

**IN THE HUALAPAI TRIBAL COURT OF APPEALS
HUALAPAI JURISDICTION
PEACH SPRINGS, ARIZONA**

HUALAPAI TRIBE,)	Appellate Case Nos. 2011-AP-003
)	2011-AP-011
Plaintiff/Appellee)	(Consolidated)
)	Re: Hualapai Tribal Court
)	Case No. 2010-CR-556(A)
)	
v.)	OPINION AND ORDER
)	
VALAN WASHINGTON)	
)	
Defendant/Appellant)	
)	
)	
)	

COUNSEL: MARIE JAMES and TAMMY WALKER for Plaintiff/Appellee
THOMAS A. GROVER and INA JACKSON for Defendant/Appellant

BEFORE Chief Justice WES WILLIAMS JR. and Associate Justices ROBERT N.
CLINTON and CAROLE GOLDBERG.

PER CURIAM

This matter is before the Court on two consolidated matters involving the same criminal conviction. In Appellate Case No. 2011-AP-003 Defendant/Appellant, Valan Washington (Washington or Defendant), timely appeals his conviction in Hualapai Tribal Court Case No. 2010-CR-556(A) for Aggravated Assault in violation of Hualapai Law and Order Code Section 6.88B. While his appeal of these criminal convictions was pending, Washington filed with this Court in Appellate Case No. 2011-AP-011 a Petition for Writ of Habeas Corpus seeking release from custody based on the claimed invalidity of the conviction in the same matter. Recognizing that both matters involved the same underlying conviction and legal questions, this Court ordered Appellate Case Nos. 2011-AP-003 and 2011-AP-011 consolidated for argument, which was heard at the Tribal Courthouse on June 24, 2011. For reasons stated more fully below, this Court affirms Washington's conviction for Aggravated Assault in Hualapai Tribal Court Case No. 2010-CR-556(A) and denies his Petition for Writ of Habeas Corpus.

Background

It is undisputed by the parties that around noon on December 26, 2010 Washington became embroiled in an argument with his friend, Richard “Janny” Sinyella, at 22 Buck & Doe Road in Peach Springs, Arizona. Both Washington and Sinyella are enrolled members of the Hualapai Tribe. Based on the testimony, the argument began as a verbal altercation with Sinyella teasing Washington about the latter's girlfriend. The confrontation escalated into physical violence when Washington pushed Sinyella and Sinyella responded by hitting Washington in the mouth. Based on the evidence presented, Sinyella then walked away from the confrontation but Washington, after being encouraged to do something about the teasing by Cooper Susanyatame, picked up a brick or a rock (the testimony differs on the precise object), pursued Sinyella, and hit him with it in the back of the head. The various eyewitnesses and Washington basically confirm this version of the events.

Sinyella testified that he did not see who hit him, although other eyewitnesses indicated it was Washington. Washington, who testified in his own defense to support his claim of self-defense, admitted on cross-examination that he had pursued Sinyella and hit him in the back of the head with a brick.

After these events, Sinyella, bleeding heavily from a head wound, proceeded to his aunt's home and sought assistance from his father, Richard Mahone, who was there. Both some of the neighbors who witnessed these events and Richard Mahone separately called the Hualapai Tribal Police for assistance. After the Police and EMS arrived, Sinyella's head wound was deemed sufficiently serious to require immediate transportation to Las Vegas, Nevada for medical treatment.

On December 27, 2010, the Tribe filed the criminal complaint in this matter based on these events charging Washington with Aggravated Assault (VIO) in violation of Hualapai Law and Order Code Section 6.88B; a Weapons Offense in violation of Hualapai Law and Order Code Section 6.25B; and Committing an Offense While Armed in violation of Hualapai Law and Order Code Section 6.259. Washington entered a Not Guilty plea to all counts and bond was set at \$5000, which he could not post. He remained incarcerated until trial. On March 1, 2011,¹ the Tribal Court conducted a full bench trial and, after hearing witnesses for both parties, the Tribal Court found Washington not guilty of a Weapons Offense in violation of Hualapai Law and Order Code Section 6.25B and Committing an Offense While Armed in violation of Hualapai Law and Order Code Section 6.259, but convicted him of the charge of Aggravated Assault in violation of Hualapai Law and Order Code Section 6.88B.² Sentencing was

¹ The Final Judgment of the Tribal Court incorrectly identifies the date of trial in this matter as March 11, 2011. The other records in the case, including the Tribal Court's Minute Order correctly identify the date of trial as March 1, 2011. March 11, 2011 was actually the sentencing date and the date that the Tribal Court signed and entered its Final Judgment in the matter.

