

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

Wilfred Walker, Jr., Appellant

Appellate Court Case: 2005-AP-009

v.

HTC No. 2005-CR-0251-0255

Hualapai Tribe, Appellee

OPINION AND ORDER

Wilfred Walker, Jr. (Appellant), appeals from his conviction of five counts of unlawful sexual contact (Hualapai Law & Order Code § 6.115A) and one count of child abuse (§ 6.200). He argues that the trial judge committed reversible error in failing to afford him a preliminary hearing as required at that time under Hualapai Law & Order Code § 5.13,¹ and in failing to grant his counsel an extension and continuance in order to present a witness list and list of witnesses to be subpoenaed. These errors, he argues, deprived him of rights guaranteed by the due process provision of the Hualapai Constitution, Art. IX(d).² In addition, Appellant argues that the hospitalization of his advocate during a key period of his case, and the associated failure of his advocate to submit a witness/subpoena list meant that he was denied effective assistance of an advocate, in violation of Art. VI, sec. 13(c) and Art. IX (d) of the Hualapai Constitution.³

All of the issues raised in this appeal are matters of first impression for this Court. Although this Court may look to other legal systems for guidance, ultimately this Court's responsibility is to interpret Hualapai law, which includes both the positive law (tribal

¹ Section 513 provides that "In every case in which the defendant enters a plea of not guilty ... the Tribal Court shall schedule a pre-trial hearing to take place not more than 30 days after arraignment." The "Arrestment Procedure: Notice of Rights" form that Appellant signed on September 26, 2005 specified "**IF YOU ENTER A NOT GUILTY PLEA** your case will be set for a pre-trial hearing. You and your counsel are encouraged to meet with the Prosecutor before your next court date to see if this case can be settled before a trial has to be set" (emphasis in the original).

² Article IX (d) provides that "The Hualapai Tribe ... shall not ... deprive any person of liberty or property without due process of law."

³ Article VI, sec. 13(c) states that "The Hualapai Tribe ... shall not ... deny to any person in a criminal proceeding the right ... to have the assistance of an advocate for his defense admitted to practice before the Tribal Courts." Article IX (d) provides that "The Hualapai Tribe ... shall not ... deprive any person of liberty or property without due process of law."

Constitution, codes, administrative determinations) and Hualapai Tribal Common Law. See Hualapai Law & Order Code § 3.1.

Statement of Relevant Facts and Procedural History

On September 26, 2005, the Hualapai Tribal Prosecutor filed a criminal complaint against the Appellant for five counts of unlawful sexual contact (each occurring on a different date between April 30, 2005 and September 8, 2005) and one count of child abuse (occurring on September 8, 2005). At arraignment on that same day, Judge Delbert W. Ray, Sr. ordered Appellant, who was not yet represented by counsel, to submit all witness/subpoena lists by October 19, 2005, and all motions by October 21, 2005. Appellant entered pleas of not guilty, and was remanded to custody in McKinley County, New Mexico pending trial, which was set for November 14, 2005. Judge Ray did not set a date for a pre-trial hearing, because by General Administrative Order issued on March 29, 2005, the Chief Judge presiding at that time had eliminated pre-trial hearings for all Hualapai criminal cases.⁴

The Tribal Public Defender, Delmar Pablo, entered a notice of appearance on behalf of Appellant on October 3, 2005. Public Defender Pablo did not submit a witness/subpoena list on behalf of Appellant by the October 19, 2005 deadline, nor did he file any motions on behalf of Appellant by the October 21, 2005 deadline.

On the day of trial, November 14, 2005, Mr. Pablo informed the Court that he had an alibi witness who could testify regarding Appellant's whereabouts on the dates and approximate times of the alleged offenses.⁵ Because the defense had not submitted a witness/subpoena list by the prescribed deadline, he asked the Court for a continuance, citing the fact that he had been hospitalized between October 16 and October 21, 2005, dates which coincided with the final 3-5 days of the period of time for submitting witness/subpoena lists and motions. Although the Tribal Prosecutor did not dispute the fact that Mr. Pablo had been hospitalized during those dates, she opposed the continuance, pointing out that the Tribe had five witnesses present and ready to testify, and Mr. Pablo had had ample opportunity, before his October 16 hospitalization, to comply with the Court's initial deadlines of October 19 for witness/subpoena lists and October 21 for motions. The Tribe had filed its own witness/subpoena list on October 5, 2005.

