In the Southwest Intertribal Court of Appeals for the Zuni Tribal Court

PUEBLO OF ZUNI,

Petitioner-Appellant,

v.

EVANGELINE and RAYMOND WYACO,

Respondents-Appellees.

SWITCA No. 00-008-ZTC
ZTC Nos. CR 99-03360, CR 99-03361, CR 99-03362

Appeal filed July 20, 2000

Appeal from the Zuni Tribal Court
Albert Banteah, Jr., Judge

Appellate Judges: Elizabeth C. Callard,
Roman J. Duran and Neil T. Flores

OPINION

SUMMARY

After considering Appellants' motion in limine, the trial court suppressed the evidence and dismissed the charges against Appellants for possession of marijuana. At the time of arrest, Appellants were in their pickup truck, with the engine off, in the parking portal of their house. The trial court concluded that Appellants had a reasonable expectation of privacy that should not have been interfered with unless an officer had a valid search warrant or arrest warrant. On appeal, Appellee argued that the parking portal was impliedly open to the public, and that the officer's observation of criminal activity was sufficient to establish probable cause to arrest. After considering the Zuni Rules of Criminal Procedure and the record, the Appellate Court found that the officer's initial entry into Appellants' driveway and parking portal was lawful because such "curtilage" is impliedly open to the public for reasonable purposes. Therefore, the officer's observance of evidence in plain view was lawful and sufficient to establish probable cause. The Appellate Court declined to adopt Appellants' argument that the Zuni Constitution should be read more narrowly than the U.S. Constitution because case law supporting such an argument had been overturned. Accordingly, the Appellate Court reversed the trial court's decision, reinstated the charges, and remanded the case for further proceedings.

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THIS MATTER COMES BEFORE THE SOUTHWEST INTERTRIBAL COURT OF APPEALS from the Zuni Pueblo court and arises out of criminal complaints filed against Evangeline Wyaco and Raymond Wyaco. After a hearing on a motion *in limine* filed by the Wyacos, the lower court suppressed the evidence against the Wyacos and dismissed the charges against them. The Pueblo of Zuni has exercised its right to appeal, and the Wyacos' cases have been consolidated in this proceeding. Briefs have been filed pursuant to the Jurisdiction and Scheduling Order issued by the Administrator for the Southwest Intertribal Court of Appeals, and the record has been reviewed by the appellate panel, which convened to review the case. The panel has reviewed the record and the law and finds that the lower court erred in suppressing the evidence and dismissing the charges. Accordingly, this Court reverses the rulings of the lower court and remands the cases for further proceedings.

I. Background

The Wyacos were both charged with drug abuse, specifically with the possession of marijuana. In addition, Raymond Wyaco was charged with resisting arrest. The Wyacos filed a motion *in limine*, asking the lower court to suppress the prosecution's evidence and dismiss the charges against the Wyacos. The Wyacos' cases were consolidated by the trial court for purposes of a motions hearing.

Based on a stipulation of the parties, the lower court made the following findings of fact: that the Wyacos were sitting in their parked pickup truck with the engine turned off in the parking portal at House 11 on Waseta Drive; that the police officer(s) who entered the parking portal did not have the Wyacos' permission to enter the driveway or parking portal; that the area where the pickup was parked is not a public road; and that the police officer(s) did not have a search warrant or an arrest warrant at the time of entry onto the Wyacos' property. The trial court judge then concluded that, "a married couple, who are sitting in their parked pickup truck with the engine off in their private parking portal by their house, has a reasonable expectation of privacy which should not be interfered with unless a police officer has a valid search warrant or arrest warrant." The trial court judge ordered all evidence seized by the police officer(s) suppressed and the charges against the Wyacos dismissed.

II. Arguments of the Parties

The Pueblo of Zuni has appealed the ruling of the trial court judge. The Pueblo argues that police officers may enter those portions of property that are impliedly open to use by the public, such as driveways, sidewalks, etc., and that when such areas have been lawfully entered, the police are free to rely on their senses and make observations that may contribute to a finding of probable cause to support an arrest. The Pueblo contends that the officer(s) had the right to enter the Wyacos' parking portal

without the Wyacos' express permission because the area was impliedly open to the public, and that if the officer(s) then observed sufficient evidence of criminal activity in plain view to establish probable cause to arrest the Wyacos, the officer(s) had the right to make an arrest and perform a search incident to arrest. The Pueblo argues that the officer(s)' observations and any evidence seized are not subject to suppression. The Pueblo asks that the ruling of the lower court suppressing the evidence and dismissing the charges be reversed and that the Pueblo be allowed to bring the cases to trial.

The Wyacos ask that the ruling of the trial court be affirmed, arguing that the officer(s) had no right to enter the Wyacos' parking portal without a warrant and, therefore, that any observations of the officer(s) after entering that area, as well as any evidence seized, were properly suppressed by the trial Court. The Wyacos further argue that although the expectation of privacy created by the trial court's ruling exceeds the expectation of privacy established by the Constitution of the United States, the Pueblo of Zuni has the power to establish stricter standards of constitutional protection against the abuse of police power than have been established by the federal constitution.

III. Legal Analysis

The Zuni Rules of Criminal Procedure provide at Rule 31(f) as follows:

> No law enforcement officer shall search or seize any premises, property or person without a search warrant unless he knows or has reasonable cause to believe that the person in possession of such property is engaged in the commission of an offense or such is done incident to a lawful arrest or under such other circumstances in which it would not be reasonable to require the obtaining of a warrant prior to the search.