² This Court notes that the Tribal Court apparently revised its judgment between March 1, 2011 and March 11, 2011. After trial, the very brief Minute Order filed by the Tribal Court simply notes that the

held on March 11, 2011 and Washington was sentenced to 8 months in jail for the Aggravated Assault conviction, with credit awarded for time served since his arrest.

Washington filed a timely Notice of Appeal on March 7, 2011 and the appeal in Appellate Case No. 2011-AP-003 ensued.

Beginning on the day after trial, Washington made numerous efforts to secure release from custody. On March 2, 2011, for example, he sought temporary release “so he can go dancing,” which was denied by the Tribal Court. Ultimately, Washington filed a Motion to Stay the judgment of conviction and sentence which the Tribal Court denied by written Order for Denying Motion to Stay entered on April 12, 2011. Thereafter, Washington filed a document with this Court seeking a Writ of Habeas Corpus and purporting to contest his conviction on most of the same grounds asserted in the appeal. While it briefly referenced a stay in the section dealing with post-conviction relief, that document was not structured as a motion for stay nor did not appear to seek a stay from this Court, but rather a Writ of Habeas Corpus. It was not filed in the Appellate Case No. 2011-AP-003, but rather was filed as a separate matter under Appellate Case No. 2011-AP-011.

Recognizing that both filings involved the same matter, this Court consolidated the two matters for argument, which was heard at the Tribal Courthouse on June 24, 2011.

Discussion

A. Misuse of the Writ of Habeas Corpus

Article VI, Section 3(c) expressly empowers the Hualapai Judiciary, including this Court, to issue “writs of habeas corpus to any part of the Hualapai Tribe upon petition by, or on behalf of, any person held in actual custody.” Washington correctly assumed that a Petition for Writ of Habeas Corpus can be used by those in current detention as a post-conviction device to contest the legality of a criminal conviction. *E.g. Fay v. Noia*, 372 U.S. 391 (1963). The problem here is that Washington tried to do so *while his appeal was pending*, rather after all other remedies were exhausted, which is the usual function performed by the writ of habeas corpus. It has long been recognized that the Writ of Habeas Corpus cannot serve as a substitute for an appeal where appellate remedies remain available. *E.g. Ex Parte Davenport*, 95 Okl.Cr. 140, 241 P.2d 429 (Ok. Ct. Cr. App. 1952). Thus, Washington's filing of a Petition for Writ of Habeas Corpus while his appeal of the same criminal conviction was pending was improper as a matter of law. For this reason alone, it must be denied.

“Defendant found guilty as charged,” drawing no distinction between the three counts with which he was charged. The much fuller and carefully elaborated Final Judgment entered on March 11, 2011, expressly acquits Washington of a Weapons Offense in violation of Hualapai Law and Order Code Section 6.25B and Committing an Offense While Armed in violation of Hualapai Law and Order Code Section 6.259. Thus, according to the Final Judgment, he was convicted and sentenced solely on the Aggravated Assault (VIO) charge.

The timing of the filing³ and the relief sought in Washington's Petition for Writ of Habeas Corpus, while not clearly structured, might suggest that what Washington's counsel actually sought to do was to seek a stay of the Final Judgment of conviction and sentence and to thereby obtain Washington's temporary, rather than permanent, release pending appeal. If that was the intent of the filing of the Petition for Writ of Habeas Corpus, it certainly was not clear from the document filed. Furthermore, counsel for Washington failed to follow proper procedure to secure a stay from this Court. The Writ of Habeas Corpus generally contests the legality of detention and, therefore, in a case involving a criminal conviction, the legality of the conviction. Most of the papers filed with the Petition for Writ of Habeas Corpus sought to attack the conviction, thereby making the application appear to be what it stated, *i.e.* a Petition for a Writ of Habeas Corpus. By contrast, an application for a stay generally does not attack the merits of the underlying judgment, it merely presents a case demonstrating hardship if the court order below is enforced prior to the completion of the appeal. Furthermore, Petitions for Writs of Habeas Corpus generally are separate proceedings and, as here, assigned a separate docket number, while motions for stays pending appeal are considered part of the same case and made under the same court filing docket number.

