IN THE HUALAPAI COURT OF APPEALS
HUALAPAI NATION
PEACH SPRINGS, ARIZONA 86434

Coby Washington, Appellant — Appellate Court Case No.: 2009-AP-002

v. — HTC No.: 2009-CR-106

Hualapai Tribe, Appellee

Before Justices Carole Goldberg, Pat Sekaquaptewa, and Wes Williams, Jr.

Opinion by Justice GOLDBERG

OPINION AND ORDER

Appellant Coby Washington ("Appellant") appeals a Tribal Court judgment of guilt for two counts of violating Hualapai Tribal Law and Order Code ("Law and Order Code") § 6.277, Possession of Alcohol by a Person under Twenty-One (Counts A and B), and for one count of violating Law and Order Code § 6.274, Possession, Manufacture, or Delivery of Drug Paraphernalia (Court C). (Judgment of Guilt and Sentencing Order, Mar. 3, 2009.) For the reasons stated below, this Court finds that the judgment was not in error and affirms the convictions.

Statement of Relevant Facts and Procedural History

Appellant was arrested at 8:33 PM on Saturday, February 28, 2009 and was held in Tribal custody until his arraignment on Tuesday, March 3, 2009. Appellant alleges that he was unable to contact an attorney or advocate during his period in custody because the jail was on lockdown. At arraignment, the presiding Tribal Court judge orally recited to a group of defendants, including Appellant, the terms of the Hualapai "Arraignment: Notice of Rights" form. This form describes the rights of Hualapai criminal defendants, including the right to an advocate at tribal expense and the consequences of guilty, not guilty, and no contest pleas. On the morning of his arraignment, Appellant orally agreed that he had heard the terms of the "Arraignment: Notice of Rights" form.

When it was time to hear Appellant's case, the Court asked Appellant if he wished to waive the reading of the criminal compliant, and Appellant stated that he did wish to waive the reading of the full complaint. The Court went on to describe the three charges filed by the Tribe against the Appellant, the Tribe's factual allegations supporting the charges, and the maximum penalty for each charge. Appellant was charged with one count of violating Law and Order Code

§ 6.277 ("Possession of Alcohol by a Person Under Twenty-One"), based on the Tribe's allegation that Appellant was in possession of two 40 ounce bottles of high gravity alcohol on February 28, 2009 when he was arrested. (Count A) Second, Appellant was charged with another count of violating Law and Order Code § 6.277 ("Possession of Alcohol by a Person Under Twenty-One"), based on the Tribe's allegation that Appellant was under the influence of alcohol when he was arrested, with a blood alcohol level of .004. (Count B) Third, Appellant was charged with violating Law and Order Code § 6.274A ("Possession, Manufacture, or Delivery of Drug Paraphernalia"), based on the Tribe's allegation that Appellant possessed a metal pipe containing marijuana residue when he was arrested. (Count C) The Court then proceeded to receive Appellant's pleas of "no contest" to each charge. The Court asked Appellant: "Now you know what you're doing by pleading 'no contest'?" Appellant responded: "Yes, your honor."

Having accepted Appellant's pleas of no contest to all three counts, the Tribal Court asked Appellant if he wanted to be sentenced immediately or if he would rather wait until April for a sentencing hearing. The Tribe stated that it would ask for the Appellant to be remanded to Tribal custody if the Appellant were to ask for a later sentencing date, and the Court indicated its willingness to grant such a request because of other pending charges against Appellant and the fact that he had not complied with his prior probation. The Court then asked Appellant, "Okay, so my question then is—would you—is there any reason why we shouldn't go to sentencing right now and do it, or would you rather have sentencing later? I have to ask you, the defendant, first. Then I'll ask the Tribe if they're ready to proceed, but I need to ask you first." After a few seconds when the recording is inaudible, Appellant said, "I'm ready to go to sentencing, I guess."

The Court proceeded to ask the Tribe for its sentencing recommendation, which was 30 days jail for Count A, 15 days jail for Count B, to run concurrently with Court A, and 30 days jail for Count C, for a total of 60 days jail. The Court asked Appellant what his response was to the Tribe's sentencing recommendation, and Appellant responded, "Nothing." The Court then took note of a prior conviction for alcohol possession by the Appellant, and imposed a sentence of 20 days jail time for Count A, 10 days jail time for Count B (to run concurrently with Count A), and 30 days jail time for Count C, for a total jail sentence of 50 days, with the condition that Appellant would be released from 5:00 AM until 7:00 PM on weekdays to attend school. After imposing the sentence, the Court told Appellant that he may want to talk to the Tribal Public Defender about sentencing schemes for future charges for which Appellant had not been arraigned. Appellant was not represented by legal counsel or a lay advocate at his arraignment, nor is there any indication that Appellant requested or received the assistance of counsel or a lay advocate at any time after his arrest.

