

**IN THE HUALAPAI COURT OF APPEALS**  
**HUALAPAI RESERVATION, STATE OF ARIZONA**

TY MARSHALL, )  
Appellant )  
 )  
v. )  
 )  
HUALAPAI TRIBE, )  
Appellee )  
\_\_\_\_\_ )

Case No.: 2009-AP-004  
Re: 2009-CR-130A

OPINION AND ORDER

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

Opinion by Justice WILLIAMS.

**OPINION AND ORDER**

**Statement of Relevant Facts and Procedural History**

Ty Marshall ("Appellant") was charged with Disorderly Conduct in violation of Law and Order Code section 6.64. The Complaint alleges that Appellant, while intoxicated, was disruptive at his grandmother's birthday party on March 13, 2009. The Complaint also states that Appellant became angry at and argued with his girlfriend, was aggressive towards members of his household, and threw his grandmother's birthday cake onto the floor.

On March 16, 2009, Appellant was arraigned. Appellant was not represented at the Arraignment Hearing when he signed the Tribe's standard "Arraignment: Notice of Rights" form, waiving his right to assistance of counsel or an advocate. The Trial Judge then read verbatim the entire Complaint, which charged Appellant with "Disorderly Conduct (VIO) in violation of [s]ection 6.64," provided the factual allegations surrounding the charge, and stated that the maximum penalty for this offense was "imprisonment for a period not to exceed 45 days, or a fine not to exceed \$1,000, or both." Appellant pled no contest to the charge. The Trial Judge then asked what the parties wanted to do with regards to sentencing. Prosecutor Marie James requested a later sentencing date so that she could review Appellant's prior conviction record to determine if he qualified for domestic violence sentencing enhancements pursuant to Law and Order Code section 7.4. Appellant requested to be sentenced immediately. The Trial Judge denied Appellant's request, and scheduled a later Sentencing Hearing for May 13, 2009.

The Trial Judge also ordered Appellant to be held in custody until the Sentencing Hearing due to the likelihood of a long jail sentence.

On or about May 4, 2009, Appellant filed a Motion to Dismiss. Appellant argued that the Trial Judge violated Law and Order Code sections 5.10(C)(1) and 5.10(C)(1)(b) by scheduling a Sentencing Hearing more than thirty days after the Arraignment Hearing. In a Minute Order dated May 7, 2009, the Trial Judge ordered, "Motion to Dismiss is Denied," but also ordered, "Set matter as soon as possible for Motion Hearing."

On May 13, 2009, the Trial Judge heard Appellant's Motion to Dismiss and denied the motion. The Trial Judge then held a Sentencing Hearing and determined that Appellant was subject to domestic violence sentencing enhancements pursuant to Law and Order section 7.4(A)(3). The Trial Judge interpreted section 7.4(A)(3) to require one year in jail and a \$1,000 fine for defendants with three or more prior domestic violence convictions in the past five years. Upon review of Appellant's prior conviction record, the Trial Judge determined that Appellant has three or more prior domestic violence convictions within the past five years. Appellant was accordingly sentenced to one year of imprisonment and a \$1,000 fine. In the "Terms and Conditions" section of the Judgment of Guilt and Sentencing Order, the Trial Judge stated that "IF the Defendant completes a domestic violence program/counseling the Defendant may motion the Court to suspend ½ the jail time AND ½ the fine."

On May 15, 2009, Appellant filed a Notice of Appeal.

### **Issues**

1. Was the Appellant adequately informed of the nature and cause of the accusation against him which is required for the court to enter a valid no contest plea to a domestic violence crime?
2. Did the Tribal Court err in delaying the Sentencing Hearing when the Appellant asked to be sentenced immediately in accordance with Law and Order Code section 5.10(C)(1)?

### **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. Law and Order Code § 10.2. Additionally, a written Notice of Appeal must be timely filed within five days after the final judgment is entered. Law and Order Code § 10.4.

In the present case, the Trial Judge sentenced Appellant on May 13, 2009 through a Judgment of Guilt and Sentencing Order. Appellant filed his Notice of Appeal two days later on May 15, 2009. Accordingly, Appellant properly invoked the jurisdiction of this Court by timely filing his Notice of Appeal following his final judgment of sentence.

