R. L. and B. J., Minors/Appellants,

vs.

Colville Confederated Tribes Children and Family Services, Appellee.

Case Number AP99-004, 3 CTCR 39, 28 ILR 6203

6 CCAR 1

[Preston Van Camp, Legal Services Office, represented the Minors/Appellants.
Joseph Caldwell, Office of the Prosecuting Attorney, represented CFS/Appellee.
Stephen L. Palmberg, Attorney, represented the father.
Mother was not represented and did not appear at oral arguments.
James Edmonds, Office of Public Defender, appeared as *amicus*.
Bruce Didesch, U. S. Attorney's Office, filed an *amicus brief* but did not appear at hearing.
Trial Court Case Number J97-16020, J97-16033]

Argued October 15, 1999. Decided October 6, 2001.

Before Chief Justice Dupris, Justice Bonga and Justice McGeoghegan

DUPRIS, Chief Justice, for the Panel

SUMMARY

On May 16, 1997, the above-named minors were found by the Colville Tribal Juvenile Court to be Minors-in-need-of-care. Care, custody and control of the minors was given to the Colville Tribal Children and Family Services (hereinafter CFS), with physical placement at the discretion of CFS. Liberal visitation was granted to the parents.

On April 23, 1999, Judge Wynne entered an Order from the Juvenile Court which stated that since CFS was granted custody of the minor children, possessed sovereign immunity from suit, and was acting *in loco parentis* for the minor children, it did not require a Court order to access money from the minor's Individual Indian Moneys (IIM) accounts.[1]

On April 28, 1999, the minors filed an Appeal alleging error of law excepted to at the time of trial, that the verdict or decision is contrary to law, and that substantial justice has not been done. Three specific issues were raised in this case: (1) May a minor's trust money be withdrawn from his Individual Indian Moneys Account without a Court Order? (2) Who has the primary duty of support for a minor who is a Minor-In-Need-Of-Care by order of the Court? and (3) When a minor is found to be a Minor-In-Need-Of-Care, is it in the minor's best interests to use the minor's money for basic his needs, and if yes, under what circumstances?

Briefs were ordered and filed, *amicus* briefs were invited and filed by the CCT Public Defender's

[1] Accounts held in trust by the Bureau of Indian Affairs pursuant to federal regulations found in 25 C.F.R.

Office and the Office of Solicitor.[2] Oral arguments were heard on October 15, 1999. Upon a review of the law and facts herein we reverse and remand, finding a strong tribal policy prohibiting use of a minor's Individual Indian Moneys account for a dependent child in lieu of other resources. The Court finds further not to address any other issues based on our ruling on the first.

DISCUSSION

I. MAY A COLVILLE MEMBER MINOR'S TRUST MONEY BE WITHDRAWN FROM HIS ACCOUNT WITHOUT A COURT ORDER?

The Appellant argues that to allow Children and Family Services (hereinafter CFS) to remove money from a minor's account without a hearing and a right to challenge the removal is a violation of the minor's due process rights.

CFS argues the process of using a minor's IIM moneys for a child who is a dependent of the Court is protected by due process by the guidelines used by the Bureau of Indian Affairs' Social Services Department.

The Tribal Legal Office (TLO) argues there is no legal authority which would allow CFS to remove the minor's money, so there is no need of a Court order in the first place. These are the arguments before the Court.[3] This is an issue of first impression.

The Colville Business Council (Council) first addressed this issue in 1970. It appears that minors' IIM moneys were being disbursed to social agencies when the minor was a dependent of the state courts. The Colville Tribes (Tribes) took the position that a minor's IIM money should not be used for the minor's support when he or she was a dependent of the Court. *See*, CCT Resolution 1970-387.[4] The Council found that such a disbursement was against the best interests of the minor. It asked the Bureau of Indian Affairs to disallow such payments to the following agencies or individuals:

1. County or State Department of Public Assistance Offices.
2. Foster parents and foster homes.

---

[2] The U.S. Attorney General's Deputy A.G. (USAG), Mr. Didesch, expressed an interest to be invited to file an amicus because of the issues touching on IIM accounts.

[3] The father's attorney argued on record that he supports CFS' position, but he did not file a brief supporting his argument. The USAG argued no court could determine independently whether, when, or for what purpose moneys can be disbursed from a minor's IIM account, and only the Bureau of Indian Affairs (BIA) can do this. This argument is non-responsive to the main issue. The sole authority of the BIA to regulate IIM accounts is not at issue in this case.

[4] "...the welfare of the child which in the initial instant is the responsibility of the given agency, foster home, guardian, foster parents or adoptive paren[t]s AND certainly not the responsibility of the child to pay for their own individual care and welfare through their dividend or per capita share made to them from tribal resources..." CCT Resolution 1970-387, paragraph 5.

3. Institutional agencies for non compos mentis or other legal disability agencies.

4. Legal guardians and adoptive parents.

5. ***Other agencies, departments and individuals*** which would deprive the minor children of their dividend and per capita shares due them by virtue of their membership in the Confederated Tribes of the Colville Reservation, Washington.[5] [emphasis added]

Subsequent Council Resolutions dealing with minors' IIM accounts do not modify the strong position of the Tribes in Resolution 1970-387. *See,* Resolution 1972-67 (creating an exception to Resolution 1970-387 for tribal member adoptive parents); Resolution 1978-108 (allowing the release of minors' IIM moneys to non-tribal adoptive parents, under certain circumstances); and Resolution 1998-330 (specifically dealing with a minors' share of what is commonly referred to as the 181-D Claims money, money received in settlement of the Tribes' claim on the Grand Coulee Dam).

Resolution 1972-67 specifically states that no other provision of Resolution 1970-387 is changed. Resolution 1972-67 was modified by Resolution 1978-108 to include the release of minors' IIM moneys to non-tribal adoptive parents, under certain circumstances. This last resolution, #1978-108, contains the language the Appellee relies on to indicate that the social services provides procedural due process in its decisions to release the minors' moneys.

Resolution 1978-108 deals specifically and only with non-tribal member adoptions of tribal children. It does not change the public policy position of the Tribes set out in 1970-387. By the very nature of its subject matter, the only other resolution dealing with minors' IIM moneys, Resolution 1998-330, does not apply in this case.

Citing *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972), Appellee argues that the nature of the IIM money is transient. If the minor were not a dependent of the Court, the parents would have free access to the minors' money, and, therefore, it was not a definable interest.[6]

Appellants assert their interests in their IIM money is a protectable property interest. The Supreme Court recognizes an individual's property interest in his IIM account. *See Kennerly vs. U.S.*, 721 F.2d 1252, 1257 (1983). The Bureau of Indian Affairs consider IIM moneys to be the property of the individual for whom the BIA maintains the account. *See* **PART 87**–USE OR DISTRIBUTION OF INDIAN JUDGMENT FUNDS: Per capita payment aspects of plans and protection of funds accruing to

---

[5] *Id* at paragraph 8.

[6] "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972).

minors, legal incompetents and deceased beneficiaries; and 25 CFR § 87.10[7] and 25 CFR § 115.1 Definitions.[8]

Due process mandates that one cannot be deprived of one's property without minimum procedural due process. That is, adequate notice, an opportunity to be heard and present evidence on one's own behalf. The time and manner of the hearing must be meaningful. See *Boddie vs. Connecticut,* 401 U.S. 371 (1971).

The Tribes established a strong public policy to protect a minor's IIM account specifically while a minor is a dependent of a Court. A minor has a protectable interest in his IIM account. Nothing in the federal regulations which provide that the Bureau of Indian Affairs is the sole agency to determine a plan for distributing a minor's IIM prohibits the Tribes from regulating its tribal employees from accessing a minor's IIM account. Defining what is in the best interests of a minor is within the discretion of the Tribes. Based on the foregoing, we hold a tribal member minor's IIM account generally cannot be accessed for the minor's support when he or she was a dependent of the Court.

We cannot ignore the practical aspects of supporting a minor dependent of the Court, however. In this case the question was never explored at the trial level. Based on (1) the resolutions; (2) the fact that there never has been a court determination of who is responsible for child support in this case;[9] and (3) the fact that both parents receive the same amount of per capitas as the children which could go toward basic needs of the children, the Appellees have not established that it is in the best interests of the minors to allow the use of their IIM accounts for their support. Nor have the Appellees established they are exempt from the Tribes' strong policy against accessing a minor's IIM account for support. An inquiry should be made regarding the ability of the parents to provide support, and what other avenues of support are available for the minor. For instance, are the foster parents receiving money for support of the children? Is there any other source of funding?

The issue of sovereign immunity of tribal caseworkers is not properly before this Court in this case, and we will not rule on the issue. The Tribes has directed its employee-caseworkers not to use a minor's IIM account for support. This does not raise a question of sovereign immunity.

We hold that the Tribes has a strong tribal policy prohibiting use of a minor's Individual Indian Moneys account for a dependent child in lieu of other resources. Accordingly, we **REVERSE** and

---

[7] (a) The per capita shares of... minors..., enhanced by investment earnings, shall be held in individual Indian money (IIM) accounts unless otherwise provided as set out in this section. While held in IIM accounts, said shares shall be invested pursuant to 25 U.S.C. 162a and ***shall be the property of the minors..."*** [emphasis added].

[8] As used in this part: (a) The term "individual Indian money accounts" means ***those accounts*** under the control of the Secretary of the Interior or his authorized representative ***belonging to individuals***. [emphasis added].

[9] At the oral arguments all parties generally agreed the parents have a primary responsibility for support of the minors. CTC §5-2-415 specifically provides for support hearings in dependency cases.

REMAND this matter to the Trial Court for further proceedings consistent with this Opinion. It is so Ordered.

Elaine SEYMOUR, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP96-022, 3 CTCR 40, 29 ILR 6009

6 CCAR 5

[Jeffrey Rasmussen, Office of Public Defender, for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, for Appellee.
Trial Court Case Number 95-18257]

Argued December 19, 1997. Decided October 18, 2001.
Before Chief Justice Dupris, Justice Chenois and Justice Miles.

DUPRIS, Chief Justice, for the Panel.

SUMMARY OF PROCEEDINGS

Appellant, Elaine Seymour, was convicted of Endangering the Welfare of a Child on December 21, 1995. At the trial, but not before, the Appellant raised the argument that the Appellee, The Confederated Tribes of the Colville Reservation (hereinafter "Tribes), had to prove the Appellant was an Indian in order to establish the jurisdiction of the Trial Court. The Trial Court ruled, without findings and conclusions, that the Tribe did not have the burden of proving the Appellant was Indian. The defendant appealed.[10] Oral arguments were heard on December 19, 1997. The Appellate Panel directed the Law Clerk of the Court of Appeals to further research the issue.

The Court of Appeals held it is the Appellant's burden to initially raise the issue of "Indian" when the allegation has already been entered into the Court record at the time of the arraignment and/or bail hearing. Further, the Appellant's due process rights were not violated in the instant case. The Trial Court is affirmed.

I. IS THE TRIBES REQUIRED TO PROVE THE DEFENDANT IS AN INDIAN IN ORDER TO ESTABLISH JURISDICTION OF THE COURT?

A. **Personal and Subject Matter Jurisdiction in the Criminal Trial Court**

It is not clear from the pleadings what jurisdiction the Trial Court was asked to establish by proving the Appellant was Indian: personal, subject matter, or a hybrid of both. In civil cases, in order to successfully plead a case, alleged facts supporting both personal and subject matter jurisdiction must be

[10] The Defendant also appealed her conviction, but withdrew this portion of the appeal at the Oral Arguments on December 19, 1997, so we will not address the conviction itself.

averred by the petitioning party.[11]

The emphasis of the criminal complaint is to give notice to the defendant of his alleged criminal behavior, as well as the alleged time, date and place of the alleged criminal act was committed by the defendant. *See*, *Bachand v. CCT*, 2 CTCR 50, 24 ILR 6179 (1997), and *U.S. v. Anderson,* 532 F.2d 1218 (9th Cir 1976), *cert. den*. 429 U.S. 839, 97 SCt 111, 50 L.Ed.2d 107 (1976). Built into the petition, by stating the place of the alleged crime, is an allegation of venue; by stating the name of the defendant is an allegation of personal jurisdiction; and by stating the crime is an allegation of subject matter jurisdiction.

Generally speaking, personal jurisdiction is the power a Court has over the Appellant's person in order to enter a judgment against him. *See generally, Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed 565 (1877). Subject matter jurisdiction is considered the power of the Court to hear the type of case that is before it. *See generally, Ex Parte Crow Dog*, 109 U.S. 556 (1883).

Tribal Courts are courts of limited jurisdiction in criminal matters, but the limitation is not over the type of crime that can be prosecuted before it. The limitation is over the person who can be prosecuted before the tribal court. There is no criminal jurisdiction to try or punish non-Indians in Tribal Courts absent express Congressional authority. *Oliphant v. Suquamish*, 435 U.S. 191, 209, 5 ILR A-9, (1978).[12] The Supreme Court ruled that such a limitation was because of the tribes' quasi-sovereign status in relation to the federal government. *Id* at 210.

The Tribes have incorporated *Oliphant* into its statutory laws[13]. For instance, CTC §1-1-70 defines the Tribes jurisdiction as follows:

> The jurisdiction of the Tribal Court and the effective area of this Code shall include all territory within the Reservation boundaries, and the lands outside the boundaries of the Reservation held in trust by the United States for Tribal members of the Tribes, and it shall be over all persons therein, **provided, however, that criminal jurisdiction of the Court shall not extend to trial of non-Indians**...." [emphasis added]

The Tribes more specifically defines its limited criminal jurisdiction in the following statutes:

---

[11] There are still no formal court rules for the Colville Tribal Trial Court. This assumption comes from reading the CTC chapter on Civil Actions, CTC, Chapter 2-2. CTC §2-2-1, Jurisdiction Generally, states the Court has jurisdiction (1) over all suits involving persons residing within the tribal jurisdiction; and (2) all other suits in which the parties consent or in which the events giving rise to the action occurred on within tribal jurisdiction.

CTC §2-2-30, Complaints - Elements, requires the plaintiff to allege, *inter alia*, the names of the parties and a "statement of the facts constituting the cause of action." Past practice is that the alleged facts under these sections set out the personal and subject matter jurisdiction requirements to bring the case into the Trial Court. For examples see the civil complaint forms provided by the Trial Court for *pro se* litigants.

[12] There is also a limit on the amount of fine and jail time a Tribal Court may assess a defendant convicted of a crime, which is not relevant to this case. *See* The Indian Civil Rights Act, 25 U.S.C. §§1302 *et seq.*

[13] For ease in looking up the sections, all references to the statutory laws of the Tribes will using the current Code sections, even though this case was commenced prior to the enactment of the new Code, *i.e.* October, 1998. There are no substantive changes in the Code provisions cited; only the numbering system changed.

1) "1-1-430 Implied Consent

Entrance by any person or his property into the Reservation or Tribal Court jurisdiction as defined by this Code, shall be deemed equivalent to and construed to be... a consent to criminal jurisdiction of the Tribes concerning any legal action pursuant to this Code,... **provided, however, that criminal jurisdiction of the Tribal Court shall not extend to trial of non-Indians**." [emphasis added]

2) "1-1-431 Acts Submitting Person to Jurisdiction of Tribal Court

(b) The Colville Confederated Tribes shall [have] criminal jurisdiction over:

(1) all crimes committed by **any Indian** within the boundaries of the Colville Reservation..." [emphasis added]

Oliphant establishes a hybrid type of jurisdiction, identifying tribal courts as courts of limited jurisdiction regarding who can come before them. That is, subject matter jurisdiction is tied to who a defendant is, and not just to what alleged conduct constitutes a crime on the Colville Reservation. This is analogous to the limitations on criminal jurisdiction over actions occurring on Indian reservations as applied in federal district courts;[14] personal jurisdiction based on ethnicity is a prerequisite to subject matter jurisdiction in several instances in federal criminal court.[15]

On the other hand, criminal jurisdiction in state courts is not defined by ethnicity as a general rule.[16] Rather, the states generally take the position that any challenges to their jurisdiction based on ethnicity is a defense to be borne by the defendant.[17]

---

[14] *See*, for example 18 U.S.C. §§ 1151 *et seq*, restricting the prosecution of defendants based on whether the defendant or victim are Indian, and whether the crime occurred in Indian country.

[15] *See*, *e.g. Lucas v. United States*, 163 U.S. 612, 16 S.Ct. 1168, 41 L.Ed 282 (1896) (it was a jury's duty to determine whether a "negro" was considered a "Choctaw" for purposes of subject matter jurisdiction over crimes involving Indian victims); *Morrison v. California*, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed 664 (1934) (the Court discussed, *inter alia*, the burden of proof necessary to show a defendant was Japanese in order to apply a statute prohibiting Japanese to own land); *Unites States v. Lawrence*, 51 F.3d 150 (8th cir., 1995) (citing *Unites States v. Rodgers*, 45 U.S. (4 How.) 567, 572-73, 11 L.Ed. 1105 (1845)) (set a test for determining, for the purposes of federal criminal jurisdiction, who is "Indian"); *United States v. Broncheau*, 597 F.2d 1260 (9th Cir., 1979), (defendant challenged federal jurisdiction because the government didn't plead the defendant was an *enrolled* Indian); and *United States v. Heath*, 509 F.2d 16 (9th Cir., 1974), (federal jurisdiction challenged because the defendant was a member of a terminated tribe).

[16] *See*, *State v. Brown*, 29 Wash. App. 11, 627 P.2d 132 (1981) (Court distinguishes between subject matter jurisdiction over the crime and the long-arm criminal jurisdiction statute, Rev. Code of Wash. §9A.04.035(5), under which the State secures personal jurisdiction); *Arizona v. Verdugo*, 22 ILR 5047 (Ariz. Ct. App., Jan. 17, 1995) (Arizona follows majority of state courts by holding the state did not have to allege the defendant and/or victim were not Indian to establish jurisdiction in that the ethnicity of the defendant was not an element of the offense and the burden was with the defendant to first assert his or the victims ethnicity in order to defeat state jurisdiction); *But see, State v. Allan*, 607 P. 2d 426 (Id., 1980) (State Supreme Court reversed conviction of Quinault Indian convicted of bribery committed on the Coeur d'Alene reservation for lack of subject matter jurisdiction.)

