

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

**CARRY ROOT,**

**Defendant-Appellant,**

**v.**

**SOUTHERN UTE INDIAN TRIBE,**

**Plaintiff-Appellee.**

**SWITCA No. 13-002-SUTC  
Tribal Case No. 13-TR-40, 13-AP-68**

**Appeal filed July 2, 2013**

Appeal from the Southern Ute Tribal Court  
Chantel Cloud, Tribal Court Judge

Appellate Judge: Anthony Lee

**OPINION AND ORDER DISMISSING APPEAL**

**SUMMARY**

*Appeal was dismissed due to Appellant's failure to file a brief as ordered by the Appellate Court. The Appellate Court determined that Appellant was provided ample opportunity to file a brief under both Rule 26 of the Southwest Intertribal Court of Appeals Rules of Appellate Procedure (SWITCARA) and Section 3-1-107(2) of the Southern Ute Appellate Code. The Court also noted that Appellant could have filed a Motion for Stay of Judgment pending appeal pursuant to Rule 20 of SWITCARA or Section 3-1-104 of the Southern Ute Appellate Code. Dismissed.*

\* \* \*

This appeal comes before the Southwest Intertribal Court of Appeals ("SWITCA") from the Southern Ute Tribal Court. SWITCA is authorized to hear this appeal pursuant to Resolution No. 90-86 of the Southern Ute Indian Tribal Council, duly adopted on July 10, 1990.

The Appellant, through her attorney, filed a timely Notice of Appeal on July 2, 2013, appealing the Order of the lower court dated June 18, 2013. This Court issued an Order Accepting Appeal on September 9, 2013, directing the parties to file briefs in accordance with Rule 26 of the SWITCA Rules of Appellate Procedure ("SWITCARA").

Shortly thereafter it was discovered that the Tribal Court and the parties did not receive a copy of the Order, due to a faulty facsimile machine. The Order was sent again to the Tribal Court and the Court Clerk of the Southern Ute Tribal Court mailed a copy to the parties via the United States Postal Service on November 1, 2013, as evidenced by a signed Certificate of Mailing.

To date, SWITCA has not received any briefs for this matter. Rule 26(a) of the SWITCARA requires the Appellant to file a brief within thirty (30) days after being served notice that SWITCA has accepted the appeal. SWITCARA #26(a) (2001). Rule 8 of the SWITCARA adds three (3) additional days to the thirty (30) days because service was made by standard mail. SWITCARA #8 (2001).

Further, Section 3-1-107(2) of the Southern Ute Appellate Code also provides that at any time after twenty (20) days of delivery of the Notice of Appeal to the appellate court, an appellant may submit a supplemental memorandum of legal authority supporting his position. The Court has allowed sufficient opportunity for the Appellant to file a brief in this matter, either under the Southern Ute rule or the briefing Order of this Court. The Appellant's failure to respond in any manner requires that the request for appeal should be dismissed. *Dosela v. Tonto Apache Tribe*, 12 SWITCA Rep. 3 (2001).

Also worth noting is the fact that a Motion for Stay of Judgment was not filed pending the appeal. This motion could have been filed after the Notice of Appeal according to Rule 20 of the SWITCARA, or it could have been filed initially with the Notice of Appeal according to Section 3-1-104 of the Southern Ute Appellate Code. If this motion were granted, it could have prevented any enforcement pending the appeal.

Due to the Appellant's failure to file a brief or any other application in this matter, this Court finds that the Appeal should be dismissed.

**ACCORDINGLY, IT IS THE ORDER OF THIS COURT THAT THE APPEAL IS HEREBY DISMISSED.**

**It is so ORDERED.**

January 14, 2014

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

**SOUTHERN UTE TRIBE,**

**Plaintiff-Appellant,**

**v.**

**JORDAN CARILLO,**

**Defendant-Appellee.**

**SWITCA No. 14-001-SUTC  
Tribal Case No. 12-TR-340**

**Appeal filed February 7, 2014**

Appeal from the Southern Ute Tribal Court  
Chantel Cloud, Tribal Court Judge

Appellate Judge: Jonathan Tsosie

**ORDER DENYING PETITION  
FOR DISCRETIONARY APPEAL**

**SUMMARY**

*The Southern Ute Indian Tribe petitioned for discretionary appeal from the sentence resulting from a probation-revocation order issued by the Tribal Court. Denied.*

\* \* \*

This Matter arises from the Southern Ute Indian Tribe’s petition for discretionary appeal from the sentence resulting from a probation-revocation order issued by the Southern Ute Tribal Court.