It appears from the record that once the officer(s) in this case entered the Wyacos' parking portal, there was reasonable cause to believe that the Wyacos were engaged in the commission of an offense or offenses, because the officer(s) smelled marijuana smoke coming from the vehicle occupied by the Wyacos, who began to roll up the window. If the officer(s) had the right to enter the Wyacos' parking portal without first obtaining their express permission, then such observations constitute evidence in "plain view" and are not subject to suppression. *See, State v. Crea*, 233 N.W. 2d 736 (MN 1975). If such evidence established probable cause to arrest the Wyacos, additional evidence discovered in a search incident to arrest is also not subject to suppression. *See, N.Y. v. Belton*, 453 U.S. 454 (1981).

The real question in this appeal is: whether the Zuni Police had the right to enter the driveway and parking portal area of the Wyacos' home without their express permission in the first place or, stated differently, whether the Wyacos' right to privacy prohibited the officer(s)' entry into the driveway and parking portal without a valid warrant.

This Court finds that the officer(s)' initial entry into the Wyacos' driveway and parking portal was lawful. Such areas are included in the "curtilage" of the Wyacos' home and are impliedly open to the public for reasonable purposes, such as approaching the door, making deliveries, etc. "A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter, which necessarily negates any reasonable expectancy of privacy in regard to observations made there." *Lorenzana v. Superior Court*, 511 P. 2d 33 (CA 1973). *See also, State v. Calvillo*, 792 P. 2d 1157, (N.M. App. 1990), citing *Lorenzana* with approval. Police with lawful business in the curtilage areas of private property "are free to keep their eyes open and use their other senses." *State v. Crea*, 233 N.W. 2d 736 (MN 1975); s*ee also, Calvillo.* There is no suggestion in the record that the Wyacos' driveway and parking portal were secured to prevent entry or that the public was otherwise excluded. Because the Wyacos' driveway and parking portal area were impliedly open to the public for reasonable purposes, such as approaching the door to attempt to contact individuals in the house, the officer(s) had the right to enter those areas for reasonable purposes as well. Legitimate police business justifying entry into the curtilage of otherwise private property includes approaching the door to attempt to contact the occupants. *Atkins v. State*, 882 S.W.2d 910 (TX App. 1994).

Given this Court's finding that the officer(s) were lawfully present in the driveway and parking portal area of the Wyacos' home, it is clear that the subsequent activities of the officer(s) were lawful under the Zuni Rules of Criminal Procedure. Once lawfully in the areas of the Wyacos' driveway and parking portal, the officer(s) had the right to observe evidence in plain view, and this is what the officer(s) did in this case. The observations of the officer(s) were sufficient to establish probable cause to believe a crime or crimes were being committed; therefore, the officer(s) had the right to make an arrest and to perform a search incident to an arrest. *Zuni Rules of Criminal Procedure*, Rule 31(f). *See also, Crea* and *Belton.*

The Wyacos' argue that the lower court had the right to interpret the Zuni constitution more narrowly than the federal constitution. The Wyacos also suggest that the lower court was in the best position to assess tribal custom and tradition when interpreting the Zuni constitution. There is nothing in the lower court's ruling to suggest,

however, that tribal custom and tradition were a factor in the lower court's decision. In fact, it appears that in reaching its decision the lower court may have been relying on a case cited by the Wyacos that was later overturned, *State v. Wenger*, 985 P. 2d 1205 (NM App. 1999), reversed in *State v. Jackson*, 15 P. 3d 1233 (N.M. 2000), rather than any provision of Zuni custom, Zuni tradition, Zuni case law, or the Zuni Tribal Code suggesting such a narrow interpretation of the Zuni constitution, and even if it had not been overturned, *Wenger* was not on point on the facts of this case.

Zuni law mandates that appropriate weight be given to the interpretation of law that results in the rational and fair administration of justice. *See*, §1-8-7(4), *General Provisions*, *Zuni Tribal Code*, and *Zuni Rules of Criminal Procedure*, Rule 1(c). If this Court were to accept the Wyacos' arguments, it would create legal precedent that would make it impossible for Zuni law enforcement officers to approach a house and knock on the door without the express permission of the owners or a warrant. The interpretation supported by the Pueblo of Zuni and accepted by this Court, however, allows officers to enter areas of the yard, driveway, parking portal, etc. that are impliedly open to the public for reasonable purposes. Such a result is reasonable and does not limit or infringe upon the constitutional protections that protect the privacy of citizens by requiring officers to secure an appropriate warrant before entering an individual's home without permission or exigent circumstances. This Court's ruling would simply allow law enforcement officers conducting legitimate business to cross unsecured areas outside a home, which are impliedly open to the public, for reasonable purposes without first obtaining a warrant.

IV. Conclusion

For the foregoing reasons, this Court finds that the lower court committed reversible error by suppressing the evidence and dismissing the charges against the Wyacos. The decision of the lower Court is reversed, the charges against the Wyacos are reinstated, and this matter is remanded for further proceedings.

IT IS SO ORDERED.

November 14, 2003

ISAAC H. DALE,

Petitioner-Appellant,

v.

MELISSA BENALLY,

Respondent-Appellee.

SWITCA No. 02-002-UMUTC
UMUTC No. 2001-0075-CS

Appeal filed May 2, 2001

Appeal from the Ute Mountain Ute C.F.R. Court
Lynette Justice, Judge

Appellate Judges: James Abeita,
Randolph Barnhouse and Ann B. Rodgers

ORDER

SUMMARY

In a child support case, the trial court erroneously applied New Mexico law to determine whether Respondent was liable for retroactive child support. The Appellate Court found that Ute Mountain Ute law did not answer this question and that tribal customs would be the second-best law to apply. Because tribal customs were not raised at the trial court level, the Appellate Court remanded the matter for a determination of whether such customs authorize retroactive child support payments from a non-custodial parent under the facts of this case. If not, then the trial court could seek to resolve the issue under Colorado law.

