In the Southwest Intertribal Court of Appeals for the White Mountain Apache Tribal Court

ROGER LUPE, JR.,

Defendant-Appellant,

v.

ROSALINDA McCREERY,

Plaintiff-Appellee.

SWITCA Case No. 18-003-WMATC
Tribal Case No. P-12-43

Appeal filed March 26, 2018

Appeal from the White Mountain Apache Tribal Court
Gloria Kindig, Judge

Appellate Judges: Jeanette Wolfley,
Heidi Todacheene and Melanie Fritzsche

ORDER DENYING APPEAL

SUMMARY

Appeal denied because appellant failed to file a timely notice of appeal, which is a jurisdictional issue. Given very long delay in this case, the appellate court urged the tribal court to diligently follow its own appellate rules in future cases.

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This case is an ongoing child support dispute between the Appellant Lupe and Appellee McCreery. On February 14, 2014, the Tribal Court issued an Order finding that the Appellant owed certain child support payments to Appellee. On February 26, 2014, Appellant filed a Petition for Appeal. On March 26, 2018, the Tribal Court forwarded Appellant's Petition for Appeal to the Southwest Intertribal Court of Appeals (SWITCA), and on August 16, 2018, it provided the SWITCA with the certified lower court records.

For the reasons below, Appellant's notice of appeal is denied.

Prior to discussing the reasons for denial of the appeal, the Court must voice its concern over the long period of time that passed between the actual date of the filed appeal and the date that the Tribal Court filed the appeal and the date that the lower court record was received by SWITCA. Justice is best served when the pleadings and record on appeal are filed in a timely manner with this Court. We fully recognize that the Tribal Court may have a heavy case load and there may be other reasons for the delay, but the parties in this case have waited for over *four years* to receive a decision in this case. We urge the Tribal Court to diligently adhere to its own appellate rules and hasten its filing of future appeals to this Court especially given Rule 9(B) of the White Mountain Apache Tribe Rules of Appellate Procedure that requires the Tribal Court to prepare the record and transmit it to the SWITCA within thirty (30) days of filing the Notice of Appeal.

Under the rules of this Court, the Appellate Code of the White Mountain Apache Tribe governs this action. The SWITCA rules serve to supplement the White Mountain Apache Tribe's Rules of Appellate Procedure. SWITCARA # 1 (b) (2001). *See Baker v. Southern Ute Department of Justice Hearing Div.*, 17 SWITCA 8 (2006). Additionally, “any conflict between these rules of appellate procedure and procedural rules of a participating pueblo or tribe shall be determined according to the respective pueblo or tribal rules or procedure.” *Id.* To secure appellate review of a judgment or order, a party must file a notice of appeal from that judgment or order. Filing a notice of appeal subsequently transfers adjudicatory authority from the lower court to the court of appeals. Rule 6(A) of the White Mountain Apache Tribe Rules of Appellate Procedure, "Time For Taking Appeal," provides that "[t]he Notice of Appeal shall be filed with the Trial Court within ten (10) days after entry of judgment . . . ." And Rule 5(A) specifies that "a filing shall not be timely unless the papers are received by the clerk within the time fixed for filing."

On February 14, 2014, the Tribal Court entered its Order finding that the Appellant owed child support arrearages. Twelve days later, on February 26, 2014, the Appellant filed a Petition for Appeal. Based on the Tribe's Appellate Procedure Rule 6(A), Appellant has failed to file a timely appeal. Courts do not have discretion to overlook such an error. "Timeliness is a jurisdictional issue." *Vigil v. Santa Clara Pueblo Housing Authority*, 20 SWITCA 8 (2007). Therefore, the notice of appeal in this matter must be denied. We hold that a party who wishes to appeal an order imposing child support payments must file a timely notice of appeal from that order. Because Appellant failed to do so in a timely manner, we must decline to consider his challenge to the amount of payments imposed.

The judgment of the Tribal Court, accordingly, is affirmed.

IT IS SO ORDERED.

January 15, 2019

KICKAPOO TRADITIONAL TRIBE OF TEXAS,

Appellant,

v.

TONY SALAZAR,

Appellee.