This Court held in *Hualapai Tribe v. Pablo*, Hualapai Ct. App. Case No.: 2010-AP-011 (Order on Motion for Release, Sept. 3, 2010), that an application for a stay pending appeal first must be presented to the Tribal Court. Applications for stays pending appeal can be made to this Court if and only if the Tribal Court has first heard and denied a motion to stay pending appeal. Here the Tribal Court had entertained and denied Washington's motion for stay pending appeal. Thus, to secure release pending appeal Washington could properly have filed a motion for stay pending appeal in Appellate Case No. 2011-AP-003. The *Pablo* procedure is now also spelled out in Rule 1(c) of the Hualapai Rules of Appellate Procedure, which expressly indicated that Washington's counsel could file a motion for stay with this Court after first presenting such a motion to the Tribal Court and having it denied in that Court. Unfortunately for Washington, that is not what his counsel, including his mother, chose to do. Instead, they improperly filed a separate Petition for Writ of Habeas Corpus with this Court while his appeal in Appellate Case No. 2011-AP-003 was pending. Not only was that matter separately docketed because of the manner in which they filed it, nothing in the papers submitted suggested that it was an application for stay pending appeal, rather than a broadside writ of habeas corpus attack on Washington's conviction. Consequently, if the Petition for Writ of Habeas Corpus actually sought merely a stay pending appeal, Washington's counsel did not follow the proper procedure set forth in Rule 1(c) of the Hualapai Rules of Appellate Procedure to secure such a stay and their use of the Petition for Writ of Habeas Corpus abused and misused the purposes of the Writ. For this reason, the Petition Writ of Habeas Corpus in Appellate Case No. 2011-AP-011 must be and hereby is dismissed.

³ This Court notes that the Petition for Writ of Habeas Corpus was filed shortly after the Tribal Court denied a Motion to Stay pending appeal.

B. Appeal of Aggravated Assault Conviction

Other than vague catch-all generalities,⁴ which this Court must and will ignore,⁵ the Amended Notice of Appeal, while not clearly drafted, basically assigns three claimed errors made by the Tribal Court. First, Washington argues that the Tribal Court misapplied the burden of proof by misinterpreting Section 6.7 of the Hualapai Law and Order Code, claiming that once he had raised the issue of self-defense the burden was on the Tribe to present new evidence proving beyond a reasonable doubt that he did not act in self-defense. Second, Washington argues that the findings of fact were arbitrary and capricious and as a result the Tribe had not proved its case beyond a reasonable doubt. Third, Washington claims that by taking the stand and, in the course of cross-examination, incriminating himself, his right not be compelled to be a witness against himself, separately protected by both Article VI(b) of the Constitution of the Hualapai Indian Tribe and Section 1302(a)(4) of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(a)(4), was violated. The Court considers each of these claims in order.

1. Burden of Proof and Section 6.7

Section 6.7 of the Hualapai Law and Order Code provides:

Section 6.7 Negating Defenses

The prosecution need not negate any defense either in the complaint or by proof unless the defense is an affirmative defense, the defendant has presented evidence of it, and the prosecution rebuts said defense beyond a reasonable doubt.

4 For example, at various points in the Amended Notice of Appeal, Washington asserts as errors “issues that will likely result in a reversal, an order for a new trial, a dismissal” and “several relevant issues of criminal law and procedure that were overlooked and there assignment of error would have altered the outcome, and reserves the right to raise these issues at a later date.”

5 Hualapai Law and Order Code Section 10.5(A)(5) expressly requires a Notice of Appeal to contain a “concise statement of the adverse ruling or alleged errors made by the court.” This requirement is repeated in Rule 6(a)(i)(1)(3) of the Hualapai Rules of Appellate Procedure. The reason for this requirements is evident since it provides clear notice to all parties of precisely which ruling is being appealed and precisely what issues or errors the appealing party seeks to raise. Without such clear notice, the opposing counsel will not fairly be apprised of the issues subject to review in the appeal. While the Court appreciates the dilemma sometimes faced by an appellant who may need to carefully review the audio or written transcription of a court hearing before they are sure of the errors sought to be raised on appeal, the appropriate response to later-discovered errors is to amend the Notice of Appeal, which will provide clear notice to all parties, rather than rely on broad catch-all generalities which provide no notice whatsoever. This Court therefore will ignore as violative of Hualapai Tribal Code Section 10.5(A)(3) and Rule 6(a)(i)(1)(3) of the Hualapai Rules of Appellate Procedure any such broad catch-all claims of error that fail to pinpoint the precise ruling and error sought to be appealed.

