

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE PUEBLO OF SAN JUAN

Juanita CATA,
Plaintiff-Respondent,

v.

Josephine BINFORD,
Defendant-Appellant.

No 90-010-PJS
(January 7, 1991)
No. 88-12-JB-0031

Appeal from the San Juan Tribal Court, Stanley A. Bird, Judge.
Josephine Binford, *pro se*.
Juanita Cata, *pro se*.

SUMMARY

Defendant appealed the lower court order to hold indefinitely Defendant's final payment of wages and benefits, an amount approximately six times the judgment to be satisfied. The Appellate Court affirmed the lower court's order that Defendant satisfy the civil judgment but ruled the lower court's failure to provide a show cause hearing or enforcement of judgment hearing was a violation of Defendant's due process rights. The Appellate Court reversed the lower court's order to hold, indefinitely, wages and benefits in satisfaction of the civil judgment.

OPINION

SMITH, Judge.

The above entitled matter came before the Southwest Intertribal Court of Appeals on a request for appeal of the civil judgment entered against the Defendant-appellant (hereinafter Appellant), Josephine Binford, and for the Plaintiff-respondent (hereinafter Respondent), Juanita Cata, in the amount of \$472.00. The June 12, 1989 order further directed Appellant to pay the judgment amount within ninety (90) days. Appeal was filed with the Pueblo of San Juan's Governor and the matter subsequently transmitted to the Southwest Intertribal Court of Appeals on October 25, 1990.

The Southwest Intertribal Court of Appeals has jurisdiction over the issues raised in the request for appeal in accordance with the Pueblo of San Juan's Resolution 90-98 requesting that the Southwest Intertribal Court of Appeals serve as an Intermediary Court of Appeals for the Pueblo of San Juan.

After reviewing the information contained in the lower court record, this Court finds no error or abuse of discretion on behalf of the lower court in rendering its decision on June 12, 1989. The lower court record, however, does not reflect that Appellant was directed to surrender monies owed her from the Pueblo of San Juan to satisfy the judgment at the time the decision was initially issued as allowed under Chapter II, Section III of the San Juan Pueblo Law and Order Code. Nor does the lower court record indicate that Appellant was required to post an appeal bond for the judgment amount, as provided in Chapter I, Section IX (c) of the San Juan Pueblo Law and Order Code, when her appeal was filed.

The lower court record does not reflect that any hearing was held prior to the November 29, 1989 letter directing the San Juan Pueblo Finance and Accounting Department to hold any monies owed the Appellant by the Pueblo of San Juan. Nor does the record reflect if a hearing was held either prior or immediately subsequent to the December 20, 1989 order directing the Pueblo of San Juan Finance Department to hold all monies owed Appellant upon her discharge from employment with the Pueblo. Absent either a show cause hearing or enforcement of judgment hearing, ordering the San Juan Accounting Department to indefinitely hold monies owed Appellant in order to satisfy a civil judgment owed by her is a violation of Appellant's due process rights.

The lower court decision is, therefore, affirmed in part and reversed in part.

**IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE PUEBLO OF SAN JUAN**

**Andrew E. and Naedin MARTINEZ,
Petitioners-Appellants,**

v.

**Susan CORDOVA and Timothy Dickie MARTINEZ,
Respondents.**

No. 90-009-PSJ
(January 7, 1991)
No. 04-90-0007

Appeal from the San Juan Tribal Court, Stanley A. Bird, Judge.
Andrew E. and Naedin Martinez, *pro se*.
Susan Cordova and Timothy Dickie Martinez, *pro se*.

SUMMARY

Petitioners-appellants sought visitation beyond that provided by the lower court. The Appellate Court, in the absence of specific code provisions, found the lower court did not err in its exercise of inherent equitable powers and affirmed the lower court decision granting grandparental visitation to Petitioners-appellants.

OPINION

SMITH, Judge.

The above entitled matter came before the Southwest Intertribal Court of Appeals on a Petition for Grandparents Visitation filed by Andrew and Naedin Martinez with the San Juan Tribal Council on April 19, 1990 and transmitted to this Appellate Court on October 25, 1990. The filed Petition requests that, as grandparents, the appellants be allowed specific visitation beyond what was provided by the lower court at the conclusion of the April 12, 1990 hearing.

The Southwest Intertribal Court of Appeals has jurisdiction over the issues raised in the filed petition in accordance with the Pueblo of San Juan's Resolution 90-98 requesting that this Court serve as an Intermediary Court of Appeals for the Pueblo of San Juan.

After reviewing the information contained in the lower court record and in light of the fact the San Juan Pueblo Code does not address the issue of grandparent visitation, this Court finds that under inherent equitable powers the lower court decision reflects no error. The lower court decision is thereby affirmed.

**IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE PUEBLO OF SAN JUAN**

**Alejandrina ABEYTA,
Petitioner-Respondent,**

v.

**ALL INDIAN PUEBLO HOUSING AUTHORITY,
Defendant-Appellant.**

No. 90-008-PSJ
(January 8, 1991)
No. 87-08-AA-0042

Appeal from the San Juan Tribal Court, Stanley A. Bird, Judge.
Alejandrina Abeyta, *pro se*.
All Indian Pueblo Housing Authority, *pro se*.

SUMMARY

The Appellate Court ruled the court could not consider the issues raised by Defendant-appellant without a stipulated record of the lower court proceedings. The Appellate Court remanded the matter to the lower court with directions the record be certified and transmitted within ninety days.

ORDER

SMITH, Judge.

The above entitled matter came before the Southwest Intertribal Court of Appeals on the All Indian Pueblo Housing Authority's appeal filed on or about March 18, 1988 with the Pueblo of San Juan Council/Governor. This matter was subsequently transmitted to the Southwest Intertribal Court of Appeals on October 25, 1990.

