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

ED LEHNER and JULIANNE WARD LEHNER,

Plaintiffs-Appellants,

v.

ROGER A. MILLICH GARCIA and ARLENE MILLICH,

Defendants-Appellees.

SWITCA No. 10-001-SUTC
Tribal Case Nos. 08-CV-169; 09-AP-225

Appeal filed January 4, 2010

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

Appellate Judge: Anthony J. Lee

OPINION AND ORDER AFFIRMING THE LOWER COURT'S RULING AS TO APPELLANTS' AWARD OF PAIN AND SUFFERING/DOG ANXIETY DAMAGES AND AS TO PUNITIVE DAMAGES AND DENYING AND DISMISSING APPELLEES' CROSS APPEAL

SUMMARY

Appellants filed post-trial motions in the tribal court and in the alternative filed a Notice of Appeal of a final judgment awarding pain and suffering/dog anxiety damages. The tribal court denied Appellants' post-trial motions but awarded punitive damages to Appellants. In the meantime, the Appellate Court received Appellants' Notice of Appeal. The Appellate Court found that the tribal court did not abuse its discretion in resolving issues of fact. Appellees filed a Notice of Cross-Appeal. The Appellate Court affirmed Appellants' final judgment and punitive award and denied their request for oral argument pursuant to SWITCARA Rule 29(b). The Appellate Court denied and dismissed Appellees' Notice of Cross-Appeal as untimely.

* * *

This matter comes before the Southwest Intertribal Court of Appeals (SWITCA) from the Southern Ute Tribal Court, and arises out of Appellants' Notice of Appeal. For purposes of properly naming the parties to this appeal, this opinion refers to the Plaintiffs (Lehner) as the Appellants and the Defendants (Millich) as the Appellees.

The Southern Ute Tribal Court, on November 18, 2009, ordered a final judgment entered against the Appellees, Arlene Millich and Roger Millich Garcia, in favor of Appellants Ed Lehner and Julianne Ward Lehner in the amount of $15,629.26. No punitive damages were awarded.

Appellants, on December 3, 2009, filed a Motion for Reconsideration or in the alternative a Motion for New Trial, or in the alternative, a Notice of Appeal as to the award of pain and suffering/dog anxiety damages and as to punitive damages. Therein they requested an oral argument upon appeal and also submitted a Motion for Stay of Judgment.

On December 16, 2009, the Tribal Court reviewed the Appellants' post-trial motions and denied the Motions for Reconsideration, New Trial and the Stay of Judgment, but awarded $2,392.17 in costs to the Appellants.

On December 21, 2009, the Appellees filed with the Trial Court a Response to Appellants' Motion for Reconsideration or, in the Alternative, Motion for New Trial, and a Reply to Appellants' Reply in Support of Court Costs. It appearing that these motions were filed after the Southern Ute Tribal Court issued its judgment on December 16, 2009, this Court will not consider them at the appellate level for purposes of appeal.

On December 22, 2009, the Appellees filed a Response to Appellants' Notice of Appeal and filed a Notice of Cross-Appeal. On January 15, 2010, Appellants filed a motion requesting that SWITCA strike Appellees' Notice of Cross-Appeal as untimely. On February 3, 2010, the Appellees filed their Response to Appellants' Motion to Strike Appellees' Notice of Cross-Appeal as Untimely. On February 12, 2010, the Appellants filed their Reply in Support of Motion to Strike Appellees' Notice of Cross-Appeal as Untimely and Response.

This Court affirms the lower court's ruling as to the award of pain and suffering/dog anxiety damages and as to punitive damages, for the following reasons:

According to S.U.I.T. § 3-1-104(2), a motion for a new trial shall also serve as a notice of appeal, if the party making said motion has properly indicated that the motion for new trial also serve as a notice of appeal. Therefore, the Appellants' Motion filed on December 3, 2009, also serves as its Notice of Appeal and will be considered herein.

The Southern Ute Tribal Court is responsible for resolving issues of fact. This court can overturn findings of fact only when it is clear that the trial court made a mistake. An appellate court will not reverse a lower court's decisions unless they are not supported by substantial evidence in the record or unless "there is a strong showing that the court abused its discretion, acted arbitrarily or capriciously, made a clearly erroneous decision, or made an illegal decision."

See Hualapai Nation v. D.N., 9 SWITCA Rep. 2, 3 (1997). After reviewing the record of the lower court, this Court concludes that the lower court did not abuse its discretion, and that the lower court's decision was not improper in any respect. Therefore, this Court affirms the lower court ruling.

Because of this established procedure, this Court denies the Appellants' request for oral argument. SWITCA Rule 29(b) (2001) provides that oral argument shall not be allowed unless it will assist the court in making its determination. Since the Court is following customary rules applicable to appellate courts, it finds that oral argument is not needed.

This Court denies the Appellees' Cross-Appeal for the following reasons:

The Appellate Code of the Southern Ute Indian Tribe (Southern Ute Indian Tribal Code §§ 3-1-101 through 3-1-112) is the governing law that pertains to this matter. S.U.I.T. § 1-104-1 states that the Notice of Appeal must be filed within 15 days of the entry of final judgment. This requirement is jurisdictional. *See* SWITCARA #11(c) (2001). The SWITCA rules serve to supplement the code whenever there is a question of computation of time. SWITCA Rule 8 provides that "the computation for any time period over 11 days shall be by calendar days." Since the final judgment was entered on November 18, 2009 and the Cross-Appeal was not filed until December 22, 2009, the Cross-Appeal is clearly untimely. In accordance with SWITCARA #11(c) (2001), this court may not hear an appeal that is not filed in a timely manner; *see also Baker v. Southern Ute Indian Tribe*, 5 SWITCA 1 (1993); *Gould v. Southern Ute Tribe*, 4 SWITCA 4, 6 (1993). Thus, this court lacks jurisdiction and cannot hear the Cross-Appeal.

ACCORDINGLY, IT IS THE ORDER OF THIS COURT THAT THE LOWER COURT'S RULING IS AFFIRMED AS TO APPELLANTS' AWARD OF PAIN AND SUFFERING/DOG ANXIETY AND AS TO PUNITIVE DAMAGES AND APPELLEES' CROSS APPEAL IS DENIED AND DISMISSED.

IT IS SO ORDERED.

May 6, 2010

RICARDO DeLEON,

Defendant-Appellant,

v.

AK-CHIN INDIAN COMMUNITY,

Plaintiff-Appellee.

SWITCA No. 09-005-ACCICC
Tribal Case Nos. CR08-131/135 and 339-341

Petition for Rehearing filed January 4, 2010

Petition for Rehearing comes from the decision on appeal by the Honorable Steffani A. Cochran, Chief Judge of the Southwest Intertribal Court of Appeals

Appellate Judge: Anthony J. Lee

OPINION AND ORDER DENYING APPELLANT'S PETITION FOR REHEARING

SUMMARY

Appellant filed a Petition for Rehearing of the Appellate Court's decision. The Appellate Court found upon review of the lower court's decision, the Appellate Court's decision, and Appellant's arguments in his Petition for Rehearing, that there had been no error in the Appellate Court's final judgment. Petition for Rehearing denied.

* * *

This matter arises out of Appellant's Petition for Rehearing filed on January 4, 2010.

BACKGROUND

On February 17, 2009, the Ak-Chin Indian Community Court entered an Oral Judgment and Sentence against the Defendant ("Appellant") Ricardo de Leon. The Order was signed by the Trial Court on February 23, 2009. On March 4, 2009, the Appellant filed a Notice of Appeal with the Southwest Intertribal Court of Appeals ("SWITCA"). On December 4, 2009, the Chief Judge of the SWITCA entered an Order finding "no error in the judgment of the Ak-Chin Community Court." In response, on January 4, 2010, the Appellant filed a Petition for Rehearing.

