IN MEMORIAM

VOLUME FOUR IS DEDICATED TO THE MEMORY OF

JUDGE P. BERT NARANJO
1939 - 1993

Judge Naranjo served as chief judge for the Pueblos of Santa Clara, San Ildefonso, and Picuris. He also served as an associate judge and court administrator for the Pueblo of Santa Clara. Immediately after Judge Naranjo retired from the United States Marine Corps in 1978, law became his career and he never strayed far from tribal court systems until his death. He was the model of the "citizen" judge who dedicated his life to justice for the Pueblo People.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE

In the INTEREST of
A.A.M.B.,
Petitioner-Appellant,

v.

No. 92-005-SUTC
(Filed Jan. 7, 1993)

John Chadd WILLIAMS,
Respondent-Appellee.

Appeal from the Southern Ute Tribal Court, Maylinn Smith, Judge.
Linda Boulder, for Appellant.
Jeffrey Wilson, for Appellee.

SUMMARY

The State of Colorado filed suit under an assignment of rights executed by the child's guardian who receives Aid to Families with Dependent Children (AFDC). The state sought to establish paternity of the child in order to obtain contribution and reimbursement for the financial assistance paid to the child's guardian for the benefit of the child. The trial court established the paternity of the child based upon the father's admission and awarded child support, but denied past child support. The trial court ruled that past decisions of the court established that child support cannot be imposed retroactively after determination of paternity in the absence of legislative authority. The Appellate Court reversed the decision of the trial court and held that nothing in the Southern Ute Indian Tribal Code prevents the suit by any party supporting the child to obtain retroactive child support from a parent.

OPINION

LUI-FRANK, Judge

This case has been appealed on the question of whether a father whose relationship to a child is established by court order can be held liable for past support of the child. The appellant and real party in interest is the State of Colorado, La Plata County Child Support Enforcement Unit, hereinafter referred to as the state. The appellee is John Chadd Williams, the father of the child. The state has filed suit under an assignment of rights executed by the child's guardian, who receives Aid to Families with Dependent Children (AFDC). The state sought to establish paternity of the child in order to obtain contribution and reimbursement for the financial assistance paid to the child's guardian for the benefit of the child.

The trial court's order and memorandum established the paternity of the child, based upon the father's admission. The trial court also decided the question of first impression in this jurisdiction whether appointment of a legal guardian relieves a parent of the duty of support of a child.

We hold that the trial court correctly stated the law on that issue and parents remain responsible for support of their children under §§6-1-126(1) and 6-1-102(4) of the Southern Ute Indian Tribal Code, even when they no longer have custody of the children, and the legal custodian/guardian also has a duty of support.

The trial court ruled that past decisions of the court established that child support cannot be imposed retroactively after determination of paternity in the absence of legislative authority. *L.K. v. M.E.T.*, 17 ILR 6005, 6007 (S. Ute Tr. Ct. 1989); *R.L.W. v. G.N.B.*, 18 ILR 6048, 6049 (S. Ute Tr. Ct. 1991). The state contends that the court's reasoning was based on the putative father's lack of rights to a child prior to a paternity determination, and distinguishes this case based upon the father's exercise of certain rights to the child, including visitation.

L.K. v. M.E.T., 17 ILR 6005, 6006-7 (S. Ute Tr. Ct. 1989), was a paternity action brought by the La Plata County Child Support Enforcement Unit in a Uniform Reciprocal Enforcement of Support Act case for the State of California. The father in that case was a member of a federally recognized Indian tribe, residing on the Southern Ute Indian Reservation. He stipulated to paternity of the child, who resided in California. The trial court established paternity and awarded child support, but denied past child support. The court interpreted the relevant code provisions as establishing that because a father whose paternity has not been established has no rights to a child, he has no duty of support. The court also cited a Florida case in support of its holding. *Florida ex rel. Luke v. Wright*, 14 F.L.R. 1319 (Fl. 1988).