The Southwest Intertribal Court of Appeals has jurisdiction over the issues raised by this appeal in accordance with the Pueblo of San Juan's Resolution 90-98 requesting that the Southwest Intertribal Court of Appeals serve as an Intermediary Court of Appeals for the Pueblo of San Juan.

A review of the lower court records reflects that no information is available regarding what transpired during the September 2, 1987 hearing held at the Pueblo of San Juan's Tribal Court. Absent either transcript, tape recording, or stipulation of the lower court September 2, 1987 proceedings, this Court is unable to address the merits of Appellant's claims.

This matter is, therefore, REMANDED to the lower court with directions to Appellant that a complete record for appeal purposes be transmitted within ninety (90) days from the date of this order.

**IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE PUEBLO OF SAN JUAN**

**In re the ESTATE OF Gabriel ABEYTA,
Deceased.**

No. 90-011-PSJ
(January 8, 1991)
No. 88-01-GA/KA-0001

Appeal from the San Juan Tribal Court, Stanley A. Bird, Judge.
Gabriel Abeyta, Personal Representative, *pro se*.

SUMMARY

The personal representative of the estate-appellant challenged the jurisdiction of the lower court and disposition of decedent's estate, particularly an award to decedent's companion of nine years. The Appellate Court affirmed the lower court's exercise of subject matter and personal jurisdiction as provided by pueblo code. The Appellate Court also affirmed the lower court's determination decedent's companion was not an heir because the Pueblo does not recognize common law marriage but is entitled to compensation for financial assistance provided to the decedent prior to his death.

OPINION

SMITH, Judge.

The above entitled matter came before the Southwest Intertribal Court of Appeals on request of Kevin Abeyta, personal representative of the above estate and son of the deceased, Gabriel Abeyta. The issues raised by the appeal involve disposition of the property of the estate; the lower court's jurisdiction in probate matters; and the legal implication of the relationship between Frances Archuleta and Gabriel Abeyta. The matter was filed with the Southwest Intertribal Court of Appeals on October 25, 1990.

The Southwest Intertribal Court of Appeals has jurisdiction over the issues raised in this appeal in accordance with the Pueblo of San Juan's Resolution 90-98 requesting that the Southwest Intertribal Court of Appeals serve as Intermediary Court of Appeals for the Pueblo of San Juan.

The Law and Order Code for the Pueblo of San Juan gives its tribal court "jurisdiction to...determine heirship and approve wills." Chapter III, Section I. The Pueblo's Law and Order Code further provides that when a member of the San Juan Pueblo dies, "any member claiming to be a heir of the decedent may bring suit in the San Juan Pueblo Tribal Court to have the Court determine the heirs of the decedent and to divide among the heirs all unrestricted property of the decedent." Chapter III, Section IV. The first provision gives the San Juan Pueblo Tribal Court subject matter jurisdiction over intestacy proceedings such as in this case. Gabriel Abeyta was a member of the Pueblo of San Juan. By filing a petition to be named personal representative of Gabriel Abeyta's estates, Kevin Abeyta evoked both the lower court's subject matter and personal jurisdiction in regards to this probate. The lower court, therefore, was correct in exercising its jurisdiction over the issues and individuals involved in this case.

The second issue raised in the appeal concerns Frances Archuleta's relationship to the deceased. The record reflects that although Ms. Archuleta and the deceased were not married, they had lived together for a period of nine years prior to Gabriel Abeyta's death, with Ms. Archuleta providing the majority of financial support. The Pueblo's Law and Order Code, however, does not recognize common law marriages. Absent a will, the lower court was correct in determining Ms. Archuleta was not a heir to the estate.

Given the nature of Ms. Archuleta's request to be appointed personal representative, the lower court properly exercised its equitable powers when considering her request to be a claimant against the estate for assistance provided the decedent. The court record supports the lower court's finding that Ms. Archuleta was entitled to compensation for the financial assistance provided the decedent prior to his death. Nothing in the lower court record reflects the allowance of Ms. Archuleta's claim was a violation of recognized law or tradition. Nor does the record reflect the lower court decision was arbitrary or capricious.

Based on the above, the lower court decision is **AFFIRMED**.

**IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE**

**COMMITTEE FOR BETTER TRIBAL GOVERNMENT
and Renee Baca, Ray Frost, Annabelle Eagle, Lorraine Baker,
Adrian Weaver, John Baker, Sr., and Levi Baker,
Individually,
Petitioners-Respondents,**

v.

No. 90-013-SUTC
(August 16, 1991)
No. 90-CV-35

**SOUTHERN UTE ELECTION BOARD
and Ruby Garcia, Patricia Rael, and Anna Marie Scott,
Individually, and in their official capacities,
Respondents-Appellants.**

Appeal from the Southern Ute Tribal Court, Maylinn Smith, Judge.
Scott B. McElroy, Patricia A. Hall, for appellants.
S. Leigh F. Meigs, Pamela Easterday, for respondents.

SUMMARY

Respondents-appellants appealed the lower court ruling that an illegally cast vote resulted in a tie and a void recall election. The Appellate Court affirmed the lower court ruling that (1) tribal constitutional issues raised by the voting case gave rise to lower court jurisdiction and (2) the Election Board acted properly in deducting one proxy vote because it was cast improperly. The Appellate Court further ruled that the tribal constitutional provision regarding recall elections requires a majority of voting members cast a vote in the recall election and a tie vote means the recall is not authorized by a vote of the people and consequently fails.

OPINION

LUI-FRANK, Judge.