The Southwest Intertribal Court of Appeals has jurisdiction over this petition pursuant to Southern Ute Indian Tribe Resolution No. 90-86 (July 24, 1990). For the reasons below, this court DENIES Plaintiff-Appellant’s petition for discretionary appeal.

**I.**

On January 15, 2013, Defendant-Appellee Jordan Carillo (hereinafter “Appellee”) pleaded guilty to Driving While Ability Impaired. The tribal court judge accepted the guilty plea and issued a “Conviction/Adjudication” order in which Appellee was given a suspended sentence of sixty days in jail with fifty-five days suspended “on the condition that all terms of probation are abided.” Conviction/Adjudication Order, January 15, 2013. Plaintiff-Appellant Southern Ute Indian Tribe (hereinafter “Appellant”) claims that the “Conviction/Adjudication” order is a plea agreement. Appellee served the five days

of the sentence at the Southern Ute Detention Center and was released on January 20, 2013.

On December 26, 2013, Appellant moved to revoke Appellee's probation, claiming that Appellee had violated certain probation terms of the order. On January 28, 2014, a probation revocation hearing was held in the Southern Ute Indian Tribal Court. At that hearing, the tribal judge sentenced Appellee to twenty days in jail for violating probation terms, and gave Appellee time to turn himself in to the Southern Ute Detention Center to serve the twenty days.

On January 29, 2014, Appellant filed a second motion to revoke probation. On January 30, 2014, Appellant filed a "Tribe's Motion for Clarification of Sentence or in the alternative, Motion for Sentence Reconsideration." On the same day, the tribal court judge denied Appellant's motions in an order stating that Appellee's probation had been fully revoked and that Appellee had to serve twenty days in jail as a result.

Appellee turned himself in to the Southern Ute Detention Center on February 4, 2014, to serve his twenty-day sentence.

Appellant then filed a petition for discretionary appeal with this Court on February 7, 2014, in which Appellant seeks to have the full sentence of sixty days imposed, claiming that Appellant is entitled to the full benefit of the bargain reached in the initial plea agreement. Appellee served the twenty days and was released.

**II.**

When a judge issues a suspended jail sentence conditioned upon the successful completion of probation, the defendant has thus been immediately convicted of the crime at issue but will not have to serve the suspended jail sentence if he successfully completes probation. If, however, the defendant violates probation, the judge has the discretion to consider the extent to which the defendant has complied with the terms of probation, and may impose a jail sentence that might be less than the original, suspended sentence.

On the other hand, when a judge issues a deferred sentence conditioned upon the successful completion of probation, the defendant is not immediately convicted of the crime at issue because the conviction has been deferred to a later date pending successful completion of probation. If the defendant violates probation, then the judge may convict the defendant and impose the full sentence.

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Plea agreements are often labeled as such, and memorialize the fact that an agreement has been made. They are often signed by both parties to the agreement and include highly specific terms that give each side notice as to the consequences of breaching the agreement. The enforceability of the terms of a plea agreement is often determined by looking to contract law.

### III.

In denying Appellant's petition for discretionary appeal, this Court takes into account the following factors in combination: (1) the "Conviction/Adjudication" order is a suspended sentence containing the terms of probation; (2) when a defendant violates the probationary terms of a suspended sentence, a trial court judge has considerable discretion when considering what sentence to impose; (3) the "Conviction/Adjudication" order contains no obligatory or mandatory language that would require the judge to impose the maximum sentence; (4) Appellant did not move for a stay of sentencing pending appeal, and Appellee has served the twenty days.