[17] *See*, *Jones v. State*, 585 P. 2d 1340 (Nev. 1978) ("[T]he State is not obliged to prove that the accused is not an Indian. Rather, the accused must shoulder the burden of establishing his Indian ancestry, if he seeks to challenge state court jurisdiction." at 1341); and *State v. Francis*, 563 A. 2d 249 (Vt., 1989) (citing cases from Nevada, New Mexico, Louisiana, Indiana, and Maryland for the proposition that the defendant has the burden of proving lack of state court jurisdiction.)

Although there are similarities between the federal laws and tribal laws, one cannot ignore the differences in their foundations. The federal courts are by their very natures courts of limited jurisdiction, a decision made when powers were being divided between the federal and state governments back in the 1700's. Tribal governments were not part of this process.

Our court system, as it now exists, derives its powers from the Tribal Constitution passed in the 1930's, as amended in the 1990's. Our court system interprets and enforces laws from custom and tradition, from tribal statutes and from tribal case law.

The U.S. Supreme Court continues to press non-Indian standards on tribal courts in their interpretations of tribal jurisdiction. It is the tribal judiciaries' responsibility to be ever vigilant in ensuring that *tribal* law is developed, based on our cultural mores and standards, and not just the pan-Indianism view of the Supreme Court. We must accept the limits of the Supreme Court in the most conservative way possible.

Our situation appears to be closer to the federal courts than the state courts, however. That is, federal criminal law, both statutory and case law, recognize being "Indian" as a prerequisite to jurisdiction. Colville statutory law adopts this view in its relevant statutes, as pointed out above.[18] Being an "Indian" is a requisite to jurisdiction over a defendant in criminal cases in the Colville Tribal Courts. We so hold.

This jurisdiction is not pure subject matter jurisdiction, however. It is a hybrid of subject matter and personal jurisdiction developed by the federal courts to limit tribal jurisdiction. As such, it should not carry the same standard as pure subject matter jurisdiction in that a party can assert lack of subject matter jurisdiction at any time. The question becomes: when may a lack of "Oliphant" jurisdiction be asserted? This is a question of first impression.

B. **Who Has the Burden to Assert Lack of "Oliphant" Jurisdiction?**

(1) APPLICABLE STANDARD OF REVIEW

Challenges to pure subject matter jurisdiction can be made at any time. *Eg. E.S.G. v. Colville Tribal Administrative Court, et. al.*, 1 CTCR 54 (1991). Subject matter jurisdiction goes to the heart of the powers of a court to decide a case. Challenges to personal jurisdiction can be waived if not raised in a timely fashion.[19] *Bachand v. CCT,* 4 CCAR 23, 27, 2 CTCR 50, 24 ILR 6179, 7 NALD 7013, (1997) (citing *U.S. v. Heath*, 509 F.2d 16, 19 (1974)).

---

[18] *Oliphant* has long been criticized, particularly for its poor reasoning and abrupt departure from foundational legal principles of Indian law. In particular it ignored the principle that only Congress or a Treaty could divest Tribes of necessary aspects of their inherent sovereignty. *See* David H. Getches, 84 Calif. L.Rev. 1499, 1595-1598, n.103 (1996). Nevertheless the Tribes have chosen to adopt the *Oliphant* ruling in its statutory law. It is this law that we are bound to enforce.

[19] In *Bachand v. CCT*, 4 CCAR 23,25, 2 CTCR 50, 24 ILR 6179, 7 NALD 7013 (1997) this Court held that we had "personal jurisdiction" over the defendant because he was Indian. The issue framed by the Appellant/Defendant was lack of personal jurisdiction, and not subject matter jurisdiction.

As stated above, however, the prerequisite of being an Indian in a criminal case in tribal court is not a pure subject matter jurisdiction question. It is a hybrid jurisdiction, in which personal jurisdiction (who is brought before the Court) is mixed with subject matter jurisdiction (the power of the Court to hear the matter).

In *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 24 ILR 1015 (1997), the Supreme Court interpreted the ruling in *Montana v. U.S.*, 450 U.S. 563, 8 ILR 1005 (1981), regarding lack of tribal civil jurisdiction over non-Indians as analogous to a tribe's lack of criminal jurisdiction over non-Indians as recognized in *Oliphant v. Suquamish*, *supra*. *Strate* at 24 ILR 1016.

Even though the Supreme Court ties lack of tribal jurisdiction over non-Indians to a lack of inherent authority in *Montana* and *Strate,* the Supreme Court further holds, *inter alia*, that a non-Indian, through his own actions, can be subject to tribal civil jurisdiction if he consented to the jurisdiction through his interactions with the tribe. *Montana* at 565 and 1011, and *Strate* at 24 ILR 1016. As a general rule, consent to jurisdiction cannot defeat lack of subject matter jurisdiction.

In *Oliphant* the same Supreme Court has held that tribes lack inherent jurisdiction to prosecute non-Indians. *Oliphant* at 212. This is the same lack of inherent jurisdiction recognized in *Montana* and *Strate*. It would be logical, therefore, to assume that questions of jurisdiction over a person in tribal criminal court are not a matter of pure subject matter jurisdiction, just as they are not in civil court.

Whether a defendant is an "Indian" is not an element of an offense. In our Courts, elements of an offense have been recognized to be those facts offered to prove a defendant committed specific acts at a specific place, time and date which constitute criminal behavior. *See, generally*, *Pakootas v. CCT*, 1 CCAR 65, 1 CTCR 67 (1993); *Condon v. CCT*, 3 CCAR 48, 2 CTCR 20, 23 ILR 6327 (1994); *CCT v. Clark*, 4 CCAR 53, 2 CTCR 45, 25 ILR 6066, 8 NALD 7006 (1998); and *Amundson V. CCT*, 4 CCAR 62, 2 CTCR 68, 25 ILR 6178 (1998).

In state courts ethnicity is not a requirement of subject matter jurisdiction as a general rule, but more a matter of *in personam* jurisdiction. *See* footnote 8, *supra*. The states regard being "Indian" as a defense to be raised by the defendant, or waived in that the states have inherent authority to prosecute anyone for violations of its criminal laws.

It is imperative that this Court preserve the inherent authority of the Tribes to enforce its laws, and protect its citizens on its Reservation. The confines put upon this inherent authority by federal case law should not diminish it any more than Congress has already done. *See*, *generally*, discussion in *Stead v. CCT*, 2 CCAR 27, 29-32, 2 CTCR 02, 21 ILR 6005 (1993).

In this matter, the Tribes is more in the position of the states. In the protection of its inherent authority to preserve peace and welfare of the Tribes, a more restrictive standard should be used in deciding to deny tribal jurisdiction. The standard of review lies between personal and subject matter jurisdiction. It should not be subject to challenge at any time. Rather, it should be raised in a timely fashion, or it will be waived, unless it can be shown that it would violate the defendant's due process rights to proceed. We so hold.

(2) WHO HAS THE FIRST BURDEN OF PRODUCTION?

The ideal mechanism would be for the Tribes to affirmatively make an allegation that the defendant is an Indian in its initial pleadings, just as it does in the criminal citation complaint. *See*, *Bachand v. CCT*, 2 CTCR 50, 24 ILR 6179, 7 NALD 7013, 4 CCAR 23 (1997) (the Trial Court did not err by not making a specific finding on record the Appellant was "Indian" because the allegation of "Indian" had been alleged in the citation complaint and the defendant did not adequately raise his challenge to it).

The facts in this case are similar to *Bachand, supra*, in that the Trial Court record during the arraignment/bail hearing indicates the Appellant is an enrolled member of the Colville Tribes, enrollment number 90E. The Appellant was present, read her rights, and entered a not guilty plea to the charges at that time. The record reflects the Appellant's name, address, message phone number, and financial status.

It is not clear from the record why the Appellant did not affirmatively raise the issue of whether she was Indian, nor was there an assertion she wasn't Indian, before the jury trial. The issue was raised at the jury trial in a proposed jury instruction which included proof of Indian as an element of the offense.

The non-tribal courts are split on who then has the burden of production on the issue of "Indianness" of a defendant in order to secure jurisdiction. *Lucas v. U.S.*, 163 U.S. 612, 617, 16 S.Ct. 1168, 41 L.Ed 282 (1896) (The burden of proof was on the government to sustain the jurisdiction of the court by evidence as to the status of the deceased, and the question should have gone to the jury as one of fact and not of presumption); *Morrison v. California*, 291 U.S. 82, 88, 54 S.Ct. 281, 78 L.Ed 664 (1934) ("The decisions are manifold that within reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant.");*In re Adolfo M.*, 275 Cal Rptr 619, 623 (App 1990) (the rule of necessity and convenience provides the burden of proving an exonerating or dispositional fact may be imposed on a defendant if its existence is peculiarly within his personal knowledge and proof of its nonexistence by the prosecution would be relatively difficult or inconvenient); *Steven Ford v. Spokane Tribal Court, et al.*, (unreported opinion order: Order Denying Petition for Writ of Habeas Corpus) No. CA-96-676-JLQ, (Dist. Ct, Eastern District of WA), March 25, 1998 (in assessing the cultural reasons for the Spokane Tribal Court's holdings, the federal District Court stated that the Petitioner could have raised or denied the jurisdictional fact of his membership in a federally recognized Indian tribe at any time. If he had done so, the prosecutor would have been required to offer proof on the issue.... Therefore, the Tribal Court placed the burden to raise this jurisdictional deficiency on the Defendant); *Arizona v. Verdugo*, 22 ILR 5047, 5048 (1995) ("The majority of other courts addressing this issue have held that a defendant bears the burden to show facts that would establish an exception to the state court's jurisdiction under the Indian Country Crimes Act. [citing cases from Vermont, New Mexico, and Nevada].").

The most persuasive position is that in the unreported *Ford* case from the Eastern District.[20] The

[20] This Court is not prohibited by any rule from citing an unreported federal district court opinion. We look to *Ford* as illustrating and

Spokane Tribes, like the Colvilles, are a plateau tribe. There are cultural similarities we can draw on, and as with the Spokanes, generally a Colville would not say he was non-Indian. Further, as the state courts have found, it would be too difficult to prove a non-Indian status, and such an allegation would be accepted at face value unless the Tribes had actual proof of tribal enrollment.

Based on the foregoing we hold a defendant has the initial burden to raise the issue of "Indian" if the Court's record indicates an allegation that she is, unless such a burden would violate the defendant's due process.

Appellant has alleged her due process rights were violated because her proposed jury instruction was refused and the Tribes did not put in record before the jury that she was an Indian. We cannot see how she was harmed. She didn't assert she wasn't Indian. Neither her arguments at the oral arguments hearing nor the record support her allegations of due process violations. We hold there are no due process violations in the facts of this case which would negate the Appellants conviction.

Accordingly, we **AFFIRM** the Trial Court and **REMAND** for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

recognizing a cultural aspect of tribes, and not as binding authority on this Court.

Vincent JACK, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP97-007, 3 CTCR 41

6 CCAR 11

[M. Brent Leonard, Office of Public Defender, for the Appellant.
Leslie Kuntz, Office of Prosecuting Attorney, for the Appellee.
Trial Court Case Number 92-15530]

Argued March 20, 1998. Decided February 15, 2002.

Before Chief Justice Dupris, Justice Chenois and Justice McGeoghegan.

Dupris, J. for the Panel.

SUMMARY

On December 19, 1992, Appellant was charged by criminal citation with Battery (Domestic Violence) and Resisting Arrest. On April 1, 1993, he plead to guilty to Resisting Arrest. The charge of Battery was dismissed. A pre-sentence investigation report was filed prior to Appellant's sentencing on May 24, 1993.

At sentencing, the Court imposed a $1000 fine with $500 suspended conditionally; 60 days jail with 50 days suspended; conditions imposed: file an alcohol evaluation within 30 days and follow recommendations of TCCS[21] for one year, with quarterly reports being required; not to be cited for any alcohol-related or violence-related offenses for one year; court costs of $5.00; and completion of all conditions contained in the order. A pre-dismissal hearing was set for May 9, 1994.

A show cause hearing was held on July 29, 1996 and the Appellant was found to have violated the Court's order by failing to pay $400; failing to comply with TCCS (failure to submit alcohol evaluation and submit quarterly reports) and failure to appear for the pre-dismissal hearing. The Court imposed $150 of the suspended fine and extended the time to comply to February 29, 1997. Another pre-dismissal hearing was set for January 13, 1997.

On January 13, 1997, Appellant failed to appear for the pre-dismissal hearing, failed to submit the alcohol evaluation and quarterly reports and to follow recommendations by TCCS. A warrant was issued for his arrest.

A Show Cause hearing was held on March 12, 1997. Appellant was found to have violated the

[21] Tribal Community Counseling Services, a Tribal program which handled alcohol evaluations, referrals and support services.

Court's prior order by failing to pay his fine of $450; failure to submit an alcohol evaluation from TCCS; failure to submit quarterly reports from TCCS; and failure to appear for a predismissal hearing on January 13, 1997. The Court imposed the suspended sentence of 50 days; the $450 was due immediately; and kept all previous orders of the Court intact.

Appellant filed his Notice of Appeal on March 14, 1997 and requested a Stay of the Sentence. The Stay was granted.

A briefing schedule was set. Briefs were filed and oral arguments were heard on March 20, 1998. Four issues were alleged in the Notice of Appeal.

ISSUES

1. Was Appellant's right to remain silent violated when the Court considered his invocation of that right in response to court questioning?

2. Did the Court err when it considered and found violations for issues not listed in the notice for show cause hearing?

3. Did the Court err when it refused to continue the show cause on Appellant's request?

4. Did the Court err when it imposed all the suspended fines and jail time under the facts of this case and the violations found in this case?

DISCUSSION

ISSUE #1: Was Appellant's right to remain silent violated when the Court considered his invocation of that right in response to court questioning?

Appellant argues that under CTC 56.02 (now CTC 1-5-2) that he should not be required to provide testimony that might incriminate himself in a criminal matter. In the instant case, answering questions concerning his alleged failure to submit reports could be a basis for the offense of Disobedience of a Court Order. When the Court questioned him about the alleged violation, it did not offer him immunity from his testimony. Appellant argues that the Court wrongly attempted to compel him to incriminate himself. Appellant was not called as a witness by either party, but the Court questioned him in regard to the show cause issues and to issues not listed in the summons for show cause. In response, Appellant specifically invoked his right to remain silent. The Court explicitly considered Appellant's lack of testimony when it found Appellant in violation of the prior show cause order.

Appellee argues that other courts (no tribal case law on point was found) have consistently held that probation revocation hearings are not "essentially criminal" and that rights usually attendant to criminal proceedings don't apply. Appellee cites various cases which support the Tribe's position that probationers who violate conditions of their probation should not possess the same rights as those facing criminal charges for which no determination of guilt has been reached. When initially reaching a finding of guilt in a criminal trial, the standard of review is "beyond a reasonable doubt," and the burden is on the government to prove their case. In probation violation hearings, guilt has already been established in the

case and the government may call the defendant to testify as a witness in alleged violations. The government's burden is not as high. The probationer's silence may be considered by the judge in determining if a violation has occurred.

It is the holding of this Court that the defendant's right to remain silent was not violated when the Court inquired as to his compliance with its court order. The burden to be used by the Trial Court at a show cause hearing is the preponderance of the evidence and not beyond a reasonable doubt. Therefore it is within the discretion of the Trial Court to ask the defendant questions about his compliance and to consider his testimony, or lack of testimony, when deciding if he has complied with its order. The defendant has no right to remain silent at post conviction hearings.

ISSUE #2:Did the Court err when it considered and found violations for issues not listed in the notice for show cause hearing?

Appellant cites *John Clark v. CCT* (Col. App. 1996) as holding that Colville Tribal rules state that a defendant is entitled to notice regarding issues to be raised at show cause hearings. In the instant case, Appellant was notified that the issue to be considered at the show cause hearing was his alleged failure to file an evaluation from TCCS. At the hearing, the Court expanded the issues to include the failure to comply with recommendations, failure to file progress reports and failure to pay his fine. Appellant feels that he should be accorded notice in order to prepare his defense.

Appellee argues that a review of the facts will show that Appellant was properly provided with notice of the issues discussed at the show cause hearing.

Appellant appeared at a show cause hearing on July 29, 1996. At that hearing, he was found in non-compliance with the original Judgment and Sentence. The court extended jurisdiction for six months. One condition was that the Appellant comply with recommendations of a certified alcohol program. Failure to comply would require the Appellant to appear at a pre-dismissal hearing on January 13, 1997 to show cause why the suspended sentence should not be reinstated. Appellant received the Order from Show Cause. At the time of the hearing, Appellant and his counsel both failed to appear. The Court found insufficient evidence of compliance and issued a warrant for Appellant's arrest. Both the Order from this hearing and the bench warrant were served on Appellant's counsel. A copy of the order was also served on Appellant.

At the subsequent bail hearing, the Tribes gave notice of the issues they intended to raise at show cause, which included whether Appellant complied with recommendations of an alcohol program. The issues were unopposed by counsel for Appellant.

Nine days later, the show cause hearing was convened. Appellant raised the issue of lack of notice of violation of the condition of non-compliance with an alcohol program. Appellee argues that Appellant had sufficient notice of the issues to be heard at the show cause hearing.

It is the holding of this Court that the Appellant received adequate notice of the issues raised at

the show cause hearing. There is ample evidence to show that the Appellant was given notice that at the predismissal hearing all conditions of the suspended sentence would be discussed at the hearing. The Appellant was put on notice that if he failed to comply with the court order that a show cause hearing would issue to determine if any or all of the suspended portion of the sentence should be reinstated.

ISSUE #3: Did the Court err when it refused to continue the show cause on Appellant's request?