R.L.W. v. G.N.B., 18 ILR 6048 (S. Ute Tr. Ct. 1991), involved contested paternity claims on two children and admissions to paternity on two other children. The question of past child support was decided in the same way as *L.K. v. M.E.T., supra.* The facts of the case were illustrative of instances where "...an individual may in fact not know with any degree of certainty that he is the parent of a child, up until the point paternity is medically established..." *Id.*, 6049. Therefore, the court held, requiring a father in that instance to reimburse AFDC payments would be unjust.

In reviewing the law on the issue of retroactive child support in adjudicated paternity actions, there is case law upholding the award of child support dating from the birth of a child. *Weaver v. Chandler*, 31 Ohio App. 2d 243, 287 N.E.2d 917, 921-922 (Ohio Ct. App. 1972). *See,* also, *Aguilar v. Barker*, 699 S.W.2d 915, 917 (Tex. App. 1 Dist. 1985). In the *Aguilar* case, the court noted that an alleged father cannot be required to pay child support until paternity is established, but once accomplished, costs for support can be awarded from the date of the child's birth. *Id.*

Dept. of Health and Rehab. Services ex rel. Luke v. Wright, 522 So.2d 838 (Fla. 1988), the same case as *State ex rel. Luke v. Wright*, 14 F.L.R. 1319 (Fl. 1988), does not hold that retroactive support cannot be awarded for any period prior to the date of adjudication of paternity. That case involved the question of whether Florida could assert personal jurisdiction over an alleged father living in Idaho under Florida's long-arm statute. The Department of Health and Rehabilitative Services claimed that personal jurisdiction was justified because he allegedly committed a tortious act when he had relations with the mother of the child in Florida, and eight months later the child was born. The Florida Supreme Court rejected the argument. "[C]onsensual sex also does not amount to tortious activity." 522 So.2d at 840. That court's major holding was that the long-arm statute could not be used against Wright on the ground that he committed a tort within Florida by failing to support the child who lived in Florida. Because paternity had not yet been established, he had no duty of support. That is the context for the statement quoted by the trial court, "To saddle a defendant with the burden of child support before paternity has been established would be both illogical and unjust." *Id.* The Florida Supreme Court held that the state cannot bootstrap a nonsupport claim to support jurisdiction over an out-of-state defendant for purposes of establishing paternity.

The case relied on by the trial court is not on point. The law in Florida in the most recent case on the specific issue of retroactive child support in paternity adjudications is stated in *Williams v. Johnson*, 584 So.2d (Fla. App., 5 Dist. 1991). After affirming the award of current child support of $1,000 per month retroactive to the filing of the complaint, the court states:

> We also affirm the trial court's determination to award Johnson child support from the date that the child was born until the date these proceedings were instituted. This was a matter within the trial court's discretion. However, the retroactive recovery of child support must be based on the theory of reimbursing Johnson for the monies that she expended to support the child during this period of time. [Emphasis added.] *Id.* at 91.

The court also went on to say that the issue is the right of the third party to be reimbursed for the support provided. *Id.*, at 91-92. The court cited a Florida Supreme Court Decision, *Issacs v. Deutsch*, 80 So.2d 657, 658 (Fla. 1955), for the premise that "...the obligation of a father to support his minor child is a continuing one during minority..." *Williams v. Johnson*, supra, at 92.

We hold that nothing in the Southern Ute Indian Tribal Code prevents the suit by any party supporting a child to obtain retroactive child support from a parent. Indeed, the code allows suits for child support. Sec. 6-1-126(2)(b).

We reverse the order regarding retroactive child support and remand to the trial court to determine the amount of money expended by the state and what Mr. Williams must pay, in addition to current support. The trial court may determine that a portion of the $25.00 he now pays should be applied to the retroactive child support, if his means do not allow more.

IT IS SO ORDERED.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE

Joseph B. GOULD
Petitioner-Appellant,

v.

No. 92-006-SUTC
(Filed Jan. 11, 1993)

SOUTHERN UTE TRIBE
Respondent-Appellee.