JURISDICTION

SWITCA jurisdiction has been established for the original appeal as per Resolution #A-74-99 of the Ak-Chin Community Council. SWITCA limits its review to the record of the lower court proceeding, issues raised in written

briefs, and, where required, oral arguments presented to the Appellate Court, *see* SWITCARA #5 (2001).

FINDINGS

After review of the lower court decision, the Appellate Court decision and the Appellant's Arguments in his Petition for Rehearing, this Court agrees with the Appellate Court's finding upon Appeal that there has been no error in the judgment of the Ak-Chin Indian Community Court. The reasons are clearly stated in the Appeal Order and it is unnecessary to re-state them here, as they are part of the Official Record. Therefore, this Court finds that there has been no error on behalf of the Southwest Intertribal Court of Appeals in its final judgment.

ACCORDINGLY, IT IS THE ORDER OF THIS COURT THAT THE APPELLANT'S PETITION FOR REHEARING IS HEREBY DENIED.

IT IS SO ORDERED.

June 23, 2010

IN THE MATTER OF CESSATION OF PARENTAL RIGHTS OF KAREN AND MANUEL G., RESPONDENTS

SWITCA No. 08-004-ZTC
Tribal Case No. CP 2007-0003

Appeal filed April 21, 2008

Appeal from the Zuni Pueblo Children's Court
Sharon Begay-McCabe, Judge

Appellate Judges: Georgene Louis,
Lynn Trujillo and Jonathan Tsosie

ORDER

SUMMARY

Appellants filed a Notice of Appeal to an Order of Denial of Cessation of Parental Rights with respect to the "G children." The Appellate Court found that the process, as mandated by tribal law, to appoint a guardian ad litem to represent the children's best interest was not followed. The Appellate Court also found that the Order of Denial of Cessation of Parental Rights was unclear, conclusory, and did not refer to any specific law even though the tribal code provides for procedures to follow and criteria to consider in terminating parental rights. The Appellate Court held that the children's court must adhere to the tribal law and process when making a determination of parental rights. Vacated and remanded.

Introduction

This matter comes before the Southwest Intertribal Court of Appeals (SWITCA) by way of appeal of an Order of Denial of Cessation of Parental Rights, issued by the Zuni Tribal Children's Court, Judge Begay-McCabe. This case involves the cessation of Respondents-Appellees' (hereinafter "Appellees") parental rights with respect to four Zuni children. Legal guardianship of all four children (hereinafter referred to as "G children") was previously granted to Petitioners-Appellants (hereinafter "Appellants") on July 21, 2005. Appellants have no biological relationship to the children and are non-Indian. Prior to the establishment of legal guardianship, Appellants were foster parents to the G children. Appellees are the natural parents of the G children.

Appellants petitioned for cessation of parental rights with respect to the G children on April 2, 2007, citing Sections 9-10-3B(2) and 9-10-3B(6)-(7) of the Zuni Tribal Code. A hearing was held in Zuni Tribal Children's Court on March 20, 2008, that resulted in an Order of Denial of Cessation of Parental Rights. Appellants were represented *pro se*. The natural mother, Karen G., was represented by Paula James-Pakkala, a professional attorney.

I. Jurisdiction

Zuni Pueblo has appointed SWITCA as its appellate court in the present proceedings. *Zuni Tribal Council Resolution No. M70-99-B059*. Also, pursuant to Sections 9-13-1D and 9-15-1 of the Zuni Tribal Code, appeals to the tribal appellate court may be taken from rulings and orders from the Zuni Tribal Children's Court. *Zuni Tribal Code Sections 9-3-1d, 9-15-1*. This Court of Appeals limits its review to the record of the lower court proceeding, issues raised in written briefs, and, where required, oral arguments presented to the appellate court. *SWITCARA #5 (2001)*. An appeal is made to SWITCA upon filing a notice of appeal with the lower court within fifteen days of entry of judgment by that same court, unless specified otherwise by the tribe. *SWITCARA #11(a) (2001).* Appellants filed a notice of appeal with SWITCA on April 9, 2008, and therefore Appellants filed a timely notice of appeal.

II. Cessation of Parental Rights

In their appeal letter, *pro se* Appellants cite Sections 9-10-3B(2)-(3)[1] and 9-10-3B(6)-(7)[2] to support their Petition of

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[1] In the original Petition for Cessation of Parental Rights filed April 2, 2007, Appellants did not cite Section 9-10-3B(3).

[2] Zuni Tribal Code § 9-10-3B provides:
The Court shall consider factors when determining

Cessation of Parental Rights ("Petition of Cessation") and argue that the Court failed to consider the "facts and reports" of the case. Although Appellants do not specifically state that the Children's Court's hearing and resulting order were insufficient to permit meaningful review, this panel interpreted the notice of appeal as such.

A. Adequacy of Findings

This Court is troubled by two particular aspects of the Children's Court's proceedings. First, a guardian ad litem was never appointed by the Children's Court to represent the best interest of the children. Second, the Order of Denial of Cessation of Parental Rights is unclear, and lacking in tribal law.

1) Appointment of Guardian ad Litem

According to Zuni Tribal Law, "[t]he Court's decision on involuntary cessation of parental rights shall be guided by the best interest of the child." *Zuni Tribal Code Section 9-10-3C [sic]*.[3] The Zuni Tribal Code recognizes the crucial role that a guardian ad litem plays in representing the best interest of the children. Section 9-10-5 of the Zuni Tribal Code states, "In any proceeding for cessation of parental rights, whether voluntary or involuntary, or any rehearing or appeal thereon, the Court *shall* appoint a guardian ad litem on behalf of the minor." *Zuni Tribal Code Section 9-10-5* (emphasis added). A guardian ad litem is "[a]n attorney, advocate, CASA [Court Appointed Special Advocate], or other adult appointed by the Court for the protection of the child's interest to represent a child in a proceeding." *Zuni Tribal Code Section 9-1-3B(19).*

On March 14, 2008, a Request for Appointment of Guardian Ad Litem was filed by Appellants pursuant to Section 9-10-5 of the Zuni Children's Code. However, no appointment of a guardian ad litem was ever made by the Children's Court as required by Zuni Tribal Law.

It is evident that Zuni Tribal Law respects the special circumstances that surround cessation of parental rights proceedings. Zuni Tribal Law established a process for which the best interest of the children would be represented through a guardian ad litem. This Court is unwilling to consider the drastic and extreme measure of terminating parental rights when no guardian ad litem has ever represented the best interest of the children.

2) The Order of Denial of Cessation of Parental Rights ("Order of Denial")

The Order of Denial from which Appellants appeal is unclear and, in this Court's opinion, too cursory. The Order of Denial ostensibly lists four findings as to why Appellants' Petition was denied, and this Court is concerned with two findings in particular.

First, the Order of Denial simply states that "The Social Service Report does not recommend that the parental rights be terminated." Such a statement appears to ignore a prior Order issued by the very same Judge Begay-McCabe on February 13, 2008, in which she finds:

> The court is unable to accept the Zuni Social Service reports. The mere statement that termination of parental rights should not be granted is not support [sic] by how the children were placed in the custody of the petitioner, how long the children been [sic] in the placement with the petitioner, and the current status of the respondents to support reunification with the parents.[4]

Having reviewed the Social Service Report in question, this Court is inclined to agree with Judge Begay-McCabe's characterization in the Order of February 13, 2008, in that the Social Service Report is indeed conclusory. Between February 13, 2008, and the hearing of March 20, 2008 (from which the Order of Denial resulted), however, there is nothing in the record to reflect that Zuni Social Services attempted to supplement their conclusory recommendation. Judge Begay-McCabe's Order of March 20, 2008, does not explain why the Social Service Report's recommendation has suddenly become acceptable.