### **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.” Accordingly, in considering this appeal, the Court may review legal errors *de novo*. This Court is not permitted to try contested facts on appeal, but may reexamine facts found below only for the purpose of determining whether the Trial Court’s findings were “arbitrary and capricious.”

## Discussion

**1. Appellant was not adequately informed that he was being charged with a domestic violence crime, which is required for the Tribal Court to enter a valid no contest plea for a domestic violence crime. Consequently Appellant was improperly sentenced pursuant to domestic violence sentencing enhancements in Law and Order Code section 7.4(A)(3).**

The Hualapai Constitution states that criminal defendants have a due process right “to be informed of the nature and cause of the accusation.” Hualapai Const. Art. VI § 13(c). As part of this right, Law and Order Code section 5.10(B) sets forth that at arraignment hearings, “the criminal complaint shall be read to the defendant in a language which the defendant understands.” This process ensures that a defendant fully understands the nature of the crimes he is being accused of committing.

While the Law and Order Code does not provide more detailed procedural rules to ensure that a defendant is properly informed of the charges brought by the Tribe, the Trial Court has adopted its own procedure. During arraignment, the Trial Court Judge generally reads the criminal complaint to the defendant, which includes a description of the charges filed by the Tribe, the Tribe’s factual allegations supporting the charges, and the maximum penalty for each charge. *See, e.g., Washington v. Hualapai Tribe*, No. 2009-AP-002 (2009).

To determine if this process provides adequate notice of the charges brought against a defendant, we can turn to foreign common law for guidance since Hualapai written and common law does not directly address this issue. *See* Law and Order Code § 3.1(D)<sup>1</sup>. In reviewing other federal, state, and tribal jurisdictions, the consensus is that a valid guilty or no contest plea must be knowingly, intelligently, and voluntarily made before it will be accepted by a trial judge. *See, e.g., United States v. Broce*, 488 U.S. 563 (1989); *State v. Cuthbertson*, 117 Ariz. 62 (1977); *Ami v. Hopi Tribe*, No. AP-003-89 (1996). Furthermore, these legal systems require three basic inquiries to ensure that the defendant has “knowingly” and “intelligently” entered a guilty or no contest plea.<sup>2</sup> First, they all provide that the trial judge inform the defendant about the charges

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<sup>1</sup> Law and Order Code section 3.1(D) provides: “As to any matters that are not covered by the Tribal Constitution, codes, ordinances or resolutions of the Tribe or by Tribal Common Law or by applicable federal law or regulation, the Tribal Court may be guided by common law as developed by other Tribal, federal or state courts.”

<sup>2</sup> Federal courts abide by the Federal Rule of Criminal Procedure 11(b)(1), which requires that a judge inquire into “(G) the nature of each charge to which the defendant is pleading; (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release; (I) any mandatory minimum penalty; . . . (M) in determining a sentence, the court’s obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a).” Likewise, Arizona state courts follow the Arizona Rules of Criminal Procedure 17.2, which requires that:

against him or her. Second, they require telling the defendant about the factual allegations surrounding these charges. Third, they mandate that the defendant be informed of the maximum consequences of the charged crimes, including sentencing enhancements. See *United States v. LaBonte*, 520 U.S. 751, 754 (1997) (holding that if a prosecutor wants to enhance sentencing due to prior convictions, the prosecutor must inform the defendant of this before a plea is entered). These notice requirements have been put in place in these legal systems to create a fair and efficient criminal justice system. See *McCarthy v. United States*, 394 U.S. 459, 467 (1968); see also *Ami v. Hopi Tribe*, AP-003-89 (1996).

These three basic inquiries are already present in the three-pronged approach practiced by the Hualapai Trial Courts. Reading the complaint to the defendant at arraignment provides the defendant with (1) a description of the charges filed by the Tribe against the defendant, (2) the Tribe's factual allegations supporting the charges, and (3) the maximum penalty for each charge. Consequently, this process enables a defendant to "knowingly" and "intelligently" assess how to plead to the charges brought by the Tribe, comporting with Article VI, section 13(c) of the Hualapai Constitution.