Appeal from the Southern Ute Tribal Court, Maylinn Smith, Judge.
Thomas J. Kimmel, Burk & Kimmel, for Petitioner-Appellant.
Patricia A. Hall, Maynes, Bradford, Shipps & Shetiel, for Respondent-Appellee.

ORDER DENYING APPEAL BASED ON TIMELINESS

SUMMARY

Appellant sought reversal of the Southern Ute Indian Tribal Council's decision to impose a penalty assessment against him pursuant to the 1989 severance tax ordinance of the Southern Ute Tribe, Tribal Ordinance No. 89-01. Respondent Southern Ute Tribe challenges the timeliness of appellant's appeal and challenges defects in the notice of appeal filed by appellant, Gould. The appellate code of the Southern Ute Indian Tribal Code is silent on the effect of failure to file a timely notice. The SWITCA Rules of Appellate Procedure do address this failure. Appeal dismissed.

ZUNI, Judge

OPINION
FACTUAL AND PROCEDURAL BACKGROUND

This matter was before the Southern Ute Tribal Court on appeal. Appellant sought reversal of the Southern Ute Indian Tribal Council's decision to impose a penalty assessment in the amount of $6000.00 against him pursuant to Section 15 of the 1989 severance tax ordinance of the Southern Ute Tribe, Tribal Ordinance No. 89-01. The parties agreed to submit the appeal to the Southern Ute Tribal Court on briefs. The Southern Ute Tribal Court affirmed the Tribal Council's decision upholding the penalty assessment provided for in the severance tax ordinance in *Gould v. Southern Ute Tribe*, Case No. 91-CV-84.

The Southern Ute Tribal Court's Memorandum and Order was "ordered and signed" on August 12, 1992. No filing date is indicated. The Memorandum and Order was hand delivered or mailed by the clerk of court on August 13, 1992, to both the attorneys for the petitioner, Joseph B. Gould and respondent, Southern Ute Tribe. The appellant, Joseph B. Gould then filed a notice of appeal from the Southern Ute Tribal Court's decision. The appellant's notice of appeal was mailed on September 4, 1992 and filed by the Southern Ute Tribal Court on September 8, 1992.

ISSUE

An issue regarding the timeliness of appellant's appeal has been raised by respondent. Respondent has also challenged defects in the notice of appeal filed by appellant. The controlling issue before the Court is whether the appellant, Joseph B. Gould's notice of appeal, dated September 4, 1992 and filed September 8, 1992 was timely filed.

The Court holds that if appellant Gould's notice of appeal was not timely filed in accordance with the Southern Ute Tribal Code's Appellate provisions, the appeal shall be dismissed. The Court does not find it necessary to consider the challenged defects in the notice of appeal at this time.

DISCUSSION

Jurisdiction of the Southwest Intertribal Court of Appeals to determine this appeal is based on Section 18 of the 1989 severance tax ordinance of the Southern Ute Tribe[1]; Resolution No. 90-86 of the Southern Ute Indian Tribe, adopted July 10, 1990, authorizing the Southwest Intertribal Court of Appeals to act as an independent appellate court on behalf of the Southern Ute Indian Tribe for appeals taken from the Southern Ute Tribal Court[2] and appellate code of the Southern Ute Indian Tribal Code (SUITC), §1-1-102[3].

Regarding the commencement of appeal, the appellate code of the Southern Ute Indian Tribal Code (SUITC) §3-1-104(1) states: "An appeal shall be commenced by filing a notice of appeal with the tribal court clerk within fifteen (15) days after entry of final judgment." Southern Ute Tribal Court Judge Maylinn Smith stated her findings and decision in a Memorandum and Order which was ordered and signed on August 12, 1992. The clerk's certification states that he hand-delivered or mailed the Memorandum and Order to the parties on August 13, 1992. The date the judge ordered and signed the Memorandum and Order, August 12, 1992, is the date of the entry of the final judgment. Pursuant to SUITC §3-1-104(1), the appellant had fifteen working days after August 12, 1992 to file a notice of appeal with the tribal court clerk.