> cessation of parental rights including, but not limited to:
> 1. Emotional or mental illness or mental deficiency of the parent;
> 2. Abuse, neglect or abandonment of the minor;
> 3. Excessive use of intoxicating liquors or illegal substances;
> 4. Adjudication by a court that the parent caused the death or serious injury of a minor's sibling;
> 5. Failure to provide reasonable substitute care and maintenance where custody is lodged with others;
> 6. Failure to maintain regular contact with the child under a plan to reunite the child and parent; or
> 7. Failure to maintain regular contact with the child for over a period of one year.

Zuni Tribal Code § 9-10-3B.

[3] As printed, the Zuni Tribal Code contains two consecutive subsections that are labeled as "C". The subsection referred to here is actually "D," as it comes immediately after "C" under Section 9-10-3 of the Zuni Tribal Code.

[4] Line 9, Order, Cause NO. CP-2007-0003, Feb. 13, 2008.

Second, the Order of Denial ostensibly finds: "The Petitioner states that the filing of the petition because the children are not question by their peers why they have a different last name and they wish to preserve family unity [sic]."[5] This Court does not know what to make of this poorly worded statement, much less how it factors into denying a petition for the cessation of parental rights.

Orders and findings should be clearly worded and, when possible, refer to specific provisions of law. The Order of Denial at issue does not refer to any law whatsoever despite the fact that Appellants grounded their original petition in specific provisions of the Zuni Tribal Code.

Conclusion

The Zuni Tribal Code sets forth certain procedures when cessation of parental rights is at issue. The record does not reflect that all necessary criteria were considered by the Children's Court when considering Appellants' petition. This panel is aware of the necessity to resolve this significant and sensitive matter as soon as possible. However, Zuni Tribal Law requires a specific process to be followed by the Children's Court. In order for the Pueblo of Zuni to make a determination of cessation of parental rights, the Children's Court must consider the facts of the case with strict adherence to the tribal court process, and any determination must be made in accordance with tribal law. Because a guardian ad litem was never appointed by the Children's Court to act on behalf of the G children, this Court is not in a position to make the drastic and extreme measure of terminating the parental rights of Appellees.

We therefore order that the Children's Court's March 20, 2008, Order of Denial of Cessation of Parental Rights be vacated, and that this case be remanded to the Children's Court for an appointment of a guardian ad litem to act on behalf of the G children.

IT IS SO ORDERED.

July 9, 2010

[5] Line 4, Order of Denial of Cessation of Parental Rights, Cause No. CP-2007-0003, Mar. 20, 2008.

DONNA GUTIERREZ,

Petitioner-Appellant,

v.

MARIE A. TAFOYA,

Respondent-Appellee,

SWITCA No. 004-007-SCPC
SCPC No. CV-04-095

Appeal filed November 13, 2009

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

Appellate Judge: Jonathan Tsosie

OPINION AND ORDER

SUMMARY

The Appellate Court affirmed a judgment against Appellant to pay an amount of money owed to Appellee. When Appellant failed to pay the full amount of the judgment, Appellee filed an Application for Writ of Execution with the tribal court. The application was granted and the tribal court issued a Writ of Execution that ordered Appellant to auction her personal property to satisfy the judgment. Appellant appealed the Writ of Execution and in her appeal raised issues that pertained to the merits of the judgment. The Appellate Court found that since there was not an abuse of discretion by the tribal court in issuing the Writ of Execution, an appellate review of the Writ of Execution would not be considered because the underlying judgment had already been appealed and affirmed. The Appellate Court also found that res judicata and claim preclusion barred review of the issues related to the merits of the judgment because the judgment had been decided with finality by the tribal court and the Appellate Court. Dismissed with prejudice and Writ of Execution affirmed.

* * *

THIS MATTER comes before the Southwest Intertribal Court of Appeals (SWITCA) pursuant to Santa Clara Tribal Council Resolution No. 99-25 (September 30, 1999), Section 42.3 of the Santa Clara Pueblo Tribal Code (2006), and the appellate rules of SWITCA.

For the following reasons, Appellant's appeal is DISMISSED with prejudice, and the writ of execution issued by the trial court is AFFIRMED.

FACTS

This case involves an attempt by Petitioner-Appellant (hereinafter "Appellant") to avoid a Writ of Execution issued to her by the Tribal Court of Santa Clara Pueblo on November 5, 2009. The original judgment underlying the Writ of Execution was entered against Appellant on June 15, 2004, in which the Santa Clara Pueblo Tribal Court ordered Appellant to pay the amount of $6,900.00 to Appellee for checks wrongfully drawn on Appellee's bank account. Appellant appealed that original judgment in a timely manner and SWITCA affirmed the tribal court on February 5, 2005.

After nearly five years and only $372.74 received from Appellant, Appellee brought to the Santa Clara Pueblo Tribal Court an "Application for Writ of Execution" that was filed in the tribal court clerk's office on October 13, 2009, seeking payment of the outstanding $6,527.26. On October 27, 2009, an officer of the tribal court served both a "Notice of Continuance" and the "Application for Writ of Execution" on Appellant. A hearing was scheduled for November 5, 2009, which resulted in a Writ of Execution ordering Appellant to release personal property by November 13, 2009, to be sold at auction in satisfaction of the $6,527.26 debt.

On November 13, 2009, Appellant, through her lay advocate, filed with SWITCA a document that this Court interprets to be an appeal to the Writ of Execution.[1]

The issue in this case is whether SWITCA may decide upon Appellant's appeal to the Writ of Execution when the Santa Clara Pueblo Tribal Court has essentially decided this case twice - both before and after SWITCA affirmed the tribal court's first judgment. In other words, Appellant is effectively asking this Court to reverse two judgments of the tribal court, as well as to overturn a previous opinion issued by SWITCA.

An appellate court will only disturb the findings of a trial court with respect to writs of execution if there is a clear showing of an abuse of discretion. *Wheatland Cold Storage and Meat Processing, Inc. v. Wilkins*, 705 P.2d 316 (Wyo. 1985). *See also* 30 Am. Jur. 2d *Executions § 273* (2005).

Based on principles of res judicata and claim preclusion, as well as on the nature of a writ of execution, this Court finds that absent an abuse of discretion by the tribal court in issuing a writ of execution, SWITCA will only entertain an appeal to a writ of execution if there is a pending appeal as to the underlying judgment.

ANALYSIS

I. WRIT OF EXECUTION

This Court is aware of potential confusion among litigants and tribal courts with respect to whether a writ of execution is appealable to SWITCA. Such confusion may stem from an incomplete understanding as to what a writ of execution actually is.[2]

A writ of execution is a remedy afforded by law that allows a judgment creditor to recover what is owed to her from a judgment debtor. 30 Am. Jur. 2d, *Executions § 47* (2005). It may be utilized after a final judgment has been entered in which the rights and liabilities of the parties have been decided. *Id.* A writ of execution is thus auxiliary to the original cause of action, and the issuance of a writ of execution therefore does not commence a whole new civil action. *Heimann v. Adee*, 1996-NMSC-053, 122 N.M. 340, 924 P.2d 1352 (1996). A procedural device only, a writ of execution reflects the policy of the law to assist judgment creditors with receiving the benefits of the judgment that was rendered in the judgment creditor's favor. 30 Am. Jur. 2d, *Executions* §§ 1, 62 (2005).

Because a writ of execution is a remedy of the court that issues the writ, the power to quash or vacate a writ of execution generally lies in the court that issued it. *Id.* at § 334. Thus if one seeks to quash or vacate the execution of a judgment, the initial forum to decide that should be the court that rendered the judgment. *See id.* Grounds for quashing or vacating a writ of execution include an improper or inadvertently made writ, or when some element of fraud, unfairness, injustice or oppressiveness is involved. *Id.* at § 339. Sometimes an irregularity in the judgment underlying the writ may be sufficient to vacate the writ, but the irregularity should be such that it renders the underlying judgment void. *Id.* at § 340. Generally, the power to quash or vacate an execution is viewed as discretionary, and if appeal to the order is allowed, the appellate court will review for abuse of discretion. *Id.* at § 336. The appellate court will keep in mind that depriving a court of power to execute its judgments is tantamount to impairing that court's jurisdiction. *See Central Nat. Bank v. Stevens*, 169 U.S. 432, 18 S. Ct. 403 (1898).

