IN THE HUALAPAI COURT OF APPEALS
HUALAPAI RESERVATION, ARIZONA

Hualapai Tribe, Plaintiff/Appellee v. Coleen Mahone, Defendant/Appellant	App. Court Case No.: 2010-AP-014 Tribal Court Case No.: 2010-CR-324(A) **OPINION AND ORDER**

Before Justices Robert N. CLINTON, Carole GOLDBERG, and Pat SEKAQUAPTEWA

Appellant Coleen Mahone (Defendant/Appellant or Mahone) appeals her conviction of one count of battery (Hualapai Law & Order Code § 6.87A). Defendant/Appellant argues that the Tribal Court committed reversible error when it set her trial date beyond the ninety-day period established by Hualapai Law and Order Code §5.15(A). We must decide whether Defendant/Appellant's rights under Hualapai Law and Order Code § 5.15A were violated by the timing of her trial, and if so, what the remedy for that violation should be. For the reasons stated below, this Court determines that the timing of Defendant/Appellant's trial violated the commands of Hualapai Law and Order Code § 5.15A and the commands of the Hualapai Constitution and, for this reason, her conviction must be reversed and the criminal complaint dismissed with prejudice.

Statement of Relevant Facts and Procedural History

On September 23, 2009, Mahone was charged with the crime of battery. Hualapai Law & Order Code ("Law and Order Code") § 6.87A. According to the criminal complaint, on August 30, 2009, she

stabbed her boyfriend's sister in the face when the sister attempted to intervene in a fight between Mahone and Mahone's boyfriend. The victim required stitches to close her wound.

Mahone was later arraigned on October 20, 2009 and released on her own recognizance. At her arraignment Mahone signed a Conditions of Release and Order form, which required her to agree to appear at her hearings in exchange for her release. During a pre-trial hearing on November 18, 2009, Mahone requested a jury trial and her first trial date was set on January 25, 2010. The Tribal Court did not give any reason for selecting that date, which was approximately four months after the criminal complaint had been filed. The Trial Court later had to re-schedule the January 25th date because the roof of the Tribal Courthouse caved in and the Courthouse was deemed unsafe. The new trial date was set for March 23, 2010.

Over the next six months, Mahone's trial was repeatedly delayed because the Tribal Court was unable to impanel a jury. The Tribal Court rescheduled Mahone's trial each time it was unable to find a jury. On September 22, 2010, the Tribal Court was again unable to seat a jury, at which time counsel for Mahone moved that the charges be dismissed, citing the violation of Mahone's right to a speedy trial under Law & Order Code §5.15(A). The Tribal Court ordered Mahone's counsel to submit a Memorandum of Points and Authorities by October 1, 2010. However, defense counsel, in apparent violation of the Court's request, never submitted the requested Memorandum. On October 15, 2010, the Tribal Court denied Appellant's motion basing its decision on the missing memorandum.

On October 21, 2010, a jury was seated and Appellant was tried and convicted of Battery (VIO). She thereafter filed a timely Notice of Appeal.

Jurisdiction

The Hualapai Court of Appeals has jurisdiction over all appeals from a final judgment imposed by the Tribal Court in any criminal case. Law and Order Code § 10.2. A notice of appeal must be filed

within five days of the final order in order to be considered timely. Law and Order Code § 10.4[1]. Appellant filed a Notice of Appeal on November 2, 2010, one day after being sentenced through a Judgment of Guilt and Sentencing Order. Accordingly, Appellant's appeal is both timely and within the jurisdiction of this Court.

Scope of Review

Article VI, section 12 of the Hualapai Constitution provides that "[a]ll matters of law and procedure may be decided by the Court of Appeals. Findings of fact may be made by the Tribal Court, and shall be reviewable only when arbitrary and capricious." Therefore, in considering this appeal, the Court may review legal errors *de novo*, however, it can only review findings of fact made by the Tribal Court only if the findings were "arbitrary and capricious."

Discussion

I. Appellant's statutory and constitutional rights to a speedy trial were violated when her first trial date was set beyond the ninety-day speedy trial period established by Law and Order Code §5.15(A).