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THIS MATTER is before the Court pursuant to a court's inherent power to control its docket. On April 15, 2002 this Court issued an order determining that it had jurisdiction to hear the matter and setting a briefing schedule for the single issue of law presented: whether the trial court erred by applying the laws of New Mexico to determine whether Respondent is liable for child support retroactively to the date of the birth of the child when paternity had not been determined until this matter arose. Pursuant to the April 15, 2002 Order, appellant Isaac H. Dale filed a letter stating his position, that the trial court erred in applying the law concerning retroactivity of child support payments, and in support of his position, he attached the Ute Mountain Ute Law and Order Code Child Support Determination provisions. Appellee Melissa Benally did not file any response.

The Court reviewed the Ute Mountain Ute Law and Order Code Child Support Determination provisions submitted by Mr. Dale. While these provisions do not expressly state that child support payments can be awarded retroactively, a retroactive reward is not expressly prohibited. For example, the 1998 amendment to Chapter Three, Section 15 concerning modification of child support orders, adds a subsection (5) that a custodial parent need not update financial information when "child support payments are in arrears." this, however, only applies where there has been a previous order requiring payment of child support. In this case there was no previous order, apparently no acknowledgment of parentage, and no exercise of any rights or duties of parentage.

The written law of the Ute Mountain Ute Tribe, as presented by Mr. Dale, does not answer the question posed. Under federal regulations this court in civil cases must look first to "...any ordinances or customs of the tribe occupying the area of Indian country over which the court has jurisdiction, not prohibited by Federal laws." Thereafter, the court may look to the laws of the State of Colorado. As noted above, the written law of the Tribe does not answer the question presented. The second source to be used are the customs of the Tribe. What the customs of the Tribe have to add to the resolution of the disputed issue have not been presented to this Court, or the trial court. Since determination of what the customs of the Tribe have to say about the issue presented in this case will likely involve mixed determinations of law and fact, at the least it is inappropriate for this Court to address this issue in the first instance. It is the trial court that must make those determinations first.

THEREFORE, IT IS THE ORDER OF THIS COURT THAT this matter is remanded to the trial court for a determination of whether the customs of the Ute Mountain Ute Tribe address the question of whether, under the facts of this case, retroactive child support payments can be required of a non-custodial parent. Only after addressing that issue may the trial court look to the laws of Colorado to answer the issue presented.

July 23, 2003

D.R., a minor,

Petitioner-Appellant,

v.

SOUTHERN UTE INDIAN TRIBE,

Respondent-Appellee.

SWITCA No. 02-003-SUTC
SUTC No. 02-JV-17

Appeal filed June 13, 2002

Appeal from the Southern Ute Tribal Court
Elaine Newton, Judge

Appellate Judge: Melissa L. Tatum

OPINION

SUMMARY

In a juvenile delinquency case, Appellant raised three issues on appeal. Appellee contested only one of the issues: whether there was sufficient evidence to support a conviction for underage consumption of alcohol. Appellant argued that the record established only that he had alcohol in his system, but not that any consumption occurred on the reservation. The Appellate Court examined the evidence to determine whether a rational trier of fact could conclude that all elements of the crime were established. The Court found sufficient circumstantial evidence to affirm the conviction, and it reversed the two uncontested issues.

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This matter comes before the Southwest Intertribal Court of Appeals from the Southern Ute Tribal Court, and arises out of a juvenile delinquency matter. Defendant was convicted by the trial court of underage consumption of alcohol and disobeying a lawful order of the court. Defendant raises three issues on appeal. For the reasons below, this Court affirms the underage consumption conviction and reverses the disobeying a lawful order of the court conviction.

I. Background

On March 12, 2002, defendant pled guilty to underage consumption, and on March 13, 2002, he was sentenced to 15 days in detention (suspended) and was placed on probation for 6 months. As part of the probation, he was required to refrain from using intoxicants and undergo regular breath alcohol tests. On March 26, 2002,

defendant flunked his breath alcohol test. He was subsequently charged and convicted of underage consumption and disobeying a lawful order of the court.

On appeal, defendant raises three issues:

1) Whether a charge of disobedience to a lawful court order (DLOC) can be based on the violation of a condition of probation;
2) Whether there was sufficient evidence to support the DLOC charge; and
3) Whether there was sufficient evidence to support the underage consumption conviction.

II. Analysis

On appeal, the Tribe has chosen not to contest the reversal of the DLOC charge. Thus, there is no reason for this court to address defendant's first two issues. That leaves only the issue concerning the sufficiency of the underage consumption charge. Defendant argues that the prosecutor failed to establish the jurisdictional prerequisite that any underage drinking occurred on the reservation.

In reviewing a challenge to the sufficiency of the evidence, this Court examines all the evidence introduced below to determine whether a rational trier of fact could conclude that all the elements of the crime were established. Defendant argues that the record establishes only that he had alcohol in his system; defendant contends the prosecutor failed to establish that any consumption actually took place on the reservation.

Evidence presented at trial established that defendant, who was 15 years old at the time of trial, lives on the reservation. All of his friends and family also live on the reservation, including the uncle he was with the day of the incident. The prosecutor also established that defendant's home is in the center of the reservation and is 10-12 miles from the nearest north-south boundary and 30 miles from either of the east-west boundaries. The distance to the nearest off-reservation liquor store is even further. This is sufficient circumstantial evidence to establish that underage consumption occurred on the reservation. Defendant's conviction for underage drinking is affirmed.

For the foregoing reasons, this Court reverses the DLOC conviction, affirms the underage consumption conviction, and remands for proceedings consistent with this opinion.

It is so ordered.

August 22, 2003

MARJORIE SOTO,

Petitioner-Appellant,

v.

HONORABLE WILLIAM McCULLEY,

Chief Magistrate, Court of Indian Offenses
Towaoc, Colorado,
Respondent-Appellee.