The essence of the argument made by Washington's counsel at oral argument appears to be that since Washington had properly raised the affirmative defense of self-defense and presented evidence on the question, the burden shifted to the Tribe to negate that defense *with separate new evidence* beyond a reasonable doubt. Since the prosecution presented no new evidence after the close of the defense case, Washington believes that the Tribe did not discharge its burden under Section 6.7 and that the Tribal Court erred in finding to the contrary.

As this Court sees the matter, there are essentially two problems with Washington's interpretation of Section 6.7. First, nothing in Section 6.7 requires that the Tribe present *new evidence* after the close of the defense case to rebut an affirmative defense. A criminal trial is not a chess match in which the opposing party must respond to each move of her opponent with a new move. It is sufficient under Section 6.7 if, after the Defendant has raised an affirmative defense, the total evidence presented by the Tribe at whatever time during the course of the trial negates that defense beyond a reasonable doubt. In this case, the concession by Washington, during cross-examination, that after being encouraged by Cooper Susanyatame to do something about the teasing, he picked up a brick, pursued Sinyella, and hit him with it in the back of the head more than sufficiently negated the defense of self-defense beyond a reasonable doubt. The Tribe was not required by Section 6.7 to present any further evidence, as Washington erroneously believes, to carry its burden under that section.

Second, and equally significant, Section 6.7 only requires the Tribe to negate the affirmative defense beyond a reasonable doubt once “the defendant has presented evidence of it.” The Tribe's evidence included eye witnesses who saw the altercation and testified that Washington hit the victim in the back of the head with a rock or brick after he had already walked away. While the defense sought to contextualize these events by showing the prior altercation, Washington was not charged with pushing the victim during that prior altercation but with pursuing and viciously attacking him from behind. The traditional common law defense of self-defense historically required those who sought to invoke it to show that they could not have retreated to avoid threatened harm (the so-called duty to retreat) and that traditional common law rule has been followed by some modern authorities. *E.g.* Model Penal Code, Section 3.04(2)(b)(a). While not controlling on this Court, Arizona, like a number of states, has statutorily modified the duty to retreat by permitting one to exercise self-defense without retreat by standing one's ground. Az Rev. Stat. Section 13-418. Washington has cited no authority and this Court is aware of no jurisdiction that sanctions the exercise of self-defense by *pursuing someone who previously constituted a threat*. Such pursuit is not self-defense; it is instead illegal retribution. Thus, the evidence presented by the defense was legally insufficient to raise the defense of self-defense under Section 6.7.

Washington tries to overcome this problem by claiming that because of mental and learning disabilities, he lacked the mental capacity to appreciate that the altercation was over and still subjectively felt threatened by the retreating victim. There are numerous

problems with this claim. First, Washington did not plead not guilty by reason of insanity and therefore his mental state was not at issue in the proceedings. Second, while this Court has repeatedly been given Social Security forms showing that Washington has been determined by that agency to have some form of disability, the forms do not indicate whether the disability is mental or physical, and absolutely no medical evidence was presented at trial by competent medical practitioners documenting any mental impairment or disability. Without such evidence, no Court can accept the mere claim of a mental defect or disability, even if it were relevant. Finally, and most importantly, what Washington subjectively believed is utterly irrelevant to a self-defense claim. Whatever requirements most jurisdictions adopt for the defense of self-defense they always make the defense turn on what the accused objectively (that is, reasonably) believed. Arizona Revised Statutes Section 13-418 is a perfect example since it makes the self-defense claim turn on what the accused “reasonably believe[d],” rather than on what he subjectively believed. Thus, even if medically documented (which it was not), Washington's alleged mental impairments would not be controlling on the question of self-defense and would be relevant only to an insanity defense, which was not raised. No reasonable person can believe that *pursuing and viciously assaulting from behind* a person who previously had threatened you could constitute self-defense. Thus, as a matter of Hualapai law, the defense failed to present sufficient evidence of self-defense even to invoke Section 6.7. Accordingly, Washington's claim of error based on that section must be rejected.