Appellant argues that the general rule of law is that if a party requests a continuance to meet unanticipated issues, the continuance should be granted and failure to do so is abuse of discretion. In the instant case, the issue noted for hearing was the failure to file an evaluation. The record established that an evaluation had been filed. The Court then considered whether Appellant had complied with other aspects of the Judgment and Sentence and Appellant was not prepared to proceed on those issues.

Appellant cited *Cora Pakootas v. CCT*, 1 CTCR 67 (1993) stating that if a rational trier of fact could not reach the finding at issue then the Appellate Court will reverse. Here, the Court found a violation of recommendations of an alcohol program, even though the evaluation did not contain any recommendation. No other evidence was produced. The alcohol counselor did not testify.

Appellee argues that Appellant received sufficient notice of the issues for the show cause and should not have been granted a continuance on those grounds.

It is the holding of this Court that it is within the discretion of the Trial Court to grant or deny continuances. Unless there is a showing of clear abuse of discretion, this Court will not overturn a decision of the Trial Court. A review for an abuse of discretion violation requires that the Court of Appeals must find the Trial Court's actions were manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *Grunlose v. CCT*, AP96-007, 3 CTCR 25, 5 CCAR 26 (1999).

ISSUE #4: Did the Court err when it imposed all the suspended fines and jail time under the facts of this case and the violations found in this case?

Appellant argues that some of the Trial Court's findings of violations should be reversed and the matter should be remanded to the Trial Court to determine the appropriate remedy under CTC 2.4.05.

Appellee argues that there was sufficient evidence contained in the file that Appellant violated the condition of his sentence. There were reports of Appellant's non-compliance with the alcohol program. Appellee concedes that the reports could have been more in-depth, but still maintains that there was sufficient data for the Trial Court to make its determination that a violation had occurred.

It is the holding of this Court that it is in the Trial Court's discretion on how much, if any, of the suspended portion of a sentence is reinstated. Before the Court of Appeals will overturn the Trial Court's decision, there must be shown a clear abuse of discretion and in the instant case, no such showing has been offered. *Grunlose* id. Where the record is void of clear and convincing evidence of abuse of discretion and the where the sentence imposed is within the sentencing limits of the Colville Tribal Code, the Court will not disturb the sentencing of the court below. *Waters v. CCT*, AP96-006, 2 CTCR 69, 25

ILR 6202, 4 CCAR 65 (1998).

ORDER

Based on the foregoing holdings, it is ORDERED that the Trial Court's decision is affirmed and the matter is remanded to the Trial Court for action consistent with this opinion.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Ernest RICKARD, Appellee.

Case Number AP02-002, 3 CTCR 42

6 CCAR 15

[Dawn Reynolds, Office of Prosecuting Attorney, for Appellant.
Tim Liesenfelder, Attorney, for Appellee.
Trial Court Case Number CR 2000-22470]

Decided February 15, 2002.

Before Chief Justice Dupris, Justice Chenois and Justice McGeoghegan

This matter came before the Court of Appeals pursuant to a filing of a Notice of Interlocutory Appeal by Appellant on this date alleging that the Trial Court abused it's discretion by creating a new rule where none had existed before, misinterpreted federal and state rules of procedure and dismissed charges which Defendant did not indicate any specific prejudice to his defense.

Upon review of the record and brief filed by Appellant, the Court of Appeals enters the following decisions:

1. If Appellant is seeking a stay of the proceedings, such stay should be made at the Trial Court. If the stay is denied by the Trial Court, then Appellant may seek relief at the Court of Appeals. Request for Stay is denied.

2. The Trial Court's dismissal of three Abduction charges based on an instant procedural rule adopted in this case is not ripe for appeal. Although the Appellant asked for a stay of the proceedings, we are characterizing the interlocutory appeal as asking this Court to reverse the Trial Court's dismissal of the three Abduction charges.

There is no existing procedural rule that expressly prohibits amending a complaint other than what has been expressed in the Trial Court's decision. The Appellant's request to stay the Trial Court's decision to dismiss the Abduction charges is anticipatory. Notwithstanding the Trial Court's indication that the "Defendant cannot and will not be charged with these new charges,"[22] the Appellant has not attempted to refile such charges and that the Interlocutory Appeal is not properly before us yet. Therefore the Appellant's request for Interlocutory Appeal is denied without prejudice.

It is SO ORDERED.

---

[22] Order Denying Motion to Vacate Order Dismissing Three Counts of Abduction, entered February 15, 2002, by Judge Aycock.

Melissa M. FRY, Appellant,

vs.

Larry E. FRY Jr., Appellee.

Case Number AP01-008, 3 CTCR 43

6 CCAR 16

[Parties appeared *pro se*.
Trial Court Case Number CV-CU-2001-21123]

Hearing held February 15, 2002. Decided March 5, 2002.
Before Chief Justice Dupris, Justice Bonga and Justice Chenois

Dupris, J. for the Panel

This matter came before the Court of Appeals pursuant to a filing of a Notice of Appeal by Appellants on August 20, 2001. A bond status hearing was held February 15, 2002 to determine if bond had been posted and it not, what the next procedure should be.

An inquiry to the Appellant in open Court revealed that bond had not been posted.

The Court of Appeals determined that the following procedure should be followed:

1. Appellant shall either post bond of $300.00 or obtain a modification of the bond amount within two weeks and show proof to the Court of Appeals, i.e. by March 1, 2002. The bond shall be posted with the Trial Court or the modification obtained from the Trial Court.

2. If the bond or modification order is posted by March 1, 2002, and proof is give to the Court of Appeals, an order setting out a briefing schedule will be issued.

3. If the bond or modification order is not posted by March 1, 2002, an order dismissing the appeal will be issued.

Upon review of the file and inquiry to the Trial Court, it is found that the bond has not been posted by Appellant. No proof of posting of the bond was filed with the Court of Appeals. On February 15, 2002, an Order was filed from the Trial Court which denied modification of the bond amount.

Therefore, it is the decision of this Court that this matter should be dismissed as the appeal has not been perfected by Appellant.

It is SO ORDERED.

Daniel HOOVER, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP99-001, 3 CTCR 44

[Tim Brewer, Office of the Reservation Attorney for the Colville Confederated Tribes; Eric Richter, Henke & Richter for the Estate of Daniel Hoover.

Argued July 16, 1999. Decided March 18, 2002.
En Banc Before: Chief Justice Anita Dupris, Justice Elizabeth Fry, Justice Dennis Nelson, Justice Howard Stewart, Justice Earl McGeoghegan, Justice David Bonga, Justice Edythe Chenois, Justice Conrad Pascal, and Justice Wanda Miles, who contributed greatly to this opinion. Justice Miles passed away on November 12, 2001.

Trial Court Case Number CV96-16042]

Fry, J.

Appeal of injunction restraining non-Indian appellant from developing real property located within the Hellsgate Game Reserve on the Colville Confederated Tribes Reservation without complying with provisions of the Tribes' Land Use Ordinance. We affirm.

PROCEDURAL HISTORY

Non-Indian Daniel Hoover (Hoover) filed an action in federal district court alleging the Colville Confederated Tribes (Tribes) lacked jurisdiction to regulate fee lands owned by him and located within the Colville Confederated Tribes Reservation. The district court determined the Colville Tribal Court had authority to determine its jurisdiction regarding Mr. Hoover's claim and ordered him to exhaust those remedies available in Tribal Court before seeking relief in the federal system.

The Tribes subsequently filed an action in Tribal Court seeking an injunction to restrain Hoover from developing his real property without complying with the provisions of the Colville Land Use and Development Code. The Tribal Court granted an injunction and Hoover appealed to this court arguing that the Tribes are without legal authority to regulate non-Indian fee lands located within their reservation.

Daniel Hoover died in 2000. The personal representative of his estate, Jerry Thon, has substituted in as plaintiff.

JURISDICTION

This Court has personal and subject matter jurisdiction of this case pursuant to the Constitution of the Colville Confederated Tribes[23] and the Colville Tribal Code[24]. *Also see Colville Confederated Tribes*

[23] AMENDMENT X - JUDICIARY - Article VIII Judiciary - Section 1. There shall be established by the Business Council of the Confederated Tribes of the Colville Reservation a separate branch of government consisting of the Colville Tribal Court of Appeals, the Colville Tribal Court, and such additional Courts as the Business Council may determine appropriate. It shall be the duty of all Courts established under this section to interpret and enforce the laws of the Confederated Tribes of the Colville Reservation as adopted by the governing body of the Tribes. The Business Council shall determine the scope of the jurisdiction of these courts and the qualifications of the judges of these courts by statute.

v. Stockwest, CV86-624, 21 ILR 6075 (1984) and *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 12 ILR 1035 (1985).

STANDARD OF REVIEW

The question of jurisdiction is entirely one of law. The standard of review for questions of law is non-deferential to findings and conclusions of the trial court and is de novo. *CCT v. Naff*, 2 CCAR[25] 50, 22 ILR 6031 (1995), *United States v. McConney*, 726 F.2d 1195 (9th Cir. 1984).

STATEMENT OF RELEVANT FACTS[26]

History

Prior to the presence of the white man, the ancestors of the tribes and bands of the Colville Confederated Tribes[27] occupied an area comprised of what is now Eastern Washington, Southern Central British Columbia, and portions of Idaho and Oregon.

In 1872, President Grant created the Colville Confederated Indian Reservation by Executive Order - without a treaty and without the consent of the tribes and bands of Indians residing in the area. The original reservation was over three million acres in size, but was reduced to its present size of approximately one million four hundred thousand acres under an agreement dated May 9, 1891, when gold was discovered in the northern half of the Reservation.

The Reservation is located within portions of Okanogan and Ferry Counties in north central Washington State. Originally, all the land within the Reservation was held in trust for the Tribes. Lands

---

[24] Colville Tribal Code 1-1-70 Jurisdiction defined. The jurisdiction of the Tribal Court and the effective area of this Code shall include all territory within the Reservation boundaries, and the lands outside the boundaries of the Reservation held in trust by the United States for Tribal members of the Tribes, and it shall be over all persons therein; provided, however, that criminal jurisdiction of the Court shall not extend to non-Indians...

Colville Tribal Code 2-2-1 Jurisdiction Generally. The Court shall have jurisdiction of all suits involving persons residing within the Tribal jurisdiction as defined by this Code and all other suits in which a party is deemed to have consented to the jurisdiction of the Court, or in which the events giving rise to the action occurred within the Tribal jurisdiction as defined by this Code.

[25] CCAR is the Colville Court of Appeals Reporter, available through the Colville Tribal Court of Appeals.

[26] The facts in this case are uncontroverted. Although Mr. Hoover did not challenge the trial court's Findings of Fact in his Notice of Appeal, he did so in his brief. Mr. Hoover informed the Court during oral argument that he did not contest the Findings of Fact. We also note that Mr. Hoover controverted none of the Tribes' expert witness testimony. The Statement of Relevant Facts is taken from the Findings of Fact entered by Judge Wynne and is, in most instances, verbatim.

[27] The Colville Tribes consist of twelve distinct Tribes or Bands: San Poil, Nespelem, Colville, Okanogan, Methow, Wenatchee, Chelan, Entiat, Moses, Palouse, Chief Joseph Band of Nez Perce, and the Lakes.

were later allotted and homesteaded within the Reservation as a result of the allotment policies of the early twentieth century. Approximately seventy-nine percent (79%) of the reservation lands are now held in trust for the Tribes and its members. The remainder is held by federal agencies or is owned in fee by Indians and non-Indians.

The Hellsgate Reserve

In 1977, the Tribes designated the southeast corner of the Reservation as the Hellsgate Game Reserve. The area was chosen because of its remote character, limited access, limited development, small population, natural geographic boundaries and critical range habitat. It is critical winter range habitat for deer, elk, and other wildlife.

The Reserve is bordered on the south and east by the Columbia River, on the west by the San Poil River arm of Lake Roosevelt and on the north by Silver Creek Road. It is situated entirely within the exterior boundaries of Ferry County and contains slightly more than one hundred thousand acres.

Approximately 87% of the land within the Reserve is in trust status, 11% of the land is in non-Indian and Indian fee ownership, and the remaining 2% is owned by the Federal Bureau of Reclamation.

The Reserve contains no cities, towns, or areas of concentrated development or settlement. At the time of hearing, there were fourteen permanent homes and five summer cabins within its boundaries. Almost all the buildings existed prior to the Tribes' designation of the areas as a reserve and enactment of its Land Use and Development Code.

The Reserve is managed specifically for conservation of wildlife and native plants. The area plays an integral role in preserving game populations and maintaining the hunting and gathering traditions of the Tribes. It consists of diverse topography and habitat with rugged hill country, dry land range, clear streams and coniferous forests. It contains abundant and diverse wildlife, including elk and deer. Tribal members, whose average annual income is approximately $7,000.00, depend significantly on wildlife and plant life within the Reserve for cultural needs and sustenance.

The Tribes have managed and regulated the Reserve to preserve its natural and cultural values. They have implemented strict wildlife management practices, including restriction of camping and off-road vehicle use.

The Tribes have actively implemented a policy to reacquire fee property within the Reservation, and the Reserve has been targeted as a priority for purchases in order to enhance wildlife habitat. The Reserve has reacquired 9,272 acres within Reserve boundaries since 1992 at a cost of over five million dollars. The Bonneville Power Administration, an agency of the federal government, has assisted in funding these purchases through authorization of the Pacific Northwest Electric Power Planning and Conservation Act,[28] which specifically provides for land acquisition and wildlife enhancement.

[28] 16 U.S.C. 839, P.L. 96-501, December 5, 1980, 94 Stat. 1333.

The Hellsgate Reserve plays a significant role in the continuation of the Tribes' culture. It is a place designated to preserve their hunting and gathering traditions and allow for extended family camps. The camps are a valued part of tribal life and cultural survival; traditions which have passed down through generations.

The Reserve contains a variety of plants[29] used by tribal members for food, as medicine, and in traditional ceremonies required for continued survival of the Tribes' culture.

The plants and animals protected and preserved through comprehensive management of the Reserve are not only a food source, but also play a vital and irreplaceable role in the cultural and religious life of tribal members. Annual medicine dances, root feasts and ceremonies incorporate animal and plant life found within the Reserve. These dances, feasts, and ceremonies play an integral role in the well being and survival of the Tribes and their members.

Management and Regulation of the Reserve

The Tribes have managed and regulated the Hellsgate Reserve to preserve its natural and cultural values. Wildlife and fish are important to the Tribes' culture and provide an important food source to its members. The Tribes expend about three million dollars per year managing game, fish, and other species found within the Reservation. A significant portion of this money is earmarked for management activities and land acquisition within the Reserve.

In 1977, the Tribes, in cooperation with the United States Department of the Interior, acquired fifty head of elk from the Wind Caves National Monument in South Dakota to re-establish an elk herd on the Reservation for supplementation of subsistence deer herds. The Tribes' Fish and Wildlife Department determined the Hellsgate area was best suited for the elk, based upon extensive winter range habitat of the area. Since then, the elk, subject to comprehensive tribal management, have flourished, greatly increasing in number within the Reserve and in other areas of the Reservation. Estimates place the size of the herd within the Reservation at over eight hundred animals.

Hunting and fishing in the Reserve are limited. There is, for instance, a six-month subsistence deer season in effect elsewhere on the Reservation, while deer hunting within the Reserve has been limited to an annual nine-day buck hunt. Elk hunting, at the time of hearing, was limited to a restrictive lottery system. The Tribes do not permit non-member hunting on trust and fee lands within the Reserve. The no-hunting restriction on fee lands is through implementation of an intergovernmental agreement with the State of Washington.

In addition to restriction of hunting within the Reserve, the Tribes conduct wildlife management practices such as tagging and monitoring big game, surveys, raptor nesting site protection, and wilderness recreation restrictions. Tribal resource and law enforcement personnel devote significant portions of their

[29] Culturally important plants include black camas, wild carrots, Indian potatoes, willow, rose bush, pine nut, black moss, huckleberry, and chokecherry.

time to management activities in the Reserve. These activities are funded by trust funds derived primarily from sales of timber and from grants and contracts through the Indian Self-Determination Act.

The Tribes permit timber harvests within the Reserve, provided they are conducted in a manner consistent with tribal wildlife management practices. Timber resources represented the largest revenue source for the Tribes at the time of hearing. All timber sales go through the Integrated Resource Management Planning (IRMP) process[30] designed to minimize harm to the environment and to ensure compatibility with the purposes of the Reserve. The Tribes review timber harvest sales on fee lands within the Reserve in accordance with an intergovernmental agreement with the Washington State Department of Natural Resources and the Washington State Department of Ecology.

In 1992, the Tribes, Ferry County and Okanogan County entered into an Intergovernmental Land Use Planning Agreement (ILUPA) which provided for resolution of land use conflicts for private lands and a joint permit process for lands within Reservation boundaries. As a result of the agreement, the Tribes and the counties agreed on permit conditions for over two hundred developments and land use changes within the Ferry County side of the Reservation. In 1997, Ferry County unilaterally withdrew from the agreement, which remains in effect between the Tribes and Okanogan County.

Ferry County does not fund, participate in, or assist in the management or development of natural resources or wildlife within the Reserve. Land use plans for Ferry County treat the Reserve no differently than other rural areas within the county. It provides no zoning controls comparable to those of the Tribes.

Land Use and Development Code

In November 1978, the Colville Business Council[31] enacted an Interim Land Use and Development Ordinance. In 1988, following an extensive resource inventory, data collection, and public meetings, the Council adopted a Comprehensive Plan for the Reservation. The Plan requires environmental and cultural review of all proposed development within the Reservation.

Prior to the adoption of the Land Use and Development Code in 1992, the Tribes issued public notices and held public meetings to solicit comments from both Indian and non-Indian communities. Land planning efforts included participation by the Reservation community and county governments.

The Code established zoning within the Reservation, including commercial, industrial, residential, special requirement, rural, forestry, game reserve, and wilderness. The zones set forth different levels of development and regulation consistent with the community values established in the Comprehensive Plan.

---

[30] See Page 9 for a description of the IRMP process.

[31] The Colville Business Council is the 14-member governing body of the Colville Confederated Tribes, with duties established by the Colville Tribal Constitution, Article II - Governing Body.