This matter came on appeal of Respondents below, the Southern Ute Election Board and its three members, in their official and individual capacities [hereinafter the Election Board or the Board]. Petitioners-Respondents are the Committee for Better Tribal Government and its individual members [hereinafter the Committee or CBTG]. The Committee did not participate in the appeal.

DECISION BELOW

The lower court held that the election complied with the law, but the proxy vote was illegal. Further, the court held that the Board was a contestant in raising the issue of the illegal vote and, therefore, had the burden of proving by clear and convincing evidence how the vote was cast before the vote could be deducted from the affirmative tally for recall. The court found that the Board failed to prove how the illegal vote was cast by clear and convincing evidence, leaving the election result in doubt. The court then declared the election void. The court also held that if the result were a tie, absent a specific requirement for a majority vote on a proposition election, the Code provision for tie votes in candidate elections should also apply to proposition elections, unless the Tribal Council specifically provided otherwise. The final holding concerned the possibility of violations of

due process rights in election disputes under the current Election Code, which apparently did not affect the instant case.

ISSUES

The issues on appeal are:

1. Whether the court has jurisdiction over disputes arising from decisions of the Board regarding elections.
2. Whether the lower court erred in holding that the Board became a contestant in raising the issue of the illegal proxy vote and as such had to prove that said vote was cast for the affirmative on the recall question by clear and convincing evidence, a burden which the lower court held was not met.
3. Whether the lower court erred in overturning the Board's interpretation of the Election Code provision that tie-breaker special elections were limited to candidate elections only. As more fully discussed below this Court affirms in part and reverses in part.

FACTS AND PROCEEDINGS BELOW

The relevant facts, as found by the lower court, are as follows. This case arose from the decision of the Board to disallow a proxy vote cast by Bertha Grove for her husband, Vincent Grove, who was in prison at the time. The Board changed the tally of votes from the election, 183 for recall of five Council members and 182 against the recall, to 182 for and 182 against the recall. The Board had permitted the proxy vote to be cast, after initially refusing to do so. The Southern Ute Tribal Council accepted the certification of the election results after considerable discussion, and the recall was determined to have failed.

The CBTG requested the Board to decide if an election would be held to break the tie. No question was raised as to whether the controverted ballot had actually been cast for the recall. The Board decided that another election was not required under the ordinance. The Committee then requested reinstatement of the original tally, and the Board denied the request.

The Committee filed this lawsuit. The Board filed a motion to dismiss and, alternatively, for summary judgment. The lower court granted dismissal as to the Southern Ute Tribal Council and five named Council members based on sovereign immunity, but denied dismissal as to the Board and its members, based on allegations that they acted beyond their authority. The lower court granted dismissal based upon lack of jurisdiction over settlement of election disputes, but upheld the lawsuit on its claims that the Committee members' due process rights may have been violated by the Board's handling of the election and the subsequent election dispute.

The Board sought to join Bertha Grove and Vincent Grove as indispensable parties. The Committee opposed joinder as unnecessary. The court below denied the joinder request.

JUDICIAL REVIEW

The court below correctly concluded that elections and election disputes are constitutionally assigned to the Election Board. Constitutional issues of due process and equal protection of the laws can arise from the procedures which the Board follows or fails to follow. Such issues are the special province of the lower court.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65, 56 L.Ed. 2d 106, 98 S. Ct. 1670 (1978), held that the Indian Civil Rights Act changed the law which lower courts must apply, but the kinds of forums in which such rights could

be vindicated were left to the tribes. Under the Southern Ute Constitution [hereinafter the Constitution], election disputes are handled by the Election Board. "Nonjudicial tribal institutions have also been recognized as competent law-applying bodies." *Id.* at 66. However, constitutional issues are, as a matter of inherent judicial authority, within the purview of lower courts. The judges of the Southern Ute Indian Tribe take an oath to support and defend the Constitution and laws of the Tribe and the United States. So. Ute Tr. Code, sec. 1-3-107. This Court notes that the Constitution of the Southern Ute Indian Tribe also presumes the establishment of courts. *See*, Articles I and VII. The Southern Ute Constitution assigns the administration of justice to the lower courts, and to that end the Council prescribes the powers, rules and procedures of the courts. Article VII, sec. 1(e). Council actions are limited by the Constitution and laws of the United States, and the Southern Ute Constitution and ordinances. The Council has reiterated the constitutional role of the courts in section 1-3-101 of the Tribal Code, "to administer justice equally and fairly in conformance with the Constitution of the Southern Ute Indian Tribe and the laws of the United States of America and to protect the rights, property, life and welfare of all people within its jurisdiction."

How these overlapping areas of responsibility are to be handled by the administrative body and the court can only be determined over time, and case by case. For the present the guiding principles are the constitutional requirement that the Southern Ute Indian Tribe shall have lower courts which administer justice and the constitutional assignment of election disputes to the Board. The court must respect the special nature of election controversies and the political issues which are often best settled in the nonjudicial arena. However, the court cannot avoid its special area of expertise in adjudicating constitutional issues, as required by the Constitution and section 1-3-101. Thus, an attitude of judicial deference, tempered by careful scrutiny of allegations involving constitutional questions, should be used. Where an agency acts within the scope of its authority, the court should defer to the decision of the agency.

PROXY VOTE

The lower court was correct in holding that the proxy vote allowed to be cast was illegal. The Board's decision to allow the vote was invalid, because it was beyond their authority. The Board's action to rescind allowance of the vote was a correction which the law required of them. Under Article IV, section 6 of the Constitution, the Board must conduct elections according to established ordinances. Section 11-1-102(2) of the Election Code allows for removal of Board members for failure to perform their duties, improper exercise of their authority or conviction of a crime.