On March 10, 2009, Appellant filed a timely Notice of Appeal with this Court. This Court has not received any briefing from the Appellant or the Appellee. On April 22, 2009, this Court ordered the Tribe and Appellant to participate in a pre-hearing conference, scheduled for April 30, 2009. Appellant did not appear telephonically for this call. On May 8, 2009, this Court set dates for briefing, set the date for the oral argument hearing, and ordered: "Subject to the consent of Coby Washington, this Court appoints the Hualapai Public Defender to represent the Appellant Coby Washington, in this appeal." It appears that Appellant and the Public

Defender never reached an agreement regarding representation in this appeal, as neither Appellant nor the Public Defender appeared at the hearing on June 12, 2009.

Issues

Although Appellant did not file any briefs in this case, he did describe the grounds for his appeal in his Notice of Appeal. In reviewing the record in this case, this Court also identified a threshold issue that affects resolution of the others. The threshold issue identified by this Court is:

1) Did Appellant effectively waive his rights at arraignment, when he entered no contest pleas?

The issues Appellant raises are as follows:

2) Was Appellant held in pre-trial detention for more than 24 hours without an arraignment, in violation of Law and Order Code § 5.12(B)?

3) Did Appellant's conviction on Counts A and B violate the prohibition against double jeopardy in Article VI, section 13(a) of the Hualapai Constitution, because both counts were for violation of the same provision of the Law and Order Code, § 6.277?

4) Did the Tribal Court consider improper prior juvenile convictions when sentencing Appellant?

5) Was Appellant improperly denied the right to counsel or an advocate?

Jurisdiction

The Hualapai Court of Appeals is a court of limited jurisdiction that may review final judgments of the Tribal Court in civil, criminal, and juvenile matters. *See* Law and Order Code § 10.2. Appellant filed his Notice of Appeal in a timely manner following his final judgment of sentencing, properly invoking the jurisdiction of this Court.

Appellant has now served his sentence in this case, a fact that raises potential questions of mootness. Mootness means that the dispute or conflict leading to the appeal no longer exists. However, in *Gene v. Hualapai Tribe*, 2006-AP-003, at 4-5 (Hualapai Ct. App. 2008), this Court held that appellants who have already satisfied their criminal sentences still have valid legal interests in their reputations, which are harmed by an allegedly improper criminal conviction. Therefore, Appellant's appeal is not moot.

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 shall be made by the Trial

Court and shall be reviewable only when arbitrary and capricious." Thus, in considering this appeal, the Court must limit itself to a review of legal errors in the proceeding below. This Court is not permitted to try contested facts on appeal, and may reexamine facts found below only for the purpose of determining whether trial court findings were "arbitrary and capricious."

Discussion

1. Appellant was properly advised of his rights at arraignment.

The Law and Order Code states that when a criminal defendant is arraigned, the "defendant shall be advised of his or her rights under Tribal law, including the right to remain silent, to have a trial by jury, to confront accusers and to have the assistance of an attorney or an advocate at the defendant's own expense." Law and Order Code § 5.10(B). The Tribal Court Judge explained these rights orally, in open court, to Appellant and all the other defendants scheduled for arraignment that day. This recitation to the assembled defendants was actually the text of the standard Hualapai "Arraignment – Notice of Rights" form, which announces not only the rights specified in the Law and Order Code, but also the right to the assistance of counsel "at your own experse OR *by the Office of the Hualapai Public Defender*" (emphasis added). The form further explains the meaning and consequences of not guilty, guilty, and no contest pleas. When it was his turn, Appellant orally assented to the waivers set forth in the form. However, a signed "Arraignment - Notice of Rights" form is absent from the Appellate Record. Once Appellant came forward for arraignment, the Tribal Court Judge again asked Appellant, "Now you know what you're doing by pleading 'no contest'?" Appellant responded in the affirmative.

Particularly when a defendant enters a plea of guilty or no contest, it is critical that such a defendant is expressly informed of these rights prior to entering such a plea, or the plea will be defective. Other federal, state, and tribal jurisdictions require defendants to be notified of the constitutional rights they are waiving by entering a guilty or no contest plea before those courts will accept such a plea. See, e.g., Fed. R. Crim. P. 11(b); Ariz. R. Crim. P. 17; Ami v. Hopi Tribe, ¶ 58, Case Nos. AP-003-89, AP-004-89, AP-003-88, (App. Ct. Hopi Tribe) available at http://www.tribal-institute.org/opinions/1996.NAHT.0000005.htm. Thus we must consider whether an oral waiver, without a separate signed statement, is legally adequate under law and Order Code § 5.10(B).