The Code requires all persons proposing subdivision and development within the Reservation, including the Reserve, to apply for a permit through the land use review process. Proposed land use activities are reviewed and permits are issued by the Colville Planning Department to ensure compatibility with the Code. There is provision for review of adverse decisions by the Land Use Review Board. Individuals questioning an appeal by the Land Use Review Board decision may seek judicial review in Tribal Court, a constitutionally separate branch of tribal government.

The Tribes permit a wide variety of development in highly populated areas of the Reservation having an adequate infrastructure. Some uses in less populated areas are severely restricted. In order to protect and provide for the general welfare of Reservation residents and to preserve the continued existence of the Tribes, a balance was achieved between the interests expressed by the general public and the protection of important cultural values. As a result, the Tribes have restricted development in certain areas. The Reserve is one such area and remains largely uninhabited and undeveloped in conformity with the Code.

The Tribes incorporate a holistic objective to planning based on ecosystems, watersheds, and natural boundaries. In 1994, the Tribes adopted an Integrated Resource Management Plan (IRMP) based on their community values. The IRMP is an interdisciplinary method of evaluating impact to ecosystems and watersheds as a whole. The Plan has three phases, 1) data collection and analysis of past and current natural resources, 2) drafting a management document based upon membership values and desires, and 3) implementation and monitoring. A basic premise of the IRMP is that tribal members are experts when it comes to the use of their land.

Hoover's Development

Daniel Hoover purchased 72.75 acres of land within the boundaries of the Reserve in 1987. The land had been an allotment of a tribal member and was converted to fee status in 1925 under the Bureau of Indian Affair's policy of forced fee patents.

Hoover built a residence on the property without notifying tribal officials and subdivided the land through Ferry County, selling two 20-acre parcels to non-Indians. Each parcel was developed with a single recreational-use cabin. One owner obtained a tribal permit to build with conditions for mitigating the impact on wildlife. In 1991, tribal officials became aware of the non-permitted land use by Hoover and notified him in writing of tribal land use requirements.

Hoover's remaining property consists of 32.75 acres adjoining tribally managed shorelands on Lake Roosevelt.[32] In 1992, Hoover sought to develop his property further by constructing a second residence without obtaining tribal permits. The Tribes and Ferry County attempted to resolve the

---

[32] Lake Roosevelt is a lengthy man-made lake created by the construction of Grand Coulee Dam during the 1930's. The dam, in combination with others further down the Columbia River, virtually eliminated the annual salmon runs which had been a substantial food source for the Tribes.

permitting issues through an intergovernmental agreement mediation process (ILUPA). The process was cut short when Hoover sued the Tribes and Ferry County in federal court.

In December 1995, the Tribes became aware that Hoover was again attempting to subdivide his property further, without going through the Tribes' permitting process. The proposed subdivision of four lots comprised a "major sub-division" under the Tribes' Land Use and Development Code and required a conditional use permit. Under the Ferry County Zoning Code, it was considered a "minor sub-division," requiring little review and no evaluation of how it would impact the Reserve.

The Tribes without rezoning, a variance, or conditions limiting uses on its site would not have approved the proposed development. Hoover was notified in February 1996 that acting to subdivide, sell, and develop lots within the Reserve without obtaining requisite tribal permits constituted a violation of tribal law.

Hoover ignored the notice from the Tribes and submitted a final subdivision plat to Ferry County for recording. He indicated he planned to sell lots in a shoreline housing development without applying for approval from the Tribes.

Impact of uncontrolled fee land development with the Reserve

The population of north central Washington, including that of the Reservation, is growing rapidly. Ferry County more than doubled its population between 1970 and 1997, according to census data. Planning and zoning regulations were enacted by the Tribes to help address the impact of growth within the Reservation while attempting to preserve traditional community values.

Uncontroverted credible expert testimony and scientific studies presented at the hearing strongly indicate that unchecked increases in housing development within the Reserve will significantly adversely impact wildlife species and native plants. Specifically, species such as deer, elk, bear, cougar, and bald eagle are sensitive to human habitation and will decline in numbers with increased and uncontrolled housing development. Wildlife studies show increased housing will result in fewer mule deer. Studies also show forest and songbird species will decrease in number and bald eagles will nest further from shorelines when nearby housing developments appear.

Uncontrolled development will increase the number of roads, traffic, and off-road activity - all of which impact native wildlife and plants. Roads cause increased runoff and dust, which impact streams and watersheds. Roads divide wildlife corridors and create barriers to migration routes. Roads kill natural plant life and spread non-native noxious weeds, which crowd out native plants.

Increasing housing without land use controls will result in more septic systems, noise, dust, artificial lighting, wood use, smoke, and pets in natural areas. These factors negatively impact wildlife habitation.

The impact resulting from lack of land use control on fee lands within the Reserve is magnified because the fee lands are disproportionately located in low-lying areas adjoining water. Low elevation riparian lands within the Reserve are important components of the arid ecosystems on which wildlife

depend, and are the most important winter range for deer and elk.

Native plants and animals within the Reserve are essential to ceremonies and other traditions of the Tribes. Tribal cultural practices such as camping, hunting, vision quests, and gathering medicines are not compatible with uncontrolled development and increased housing density. Uncontrolled development places at risk important components of the Tribes' cultural and religious traditions.

Unregulated development of fee lands within the Reserve would significant impact adjoining tribal trust lands. Increased car exhaust, wood smoke, water use, waste discharge, human activity, traffic, dust, garbage, and erosion from grading and construction, do not stop at fee land boundaries. The inability of the Tribes to apply comprehensive planning regulations to fee lands within the Reserve will substantially impair the Tribes' ability to preserve the general character, cultural and religious values, and natural resources associated with the Reserve.

The inability of the Tribes to fairly and impartially enforce comprehensive planning regulations to all lands within the Reserve presents a clear danger to the continued cultural identity and existence of the Tribes, and threatens the health and welfare of their members.

ISSUE

The sole issue before this court is whether real property owned by a non-Indian in fee is subject to zoning regulations of the Tribes when the property is within a Game Reserve situated entirely within the exterior boundaries of the Colville Confederated Tribes Reservation.

DISCUSSION OF ISSUE

The recently decided case of *Atkinson Trading Co. Inc. v. Shirley et al*., No. 00454 (U.S. 05/29/2001) more clearly defined the extent of jurisdiction Indian tribes possess over non-Indians on fee lands within the exterior boundaries of Indian reservations. The United States Supreme Court continues to hold that inherent sovereign powers of an Indian tribe do not extend to activities of non-members of the Tribe within reservation boundaries. *Atkinson*, *supra*, does recognize the exceptions to this general rule as set forth in *Montana v. United States*, 450 U.S. 544 (1981), which states, "First, (a) tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationship with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.…Second, (a) tribe may…exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana* at 565.

In addition to the foregoing exceptions, the Court has long held that Indian tribes have jurisdiction over non-Indians when expressly authorized by Congress. *See Montana*, 450 U.S. 544, 564, 101 S.Ct. 1245, 1258.

We have closely scrutinized the facts of this case and the jurisdictional requirements determined by the Supreme Court in matters such as this. For the following reasons, we are of the opinion that the

Tribes possess the necessary authority to regulate the use of Hoover's fee land within the Reserve.

Express Delegated Authority

Federal courts have found congressional delegation of authority for tribes. *See Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 229 F.3d 1210 (9th Cir. 10/03/2000), (hereinafter *Bugenig I*), and *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 09/11/2001), (hereinafter *Bugenig II*), *United States v. Mazurie*, 419 U.S. 544 (1975), *Rice v. Rehner*, 463 U.S. 713 (1983). The statutory language delegating the requisite authority was viewed by Justice White, writing in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), wherein he cited two statutes where Congress expressly delegated authority to Indian Tribes. The first is 18 U.S.C. §1161, which authorizes tribes to make laws regarding liquor sales in "Indian Country." The Act defines Indian Country as including "all lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through reservations."

The second statute cited by Justice White is the Clean Water Act, 33 U.S.C. §1377 *et seq*. It authorizes Indian tribes to be treated as states in setting clean water standards for federal Indian reservations. The terms "federal Indian reservation" is defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 33 U.S.C. §1377(h).

Bugenig I labeled the phrase "notwithstanding the issuance of any patent…" as the "gold standard" in finding the requisite delegation of authority. *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1219 (9th Cir. 2000). The Clean Water Act meets the "gold standard" because it includes the requisite phrase. The Act expressly delegates congressional authority to those Indian tribes able to meet certain requirements. Those tribes meeting the requirements have authority to establish water quality standards (Section 1313) and to determine standards for rural septic systems for the entire reservation, including fee lands owned by non-Indians (Section 1254(q)). The Act includes direction for the state or tribe to establish, for approval by the Administrator, procedures, processes, and methods (including land use requirements) to control sources of water pollution. Section 1324(a)(2).

The Tribes, having met requirements to be "treated as a state" under the Clean Water Act,[33] possess the equivalent of state jurisdiction for the limited purpose of regulating clean water use for all lands within the exterior boundaries of the Colville Reservation, including non-Indian fee lands. The explicit authority of the Clean Water Act confers jurisdiction upon the Tribes to regulate water quality use of non-member fee lands within the boundaries of the Reserve regarding water quality.

The Court in *Bugenig v. Hoopa Valley Tribal Council, et al*., 229 F.3d 1210 (9th Cir. 2001) or

[33] In accordance with the requirements of 33 U.S.C. 1324(a)(2), the Tribes have adopted a land use policy implemented through their zoning ordinance. The provisions of the ordinance affecting water quality within the Reservation are therefore valid and enforceable against all persons within the exterior boundaries of the Reservation. As such, the Tribes are able to regulate water quality standards affecting Hoover's property within the Reservation.

Bugenig II, noted that *United States v. Mazurie*, *supra*, "instructs that any determination that Congress delegated to the Tribe authority…involves two distinct questions. *First*, we must be sure that Congress…actually delegated regulatory authority to the Tribe. *Second*, if we conclude that Congress did delegate such authority, we must analyze whether exercising that delegation was lawful."

Congress has clearly delegated its authority to regulate water quality on federal Indian reservations to tribes meeting certain requirements. Challenges to its authority to do so have been rebuffed. *See Montana v. United States Environmental Protection Agency*, 137 F.3d 1135 (9th Cir. 1998), and *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996).

The Tribes received authority from the federal Environmental Protection Agency in 1991 to enact water quality regulations for the entire reservation in accordance with the provisions of the Tribes' Constitution and Codes. This included fee lands owned by non-Indians within the boundaries of the Reservation. The Tribes were delegated authority to zone for control of water quality standards over Indians and non-Indians on the Colville Indian Reservation. We would be well advised to allow the Tribes to exercise zoning controls over land use even as they are appropriately exercising authority over water quality on their Reservation. *Cavenham Forest Products, Inc. v. Colville Confederated Tribes*, 1 CCAR 39 (Colville Confederated 02/22/1991). (recognizing Tribes' authority to require compliance with the Tribes' Land Use Ordinance by a non-Indian business on the Reservation) The *Cavenham* decision was based upon general principles of tribal sovereignty and applicability of the tests in the *Montana* case.

Yet, there is an additional consideration in determining whether the Tribes' jurisdiction to regulate non-member fee land within the Reserve goes beyond the Clean Water Act. For this, we look to the *Montana* exceptions, and actions of the United States government in determining the character of Reserve.

The *Montana* Exceptions

The first *Montana* exception (consensual relationships) is not applicable to this case.

The second exception authorizes tribal regulation of "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana* at 565. The findings of fact show clearly that the requirements of the second exception have been fulfilled inasmuch as Hoover's proposed conduct (that of developing land for construction of additional residences within the Reserve) would affect the health and welfare of the members of the Tribes.

Health and Welfare

The average annual income of tribal members is thousands of dollars below the national poverty level and their employment rate is near fifty percent.[34] Reduced economic circumstances and cultural

[34] Annual income is $7561 and the unemployment rate is 48%. Finding of Fact No. 41.

traditions cause many members to depend on subsistence hunting of large game animals, primarily deer and elk. The dependence upon subsistence hunting is greater now than before construction of Grand Coulee Dam that, together with the construction of other dams downstream on the Columbia River, destroyed the salmon runs which had previously provided a substantial subsistence food source.

Hoover's planned development would have an impact on the ecology and environment because any increase in the number of homes within the Reserve would directly affect the deer and elk population. Were he granted permission to construct his development, the Tribes would have no ground to prevent other non-member fee owners from developing their properties within the Reserve. It is clear from the evidence adduced at trial that the Tribes had little choice in preventing Hoover from proceeding. They either had to allow him and others to build in the Reserve, and thus destroy or greatly diminish an important, necessary food and culture source, or prevent him from building and thus preserve a valuable source of subsistence hunting and cultural participation.

In addition to game animals, tribal members use many varieties of plants within the Reserve as a food source. The importance of the plants lies in their use for maintaining and preserving cultural traditions

Health and Welfare - Spirituality and Cultural Preservation

The trial court found

> Plants and animals preserved through comprehensive management in the reserve are not only a source of food, but also play a vital and irreplaceable role in the cultural and religious life of Colville people. Annual medicine dances, root feasts, and ceremonies of the Longhouse religion all incorporate natural foods such as deer and elk meat and the roots and berries found in the Hellsgate Reserve. The ceremonies play an integral role in the current well being and future survival of Colville people, both individually and as a tribal entity. Finding of Fact 36.

Bugenig II is the only federal court in our experience to refer to the spiritual health of a tribe. It is well known in Indian Country that spirituality is a constant presence within Indian tribes. Meetings and gatherings all begin with prayers of gratitude to the Creator. The culture, the religion, the ceremonies - all contribute to the spiritual health of a tribe. To approve a planned development detrimental to any of these things is to diminish the spiritual health of the Tribes and its members.

The spiritual health of the American Indian is bound with the earth. Their identity as a people becomes invisible in the city, away from nature. It is the land and the animals which renew and sustain their vigor and spiritual health. The nature of the spirituality of the American Indian was well-expressed by Luther Standing Bear when he said:

> Nothing the Great Mystery placed in the land of the Indian pleased the

> white man, and nothing escaped his transforming hand. Wherever forests have not been mowed down, wherever the animal is recessed in their quest for quiet protection, wherever the earth is not bereft of four footed life - that to him is an 'unbroken wilderness.'
>
> But, because for the Lakota there was no wilderness, because nature was not dangerous but hospitable, not forbidding but friendly, Lakota philosophy was healthy--free from fear and dogmatism. And here I find the great distinction between the faith of the Indian and the white man. Indian faith sought the harmony of man with his surroundings, the other sought the dominance of surroundings.
>
> In sharing, in loving all and everything, one people naturally found a due portion of the thing they sought, while, in fearing, the other found need of conquest.
>
> For one man the world was full of beauty; for the other it was a place of sin and ugliness to be endured until he went to another world, there to become a creature of wings, half-man and half-bird.
>
> Forever one man directed this Mystery to change the world He made; forever this man pleaded with Him to chastise his wicked ones; and forever, he implored his God to send His light to earth. Small wonder this man could not understand the other.
> But the old Lakota was wise. He knew that man's heart, away from nature, becomes hard; he knew that lack of respect for growing, living things soon led to his lack of respect for growing, living things soon led to his lack of respect for humans, too. So he kept his children close to nature's softening influence.[35]

These words describe not only the faith and spirituality of the Lakota, but of all Indian peoples. It is the "harmony of man with his surroundings" that the Tribes seek in maintaining the Reserve in a state compatible with nature.

---

[35] Native American Wisdom, 1991, published by Classic Wisdom New World Library, compiled by Kent Nerburn, Ph.D. and Louise Mengelkoch, M.A. The quotation is on pages 47 and 48.

The evidence is highly persuasive that the encroachment of human habitation would have a detrimental effect on the animals, plants, and herbs used for sustenance, medicinal, and ceremonial purposes - the continued existence of which is vital to the spiritual health of the Tribes and their members.

Implicit Authority

The United States Supreme Court has clearly stated that, aside from the *Montana* exceptions, Indian tribes may regulate non-member activities on reservations only when Congress has explicitly granted the tribes explicit authority to do so. We believe this approach unduly restrictive because it ignores the clear reality of circumstantial evidence. In almost all matters, courts should look at the totality of circumstances rather than seeking a specific mantra (i.e. "notwithstanding the issuance of any patent")[36] and we see no rational reason to do otherwise here.

The Tribes' action in denying Hoover permission to develop his properties can be affirmed, at least in part, because of its authority under the Clean Water Act. Further analysis is instructive.

The Pacific Northwest Electric Power Planning and Conservation Act

Particularly germane to this case are the millions of dollars the federal government has provided the Tribes to purchase 9,272 acres of fee lands within the Reserve for the purpose of wildlife habitat enhancement.

The money for repurchase of fee lands within the Reserve[37] was appropriated by Congress and distributed through the Bonneville Power Administration, an agency of the federal government. Congressional funding and authorization of this program is through the Pacific Northwest Electric Power Planning and Conservation Act of 1984, 16 U.S.C. 839 *et seq*. (hereinafter PNEPPCA).

The Act authorizes development of "regional plans and programs related to energy conservation, renewable resources, other resources, and protecting, mitigating, and enhancing fish and wildlife resources…." 16 U.S.C. §839(3)(A).

---

[36] *See Bugenig I,* at page 1219.

[37] It should be noted that the repurchase monies have been appropriated for only lands within the Reserve. There is no record in this case of federal monies being used for repurchase of lands outside the Reserve but within the Reservation.

The Reserve has been an ideal candidate to satisfy one of the Act's intended goals - the enhancement of fish and wildlife habitat. Funds have been appropriated through PNEPPCA to the Tribes for the purpose of protecting "renewable resources…and…enhancing fish and wildlife resources" within the Reserve. In accordance with a five-party agreement[38] with federal agencies and the Spokane Tribe of Indians, the Tribes retain primary management authority of the portions of Lake Roosevelt within the Colville Indian Reservation. This includes Hoover's shoreline property.