The original sentencing order at issue is labeled a "Sentencing Order" and contains a check mark written next to the typed words, "Conviction/Adjudication." The space next to the words, "Deferred Sentence" does not contain a check mark and has been left blank, thus we may conclude that this is not a deferred sentence order. The terms of the Conviction/Adjudication order unequivocally indicate that it is handing down a suspended sentence with probationary terms. Appellant claims that this order is a plea agreement, the terms of which must be absolutely enforced due to Appellee's probation violations.

If the order were a plea agreement, the breach of which would require absolute enforcement of its terms, it should contain precise wording, as plea agreements are construed according to contract law and precise wording is crucial to their enforceability. Though the Conviction/Adjudication order suspended fifty-five days in jail "on the condition that all terms of probation are abided," this is not mandatory language, such as "shall" or "must," that would unequivocally bar the tribal court judge from using her discretion and force her to impose the full sentence of the order. If there had been such mandatory language and the judge had ignored it, the judge may well have abused her discretion in such a situation. But based on the wording of the order and on the fact that judges may exercise discretion after revoking probation under a suspended sentence, there is no indication in the written record that the trial court judge abused her discretion.

Lastly, this Court cannot ignore the fact that Appellee has completely served the jail sentence resulting from the probation revocation hearing and has been released. Pursuant to the terms of the probation revocation order,

Appellee has thus completed his punishment. To grant an appeal in this matter would, for all intents and purposes, amount to a new trial for the same underlying offense. Given that Appellee has served his jail sentence as imposed by the trial court judge when Appellant could have moved for a stay of sentencing pending appeal, this Court is reluctant to grant an appeal in this matter.

### IV.

Based on the foregoing, this Court must conclude that the "Conviction/Adjudication" order is a sentencing order issuing a suspended sentence with terms of probation. As such, the judge had discretion when imposing punishment after revoking probation. Here, the trial court judge took into consideration the probationary terms that Appellee had successfully completed when she sentenced him to twenty days in jail for violating his probation. The trial court judge did not abuse her discretion when doing so.

For the foregoing reasons Appellant's petition for discretionary appeal is hereby DENIED.

**It is so ORDERED.**

June 10, 2014

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### THE SOUTHERN UTE INDIAN TRIBE DIVISION OF SOCIAL SERVICES,

**Petitioner-Appellant,**

**IN THE INTEREST OF:  
K.D.W., MINOR CHILD,**

**and concerning:  
TAMARA JEAN NEZ, MOTHER, and  
JOHN JAMES WASHINGTON, FATHER,**

**Respondents-Appellees.**

**SWITCA NO. 13-003-SUTC  
Tribal Case Nos. 13-110-AP, 12-DN-155, 14-012-AP**

**Appeal filed November 12, 2013**

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

Appellate Judge: Anthony Lee

**OPINION AND ORDER AFFIRMING  
PERMANENCY ORDER**

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### SUMMARY

*Appellant appealed a Permanency Order for a minor issued by the Tribal Court. Following the timely filed Notice of Appeal and prior to the appeal being accepted, Appellant filed a Motion to Reconsider the Permanency Order with the Tribal Court. The Tribal Court issued a Minute Order Regarding the Motion to Reconsider denying Appellant's Motion. The Appellate Court concurred with the Tribal Court's findings in the Minute Order and did not consider the merits of Appellant's appeal as the Appellant failed to object or properly preserve the issues noted in its appeal with the Tribal Court. Affirmed.*

\* \* \*

This appeal arises from a dependency and neglect action brought pursuant to the Southern Ute Tribe's Children's Code. The Southern Ute Tribal Court issued a Permanency Order for a minor on October 25, 2013, setting a goal of permanent placement of the minor with her paternal aunt. The Southern Ute Indian Tribe's Division of Social Services ("DSS") filed a timely Notice of Appeal on November 12, 2013, and thereafter, on February 26, 2014, the Southwest Intertribal Court of Appeals Southwest Intertribal Court of Appeals ("SWITCA") accepted the appeal and set a briefing schedule. The Court received a brief from the Appellant and the Guardian *ad Litem* and a Reply brief from the Appellant.