Law and Order Code § 5.10(B) does not prescribe any particular manner in which defendants are to be "advised" of their rights. This Court observes that use of the printed and signed "Arraignment – Notice of Rights" form can avoid factual disputes about whether waivers were actually made. Nonetheless, we conclude that oral notification to defendants of their rights, documented in the hearing transcript, coupled with oral affirmation of the waivers, also properly documented in the transcript, is legally sufficient to support a plea of guilty or no contest. Given that the notification and assent are clearly set forth in the audio recording in this case, Appellant's assignment of error must fail.

2. Appellant's claim of pre-trial detention of excessive duration cannot be raised for the first time on appeal.

Law and Order Code § 5.12A provides that except for offenses involving violence and DUI, no arrestee "shall be detained, jailed or imprisoned for a longer period than 24 hours absent a temporary or final commitment order bearing the signature of a Tribal Court Judge." For the first time in this appeal, Appellant raises the issue of his improper detention for longer than 24 hours without a court order following his arrest. His position, apparently, is that an excessive period of pre-trial detention should invalidate the judgment of his guilt following his no contest pleas.

The jurisdiction of this Court is limited to reviewing errors of law committed in the Tribal Court. Without a factual record to review regarding the conditions of Appellant's pre-trial confinement and without any ruling on the issue from the Tribal Court, there is nothing for this Court to examine on appeal. *Cf. Gene v. Tribe*, *supra*, at 8 (declining to award damages for wrongful prosecution when raised in the first instance on appeal for lack of jurisdiction). The record does indicate that more than 24 hours passed between Appellant's arrest on Saturday, February 28 and his arraignment on Tuesday, March 3. But it is possible that other facts exist that would explain this longer detention. For example, it is possible that Appellant was being held longer than 24 hours on some other charge or for a probation violation. It is thus beyond the jurisdiction of the Court of Appeals to make any determination of wrongful pre-trial incarceration in the first instance on appeal of a no contest plea.

In choosing to plead no contest to the charges against him, Appellant also waived (or gave up) his right to challenge his prosecution, including any pre-trial violations that might invalidate his conviction. The validity of Appellant's no contest plea and associated waivers is discussed under points 4 and 5, below.

3. Charging two counts of violating the same statute is not double jeopardy where at least one separate element is involved in proving each count.

Appellant alleges that because he was charged and convicted of two counts of Possession of Alcohol by a Person under Twenty-One that he was twice put in jeopardy for the same offense, in violation of Hualapai Constitution Art. VI, § 13(a). In the criminal complaint filed against Appellant, Count A alleged that Appellant possessed a bottle of alcohol, in violation of Law and Order Code § 6.277, and Court B alleged that Appellant was himself under the influence of alcohol, also in violation of Law and Order Code § 6.277.[1]

[1] Law and Order Code § 6.277 defines Possession of Alcohol by a Person under Twenty-One as follows:

A person commits the offense of possession of alcohol by a person under the age of 21 if, while being under the age of 21, the person *possesses*, purchases, consumes, obtains, or sells, or *is found under the influence, of* any beer, wine ale, whiskey or any substance whatsoever which produces alcoholic intoxication, or misrepresents his or her age for the purpose of buying or otherwise obtaining an alcoholic beverage [emphasis added].

Appellant's plea of no contest, if properly taken (see Discussion under points 4 and 5, below), might preclude a challenge on appeal to the constitutionality of the charges against him, including the double jeopardy challenge he makes. Even if he had not waived his rights, however, the challenge would fail. This Court acknowledges that if an indictment charges a single offense over multiple counts, it may put a criminal defendant at risk for being twice punished for the same crime, in violation of constitutional protections against double jeopardy. However, in *Gene v. Tribe*, *supra* at 7, this Court held that two crimes will *not* be deemed the "same offense" for double jeopardy purposes so long as each crime requires proof of one distinct element. Although the defendant in *Gene* was charged under two separate sections of the Law and Order Code, the same analysis applies to Appellant, who was charged with two counts of violating the same section of the Law and Order Code. Count A alleged that Appellant possessed a bottle of alcohol, while Count B alleged that Appellant was himself intoxicated. Each count required the Tribe to prove one distinct element, separate from the other count, namely that Appellant possessed alcohol and that Appellant was under the influence of alcohol while under the age of twenty-one. Thus, each count required proof of one distinct factual allegation, and Appellant could not have been twice put in jeopardy for the same offense.