Judge Ray denied the request for a continuance, and the Tribe proceeded to present its case against Appellant. Mr. Pablo did not call Appellant to testify on his own

⁴ Hualapai Tribal Court, General Administrative Order 2005-003 (March 29, 2005). On October 20, 2006, in a new General Administrative Order, Chief Judge Flies-Away reinstated pre-trial hearings for Hualapai criminal cases upon request of the Defendant. Hualapai Tribal Court, General Administrative Order 2006-003 (Oct. 20, 2006).

⁵ In oral argument, Appellant cited as error the failure of the criminal complaints to specify the particular times of day when the alleged offenses occurred. However, the references to "early morning" or "late at night" in the complaints were specific enough to enable Appellant to determine whether he had any alibi witnesses.

behalf, and he did not introduce any other witnesses or physical evidence for the defense. Neither did he object to the fact that Appellant had been denied a pre-trial hearing. Appellant was found guilty on all six counts, and sentenced to five consecutive six-month sentences on the five counts of unlawful sexual contact, and one consecutive one-year sentence on the child abuse count, for a total of three and one-half years.

On November 16, 2005, Appellant filed a timely notice of appeal. In addition, on September 7, 2006, Appellant, through a new advocate he had hired to represent him, moved ex parte for expedited consideration of a motion for arrest of judgment and for a new trial. As far as this Court can determine, there has been no ruling on that motion. Oral argument on the appeal was held on February 2, 2007, at which time this Court requested additional briefing on the legal standard that should be applied to determine ineffective assistance of counsel/advocate.

Scope of Review

Article VI, sec. 12 of the Hualapai Constitution provides that “All 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 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

Appellant’s designations of error in his criminal trial can be distilled into the following: 1) the Court erred in failing to afford him a preliminary hearing, as required by Hualapai Law and Order Code § 5.13; and 2) the Court erred in failing to grant his advocate a continuance, thereby leading to his receiving ineffective assistance of counsel. This Court does not need to reach the issue of denial of a preliminary hearing, nor does it need to reach the issue of ineffective assistance of counsel, because the Court finds that the denial of a continuance constituted an abuse of discretion, violating Appellant’s right to due process under the Hualapai Constitution. Appellant’s Public Defender at trial, Mr. Pablo, raised this objection during the trial, so it is preserved on appeal.

The factual circumstances surrounding the motion for continuance at trial do not appear to be in dispute. The recorded transcript of Appellant’s trial indicates that both the Tribal Prosecutor and Judge Ray accepted Mr. Pablo’s claim that he had been hospitalized during the last part of the period of time ordered for submission of witness/subpoena lists and motions.

On these facts, the denial of Appellant’s request for a continuance constituted an abuse of discretion that deprived Appellant of his right to be heard at trial. Under Hualapai law, Appellant could not be deprived of his liberty without due process of law. Hualapai Constitution, Art. IX, sec. (c). He was also entitled to the assistance of an

advocate at tribal expense and the right to have compulsory process for obtaining witnesses in his favor. Hualapai Constitution, Art. VI, sec. 13(c). Mr. Pablo, the advocate representing Appellant through the Tribe's Public Defender office, was unable to perform a necessary service for Appellant, filing a witness/subpoena list, because he was hospitalized during the final three days of the period for doing so. While the Tribe argues, and the trial court judge in this case agreed, that Mr. Pablo should have been able to submit his list before he was hospitalized, that position places unreasonable demands on the Public Defender, who is the only advocate on staff. There were only sixteen days, thirteen of them business days, between the date when Mr. Pablo entered his appearance for Appellant (October 3, 2005) and the date when the witness/subpoena list was due (October 19, 2005). By going into the hospital on October 16, 2005, Mr. Pablo lost three of those business days.⁶ There were six different charges against Appellant, five of them involving events on different dates. Under those circumstances, Mr. Pablo could reasonably have assumed that he needed the full time period, until October 19, 2005, to develop his witness/subpoena list. He is not at fault for planning to take all of the available time to prepare the defense case for Appellant. Doubtless Appellant was not Mr. Pablo's only client, and he may have been facing earlier deadlines for their cases.

