

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

**RECOMMENDATIONS MADE TO
THE SANTA CLARA PUEBLO
COURT OF APPEALS**

The Santa Clara Pueblo joined the Southwest Intertribal Court of Appeals (SWITCA) on June 25, 1993 by resolution 93-23 and appointed SWITCA as an advisory appellate court to the Santa Clara Pueblo Court of Appeals. Under the interim rules of appellate procedure adopted by the Pueblo on April 6, 1994 (resolution 94-14), SWITCA makes recommendations to the Santa Clara Pueblo Court of Appeals on cases assigned. In turn, the Pueblo Court of Appeals may adopt, modify, or not accept the recommendations. Recommendations for calendar year 1994 were made to the Court of Appeals in the following cases. The final opinions were issued by the Santa Clara Court of Appeals.

1. **SANTA CLARA PUEBLO v. SISNEROS**, Case No. CR-91-0204; 93-006-SCPTC*
2. **SANTA CLARA PUEBLO v. LUJAN**, Case No. CR-93-052; 93-007-SCPTC
3. **SANTA CLARA PUEBLO v. GALLEGOS**, Case No. CR-93-004; 93-008-SCPTC
4. **SANTA CLARA PUEBLO v. SINGER**, Case No. CV-93-039; 93-009-SCPTC
5. **SISNEROS v. PUEBLO**, Case No. CR-92-0249; 93-010-SCPTC
6. **CHAVARRIA V. PUEBLO**, Case No. CR-92-0297; 93-011-SCPTC
7. **GUTIERREZ V. PUEBLO**, Case No. CR-93-035; 93-012-SCPTC
8. **SANTA CLARA PUEBLO v. VELARDE**, Case No. CR-92-195; 93-013-SCPTC
9. **PADILLA V. PUEBLO**, Case No. CR-92-0147; 93-015-SCPTC
10. **NARANJO V. PUEBLO**, Case No. CR-93-056; 93-016-SCPTC
11. **IACABONE V. PUEBLO**, Case No. CR-93-003; 93-017-SCPTC

12. **ROLLER V. PUEBLO**, Case No. CR-92-0251; 93-018-SCPTC

*The first set of numbers is the Santa Clara Pueblo's trial court designation; the second set is the SWITCA designation.

Robert Baker-Appellant,

v.

**Southern Ute Indian Tribe,
Respondent-Appellee.**

No. 92-003-SUTC

Appeal Filed July 14, 1993

The appeal is dismissed for appellant's failure to comply with the Southern Ute Tribe's statutory requirements for the filing of an appeal. These requirements are jurisdictional and the appellate court cannot proceed if the appealing party fails to comply exactly with the requirements.

Jim Salvatore, for Appellant
James D. DeVaney, for Appellee

Appeal from the Southern Ute Tribal Court
Appellate Judge Violet A.P. Lui-Frank

This matter is before the Court on the appellate's motion to reconsider this Court's order and opinion of June 29, 1992. Appellant pointed out that the only issue that would be considered before reaching the merits was the payment of the filing fee for the appeal. In the order of June 29, 1992, the Court decided the merits of the appeal.

The Court finds that the parties are in agreement that the threshold issue is whether the appellant complied with the statutory requirements for the filing of an appeal.

Compliance with the legal requirements for filing of an appeal is a jurisdictional prerequisite. In other words, there is no appeal until the filing requirements of the Southern Ute Indian Tribal Code are met.

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

The Southern Ute Indian Tribal Code, Title 3, Appellate Code, §3-1-104, states that an appeal is commenced by filing a notice of appeal within fifteen days after entry of the final judgement. Section 3-1-104 (3) specifically provides that "[a]t the time of filing a notice of appeal, the party appealing shall be required to pay a fee of twenty-five dollars (\$25.00) to the Tribal Court Clerk."

The record shows that the appellant's counsel signed a form titled Affidavit of Inability to pay Filing Fees and Other Costs on April 27, 1992, for appellant, but the affidavit was not notarized. Another form, Answers to Questions Regarding Ability to Pay, accompanying the affidavit, is blank. The form required the defendant's signature certifying the correct information was supplied. There is no filing date on the affidavit.

The trial court's order of May 6, 1992 denying reconsideration specifically noted that the defendant had failed to supply the lower court with information to support a waiver of the filing fee, and denied the request for waiver of the filing fee implicit in the incomplete affidavit.

Appellant filed the motion for reconsideration/notice of appeal on April 28, 1993, which was the fifteenth day after the final judgement below. This was not sufficient to perfect the appeal. This Court has held that Title 2, §2-1-104 (3) requiring payment of a filing fee is not permissive. *In the Matter of L.K. v. M.E.T.*, No. 90-001-SUTC/No. CS-89-01 (Nov. 9, 1990).