4. The Tribal Court did not improperly consider Appellant's juvenile convictions.

Law and Order Code § 5.20 gives the Tribal Court wide discretion when imposing sentences on criminal defendants after a judgment of guilty has been entered, so long as the sentence imposed falls within the minimum and maximum range specified for each crime. The Law and Order Code also charges the Tribal Court with considering the following factors when determining a criminal sentence: "the previous conduct of the defendant, the circumstances under which the offense was committed, whether the offense was malicious or willful and whether the offender has attempted to make restitution, the extent of the defendant's resources and the needs of the defendant's dependents." Law and Order Code § 5.21. Because the Law and Order Code charges the Tribal Court with considering many highly fact-dependent factors when sentencing a defendant and because the Law and Order Code does not set out any objective criteria for sentencing beyond certain minimum and maximum jail terms or fines, this Court should only review Tribal Court sentencing decisions to ensure they are within the upper and lower statutory limits, and neither arbitrary nor capricious.

In this case, the Tribal Court imposed sentences well below the statutory maximum penalties of 90 days imprisonment for Possession of Alcohol by a Person under Twenty-One and of one year imprisonment for Possession, Manufacture, or Delivery of Drug Paraphernalia. See Law and Order Code §§ 6.277, 6.274. Therefore, the Tribal Court's sentencing decision should be reviewed only to determine if it was arbitrary or capricious.

Appellant, who was 18 years old when arrested, claims that the Tribal Court improperly considered his juvenile criminal record when imposing its sentence. This contention fails for want of support in Hualapai law or in the record. It is unclear under Hualapai law that considering an adult's juvenile convictions is improper when determining a sentence for an adult. Law and Order Code § 5.21, which sets out the factors for sentencing, indicates that the Tribal Court should consider "the previous conduct of the defendant." This provision makes no

reference to whether the Tribal Court should limit itself to the defendant's conduct as an adult. No decision of the Hualapai Court of Appeals has addressed this issue either.

Law and Order Code § 13.20(C) does state that "Neither the record in the Juvenile Court nor any evidence given therein shall be admissible as evidence against the child in any proceeding in any other court….Upon reaching the age of 18, a child's record shall be sealed or destroyed upon the child's request." However, this language has limited application to Appellant's claim. It bars only the use of *evidence* from the juvenile proceeding in a later judicial matter, and allows for destruction or sealing of a juvenile record. Yet there is no indication in the record (or in Appellant's Notice of Appeal) that such evidence was actually used; and Appellant has not demonstrated that his juvenile record(s) have been destroyed or sealed. In fact, the only potentially relevant portion of the sentencing hearing involves the Hualapai Adult Probation Officer reporting to the Tribal Court that Appellant performed poorly in a prior probation. (Trial Audio Recording at 1:06:44.) Information about performance while on probation is not the same as evidence from the juvenile proceeding. Furthermore, because the Adult Probation Officer was making this recommendation and not the Juvenile Probation Officer, an appropriate inference is that the Tribal Court was considering a prior *adult* and not a juvenile probation, anyway. Appellant has not demonstrated otherwise. In the absence of any specific statements that Appellant has identified in the record showing improper consideration by the Tribal Court, this Court concludes that the Tribal Court did not utilize any improper information regarding Appellant's juvenile conviction(s) when determining Appellant's sentence.

5. Appellant was not denied the right to representation by an advocate.

Appellant also claims that he was denied the right to contact a legal advocate to represent him in this case. There has been no factual hearing on the question whether Appellant was denied access to an advocate during his period of pre-trial detention. It is clear, however, that Appellant was not represented by an advocate at his arraignment, which was the only hearing that took place in this proceeding. Nonetheless, as noted above, Appellant was clearly informed at his arraignment of his right to representation by the Office of the Hualapai Public Defender. Appellant chose instead to be arraigned and sentenced immediately.

It is unclear from Appellant's notice of appeal whether Appellant is also claiming that he was entitled to representation by a licensed attorney at tribal expense, rather than representation by an advocate at tribal expense. The Hualapai Constitution, in Art. VI, sec. 13(c), specifies that the Tribe shall not deny any criminal defendant the right to "assistance of an *advocate* for his defense admitted to practice before the Tribal Court" (emphasis added); and § 5.2 of the Law and Order Code merely affords the right "to assistance of a professional attorney or an advocate *at the defendant's own expense*" (emphasis added). So the question (if it has been raised) would be whether the more general due process provision in Art. IX (d) of the Hualapai Constitution provides criminal defendants with more robust rights to representation by licensed attorneys at tribal government expense. Given the lack of clarity in Appellant's notice of appeal, Appellant's failure to file any briefs or to appear at his appellate pre-conference hearing or oral argument hearing, and Appellant's waiver of rights through his no contest plea, this Court finds that the issue has not been properly raised on appeal.

Conclusion and Order

This Court finds that that Tribal Court did not commit any error in accepting Appellant's no contest pleas and sentencing him to a term of confinement. Therefore, Appellant's convictions are AFFIRMED.

Justice Carole Goldberg
Hualapai Court of Appeals

Justice Pat Sekaquaptewa
Hualapai Court of Appeals

Justice Wes Williams, Jr.
Hualapai Court of Appeals

July __, 2009