Given the foregoing principles, SWITCA holds that, absent an abuse of discretion in the trial court, one may appeal a

[1] Appellant, through her lay advocate, actually filed a document that she entitled a "Writ of Stay." Because the "Writ of Stay" objects to the Santa Clara Pueblo Tribal Court's most recent judgment order of November 5, 2009, and because of reasons discussed in this opinion, SWITCA interprets the "Writ of Stay" to be an appeal to the Writ of Execution.

[2] For more about executions and enforcement of judgments, *see 30 Am. Jur. 2d, Executions* (2005).

writ of execution *only if there is a pending appeal as to the underlying judgment.* In other words, if a tribal court issues a final judgment on the merits of a case and a writ of execution results from that judgment, any appeal of that judgment to SWITCA would effectively include an appeal to the writ of execution. That writ of execution would be stayed pending appeal. If, however, the underlying judgment is appealed to SWITCA unsuccessfully, then the writ of execution - whether it was issued before *or after* the unsuccessful appeal - will generally be valid absent a clear showing of abuse of discretion by the tribal court.

II. SANTA CLARA PUEBLO'S USE OF THE WRIT OF EXECUTION

The Santa Clara Pueblo Tribal Court clearly allows the tribal judiciary "to issue any order or writ necessary and proper to the complete exercise of their powers." *Santa Clara Pueblo Tribal Code, Title VI, Sec. 35.2(A) (2006).* Moreover, "the [Santa Clara Pueblo Tribal] Court may enforce judgments in civil proceedings by issuing a writ of execution against any eligible personal property of the party against whom judgment is rendered which is located or found within the jurisdiction of the Pueblo returnable not less than ten (10) days after the day of issuance."[3] *Santa Clara Pueblo Tribal Code, Title VII, Sec. 40.13 (2006).*

Here, the Santa Clara Pueblo Tribal Court had decided the rights and liabilities of both Appellant and Appellee in the judgment issued June 15, 2004, which ordered Appellant to pay $6,900.00 to Appellee. When that judgment was issued, Appellant became the judgment debtor and Appellee became the judgment creditor. SWITCA affirmed the tribal court's decision on February 5, 2005. Thus any writ of execution issued by the tribal court as a result of either the initial judgment or SWITCA's affirming judgment, would be valid absent a clear showing of an abuse of discretion by the tribal court.[4]

When Appellee failed to pay the amount owed to Appellant, Appellant acted upon her right to request the tribal court to issue a writ of execution upon Appellee. The tribal court again afforded Appellant the opportunity to present any argument that would justify either staying or vacating an execution in a hearing scheduled for November 5, 2009. Appellant's arguments were clearly insufficient to the tribal court, and the tribal court acted within its discretion to issue the Writ of Execution.

Appellant then filed what she entitled a "Writ of Stay" with the tribal court. SWITCA could interpret the "Writ of Stay" to be either (1) a motion to quash or vacate the Writ of Execution, or (2) an appeal to the Writ of Execution. Either way, Appellant cannot succeed.

If the "Writ of Stay" is interpreted to be a motion to quash or vacate the Writ of Execution, then such a motion, for reasons above, should be presented to the tribal court in the first instance. Such an opportunity, however, was already afforded, as the tribal court held a hearing on November 5, 2009, in which Appellant was allowed to present arguments that might quash or vacate the execution. Appellant cannot file another motion to quash or vacate the Writ of Execution in this Court, as this Court is unwilling to impair the jurisdiction of the tribal court in executing its judgments absent a clear showing of abuse of discretion. This Court can find no evidence of any abuse of discretion in the issuance or form of the Writ of Execution.

If the "Writ of Stay" is interpreted to be an appeal from the Writ of Execution, then, for reasons above, Appellant again fails because this Court will generally only entertain an appeal to a writ of execution if there is a pending appeal to the underlying judgment. The appeal to the underlying judgment, however, was already decided by SWITCA, which held against Appellant. Because the underlying judgment has already been appealed, SWITCA will not entertain an appeal to this Writ of Execution absent a clear showing of an abuse of discretion. Again, SWITCA finds

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[3] The Writ of Execution at issue provided Appellant with eight days' notice, contrary to the Tribal Code. To this Court's knowledge, no property was ever seized, and this opinion will issue well after 10 days of the original writ. Also, the record does not indicate that the tribal officer who served the "Application for Writ of Execution" on Appellant signed the section denoting return of service to the court. Appellant clearly received notice, however. "Since an execution ordered to enforce a judgment does not form a part of the judgment, errors associated with the execution proceedings will not render the underlying judgment open to collateral attack." *Heimann v. Adee*, 1996-NMSC-053, 122 N.M. 340, 924 P.2d 1352 (1996).

[4] It might be noted that the Santa Clara Pueblo Tribal Code includes this provision: "No judgment of the Court for money shall be enforceable after five (5) years from the date of entry, unless the judgment shall have been renewed once before the date of expiration by institution of appropriate proceedings in the Court by the judgment creditor filing an application for renewal and the Court thereupon shall order the judgment renewed and extended for an additional year." *Santa Clara Pueblo Tribal Code § 40.13(3) 2006.* SWITCA considers the "date of entry" of the judgment to be February 5, 2005, when SWITCA affirmed the trial court's judgment, with the time between the trial court's first judgment and the issuance of SWITCA's opinion tolled due to the pending appeal. Appellee/judgment creditor requested that the judgment be enforced on October 13, 2009, which falls within the five-year period.

no abuse of discretion in the issuance or form of the Writ of Execution.

III. *RES JUDICATA*

Repetitive litigation takes a toll on courts, litigants and the public. Courts have limited time and resources, as do litigants. The central role of litigation is to provide answers that are binding. Wright & Miller, *Federal Practice and Procedure* § 4403. Both the public and the various parties to a lawsuit deserve to have rights and liabilities decided with finality. It is also in the public's interest to see that its tribal court's orders and judgments are obeyed.

Principles of *res judicata* and its sub-doctrine of claim preclusion developed to prevent the same claims from being litigated again and again. The merits of this case were decided with finality by the tribal court in 2004, affirmed by SWITCA in 2005, and again by the trial court in 2009. This case has proceeded far too long for Appellee.

Thus it is much too late to question Appellee's mental state, as Appellant does in her appeal. Both the tribal court and SWITCA found Appellee to be competent. Appellant similarly cannot ask this court to retroactively add or remove another person as a co-respondent, as both the tribal court and SWITCA have already decided the final rights and liabilities of every party.[5] Also, whether Appellee's Power of Attorney is legal or not has no bearing on the merits of the underlying judgment, which, again, have been decided with finality by the tribal court and SWITCA. Lastly, Appellant bases her appeal in part on documents pertaining to land within the Pueblo that she feels were wrongfully given to Appellee. SWITCA has no jurisdiction whatever over issues concerning land within the territorial boundaries of the Pueblo. Santa Clara Pueblo has full and complete jurisdiction over its land.

For the foregoing reasons, Appellant's appeal is DISMISSED with prejudice and the trial court's writ of execution is AFFIRMED.

July 22, 2010

[5] It is unclear from the "Writ of Stay" whether Appellant wishes to have a person added or removed as a co-respondent. By all appearances, the other person is Appellant's husband, who *was* named on the Writ of Execution, which is the first time that he is named as a party in the heading of any judgment document. SWITCA regards the inclusion of Appellant's husband's name on the Writ of Execution as harmless clerical error. Property eligible for seizure may, however, include marital community property that the Santa Clara Pueblo Tribal Court sees fit to seize.