Performance of their constitutional and statutory duty by proper exercise of their authority is not the same as a contest of an election by a candidate or proponent of an issue. An election contest seeks to overturn the settled result of an election, which is presumed valid. A party contesting illegal votes can be held to clear and convincing proof that an illegal vote was cast a certain way, before having the vote deducted. *Wilks v. Mouton*, 42 Cal. 3d 400, 722 P.2d 187, 190, 229 Cal. Rptr. 1 (1986). The instant case is distinguishable because it involves an Election Board correction of an *ultra vires* act, allowing a proxy vote to be cast in favor of the recall.

The CBTG never raised the issue of how the proxy vote was cast in its petition, nor was there an amendment to reflect any claim that they had changed the theories of their case. They agreed that Bertha Grove had cast the proxy vote for the recall, as instructed by Mr. Grove's letter and sample ballot. Because there was never a question about how the illegal proxy vote was cast, and the matter did not have to be and was not litigated,

Reynolds v. Stockton , 140 U.S. 254, 266, 35 L.Ed. 464, 468, 11 S.Ct. 773 (1891), this Court holds that the Board properly relied on the substantial and, in this case, clear information available and known to them in deducting one vote from the affirmative count.

That the Board took the initiative in correcting their action is commendable, although the entire lawsuit could have been avoided had the Board stuck with its original decision to disallow the proxy vote and not given in to a perceived threat, no matter how serious. As the Hopi Tribal Court stated, "Better to have each person or administrative body bear the burden and responsibility to take right action. To do otherwise may lead to the nonbeneficial development of people unwilling to take the responsibility to stand up and take right action." *Sekaquaptewa v. Hopi Tribal Election Board* , 13 Indian L. Rep. 6009, 6010 (Hopi Tr. Ct. 1986).

TIE VOTE IN A RECALL ELECTION

In construing section 10 of the Election Code, this Court applies the plain meaning rule, which is that a court need look no farther than the words of the statute in determining what it means and how it affects the case. Such a rule is deferential to the legislature's role as lawmaker. *Sutherland Statute Construction*, sec. 46.03 (4th Ed.). By its terms section 10 does not apply to ties in proposition elections.

The lower court found that the provision for tie votes for candidates had to be interpreted to apply to proposition elections, otherwise there would be no election, because the court found there was no provision for ties in proposition elections. For the reasons explained below, such a strained construction of section 10 is not necessary.

The Southern Ute Constitution, Article V, section 2, governs recall elections. "Once a recall attempt had been concluded for any given member, it shall not be considered again until twelve (12) months have passed." *Id.* In a recall election a question is put to the vote of the people, that is, whether or not an officeholder should be recalled. The conclusion of a recall election necessarily implies that the votes authorize a recall or not. Interpretation of this provision requires that we look to the case law of other jurisdictions for construction of similar language.

It has been said that in a statute authorizing the issuance of bonds when such an issuance is authorized by a vote of the people, the phrase "authorized by a vote of the people" means by a vote of the majority of the voters. *Bryan v. City of Lincoln* , 70 N.W. 252 (Neb. 1897). This Court holds that a recall election under the Southern Ute Constitution requires a majority of the votes cast in the recall election, as long as a majority of the registered voters of the Tribe vote in such election. A tie vote means the recall is not authorized by a vote of the people; it fails.

This construction leaves intact the clear intent of the Council in providing a tie-breaker election under the Election Code only for ties involving candidates. Any matters pending below shall be resolved in accordance with this opinion.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE

SOUTHERN UTE INDIAN TRIBE,
Plaintiff-Respondent.

v.

Harold CARMENOROS,
Defendant-Appellant,

No. 90-012-SUTC
(August 19, 1991)
No. 89-CR-142-143

Appeal from the Southern Ute Tribal Court, Elaine Newton, Judge.
Harold Carmenoros, *pro se*.

SUMMARY

Defendant appealed, *pro se*, a lower court conviction as violating his due process rights. The Appellate Court ruled the lower court erred by not notifying Defendant of his right to postpone arraignment pending consultation with counsel. The Appellate Court remanded the case to the lower court with instructions that entry of a plea of not guilty in behalf of Defendant and failure to inform Defendant of the specific penalties for the offense charged did not comply with rights afforded by the tribal code. The Appellate Court denied Defendant-appellant's contention he did not have adequate access to necessary documents and ruled the lower court may impose one sentence for several offenses but cautioned the lower court to comply with the tribal code mandate to explain why a particular sentence is imposed.

OPINION

LUI-FRANK, Judge.

This appeal is brought by Defendant, *pro se*, as a matter of right under section 3-1-102(2) of the Southern Ute Indian Tribal Code [the Code]. An appeal as matter of right is afforded a Defendant who is subject to a criminal penalty including a jail sentence in excess of ten days or a fine of \$200. The Defendant in this case qualifies, because the penalties for both charges are in excess of ten days and \$200 in fines.

The scope of appellate review under the Code includes the issues raised by the parties, and instances where plain error has occurred in earlier proceedings. S.U.I. Tr. C. section 3-1-109.

ISSUES

Defendant appealed without the assistance of counsel. His written appeal is, in relevant part, as follows:

I Harold M. Carmenoros would like to appeal my decision in my case. I went to court on 11-13-90 at 2:00 p.m. The Judge was Elaine Newton. Im [sic] appealing the case cause [sic] I didn't get to explain my case and the[re] was no police report. I also do not believe my sentence was fair, for that matter....

The Defendant raises issues of fairness in his arraignment, that is, whether he was properly arraigned, whether he was given all pertinent information, such as the police report, and whether his sentence was fair. Fairness

of his sentence encompasses three questions: opportunity to speak on his own behalf, propriety of one sentence for two charges, and compliance with the statutory requirements for the sentence proceeding.