Zoning Conflicts

The Clean Water Act expressly authorizes the Tribes to regulate water quality and sewer systems on the reservation, including the Reserve. We have found no other express congressional authority for the Tribes to regulate non-member fee lands. Arguably, this means all other zoning authority to regulate non-member fee lands within the Reserve resides with Ferry County. We see this as unworkable. Ferry County unilaterally withdrew from participation in the successful Interim Land Use Planning Agreement when Hoover filed his complaint in federal court. Ferry County has since approved development within the Reserve that is incompatible with the goals of the Tribes and federal government in maintaining the area in its natural pristine condition. It is well known in Indian Country that county governments do not, as a general rule, cooperate with Indian Tribes and do not provide the same level of services within reservations as they do in other areas of a county. We do not believe it realistic to expect Ferry County Commissioners to be sympathetic with the Tribes' goal to regulate development within the Reserve in accordance with its land use regulations.

What then is the role of Ferry County regarding its zoning regulations applicable within the Reserve as to lot size and other building regulations? What is its interest in regulating zoning within a hundred thousand-acre game reserve, and how can it effectively adhere to its comprehensive plan when it does not have the authority to issue water quality regulations?

Clearly, the interests of Ferry County within the Reserve are minimal and are insignificant compared to those of the Tribes. The Tribes have multiple interests in the Reserve, not the least of which is retaining its culture, physical and spiritual health and welfare.

Again, we are of the opinion we should look at the totality of circumstances. We see the circumstances as this - the Tribes have express delegated authority to regulate water quality within the Reservation. The Tribes have enacted a Comprehensive Land Use and Development Code that is neutral in its application to Indians and non-Indians. The Tribes have closed the Reserve to unrestricted development and actively work to enhance its wildlife. The Reserve has a "vital and irreplaceable role in the cultural and religious life of Colville people." The large game animals within the Reserve are an important food source for the Colville people. Finally, Congress has appropriated millions of dollars for

[38] The Lake Roosevelt Cooperative Management Agreement participating parties consist of the National Park Service, the Bureau of Reclamation, the Bureau of Indian Affairs, the Spokane Tribe of Indians, and the Confederated Tribes of the Colville Indian Reservation.

purchase of fee lands within the Reserve in order to help maintain the area in a natural state.

What are the interests of Ferry County vis-à-vis the Tribe? The Reserve is comprised of over one hundred thousand acres with less than twenty-five residential structures within it. Access to these permanent and summer homes is by a single road that traverses the length of the reserve. The Colville Tribal Police Department provides police protection. Emergency medical services are provided by the Colville Tribal Emergency Services.

Most of the structures, including Hoover's proposed development, are at or near the end of the road. Other than occasional road maintenance and sporadic police protection, the County appears to have little presence or interest in the Reserve. It does not appear to have any interest in determining the character of the land and certainly none in preserving the pristine nature of the land.

Characterization of the Reserve

The Tribes' ancestors and members have sustained themselves from the land for thousands of years. They harvested the roots and the berries from the plants for food and medicine; they caught salmon from the Columbia River, and they killed deer for meat. In 1977, with the Columbia River dammed and the salmon long gone, the Tribes acquired fifty head of elk to establish a large game animal to supplement the deer herds.

The elk were released in the Hellsgate area (the Reserve) because it was best suited to survival of the herd. This is the first record of initial efforts to characterize the area as a game reserve. The herd had now grown to over eight hundred animals and is subject to a closely regulated annual hunt.

In addition to introducing the elk herd, the Tribes and the federal government, for over ten years, have participated in a land buy-back program within the Reserve. The purpose of the program is to purchase fee lands and return them to their natural state. Over nine thousand acres have been purchased for this purpose- primarily with federal funds. The Tribes and the federal government are in the midst of a long-range plan to define and characterize the area as a natural habitat for plants and animals.

The Tribes, in addition to the buy-back program, have developed land use regulations for the Reserve. Public notice and public hearings were held prior to the adoption of the regulations. An appeals process with access to the tribal court was allowed. The regulations apply equally to tribal members and non-members - there is no preferential treatment.

The record is devoid of Ferry County's long-range plans for fee lands within the Reserve. However, a letter from the Ferry County Prosecuting Attorney dated August 12, 1991[39] was written in response to the Tribes' request for comments on its proposed Land Use and Development Code. It implies the County considered Hoover's property, and that of other non-Indians near it, to be an "open area." While encouraging an intergovernmental agreement be finalized (which subsequently occurred in the

[39] Exhibit 90 of the evidence introduced at trial.

form of ILUPA), the Prosecuting Attorney urged the Tribes not to adopt the proposed Code as "there may be areas where enactments by other entities afford better protection of the environment and more orderly growth management."[40] We have seen no evidence that this has occurred in the ten years since the letter was written.

We deduce from the record that there will be no additional land becoming available for development within the Reserve and that more fee lands will be purchased from non-Indians to be returned to their natural state. The result of this is predictable - services provided by Ferry County to non-Indians owning property in the Reserve will be diminished, along with the County's interest in the property. This will have little impact on non-Indians in the area, as public services such as fire and ambulance are being provided by the Tribes.

CONCLUSION

The trial court correctly entered its Order permanently enjoining Daniel Hoover and those acting in concert with him from developing, improving, or otherwise changing the land use of his property within the Hellsgate Reserve without first obtaining the necessary permits from the Colville Tribes in conformity with the provisions of the Colville Land Use and Development Code. The order is AFFIRMED.

Robert SIMMONS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES and

J. D. SIMMONS, Appellees.

Case Number AP99-010, 3 CTCR 45

6 CCAR 30

[Theodore J. Schott, Attorney, for Appellant/father; David Ward, Office of the Prosecuting Attorney, for Appellee. Ucho M. Umuolo, Office of the Public Defender, for Appellee/ Joseph D. Simmons.
Trial Court Case Number JV99-1900 to JV99-19006]

Argued May 19, 2000. Decided April 15, 2002.

Before Presiding Justice Dupris, Associate Justice Nelson and Associate Justice Pascal.

Dupris, Chief Justice. for the panel.

---

[40] *Ibid.*

SUMMARY OF PROCEEDINGS

On February 20, 1998, The Colville Tribes (hereinafter Tribes) was notified that the federal government and Washington State were declining to prosecute the Appellee, Joseph D. Simmons and that the case was more appropriately handled in the Colville Tribal Court.

On June 4, 1998, the Tribes filed a criminal complaint in the Colville Tribal Court alleging that Joseph Dale Simmons committed certain offenses between the period of September 1995 through June 1996. Mr. J.D. Simmons' birth date is August 1, 1979. At the time the complaint was filed, he was eighteen (18) years of age. He was sixteen (16) years old at the time of alleged offenses.

On April 30, 1999, the Chief Judge, Steve Aycock, ruled that the Colville Tribal Adult Court[41] (hereinafter "Adult Court") did not have jurisdiction over Mr. Joseph D. Simmons because Mr. J.D. Simmons was a minor at the time of the alleged offenses. Chief Judge Aycock then transferred the matter to the Colville Tribal Juvenile Court (Juvenile Court). *See Order Transferring Case to Juvenile Court For Lack of Adult Criminal Court Jurisdiction*.[42] The Chief Judge indicated that the Tribes could initiate a transfer proceeding in the Juvenile Court pursuant to CTC §§ 5-2-142 through 5-2-145[43] through an amended Petition.

On June 28, 1999, the Tribes filed a Petition in the Juvenile Court pursuant to CTC § 5-2-196 alleging one count of Indecent Liberties and one count of Abduction against J.D. Simmons.

On July 28, 1999, the Appellant Robert Simmons, father of J.D. Simmons, filed a Motion to Dismiss the Juvenile Court case for lack of subject matter jurisdiction and lack of jurisdiction to transfer the matter back to Adult Court. All of the parties joined in this Motion and filed a Stipulation to the granting of the Motion.

On August 13, 1999 by Judge *Pro-Tem* Gabourie, held that the Juvenile Court had jurisdiction and transferred it back to the Adult Court. On September 22, 1999 Judge Gabourie reaffirmed his original order that the Juvenile Court had subject matter jurisdiction and further, the Colville Tribal Court retained continuing jurisdiction over the case.

Appellant filed his Notice of Appeal on September 22, 1999, appealing the Juvenile Court's

---

[41] There is no "Colville Tribal Adult Court" specifically designated in the Colville Tribal Constitution or Law and Order Code. We use this term to distinguish it from the Tribes' Juvenile Court.

[42] From a review of the Order it appears Chief Judge Aycock entered his ruling verbally on the record on April 30, 1999 but didn't sign the Order until June 24, 1999. For convenience we will refer to this Order as the April 30, 1999 Order.

[43] The relevant sections of the Code actually start at CTC§5-2-141, Transfer to Adult Court: The presenting officer or the minor may file a petition requesting the Juvenile Court to transfer the minor to adult Tribal Court if the minor is fourteen (14) years of age or older and is alleged to have committed an act that would have been considered an offense under this Code, if committed by an adult.

Sections 5-2-142 through 5-2-1445 set out when a hearing is to be held on the petition; factors for the judge to consider regarding whether to transfer the case; circumstances for transferring the case; and what is to be in the order if the transfer request is granted.

rulings of August 13, 1999 and September 22, 1999. The Appellant, Robert Simmons, father of the Appellee, Joseph D. Simmons, raised the following issues on Appeal:

1. Whether the Juvenile Court erred by not dismissing the case for lack of subject matter jurisdiction.
2. Whether the Juvenile Court erred by holding the Court had continuing jurisdiction over the alleged minor.
3. Whether the Juvenile Court erred by transferring the case back to the adult Court, or in the alternative whether the Juvenile Court could transfer the case back to the adult Court *sua sponte*.
4. Whether the Juvenile Court is precluded from transferring the matter back to the adult Court.

Briefs were filed and oral arguments were heard on May 19, 2000.

This Court, after reviewing the arguments of the parties, the record and the law, finds herein that the issue of jurisdiction was properly raised in the Adult Court, and the decision to deny jurisdiction in the first matter was erroneous for reasons stated herein.

ISSUE

The one issue before this Court is: Who has jurisdiction over a defendant who is alleged to have committed an offense as a minor and who has turned an adult over the age of eighteen (18) years within the time of the statute of limitations for the offenses alleged?[44] This is an issue of first impression.

STANDARD OF REVIEW

The issue before the Court is a question of law. There are no disputed material facts involved at this stage of the case. For those reasons our review is *de novo*. *See*, *Palmer v. Millard*, *et al.*, 2 CTCR 14, (1996), *Naff v. CCT*, 2 CTCR 8, 22 ILR 6032, 2 CCAR 50 (1995).

DISCUSSION

In its April 30, 1999 hearing the Adult Court specifically addressed the issue: "Does the Tribal adult criminal court have jurisdiction over a defendant where the acts alleged occurred prior to the 18th birthday of the defendant?" It held no, it did not have jurisdiction. The Adult Court predicated its decision first on the Purpose section of the Juvenile Code, Chapter 5-2, which encourages rehabilitation of juvenile offenders as well as community safety. *Order Transferring Case to Juvenile Court For Lack of Adult Criminal Court Jurisdiction*, April 30, 1999, signed June 24, 1999, at pp 2-3. The Court found

[44] The Panel discussed the issues raised by the parties as well as the relevant orders at the trial level. It was determined that the real issue stemmed from Chief Judge Aycock's initial order April 30, 1999 in which the Adult Court declined jurisdiction over the defendant J.D. Simmons. An answer to this question settles all the issues raised in the Appellant's Notice of Appeal.

that, under the Tribes' Criminal Code, CTC, Chapter 2, an adult criminal case may be closed even if rehabilitation did not occur. *Id*.

The Chief Judge then set out the definitions of "juvenile offender"[45] and "delinquent act."[46] These sections, he found, gave weight to Mr. J.D. Simmons's argument that the alleged offenses were supposed to have occurred while he was a minor, and, therefore, were alleged delinquent acts of a juvenile offender. The Chief Judge pointed out that Mr. J.D. Simmons was not now, nor would he ever be under eighteen years of age at the time of the filing of the criminal complaints against him, either in Adult Court or if filed thereafter in Juvenile Court.

Finally, the Adult Court found that it was the time of the act that determined which Court had jurisdiction. *Id.* at page 4. The Court resolved the issue of the alleged offender being over eighteen (18) years of age and the Juvenile Court still having jurisdiction by (1) relying on this Court's holding in *In re The Welfare of S.M.C.*, 2 CTCR 21, 24 ILR 6016, 3 CCAR 52 (1996) (a Minor-In-Need-Of-Care case in which the Court of Appeals held jurisdiction of a Minor-In-Need-Of-Care could extend beyond the age of 18); and (2) finding that, as a matter of law, the Juvenile Court could retain jurisdiction over an alleged offender until the statute of limitations had run on the alleged offense. The Adult Court held that this is a reasonable interpretation of conflicting statutes and liberally construes the Code, and such an interpretation would foster the purposes of the Juvenile Code to provide rehabilitation and provide for the community's safety. The Adult Court transferred the case to the Juvenile Court with instructions to the plaintiff to conform its pleadings with the requirements of the Juvenile Code.

Once the Tribes filed a complaint consistent with the requirements of the Juvenile Code in Juvenile Court, the Appellant herein, Robert Simmons, father of the alleged offender, Joseph D. Simmons, filed a Motion to Dismiss for lack of subject matter jurisdiction. R. Simmons argued that the Juvenile Court never had acquired jurisdiction over J.D. Simmons when he was a juvenile, so it did not have continuing jurisdiction. R. Simmons argued further that the Juvenile Court did not have the requisite jurisdiction to transfer the "minor" to Adult Court because J.D. Simmons was never a "minor" under the jurisdiction of the Juvenile Court. All of the parties joined in R. Simmons's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and filed a stipulation to that effect in Juvenile Court.

Even though the Adult Court held it did not have jurisdiction over the case, the Juvenile Court held it had continuing jurisdiction based on the Adult Court acquiring proper jurisdiction in the first filing against J.D. Simmons, which the Adult Court transferred to the Juvenile Court. The Juvenile Court found it did not lack subject matter jurisdiction and transferred the case to the Adult Court, *sua sponte*. It is from

---

[45] "A person who commits a delinquent act prior to his eighteenth (18th) birthday." CTC §5-2-38.

[46] "An act, which if committed by an adult, is designated a crime under the Colville Tribal Law and Order Code." CTC §5-2-35.

these orders the parties are before us in this case.[47]

The Colville Tribal Juvenile Code

The crux of this case is the Adult Court's decision that the Tribal Juvenile Code applied to the Appellee J.D. Simmons, an adult. The Adult Court based this decision on: (1) the Purpose section of the Juvenile Code, §5-2-1, which directs the Courts to liberally construe its purposes, *inter alia*, of providing rehabilitation to the juvenile as well as protection to the community; (2) the definitions of a "juvenile offender" and "delinquent act" in the context of CTC §5-2-40(c) to find the Juvenile Court has continuing jurisdiction over a person over eighteen years of age as a defined "minor;"[48] and (3) finding that the "continuing jurisdiction" could refer to jurisdiction over the alleged offense, and, therefore, the Juvenile Court could continue it until the statute of limitations ran on the alleged offense.[49]

The Adult Court supported its position with *In Re S.M.C., supra*, in which the Court of Appeals found that the Juvenile Court could decide it had continuing jurisdiction over a minor-in-need-of-care who had turned eighteen years of age.

No to detract from the good intentions of the Adult Court, such an interpretation strains the boundaries of statutory construction. The Juvenile Code had three (3) parts: (1) two general sections that refer to both minor-in-need-of-cares and juvenile offenders; CTC §§ 5-2-1 to 5-2-140, and CTC §§ 5-2-410 to 5-2-415; (2) a section for juvenile offenders, CTC §§ 5-2-141 to 5-2-211; and (3) a section for minors-in-need-of-care, CTC §§ 5-2-240 to 5-2-380. Although it is not a very cohesive Code, its purposes and procedures can be gleaned from its provisions.

The Juvenile Code is specific in its general rule that it applies to those under the age of eighteen (18) years. *See* CTC § 5-2-31 ("Adult" is a person 18 years or older, or otherwise emancipated); CTC § 5-2-38 ("Juvenile Offender" as a person who commits a delinquent act before his 18th birthday)[50]; CTC § 5-2-40; CTC § 5-2-140, Original Jurisdiction; CTC § 5-2-141, Transfer to Adult Court; and CTC § 5-2-

---

[47] The Panel is not going to address the issue of lack of subject matter jurisdiction in the contexts of the Juvenile Court orders because of its ruling on the main issue identified, *supra*.

[48] CTC, Section 5-2-40 states: **Minor**: (a) A person under eighteen (18) years of age who is not emancipated; (b) A person eighteen (10) years of age or older concerning whom proceedings are commenced in Juvenile Court prior to his eighteenth birthday; (c) A person eighteen (10) years of age or older who is under the continuing jurisdiction of the Juvenile Court.

[49] The Adult Court offers no statutory authority nor case law to support such an interpretation of the applicability of the statute of limitations in determining juvenile jurisdiction. We have not found any either.

[50] The Adult Court reasoned that this definition meant such charges could not be brought in Adult Court. We don't read this section as this preclusive. For example, the Juvenile Code allows any juvenile fourteen (14) years of age or older to be transferred to Adult Court for prosecution in certain circumstances (CTC § 5-2-141), which does not negate Juvenile Court jurisdiction over the offender in the beginning, or in the case of declination of the transfer by the Adult Court.

208, Dispositional Alternatives[51].

The Adult Court's analysis of "continuing jurisdiction" found in CTC § 5-2-40(c) does not comport with the plain meaning of the term.[52] Rather, it creates a new definition based on the premise that the Juvenile Court would have jurisdiction over the offense until the statute of limitations ran, as opposed to the offender. The plain meaning of "continuing jurisdiction" is: "A doctrine... by which a court which has once acquired jurisdiction continues to possess it for purposes of amending and modifying its orders therein." Black's Law Dictionary, 169 (5th Ed. 1983). There is no reason to reinvent the wheel on this doctrine. There is no tribal custom or tradition offered from either trial courts nor any of the parties which would state otherwise.

