IN THE HUALAPAI COURT OF APPEALS

HUALAPAI RESERVATION, PEACH SPRINGS, ARIZONA

HUALAPAI TRIBE, *Plaintiff/Appellee,* v. DARREN PABLO, *Defendant/Appellant.*	App. Case No.: 2010-AP-011 Trial Case No.: 2009-CR-176 ORDER AND OPINION

Before Presiding Justice Carole Goldberg, Justice Pat Sekaquaptewa, and Justice Wes Williams, Jr.

OPINION AND ORDER

Appellant Darren Pablo ("Appellant" or "Defendant") appeals his conviction of battery (VIO) under Sec. 6.87A of the Hualapai Law and Order Code (the "Code"). For the reasons given below, the Court finds that there was no reversible error and affirms the conviction.

Statement of Facts & Procedural History

On July 26, 2010, Appellant Darren Pablo was convicted of battery (VIO) under Sec. 6.87A of the Code. At the sentencing hearing the next day, the prosecution stated that Appellant had two prior domestic violence designated convictions.[1]

The trial court interpreted the Domestic Violence Penalty provision of the Code, Section 7.4(A)(3), to impose a statutory mandatory sentence for the third VIO designated conviction. Accordingly, Appellant was sentenced to one-year of imprisonment to run from March 23, 2010 to March 23, 2011, a $1,000 fine, and mandatory domestic violence counseling. On August 3, 2010, Appellant filed a timely appeal. The notice of appeal includes the following assignments of error: (1) "that the Court erred regarding the mandatory sentencing statue [sic] and its application;" and (2) "that the tribe withheld discovery material from [Appellant]… [in] violation of his due process right pursuant to both Article IX(c) of the Constitution of the Hualapai Tribe

[1] It appears that the prosecutor was relying on a document in front of her, presumably Appellant's "arrest record card," which is a Hualapai Tribal Court document that lists the court hearing dates, and the disposition of all of a defendant's offenses.

and the Indian Civil Rights Act of 1968, 25 U.S.C. §§1302, Section 8 [sic]." At oral argument Appellant's counsel clarified that Appellant's challenge to the mandatory sentencing statute only concerned the court's interpretation of Section 7.4(A)(3).

The criminal complaint, dated April 27, 2009, charges Appellant with aggravated battery (VIO) under Section 6.89 and battery (VIO) under Section 6.87A. The maximum penalties are described as "imprisonment for a period not to exceed 1 year, or a fine not to exceed $5,000, or both" and "imprisonment for a period not to exceed 90 days or a fine not to exceed $2,000, or both." The maximum penalty sections of the criminal complaint also state: "Mandatory sentencing and Domestic Violence sentencing guidelines apply." On August 21, 2009, Appellant was arraigned on these charges.[2] A month before trial, the Tribe filed a document with the court that states (1) the Tribe disclosed to the Defendant "all discovery material in possession of the Tribe" including the police report, (2) Detective Falker / Hualapai Police Department and [the named victim] would testify at trial, and (3) exhibits presented at trial will include "any evidence that was seized."

At trial, following the opening statement of the prosecution, Appellant's lay advocate objected to the absence of the officer who initially took the victim's statement on the ground that it violated his right to confront the witnesses against him. The prosecution stated that it would not rely on documents prepared by the police officer. While Appellant's advocate raised concerns that the officer was not available "to answer any questions the Defendant may have," he did not request that the officer be present or ask for a continuance; he only objected to possible references to the police report at trial. The trial proceeded without the police officer on the understanding that the report would not be used. The only evidence presented was the victim's testimony. On direct examination the victim testified that the Appellant hit her with a wooden rake, and that after she escaped she reported the incident to an investigating officer, who tape recorded her testimony and took pictures of the injury.

The Tribal Court convicted Appellant on the basis of the victim's testimony. When asked if there is any reason not to proceed to sentencing, the prosecution replied that there was insufficient information for sentencing, because the prosecution did not know how many prior domestic violence convictions Appellant had in the last five years. The following day, on July 27, 2010, Appellant was sentenced under Section 7.4(A)(3).

Jurisdiction

The Court of Appeals has jurisdiction over "[a] final judgment imposed by the Tribal Court in any criminal case." Tribal Law and Order Code, Section 10.2. Under Sections

[2] This action precedes this Court's *Marshall v. Hualapai Tribe*, 2009-AP-004 (Hualapai Ct. App. 2009) opinion, decided on January 6, 2010, which held that the taking of a guilty or no contest plea in an arraignment on a domestic violence charge without charging the defendant under Section 7.4(A)(3) and without notifying the defendant of the potential for application of the sentencing provisions of Section 7.4 violated defendant's due process right "to be informed of the nature and cause of the accusation." We note that in this case, Appellant pled not guilty, and the criminal complaint notified him that the sentencing provisions of Section 7.4 would apply.