The decision below is reversed and the case is remanded for further proceedings consistent with this opinion. Defendant is entitled to be arraigned again.

FACTS AND PROCEEDINGS BELOW

Defendant was arrested on November 10, 1990 for disobedience to court orders by the consumption of alcoholic beverages and for disorderly conduct at the Police Department. He was arraigned on November 13, 1990.

At the arraignment the court explained their rights to a group of defendants. The rights were: the right to remain silent and not be forced to testify against oneself, the right to counsel at defendant's expense, the right to trial by jury or judge, the right to subpoena witnesses, the right to post bond if held pending trial, and the right to inspect and receive evidence, statements and the list of prosecution witnesses prior to trial. The court also explained that if defendant wanted to get legal assistance, a not guilty plea would be entered for defendant and the pretrial conference would be set.

For a guilty plea, the court stated that the defendant could make a statement which might lessen any penalties. The court also described the maximum penalties allowed under the Indian Civil Rights Act, 25 U.S.C. § 1302(7), as a fine up to \$500 and/or imprisonment of up to six months, and that such penalties are imposed only in certain cases. This court notes that in 1986 Congress increased the maximum penalties that a tribe may impose. Pub. L. No. 99-570, § 4217.

Defendant Carmenoros was called and questioned by the court as to his understanding of his rights. He had no questions. The charges were read to him. He indicated that he understood the charges. In response to the court, Mr. Carmenoros stated that he wanted to plead guilty to the disorderly conduct charge. He also chose to plead guilty to the charge of disobedience to court orders.

The court then inquired if defendant understood that by his guilty plea he was giving up the right to a jury trial, and the right to have an attorney. He responded affirmatively.

The court then asked as to the basis of his guilty pleas, and Defendant explained how and why he believed he was guilty. After some discussion the court accepted both guilty pleas. Before sentencing the court asked if defendant wanted to say anything before sentence was imposed. Defendant made a request to go to a treatment center in Denver instead of to jail, and to be put on probation after treatment. He also asked for any fine to be suspended, so he could pay for the treatment costs.

The court imposed a sentence of 180 days in jail, to start immediately, with a required alcohol evaluation within ten days of the order. Limited release would be allowed for the evaluation and attendance at a treatment. In addition he was ordered to perform ten hours of community service, pay a fine of \$500, with \$400 suspended on condition that all treatment costs are paid, with the balance due December 31, 1990, and pay \$25.00 court costs on or before December 31, 1990. Proof of ongoing compliance had to be provided to the court by the 10th of

each month. All conditions had to be completed by May 9, 1991. Defendant was required to abstain from alcohol and stay away from any place serving alcohol.

Defendant asked if any of his days could be suspended. The court stated that suspension would be considered only after he completed a treatment program.

ARRAIGNMENT

Arraignments are governed by section 4-1-114 of the Code. Subsection (2) sets forth what the court must do: read the charges to the defendant; determine that he understands the charges, the section of the Code he is charged with violating and the possible authorized penalty; and advise him of his right to remain silent, to be tried by a jury, to be represented by counsel at his own expense, and that the arraignment will be postponed should he desire to consult with counsel. The terms of section 4-1-114(2) are mandatory.

The arraignment proceeding met all but two of the statutory requirements. Defendant was not advised that the arraignment would be postponed if he desired to consult with counsel. Instead he was told that if he wanted to obtain legal counsel, a not guilty plea would be entered for him and the matter would be set for pretrial conference. While this practice may not be prejudicial, it is contrary to the statute, and therefore, a denial of the due process afforded by the Southern Ute Tribal Council.

The defendant was informed in a general way that the possible authorized penalties imposed by the Court are limited under the Indian Civil Rights Act of 1968, *supra*, to a fine of \$500 and/or imprisonment of up to six months. He was also told that these were maximum penalties and were imposed only in certain cases.

The provision for disorderly conduct, section 5-1-107(3)(i), states that there are maximum penalties for a first and second offense. The initial penalty is up to 90 days and a fine of up to \$250. The second offense penalty is the maximum of six months and \$500.

The lower court did not explain to the defendant what was the specific authorized penalty for each of the charges in this case. The explanation given was only a general notice that the lower court could impose a maximum sentence as set by federal law. Section 5-1-114(2) of the Code requires more specificity. The lower court is obligated to afford the full protection which the Tribal Council has provided.

The arraignment failed to comply with the statutory requirements.

ACCESS TO INFORMATION

The record below shows that defendant was given a copy of the complaint. Access to the police report is not required at the arraignment. Defendants who plead not guilty are entitled to have a copy of the police report and other documents and evidence of the prosecution prior to trial. S.U.I.Tr. C. section 4-1-120. In the instant case Defendant was accorded due process in the provision of documents to which he was entitled at the arraignment.

SENTENCE

The first sub-issue is whether Defendant was afforded an opportunity to speak on his behalf with regard to the sentencing. The record shows that he was, and that he spoke up.

The second issue is the propriety of the sentence. The court imposed one sentence for the two charges. A general sentence covering several charges is not improper, so long as the sentence does not exceed the maximum which might be imposed cumulatively on the charges. *Vandegrift v. Maryland*, 226 Md. 38, 171 A. 2d 713, 91 A.L.R. 2d 507, 510 (Md. 1961). The better practice is, however, to sentence a defendant separately on each charge. *Id.*, at 511.