The unraveling of the Adult Court's reasoning starts with its reliance on the Purpose section of the Juvenile Code to the exclusion of all of the other applicable laws in the Juvenile Code. *In Re S.M.C., supra,* is distinguishable. The Juvenile Court was already exercising jurisdiction over the person when she was a minor as defined by the Code. The question before both the Juvenile Court and the Court of Appeals centered on the interpretation of "Minor" that referred to continuing jurisdiction after she turned eighteen (18). In this case the Juvenile Court never exercised jurisdiction over the Appellee J.D. Simmons when he was under eighteen (18). There was no jurisdiction to continue.

The analysis unravels further when it attaches "continuing jurisdiction" to the offense rather than the alleged offender. No legal reasoning is given to support this approach. Such an approach would leave the Tribe without a remedy even if the alleged offender were found to have committed the offense. *See* CTC §5-2-208, Dispositional Alternatives, which specifically precludes orders from extending beyond the offender's eighteenth birthday. The language in this statutory provision is not ambiguous.

Based on the foregoing we hold the Adult Court's finding that the Juvenile Court had jurisdiction herein is erroneous and should be reversed.

Rule of Law

By its rulings, the Adult Court put the Tribes in a Catch-22 situation: it dismissed the Tribes' complaints against Appellee Simmons for lack of jurisdiction, and held the Juvenile Court had the jurisdiction to hear the matter and ask that it be transferred back to the Adult Court. Although the parties' attempt to dismiss the cases from the Juvenile Court were unsuccessful, the end result was the same. The Juvenile Court held that its jurisdiction was based on the continuing proper jurisdiction of the Adult

---

[51] CTC §5-2-208(b) states "The dispositional orders [for juvenile offenders] are to be in effect for the time limit set by the Juvenile Court, but no order shall continue after the minor reaches the age of eighteen (18) years of age ." [emphasis added]

[52] CTC § 1-1-7(b), Principles of Construction. The following principles of construction will apply to all of the Law and Order Code unless a different construction is obviously intended:... (b) Words shall be given their plain meaning and technical words shall be given their usually understood meaning where no other meaning is specified.

Court.[53] Yet the Adult Court held it didn't have any jurisdiction.

The one question left in this analysis is: does the Adult Court has jurisdiction over a defendant charged with alleged offenses that occurred while the defendant was still a minor, but for which the statute of limitations has not run? We hold yes, it does.

The two rules of law on this issue are: (1) the federal rule, in which juvenile courts would retain jurisdiction in cases such as the one herein[54]; and (2) the Washington State rule, in which jurisdiction attaches at the time of the filing of the complaint, and not at the age of the defendant at the time of the offense[55]. Washington follows the majority rule. *See* 89 A.L.R. 2d 506 (1963).

The Adult Court reasoned the majority rule did not apply in the Colville Tribal Courts because it was contrary to the Tribes' policy statement in the Juvenile Code's Purpose section, § 5-2-1. It is an insular view of the whole Law and Order Code. It has other relevant chapters with their own purposes. The purpose of the Criminal Code, Chapter 3, cannot be ignored. Even though it is not stated as specifically as that in the Juvenile Code, if read as a whole, one perceives an intent of the Tribes to prohibit criminal behavior, and to impose penalties for the commission thereof. The Juvenile Code supports this purpose in its sections regarding transferring juvenile offenders to Adult Court. One purpose is not necessarily more important than the other.

The general provisions of the Law and Order Code are specific about who is to be considered an "adult"[56] and who is a "child or minor."[57] The distinction is unambiguous. The distinction is unambiguous. The Code is unambiguous about its criminal jurisdiction.[58] The rule of law that the Court's

---

[53] One of the issues in the Notice of Appeal herein is whether the Juvenile Court is a subordinate or equal Court to the Adult Court. The issue was framed to indicate that the Juvenile Court judge overruled the Adult Court's ruling on jurisdiction. We will not address the status of the two Courts in this opinion because of our rulings on jurisdiction. That is another question for another case.

[54] The federal laws governing the issue are mainly statutory. See 18 U.S.C. §§ 5031 *et seq*. It is noted that even in the federal law, jurisdiction is extended only to an offender's twenty-first (21st) birthday. *Id. At §* 5031.

[55] *See*, *State v. Ring*, 54 Wash. 2d 250 (1959), *State v. Melvin*, 144 Wash. 687 (1927), and *State v.. Calderon*, 102 Wash. 2d 348 (1984).

[56] CTC § 1-1-350: **Adult**: The term "adult" as used in this Code shall mean a person 18 years of age or older.

[57] CTC § 1-1-353: **Child or Minor**: The term "child" or "minor" as used in this Code shall mean any human of less than 18 years of age unless a lesser age is specified.

[58] CTC § 1-1-431(b): **Acts Submitting Person to Jurisdiction of Tribal Court**. (b): The Colville Confederated Tribes shall [have][*sic*] criminal jurisdiction over: (1) All crimes committed by any Indian within the boundaries of the Colville Reservation; and (2) To the greatest extent permissible by law, all violations of the Colville Fish and Wildlife Chapter of this Code committed by a member of the Colville Tribes outside the Colville Reservation.

look for guidance to State law in the absence of tribal law is not ambiguous.[59] The exception to this rule is if the State law is contrary to tribal policy or law. The Adult Court found this so. Reasonable men may differ. We review *de novo* and find, as a matter of law, the Adult Court has not articulated a legal reason to apply the exception.

To the contrary, applying the Washington rule, i.e., jurisdiction attaches at the time the complaint is filed, promotes the purposes of the Criminal Code, and is a more logical interpretation of the statutes, both criminal and juvenile. It is the least ambiguous. It does not detract from the purposes of the Juvenile Code. It complements them. We so hold.

CONCLUSION

For the reasons stated in this opinion we hold that jurisdiction of the complaints filed against Joseph D. Simmons were first properly before the Adult Court. The Juvenile Court never had continuing jurisdiction over J.D. Simmons, and, therefore could not rule on a transfer of the complaints from Juvenile Court to Adult Court. To the extent the Order Transferring Case To Juvenile Court for Lack of Adult Criminal Jurisdiction of Chief Judge Aycock, entered on record April 30, 1999 and signed June 24, 1999, and the Amended Minute Order of Judge Fred Gabourie, Sr., entered September 23, 1999 conflict with this ruling, they are REVERSED.

Further, this matter is REMANDED (1) to the Juvenile Court for an Order of Dismissal; and (2) to the Adult Court for an Order Vacating its Order of April 30, 1999/June 24, 1999.

IT IS SO ORDERED.

---

[59] CTC § 1-2-11. Also *see*, *Coleman v. CCT*, 3 CTCR 18 (1994) and *CCT v. St. Peter*, 1CTCR 75, 20 ILR 6028 (1993).

PAGE DELIBERATELY LEFT BLANK

PAGE DELIBERATELY LEFT BLANK

PAGE DELIBERATELY LEFT BLANK

Herman GORR, Appellant,
Danny Joe STENSGAR, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case Number AP97-002, AP97-003, AP97-004, 3 CTCR 47
6 CCAR 39

[M. Brent Leonhard, Office of Public Defender, for Appellant.
Leslie Kuntz, Office of the Prosecuting Attorney, for Appellee.
Trial Court Case Numbers: 94-17485/86/87; 94-17474; and 96-19027]

Argued April 17, 1998. Decided June 28, 2002.
Before: Chief Justice Anita Dupris, Justice Edythe Chenois, Justice Howard E. Stewart, Justice Earl L. McGeoghegan and Justice Dennis L. Nelson

Dupris, CJ

HISTORY

AP97-002: On December 12, 1994, the Office of Prosecuting Attorney filed a complaint in Tribal Court alleging the defendant, Herman Gorr, violated the CCT Law and Order Code. He was charged with the offenses of Disobedience of a Court Order, Battery, Malicious Mischief and Battery. The second count of Battery was dismissed on February 27, 1995.

Defendant was sentenced on October 9, 1995. A predismissal hearing was set for September 23, 1996. He failed to appear for that hearing and a warrant for his arrest was issued. Defendant was brought before the Court for a bail hearing on February 10, 1997. Bail was set and a show cause hearing scheduled for February 19, 1997.

At the Show Cause hearing, Defendant was found to have violated the conditions of the Judgment and Sentence. Defendant was ordered to pay the $200 fine imposed on the Judgment and Sentence and to pay an additional $200 of the suspended sentence, for a total of $400 due. The amount was due prior to his release from jail or he could serve it out at the rate of $30 per day. Defendant was also given 86 days in jail, to be run concurrently with any other jail sentence imposed.

The Notice of Appeal was filed on March 6, 1997. Appellant alleges that 1) the Court wrongly set this matter before a judge who was not a judge of the Court; and 2) that the fine and jail imposed were excessive, arbitrary and capricious.

AP97-003: On December 9, 1994, the Office of Prosecuting Attorney filed a complaint in Tribal Court alleging the defendant, Herman Gorr, violated the CCT Law and Order Code. He was charged with the offense of Battery.

Defendant was sentenced on October 9, 1995. A predismissal hearing was set for September 23, 1996. He failed to appear for that hearing and a warrant for his arrest was issued. Defendant was brought before the Court for a bail hearing on February 10, 1997. Bail was set and a show cause hearing scheduled for February 19, 1997.

At the Show Cause hearing, Defendant was found to have violated the conditions of the Judgment and Sentence. Defendant was ordered to pay the $500 fine imposed on the Judgment and Sentence and to pay an additional $500 of the suspended sentence, for a total of $1000 due. The amount was due prior to his release from jail or he could serve it out at the rate of $30 per day. Defendant was also given 88 days in jail, to be run concurrently with any other jail sentence imposed.

The Notice of Appeal was filed on March 6, 1997. Appellant alleges that 1) the Court wrongly set this matter before a judge who was not a judge of the Court; and 2) that the fine and jail imposed were excessive, arbitrary and capricious.

AP97-004 On January 13, 1996, the Office of Prosecuting Attorney filed a complaint in Tribal Court alleging the defendant, Danny Joe Stensgar, violated the CCT Law and Order Code. He was charged with the offense of Driving While Intoxicated.

Defendant was sentenced on February 14, 1996. A predismissal hearing was set for January 21, 1997. Defendant failed to appear for that hearing and a warrant for his arrest was issued. Defendant was brought before the Court for a bail hearing on February 18, 1997. Bail was set and a show cause hearing set.

At the Show Cause hearing, Defendant was found to have violated the conditions of the Judgment and Sentence. Defendant was ordered to pay a fine of $250, if not paid when due, Defendant to serve out the fine at a rate of $30/day; 30 days jail to be served on weekends; if any failure of payment of fine or reporting to jail, warrant to issue and Defendant to serve out the remainder of the jail as straight time.

The Notice of Appeal was filed February 28, 1997. Appellant argues that 1) the Court wrongly set this matter before a judge who was not a judge of the Court; 2) Court wrongly denied defendant the opportunity to call witnesses, testify on his own behalf and present his defense; the Court wrongly found that defendant violated the conditions of the Judgment and Sentence; the Court was arbitrary and capricious in setting a due date for the reimposed fine without consulting defendant about appropriateness of the time; and the reimposition of the sentence was excessive, arbitrary and capricious.

Two panels were appointed to hear these cases. Cases AP97-002 and AP97-003 were before Justices Dupris, Chenois and Stewart. Case AP97-004 was before Justices Dupris, McGeoghegan and Nelson. An Initial hearing was held on May 16, 1997 and it was ordered that the cases would be combined and the issues bifurcated. Briefs were ordered and filed. Oral arguments were held April 17, 1998.

STANDARD OF REVIEW

The issues in these cases involve questions of law only. The standard of review in a case concerning only questions of law is *de novo*. *In Re R.S.P.V.,* AP97-001, 4 CCAR 68, 3 CTCR 7, 26 ILR 6039 (1998); *Wiley v. CCT*, AP93-16237, 2 CCAR 60, 2 CTCR 9, 22 ILR 6059 (1995).

ISSUE #1 (AP97-002/003/004)

Was Judge Collins a judge of the Colville Tribal Court when he made his decision in these cases herein?

DISCUSSION

Appellants argue that the judicial acts of Judge Collins were invalid in that his term of office had expired. The Colville Tribal Constitution grants the Colville Business Council authority to set the term of office for associate judges[60] as well as appoint and remove judges. It is the Appellant's position that Judge Collins's term of office terminated immediately upon the appointment of Judge Katherine Eldemar on February 14, 1997. Judge Eldemar signed her Judicial Oath of Office on February 18, 1997.

Appellee first argues that this issue was not fully developed nor ruled on by the trial court in violation of Interim Rule 4(c).[61] Appellee argues there is no record that the issue of Judge Collins being an improperly sitting judge was argued at the Trial Court with a written order issuing.[62] Judge Collins ruled orally from the bench holding he was a properly sitting judge. Appellee points out the Law and Order Code allows for "at least two" associate judges to be appointed to the Trial Court.[63] Resolution

---

[60] Constitution, Article VIII, § 4: "Compensation and Term. Except for the terms of the Justices of the Tribal Court of Appeals and the Chief Judge of the Tribal Court, the term of any appointed judge shall be determined by the Business Council."

[61] Interim Court Rules, 4(c): The Court of Appeals will not entertain issues on appeal that are not fully developed and ruled on by the Trial Court.

[62] Interim Court Rules 4(b): For purposes of filing an appeal with the Court of Appeals, "final" orders set out above in part (a) are the written orders issued by the trial court that dispose of the substantive issue, and not the oral bench orders entered in the matter to be appealed.

[63] Colville Tribal Law and Order Code 1-1-100: The Tribal Court shall consist of one Chief Judge whose duties shall be regular and at least two Associate Judges who may be called into service when the occasion arises. Among other duties assigned by the business Council and this

1994-269 appointed Judge Collins as a temporary judge until the position could be filled permanently. A contract was entered into which gave a start date of April 26, 1994 and that termination would be with 60 days notice given by either party to the other. Chief Judge Wynne filed an affidavit indicating that a review of Judge Collins's employment records did not reveal a termination date nor has there been any other documentation presented which specifically gives a termination date for his appointment.

After review of the record, we find that there is no statutory requirement which limits the number of judges that the Court may have. The Code only specifies that there be "at least two" associate judge positions. If the Council wanted to have ten (10) associate judges, they have the authority to do so. We hold that Judge Collins was a proper sitting judge and not a *de facto* judge.

ISSUE #2 (AP97-002/003)

Was the reimposition of fine and jail time in these matters excessive, arbitrary and/or capricious?

DISCUSSION

Appellant argues that when the suspended fine was imposed, he was indigent and the Court should have determined his ability to pay the fine. Appellant asserts the Court should have known he was indigent because he was being represented by the Public Defender's Office which only represents indigent clients. Appellant stated the Judgment and Sentence Order imposed 90 days jail, with credit for time served of 2 days and the remaining 88 days suspended. The Show Cause Order reinstated 88 days jail and $1000 fine due prior to release from jail. He argues the imposition of the fine, which was due prior to release, extends the time in jail to more than the 90 days originally imposed. Appellant argues that the Court should find that statutorily the longest jail time that could be imposed would be the 88 days suspended. Confinement of indigents longer than the maximum term imposed by statute for their failure to pay the monetary provision of their sentence is a violation of the Equal Protection Clause, he argued.

Appellee counters that Appellant did not adequately argue which part of the statute the Court violated. Appellee also argues that Appellant cannot appeal a sentence that is within statutory limits, and the sentence imposed was within the limits.

Appellee also argues that Appellant did not establish a record in the lower court on the issue of indigency. The Court's order *ex parte* appointing the Public Defender's Office to represent Appellant established only that he was unable to pay for an attorney to represent him and did not deal with whether he could pay a fine. Appellee argues Appellant did not raise the indigency issue at the Trial Court and now cannot raise it at the Court of Appeals for the first time.

If an issue hasn't been sufficiently developed at the trial level, the Court of Appeals will not address the issue at the appellate level. *Smith v. CCT,* AP97-008, 4 CCAR 58, 2 CTCR 67, 25 ILR 6156,

---

Chapter, Associate Judges shall preside over court proceedings as assigned by the Chief Judge, sign court documents, complete case dispositions' [sic] monitor court officer conduct to maintain respect due to the Court and abide by the Tribes' Judicial Rules of Conduct. All judges shall be bonded.

8 NALD 7005 (COA, 05-07-1998). We hold the issue of the Appellant's indigency has not been properly developed at the Trial Court and we will not rule on it.

Further, there is no abuse of discretion by the Trial Court if the sentence imposed is within the statutory limits set by the Colville Law and Order Code. *Condon v. CCT,* AP92-15313, 1 CTCR 71, 20 ILR 6107, 1 CCAR 70 (COA, 05/28/93). We are not persuaded to adopt the Appellant's interpretation that the statutorily maximum sentence is 88 days. We so hold.

ISSUE #3 (AP97-004)

Did the Trial Court err by not allowing Defendant to call witnesses, testify on own behalf and present his defense at the Show Cause hearing?

DISCUSSION

Appellant alleged the following: (1) he was not allowed to call two witnesses from the Probation Department to corroborate his testimony that he failed to contact the Probation Office on a monthly basis; (2) the judge determined that the witnesses' testimony would not be material to the case and denied Defendant a continuance to call the witnesses; (3) he did not receive the letters in question and that there was no evidence presented to the Court on the adequacy of the mailing of the letters to him; and (4) that the Court did not allow Defendant to testify on his own behalf about the alleged non-contact stating that it too was immaterial to the case. A review of the record indicates that Appellant was sworn in and allowed to testify at the show cause hearing. He was allowed and encouraged to cross-examine his probation officer. Judge Collins made every effort to assure that Appellant was given an opportunity to present his defense and to offer proof of his compliance with the Judgment and Sentence.

Appellee argues that the Court correctly denied Appellant's request for a continuance to call witnesses because even if they did testify to his contacts with the Department, he was required to maintain contact with his probation officer. Only her testimony from the department was material to that allegation. Appellee also argues that there was a dispute on the fact that the Appellant claims not to have received any letters from his probation officer. After hearing testimony from both, the Court found that there was sufficient evidence to find a violation of the terms of the probation agreement.