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[1] 1989 Severance Tax Ordinance of the Southern Ute Tribe, Ordinance No. 89-01.

Section 18 - Consent to Suit

Should a taxpayer or other working interest owner in a well be adversely affected by a ruling of the Tribal Council, its authorized representative or an independent board or panel designated by the Tribal Council in enforcement of this ordinance, said adversely affected party may seek judicial relief against the Tribe in the Southern Ute Tribal Court, and the Tribe hereby consents to such a suit. The decision of the Tribal Court may be appealed to the Southern Ute Court of Appeals in accordance with the rules and procedures governing practices before said court. Provided that such a jurisdictional basis exists, the final decision of the Southern Ute Court of Appeals may be appealed to the United State District Court for the District of Colorado, and the Tribe hereby consents to such a suit. The Tribe does not consent to be sued in the state courts of Colorado.

[2] Resolution No. 90-86, Resolution of the Southern Ute Indian Tribe, adopted July 10, 1990.

"...NOW, THEREFORE BE IT RESOLVED, that the Southern Ute Indian Tribal Council authorizes the Southwest Intertribal Court of Appeals to act as an independent appellate court on behalf of the Southern Ute Indian Tribe for appeals taken from the Southern Ute Tribal Court, in accordance with the procedures and laws set forth in the Southern Ute Indian and Tribal Code."

[3] Southern Ute Tribal Code, § 3-1-102. Procedures for Appeal.

(1) Any party against whom an issue has been resolved in Southern Ute Indian Tribal Court may seek review of the decision either through appeal by right or petition for discretionary appeal as set forth below.

(2) Any party who is subject to a criminal penalty which includes a jail sentence in excess of ten (10) days or a fine in excess of Two Hundred Dollars ($200.00), or any party in a civil suit who is required to pay damages in excess of Five Hundred Dollars ($500.00) shall be entitled to an appeal as a matter of right.

(3) All other parties seeking review shall do so by petition for discretionary appeal. It shall be within the discretion of the appeals judge to grant such a petition.

The appellate code of the Southern Ute Tribe, SUITC §§3-1-101, *et seq.*, does not have a provision for computation of time. The rules of appellate procedure of the Southwest Intertribal Court of Appeals are intended to apply in the absence of tribal rules or provisions for appellate procedure, SWITCA rules of appellate procedure, Rule 1(a)[4]. See *Cocopah v. Valenzuela*, 3 SWITCA 6, at 7, 1992. (Application of SWITCA rules of appellate procedure where Cocopah Law and Order Code lacked provision on unavailability of lower court record). This Court will therefore apply Rule 7 of the SWITCA Rules of Appellate Procedure on computation of time which states: "The computation of any time period shall be by the working days of the Pueblo or Tribal Court from which the appeal is taken."

The appellant had fifteen working days after August 12, 1992, as observed by the Southern Ute Tribal Court, to file his notice of appeal with the court clerk. Based on standard working days, Monday through Friday, and on the standard calendar, the fifteenth working day after August 12, 1992, fell on September 2, 1992. The date the appellant filed his notice of appeal, September 8, 1992, fell on eighteenth working day after August 12, 1992, assuming the Southern Ute Tribal Court observed Labor Day on September 7, 1992. The standard calendar observes no holidays between August 12 and September 2, 1992. Unless the Southern Ute Tribal Court calendar observed three non-working days in addition to Labor Day, during the period from August 13 through September 8, 1992, the appellant's notice of appeal was not timely filed.

The appellant does not argue that his notice of appeal was timely filed. Appellant argues that he was observing SWITCA's Rules of Appellate Procedure which allow thirty (30) days after entry of final judgment to file a notice of appeal, SWITCA rules of appellate procedure, Rule 10(a)[5]. Appellant further argues that he should not be penalized for his untimely notice of appeal because any delay in filing the notice of appeal was inadvertent and caused no prejudice to the Tribe, and therefore should be disregarded. The Court cannot accept appellant's arguments.