Finally, the question is whether the lower court complied with the statutory requirement for sentencing. Section 4-1-124 (10) of the Code sets forth what the court should do in a sentence proceeding. The court complied with all but one requirement: subsection (h), stating the reason for selecting the particular sentence imposed. On remand, and if Defendant again pleads guilty or is convicted upon trial, the court must state reasons for a period of incarceration, a fine and any conditions of sentence. The rationale for doing so is to make plain the bases for the sentence, which then allows Defendant to specifically respond with objections, if any, to the sentence imposed. The sentence imposed below was not beyond the authority of the lower court, and would stand, except for the defects in the arraignment and sentencing procedures.

**IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE**

**SOUTHERN UTE INDIAN TRIBE,
Plaintiff-Respondent,**

v.

**Troy SCOTT,
Defendant-Appellant.**

No. 91-003-SUTC
(Filed Dec. 4, 1991)
No. 90-TR-105-106

Appeal from the Southern Ute Tribal Court, Maylinn Smith, Judge.
Jeffrey R. Wilson, Tim LaFrance, for appellant.
Douglas S. Walker, for respondent.

SUMMARY

Defendant appealed the lower court's denial of Defendant's motion to suppress and motion to dismiss. The Appellate Court affirmed the lower court's decision (1) to grant Defendant's motion to suppress with regard to the roadside test noting Defendant was too intoxicated to validly consent, a component of the roadside test but (2) allow testimony regarding Defendant's later refusal to take a breathalyzer test as a separate and distinct act. The Appellate Court also affirmed the lower court's refusal to dismiss the complaint due to Defendant-appellant's failure to challenge the complaint in a timely manner.

OPINION

CERNO, Judge.

THIS MATTER having come before the Southwest Intertribal Court of Appeals on the appeal of the above-named Defendant-appellant, Troy Scott, filed September 12, 1991 with the Southern Ute Tribal Court and later filed with this Court on September 23, 1991, and after careful and extensive review of the case file and the law pertaining to this appeal:

THE APPELLATE COURT FINDS:

That the Southern Ute Tribal Court correctly held that the Defendant's (Troy Scott) refusal to submit to a breathalyzer test was a separate incident both in time and place from the Defendant's inability to give voluntary consent to perform the roadside maneuvers due to his extreme intoxication. The Court made the proper ruling on Defendant's Motion to Suppress and such ruling is hereby affirmed.

The Southern Ute Tribal Court correctly determined that the Defendant's Motion to Dismiss based upon allegations that the charging document (the complaint) was not properly sworn to in accordance with the requirements set forth in the Southern Ute Tribal Code, was not timely filed. It is well established that any irregularities or defects in a complaint which are not clearly prejudicial to the defendant or otherwise result in the failure of the complaint to charge an offense, are deemed waived if not raised prior to the time of trial.

IT IS THEREFORE ORDERED that the Southern Ute Tribal Court's Order of April 16, 1991 is hereby affirmed insofar as its ruling on Defendant's Motion to Suppress. The Southern Ute Tribal Court's Order of

August 27, 1991 is hereby affirmed insofar as to the Court's ruling on Defendant's Motion to Vacate Judgment and Dismiss based upon the alleged improper swearing of the complaint.

**IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE**

**SOUTHERN UTE INDIAN TRIBE,
Plaintiff-Respondent,**

v.

**Margaret HUMMINGBIRD,
Defendant-Appellant.**

No. 91-004-SUTC
(December 13, 1991)
No. 91-TR-11

Appeal from the Southern Ute Tribal Court, Elaine Newton, Judge.
Michael Lane for appellant.
Douglas S. Walker, for respondent.

SUMMARY

Defendant appealed the lower court's conviction claiming Defendant was denied a jury trial, the court improperly proceeded with trial even though a subpoenaed witness failed to appear and the findings of fact failed to support the conviction. The Appellate Court upheld the conviction and affirmed the lower court ruling that (1) Defendant's failure to pay the jury fee as required was a waiver of the right to a jury trial, (2) Defendant's failure to demand a continuance when witnesses did not appear undermined the contention the witness could have been helpful, and (3) the evidence presented at trial was sufficient to find the Defendant guilty of careless driving.

OPINION

CERNO, Judge.

THIS MATTER having come before the Southwest Intertribal Court of Appeals on the Appeal of the above-named Defendant-appellant, Margaret Hummingbird (hereinafter referred to as Defendant), the Court having carefully and extensively reviewed the case file, the Southern Ute Tribal Code, the typed transcripts of the hearings before the Southern Ute Tribal Court, the appropriate case law in this area, and the Court being otherwise fully advised in the premises;

THE APPELLATE COURT FINDS:

That the Defendant appeared, *pro se*, before the Southern Ute Tribal Court for her arraignment on February 25, 1991. At such time Judge Newton advised the Defendant of her rights, one of which (provision # 7) states that the Defendant could "request a jury trial of six tribal members" if she decided that she was not guilty.

The Defendant decided that she would enter a not guilty plea to the charge of Careless Driving. The Court then inquired as to whether the Defendant was going to be represented. The Defendant indicated that she was, so the matter was set for what the Court referred to as a "pre-trial" at 3:00 p.m. on March 25, 1991.

At the "Pre-Trial" the Defendant did not show up at the scheduled time and a bench warrant was issued by the Judge. Apparently, the Defendant showed up at a later time and the court opted to hold a contempt hearing for the Defendant for her failure to appear at the scheduled time. The Defendant was found to be in contempt but was only given a warning. The Defendant appeared *pro se* for this hearing. The Court again inquired of the Defendant if she wanted a jury trial or a hearing before the court. The Defendant indicated at first that she wanted a hearing before the Court. She then indicated her confusion about the process and stated she really did not know what she wanted because she had not had the opportunity to consult with her attorney.