DONALD CHAPMAN,

Appellant,

v.

PUEBLO OF ZUNI,

Appellee.

SWITCA No. 08-012-ZTC
Tribal Case No. CR 2008-1422

Appeal filed October 10, 2008

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

Appellate Judges: Stephen Wall,
Delilah Choneska and Robert Medina

ORDER

SUMMARY

Appellant appealed the tribal court's conviction of Careless Driving and Great Bodily Injury by Motor Vehicle. The tribal traffic code categorizes violations within the sentencing structure of the tribal criminal code. Appellant represented himself pro se at trial and the tribe was represented by a prosecutor, who was law-trained. Upon review of the record, the Appellate Court decided that the trial lacked fundamental fairness because the prosecutor took advantage of Appellant's lack of judicial knowledge and the trial judge accepted the prosecutor's behavior instead of protecting the pro se party. The Appellate Court found in regard to the conviction of Careless Driving that the evidence at trial did not meet the standard of proof. The Appellate Court also found that since the Appellant was not guilty of Careless Driving, the charge of Great Bodily Injury by Motor Vehicle must be dismissed. Conviction reversed.

* * *

I

On September 9, 2008, Donald Chapman was found guilty of Careless Driving and Great Bodily Injury by Motor Vehicle in the Zuni Tribal Court. The next day, September 10, Mr. Chapman filed a motion for reconsideration that was denied. He filed an appeal of his guilty verdict on September 17, 2008. The Southwest Intertribal Court of Appeals agreed to hear the appeal on July 8, 2010.

Mr. Chapman was a *pro se* defendant and the Tribal Prosecutor represented the Pueblo of Zuni. From the court record, both electronic and physical, there was no material dispute of the facts of the case. Mr. Chapman was charged with both offenses after he struck Mr. Niiha while driving eastbound through Zuni Pueblo on New Mexico State Highway 53. The only evidence, other than the Defendant's testimony, entered into the Court's record was by the Tribal Prosecutor. In summary, the Prosecution's first witness was a person who saw the accident, but did not see the impact with the victim and could not testify as to how Mr. Chapman was driving prior to the accident. This witness also volunteered testimony that would have been considered expert testimony, but was not qualified as an expert prior to his testimony. The Prosecution also called Law Enforcement Officers who provided an extensive overview of the scene of the accident. Lastly, the responding EMT was called and he testified about what he saw at the scene and the extent of the victim's injuries. Mr. Chapman subpoenaed no witnesses and did not challenge the version of the facts as presented by the Prosecution's witnesses. He also did not object to any evidence that was presented during the course of the trial.

II

While the Defendant has filed a Notice of Appeal with 18 issues as the basis for the appeal, this matter can be disposed of with the first issue raised in the appeal: whether the evidence tendered at trial was sufficient to base a conviction of the charges against the Defendant.

The first question that must be addressed to resolve this issue is the standard of proof required in this matter. The Zuni Traffic Code (hereinafter "ZTC"), which defines the offenses of which the Defendant was convicted, is silent as to the standard of proof required for conviction. Generally, traffic cases have been decriminalized and are often considered civil offenses. This would imply a lower standard of proof than the usual criminal standard of beyond a reasonable doubt. However, the Zuni Traffic Code categorizes traffic violations within the sentencing structure of the Zuni Criminal Code. ZTC § 4-3-6. With such categorization coupled with the silence of the Traffic Code on standard of proof, it must be assumed that the standard of proof for a finding of guilt in a traffic offense is the criminal standard of beyond a reasonable doubt. ZTC § 4-1-10.
After establishing that the standard of proof is one of beyond a reasonable doubt, the next question that must be addressed is whether the evidence entered into the trial record meets that standard. The SWITCA panel finds that the evidence entered into the tribal record is insufficient to meet the burden of proof. The ZTC defines Careless Driving as "operat[ion] of a motor vehicle in a careless, inattentive, or imprudent manner without due regard for the width, grade, curves, corners, traffic, weather and road conditions . . ." ZTC § 6-1-4. All of the witnesses who testified addressed the aftermath of the accident. They all discussed what they saw after the victim had been struck by the Defendant's vehicle. There was no testimony by any of witnesses regarding whether the Defendant was operating his vehicle in a careless, inattentive or imprudent manner. Evidence should have been presented regarding the Defendant's actions just prior to the impact. What was his state of mind? Was he speeding? While we have evidence of the skid mark, was it speed alone that caused the length of the skid mark or were there intervening mechanical or road-surface factors? The occurrence of an accident is not prima facie evidence of careless driving. There also needs to be some evidence as to the victim. Why was he crossing the street at that particular point? Did he see the oncoming vehicle? If not, why not? What was his mental state? The failure to answer to these basic questions indicates that there is reasonable doubt as to the Defendant's guilt.

Thus, the conviction of the charge of Careless Driving is reversed.

III

The ZTC defines Great Bodily Injury by Motor Vehicle as "the injuring of a human being resulting from the unlawful operation of a motor vehicle." ZTC § 6-1-15(B). Because the Pueblo failed to meet the burden of proof for a conviction of Careless Driving or otherwise prove the Defendant operated his vehicle in an unlawful manner, there is no basis for a conviction of Great Bodily Injury by Motor Vehicle. Therefore, the charge of Great Bodily Injury by Motor Vehicle must be dismissed.

IV

The evidentiary liberties taken by the Prosecutor in this case and their acceptance by the Judge raise an issue of fundamental fairness in a trial in which there is a law trained Prosecutor and a *pro se* Defendant. SWITCA has addressed this issue in *The Matter of K Children, Matthew and Susan K, Appellants v. The Fort Mohave Tribe, Appellee, SWITCA No. 96-002 FMC*, in which the panel of judges stated "this Court is mindful that when *pro se* parties are up against law trained attorneys, fundamental fairness requires a pragmatic examination of whether a waiver [of evidentiary issues] was knowingly and voluntarily given." There were several instances indicated by the electronic record in which the Prosecutor took advantage of the *pro se* status of the Defendant. The record also indicates that the Judge failed to admonish the Prosecutor or witnesses for their excesses. These include allowing and even encouraging a witness who is not qualified as an expert witness to render opinion-based evidence and conclusions and the Prosecution offering leading questions to his own witnesses. Although the Zuni Tribal Court is patterned to a large extent after the American judicial system, tribal code provisions, ZTC § 1-3-3 & § 8, indicate that the tribal aspect of the court is to be the basis

for much of the court's work. As a result, the judge has a duty to protect the rights of those whose station in life prevents them from securing counsel and the law-trained advocates practicing in the Zuni court system have an affirmative duty to respect those rights and restrain themselves from taking advantage of the *pro se* parties' lack of judicial knowledge.

August 10, 2010

IN THE MATTER OF THE CUSTODY:
JHW, a minor child

And Concerning,

Gregory Waatsa, Petitioner *Pro Se*
Jolie Vacit, Respondent *Pro Se*

SWITCA No. 08-013-ZTC
Tribal Case No. MC 2008-0003

Appeal filed October 22, 2008

Appeal from the Zuni Pueblo Children's Court
Sharon Begay-McCabe, Judge

Appellate Judges: Stephen Wall,
Georgene Louis and Michael Oeser

ORDER

SUMMARY

Respondent appealed a custody order. Since both parties were pro se, the Appellate Court was mindful of fundamental fairness when reviewing the record. The only evidence presented in the children's court was the testimony of each party and the home studies conducted by the tribal social worker. The tribal children's code and tribal domestic relations code provided procedures, requirements, and standards to follow in awarding custody of a child, including the presumption that the mother is to have custody of a young child and to consider the best interest of the child. The Appellate Court found that the record lacked sufficient evidence to overcome the presumption that the mother was to have custody or to determine the best interest of the child. Remanded for rehearing.