One might reasonably ask why Mr. Pablo did not file a motion for a continuance prior to the date of trial, November 14, 2005. His waiting until the trial certainly created a great potential for inconvenience to the five witnesses the Tribe had assembled on that date, as well as possible trauma for the alleged victim. The denial of his continuance motion may well have reflected concern for those witnesses and the alleged victim. However, Mr. Pablo had already missed the date for filing motions (October 21, 2005) due to his hospitalization. And he could not alert the trial court to potential scheduling and witness/subpoena problems at a preliminary hearing held in advance of trial because the prevailing General Administrative Order had dispensed with all preliminary hearings. In fact, Appellant and the Tribe disagree about whether Hualapai law afforded Appellant the right to a preliminary hearing in the first place.⁷ But whether or not Appellant was legally entitled to a preliminary hearing, it is true that the absence of a preliminary hearing left Appellant's trial counsel with one less opportunity to explain the situation in advance of trial, and to seek an appropriate continuance. Thus, although this Court is not ruling on whether the failure to provide Appellant with a preliminary hearing constituted reversible error, the absence of a preliminary hearing does figure into this Court's

⁶ Given that the Tribe did not submit its own witness/subpoena list until October 5, 2005, one might reasonably subtract two additional days from that time period.

⁷ The disagreement between Appellant and the Tribe centers on the power of the Chief Judge, through a General Administrative Order, to dispense with the preliminary hearing. The Tribe relies on Section 5.10(C)(2)(a) of the Law and Order Code, which states that if defendant pleads not guilty, "The matter will be set for pre-trial hearing at the earliest practical date, *or as otherwise provided by Rules of Tribal Court*" (emphasis added). According to the Tribe, the italicized language grants power to the Chief Judge to eliminate preliminary hearings. Appellant's position is that this language only relates to the timing of the preliminary hearing, not whether it must be held. See note 1, above, and accompanying text.

assessment of the appropriateness of denying Appellant's motion for a continuance at trial.

Had Mr. Pablo's request for a continuance been one of several made over a sustained period of time, suggesting that Appellant was unreasonably delaying the trial, Judge Ray would have been within the proper bounds of his discretion in denying the motion. But the protections of due process under the Hualapai Constitution must mean, at a minimum, that criminal defendants have an opportunity to present a defense to serious charges with potential for multi-year jail sentences, such as those leveled at Appellant. Due process in a Hualapai context need not mean exactly what it means in a state or federal law context.⁸ But as one source on tribal legal systems has pointed out, "[T]he introduction of Anglo-American models of police, jails, and more coercive governmental power has required tribal governments to protect individuals from overbearing governments and intrusions upon their liberty."⁹ To deny a first request for a continuance under the circumstances of this case was to deny all opportunity for presentation of a defense, without any compelling reason. That action comprised the fundamental fairness of Appellant's trial.

As a matter of first impression, this Court chooses to adopt the distinction between "structural" and "trial" error, for purposes of determining whether a "harmless error" rule should operate. Basically, if an error at trial is deemed structural, then the Appellant is spared having to demonstrate that the error affected the outcome of the prosecution. An error is considered structural if it does not involve the presentation of evidence at trial, but rather affects the framework for conducting the trial.¹⁰ To ensure that criminal defendants receive fair trials under Hualapai law, their trials must proceed within a framework that is free from procedural error. Criminal trials cannot reliably serve their function as vehicles for determining guilt or innocence if the very method for conducting the trial is procedurally flawed.

The denial of a continuance in this case is a structural error under this analysis. It affected Appellant's ability to present evidence, rather than the particular type of evidence heard by the trier of fact. Accordingly, this Court is not required to determine whether the error below in refusing to grant the motion for a continuance constituted "harmless error."

Because this Court concludes that the denial of Appellant's motion for a continuance constituted an abuse of discretion and a denial of Appellant's right to due process under the Hualapai Constitution, Appellant's conviction is REVERSED and his

⁸ See Hualapai Law & Order Code § 3.1.

⁹ Carrie E. Garrow and Sarah Deer, Tribal Criminal Law and Procedure 202 (2004).

¹⁰ To see how the United States Supreme Court understands this distinction, see *Arizona v. Fulminante*, 499 U.S. 279 (1991). An example of a trial error would be admission of evidence obtained via an unlawful police search and seizure. An example of a structural error would be the conduct of a trial before a jury selected without the opportunity for defendant to challenge biased jurors.

case is REMANDED for retrial. Such retrial should be scheduled within 45 days of this order, unless Appellant requests a continuance.

A handwritten signature in black ink, reading "Carole Goldberg". The signature is written in a cursive, flowing style with a large initial "C" and "G".

Dated: July 23, 2007

Justice Carole Goldberg
Hualapai Court of Appeals