The Transcript does not indicate any other dialogue taking place between the Defendant and the Court, but the Judge stated that Defendant had ten (10) days from that date (March 25, 1991) within which to pay the jury fee. The Defendant then apparently questioned the Judge about the jury trial (and it is presumed the fee) and again asked if she could talk with her attorney first. Some other discussion took place with the Judge finally informing the Defendant that a jury trial would be set for 8:30 a.m. on May 22, 1991. The Judge again informed the Defendant that she had ten (10) days within which to pay the jury fee, and if the fee was not paid, the matter would be set for a hearing before the Court.

The case file does not specifically reflect whether the jury fee was paid, but it can safely be presumed that such fee was not paid. At the hearing scheduled for May 22, 1991, the Defendant again failed to appear at the scheduled time, she did appear at a later time the same day, and the Court again opted to hold a contempt hearing. The Defendant was found to be in contempt and certain conditions imposed. The Court again indicated that this matter would be set for trial before the Court at 9:30 a.m. on July 8, 1991. The Defendant once again failed to show for the July hearing and a bench warrant was issued.

The record is unclear, but it appears that the Defendant and her lay advocate apparently appeared later the same day and the Court reconvened. The Judge then inquired of the Plaintiff and the Defendant whether there were any motions that needed to be made. The only motion that was entertained was a motion for a continuance, which was granted by the Court. Hearing (before the Court) was scheduled for 9:00 a.m. on August 12, 1991. No request for jury trial was made.

Another contempt hearing on the failure of the Defendant to submit proof of completion of community service was held on July 17, 1991. The Defendant appeared with her advocate, and once more no motion for jury trial was made.

From the transcript it appears that one other hearing was held prior to the September 9, 1991 hearing. It appears that it was at this point, for the first time, that any motion for a jury trial was made. After some discussion, the Court denied the motion and ordered that trial, before the court, take place on September 9, 1991.

The right to a jury trial is a fundamental right guaranteed to all tribal members of the Southern Ute Tribe by way of the Tribal Code and the Indian Civil Rights Act. 25 U.S.C. § 1302(10). However, in order to take advantage of this fundamental right, certain procedures need to be followed. The Southern Ute Tribal Code, under Section 4-1-122 of the Criminal Procedure Code, states that a defendant "shall be entitled upon filing a written request and paying a twenty-five (\$25.00) jury fee to have the case heard and decided by a jury of not less than six (6) persons."

From the record, neither a written request or the paying of the \$25.00 jury fee were made by the Defendant. The only other way that a request for a jury trial could be made by the Defendant would have been by way of her answer to the complaint, wherein she would have had to have made a specific request for a jury trial, or by way of a motion to the Court prior to the action going to trial. Neither the Defendant, nor her legal advocate requested a jury trial at any point before the Court actually began proceedings. No answer was ever filed to the complaint.

That as to the argument that the Defendant's right to confront witnesses against her, or that due to Sgt. Zachery Rock's failure to appear at the hearing somehow had a prejudicial effect upon the Defendant, such argument is tenuous at best. Sgt. Rock was called as a witness for the Plaintiff but apparently his testimony was of very little significance because the Prosecutor did not indicate the importance of his testimony by demanding a continuance. The Defendant did not make a request for continuance based upon the importance of having Sgt. Rock testify in this matter. Had Sgt. Rock's testimony been of such importance that the Defendant felt that without his testimony a proper defense could not be provided, then such a request should have been made.

That there appears from the record and the transcripts of the recording of the trial enough evidence presented upon which the Court could make a final determination on the charge of careless driving.

IT IS THEREFORE ORDERED that the Southern Ute Tribal Court's Order of September 9, 1991 is hereby upheld in all respects.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE

SOUTHERN UTE INDIAN TRIBE,
Plaintiff-Respondent,

v.

Stacey E. FERGUSON,
Defendant-Appellant.

No. 90-007 SUTC
(December 19, 1991)
No. 89-TR-10

Appeal from the Southern Ute Tribal Court, Maylinn Smith, Judge.
Timothy LaFrance, for appellant.
Douglas S. Walker, for respondent.

SUMMARY

Defendant appealed the lower court denial of Defendant's motion to dismiss. The Appellate Court ruled that although *Duro v. Reina* did not render the tribe's original prosecution invalid, it now divested the lower court of subject matter jurisdiction and the power to impose further criminal sanctions against Defendant-appellant, a non-member Indian. The Appellate Court also addressed an issues not raised by either party and held the lower court erred in (1) proceeding with the revocation hearing after the expiration of probation and (2) imposing incarceration upon revocation of probation when incarceration was not originally imposed.

OPINION

LUI-FRANK, Judge.

This is an appeal of the denial of a motion to dismiss filed by the Defendant, citing as grounds the decision of the United States Supreme Court in *Duro v. Reina*, 495 U.S. 676 (May 29, 1990).

Defendant appeals as a matter of right under Southern Ute Indian Tribal Code [the Code] section 3-1-102(2). That section covers defendants subject to a criminal penalty which includes a jail term greater than ten days or a fine exceeding two hundred dollars.

All appeals not a matter of right may be brought as a discretionary appeal, section 3-1-102(3). This appeal was granted as a matter of right because Defendant was subject to a criminal penalty in excess of ten days and a fine exceeding two hundred dollars. On February 5, 1990, Defendant was found in contempt and sentenced to 10 days in jail and a fine of \$500. The fine was suspended for her agreement to pay all costs of treatment. On July 5, 1990, she was again held in contempt and sentenced to 30 days imprisonment; the \$500 fine was re-imposed.

ISSUE

On first impression it appears that there is but one issue on appeal. That issue is whether the lower court had the power to continue to enforce its criminal orders against the Defendant after the decision in *Duro v. Reina*, *supra*. Defendant argued that the decision made her criminal prosecution void from its inception. Defendant's position is not correct.