Article VI, Section13 of the Hualapai Constitution guarantees a right to a speedy trial but does not provide a specific time constraint. Like the Hualapai Constitution, the Sixth Amendment to the United States Constitution also does not mandate a specific time limit within which a defendant's trial must occur. *Barker v. Wingo*, 407 U.S. 514, 523 (1972). Unlike Article VI, Section 13(c) of the Haualapai Constitution, the Sixth Amendment speedy trial right is not directly applicable to the Tribe and therefore does not govern this matter, although its interpretation may prove instructive of the meaning of the tribal constitutional right to a speedy trial.

[1] Since the date of the filing of this appeal, amendments to the Hulapai Law and Order Code have gone into effect, extending the time period for filing an appeal to thirty (30) days.

Like the federal government, the Hualapai Tribal Council has further delineated the speedy trial right set forth in Article IV, Section 13 of the Haualapai Constitution with more specific statutory rights found in section 5.15(A) of the Hualapai Law and Order Code. Section 5.15(A) expressly provides, "[t]he trial of a criminal case *shall* take place within ninety days after the date on which the complaint initiating the case was filed, unless extraordinary circumstances exist which require further delay or the defendant consents in writing to a delay." (Emphasis supplied). This Court understands the word "shall" employed in section 5.15(A) to mandate that the criminal trial take place within ninety days from the date of the filing of the criminal complaint absent either a showing, made before the Tribal Court, of extraordinary circumstances or a written consent to waive these rights by the defendant.

In this case, a criminal complaint was filed against Mahone on September 23, 2009 and she was arraigned on three counts of battery on October 20, 2009. According to the terms of section 5.15(A), unless there were "extraordinary circumstances," Mahone should have been given a trial date by December 23, 2009. Instead, her *first* trial date was set for January 25, 2010, one hundred and twenty-five days later. The record in the Tribal Court is devoid of any reasons for the delay. The Tribe stated at oral argument in this matter that it is its unwritten policy to start the speedy trial clock at the time a defendant is arraigned, rather than on the date the criminal complaint is filed. Since neither the Prosecutor nor the Tribal Court has any power to ignore or alter the plain language of section 5.15(A), which expressly starts the speedy trial clock on the date the criminal complaint is filed, this claimed policy is simply illegal and must be ignored by this Court. However, even if this Court could accept the Prosecutor's illegal approach to enforcing section 5.15(A) and could begin the speedy trial clock from the date of Mahone's arraignment on October 20, 2009, the January 25th trial date was still set for totally unexplained reasons five days beyond the statutory limit and therefore presumptively violated Mahone's constitutional and statutory rights to a speedy trial.

No "extraordinary circumstances" have been suggested or appear in the Tribal Court record that would explain the initial delay beyond ninety days. The Tribe asserted before this Court that the *subsequent* delays (first to March 23, then to September 22, 2010) were attributable to two different types of "extraordinary circumstances" – the cave-in of the courtroom ceiling and the difficulties impanelling a jury. While clearly an act of nature like the snowstorm that caused the cave-in of the courtroom ceiling constituted an extraordinary circumstance, whether or not difficulties impaneling a jury constitutes "extraordinary circumstances" is a matter on which this Court declines to rule since these *later* events cannot and do not excuse the *initial* failure to meet the ninety-day requirement.

The Tribe has urged the Court to adopt the four-factor balancing test created in a United States Supreme Court decision, *Barker v. Wingo*, 407 U.S. 514, 530 (1972), to determine if Mahone's rights under section 5.15(A) were violated. In *Barker,* the Supreme Court created a four-part balancing test to determine when a defendant's *constitutional* right to a speedy trial has been violated. *Barker*, 407 U.S. at 530-533. Courts must balance (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant. *Id.* The Tribe argues that *Barker* is the right test because it provides the already burdened Tribe with more flexibility in setting trial dates.