While the procedural requirements put in place by the Trial Court are constitutionally sound as a general matter, prong one and prong three of these due process requirements were not met in this case. First, the Complaint did not adequately describe that Appellant was being charged with a domestic violence crime. Appellant was charged with "Disorderly Conduct (VIO) in violation of [s]ection 6.64." The Tribe had argued that the letters "VIO" sufficiently indicate a domestic violence charge, and that this has been a common practice of the prosecutor's office. This Court finds that charging Appellant with a domestic violence crime through a "VIO" designation did not provide Appellant, who was unrepresented at arraignment, with adequate notice that he was being charged with a domestic violence crime. Additionally, Law and Order Code section 7.3(A) states that "domestic violence is a separate crime punishable separate and apart from the underlying crime." As such, to properly charge Appellant with Disorderly Conduct involving domestic violence, the Tribe needed to formally charge Appellant with Domestic Violence Disorderly Conduct under Law and Order Code section 7.3(A)(10).

Second, even if the Tribe had properly charged Appellant with Domestic Violence Disorderly Conduct under section 7.3(A)(10), the Tribe failed to inform the Appellant of the maximum penalty associated with that charge. The maximum penalty of a charge must include information about sentencing enhancements. See *LaBonte*, 520 U.S. at 754. The Complaint against Appellant states that "[t]he MAXIMUM PENALTY for this offense carries a penalty of: imprisonment for a period not to exceed 45 days, or a fine not to exceed \$1,000, or both."

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Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court, informing him or her of and determining that he or she understands the following:

- a. The nature of the charge to which the plea is offered;
- b. The nature and range of possible sentence for the offense to which the plea is offered, including any special conditions regarding sentence, parole, or commutation imposed by statute.

Meanwhile, under Hopi law, a judge must do the following before accepting a guilty or no contest pleas: "(1) read the complaint to the defendant; (2) give the complaint to the defendant; (3) explain the possible consequences to the defendant; (4) advise the defendant of his rights; (5) create a complete record of the proceedings; (6) determine that there is a factual basis for the plea; (7) determine the plea was voluntarily made; and (8) ask the defendant to plead to the charges." *Ami v. Hopi Tribe*, AP-003-89 (1996).

Criminal Complaint, March 16, 2009 (emphasis in original). However, domestic violence convictions may carry enhanced penalties. In fact, the Tribe recommended and the Trial Court agreed to sentence Appellant according to the domestic violence sentencing enhancements set forth in section 7.4(A)(3). As a result, Appellant received a sentence of a year of imprisonment and a \$1,000 fine, which far exceeded the maximum penalty set forth in the Complaint. Thus, Appellant was not provided with adequate notice of the maximum penalty associated with a Domestic Violence Disorderly Conduct crime because he was not informed of the sentencing enhancements.

Finally, this Court disagrees with the Tribe's argument that Appellant has the burden to withdraw or change his plea when the Trial Court sought to enhance his sentence due to prior domestic violence convictions. This is a particularly excessive demand to place on the Appellant, who was unrepresented at both the Arraignment and Sentencing Hearings. The right of criminal defendants to be informed of the nature and cause of the accusations against them is a fundamental due process right afforded by the Hualapai Constitution. Its purpose is to protect the integrity and effectiveness of the judicial system. Accordingly, the burden of adequately informing criminal defendants of charges and accusations rests with the Tribe.

For the reasons stated above, Appellant was not properly charged with a domestic violence crime. As a result, Appellant did not enter a valid no contest plea to Domestic Violence Disorderly Conduct under Law and Order Code section 7.3(A)(10). The Trial Court consequently erred in enhancing Appellant's sentence in accordance with the domestic violence sentencing guidelines set forth in Law and Order Code section 7.4(A)(3).