SWITCA Case No. 18-004-KTTTC
Tribal Court Case No. 17-0146

Appeal filed April 30, 2018

Appeal from the Kickapoo Traditional Tribe
of Texas Tribal Court
Francisco Martinez, Judge

Appellate Judges: Anthony Lee,
Heidi Todacheene and Melanie P. Fritzsche

OPINION AND ORDER REVERSING LOWER COURT

SUMMARY

Appellate court upheld tribe's termination of "at will" tribal employee without cause and reversed tribal court's decision to award back pay. Tribal court failed to apply correct de novo standard of review to termination letter. No evidence is needed to support termination of "at will" employee without cause. Tribal court erred in upholding termination letter that did not comply with tribe's Labor and Employment Rights Code.

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This is an appeal from the Kickapoo Traditional Tribe of Texas (KTTT) affirming the Tribal Employments Rights Commission's (TERC) decision to terminate the employment of Tony Salazar (Appellee). The Southwest Intertribal Court of Appeals (SWITCA) has jurisdiction over this matter pursuant to Resolution No. 2018-013 of the Tribal Council of KTTT, passed on March 13, 2018. This authorizes SWITCA to act as the KTTT Supreme Court and adopts the SWITCA Rules of Appellate Procedure to the extent consistent with Tribal law. Accordingly, this Court reverses the lower court's Order and upholds the termination of the Appellee.

I. Facts and Procedural Background

Appellee was terminated from his employment with KTTT on or about May 16, 2017 and appealed to TERC, which subsequently issued a letter of determination in Appellee's favor on July 25, 2017. TERC's decision recommended Appellee be reinstated with back pay. KTTT then appealed TERC's decision to the Tribal Court, and it issued an Order and Entry of Final Judgment on April 13, 2018 that denied KTTT's appeal and upheld TERC's determination as to back pay, but not reinstatement. KTTT then filed a timely Notice of Appeal and Request for Stay of Enforcement of Order Pending Appeal on April 30, 2018 with SWITCA. Subsequently, on June 1, 2018, Appellee filed a Motion to Dismiss Appeal Sua Sponte, KTTT filed a Response on June 18, 2018, and Appellee filed a Reply on June 21, 2018. On August 1, 2018 this Court issued an Order Granting Appeal and Denying Sua Sponte Motion, wherein a briefing schedule was set forth. On August 31, 2018, this Court received a Brief in Support of Appeal from the KTTT; a Brief in Response from Appellee on September 30, 2018; and a Reply Brief from the KTTT on October 17, 2018. The Appellee filed a Motion pursuant to SWITCARA # 25(a) For Leave of Court for SWITCA to Consider Brief Filed in Contravention of SWITCARA # 26(c); Response of Appellee Tony Salazar To Reply Brief of Appellant KTTT on October 30, 2018; and KTTT filed its Response of Appellant KTTT In Opposition to Appellee Tony Salazar's Motion for Leave of Court for SWITCA to Consider Brief Filed in Contravention of SWITCARA #26(c) on November 13, 2018.

II. Opinion

After a proper review and consideration of the briefs submitted, this Court reverses the decision of the Tribal Court. This Court did not review or consider the two briefs submitted on October 30, 2018 and November 13, 2018 because they were submitted outside the scope of the August 1, 2018 SWITCA Order that are in clear contravention of SWITCARA #26(c), which states that after the Reply brief, no other briefs shall be filed.

First, this Court will consider Appellant's first argument that the Tribal Court erred by not reviewing the TERC determination according to a de novo standard. The Tribal Court mentioned in its Order that "[t]he TERC did not abuse its discretion or otherwise act beyond its authority in its determination in favor of Respondent." Order at p. 1, ¶ 2. This stated standard of review shows that the Tribal Court applied the wrong standard of review in its decision making. Section 23-1104 of the KTTT Labor and Employment Rights Code (LERC) clearly states that the standard of review for reviewing a letter of determination is de novo. *See* LERC § 23-1104.

Under a de novo standard of review, the reviewing court "exercises its own judgment and re-determines each issue of fact and law" affording the lower court's decisions "absolutely no deference." *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998). Here, the Tribal Court did

not apply the law to the facts in this matter and gave deference to TERC's termination determination by stating that TERC did not abuse its discretion. The Tribal Court instead should have reviewed the evidence as though considering the matter for the first time, allowing it to substitute its own judgment about the application of the law to the facts for a determination.