It is within the discretion of the Trial Court to grant or deny continuances. Unless there is a showing of clear abuse of discretion, this Court will not overturn a decision of the Trial Court. A review for abuse of discretion violation requires that the Court of Appeals must find the Trial Court's actions were manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *Jack v. CCT*, AP97-007, 6 CCAR 11, 3 CTCR 41 (2002). The Appellant must prove the trial judge clearly abused his discretion based on a review of the facts of the case and the decision made. This review by the Court of Appeals cannot be *de novo*. *Smith v. CCT*, AP97-008, 4 CCAR 58, 2 CTCR 27, 25 ILR 6156, 8 NALD 7005 (1998).

We are not persuaded that Judge Collins's decision was manifestly unreasonable, exercised on

untenable grounds or for untenable reasons. We hold that there was no abuse of discretion by the Trial Court in denying a continuance of the hearing to obtain witnesses, nor was Defendant denied an opportunity to testify on his own behalf or to present his defense.

ISSUE #4 (AP97-004)

Did the Trial Court err in finding the Appellant violated the conditions of his Judgment and Sentence based on the evidence?

DISCUSSION

Appellant argues the Court found he had violated his Judgment and Sentence by (a) violating probation and parole; (b) failing to pay a $250 fine on time; and (c)failing to appear for a pre-dismissal hearing.

Appellant argues the Court should not have found him in violation of failing to contact his probation officer. He states that in order to find a violation there must be a certified copy of the probation contract filed with the Court. Appellant testified that he wasn't sure that he actually received the document and that even if he did, he didn't think that personally meeting with his probation officer was part of the agreement. Appellee counters that the Court was in receipt of the probation contract because it was submitted with the officer's report indicating Appellant was not in compliance with the Judgment and Sentence. Appellee argues that the Court can take judicial notice of documents already contained in it's files.

The Trial Court concluded that Appellant had ample notice of the Probation Agreement. Upon questioning by the Court, Appellant admitted that he had signed the Probation Agreement and was probably aware of its contents. He conceded that he probably had gone over the Judgment and Sentence with his probation officer and knew of the conditions imposed. Evidence presented showed that Appellant's request for a different probation officer was denied by the Program Manager.

Appellant argues that the Court should not have found him in violation of the Judgment and Sentence by failing to pay his fine on time. He stated he had significant changes in his life and was unable to either pay the fine or perform community service work. He thought that he could request a continuance on the due date when he appeared at his predismissal hearing.

The Trial Court specifically asked Appellant if he had paid his fine on time. Appellant acknowledged that he did not. He offered no proof as to requesting an extension on the fine.

Appellant argues that failure to appear for a predismissal hearing is not a basis to find a violation of the Judgment and Sentence. Appellee agrees, but argues that the issues were bifurcated, and the Court was properly looking at the entire record when it imposed the unsuspended portion of the sentence. Appellee believes that the Court first looks at whether the defendant has violated any of the conditions of the Judgment and Sentence. If a violation is found, then the Court takes a broader look at the entire file to determine the overall compliance or non-compliance so that a suitable sentence may be imposed. That is

where the failure to appear for the predismissal hearing came into play.

Where a defendant has failed to complete his sentence as prescribed, the Court may reinstate or impose any part of the suspended sentence where the defendant has violated a condition of suspension. *Brown v. CCT*, AP94-029, 4 CCAR 28, 2 CTCR 51, 24 ILR 6245 (1997). It is in the Trial Court's discretion on how much, if any, of the suspended portion of sentence is reinstated. Before the Court of Appeals will overturn the Trial Court's decision, there must be shown a clear abuse of discretion. *Jack v. CCT,* AP97-007, 6 CCAR 11, 3 CTCR 41 (2002). It was within the judge's discretion to order the Appellant to finish out his jail term plus any additional amount for failing to comply with the conditions of the initial Judgment and Sentence. *Smith v. CCT,* AP97-008, 4 CCAR 58, 2 CTCR 67, 25 ILR 6156, 8 NALD 7005 (1998). Where the defendant has failed to complete his sentence as prescribed, the Court may reinstate or impose any part of the suspended sentence where the defendant has violated a condition of suspension. *Brown v. CCT*, AP94-029, 4 CCAR 28, 2 CTCR 51, 24 ILR 6245 (1997). We hold that the judge did not err when he found Appellant had violated the conditions of his Judgment and Sentence based on the evidence presented.

Two other assignments of error were abandoned by Appellant and will not be ruled upon.

ORDER

Based on the foregoing, the Court holds:

(1) Judge Collins was properly sitting as a judge and not a *de facto* judge at all times in the instant cases;

(2) the issue of the Appellant's indigency has not been properly developed at the Trial Court and we will not rule on it.

(3) there was no abuse of discretion by the Trial Court in denying a continuance of the hearing to obtain witnesses, nor was defendant denied an opportunity to testify on his own behalf or to present his defense.

(4) the judge did not err when he found Appellant had violated the conditions of his Judgment and Sentence based on the evidence presented.

(5) the appeals are denied and these cases are remanded to the Trial Court for execution of the Orders of February 20, 1997 consistent with this Opinion and Order.

It is SO ORDERED.

Clifford WILLIAMS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP99-003, 3 CTCR 46

6 CCAR 45

[M. Brent Leonhard, Office of Public Defender, for Appellant.
Leslie Kuntz, Office of Prosecuting Attorney, for Appellee.
Trial Court Case No. 98-21367/68.]

Argued October 15, 1999. Decided April 30, 2002.
Before Chief Justice Anita Dupris, Justice David Bonga and Justice Conrad Pascal

Bonga, J.

SUMMARY

Defendant was arrested for DUI on August 18, 1998 at approximately 1:45 P.M. Less than twenty-four hours later at 1:00 P.M. on August 19, 1998 the defendant was brought before the court for arraignment. The court, presided by Judge Mike Somday, found the description of the location of the offense not adequately specific. *Sua Sponte*, Judge Somday dismissed the matter without prejudice.

An amended Complaint was filed on August 27, 1998 by the Office of the Prosecuting Attorney alleging two violations stemming from the August 18, 1998 incident. Driving While Intoxicated and Driving Without a Valid License. An Affidavit of Probable Cause was attached.

Defendant was arraigned and entered pleas of not guilty within 72 hours of his arrest as required by CTC § 2-1-100 and CTC § 2-1-101. Defendant did not make a request or motion at arraignment for the Tribal Court to make a determination on probable cause for his arrest.

Appellant, through counsel, filed two motions to dismiss and a motion to exclude the BAC test. The motions to dismiss were based on Appellant not being given a timely probable cause hearing, a *Gerstein*[64] review. The Court denied the motions. On February 26, 1999, Appellant entered a plea of guilty to both charges and was sentenced. Appellant filed his Notice of Appeal on march 1, 1999.

The Court of Appeals set a briefing schedule. Briefs were filed and oral arguments were heard on October 15, 1999.

ISSUES

1.Did the Court err by finding that the Appellant was not entitled to a determination of probable

[64] *Gerstein v. Pugh*, 420 U.S. 103 (1975).

cause (*Gerstein* hearing) by a neutral and detached magistrate promptly after his arrest?

2. Did the Court err by not requiring the probable cause to be held within 48 hours of custodial arrest?

DISCUSSION

Appellant relies on the U.S. Supreme Court case *Gerstein, supra*, to support his position. The *Gerstein* case held that a warrantless seizure of a person who continues to be in pre-trial detention is not a "reasonable seizure" unless a neutral and detached magistrate makes a prompt determination of probable cause. Appellant further argues that *Gerstein* holds that continued detention is not reasonable if left to the police or the prosecutor to determine probable cause.

Appellant also cites *County of Riverside v. MacLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) holding that the Fourth Amendment of the U.S. Constitution[65] as requiring the Court to hold a probable cause hearing within 48 hours of detention. In *Riverside* the U.S. Supreme Court held that they believed that if a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will comply with the promptness requirement of *Gerstein*. Such jurisdiction will then be immune from systemic challenges, though it may still consider violations if the arrested individual can probe a delay was unreasonable.

The Court finds that there has been no prejudice to the Appellant by not having a probable cause hearing. The record indicates that the Appellant was arrested on August 18, 1998 at approximately 1:45 p.m. Less than 24hours later, at 1:00 p.m. on August 19, 1998, he was brought before the Court for an arraignment. The judge found that the location of the offense was not adequately specific and dismissed the case, *sua sponte* without prejudice. On August 27, 1998, the Tribes filed a new action. The Court issued a criminal summons and the Appellant appeared in response to it. He was not arrested - with or without a warrant. Appellant filed a motion to counsel on September 24, 1998, well before his arraignment. The Public Defender was appointed on October 4, 1998. The Public Defender was provided with discovery on the same day as Appellant's arraignment, October 12, 1998. This Court finds that the facts in this case do not support the claim that probable cause hearings are required when liberty is restrained through pretrial incarceration as pretrial incarceration did not occur here.

Just as the United states is the ultimate authority on how the Bill of Rights applies to its citizens, so to is the Colville Tribe the authority on how the Indian Civil Rights Act (ICRA) applies to its members and others over whom it rightfully exercises jurisdiction. Through it's Law and Order Code and through court practices over many years, it is clear that the Tribe does not require a probable cause determination before the Court within 48 hours of arrest. Instead, the Tribe has found that the requirements of the ICRA,

---

[65] Fourth Amendment, U.S. Constitution: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and not Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

as well as it's own civil rights statute, are satisfied by an initial appearance within 72 hours of arrest.

In conclusion this court agrees with the ruling delineated below by the trial court that *Gerstein* is not applicable to the Tribal Court. The Court points to the fact that the U.S. Constitution does not apply to Indians, therefore the cases cited by Appellant that interprets the Fourth amendment do not apply to this matter, as the Fourth Amendment, as well as the other provisions of the Bill of Rights, do not apply to any sovereign Indian Tribe in the United States, including the Colville Confederated Tribes. *Talton v. Mayes*, 163 U.S. 376 (1896).

ORDER

1. The decision of the trial court is upheld and defendant's appeal is DENIED.

Linda LOUIE, Appellant,

vs.

PASCAL SHERMAN INDIAN SCHOOL, Wolfgang STEVENS, Appellees.

Case Number AP01-012, 3 CTCR 48,

6 CCAR 47(1)

[Appellant appeared pro se.
W. Scott DeTro, Attorney, for Appellees.
Trial Court Case Number CV-OC-2001-21288]

Initial hearing held December 14, 2001. Decided January 2, 2002.
Before Chief Justice Anita Dupris, Justice Earl L. McGeoghegan and Justice Howard E. Stewart

Dupris, CJ

This matter came before the Court of Appeals pursuant to an Initial Hearing being scheduled on his date. Appellant appeared in person and without counsel. Appellee appeared through counsel, Scott DeTro.

Appellee moved for a dismissal based on lack of service on the Appellee of the filing of the Appeal. Discussion was heard and the Court ruled that the Appellant did not file proof of service of her appeal within the 5-day rule as provided in Interim Court Rule 7-c, Proof of Service.[66]

It is ORDERED that the Motion to Dismiss entered by Appellee shall be granted. This case is dismissed and shall be sent to the Trial Court for disposition consistent with this order.

James H. GALLAHER Jr., Petitioner,

vs.

OFFICE OF PROSECUTING ATTORNEY, Respondent.

Case No. AP02-009, 3 CTCR 49

6 CCAR 47(2)

[Petitioner, pro se.
David Ward, Office of Prosecuting Attorney, for respondent.]

---

[66] Proof of Service. Papers presented for filing shall contain an acknowledgment of service by filing an affidavit of service. The Clerk may permit papers to be filed without the acknowledgment or proof of service, but shall require the acknowledgment or proof of service to be filed within five (5) days thereafter. Failure of his section shall be cause for the clerk to return the papers filed to the appellant and strike the matter from the Court of Appeals record for incompleteness.

Decided July 1, 2002.
Before Chief Justice Anita Dupris, Justice Earl L. McGeoghegan, Justice Dennis L. Nelson

Dupris, CJ

This matter came before the Court of Appeals pursuant to a filing of a Petition for Writ of Mandamus filed by Petitioner on May 29, 2002. Petitioner is requesting that the Court of Appeals direct the Office of the Prosecuting Attorney to file a Motion to Dismiss proceedings commenced in the United States District Court for the Eastern District of Washington. Counsel for Respondent, Prosecuting Attorney's Office, David Ward, Prosecutor in Charge, did not file an answer to the Petition for Writ of Mandamus.

The Court of Appeals met on June 21, 2002 by telephone conference call to discuss preliminary matters in this case. After review of the record and discussion, the Panel has made the following determinations:

1) The Court of Appeals for the Colville Reservation lacks jurisdiction to entertain the Writ of Mandamus that Petitioner is requesting. Petitioner is under Federal jurisdiction and he should be pursuing any legal action through that venue.

2) Writs of Mandamus are issued from courts to compel officials to perform acts that the law recognizes as an absolute duty, rather than acts that may be at the official's discretion. Ministerial acts are those which are performed according to explicit directions by a subordinate official, allowing no judgment or discretion on the part of that official. The act that Petitioner is requesting the Office of the Prosecuting Attorney to perform is discretionary and therefore not subject to a Writ of Mandamus.

It is therefore ORDERED that the Writ of Mandamus is not properly before the Colville Court of Appeals and is denied.

John D. GALLAHER Sr., Appellant,

vs.

Alton FOSTER, Hazel FOSTER and Vickie FOSTER, Appellees.

AP00-007, 3 CTCR 50

6 CCAR 48

[Appellant, John D. Gallaher, Sr., appeared *pro se.*
Wayne Svaren, Attorney at Law, appeared for Appellees Alton & Hazel Foster.
Appellee Vicki Foster appeared *pro se.*
Trial Court Case Number CV-CU-2000-20132]

Argued February 16, 2001. Decided July 23, 2002.
Before Chief Justice Dupris, Justice Miles[67] and Justice Pascal.

Dupris, CJ for the Panel.

PROCEDURAL HISTORY

This matter came before the Trial Court upon a filing of two custody petitions. The first was filed by Appellee, Vickie Foster, on September 2, 1998 against John D. Gallaher, Sr., Appellant herein, asking for custody of their minor daughter.[68] The second was filed by the Appellees, Alton and Hazel Foster, on May 11, 2000 against John D. Gallaher and Vickie Foster, also asking custody of the same minor child. The Fosters are the maternal grandparents of the child in question.

This case went through several preliminary hearings throughout 2000. On April 26, 2000, Judge LaFountaine entered temporary orders granting temporary custody to Vickie Foster and temporary visitation to John D. Gallaher, Sr. The Court also appointed a Guardian Ad Litem for the minor child and set the "custody trial" for June 27, 2000. On May 11, 2000 Judge Aycock granted temporary custody of the minor to Alton and Hazel Foster, and further ordered supervised visitations for the parents of said child. A Show Cause on the temporary orders was set for May 24, 2000.[69] The Court signed the orders from the May 24, 2000 on May 30, 2000, continuing the temporary orders from May 11, 2000, and setting the "custody hearing" on June 26, 2000.

It appears from the record that the Court held at least two (2) or three (3) more preliminary hearings, the results basically the same: the temporary orders were continued and the "custody hearing" was continued. The hearings appear to be the result of show causes set from emergency motions filed by different parties to the action.

On July 14, 2000 the Court consolidated the cases and set a custody hearing for September 6,

---

[67] Since the Oral Arguments in this matter Justice Miles has passed away; she did discuss the decision in this matter with the whole panel, however, and contributed to it.

[68] The minor daughter's name and age are not relevant to the decision herein so we will not include them in the opinion.

[69] The record does not reflect how the Trial Court addressed the conflicting order of April 26, 2000.

2000.[70] A Show Cause hearing was held on August 29, 2000 to decide whether a restraining order should be continued against Norman "Bo" Sammaripa contacting the Fosters. Mr. Sammaripa was living with Vickie Foster at the time of the hearing. Mr. Gallaher was not present at the hearing which involved issues between the Fosters and their daughter and the man she was living with, Mr. Sammaripa. The judge did not sign the order until September 21, 2000, and it was not filed with the Court until September 26, 2000. The Order included a Notice of the Custody/Support hearing, continuing it from September 6, 2000 to September 27, 2002, one day after the order was filed.

Mr. Gallaher's sister, Jeanetta Manley, accepted service for Mr. Gallaher. There is nothing in the record showing Mr. Gallaher received personal service.[71] On September 26, 2000, however, he moved for a continuance of the September 27, 2000 hearing.

At the start of the hearing on September 27, 2000, Judge Gabourie denied Mr. Gallaher's Motion to Continue as untimely filed. A Custody hearing was held on September 27, 2002 before Judge Fred Gabourie, Sr. The Order from this hearing was issued on October 2, 2002 granting custody of the minor child in question to Alton and Hazel Foster, her maternal grandparents.

Appellant filed his Notice of Appeal on October 10, 2002 alleging misconduct of the judge, irregularity in the proceedings by the Court, abuse of discretion by which he was prevented from having a fair trial, that the decision is contrary to the law and that substantial justice has not been done.

An Initial Hearing was held on November 17, 2000 and oral arguments were heard on February 16, 2001. The Appellant failed to file a brief in the Court of Appeals. Appellees, Alton and Hazel Foster, filed a Motion to Dismiss the appeal because of the Appellant's failure to brief the issues raise. Appellee Vickie Foster did not file a brief.

Based on the reasoning below we find that the due process issue herein is fundamental and compelling enough for the Court to address it as a matter of law. Further, we find that the Appellant was not given adequate notice of the custody hearing, and the Order of September 27, 2000 should be vacated and the matter remanded for another custody hearing in compliance with the opinion and orders herein.

FIRST ISSUE

SHOULD THE APPEAL BE DISMISSED BECAUSE THE APPELLANT FAILED TO FILE A BRIEF ON THE ISSUES RAISED?

At the Oral Arguments hearing on February 16, 2001, the Appellees, Alton and Hazel Foster, moved to dismiss the Appeal because the Appellant failed to file a brief. Appellees argued the Appellant

---

[70] The order from the July 14, 2000 hearing was not signed until August 7, 2000, and filed August 8, 2000.