* * *

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

This matter has come to the Southwest Intertribal Court of Appeals (SWITCA) on appeal from the Zuni Children's Court. On July 8, 2008, the Petitioner, Gregory Waatsa filed for custody of his son, JHW. The Respondent responded to the petition by admitting all of the Petitioner's allegations, but denying that custody of the child should be with the Petitioner. The Zuni Children's Court ordered Zuni Social Services to conduct studies of both the Petitioner's and Respondent's homes. Zuni Social Services visited the Petitioner's home in August 2008 to conduct the court-ordered home study. A memo entered into the record indicates that the Zuni Social Services relied upon an October 21, 2005 home study of the Respondent that was updated through a telephone call to the Respondent.

A hearing was scheduled and the Zuni Children's Court issued an order for joint custody with the Respondent having physical custody of JHW. The only evidence presented and considered by the court were the Zuni Social Services home studies and statements of the parties. Neither party subpoenaed witnesses nor submitted witness lists. Respondent asserts in her appeal that she brought a number of witnesses to the courthouse, that these witnesses waited outside the courtroom during the hearing and that the court clerk saw these witnesses waiting outside the courtroom. However, there is nothing in the record reflecting a request by Respondent, either orally or in writing, that she be allowed to call these witnesses and have them testify and none were called to testify.[1] The Respondent appeals the custody order.

I

Both parties were in the court *pro se*. The trial court pleadings were simple court forms the parties filled out or were typewritten motions clearly developed with little, if any, aid of counsel. The appeal filed by the mother of JHW barely met the minimum requirements of SWITCARA Rule 11 (2001). Given that both parties are *pro se* and have little understanding of court procedures, the Children's Court Judge has a more extensive role in the conduct of the hearings than if the parties were represented by counsel. This more extensive role of the judge creates a duty to insure that the hearings are conducted in a fair manner. SWITCA indirectly addressed this issue in *The Matter of K Children, Matthew and Susan K, Appellants v. The Fort Mohave Tribe, Appellee*, SWITCA No. 96-002 FMC, the panel of judges stated, "This Court is mindful that when *pro se* parties are up against law trained attorneys, fundamental fairness requires a pragmatic examination of whether a waiver [of evidentiary matters] was knowingly and voluntarily given." While this case is not entirely on point

[1] Respondent argues that the failure of the trial court to allow her to present witnesses is a source of reversible error by the trial court. However, by not making a request to the trial judge, orally or in writing, that she be allowed to present witnesses, the Respondent failed to preserve this argument for appeal.

in that it addresses the disparity between *pro se* parties and law trained advocates, it indicates that SWITCA must be mindful of issues of fundamental fairness when *pro se* parties are involved.

The Zuni Children's Code (hereinafter ZTC), Chapter 9, has extensive procedural requirements for child custody cases in matters of an abused or neglected child and a child in need of services. The Zuni Domestic Relations Code, ZTC Chapter 11, has extensive procedural and substantive requirements for divorce, paternity and child support. But neither of those codes provides procedural direction for cases of child custody between parents. Thus without statutory procedural direction, the Judge has a great deal of discretion as to conduct of the Court in this matter.

Section 11-3-9 of the Zuni Tribal Code establishes standards for assessing which parent should have physical custody of the child. That Section states, "In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties and the natural presumption that the mother is best suited to care for young children." Not only must the court consider the best interest of the child and the parents' repute, if the child is to be placed with the father, there must be sufficient evidence to overcome the presumption in favor of the mother's custody.[2]

II

The only evidence presented in this matter was the testimony of the parties and the home studies conducted by Zuni Social Services. While one of the parties had additional witnesses waiting to be called to enter testimony, they were not called. The trial court judge managed the hearing by calling the social worker to testify and asking the parties to state their positions. The judge did not entertain any other witnesses.

The record shows that while the social worker conducted a new home study on the father's residence in Albuquerque, she telephoned the mother to update a pre-existing home study of the mother's residence. The pre-existing home study was conducted in 2005, three years prior to the custody hearing, significantly undermining its evidentiary value.

A review of the trial record indicates that the court order was based solely on the home studies. Neither party provided direct evidence; their comments were based in opinion. The father's statements did not raise the issue of possible educational neglect on the part of the mother, but there was no corroborating evidence or any effort to establish whether the child's educational pattern constituted neglect.

The trial court judge is the sole judge of the credibility of the witnesses and was entitled to determine what weight should be attributed to the evidence. *Antonio Lucio v. Pueblo of Zuni*, 16 SWITCA Rep. 2 (Zuni 2005). The question to be answered by this Court is whether there is sufficient evidence in the record to support the findings of the trial court judge. *Antonio Lucio v. Pueblo of Zuni*, 16 SWITCA Rep. 2 (Zuni 2005). Given that the Zuni Tribal Code requires that two standards must be met to establish physical custody, the court's records should reflect the introduction of evidence that would serve to meet those standards. The court record does not reflect that sufficient evidence was introduced to overcome the presumption in favor of the mother's custody or to provide sufficient information to determine the best interests of the child.

This matter is remanded to the Zuni Children's Court for rehearing.

August 10, 2010

ESTEFANITA LUNASEE,

Petitioner-Appellant,

v.

LOUISE PONCHUELLA-WALLACE,

Respondent-Appellee.

SWITCA No. 09-002-ZTC
Tribal Case No. PO 2008-0012

Appeal filed November 14, 2008

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

Appellate Judge: Stephen Wall

ORDER

Upon motion by the Petitioner-Appellant and upon review of the case file, this matter is hereby dismissed.

August 24, 2010

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[2] While Section 11-3-9 of the Zuni Tribal Code provides custody standards specifically in cases of separation or dissolution of marriage between a husband and wife, this court relies on those standards in absence of provisions relating to custody standards of unmarried parents.

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

IN THE MATTER OF THE ESTATE OF:
EVERETT BURCH, Deceased.

SWITCA No. 09-018-SUTC
SUTC Nos. 09-AP-124, 08-PR-177

Appeal filed July 16, 2009

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

Appellate Judge: Anthony J. Lee

ORDER DISMISSING APPEAL

SUMMARY

Appellant filed a Petition for Discretionary Appeal of a Probate Order and Amended Probate Order. Appellant then filed a Notice to Withdraw Discretionary Appeal. The Appellate Court dismissed the appeal pursuant to SWITCARA #36(a).

* * *

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 10, 1990), the general appellate laws of the Southern Ute Tribal Code, sections 3-1-101 *et seq.*, as amended, and the appellant rules of SWITCA.

Pursuant to sections 3-1-102(3) and 3-1-104 of the Southern Ute Tribal Code, Appellant timely filed a Petition for Discretionary Appeal on July 16, 2009. The petition objected to the terms of a Probate Order of June 5, 2009, and an Amended Probate Order of July 1, 2009, both issued by Judge Suzanne F. Carlson of the Southern Ute Tribal Court. Appellee filed a Response to the Notice of Discretionary Appeal on July 30, 2009.

Without explanation, Appellant filed a Notice to Withdraw Discretionary Appeal on September 10, 2009. Nearly one year has passed and there has been neither an objection by Appellee, nor any objection by the executor to the estate, Steven Burch. The Southern Ute Tribal Code is silent as to the withdrawal of appeals; therefore, pursuant to Rule 36(a) of the SWITCA Rules of Appellate Procedure, the appeal is hereby DISMISSED.

IT IS SO ORDERED.

August 30, 2010

IN THE MATTER OF M.W., Minor,

SWITCA No. 10-005-SUTC
Tribal Court Case Nos.: 10-JV-18,
10-AP-095

Appeal filed May 25, 2010

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

Appellate Judge: Placido Gomez

OPINION

SUMMARY

Appellant appeals an order adjudicating a minor Not Delinquent. The Appellate Court reviewed the appeal de novo and determined that the evidence presented at trial was not sufficient to prove that the minor committed the offense of underage possession or consumption of alcohol within the exterior boundary of the reservation. The Appellate Court also determined that the trial court did not err in its interpretation of the underage drinking statute. Affirmed.