An issue not raised by Defendant, but raised by this Court as plain error, is the extension of Defendant's probation in February 1990 and again in July 1990.

For the reasons stated in this opinion the decision of the lower court denying the motion to dismiss is reversed, and the case is remanded for action consistent with this opinion.

FACTS AND PROCEEDINGS BELOW

Defendant is an Indian, but is not a member of the Southern Ute Indian Tribe. She was cited for three traffic violations on February 11, 1989: driving under the influence of intoxicating liquor, careless driving and driving without a license. She was convicted on March 14, 1989 on guilty pleas to the charges, and sentence was pronounced that day. Her sentence was six months probation, court costs of \$75.00, and what apparently was a fine of \$25 for each offense. Specific terms of probation included payment of the costs of alcohol treatment, \$396.00, and obtaining a driver's license. The order did not contain a reference to a term of incarceration which was suspended for the probation term.

Defendant did not comply with the terms of her probation and it was extended from September 1989 to December 31, 1989. A motion to revoke her probation was filed on December 11, 1989, but was not heard until February 5, 1990. No extension of her probation was provided for beyond December 31, 1989. The motion to revoke probation did not address the issue, and the court did not issue any order pending the hearing on the motion. Defendant did not have a lawyer at the time.

On February 5, 1990, Defendant's probation was revoked and she was found in contempt. It is not clear what the consequences of the revocation of the probation were, because the probation term was extended again. It does appear that she was incarcerated for the contempt for ten days and subject to a \$500 fine. The fine was suspended for payment of her treatment costs.

Defendant left the jail without leave of court on February 10, 1990. She was returned to jail on June 30, 1990. On July 5, 1990, the court again found her in contempt for failing to comply with the court orders and sentenced her to 30 days in jail. The suspended \$500 fine was re-imposed, but her probation was again extended. On July 9, 1990, her attorney filed a motion to dismiss for lack of jurisdiction.

DECISION

The scope of appellate review under the Code is not limited to the issues raised by the parties. Instances of plain error in the proceedings below may be addressed by the appellate court. Section 3-1-109.

The Code sections on probation do not provide for any automatic extension of the probation term upon a filing of a motion to revoke probation. Section 4-1-124. In this case the sentence was probation, with no suspended sentence of a jail term which could be imposed upon failure to successfully comply with the terms of probation. When the Defendant's probation term expired on December 31, 1989, the court no longer had any basis for continuing to hold Defendant on probation. At most the Defendant might be held answerable for contempt. The Tribe, through the probation officer, had the responsibility to act in a timely manner to have the court make an appropriate order to extend the probation at least to the hearing on the motion to revoke probation. Failure to do so cannot cure the result to which the Defendant is entitled, termination of the probation according to its

terms. This Court holds that Defendant's probation ended December 31, 1989. Any actions subsequent to that date to hold her for probation violation are null and void.

Additionally, even if the court had the authority to act on the motion to revoke probation in February 1990, there was no consequence of sentence. The original order had not suspended a jail term or a fine. The lower court had put itself in the untenable position of issuing a probation order for which no other consequence was available except contempt.

Defendant was held in contempt on February 5, 1990, and she was incarcerated. She was apprehended and returned to custody on June 30, 1990. On July 5, 1990, a longer jail term was imposed and a criminal fine was re-imposed.

The United States Supreme Court issued its decision in *Duro v. Reina*, *supra*, on May 29, 1990. The lower court construed *Duro* not to effect the Tribe's ability to prosecute and continue to enforce its criminal sanctions against Defendant because Defendant had waived any challenge to personal jurisdiction over her, and *Duro* had no effect on the current case, citing *United States v. Johnson*, 457 U.S. 537 (1982).

Although one might disagree strenuously with the *Duro* decision, there can be no doubt that the Supreme Court defined the limit of tribes' criminal authority over non-member Indians. "We address in this case whether an Indian tribe may assert criminal jurisdiction over an Indian but not a tribal member. We hold that the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership." *Duro*, 109 L.Ed. 2d at 700.

This Court holds that *Duro* applied to this case, but did not render this case void from its inception. Rather, the effect was to require that the Tribe dismiss the July 5, 1990 contempt and cease any efforts to enforce its criminal orders against the Defendant. *Duro* has no effect on the original prosecution and sentence in this case. *Johnson*, *supra*. The sentence effectively ended December 31, 1989. *Duro* does affect the contempt sanctions imposed on Defendant, and she must be released.

Duro involved a rule of limits on governmental authority over a whole class of defendants and the offenses they commit. This is not just personal jurisdiction. This is subject matter jurisdiction. In July 1990, the lower court lacked jurisdiction over the Defendant and lacked the power to impose further criminal sanctions upon her.

United States v. Johnson, 457 U.S. 537 (1982), supports the application of *Duro* to the present case. The Supreme Court held that the rule that they announced should apply to the case that raised the issue, and all other cases similarly situated, that is, those on direct appeal. While the result of *Johnson* was to apply an exclusionary rule to evidence in cases on appeal, the same retroactive rule in this case would be just. The case had remained active through the Tribe's error with regard to the probation term. Then the lower court found the Defendant in criminal contempt and imposed sanctions. The Defendant had recourse to attack the contempt sentence for lack of jurisdiction. That the motion and brief attacked the court's authority back to the 1989 convictions does not bar this Court from denying the *ab initio* argument, but holding invalid the contempt order.

The significant departure from settled law that *Duro* represents does require that its effect be limited to the cases then on direct appeal, or still eligible for direct appeal. See *United States v. Johnson*, *supra*.

then on direct appeal, or still eligible for direct appeal. See *United States v. Johnson, supra*.