The Southern Ute Tribe's resolution authorizes this Court to hear cases in accordance with the procedures set forth in the Southern Ute Tribal Code. The appellate code of the Southern Ute Indian Tribal Code is very clear in setting forth the requirements to effect a timely appeal. Further, the scope of the SWITCA rules of appellate procedure very clearly state that in proceedings before the Southwest Intertribal Court of Appeals, the rules apply only in the absence of tribal rules or provisions for appellate procedure. SWITCA rules of appellate procedure, Rule 1(a). To the extent that the SWITCA rules of appellate procedure may be applied to supplement Southern Ute's appellate code in the absence of a rule or provision, when the Southern Ute Code contains a provision that is clear on its face, that provision must control. SWITCA rules of appellate procedure, Rule 1(d) states:

> "The following rules are not intended to diminish the authority of nor create an implied waiver of sovereign immunity by any participating Pueblo or Tribe. Any conflict of these rules of appellate procedure and procedural rules of a participating Pueblo or Tribe shall be resolved in accordance with the respective Pueblo or Tribal rules of procedure." (Emphasis added.)

Without question, it is this Court's opinion that the Southern Ute appellate code provision setting forth a fifteen day time period for filing a notice of appeal to commence an appeal controls.

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[4] Rule 1. Scope of Rules

(a) In proceedings before the Southwest Intertribal Court of Appeals, these rules apply only in the absence of Pueblo or Tribal rules or provisions for appellate procedure.

[5] SWITCA Rules of Appellate Procedure, Rule 10. Filing Notice of Appeal.

(a) An appeal shall be taken by filing a notice of appeal with the respective Pueblo or Tribal Court within thirty days of entry of judgment by that same Pueblo or Tribal Court.

The appellate code of the Southern Ute Indian Tribal Code is silent on the effect of failure to file a timely notice. The SWITCA rules of appellate procedure do address this failure. Rule 10(c), SWITCA rules of appellate procedure states: "Failure to file a timely notice of appeal may affect the validity of the appeal. The Court of Appeals may take whatever action is appropriate, including dismissal." While this provision allows discretion when there has been a failure to file a timely notice of appeal, where the SWITCA rules of appellate procedure clearly state in the scope of the Rules that they apply only in the absence of Tribal rules or provisions, SWITCA rules of appellate procedure Rule 1, it was incumbent upon the appellant to determine whether the Southern Ute Tribe had appellate provisions which would apply. Where the Southern Ute appellate code clearly sets forth a time frame for the commencement of an appeal, and the appellant failed to determine the existence of tribal rules of appellate procedure, the Court finds that the appropriate action to take is dismissal. If the appeal was not properly filed in accordance with the Southern Ute appellate code provisions requiring the filing of the notice of appeal within fifteen (15) days from the date of entry of judgment, this appeal will be dismissed.

ORDER

The Southern Ute Tribal Court Clerk is hereby directed to provide this Court and the parties with the date of the fifteenth working day after August 12, 1992, as observed by the Southern Ute Tribal Court. Unless the appellant's notice of appeal was filed within the fifteen day time period after August 12, 1992, this appeal is dismissed.

IT IS SO ORDERED.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE COCOPAH INDIAN TRIBE

COCOPAH INDIAN TRIBE
Plaintiff-Respondent,

v.

No. 92-002-CTC
(Filed Feb. 8, 1993)

Arnold VALENZUELA
Defendant-Appellant.

Appeal from the Cocopah Tribal Court, Jay Irwin, Judge.
Verley Valenzuela, for Appellant.

ORDER DISMISSING APPEAL

SMITH, Judge

The above entitled matter came before the Southwest Intertribal Court of Appeals on the Court's own motion. A review of the Court's record reflects that this appeal was filed with the Cocopah Indian Tribe on November 19, 1991, and transmitted to this Court on February 20, 1992. By order of this Court dated March 25, 1992, the parties to this action were directed to provide this Court with a statement of the evidence and proceedings at the lower court level in order that the issues on appeal could be addressed. To date no statement has been filed with this Court in accordance with the terms of the above mentioned order and Rule 15(b) of the Appellate Rules.