Also, on November 12, 2013, the Appellant filed a Motion to Reconsider the Permanency Order with the Tribal Court, arguing that the mother was not given a reasonable time frame in which to demonstrate fitness to parent, and that the procedures utilized by the court did not afford the parties and the child the basic protections of procedural due process guaranteed by the Tribe's Children's Code and the Indian Civil Rights Act, 25 U.S.C. § 1303(8). Specifically, the Appellant argues that no party was given the opportunity to put on evidence at the hearing, no sworn testimony was taken, no documents were admitted into evidence, and no party was given the opportunity to question speakers on their unsworn written or oral statements.

The Tribal Court issued its Minute Order Regarding the Motion to Reconsider on November 22, 2013, and denied the Appellant's Motion finding that the Appellant was afforded the opportunity to call any witness and could have requested that any party or relative be sworn in to testify. The Tribal Court found that the Appellant was the only party represented by an attorney, but did not call a witness, did not request a continuance to review a letter submitted by the non-party grandparents, did not object to the submission of the letter by the non-party grandparents,

and never requested or moved the court to interview the minor or to place any party or relative under oath. The Tribal Court also mentioned in its Minute Order that it carefully considered many factors in determining the best interests of the minor.

For the reasons stated below, this Court affirms the Tribal Court's Permanency Order. After a review of the Tribal Court record, this Court concurs with the Tribal Court's findings in its Minute Order dated November 22, 2013, namely that the Appellant was afforded the opportunity to call any witness and could have requested that any party or relative be sworn in to testify, and that the Appellant was the only party represented by an attorney, but did not call a witness, did not request a continuance to review a letter submitted by the non-party grandparents, did not object to the submission of the letter by the non-party grandparents, and never requested or moved the court to interview the minor or to place any party or relative under oath.

This Court need not consider the merits of Appellant's appeal, because the Appellant did not properly preserve these issues for appeal by making timely objection with the Tribal Court. Tribal law does not directly address this issue, however, prior Southern Ute Tribal Appellate Court decisions decided through the Southwest Intertribal Court of Appeals have established that, absent fundamental error, only issues properly raised in the lower court will be considered by an appellate court, and that issues not raised or relied upon in the trial court usually will not be considered and given any weight. *See Burch v. Southern Ute Indian Tribe*, 5 SWITCA 2, 3 (1994), citing *Shoshone Business Council v. Skilling, et al.*, 20 Ind. L. Rep. 6001 (Shos. and Arap. Ct. App. 1992); and *Southern Ute Tribe v. Williams*, 6 SWITCA 10, 12 (1995). Judicial efficiency and resolution requires such practice, especially in the permanent placement of minors. The Appellant should have apprised the Tribal Court of its objection so that the Tribal Court had an opportunity to rule on it. This gives the Tribal Court judge a chance to rectify any potential error and dispense with any argument that could be made, thereby avoiding unnecessary delay and expense associated with an appeal. Since the Appellant failed to object or otherwise properly raise the issues noted in its appeal with the Tribal Court, this Court will not hear these matters that could have been timely resolved by the Tribal Court judge.

Section 6-1-104(1) of the Southern Ute Indian Tribal Code grants the Children's Court with authority to issue all orders necessary to ensure the safety of children. *See* SUICT § 6-1-104(1). This Court will not second guess the Tribal Court's decision wherein the matter involves the sensitive issue of a permanent placement of a child and it appears that the Tribal Court judge has considered all the relevant facts and made a decision based on the

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best interests of the child that follows the recommendation of the Guardian *ad Litem*.

This Court has not considered the brief filed by the Guardian *ad Litem*, as it was not prepared by an attorney duly authorized to practice law. Therefore, this Court has also not considered the Appellant's Reply to the Guardian *ad Litem*'s brief.

The Tribal Court's Permanency Order is hereby AFFIRMED.

**IT IS SO ORDERED.**

September 22, 2014

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