10.4(A)(1) and 3.3, a notice of appeal must be filed within five business days of the entry of the final judgment. The Court has jurisdiction over this case since it concerns an appeal from a sentencing order that was imposed on July 27, 2010 and appealed on August 3, 2010, the fifth business day.

Issues

1. As a matter of statutory interpretation, does Section 7.4(A)(3) require the Tribal Court to impose a one-year jail sentence, $1,000 fine, and mandatory counseling for a third and subsequent domestic violence offense within five years?

2. Are Hualapai due process and the requirements of the Indian Civil Rights Act violated if, in the absence of a discovery request, the prosecution does not disclose an audio tape of the victim's statement to a police officer made immediately after the incident, where the content of this tape is unknown, the tape was not used at trial, and there is no allegation of bad faith?

Standard of Review

Under Article VI, sec. 12 of the Hualapai Constitution "[a]ll matters of law and procedure may be decided by the Court of Appeals. Findings of fact shall be made by the Trial Court and shall be reviewable only when arbitrary and capricious." Since the first issue concerns the interpretation of a statute, which is a question of law, it is reviewed *de novo*.

The second issue, concerning a possible due process violation in the Tribe's failure to provide Appellant with an audiotape of the victim's police investigation statement, also involves a question of law, and would be reviewable de novo if Appellant had raised the objection during the trial. However, Appellant's advocate did not object to the Tribe's discovery response before or during the trial. As a matter of sound judicial administration and fairness, objections are normally deemed waived if a criminal defendant had the opportunity to object at trial but did not do so. Requiring that an objection be raised at the trial court level facilitates the correction of errors at a time when correction is most feasible and least disruptive to the criminal justice process. Exceptions to this requirement are made, however, in cases of "plain error," where the trial court has made a mistake that seriously prejudices substantial rights. A plain error must be corrected in order to prevent a miscarriage of justice and to preserve the integrity and the reputation of the judicial process. *See Colton Ron Selana v. Hualapai Tribe*, 2008-AP-005 (Hualapai Ct. App. 2008). Thus, Appellant's challenge to the Tribe's failure to provide the audiotape will be reviewed to determine whether the Tribe's failure has given rise to plain error in the conduct of the trial.

Discussion

1. <u>Is Imprisonment Mandatory under Domestic Violence Sentencing?</u>

Section 7.3(A) of the Code states that "domestic violence is a separate crime." Section 7.3(A) classifies certain offenses, defined elsewhere in Chapter 6 of the Code, as crimes of

domestic violence if they are committed against a family or household member, and Section 7.4 prescribes special penalties for first and subsequent domestic violence offenses. Appellant contends that the Tribal Court has discretion under Section 7.4(A)(3) of the Code to decide *not* to impose to a jail sentence. The Tribal Court interpreted the Section to *require* a mandatory enhanced sentence of one year and a minimum fine of $1,000. Since this Court finds that the Tribal Court's interpretation is correct, this case need not be remanded for resentencing.

Section 7.4(A)(3) of the Code states that "A person convicted of a third or subsequent offense of domestic violence within five years of the last conviction *may be imprisoned* for a term of *not less than one year* and fined an amount not less than $1,000 or more than $5,000, *or both such imprisonment and fine*." (Emphasis added.) In interpreting the Code, this Court looks to the text, the structure, and the legislative purpose of the Code, reading the Code as a harmonious whole. The text of the Code is at best unclear and at worst, it appears to contain two internal conflicts. First, the word "may" is used in place of "shall," suggesting that the sentencing judge has discretion to apply a non-jail sentence. Second, the "or both such imprisonment and fine" segment suggests that the sentencing judge has discretion to apply either a jail sentence or merely a fine. Both the "may" and the "or" wording are in conflict with the final sentence of Section 7.4(A)(3) which states, "A convicted person under this section shall not be eligible for suspension of sentence, probation, parole, or any other release from custody until the sentence imposed by the Court is served" - wording which requires the existence of a jail sentence. It appears that the Tribal Council intended to create a mandatory jail sentence of "not less than one year" for persons convicted of a third or more domestic violence offense, and that the "may" and "or" are simply drafting errors. Reading Section 7.4(A)(3) in conjunction with Sections 7.4(A)(1) and (2) supports this interpretation. For the first offense, a convicted person "may be imprisoned for a term not to exceed six months" and fined between $200 and $1,000; for the second offense, a person "may be imprisoned for a term of not less than 60 days or more than one year" and fined between $500 and $3,000. The text and structure of these provisions reflect the Tribal Council's intent to increase the penalties with each subsequent offense. Consequently, we find that the Tribal Court correctly interpreted the statute as requiring at least a one-year jail sentence and a fine between $1,000 and $5,000 for the third or subsequent domestic violence crime.