SWITCA No. 02-004-UMUTC
UMUTC No. 2002-0000001-AP

Appeal filed September 13, 2002

Appeal from the Ute Mountain Ute C.F.R. Court
William L. McCulley, Judge

Appellate Judges: James Abeita,
Randolph Barnhouse and Ann B. Rodgers

ORDER NUNC PRO TUNC

SUMMARY

Respondent successfully complied with a writ of mandamus that was previously issued against him. The writ became null and void as of the date of compliance, so on its own motion the Appellate Court dismissed the writ with prejudice.

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THIS MATTER comes before the court on its own motion. In September of 2002, Petitioner sought a writ of mandamus from this Court to require Respondent to issue his decision in a matter before the Court of Indian Offenses for the Ute Mountain Ute Tribe. This Court, after requiring Respondent to issue his decision by December 6, 2002.

In accordance with the writ that was issued, Respondent issued his decision in this matter on December 3, 2002. The relief sought by filing the petition has been achieved in accordance with the writ issued by this Court. As of that date the need for the petition and the writ no longer existed.

THEREFORE, it is the order of this Court that the writ issued in this matter on September 25, 2002, was, after December 2, 2002, of no effect, and therefore should be, and hereby is **NULL AND VOID** as of that date;

IT IS FURTHER ORDERED that as of December 3, 2002, the Petition for a writ of mandamus no longer stated

a claim and hereby is dismissed with prejudice as of that date.

January 28, 2003

DEBRA PATE,

Petitioner-Appellant,

v.

STARLENE NARANJO, TONECE BACA, and STEVE RIVERA,

Respondents-Appellees.

SWITCA No. 02-005-SUTC
SUTC No. 01-CV-57

Appeal filed June 13, 2002

Appeal from the Southern Ute Tribal Court
Elaine Newton, Judge

Appellate Judge: Melissa L. Tatum

ORDER DISMISSING APPEAL

SUMMARY

In a personal injury suit, the trial court entered a default judgment of liability against all defendants, but awarded actual damages against only one defendant. The trial court declined to award damages for pain and suffering or permanent disability. Appellant contended that the judgment was unfair because the defendants' testimony was untruthful, and she experienced a great deal of pain and suffering from her injuries. However, the Appellate Court dismissed the appeal for lack of jurisdiction because the notice of appeal was not timely filed under SWITCA Rule 8 (2001). Nonetheless, the Appellant suffered no prejudice from the dismissal because the Appellate Court found no clear error in the trial court's determination of fact and witness credibility, and no plain error with respect to damages, so it would have affirmed the judgment below even if the notice of appeal had been filed on time.

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This matter comes before the Southwest Intertribal Court of Appeals from the Southern Ute Tribal Court and arises out of a personal injury lawsuit. Pate filed suit against the three defendants, accusing them of beating her and inflicting serious, permanent injuries. She sought damages from each of the three defendants. The lower court entered a default judgment on liability against each defendant, but found that Pate had established damages only as against Naranjo. With respect to Naranjo, the lower court awarded actual damages, but declined to award either damages for pain and suffering or damages for permanent disability. Pate filed a notice of appeal.

At the time Pate filed her notice of appeal, some dispute existed about whether the filing was timely. The notice of appeal must have been filed within 15 days of the final judgment. This requirement is jurisdictional. SWITCA Rule 11(c) (2001). In other words, if the notice is not timely filed, this Court cannot hear the appeal. The Southern Ute Appellate Code does not contain a rule explaining how to compute the time for purposes of the notice of appeal. The SWITCA rules, however, do contain such a computation rule. SWITCA Rule 8 (2001). This computation of time for appeals arising out of the Southern Ute Tribal Court. *Baker v. Southern Ute Indian Tribe*, 5 SWITCA 1, 2 (1993); *Gould v. Southern Ute Indian Tribe*, 4 SWITCA 4, 6 (1993).

On December 6, 2002, this Court ruled that the appeal was timely. That determination rested on SWITCA rule 8, which sets forth a method for counting days. It has come to this Court's attention that it used the wrong version of Rule 8 when it took jurisdiction. Under the 1998 version of Rule 8, a notice of appeal must be filed within 15 working days of the final judgment, "Working days" refers to working days of the tribal court from which the appeal is taken. SWITCA Rule 8 (1998).

SWITCA Rule 8, however, was amended in 2001 to provide that "the computation of any time period over 11 days shall be by calendar days." Thus, this Court used the wrong method to count days. Using calendar, rather than working days, the last possible day to file an appeal was September 26. Pate's first attempt at filing a notice of appeal occurred on September 27. Thus, this Court must dismiss the case for lack of jurisdiction. This dismissal for lack of jurisdiction does not, however, prejudice Pate's appeal, as the lower court committed no error.

In her appeal, Pate contends that the lower court's judgment was unfair. Pate raises two specific grounds of unfairness. First, she alleges that defendants' testimony was untruthful. Second, she alleges that she has undergone a great deal of pain and suffering as a result of her injuries. Pate questions how the trial court can award medical damages, but not damages for pain and suffering.

As to truthfulness of defendants' testimony, the lower court is responsible for resolving issues of fact and of witness credibility. This court can overturn findings of fact and declare that witnesses are not credible only when it is clear that the trial court made a mistake. Because it is not clear that a mistake was made, Pate cannot meet her burden of proving the trial court erred on this issue.

With respect to the damages issue, a plaintiff is not automatically entitled to damages for pain and suffering, or for permanent disability, just because that person has suffered injuries and incurred medical expenses. There are certain legal standards of proof that must be met, and the trial court correctly found that Pate had not met her burden. There is no error as to this issue.

This Court has also reviewed the lower court record to determine if any other errors were obvious. Because it finds no plain error, this Court would have upheld the trial court's decision. Accordingly, Pate suffered no prejudice from the dismissal of her lawsuit.

IT IS SO ORDERED.

August 1, 2003

MARTEN PINNECOOSE,

Petitioner-Appellant,

v.

GERALDINE PINNECOOSE,

Respondent-Appellee.