* * *

The Southern Ute Tribe appeals an order of Not Delinquent issued by the Southern Ute Tribal Court. The order followed the Tribal Court's ruling that the Tribe had not presented sufficient evidence that M. W. either possessed or consumed alcohol within the exterior boundary of the Southern Ute Indian Reservation.

The Tribe seeks an order adjudicating M.W. delinquent for committing the offense of underage possession or consumption of alcohol or, in the alternative, an order disapproving the trial court's interpretation of the underage drinking statute and the ruling of the trial court. The Tribe argues that the element of possession in the Southern Ute Tribe's underage drinking statute is satisfied by the mere presence of alcohol in the "mouth, blood, brain, stomach or liver."

Reviewing the case de novo, this court affirms the Tribal Court's decision.

M.W., a minor, was charged with violating §5-1-106(3)(c) of the Southern Ute Tribal Code prohibiting possession or consumption of an alcoholic beverage by a person under 21 years of age.[1] While there was strong evidence that M.W.

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[1] § 5-1-106(3)(c) Illegal Possession or Consumption of an Alcoholic Beverage by an Underage person. Any person under twenty-one (21) years of age who possesses or

was intoxicated,[2] the evidence that she possessed or consumed alcohol within the exterior boundaries of the Southern Ute Indian Reservation was limited. Officer Joel Flaugh was in training that evening. He questioned M.W. at a residence on the Southern Ute Reservation. On direct examination, Officer Flaugh testified that M.W. had told him she was drinking in Ignacio, on the Southern Ute Reservation. However, on cross-examination, Officer Flaugh admitted that M.W. had merely told him she was drinking "in town," and that could mean in Durango, which is not on the Southern Ute Reservation.[3] Corporal Monica Medina, who was also present at the residence, testified that M.W. had stated that she had gone to see friends, but there was no mention regarding where she was to meet the friends.

The trial court concluded that the Tribe had not presented sufficient evidence that M.W. had violated § 5-1-106(3)(c) of the Tribal Code by possessing or consuming alcohol within the boundaries of the Southern Ute Reservation.

The Tribe argued at trial, and argues on appeal, that the Southern Ute Tribal Court intended the Tribal Code's definition of possession encompass alcohol inside a person's bloodstream.[4] As support for its position, the tribe presents three arguments. First, the Tribe argues that the Southern Ute Tribal Council amended its underage drinking statute to "counter the effect of an earlier appellate decision that interpreted the element of `possession' narrowly." Second, the Tribe argues that the Trial Court's interpretation of the Tribal Code would lead to absurd results.[5]
The evidence on the record does not support the Tribe's position that the Southern Ute Tribal Council amended its underage drinking statute to create a definition of possession that includes presence of alcohol in the breath or bloodstream of a person. The Tribe argues that when the Southern Ute Tribal Council passed Resolution 98-115 amending the Southern Ute Tribe's criminal code § 5-1-106(3)(c), it intended to address the holding of *In the Matter of A.B.,* 09-JV-13. The only evidence presented by the Tribe in support of its position is that the amendment was passed two years after the appellate court's decision in *In the Matter of A.B.*[6]

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consumes an Alcoholic Beverage by an underage person, and upon conviction thereof, the offender shall be sentenced to a term of imprisonment not to exceed sixty (60) days and a fine not to exceed Two Hundred and Fifty Dollars ($250.00).

[2] Officer Joel Flaugh and Corporal Monica Medina responded to a call from M.W.'s grandmother and uncle; the call indicated that M.W. was intoxicated at a residence at 492 Dirt Road, on the Southern Ute Reservation. When they arrived, both saw signs of intoxication, including bloodshot eyes and the odor of alcohol. M.W.'s BAC, as indicated by a portable breath test, was 0.105. Further, both Flaugh and Medina testified that M.W. had admitted to consuming alcohol.

[3] The relevant testimony follows:
direct examination:

Prosecutor:	Did [M.W.] say who [she was drinking] with or what the circumstances were?
Flaugh:	. . . she said she was just in town . . .
Prosecutor:	Ok, so in Ignacio, then?
Flaugh:	Yes.

cross examination:

Mr. Heydinger:	. . Do you know if she was drinking in Durango or Ignacio?
Flaugh:	No . . .

redirect:

Prosecutor:	But you indicated on direct examination that it was Ignacio, in a bar. Did you not?
Flaugh:	Yes, sir.
Prosecutor:	Ok; that was based on what she told you.
Flaugh:	Yes, she indicated Ignacio . . . .

re-cross examination:

Mr. Heydinger:	So, I'm confused. You told me that you didn't know if she drank in Ignacio or Durango . . . .
Flaugh:	In my personal opinion, she drank in Ignacio.
Mr. Heydinger:	In your opinion?
Flaugh:	Yes.
Mr. Heydinger:	But you're not sure?
Flaugh:	Well . . .
Mr. Heydinger:	Yes or no.
Flaugh:	No.

[4] Section 5-1-106(3)(c)(i) states: Possession of an Alcoholic Beverage means that a person has or holds any amount of an Alcoholic Beverage anywhere on his person, or that a person owns or has custody of an Alcoholic Beverage, or has an Alcoholic Beverage within his immediate presence and control.

[5] Tribe's Notice of Appeal/Petition for Discretionary Appeal, at 1.

[6] Previous to the Tribal Council's adoption of Resolution 98-115, § 5-1-106(c) read:

> Illegal Possession of Alcoholic Beverage. A person is guilty of illegal possession of alcoholic

The plain language of the statute is contrary to the Tribe's position. The language of § 5-1-106(3)(c)(i) indicates that the Tribal Council intended to include in the definition of constructive possession.[7] Both definitions contemplate possession to be outside a person's body. As the Tribal Court indicated, if the Tribal Council had intended to include alcohol detected within a person's body it could have done so by including the words "has or holds any amount of an Alcoholic Beverage anywhere *in* his person" rather than "*on* his person." Similarly, if the Tribal Council had intended for "consume" to mean anything but "to ingest," it would have clearly indicated that intent in the amendment.[8]

Additionally, the clear weight of authority supports the trial court's reasoning that the definition of possession does not include alcohol merely detected on a person's breath or bloodstream. As both sides agree, *In the Matter of A.B.* is directly on point. In that case, the appellate court held that "once alcohol has been ingested in one's system, there is no longer physical possession of an alcoholic beverage."[9] The Tribe has not presented a compelling argument to overrule that decision.

> beverage if he is not yet twenty-one (21) years old and possesses an alcoholic beverage that has an alcoholic content of six percent (6%) or greater by volume, or is not yet eighteen (18) years old and possesses an alcoholic beverage, or if twenty-one (21) procures an alcoholic beverage for those persons under twenty-one (21) and over eighteen (18) which contains six percent (6%) or more alcohol by volume, or procures any alcoholic beverage for a person under age eighteen (18), and upon conviction thereof the offender shall be sentenced to a term of imprisonment not to exceed sixty (60) days and a fine not to exceed Two Hundred Fifty Dollars ($250.00).

The trial court suggests that, by adopting the 1998 amendment, the Tribal Council intended to eliminate the statutory scheme that allowed adults between 18 and 21 to possess 3.2% alcohol. This court need not decide whether the evidence on the record supports this suggestion.

[7] *See, for example, State v. Hornaday*, 713 P.2d 71, 74-75 (Wash. 1986).

[8] Further, due process requires that courts construe criminal statutes literally and strictly in favor of an accused. *State v. Hornaday*, 713 P.2d 71, 75-76 (Wash. 1986).

[9] *In the Matter of A.B.*, SWITCA No. 96-003-SUTC.