2. Was Evidence Improperly Withheld?

Article IX(d) of the Hualapai Constitution guarantees due process of law, as does the Indian Civil Rights Act. 25 U.S.C. § 1302(8). Since we interpret the Hualapai Constitution in this case to establish a due process standard very similar to federal due process, we do not need to reach the question whether the Indian Civil Rights Act establishes greater due process protection than the Hualapai Constitution.

It is a matter of first impression whether due process under the Hualapai Constitution requires the prosecution to disclose a taped recording of the witness's statement that was not used at trial, where there is no allegation of bad faith and no discovery request was made. Because the existence of the tape was disclosed at trial and the Appellant did not make a timely objection or seek a continuance, non-disclosure can only constitute reversible, *i.e.* plain, error if it seriously prejudiced substantial rights.

The Hualapai Code does not set out discovery procedures.[3] Under Section 3.1(D) of the Code, in any matter not covered by the Tribal Constitution, codes, ordinances, resolutions, customs, or usages, the Court may be guided by other tribal, federal, or state law. A review of relevant non-Hualapai law follows.

There does not seem to be tribal court case law on disclosures in the absence of a request. There are two lower tribal court decisions that uphold a criminal defendant's discovery right upon request. *Navajo Nation v. Bigman*, 3 Nav. R. 231 (Navajo 04/26/1982) granted the defendant's motion and permitted the defendant to inspect and copy all witness statements, reports, tests, demonstrations, documents, exhibits, and other matters in the custody and control of the prosecution related to the case. The court construed the statutory right to receive requested information (under Navajo Rule 12 of the Rules of Criminal Procedure) as limited only by a required "showings of materiality to the defense and reasonableness." Even in the absence of a statutory right, the court in *Puyallup Tribe v. LaPointe*, No. 94-3075 (Puyallup 08/29/1994) dismissed the criminal case, holding that "[t]he failure to disclose *requested* discoverable information, necessary for preparation of a competent defense, violates due process and makes a fair trial impossible." (Emphasis added.) In that case, the defendant had requested one specific document.

The two cases show that tribal courts have taken discovery *requests* very seriously. However, even while upholding a broad right, the courts explicitly or implicitly considered the reasonableness of the request. The present case is distinguishable, however. The existence or absence of a discovery request is a critical fact because there are costs associated with disclosing evidence – in terms of burden imposed on the prosecution and unnecessary disclosure of victim information – which may outweigh the benefits in truth-finding. This concern about costs of disclosure outweighing the benefits is particularly true for *nonexculpatory* evidence (that is, evidence that does not tend to prove innocence or blamelessness) that is not used at trial. Thus, the purpose of requiring the defendant to make a specific discovery request is to enable the trial court to assess the reasonableness of the request. If the request is "reasonable" (not unduly burdensome), a defendant can discover evidence that is cumulative (that is, supporting a point already made with other evidence), nonexculpatory, and not used at trial. However, if we were to hold on appeal that due process is violated where the prosecution did not disclose cumulative, nonexculpatory evidence that was not used at trial, we would be upholding an absolutely unlimited right to "unreasonable" discovery by the defendant. That we decline to do.

Just as other tribal courts, this Court must strike a balance in determining the level of disclosure that due process requires. In this case, the prosecution disclosed all evidence it used at trial. There is no showing that the audiotape was ever in the possession of the prosecution; and

[3] The only Hualapai criminal case that touches upon due process in the context of criminal discovery is *Colton Ron Selana v. Hualapai Tribe*, 2008-AP-005 (Hualapai Ct. App. 2008). However, the facts in that case are different from the facts presented in this appeal. In *Selena*, this Court found no due process violation, where the defendant had 25 days to review a four-page diary that was later admitted into evidence. Here, the defense had no opportunity to review the audiotape statement of the victim before trial.

while the prosecutor did not provide the audiotape, the witness's testimony at trial alerted Appellant to the tape's existence. Although tribal court decisions do not directly address whether the prosecution's conduct struck an appropriate balance for due process purposes under these circumstances, federal court decisions come closer, and the Arizona Supreme Court has indicated that it "applies the due process clause of the Arizona Constitution in the same manner as its federal counterpart." *State v. Youngblood*, 173 Ariz. 502, 508 (1993) (Feldman, J., dissenting). Hence, federal court decisions will be examined for any guidance they may provide to the interpretation of the Hualapai due process clause.