Appellant had until May 4, 1992 to perfect his appeal, counting only the working days. *Gould v. Southern Ute Tribe*, No. 92-006-SUTC (Jan 11, 1993). He did not file a request for waiver of the fees. The affidavit is incomplete in that it is not notarized, and the signature is not the defendant's, but that of his legal counsel. The financial information form is blank.

This Court holds that the appellant did not meet the statutory requirements for the filing of an appeal. Further, he did not take exception to the order of the lower court denying an implied waiver of the fees for lack of information to support waiver.

Appellant's failure to pay the fees or file a valid and complete request to waive the fees within the time to appeal is fatal to his cause. Noncompliance with the filing requirements is jurisdictional. The Southern Ute Tribal Council has set forth the requirements for invoking the power of the Appellate Court.

The appellant's motion to reconsider this Court's opinion and order of June 29, 1992 is granted and said order is hereby withdrawn. This matter is dismissed for failure to comply with the Southern Ute Indian Tribal Code, §3-1-104.

IT IS SO ORDERED.

Laurena Burch, Petitioner-Appellant,

v.

Southern Ute Indian Tribe, Respondent-Appellee.

No. 93-003-SUTC

Appeal filed June 13, 1994

The petitioner-appellant appealed the lower court's conviction of reckless driving and disorderly conduct on grounds that she was denied legal counsel and that the proceedings were unfair. The Appellate Court affirms the conviction for disorderly conduct and reverses the conviction of reckless driving.

Laurena Burch, *Pro-se*
Douglas S. Walker, for Respondent-Appellee.

Appeal from the Southern Ute Tribal Court
Appellate Judge Allan Toledo

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts were taken from the record proper and the trial court's order filed herein.

On the evening of March 17, 1993, Phil Drake, La Plata County Sheriff Department, observed two females fighting on highway 172 within the town of Ignacio, Colorado. Officer Drake determined that combatants were appellant, Laurena Burch, and Leona Howe, who are members of the Southern Ute Tribe (SUT) and that SUT had jurisdiction in this matter.

Officer Drake requested assistance of the Southern Ute Tribal Police (SUTPD) and Officer Mark Torres and Officer Jack Frost, Jr. of the SUTPD responded and arrived upon the scene. Pursuant to an investigation at the scene, Officer Torres filed a criminal complaint

charging Laurena Burch with reckless driving and disorderly conduct.

On June 30, 1993, after a bench trial, the appellant who appeared *pro-se* was found guilty of reckless driving and disorderly conduct.

On appeal, *pro-se* appellant Burch states her grounds for appeal are denial of legal representation, that the sentence was unfair, and that she is appealing the "whole matter". Since the appellant was not represented by counsel, we will review the entire record to determine whether there was sufficient evidence to convict the appellant.

II. DISCUSSION

A. Sufficiency of the Evidence

1. Standard of Review

Appellate courts have developed and applied the rule that they normally will consider only issues which were properly raised in the lower court and that issues not raised or relied upon in the trial court usually will not be considered and given any weight by appellate courts. *Shoshone Business Council v. Skilling, et al*, 20 *Indian L. Rep.* 6001 (Shos. and Arap. Ct. App., 1992)

The *pro-se* petitioner-appellant in her appeal states that the proceedings and sentencing below were unfair. Appellate courts have held that dismissal of criminal charges should only be used when the appellant's rights have been so prejudiced that it materially affects the right to a fair trial - See for guidance *U.S. v. Morrison*, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d.564 (1981) and *U.S. v. Colbert*, 474 F.2d 174 (9th Cir. 1973). We will review the entire record herein to determine whether the appellant had a fair trial below.

The appellate court shall review the evidence in the light most favorable to the tribal court's findings. *State v. Yazzie*, 108 NM 677, 777 P.2d 916 (C.App. 1989) *cert. denied* 108 NM 681, 777 P.2d 1325. We are aware of the reviewing court's duty to scrutinize the evidence to ensure that a rational jury could have found, beyond a reasonable doubt, the essential facts required for a conviction. *Jackson v. Virginia*, 442 U.S. 307 (1979) and *In re Winship*, 397 U.S. 358 (1970).

B. Assistance of Counsel

Ms. Burch argues that she was denied assistance of counsel. The record shows that on March 17, 1993, during her arraignment, she was advised by the tribal

court that she had the right to obtain legal representation, but only at her own expense. Indian Civil Rights Act, 25 U.S.C. &1302(6). On April 12, 1993 and May 10, 1993, she advised the court that she would obtain legal representation in this matter. On May 25, 1993, she informed the court that she was unable to retain legal counsel because she has used her funds to pay her electric bill after the prosecutor advised her that he would vacate the scheduled hearing.