In consideration of the above, the Court, therefore, orders that this action be dismissed, without prejudice, due to the parties' failure to proceed. Said dismissal may be set aside only if a party to this action motions this Court for a hearing within thirty days of this order and can show cause why the dismissal should not stand at said hearing.

SO ORDERED and SIGNED this 2nd day of February, 1993.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE

SOUTHERN UTE INDIAN TRIBE
Plaintiff-Respondent,

v.

No. 92-007-SUTC
(Filed Feb. 18, 1993)

Audrey FROST
Defendant-Appellant.

Appeal from the Southern Ute Tribal Court, Maylinn Smith, Judge.
Michael Lane, Advocate, for Appellant.
Douglas Walker, Attorney, for Respondent.

ORDER DISMISSING APPEAL

LUI-FRANK, Judge

This matter coming before the Court on motion of defendant, Audrey Frost, to dismiss the appeal in the above captioned and numbered cause, and it appearing that the Southern Ute Indian Tribe has no objection to the motion and it appearing to the Court that the motion is well-taken, the Motion is granted and the appeal is hereby dismissed.

IT IS SO ORDERED.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS FOR THE SOUTHERN UTE INDIAN TRIBE

Clayborn Wayne SCOTT
Petitioner,

v.

No. 93-001-SUTC
(Filed Feb. 26, 1993)

SOUTHERN UTE TRIBE
Respondent.

Writ of Habeas Corpus from the Southern Ute Tribal Court, Pearl Casias, Judge.
Jim Salvator, Colorado Rural Legal Services, Inc., for Petitioner.
Douglas S. Walker, for Respondent.

SUMMARY

Petitioner was released inadvertently, without authorization from the tribal court, from custody while serving a sentence for a conviction of assault and battery. Petitioner was aware that his release was a mistake, but did not inquire or report to the tribal court. Upon petitioner's return to custody, a parole hearing was held and petitioner's motion was denied. Petitioner now seeks a writ of habeas corpus on the grounds that he is being unlawfully detained and was denied a fair hearing on his motion for parole. Petitioner has failed to demonstrate that the court was prejudiced against him and petitioner was not denied due process in his motion for parole hearing. Petition for writ of habeas corpus is denied.

ORDER DENYING WRIT OF HABEAS CORPUS

TOLEDO, Judge

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner, Clayborn Wayne Scott, files his petition for writ of habeas corpus from the Southern Ute Tribal Court's denial of his motion for parole. The petitioner is seeking immediate release from custody pending a rehearing of his motion for parole and Southern Ute Tribal Court's order commanding the petitioner to report to La Plata County Jail to resume his sentence.

Petitioner was ordered to serve one hundred eighty (180) days of incarceration and fined $500.00 plus $25.00 court costs pursuant to petitioner's plea of guilty to the charge of assault and battery, cause No. 92-CR-80. The judgement was entered by the tribal court on September 9, 1992. In addition, the petitioner was ordered not to have direct contact with Tammy Scott the complaining witness in this matter.

On December 8, 1992, the petitioner, without authorization from the tribal court, was inadvertently released from custody by La Plata County Jail. On January 8, 1993, the Tribal Court ordered the petitioner to return to custody. Petitioner was aware that his release was a mistake but did not inquire nor attempt to remedy the situation. Petitioner filed his motion for parole on December 10, 1992, and a hearing in this matter was held in abeyance pursuant to an order entered herein on December 15, 1992.

Upon petitioner's return to custody, a parole hearing was held on January 22, 1993. Judge Casias denied petitioner's motion for parole. Petitioner objects to Judge Casias' closing remarks that she had witnessed the petitioner being present in the same room at the chambers of the Southern Ute Tribal Council with the complaining witness in violation of the Court's order. Petitioner alleges that he has been denied due process and petitions the Court for a writ of habeas corpus requesting immediate release from custody.