Further, the trial court's opinion reviewing non-controlling authority regarding the definitions of "possession" and "consumption" is thorough and well reasoned.[10] A review of that authority supports the trial court's analysis. The trial court's focus on control is particularly pertinent. Primary among the factors indicating possession is the concept of control. And, control assumes the ability to divest oneself of control.[11] In the context of the case at bar, once alcohol has entered a person's bloodstream, that person is not capable of divesting herself of control over the alcohol. Thus, she does not have control, nor possession.

Even the cases cited by the trial court as supporting the Tribe's position are not contrary to the trial court's decision.[12] Unlike the case at bar, *State v. Schroeder* involved a clear statement by the South Dakota legislature of its intent to authorize a conviction for unauthorized possession when the only evidence is that the drug is present in the defendant's body. In *Schroeder*, the defendant's conviction for possession of a controlled substance was based solely upon the presence of methamphetamine in his urine. The defendant argued that there was insufficient evidence to convict him of possession of a controlled substance. The Supreme Court of South Dakota ruled that the recently amended definition of "controlled substance" reflected the legislature's intent to permit conviction based solely on the presence of the drug in his urine. In that case, the title of the bill adopting the amendment was "An act to include in certain drug offenses the altered state of a controlled drug or substance or marijuana once absorbed into the human body." The amendment itself modified the definition of "controlled substance" to provide "[t]he term

[10] The trial court analyzed *State v. Ireland*, 133 P.3d 396 (Utah 2006). In *Ireland*, the defendant was charged with unlawful possession or use of a controlled substance within the state. The state argued that the presence of methamphetamines in the defendant's bloodstream conclusively established that he had possessed the drug. In holding that the presence of methamphetamine or metabolites of methamphetamine alone is insufficient to show that the defendant possessed a controlled substance within the state, the Supreme Court of Utah surveyed other jurisdictions regarding the issue. *Ireland*, at 401, n.31; *see also State v. Sorenson*, 758 P.2d 466, 468 n.2 (Utah App. 1988). In the present case, the trial court included the results of this survey in its opinion. *In the Interest of M.W.*, SUTC No. 10-JV-18 at 3-4.

[11] *State v. Hornaday*, 713 P.2d 71, 74-75 (Wash. 1986).

[12] *State v. Schroeder*, 674 N.W.2d 827 (S.D. 2004); *Green v. State*, 398 S.E. 2d 360 (Ga. 1990).

includes an altered state of a drug or substance . . . absorbed into the human body."[13]

In *Green v. State*, the Supreme Court of Georgia affirmed a lower court decision ruling that there was sufficient evidence to convict the defendant of possession of cocaine. In doing so, however, the Supreme Court ruled that the presence of cocaine metabolites is not direct evidence that a person possessed cocaine. Therefore, the Court held, to prove beyond a reasonable doubt that a person possessed cocaine within a specific jurisdiction, additional evidence is required. In *Green*, there was testimony that the defendant was present in the jurisdiction immediately before giving the relevant urine sample, and that cocaine metabolizes in the body "very quickly."[14]

The Tribe's final argument is that the trial court's interpretation of the Tribal Code would lead to absurd results. As an example, the Tribe submits that the trial court's interpretation "bar[s] delinquency adjudications for underage drinkers who are found unconscious and face down in the middle of the street due to intoxication, but allow[s] delinquency adjudications against juveniles who have not consumed alcohol, but who are found with a beer can in hand."[15]

Certainly, the intent of the Tribal Council is to allow delinquency adjudications against juveniles who are found with a beer can in hand regardless of whether or not the juvenile has consumed alcohol. However, the trial court's interpretation of § 5-1-106(3)(c) will not bar delinquency adjudications of juveniles who are found unconscious due to intoxication. In such a case, the Tribe need only produce sufficient evidence to prove beyond a reasonable doubt that the juvenile possessed or consumed alcohol within the exterior boundary of the reservation. Evidence of intoxication on the reservation may be relevant, but is not, by itself, sufficient to prove possession or consumption of an alcoholic beverage on the reservation in violation of § 5-1-106(3)(c).

IT IS SO ORDERED.

October 13, 2010

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[13] *State v. Schroeder*, at 830-31.

[14] *Green v. State*, at 362.

[15] Tribe's Notice of Appeal/Petition for Discretionary Appeal, at 1.

STANLEY BIRD,

Appellant,

v.

OHKAY OWINGEH,

Appellee.

SWITCA No. 08–010-OOTC
Tribal Case No. DV2007-0042

Appeal filed June 23, 2008

Appeal from the Ohkay Owingeh Tribal Court,
Marilynn J. Crelier, Judge
Appellate Judges: Jonathan Tsosie,
Melanie Fritzsche and Anthony Lee

ORDER

SUMMARY

Appellant filed a Notice of Appeal. The tribal court took two years to provide a record to the Appellate Court. The tribal court did not follow its own rules to certify the record and did not provide an updated law and order code to the Appellate Court. During this time, Appellant passed away. The Appellate Court used its inherent powers to decide that the appeal was moot because the Appellant passed away and the tribal court was not cooperative. Dismissed.

* * *

This matter comes before the Southwest Intertribal Court of Appeals (SWITCA) pursuant to Ohkay Owingeh Resolution No. 90-98 (July 12, 1990),[1] Rule 3(a)(1) of the Ohkay Owingeh Rules of Appellate Procedure,[2] and the appellate rules of SWITCA.

Appellant filed a notice of appeal on June 23, 2008, appealing a verdict of the Ohkay Owingeh Tribal Court issued on June 9, 2008. The notice of appeal was filed timely. However, SWITCA did not receive a record of the lower court's proceedings until two years later, and such record did not include an audio recording or a transcript of the lower court's proceedings at trial. Moreover, the record

[1] Ohkay Owingeh was formerly known as the Pueblo of San Juan. Resolution No. 90-98 was passed by the Pueblo of San Juan.

[2] The Ohkay Owingeh Rules of Appellate Procedure can be found in Ordinance No. 2007-02, which was passed on September 19, 2007.

of the lower court was not certified by the tribal court clerk as required by Rule 5(d)(1) of the Ohkay Owingeh Rules of Appellate Procedure. Complicating matters further, the tribal court did not respond to SWITCA's repeated requests for an updated version of the tribe's Law and Order Code until September 2010.

Because the notice of appeal was timely and properly filed, and because of the tribal court's two year delay in sending both a record of the lower court's proceedings and an updated version of the tribe's Law and Order Code to SWITCA, appellant was granted permission to proceed with the appeal by an order issued October 5, 2010. In that order, we allowed two weeks to the Ohkay Owingeh Tribal Court to send SWITCA either an audio recording or a written transcript of the lower court's trial in this matter, as well as a certification of the lower court's entire record of this case. SWITCA did not receive any of these documents within the prescribed time period.

In mid- to late October 2010, SWITCA became aware that appellant Stanley Bird passed away on October 1, 2010. An obituary for Mr. Bird was published in the *Albuquerque Journal* on October 5, 2010. SWITCA hereby takes judicial notice of the obituary of October 5, 2010.

Mr. Bird's untimely passing did not excuse the tribal court from complying with our order of October 5, 2010, and we made the tribal court aware of this with several phone calls and emails to them. Our phone messages and emails to the tribal court have gone unanswered. In light of these circumstances it appears that none of the ordered documents is forthcoming. The tribal court's unwillingness or inability to follow its own rules of appellate procedure, as well as its unwillingness or inability to cooperate with SWITCA for over two years in this matter, trouble this Court deeply.

Given the combination of Mr. Bird's passing and the apparent lack of cooperation on the part of the Ohkay Owingeh Tribal Court in this matter, SWITCA hereby uses its inherent power to manage its own docket to decide that Mr. Bird's appeal is moot. Mr. Bird's appeal is therefore DISMISSED.

IT IS SO ORDERED.

November 22, 2010