2. Findings of Fact Were Not Arbitrary and Capricious

Washington's second claim of error can be quickly and easily dismissed by simply focusing on his testimony during cross-examination. Given that Washington conceded on cross-examination that Sinyella had walked away from their earlier confrontation but that Washington, after being encouraged to do something about the teasing by Cooper Susanyatame, picked up a brick, pursued Sinyella and hit him with it in the back of the head, it is hard to find any fault whatsoever with the Tribal Court's findings of fact or its conclusion that the Tribe had proven its case of Aggravated Assault beyond a reasonable doubt. This Court can only overturn the findings of fact of the Tribal Court if it finds them arbitrary and capricious. Constitution of the Hualapai Indian Tribe, Art. VI, Sec. 12. That constitutionally-imposed standard sets a very high threshold that requires the findings of fact to be completely inconsistent with the weight of evidence, leaving almost no doubt that the Tribal Court incorrectly found the facts based on the evidence presented. In this case, given Washington's admissions while testifying on cross-examination, precisely the reverse is true. There is simply no question that the Findings of Fact and Conclusions of Law entered by the Tribal Court were plainly correct.

3. Denial of the Privilege Against Self-Incrimination

Perhaps belatedly recognizing the devastating effect that Washington's testimony, particularly his admissions on cross-examination, had on his case, counsel now argues

that his testimony denied him his privilege against self-incrimination. Both Article VI(b) of the Constitution of the Hualapai Indian Tribe and Section 1302(a)(4) of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(a)(4), guarantee the right of an accused not to be *compelled* to be a witness against himself, *i.e.* the privilege against self-incrimination. That privilege only protects against government coercion forcing self-incriminatory testimony. It is not an absolute bar to the defendant testifying. In fact, just as a defendant has a right not to be forced to testify against himself, he or she also has a right to waive that privilege and testify in his or her own defense.

In this case, Washington can point to no action of the Prosecutor or the Tribal Court that forced or in any other way coerced him to testify. Rather, his defense counsel candidly conceded that after discussing the matter with Washington he made a conscious decision to put his client on the stand to prove his self-defense claim. Given the incriminating testimony elicited by the Tribe on cross-examination, that strategic decision proved disastrous. The privilege against self-incrimination surely does not prevent cross-examination of the accused once he has voluntarily taken the witness stand, nor does it prevent incriminating statements he makes under oath from being used against him so long as they were not coerced. In this case, this Court can only see the self-incrimination argument offered by Washington's counsel as a confession that his strategy of permitting his client to take the stand backfired quite badly. The privilege against self-incrimination, however, does not protect an accused from the incriminatory effects of his or her own voluntarily offered testimony. Washington's counsel cannot use the privilege to secure a "do-over" simply because his strategy of voluntarily putting his client on the stand backfired badly and resulted in self-incriminatory testimony. Washington admits that he voluntarily took the witness stand to prove his self-defense claims and he has shown no coercion whatsoever from the Prosecutor or the Tribal Court. The mere fact that the testimony the Prosecutor ultimately elicited from him on cross-examination was highly self-incriminating does not mean, as he suggests, that his rights had been violated. Instead, it simply indicated that the defense decision to voluntarily put him on the stand badly backfired on his case. Consequently, his claim for denial of his privilege against self-incrimination must be and hereby is rejected by this Court.⁶

Conclusion

Based on the previous discussion, this Court finds that both the appeal in Appellate Case No. 2011-AP-003 and the Petition for Writ of Habeas Corpus in Appellate Case No. 2011-AP-011 lack merit. As a result Washington's conviction and sentence for Aggravated Assault involved in Appellate Case No. 2011-AP-003 must be and hereby is

⁶ Insofar as Washington also now argues that he lacked the mental capacity to understand the consequences of waiving his privilege against self-incrimination, this Court notes, as mentioned above, that such conclusory allegations are not backed by medical evidence admitted into the record demonstrating such disabilities and that Washington was represented by counsel at trial (one of the same counsel who appeared on his behalf in this matter) who conceded at oral argument that he concurred in and was responsible for Washington's decision to testify in his own defense.

affirmed and the Petition for Writ of Habeas Corpus involved in Appellate Case No. 2011-AP-011 hereby is denied.

IT IS SO ORDERED.

Entered this 29th day of July, 2011 on behalf of the entire panel:

By: Robert N. Clinton
Robert N. Clinton
Associate Justice