ISSUES

The petitioner asks the court to issue a writ of habeas corpus on grounds that he is being unlawfully detained by the Southern Ute Tribe at the La Plata County Detention Facility on grounds that Judge Casias had become a witness in this matter and that he has been denied a fair hearing on his motion for parole. The issue in this matter is whether the prejudicial comments of the trial judge denied him a fair hearing in violation of the Indian Civil Rights Act of 1968 [25 U.S.C. 1302(8)]?

The Court denies the petitioner's [petition for a] writ of habeas corpus.

DISCUSSION

Upon review of the recordings, the orders filed herein, and the pleadings filed by the parties, and the record cited in the petition for the writ, Judge Casias' closing remarks were not prejudicial to the petitioner. Courts have held that unless prejudicial remarks amount to constitutional violations, prejudicial comments and conduct by a judge in a criminal trial are not proper subjects for collateral attack. Furthermore, in order to prove an allegation of bias by the trial judge as grounds for habeas corpus relief, the petitioner must factually demonstrate that during the trial the judge assumed an attitude which went further than an expression of her personal opinion. *Brinlee v. Crisp*, 608 F.2d 839, 852 (10th Cir. 1979) *cert. denied*, 444 U.S. 1047, 100 S.Ct. 737, 62 L.Ed.2d 733 (1980).

At the hearing on petitioner's motion for parole, both parties introduced evidence. The Southern Ute Tribe's evidence consisted of testimony of Sergeant Leva of the La Plata County Jail who testified that on December 8, 1992, the petitioner was released from detention without authorization after having served seventy-six (76) days of his one hundred eighty (180) day sentence. The petitioner testified that he was aware of the mistake and that during his inadvertent release, he lived with Tammy Scott, his wife and the complaining witness in the case.

The petitioner attempted to modify his sentence by filing his motion for parole on December 10, 1992, and the court held the hearing on the motion in abeyance until he submitted himself to custody. Unless Judge Casias' actions were capricious, arbitrary, or she acted in absence of information, or without adequate investigation, habeas corpus cannot be used to interfere with proper exercise of discretion. 39 C.J.S., Habeas Corpus, §101(b).

Furthermore, the petitioner cannot rely on habeas corpus to modify his sentence. *Killcrow v. U.S.*, 555 F.2d 638 (8th Cir. 1977).

Judge Casias stated that the petitioner had knowingly violated the Court's order and that he knew that he had been released from jail by mistake but made no effort to report back to the La Plata County Jail.

The Tenth Circuit Court of Appeals in *Nicols v. Sullivan*, 867 F.2d 1250, *cert. denied*, 109 S.Ct. 3169, 490 U.S. 1112, 104 L.Ed.2d 1031, stated the standard for evaluating judicial bias as follows:

> ...In general the standard for evaluating whether a habeas petition alleges judicial bias amounting to a denial of due process is whether the judge was 'actually biased or prejudiced against the petitioner.' (citations omitted).
>
> * * *
>
> The test for assessing whether the likelihood of or appearance of bias is so great as to be constitutionally intolerable is whether 'the judge [is] unable to hold the balance between vindicating the interests of the court and the interests of the accused.' *Taylor*, 41 U.S. at 501, 94 S.Ct. at 2704.

The petitioner has failed to factually demonstrate that Judge Casias was prejudiced against the petitioner nor has he shown actual bias or appearance of bias and that the judge was "unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Nicols, supra*. The petitioner was not denied due process in his motion for parole hearing. Petitioner's petition for writ of habeas corpus is denied.

IT IS SO ORDERED.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE

Dudley WEAVER
Petitioner-Appellant,

v.

No. 92-004-SUTC
(Filed Apr. 9, 1993)

SOUTHERN UTE TRIBE
Respondent-Appellee.

Appeal from the Southern Ute Tribal Court, Maylinn Smith, Judge.
Jim Salvator, for Petitioner-Appellant.
Douglas S. Walker, for Respondent-Appellee.

