

The Appellant's final, and only appropriate, notice of appeal contained seven grounds. Four relate directly to the criminal trial and sentencing hearing, while three arise from the restitution hearing. The Appellee submitted a Response to the Notice of Appeal, but failed to address any of the grounds of appeal other than to generally deny error in the conduct of the trial, sentencing hearing or restitution hearing. On October 16, 2008, the Appellant filed a brief in support of the Notice of Appeal and the Appellee filed a Response to the Appellant's brief on the 24th of October. The SWITCA accepted all briefs that were submitted.

I.

The grounds for appeal, as identified in the Notice of Appeal, that flow from the trial and sentencing hearing can be resolved through the court record.

1. The Appellant states that the Zuni Tribal Court failed to establish jurisdiction. We find nothing in the record that indicates a failure to establish jurisdiction.
2. The Appellant states that the Zuni Tribal Judge erred in finding that a crime had been committed. We find that the record does not indicate that the trial judge committed any error during the course of the trial,

including the finding that crimes had been committed.

3. The Appellant argues that the Appellant was denied her right to due process because she was incarcerated pending the restitution hearing. While we are uncertain why the issue of restitution was not addressed during the sentencing hearing and, further, question the use of a separate civil hearing in a criminal matter, the Appellant was sentenced to one hundred twenty (120) days in jail and the restitution hearing was scheduled within fifteen(15) days of the sentencing hearing. These facts do not support a finding of reversible error. According to the original sentence, the Appellant did not have a right to be out of jail and any release from jail would be at the trial judge's discretion.
4. The last issue relating to the trial and sentencing hearing is whether the seven hundred and fifty dollar (\$750) bail was excessive. Rule 34(C) and (H) of the Zuni Rules of Criminal Procedure control this issue. Rule 34(C) indicates that the amount of the bail shall not exceed twice the amount of the maximum fine payable for each offense. In this case, there are four offenses: three are class A offenses with each having a maximum fine payable of five hundred dollars (\$500), and one Class B offense with a maximum fine payable of (\$250). The Appellant therefore faced one thousand seven hundred fifty dollars (\$1,750) in maximum fines payable. This amount is well beyond the seven hundred fifty dollars (\$750) bail set by the trial judge. Rule 34(H) allows the trial judge discretion whether to allow bail if the defendant has been charged with a Class A offense. The Appellant was found guilty of three Class A offenses, placing the decision to offer bail well within the discretionary authority of the trial judge. We find no reversible error.

II.

The remaining three grounds for this appeal are based in the restitution hearing. The Appellant's assertions concerning the restitution hearing include:

1. That the Tribal Court erred by not separating the civil restitution hearing from the criminal proceeding.
2. That the trial judge erred by acting as a spokesperson for the victim who did not attend the restitution hearing, but received a restitution award.
3. Lastly, the Appellant questions the validity of the restitution repayment contract by stating that the Appellant was under duress to sign the document.

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This presents a particular problem for SWITCA. When asked for a copy of the record, the Zuni Tribal Court indicated that no record of the February 20, 2008 restitution hearing was made. If no audio recording or transcript of the proceedings is available, SWITCA Appellate Rule 17 requires that the appellant prepare a statement of the evidence and proceedings within 30 days of the filing of the notice of appeal. SWITCARA #17 (2001). The Appellant has not complied with the rule. Further, the Appellee's counsel, in his response, failed to provide any specific response to the points raised in the Appellant's Notice of Appeal relating to the restitution hearing. In our September 17th Order, we called for the parties to submit any evidence that could be used to establish a record for the restitution hearing. Nothing was submitted.

Since there is no record, we therefore remand the restitution portion of the case back to the Zuni Tribal Court for a hearing *de novo* or any other procedure consistent with the lower court's rules relating to restitution. SWITCARA #18 (2001). It is important to recognize that the Zuni Rules of Civil Procedure are the source of the confusion in this matter. Rule 14, which controls pretrial conferences, provides that the pretrial process be made available in both civil and criminal. This gives the impression that issues such as restitution in this case are civil rather than criminal matters. Yet § 4-3-5(2)(c) of the Zuni Tribal Code provides that the trial court has "the authority to order a person adjudged guilty of an offense to . . . pay money damages, surrender property, or perform any other act for the benefit of any person or party injured personally or in his property by the person adjudged guilty provided such injuries are fairly attributable to the act or failure to act constituting the offense for which guilt was adjudged."

The result is confusion, particularly in light of the nature of rights that attach to the Defendant in such hearings. The matter before us is a criminal matter and specific rights attach to a Defendant in all hearings related to a criminal action. For that reason, when the case is remanded, the Zuni Tribal Court appears to have two options available under the Zuni Tribal Code. One is to treat the restitution hearing as a component of the criminal proceeding and, consequently, recognize those rights that attach at all criminal proceedings through Rule 3 of Zuni Rules of Criminal Procedure and the Indian Civil Rights Act, 25 U.S.C. § 1302, *et seq.* The other option is to dismiss the restitution proceeding and allow the injured party to file their own civil action for restitution against the Appellant.

IT IS SO ORDERED.

December 15, 2008