[71] The only provisions for allowable types of service in Chapter 2-2 of the Code are regarding initial service of the Notice and Summons and Complaint in an action. It allows personal service, service by certified mail, and, in some instances, publication service. No where in the Code is abode service allowed.

had the initial burden to support the arguments in his case. *Seymour v. CCT*, 3 CCAR 11 (1995). In the alternative, Appellees argued, by failing to file a brief the Appellant has abandoned his appeal. *See: Grunlose v. CCT*, 5 CCAR 26 (1999); *Covington-Garry v. Sanchez*, 5 CCAR 20 (1999); *CCT v. Meusy*, 4 CCAR 37 (1997); *Condon v. CCT*, 3 CCAR 67 (1996); *Louie v. CCT*, 3 CCAR 66 (1996); *Herman v. CCT*, 3 CCAR 65 (1996); and *Picard v. CCT*, 3 CCAR 65.

Appellant responded that he has been ill for several months and was unable to properly draft a brief. He also has had to make several doctor's appointments and was unable to unable to work and had to go on disability.

DISCUSSION OF LAW

At the Oral Arguments Hearing this Panel, after careful consideration, found *Covington-Garry v. Sanchez*, 5 CCAR 20 (1999), controlled the issue and denied the Motion to Dismiss for cause. It is the Court of Appeals's duty to decide what the law is and to administer justice fairly. This Court may make exceptions to procedural rules when the issues presented are of such a serious nature that this Court should reach a decision in spite of the procedural flaws.

The Court of Appeals will make a decision based on the entire record and the interests of the parties in reaching a decision on issue before it. In the instant case, serious due process issues are present which rise to the "serious error" standard of *Covington-Garry v. Sanchez*, *supra*. Therefore we hold that sufficient cause has been shown to review the case and make a determination on the merits.

SECOND ISSUE

WAS THE APPELLANT GIVEN ADEQUATE NOTICE OF THE CUSTODY HEARING?

We have already set out in the Procedural History section the protracted number of hearings on temporary issues in this case. The notices given to the parties, included those given by separate Summons or Notice,[72] and those given within the language of the Court orders.[73] The record shows that Appellant was not present at the Show Cause hearing held on August 29, 2000 which was convened to restrict Norman "Bo" Sammaripa, a person not named as a party in this action, from contacting the minor. The last line of the Order From Show Cause Hearing indicated that the "custody/support" trial would be continued from September 6, 2000 to September 27, 2000. As stated before, the record indicates the tribal police officer served the Appellant's sister the Appellant's copy of the court order setting the

[72] There were three: (1) "Notice (Summons)" filed September 2, 1998 by Appellee V. Foster addressed to the Appellant; (2) "Notice (Summons) filed May 11, 2000 by Appellees A. and H. Foster, addressed to both Appellant and Appellee V. Foster; and (3) "Notice of [Custody] Hearing" issued by the Court on May 11, 2000, sent to the Appellant, Appellee V. Foster, and the Guardian Ad Litem.

[73] There are at least six (6) orders with language giving notice of a custody hearing or trial, the latest that from the hearing on August 29, 2000, which wasn't filed with the Court until September 26, 2000, one day before the hearing was set, *i.e.* September 27, 2000.

hearing for the following day. There is nothing in the record showing the Appellant actually received the order. Appellant's sister is not a party to this action.

When questioned at Oral Arguments, Appellant couldn't remember why he missed the Court date. His Motion to Continue indicated he wanted to hire an attorney. He also wasn't sure when he received the Guardian ad Litem report, but thought it was only one (1) or two (2) days prior to the hearing.[74] Upon a review of the record in this case the Appellees Fosters' arguments that Appellant had ample notice of the custody hearing are not persuasive.[75]

DISCUSSION OF LAW

There are no general notice time lines set out in the Colville Tribal Domestic Relations Code[76] to guide the Courts. CTC § 1-2-2[77], Time, states that the parties shall be given a **reasonable** notice of the time set for hearing. (Emphasis added). The Notice provision in the custody statute does not address how much time to allow for notice of a custody proceeding.[78]

This Court addressed inadequate notice for custody hearings in *George v. George*, 1 CCAR 52, 1 CTCR 53 (1991). In *George* this Court held that the Colville Tribal Law and Order Code provided inadequate notice to a party to a custody hearing, as did the form Notice provided to the parties by the Trial Court. *Id at 53.* A review of the Code as well as the current Trial Court's Notices provided to parties to a custody hearing show that no changes have been made to either to address the inadequacies identified in *George*.

In *George* this Court stated:

> The Colville Tribal Code gives inadequate notice to litigants of the Court's requirements that the hearing on permanent custody is the one

---

[74] The record indicates the judge based his decision to award custody to the maternal grandparents solely on the Guardian Ad Litem report. It is a 136-page report, including attachments. We are remanding this matter on grounds of lack of adequate notice. This ruling does not specifically address the issue of reasonableness in terms of giving the Appellant adequate time to review and respond to a 136-page report. We would encourage the Trial Court to give the matter consideration when setting the next hearing in this case. *See, Clark v. Friedlander*, 4 CCAR 55, 2 CTCR 47, 25 ILR 6154 (1998), and CTC §5-1-08 Child Custody - Relevant Factors in Awarding Custody.

[75] For example, Appellees argue the Appellant had constructive notice of the hearing set from the Guardian Ad Litem report. Appellees do not dispute the Appellant was not at the August 29, 2000 show cause hearing for Mr. Sammaripa in which the custody hearing date was set, however.

[76] Title 5, Chapter 5-1.

[77] All trials, both civil and criminal, shall be commenced at a designated time determined by the judge, with reasonable notice of the time being given to the parties.

[78] CTC § 5-1-107, **Child Custody Proceeding - Commencement - Notice Intervention** "(b) Notice of a child custody proceeding shall be given to the child's parent, guardian and custodian, who may appear and be heard and may file a responsive pleading...."

and only opportunity for presentation by the litigants of testimony of their witnesses, and of the requirements for live testimony. *Id* at p 53.

The *George* Court directed the Trial Court to add to its "Court Date/Time Set" form language to cure the inadequacies it identified. *Id* at 55.

In the instant case none of the Notices given to the parties, either by separate notice or within the orders issued, comply with the requirements of *George*. This by itself indicates an omission of due process for the Appellant in the instant case.

The matter goes another step in the instant case, however. In this case the Appellant did not receive the notice that the hearing for permanent custody was going to be held on September 27, 2002[79] in a reasonable time. Parties must have reasonable notice prior to any substantive hearing to allow the parties time to prepare their respective cases. It is not reasonable to expect any party to be prepared for a permanent custody hearing with only one day's notice.

Appellant attempted to get a continuance of the permanent custody hearing, but the Trial Court denied his motion as untimely. It is is not clear how Appellant could have filed a timely motion in the circumstances in this case. The Trial Court erred when it denied the continuance. There was adequate proof that Appellant did not have a reasonable amount of notice prior to the hearing in which to prepare his case. Minimum due process was not provided Appellant in this case. We so hold.

ORDER

The Appeal is granted and the Findings of Fact, Conclusions of Law, and Order from Motion/Custody/Visitation/Child Support entered on September 27, 2000, and signed September 29, 2000 is **VACATED**. This matter is **REMANDED** to the Trial Court for a new permanent custody hearing in compliance with this Opinion and Order.

---

[79] It appears from the record that the trial judge did not hear witnesses at the hearing. He based his decision solely on the Guardian Ad Litem report. It is not possible to know if all the statutorily mandated relevant factors in awarding custody were considered by the judge. *See* CTC §5-1-108 and *Clark v. Friedlander*, supra, at footnote 8 . We hope at the next hearing more attention is given to this provision of the Code.

Jennifer LEAF, Appellant,

vs.

COLVILLE INDIAN HOUSING AUTHORITY, Appellee,

AP02-014, 3 CTCR 51,

6 CCAR 53

[Jennifer Leaf, Appellant, pro se.
John Vander Molen, Attorney, for Appellee.
Trial Court Case Number CV-EV-2001-21133]

Decided August 8, 2002
Before Justice Anita Dupris

Dupris, CJ

This matter came before the Court of Appeals pursuant to a filing of a Notice of Appeal by Appellant on April 11, 2002 alleging newly discovered evidence.

Colville Tribal Law and Order Code § 1-1-282 limits the grounds that may be used when appealing a Trial Court decision. Part C of that section lists "Newly discovered evidence material for the defendant, which he could not have discovered with reasonable diligence and produced at trial;" as a ground for appeal. In her appeal, Ms. Leaf alleges that the land in question has now been surveyed and there is proof that Colville Indian Housing did not have a lease on it. She is asking the Court of Appeals to recognize that the two houses in question are not on land leased by the Colville Indian Housing Authority.

Pursuant to Interim Court Rule 6.a(3) when a party discovers new evidence, he/she may appeal a final order but only after they have unsuccessfully made reasonable attempts to bring the matter back before the Trial Court by using appropriate motions. A review of the Trial Court's file does not reflect any attempts have been made by Appellant to bring this matter back before the Trial Court for reconsideration.

Before the Court of Appeals can make a decision on a dispute, some requirements must be met. First, there must be a final, written order. In the instant case, the final order was entered on March 26, 2002. Second, there must be adequate grounds stated for the appeal from which both the Panel and opposing party can decide why the Appellant feels the final order is not correct. Third, there must be a legal basis for making a determination on the case being appealed, which includes being able to grant the relief that the Appellant is requesting. In this case, Appellant is alleging that she has obtained new evidence that the land in question has not been leased by the Housing Authority. This is "newly discovered evidence material to the party." However, before the Court of Appeals can look at this case,

the Interim Court Rules say that Appellant must try to bring this matter back before the Trial Court first. If the Trial Court issues an order contrary to this evidence, then Appellant may ask the Court of Appeals to review the matter. In the case *Colville Tribal Credit v. Gua*, AP96-012, 3 CTCR 23, 5 CCAR 23, the Court of Appeals ruled that "This appellate court can only consider those matters **in the record** from the Trial Court in determining whether the Trial Court judge abused his discretion... The matters in the Trial Court record do not include new affidavits filed at the appellate level." Emphasis added. The Court of Appeals also stated in *Williams v. CCT*, AP99-005, 3 CTCR 22, 5 CCAR 22, 26 ILR 6120, that "We cannot, nor should be attempt to, address issues that have not been fully developed before the Trial Court." It is clear that before an Appellant can bring a matter before the Court of Appeals, it must be fully litigated at the Trial Court.

Therefore, based on the foregoing this matter is being dismissed. If, after a ruling has been made by the Trial Court, Appellant disagrees with that ruling, she may bring a new appeal before the Court of Appeals for consideration.

It is ORDERED that this matter is Dismissed and Appellant is directed to file the proper documentation with the Trial Court for reconsideration of the newly discovered evidence.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Travis GEORGE, Appellee.

Case No. AP98-001, 3 CTCR 52

6 CCAR 54

[Appellant, Colville Confederated Tribes, was represented by Frank S. LaFountaine and Leslie Kuntz[80], Office of the Prosecuting Attorney. Appellee, Travis George, was represented by M. Brent Leonhard, Office of the Public Defender. Before Chief Justice Anita Dupris, Justice Wanda L. Miles[81] and Justice Earl L. McGeoghegan.
Trial Court Case No. 97-20382]

Argued August 21, 1998. Decided September 11, 2002
Before Chief Justice Anita Dupris, Justice Earl L. McGeoghegan and Justice Wanda L. Miles

Dupris, CJ

---

[80] Mr. LaFountaine submitted the briefs. Ms. Kuntz presented the oral arguments.

[81] Justice Miles, who passed away in November 2001, did the initial draft of this opinion which was recently discovered. Justice Dupris edited the draft without any significant changes to Judge Miles' original draft.

SUMMARY

The Appellee was charged with Driving While License Suspended or Revoked (CTC 3-3-5[82]) on December 11, 1997. This incident occurred at Agency Campus Road, County of Okanogan, within the exterior boundaries of the Confederated Tribes of the Colville Indian Reservation (hereinafter Reservation).

On December 22, 1997, the Appellee failed to appear for his arraignment. The Trial Court issued a bench warrant with a no bail provision. The Appellee was arrested and brought before the Trial Court on January 12, 1998. At his arraignment, Appellee plead not guilty and requested a judge trial.

On March 9, 1998, the defendant filed a motion to dismiss the citation based on the ground that the facts did not indicate that Appellee's license was suspended by the Tribes. Further, Appellee stipulated that the CCDR indicated that his license was suspended in the third degree by the State of Washington.

On March 20, 1998, the Trial Court dismissed the charge of Driving While Suspended or Revoked (CTC 3-3-5), ruling that a suspension or revocation of the Appellee's privilege to drive by the State of Washington or it's courts is not an element of CTC 3-3-5.

The Tribes appealed the Court's ruling on March 27, 1998.

This matter came before the Court of Appeals for oral argument on August 21, 1998. The Appellant was represented by Leslie Kuntz, Office of Prosecuting Attorney. Brent Leonhard, Office of Public Defender, represented the Appellee.

The Court has reviewed the record, applicable law, and arguments of counsel. The Court found that the Trial Court erred in dismissing the case and remands the matter back to the Trial Court.

ISSUE

DID THE TRIAL COURT ERR BY DISMISSING THE CRIMINAL CHARGE OF DRIVING WHILE SUSPENDED OR REVOKED (CTC 3-3-5) AGAINST THE APPELLEE?

STANDARD OF REVIEW

The issue in this case concerns questions of law only. The standard of review in a case concerning only questions of law is *de novo*. *Simmons v. CCT,* AP99-010, 3 CTCR 45, 29 ILR 6065, 6 CCAR 30 (2002); *Palmer v. Millard*, *et al.*, 2 CTCR 14, 3 CCAR 26 (1996); *Naff v. CCT*, 2 CTCR 8, 22 ILR 6032, 2 CCAR 50 (1995).

DISCUSSION

---

[82] CTC 3-3-5, Driving While License Suspended or Revoked. Any person who drives a motor vehicle on any public highway at a time when his privilege to do so is suspended or revoked shall be guilty of Driving While License Suspended or Revoked.

This Court first looks to tribal statutory[83] and case law for guidance.

CTC 1-1-7, Principles of Construction states in part: (b) Words shall be given their plain meaning and technical words shall be given their usually understood meaning where no other meaning is specified. (d) This Code shall be construed as a whole to give effect to all its parts in a logical, consistent manner.

We also reviewed CTC 3-3-4, Driving Without a Valid Driver's License, which states: Any person, except those expressly exempt by statute, who shall drive any motor vehicle upon a public highway without a valid driver's license ***issued by the State of Washington*** under RCW Chapter 42.20 shall be guilty of Driving Without a Valid Driver's License. (emphasis added)

It appears from reading the Tribes Motor Vehicle Code as a whole that the Colville Business Council intended that any person who drives on a public highway within the exterior boundaries of the Reservation must have a valid driver's license ***issued by the State of Washington***. (emphasis added)

CTC 3-3-5, Driving While License Suspended or Revoked, states any person who drives a motor vehicle on any public highway at a time when his privilege to drive is suspended or revoked shall be guilty of Driving While License Suspended or Revoked. It does not specify whether it means a state or tribal suspension, revocation, or both.

CTC 1-1-7(d) holds the key element for interpreting CTC 3-3-5. If a person is required to have a valid Washington State driver's license in order to drive on any public highway according to CTC 3-3-4, logic would dictate that if the State of Washington suspends or revokes an individual's driving privilege, then the Trial Court was obligated to give due consideration to those suspensions or revocations in order to be consistent with CTC 3-3-4.

The provisions of CTC 3-3-5 and RCW 46.20.242 are similar. The legislative bodies of each jurisdiction, i.e. Washington State and the Colville Confederated Tribes, do not want people whose privilege to drive has been suspended or revoked to be driving in their respective jurisdictions.

The Tribes does not issue driver's licenses for personal use. The CCT Motor Vehicle Code, when read as a whole, indicates the Tribes' intent to provide safe driving conditions on Reservation roads. As such, we interpret CTC 3-3-4 to mean a valid Washington State driver's license[84] is mandatory to drive within the Reservation boundaries. Restricting the application of CTC 3-3-5 to only suspensions or revocations of drivers' licenses by the Tribes would jeopardize the health and welfare of the residents of this reservation by allowing drivers who have been suspended or revoked in state proceedings the privilege to drive on the Reservation. The magnitude of this problem would not only create chaos on the

---

[83] CTC 1-2-11, Applicable Law.

[84] RCW 46.20.021, Driver's license required–Surrender of license held from another jurisdiction–Penalty–Other license not required. (1) No person, except as expressly exempted by this chapter, may drive any motor vehicle upon a highway in this state unless the person has a valid driver's license issued under the provisions of this chapter...

RCW 46.20.025, Persons exempt from licensing requirements. The following persons are exempt from license hereunder: ... (2) a nonresident who is at least sixteen years of age and who has in his immediate possession a valid driver's license issued to him in his home state;...

highways and roadways of the Colville Reservation, it would also restrict judicial authority in enforcing it's own Tribal laws.

The Trial Court premised its decision in part on CTC 2-1-171 which allows the Court to not be bound by common law rules of evidence. It allows the Court to use its own discretion regarding what evidence it deems necessary and relevant to the charge and defense. It does not mean the Trial Court can circumvent procedural requirements set forth in other sections of this Law and Order Code, specifically CTC 1-1-7(b), (d) and CTC 1-2-11.[85]

For the reasons stated above, this Court finds the Trial Court erred in dismissing the charge of Driving While License Suspended or Revoked.

Therefore, IT IS ORDERED, ADJUDGED AND DECREED that:

1. The order dismissing the charge of Driving While License Suspended or Revoked filed against the Appellee on March20, 1998 shall be vacated.

2. This matter shall be remanded to the Trial Court for further proceedings consistent with this Order.

[85] CTC 1-2-11, Applicable Law. In all cases the Court shall apply, in the following order of priority unless superceded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law.