SWITCA No. 02-006-SUTC
SUTC No. 01-DV-92

Appeal filed November 18, 2002

Appeal from the Southern Ute Tribal Court
Elaine Newton, Judge

Appellate Judge: Melissa L. Tatum

ORDER DISMISSING APPEAL

SUMMARY

Appellant appealed the lower court's denial of his motion to modify or suspend child support. The Appellate Court dismissed the appeal for lack of jurisdiction because the notice of appeal was not timely filed under SWITCA Rule 8 (2001). The Court noted that even if the appeal had been timely, it would have been dismissed due to Appellant's failure to post an appeal bond. An appeal bond does not guarantee a right to appeal, but it does ensure that the money the trial court awarded to Appellee be preserved pending appellate review.

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This matter comes before the Southwest Intertribal Court of Appeals from the Southern Ute Tribal Court, and arises out of a motion to modify or suspend child support. The lower court denied co-petitioner's motion. Co-petitioner has filed a notice of appeal.

At the time Mr. Pinnecoose filed his notice of appeal, some dispute existed about whether the filing was timely. The notice of appeal must have been filed within 15 days of the final judgment, in this case the October 22, 2002 order denying petitioner's motion to modify or suspend child support. This requirement is jurisdictional. SWITCA Rule 11(c) (2001). In other words, if the notice is not timely filed, this Court cannot hear the appeal. The Southern Ute Appellate Code does not contain a rule explaining how to compute the time for purposes of the notice of appeal. The SWITCA rules, however, do contain such a computation rule. SWITCA Rule 8 (2001). This Court has previously addressed this issue and has determined that the SWITCA rules govern the computation of time for appeals arising out of the Southern Ute Tribal Court. *Baker v. Southern Ute Indian Tribe*, 5 SWITCA 1, 2 (1993); *Gould v. Southern Ute Tribe*, 4 SWITCA 4, 6 (1993).

On December 6, 2002, this Court ruled that the appeal was filed on the last possible day and was therefore timely. That determination rested on SWITCA rule 8, which sets forth a method for counting days. It has come to this Court's attention that it used the wrong version of Rule 8 when it took jurisdiction. Under the 1998 version of Rule 8, a notice of appeal must be filed within 15 working days of the final judgment. "Working days" refers to working days of the tribal court from which the appeal is taken. SWITCA Rule 8 (1998). When counting using working days, the fifteenth (and last) day for filing the notice of appeal was November 12, 2002. The notice of appeal was filed on November 12, 2002.

SWITCA Rule 8, however, was amended in 2001 to provide that "the computation of any time period over 11 days shall be by calendar days." Thus, this Court used the wrong method to count days. Using calendar, rather than working days, the last possible day to file an appeal was November 6. Thus, this Court must dismiss the case for lack of jurisdiction. This dismissal for lack of jurisdiction does not, however, prejudice Mr. Pinnecoose's appeal, as this Court would have dismissed the appeal anyway for failure to post an appeal bond.

On March 27, 2003, Ms. Pinnecoose filed a motion requesting this Court to dismiss Mr. Pinnecoose's appeal as a sanction for failure to deposit the appeal bond. On that same day, the trial court filed a notice to SWITCA stating that Mr. Pinnecoose had failed to post the $10,350.00 appeal bond ordered by the trial court.

Failure to post an appeal bond is an extremely serious

matter. The purpose of an appeal bond is to maintain the status quo – that is, to ensure that the money the trial court awarded Ms. Pinnecoose was preserved pending appellate review of the trial court's order. If this Court reversed or modified the trial court's order, some or all of the money would be returned to Mr. Pinnecoose. If this Court affirmed the trial court, the appeal bond would ensure that the funds would be available for Ms. Pinnecoose and would not have been spent by Mr. Pinnecoose for other purposes.

Accordingly, on April 2, 2003, this Court ordered Mr. Pinnecoose to show cause why the appeal should not be dismissed. Mr. Pinnecoose responded that he had not posted the bond because he did not have the money; he had spent the money on, among other things, living expenses, medical expenses, and expenses related to a broken engagement. He asserts, however, that the purposes of an appeal bond is to ensure the collectability of the judgment, not as a guarantee of the right to appeal.

Mr. Pinnecoose is correct that the appeal bond does not guarantee the right to appeal. It does, however, guarantee that he does not spend funds that the trial court determined rightfully belonged to Ms. Pinnecoose. The continued pendency of the appeal provides more time for him to continue to spend those funds, which right now do not belong to him. Accordingly, this Court would have dismissed the appeal even if it did possess jurisdiction over the case. Thus, the appeal is dismissed, leaving the trial court's order intact.

IT IS SO ORDERED.

June 16, 2003

MARJORIE SOTO,

Petitioner-Appellant,

v.

RONDA LANCASTER, et al,

Respondents-Appellees.

SWITCA No. 03-001-UMUTC
UMUTC No. CV94-0003

Appeal filed February 2, 2003

Appeal from the Ute Mountain Ute C.F.R. Court
William L. McCulley, Judge

Appellate Judges: James Abeita, Randolph Barnhouse and, Ann B. Rodgers

OPINION AND ORDER

SUMMARY

The Appellate Court considered two actions: (1) Appellees' petition for rehearing on a prior motion to dismiss, and (2) Appellant's motion for rehearing. Both were denied, and the case was remanded to the trial court for enforcement of the judgment previously affirmed by the Appellate Court.

Appellees' petition asserted a lack of jurisdiction, stating that the Southwest Intertribal Court of Appeals was no longer the Tribe's appellate court because the Tribal Council enacted a resolution stating so. However, the Tribal Council did not receive Secretarial approval for the resolution as required by the Tribe's Constitution. Accordingly, the Appellate Court held that the resolution had no legal force to deprive the Appellate Court of jurisdiction. In addition, Appellee's petition sought to declare the Appellate Court's prior judgment on a motion to dismiss void under Federal Rule of Civil Procedure (FRCP) 60 because none of the appellate judges had been confirmed by the Tribal Council in the last four years, so they had no authority to act. The Court held that FRCP 60 applies to the district court's judgment, not to appellate review thereof. Moreover, the BIA had not affirmatively dismissed any of the judges on the appellate panel. If the Tribe were to challenge the appellate panel's authority, the proper initial forum would be the Department of Interior administrative appeals system, not the tribal court system.