An individual citizen's right to appointed counsel is protected under the Sixth and Fourteenth Amendments to the U.S. Constitution in criminal actions brought by the federal government or a state government. Ms. Burch and other Indians do not have such protection when a criminal action is brought under tribal laws in the tribal courts, and "it is clear from legislative history, as well as from the language of the statute, that Congress in enacting the Indian Bill of Rights did not intend to require the Indian tribal courts to provide counsel for indigent appellants in criminal cases". *Tom v. Sutton*, 533 F.2d 1101, 1104 (9th cir. 1976). Appellant was not denied, illegally, the assistance of counsel.

C. Reckless Driving

The prosecution bears the burden of proving appellant guilty beyond a reasonable doubt. The burden of proof remains with the prosecutor throughout the hearing. The test for reasonable doubt is whether reasonable minds could find that the evidence excludes every hypothesis but that of guilt. *Agnew c. United States*, 165 U.S. 36, 49-50, 17 S.Ct. 242 (1897).

We will not weigh the evidence of substitute the judgement of the tribal court so long as there is sufficient evidence to support the convictions.

Title 14, Section 14-1-116(6) of the SUT code defines reckless driving as follows:

Any person who drives any motor vehicle, bicycle or motorized bicycle in such a manner as to indicate either a wanton or a willful disregard for the safety of persons or property is guilty of reckless driving.

In order to obtain a conviction for reckless driving under the SUT code, the prosecution must prove the following elements: 1. careless and heedless driving in willful or wanton disregard of the rights or safety of others, and 2. driving without due caution and circumspection at a rate of speed or in a manner so as to endanger or be likely to endanger any person or property. 7A *Am.Jur.*2d Sec. 313.

Officer Mark Torris, SUTPD, testified that upon his arrival at the scene of the accident, he observed officer Drake, four females and a red pick-up truck which had collided with the rear end of a green pick-up truck.

Officers Mark Torris and Jack Frost, Jr., SUTPD, investigated the accident and reported that the collision occurred in the inner passing lane; that both vehicles involved in the accident were traveling at a very slow rate of speed; that there were no skid or scuff marks on the pavement; that the vehicles came to a rest at the point of impact; that there was no observable damage to the rear bumper of the red pick-up which was registered and driven by Leona Howe; that appellant's pick-up had sustained minor damage.

Leona Howe, witness for the prosecution, testified that she swerved into the passing lane to avoid hitting a cat on the highway. Appellant and her witness Sharleen Whyte testified that they were driving in the passing lane when Ms. Howe, without signaling, changed lanes and applied her brakes and neither of the witnesses observed a cat on the road.

We have considered this testimony, along with other evidence in the record, and hold that there is insufficient evidence to support the guilty verdict beyond a reasonable doubt with respect to every element essential for a conviction of reckless driving and reverse the trial court.

D. Disorderly Conduct

Officer Drake testified that he observed appellant and Leona Howe shoving and striking one another in the middle of the highway and that he specifically observed the appellant strike Ms. Howe and that he ordered the parties to sit in their respective vehicles before he summoned the SUTPD.

The SUT code defines disorderly conduct as:

Section 5-1-106(1)(a)(i): A person is guilty of disorderly conduct if he intentionally, knowingly or recklessly:

- (1) Engages in fighting, threatening or violent behavior.

The appellant Burch and Leona Howe both testified that they were shoving one another after the accident.

We hold that this was sufficient evidence to support the trial court's conviction of guilty of disorderly conduct and affirm.

III. CONCLUSION

Appellant's claim of failure to provide the assistance of counsel is denied. We ordinarily will not weigh the evidence or substitute the judgement of the tribal court so long as there is sufficient evidence to support the convictions. In this case, however, the prosecution has not presented sufficient evidence to support the conviction of reckless driving and reverse the tribal court on this matter. There was sufficient evidence presented to support the conviction of disorderly conduct and the tribal court's judgement is affirmed.

Affirmed in part; Reversed in part

IT IS SO ORDERED.

Committee for Better Tribal Government, *et al.*, Petitioner, Appellant,

v.

Southern Ute Election Board, *et al.*

SWITCA No. 94-001-SUTC

Order Filed December 15, 1994

ORDER

This matter coming on by the Court's motion, it appearing that this matter is not now before the court and was assigned an appellate number erroneously, IT IS THEREFORE ORDERED THAT THIS MATTER BE DISMISSED.