Appellee supports the idea throughout his Response Brief that the Tribal Court was required to hold a de novo hearing, and much of his argument rests on the same assertion that the Appellant failed to properly present its case, as if the matter were a new hearing. *See* Appellee's Response Brief at 2-5. There is no such requirement in LERC. LERC only requires a de novo review, in which the Tribal Court reviews the record before it and makes its own decision as to whether the Appellee's at will employment was properly terminated. Clearly, this process was not followed by the Tribal Court.

This Court considered Appellant's second argument that the Tribal Court erred by finding insufficient evidence of disruptive behavior because Appellee's employment was at-will and no cause was required. We find that the Tribal Court erred in upholding the determination by TERC. In its letter of determination dated July 25, 2017, TERC found in favor of the Appellee based upon insufficient evidence to support a claim of disruptive behavior. The Appellant argues that it was not required to provide cause to justify his termination because he was an "at will" employee. Section 23-501 of the LERC states:

> Absent a collective bargaining agreement or written employment agreement approved by a recorded vote of the Tribal Council, *all employment with Tribal Employers is 'at will'*, which means that both the employee and the Tribal Employer have the contractual right to terminate the employment relationship at any time, *with or without cause*, with or without notice.

LERC § 23-501 (emphasis added).

This Court agrees that the plain reading of the tribal law means that employees can be terminated at the will of KTTT with or without cause, thus no evidence is needed to support the Appellant's termination. TERC clearly weighed evidence to support its conclusion in favor of the Appellant, which was outside the scope of LERC's review. Thus the Tribal Court erred in applying TERC's reasoning and should have reversed its decision.

This Court considered Appellant's third and final issue that the Tribal Court also erred in upholding the determination by TERC because it did not meet the LERC requirements. Section 23-1010 states:

> Where the Commission completes its investigation of a complaint and finds in favor of the Employee filing the complaint as to all or part of the issues set forth therein, the Commission shall issue, via e-mail or first class mail, a letter of determination as to all parties to the complaint including the following:
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> (a) The specific finding of the Commission;
> (b) The Sections of this Code or the KTTT Employee Handbook relevant to the finding;
> (c) The reason for the finding;
> (d) A proposed remedy authorized under Subchapter 14 of this Code; and the right of the Tribal Employer, Covered Employer or Labor Organization to appeal the finding to the Tribal Court and the deadline for filing the appeal to be set at twenty (20) business days.
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> The Commission's letter of determination shall be the final determination of the Commission.

The letter of determination issued by TERC was a scant two paragraphs with conclusory statements. No specific findings were included and TERC did not cite a single section of LERC or the Employee Handbook. This Court finds that TERC's letter of determination was insufficient as a matter of law and did not contain the necessary elements required under LERC or the Employee Handbook, and therefore, should not have been upheld by the Tribal Court.

ACCORDINGLY, this Court upholds KTTT's determination to terminate Appellee through his employment status of an "at will" tribal employee without cause and REVERSES the Tribal Court's decision to award back pay.

IT IS SO ORDERED.

January 30, 2019

IONA ORTIZ,

Respondent-Appellant,

v.

DONOVAN TRUJILLO

Petitioner-Appellee,

AND CONCERNING J. Trujillo, a Minor.

SWITCA Case No. 19-001-OOTC
Trial Court Case No. CV-2018-0001

Appeal filed November 7, 2018

Appeal from the Ohkay Owingeh Tribal Court
Geoffrey Tager, Judge

Appellate Judges: Anthony Lee,
Jeanette Wolfley and Melanie P. Fritzsche

ORDER DISMISSING APPEAL

SUMMARY

Appeal dismissed because appellate court review is limited to final judgments, but order under appeal was not a final judgment.

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Pursuant to Ohkay Owingeh Tribal Council Ordinance No. 2007-02, appeals of Tribal Court decisions may be referred to the Southwest Intertribal Court of Appeals ("SWITCA") if authorized by the Tribal Council. The Ohkay Owingeh Tribal Council authorized SWITCA to hear this matter as set forth in a letter dated December 14, 2018, from the Governor.

In this case before SWITCA, the Appellant filed a Notice of Appeal on November 7, 2018, appealing an Order Suspending Visitation entered on October 29, 2018. After a review of the Order, this Court finds that it is not a final judgment. In fact, the Order itself orders a temporary suspension of visitation and sets the matter for a status review hearing to be scheduled.