Appellant's motion for rehearing sought to treat tribal common law as an affirmative defense under FRCP 8(c). The Appellate Court held that tribal common law does not

fall under the category of affirmative defenses that are listed in the FRCP. Instead, the Code of Federal Regulations requires the trial court to consider tribal common law if it is consistent with federal regulations. The Court found that the trial court's consideration of tribal common law in this case was totally inconsistent with the pertinent federal regulations.

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THIS MATTER comes before the court on the petitioner's motion for rehearing and on the respondents' joint petition for rehearing on the respondents' motion to dismiss the appeal. The Court, having reviewed each of the requests on the merits and applicable law, concludes that both motions should be denied. Our reasoning is set out below.

I. Respondents' Petition for Rehearing

The court acknowledges that the respondents' petition raises a jurisdictional question, and therefore it should be addressed first. Respondents ask the court to dismiss this appeal on various grounds. First the petition incorporates the arguments made in the respondents' initial motion to dismiss the appeal. Respondents' initial motion argued that this court is no longer the appellate court because the Ute Mountain Ute Tribal Council enacted Resolution No. 2001-091 stating that the Southwest Intertribal Court of Appeals (SWITCA) was no longer the Tribe's appellate court. Respondents are correct that the procedural rules that govern SWITCA's jurisdiction do require that the court "shall hear cases based on the authority granted by pueblo or tribal constitution, legislative authority, or resolution."

This argument ignores the Tribe's own constitution. Article 5, Section 1 of the Constitution of the Ute Mountain Ute Tribe states the tribal council's powers. It also states when the Secretary of the Interior or his designee must approve tribal council action in order for the action to be valid. The Constitution does not expressly give the tribal council the power to create the tribal court or define its powers. This power can be implied as necessary and proper from Section 1(n). This section states that the tribal council has the power "to regulate the conduct of members of the tribe and to protect the public peace, safety, morals and welfare of the reservation through the promulgation and enforcement or ordinances subject to review by the Secretary of the Interior to effectuate these purposes" (emphasis added). It is undisputed that Tribal Council Resolution No. 2001-091 was not approved by the Secretary of the Interior. Article 5 Section 3 of the Constitution states:

> Manner of Review - Any resolution or ordinance which by the terms of this Constitution is subject to review by the Secretary of the Interior, shall be presented to the Superintendent of the reservation who shall within two weeks thereafter, approve or disapprove the same. If he approves an ordinance or resolution, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement to the Secretary of the Interior who may, within 90 days from the date of enactment, rescind the said ordinance or resolution for any cause by notifying the Tribal Council of his action. If the Superintendent refuses to approve an enactment he shall advise the Tribal Council of his reasons. The Tribal Council may by a majority vote to refer the ordinance or resolution to the Secretary of the Interior who may within 90 days from its enactment approve the same in writing, whereupon the said ordinance or resolution shall become effective.

Respondents have the burden to come forward with any document establishing Secretarial approval for Resolution 2001-091, but given the history of this case, none will be found. In 1996 Petitioner filed a lawsuit against the Secretary of the Interior and others in the United States District Court for the District of Colorado, Marjorie Soto, et al., v. Babbitt, et al., DCOLO Civil Action No. 96-WY-31. The lawsuit sought court review of a Ute Mountain tribal court case because no tribal appellate court existed. All remedies under tribal law were exhausted. The parties to that federal court lawsuit entered into a settlement agreement with the following provisions:

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> 3. The United States agrees to provide, as a regular and continuing forum, an avenue of appeal for litigants from the Ute Mountain Ute Agency Code of Federal Regulations (CFR) Court to the Southwest Inter-Tribal Court of Appeals (SWITCA).
> 4. The United States will not raise, as an objection to any appeal by Plaintiff Marjorie Soto . . . from the final decisions Dockets Nos. CV 94-0022 . . . , any defense based on waiver or timeliness, to the extent any delay in time of filing appeal was occasioned by the lack of a means of appeal from the CFR Court.
> 5. The United States will provide written notice to the Plaintiff's Counsel, Colorado Rural Legal Services, Inc., of the formal initiation of appellate process from the Ute Mountain Ute Agency CFR Court. Such process shall be available to Plaintiffs and others no later than 90 days from the date of execution of this Settlement Agreement.

Pursuant to this Settlement Agreement, the Bureau of Indian Affairs established the Ute Mountain Ute Court of Indian Offenses appellate court with a panel of three magistrates as required by federal regulations. 25 C.F.R. §§11.200 and 11.201. In the ensuing years the Tribal Council attempted to enact Resolution 2001-091 and other resolutions demanding the Bureau of Indian Affairs pay for the establishment of a new appellate court, and expanding the jurisdiction of the appellate court beyond that permitted in the Code of Federal Regulations. The Bureau of Indian Affairs denied all of these requests.

The Bureau of Indian Affairs disapproved Resolution 2001-091 because it would have been inconsistent with the Settlement Agreement reached in the petitioner's federal court case against the Department of the Interior. Absent a letter from the Secretary of the Interior or his designee approving of this resolution, and the respondents have not provided any such ruling to this court, Resolution 2001-091 is a nullity; it has no legal force to deprive this court of jurisdiction.