However, *Barker* merely outlines the *constitutional floor* of the federal constitutional right to a speedy trial. The federal government, all fifty states, and, most importantly, the Hualapai Tribe have chosen to implement the constitutional speedy trial rights by providing statutory speedy trial rights that are more specific than *Barker*, and in some cases, even more demanding than the Haulapai Law and Order Code. These governments recognize, as the Court in *Barker* did, that:

> "[s]ociety has a considerable interest in limiting the amount of time between a criminal defendant's indictment or arrest and trial. Lengthy delays between indictment and trial can lead to a backlog of criminal cases that overburden the system, which, in turn, improves defendants' ability to negotiate for lesser charges in exchange for guilty pleas."

Id. at 519. A speedy trial is even more important in a small community, such as Hualapai, where

defendants are in close proximity to victims and witnesses, thus giving them the opportunity to intentionally taint the jury pool. Furthermore, *before trial* the Tribe has the option of dismissing the charges against a defendant and re-filing at a later date, thus, re-starting the speedy trial clock. The initial and primary responsibility to monitor and assure compliance with the defendant's statutory speedy trial rights set forth in Haulapai Law and Order Code, Section 5.15(A), therefore, rests with the Prosecutor since only (s)he can voluntarily dismiss a prosecution pre-trial if such rights might be violated. If the Prosecutor takes a case to trial after the speedy trial date set forth in Haulapai Law and Order Code, Section 5.15(A), the Tribe does so at its peril and the Tribe must make a showing on the record of the extraordinary circumstances required by that section for such actions. No such showing was made in this particular case. Thus, we interpret Law and Order Code to establish an absolute time limit, which can be relaxed only where the Tribal Court record clearly demonstrates "extraordinary circumstances" or the defendant's proper written consent to a trial later than the deadline set forth in Haulapai Law and Order Code, Section 5.15(A) .

II. Under the terms of Hualapai Law and Order Code § 5.15(A), Appellant did not consent to the delay of her trial date or otherwise waive her right to a speedy trial.

The language of section 5.15(A) of the Law and Order Code is clear and unambiguous. The statute provides that a defendant may waive the constitutional and statutory right to a speedy trial in order to allow a trial to continue beyond the statutory deadline, but only if the "defendant consents in writing" to the delay. At no time did Mahone consent in writing to delay of her trial as required by section 5.15. Thus, the Tribal Court committed legal error by setting Appellant's initial trial date for January 25, 2010, one hundred and twenty-five days later, without her written consent.

The Tribal Court apparently viewed the failure of defense counsel to file the requested memorandum of law on the speedy trial question as a waiver of the claim. While this Court condemns

defense counsel's failure of honor his obligations to defend his client fully within the bounds of the law by filing the requested Memorandum, the Court nevertheless must find that the Tribal Court erred as a matter of law in treating defense counsel's inexcusable dereliction as a waiver of Mahone's right to a speedy trial. Section 5.15(A) expressly provides that the speedy trial right can only be waived with a knowing waiver *signed by the defendant*. Clearly defense counsel's inexcusable dereliction cannot and does not substitute for the express requirement of a waiver signed by the defendant (which this Court does not understand to include defendant's counsel). Mere inaction is certainly not the same as a signed waiver of the type expressly required by section 5.15(A).

The Tribe argues, however, that the Mahone did consent in writing in the Conditions of Release Order Form that the Appellant signed on October 20, 2009 upon her release from custody. This argument is troubling, to say the least. To accept the argument, this Court would be forced to find that the Tribe may force a defendant to sign away a fundamental right to a speedy trial in order to secure release from custody. Furthermore, contrary to the Tribe's argument, the form that was actually signed does not explain the statutory right to trial within ninety days, nor explicitly ask a defendant to waive that right. As discussed above, section 5.15(A) makes it clear that a defendant must "consent in writing" to a delay. Mahone's signature on the Conditions of Release Order Form only indicates her agreement to appear at trial, and thus is not a knowing and intelligent waiver of her constitutional and statutory right to a speedy trial and fails to comply with the requirements of section 5.15(A). Because we find that Mahone did not consent in writing to the *initial* violation of her statutory right to trial within ninety days, we do not consider whether the subsequent delays in her trial date were justified by "extraordinary circumstances."