A review of the Complaint, however, reveals that the Tribe did properly charge Appellant with Disorderly Conduct under Law and Order Code section 6.64. This charge carries a maximum penalty of 45 days of imprisonment, a \$1,000, or both. Because Appellant has already served 45 days of imprisonment, this Court ordered Appellant immediately released on October 15, 2009. This Court also ordered that Appellant not be subject to further charges for disorderly conduct occurring on March 13, 2009 pursuant to the ban on double jeopardy in Article VI, section 13(a) of the Hualapai Constitution. Finally, this Court sets aside the \$1,000 fine because it is unclear if the fine was imposed due to the improper Domestic Violence Disorderly Conduct charge.

**2. Law and Order Code section 5.10(C)(1) does not require immediate sentencing, but allows the Trial Judge to sentence the defendant within a reasonable time under the circumstances.**

Although the sentencing delay is not the deciding issue on appeal, the delay in this case did go beyond a reasonable amount of time because it exceeded the maximum sentence for the charged crime.

Law and Order Code section 5.10(C)(1) specifies the process the Court uses in sentencing a defendant pleading guilty or no contest. According to the section, the Court inquires whether the defendant "has any reason for not being sentenced at that time" and if the defendant asserts no reason for delay, the Judge "shall pass sentence forthwith in accordance with the sentencing

procedures set forth below.” In determining the sentencing, the Judge can consider a number of determining factors as set forth in section 5.21, which includes the previous conduct of the defendant.

Appellant argues that the Trial Judge erred in not sentencing the defendant immediately based on the instruction in section 5.10(C)(1)(a) to sentence the defendant “forthwith.” Section 5.10(C)(1)(a), however, does not require immediate sentencing. Forthwith in this context means the Judge should sentence the defendant as soon as reasonably possible under the circumstances. The Code allows for these qualifications for sentencing by specifying forthwith “in accordance with the sentencing procedures.” Law and Order Code § 5.10(C)(1)(a). In cases of domestic violence, these sentencing procedures include a pre-sentencing domestic violence evaluation under section 7.4(E), which would require a reasonable delay before sentencing.

A reasonable delay under the circumstances and in accordance with sentencing procedures serves to benefit both the Court and the defendant. The reasonable delay provides the Court with additional time to evaluate the defendant’s record and the surrounding circumstances. The delay also allows the Court to conduct rehabilitation and substance abuse evaluations that could potentially shorten the sentence and provide the defendant with useful rehabilitation social services. Therefore, the reasonable delay does not necessarily prejudice the defendant and does not amount to a violation of due process rights.

Here, however, the delay of two months did not amount to a reasonable delay under the circumstances, since the maximum sentence for the charged crime was only 45 days.

As a guideline, the Trial Court should delay sentencing only for the time period required to allow the court to conduct any necessary investigation before determining the final sentence. A reasonable time under the circumstances includes enough time for the Judge to investigate the determining factors of sentencing stated in section 5.21, including the previous conduct of the defendant, the circumstances under which the offense was committed, whether the offense was malicious or willful and whether the defendant has attempted to make restitution, the extent of the defendant’s resources and the needs of the defendant’s dependants. A reasonable time under the circumstances will also allow enough time for any necessary domestic violence, rehabilitation, or substance abuse evaluations. However, a reasonable time under the circumstances will never exceed the maximum sentencing time allowed under the Law and Order Code for the crime charged.


Because the Appellant has already been released from custody and the Judgment reversed, there is no further remedy for the error in delayed sentencing in this case.

## **Conclusion and Order**

This Court finds that the Trial Court erred in accepting Appellant’s no contest plea to a domestic violence crime, and sentencing Appellant in accordance with the domestic violence sentencing enhancements set forth in Law and Order Code section 7.4(A)(3). This Court consequently sets aside the \$1,000 fine because it is unclear whether the fine was imposed due to these errors. The “Judgment of Guilt and Sentencing Order” entered May 13, 2009 is hereby

revised to state that Mr. Marshall pled no contest to Disorderly Conduct under Law and Order Code Section 6.64 with an imposed sentence of 45 days, and the remaining sections of the order are hereby revised accordingly.

Dated: January 6, 2010

  
Justice Wes Williams, Jr.  
Hualapai Court of Appeals

Goldberg, J. and Sekaquaptewa, J. concur.