Respondents' second argument in the petition for rehearing, seeks a ruling pursuant to Federal Rule of Civil Procedure 60 that the judgment is void. The purported reason given for believing that the judgment is void is that none of the members of the appellate panel have been confirmed by the tribal council in the last four years, and therefore, do not have authority to act as a CFR appellate panel for the Ute Mountain Ute Court of Indian Offenses. (Pet. for Reh'g at p.2).

As a practical matter, Federal Rule of Civil Procedure 60 applies to the district court's judgment, not appellate court review of that judgement. However, it is the duty of a court to address jurisdictional arguments even when an inappropriate rule may be cited. Respondents are, if their alleged facts are true, asking this appellate panel in a back-handed way to rule on the validity of Bureau of Indian Affairs action establishing this CFR appellate tribunal. This is something that we do not have the power to review.

Respondents are correct that this court must look to the Code of Federal Regulations to determine its powers. One power this court does not have is the power to rule on the constitutionality or validity of the acts of the Bureau of Indian Affairs or its employees. 25 C.F.R. §§ 11.104(a), 11.207(a). None of the members of this appellate panel have been affirmatively relieved of our responsibilities by the Bureau of Indian Affairs.[1] The Bureau of Indian Affairs is acting pursuant to the federal court settlement with the petitioner and other parties, including the Secretary of the Interior. Until otherwise notified by the Secretary or his designee that this panel no longer has authority, the federal court settlement mandates that this panel act as an appellate forum, at least as to the cases involved in the settlement agreement.

If the Ute Mountain Ute Tribe wants to challenge the Secretary's action based upon the argument that the Tribe has not approved of our present appointments, the proper forum for that is the Department of the Interior administrative appeals system with further review in the federal court system. It is not the tribal court system. Respondents' petition for rehearing of the motion to dismiss is **DENIED**.

II. Petitioner's Motion for Rehearing

Petitioner asks this Court to reconsider its affirmance of the trial court's ruling on very technical, procedural grounds. Federal Court Procedure does apply in CFR courts. The Federal Rules of Civil Procedure state that there are some defenses that a defendant must explicitly or affirmatively state in an answer to a complaint or the defenses are considered as waived if not stated. These are called "affirmative defenses." Federal Rules of Civil Procedure 8(c) lists these defenses.[2] The general purpose for the rule is to prevent unfair surprise. A defendant must expressly include an affirmative defense in the answer if it raises a matter that is unanticipated in light of the general allegations of the complaint. Blonder-Tongue Labs, Inc. V. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434 (1971); See also, Wright & Miller, Federal Practice and Procedure § 1271. ("[I]n determining what defenses other than those listed in Rule 8(c) must be pleaded affirmatively, resort often must be had to considerations of policy, fairness, and in some cases probability, citing to Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1336 (10thCir.1982)").

At the outset, it may be necessary for the Court to address

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[1]Judge Rodgers was expressly reappointed by designee of the Secretary of the Interior within the past four years as was Judge Abeita. Judge Barnhouse, although having completed his first four year term, has not been replaced or reappointed by the Secretary as of the date of this order. We are issuing a ruling in this case because both of the Judges who were expressly reappointed concur in this Opinion and Order.

[2]Federal Rule of Civil Procedure 8(c) lists the following as affirmative defenses: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver and any other matter constituting an avoidance or affirmative defense.

this question because tribal "custom and usage," was not the sole basis for affirming the trial court's decision (See Opinion and Order of June 26, 2003). The court cannot overlook the importance of tribal "custom and usage" within a tribal court system, particularly where there has been no express statement of law that tribal custom and usage has no force or effect. This mandates consideration of the petitioner's motion. In the following discussion, this court will refer to tribal "custom and usage" by a more accurate legal term: tribal common law.

The motion urges us to reverse our previous opinion and order, arguing that the respondents waived any defense based upon tribal common law. Petitioner argues that since tribal common law is not part of tribal written law, federal procedural rules treat the common law as an affirmative defense that must be raised or waived. Since tribal common law was not raised as an affirmative defense, respondents cannot rely on tribal common law as a defense to their actions. According to petitioner, no basis exists for affirming the trial court based upon its findings of tribal common law and respondents' conformity with the common law. (Petitioner's motion at pp. 1-2). Petitioner's argument misses the mark.

The Code of Federal Regulations requires the trial court to consider tribal "custom and usage," or common law, in all the trial court's decisions if the common law is consistent with the federal regulations set out in 25 C.F.R. part 11. 25 C.F.R. §11.101(f). The trial court's consideration of tribal common law in this case was totally inconsistent with the pertinent federal regulations. While it is true that some courts have held that defenses as defined in Federal Rules of Civil Procedure 8(c) are waived if not pled as affirmative defenses in an answer, tribal common law does not fall within those categories. Of all the defenses listed, the only category that would possibly fit would be "any other matter constituting an avoidance or affirmative defense."

It cannot be said in light of these federal regulations that the application of tribal common law constitutes a particularized defense that a party would not anticipate in a tribal court. Unlike state law matters in federal diversity cases which can be treated as an affirmative defense, the parties in this case are in tribal court. By the very nature of a tribal court proceeding, it involves the application of both written tribal law and unwritten common law. Another way to look at the issue is the "tribal custom and usage" or common law could be a basis for seeking dismissal for failure to state a claim that can be granted under the pertinent law. Even if a defendant does not list failure to state a claim that can be granted as an affirmative defense, a defendant can still file a motion asserting the argument to obtain dismissal of the complaint. Petitioner's motion for rehearing is **DENIED**.

With the denial of Petitioner's motion for rehearing and Respondents' petition for rehearing, this matter is remanded to the trial court for enforcement of the judgment previously affirmed by this Court.

December 30, 2003

VERONICA SILVA,

Plaintiff-Appellee,

v.

SOUTHERN UTE INDIAN TRIBE, THE PROGRAM FOR SOVEREIGN INDIAN NATIONS, AND RELIANCE INSURANCE COMPANY, f/k/a RELIANCE INSURANCE COMPANY OF ILLINOIS,

Defendants-Appellants.