The seminal United States Supreme Court case, *Brady v. Maryland*, 373 U.S. 83 (1963), requires the prosecution to disclose exculpatory evidence even if no discovery request is made. In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87 (ordering a new trial for punishment in a murder case, where the defendant learned after trial that the prosecution withheld someone's statement admitting guilt). The standard of materiality is whether there is "a reasonable probability that, had the evidence been disclosed to the defense, the result … would have been different." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

Since *Brady*, the Court has applied the *Brady* rule not only to exculpatory, but also to impeachment evidence. *Bagley*, 473 U.S. at 676 (remanding the case for a determination whether the non-disclosure of impeachment evidence that the witnesses would be paid was material). The *Brady* rule applies even to evidence known only to the police and not the prosecution. *Kyles*, 514 U.S.at 437, 433. However, due process under the United States Constitution does not demand "an open file policy … and the rule … requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Id.* at 437. The Supreme Court has noted that – apart from the *Brady* rule – the due process clause speaks to the "balance of forces between the accused and his accuser," but "has little to say regarding the *amount* of discovery which the parties must be afforded." *Wardius v. Or.*, 412 U.S. 470 (1973).

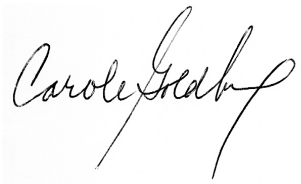
While the bad or good faith of the prosecution is generally not relevant in a *Brady* analysis, it is relevant where the context of the tape is unknown, because of the inference that can be drawn from the bad faith, *i.e.*, that the tape is exonerating. For instance, state courts have consistently held that, where the tape was erased or lost, claims that the tape *may* have been exculpatory did not suffice, unless there was evidence of bad faith. *State v. Walters*, 515 N.W.2d 562, 568 (Iowa Ct. App. 1994); *Com. v. Simmarano*, 50 Mass. App. Ct. 312, 317-18 (2000) (noting that a defendant must show a reasonable possibility that the lost evidence had some exculpatory value); *Keeney v. State*, 109 Nev. 220, 230 (1993) (overruled on other grounds) (holding that where there was no allegation of bad faith, defense counsel's argument that "it was quite possible" that the erased taped contained exculpatory evidence did not suffice); *see also Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) ("unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law").

The rule in those cases strikes a balance between the due process concern that the police may not suppress favorable evidence and the burden it would impose on the police to guard every shred of evidence. In the absence of a due process requirement that the police open their files, courts are hesitant to reverse a conviction on a technicality. This policy concern applies with equal force in the Hualapai context. In the instant case there is no allegation of bad faith and there is no more than a mere possibility that the earlier statement by the victim *could have* included exculpatory or impeachment evidence. Unlike *Brady*, where the existence of the statement was unknown until after trial, the existence of the audiotape was disclosed to the Appellant at trial. Appellant had an opportunity ask for a continuance to review the audiotape, but did not. In fact, Appellant's advocate indicated during the oral argument of this appeal that he has still not reviewed the content of the audiotape. Further, the defendant received a police report that was completed on the basis of and at the time of the earlier statement. Inconsistencies in the witness's statements would – absent bad faith – be reflected in the police report. The inference to be drawn from Appellant's failure to object at trial or to make an effort to review the tape after trial is that Appellant believed the tape to be cumulative of the victim's testimony at trial. Under the circumstances, where the content of the tape is speculative, the standard of materiality for *Brady* evidence has not been met: there is no reasonable probability that, had the evidence been disclosed to the defense, the result would have been different. Consequently, this Court finds that non-disclosure of the tape did not "seriously prejudice substantial rights."

Conclusion

This Court finds that the Tribal Court correctly interpreted the mandatory enhanced sentencing provision in Section 7.4(A)(3) and that the failure to disclose the tape did not violate the due process provisions of the Hualapai Constitution or the Indian Civil Rights Act. For the foregoing reasons, Appellant's conviction is AFFIRMED.

Entered this 3rd day of January, 2011
on behalf of the entire panel



Justice Carole Goldberg
Hualapai Court of Appeals