III. Since the Prosecutor took Mahone to trial after the speedy trial clock had run out, the only remedy available for violating Mahone's statutory right to a speedy trial is dismissal of all charges with prejudice.

Hualapai Law and Order Code Section 5.15 is silent as to a remedy for a violation of the ninety-day deadline for setting a trial date. Thus, in accordance with Hualapau Law and Order Code § 3.1B, we consult foreign law for guidance in determining the proper remedy for a violation of Appellant's right. In the case of the federal constitutional right to a speedy trial, the Supreme Court has ruled that dismissal is the only remedy for a violation. *Barker v. Wingo*, 408 at 522; *see also Strunk v. United States* 412 U.S. 434 (1973) (holding that reducing the defendant's sentence was not a sufficient remedy for a speedy trial violation). Of course, the federal constitutional right is far more flexible than the Hualapai Tribe's statutory right, and already takes into account such factors as prejudice to the defendant. Nonetheless, Hualapai Law and Order Code Section 5.15(A) does contain an exception for "extraordinary circumstances," and does not preclude refiling by the prosecution if the Prosecutor voluntarily dismisses the criminal complaint *before trial*.[2] Thus, there is enough flexibility for the prosecution to warrant an absolute remedy of dismissal once the ninety-day period is exceeded.

While not controlling law at Hualapai, this Court notes that the State of Arizona also follows the rule that the remedy for a speedy trial violation is a dismissal of the charges. In *State v. Craig*, 214 Ariz. Adv. Rep. (AZ Ct. App. 1996), the defendant was tried and convicted of sexual assault, kidnapping and aggravated assault in a trial that began 81 days after the speedy trial clock ran out due to delays allegedly caused by necessary the DNA testing. Notwithstanding the seriousness of the offenses, the Court of Appeals held that the defendant's convictions had to be reversed and the charges dismissed due to the violation of the defendant's speedy trial right.

Thus, when, as here, the criminal trial occurs later than the ninety-day period permitted by

[2] In some such circumstances, there may be other problems with refiling, such as double jeopardy or the running of a statute of limitations.

Hualapai Law and Order Code, Section 5.15(A) and no showing of either extraordinary circumstances or a written consent and waiver by the defendant appears in the Tribal Court record, a clear violation of section 5.15(A) exists. When, as here, the defendant has already gone to trial and thereby been placed in jeopardy, any retrial following dismissal is barred by the defendant's constitutional right against being placed in double jeopardy guaranteed by Article VI, Section 13(a) of the Hualapai Constitution. While this Court recognizes the extreme seriousness of the crime with which Mahone was charged and convicted and it certainly does not in any way condone or excuse her alleged conduct, the dictates of Hualapai constitutional and statutory rights are clear in this case. Since the Tribe chose to permit the Tribal Court to set an *initial* trial date after the speedy trial clock of Section 5.15(a) had expired and thereafter chose much later to take Mahone to trial without any showing of extraordinary circumstances or written consent from the defendant, the Tribe blatantly violated Section 5.15(A) in a fashion that requires dismissal of the criminal complaint with prejudice. Accordingly, this Court holds that the criminal conviction in this matter must be vacated and the criminal complaint against Mahone must be dismissed with prejudice.

Conclusion and Order

Because Mahone's initial trial date was set beyond the ninety days required by the Hualapai Law and Order Code §5.15(A), we hold that Mahone's constitutional and statutory rights to a speedy trial were violated. We therefore vacate Mahone's judgment of conviction and order the Tribal Court to dismiss the criminal complaint against Mahone with prejudice.

Justice Carole Goldberg joins in the result and basic reasoning of this Opinion but does not think it necessary to that reasoning for the Court to address the provisions of Article VI, Section13 of the Hualapai Constitution that guarantee a right to a speedy trial.

Entered this 26th day of May, 2011 on behalf of the entire panel:

By: Robert N. Clinton
Justice Robert N. Clinton