SWITCA No. 03-002-SUTC
SUTC No. 00-CV-152

Appeal filed February 21, 2003

Appeal from the Southern Ute Tribal Court
Elizabeth C. Callard, Judge

Appellate Judge: Melissa L. Tatum

ORDER OF DISMISSAL

SUMMARY

The Appellate Court approved the parties' stipulation for settlement, vacated the appeal, and dismissed the interlocutory appeal with prejudice.

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This interlocutory appeal comes before the Southwest Intertribal Court of Appeals from the Southern Ute Tribal Court, and arises out of a partial denial of the Tribe's motion to dismiss on sovereign immunity grounds. The parties have now filed a stipulation for settlement and dismissal.

After reviewing that stipulation, this Court orders:

1) The stipulation for settlement and dismissal is hereby approved.

2) The decision of the Southern Ute Indian Tribal Court dated February 10, 2003, which is the subject of this appeal, is hereby

vacated.

3) The action herein is dismissed with prejudice, each party to pay their own attorney fees and costs.

IT IS SO ORDERED.

August 21, 2003

SOUTHERN UTE INDIAN TRIBE
d/b/a RED WILLOW PRODUCTION COMPANY,

v.

Plaintiff-Appellee.DAN S. BUSHNELL, CORONADO CORPORATION, f/k/a ATLAS MINING AND MILLING CORPORATION, f/k/a ATLAS URANIUM CORPORATION, a dissolved Utah Corporation, and

BURGESS FINANCE COMPANY, f/k/a BURGESS INVESTMENT COMPANY,

Defendants-Appellants,

v.

THE BURGESS FAMILY TRUST,

Intervenor.

SWITCA No. 03-005-SUTC
SUTC No. 01-CV-10

Appeal filed May 15, 2003

Appeal from the Southern Ute Tribal Court
Elizabeth C. Callard, Judge

Appellate Judge: Melissa L. Tatum

ORDER REGARDING JURISDICTION

SUMMARY

Appellants appealed the first phase of a bifurcated trial. The Appellate Court dismissed the appeal for lack of jurisdiction because no final judgment had been issued. The Court noted that SWITCA Rule 13 (2001) sets forth a procedure for interlocutory appeals, but it was not followed.

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This matter comes before the Southwest Intertribal Court of Appeals from the Southern Ute Tribal Court, and arises out of an interpleader action. Through its attorney, the Estate of Dan S. Bushnell has filed both a notice and an amended notice of appeal.[1] For the reasons below, this Court does not have jurisdiction over the appeal at this time and therefore must decline to hear the case.

This case centers around royalties owed on a mineral interest. The mineral interest was once owned by Coronado, a Utah corporation that was forcibly dissolved in 1974. For a variety of reasons, the mineral interest was not dealt with when the corporation was dissolved, and now, almost 30 years later, the present lawsuit asks the court to determine who is entitled to the royalties and how they should be distributed.

The amended notice of appeal raises three issues:

1) whether the trial court erred in denying the motion for a stay of judgment;

2) whether the trial court erred in finding that Coronado is no longer a legal entity and therefore is unable to make a claim for the funds; and

3) whether the trial court erred in its determination that the Burgess Finance Company and the Burgess Family Trust own 89% of Coronado's stock.

Under the rules of this Court, the Appellate Code of the Southern Ute Indian Tribe governs this action (Southern Ute Indian Tribal Code §§3-1-101 through 3-1-112). The SWITCA rules serve to supplement the Southern Ute's Appellate Code. SWITCARA #1(b) (2001). The S.U.I.T.C. provides for both appeals as of right and for discretionary appeals. S.U.I.T.C. §3-1-102(1). Any party in a civil suit who is ordered to pay damages in excess of $500 is entitled to an appeal as of right. S.U.I.T.C. §3-1-102(2).

Regardless of whether the appeal is as of right or discretionary, there are a two requirements that must be

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[1]Both pleadings were also purportedly filed on behalf of Coronado Corporation and contain signature blocks for Mr. Brennan, Coronado's attorney. The Court notes, however, that Mr. Dahlquist, attorney for the Estate of Dan S. Bushnell, is the only person who signed the pleadings. This Court takes judicial notice of the fact that Mr. Dahlquist has been admonished by the lower court for sloppy pleading. Likewise, this Court will also not tolerate such sloppy lawyering. If this case should come back to this Court, Mr. Dahlquist is admonished that he should either obtain Mr. Brennan's signature or not represent the pleading as filed on behalf of Coronado.

satisfied. First, the notice of appeal must be filed within fifteen days of the entry of final judgment. S.U.I.T.C. §3-1-104(1). This requirement is jurisdictional. SWITCARA #11(c) (2001); see also Baker v. Southern Ute Indian Tribe, 5 SWITCA 1 (1993). In other words, if the notice is not timely filed, this Court cannot hear the appeal.

Second, this Court can hear appeals only from final judgments. The Southern Ute Appellate Rules do not contain a definition of "final judgment." The SWITCA rules, however, state that the "appellate court may review any final judgment, order, or commitment ending litigation and requiring nothing more than execution of the judgment . . . ." SWITCARA #3(d) (2001).

No final judgment has been issued below, and the litigation is not ended. On November 1, 2001, the trial court issued a case-management order bifurcating trial. The first stage would address only the issue of stock ownership and the second stage would address the remaining issues.

On April 29, 2003, the trial court issued its decision and order regarding the first stage. That order, however, also makes it clear that the second stage has not yet occurred. Accordingly, the litigation below has not yet ended and no final judgment exists. The rules of this Court do contain a procedure for interlocutory appeals. See SWITCARA #13 (2001). Those procedures have not been followed. Accordingly, this Court is without jurisdiction and must decline to hear the case.

IT IS SO ORDERED.

August 1, 2003