SWITCA only reviews final judgments of the Tribal Court, as required by the above mentioned Council Ordinance that includes the Ohkay Owingeh Rules of Appellate Procedure. Therefore, the Appellant's appeal must be dismissed, as it is not a final judgment. If the Appellant is not satisfied with the ultimate final judgment of the Tribal Court, she may then decide to appeal.

In the future, if the Appellant is not satisfied with a judgment that is not a final judgment, the Appellant may file a request for permission to appeal pursuant to Rule 4 of the Ohkay Owingeh's Rules of Appellate Procedure, and she must file the request with the Tribal Court within 15 days of the action giving rise to the appeal.

ACCORDINGLY, THE APPELLANT'S APPEAL IS HEREBY DISMISSED.

IT IS SO ORDERED.

April 17, 2019

KICKAPOO TRADITIONAL TRIBE OF TEXAS,

Appellant,

v.

TONY SALAZAR,

Appellee.

SWITCA Case No. 18-004-KTTTC
Tribal Court Case No. 17-0146

Petition for Rehearing Filed March 13, 2019

Appeal from the Kickapoo Traditional Tribe
of Texas Tribal Court
Francisco Martinez, Judge

Appellate Judges: Anthony Lee,
Heidi Todacheene and Melanie P. Fritzsche

ORDER DENYING PETITION FOR REHEARING

SUMMARY

Appellate court denied petition for rehearing because its full review of the petition and the record revealed no error.

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This Court has received Appellee Salazar's Petition for Rehearing, timely filed on March 13, 2019, requesting that we reconsider our Opinion and Order Reversing Lower Court, dated January 30, 2019 ("Order"). Appellee's Petition was filed pursuant to SWITCARA #35 (2001).

After a full review and consideration of Appellee's Petition and the record, this Court finds that it committed

no error and that the Petition must be denied. This Court was fully aware and informed of the legal issues presented and fairly addressed them in our prior Order. Appellee's Petition does not convince this Court that our Order should be reheard, therefore our Order stands.

ACCORDINGLY, Appellee's Petition for Rehearing is hereby denied.

IT IS SO ORDERED.

June 21, 2019

CHRISSA HENIO,

Respondent-Appellant,

v.

KYLE SILVERSMITH,

Petitioner-Appellee.

SWITCA Case No. 19-004-ZTC
Cause No. MC-2018-0008

Appeal filed August 1, 2019

Appeal from the Zuni Tribal Court
Nichole A. Alex, Judge

Appellate Judges: Jeanette Wolfley,
Anthony Lee, and Melanie Fritzsche

ORDER DENYING APPEAL

SUMMARY

Appeal denied for lack of jurisdiction because notice of appeal was insufficient under SWITCA Appellate Rule 11.

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Petitioner Kyle Silversmith filed a Petition for Child Custody seeking sole custody of his minor son Paul Anthony Silversmith. Respondent Chrissa Henio is the mother and primary custodian of the child. Following several hearings, an Adjudication Hearing, and submission of a Parenting Plan, on August 1, 2019, the Pueblo of Zuni Tribal Court issued an order granting joint physical and legal custody of the child, and approving the Parenting Plan.

The Respondent Chrissa Henio filed a Notice of Appeal on August 1, 2019. For the reasons below, Respondent-Appellant's notice of appeal is denied. SWITCARA #11(e) (2001) requires at a minimum the notice of appeal contain a "concise statement of the adverse ruling or alleged errors made by the lower court". Respondent-Appellant's Notice of Appeal contains no such statement. The Notice of Appeal merely states Appellant "[h]ereby submits this Notice of Appeal regarding the Judgment and Order that was issued by Judge Nicole A. Alex in the above-captioned Cause on July 26, 2019." The statement is clearly insufficient to perfect an appeal under SWITCARA #11(e)(3) because the statement fails to provide the Court with adequate information of the errors challenged to form the basis for the appeal. Further, the notice does not state the nature of the relief being sought on appeal (See SWITCARA #11(e)(4)), or contain any reasons for reversal and modification (See SWITCARA #11(e)(5)). This Court has consistently held that such a deficiency is jurisdictional. *See, Rice v. Yavapai-Prescott Indian Tribe*, 21 SWITCA Rep. 12, 13 (2010). Therefore, the notice of appeal in this matter must be denied.

It is so ORDERED.

November 7, 2019