SUMMARY

Appeal from the Southern Ute Tribal Court's decision to forfeit appellant's performance bond for his failure to complete an alcohol treatment program and for failure to show good cause for not complying with the terms of the bond. The Court reviewed only the lower court's jurisdiction in reimposing appellant's suspended sentence. The appeal is decided on the appellate court's *sua sponte* review and finds that the lower court lacked jurisdiction when it acted to reimpose the suspended sentence. Reversed.

OPINION

ZUNI, Judge

This is an appeal from the Southern Ute Tribal Courts's decision to forfeit appellant's five hundred dollar ($500) performance bond for his failure to complete an alcohol treatment program and for failure to show good cause for not complying with the terms of the bond. Appellant, in his notice of appeal, claims error in: (1) the trial court's refusal to find a violation of his due process rights upon his discharge from the alcohol treatment program, as well as error in findings related thereto; (2) the trial court's ruling that his discharge from alcohol treatment was final, when he had not yet exhausted the grievance procedure of the alcohol treatment center; (3) the trial's court's inclusion of alcohol evaluation and treatment in the sentence when his suspended sentence was reimposed; (4) the trial court's finding that treatment was not satisfactorily completed, if the inclusion of alcohol evaluation and treatment is allowed; and (5) the trial court's refusal to find a violation of equal protection where the due process rights accorded to Southern Ute Tribal Court inmates differ from those accorded Bureau of Prison inmates, upon discharge from the same alcohol treatment program. Appellant briefed issues (1) and (3).

The scope of appellate review allowed under the Southern Ute Indian Tribal Code (SUITC), Appellate Code, is of those issues raised by the parties on appeal. In addition, where plain error has been committed during the original proceedings, such error may be corrected, *sua sponte*, Southern Ute Indian Tribal Code (SUITC) §3-1-109 (1989), *Southern Ute Indian Tribe v. Ferguson*, 2 Southwest Indian Tribal Court of Appeals (SWITCA) 18 at 19 (1991). Plain error generally involves specific errors complained of or in need of preservation which would result in substantial injustice if the appeals court were not to take notice of them, see §7.03, with reference to §6.03, *Federal Standards of Review*, Vols. 1 & 2, 2nd Ed., Childress and Davis (1992), and the Court must be careful to distinguish between review of plain error and review of new issues. The issue of jurisdiction may be raised at any point in the proceedings, including on appeal, even though not raised below. See *Federal Standards*

of Review, at pp. 6-30 and 6-31, as this Court has so recognized in prior cases. *Ferguson*, 2 SWITCA 18 at 19 and *Naranjo v. Southern Ute Indian Tribe*, 3 SWITCA 8 at 9 (1992) (jurisdiction of the court to act may be raised at any time, and for the first time on appeal). This appeal is decided on this Court's *sua sponte* review and finding that the lower court lacked jurisdiction when it acted to reimpose the suspended sentence. It is unnecessary for the Court to consider the errors cited by the appellant in his notice of appeal. For the reasons stated in the discussion following, the trial court's decision to forfeit the appellant's performance bond is reversed. Appellant's performance bond is hereby ordered to be returned to him by the trial court in accordance with this decision.

The Court now considers the argument for dismissal which appellant raised in his brief. Appellant argues that this Court should have dismissed the appeal because the Tribe conceded error by accepting appellant's arguments in his motion for expedited release from court supervision filed in the trial court after this appeal was final. First, this Court has no record of the lower court's consideration of appellant's motion for expedited release from court supervision. This issue is therefore not properly subject to the Court's scope of review. SWITCA Rules App., Rule 4. Second, no motion or stipulation to dismiss was ever filed with this Court asking the Court to consider the argument for dismissal which appellant asserts is the "threshold issue" in his brief. SWITCA Rules App., Rule 22. The Court may dismiss for failure to file a timely notice of appeal, SWITCA Rules App. Proc., Rule 10(c), *Gould v. Southern Ute Tribe*, SWITCA Case No. 92-006-SUTC, Jan 11, 1993; for failure of appellant or the parties to appear at a hearing for oral argument, SWITCA Rules App., Rule 27(e); and may deny an appeal for lack of jurisdiction, see SWITCA Rules App., Rule 3, Rules 10(1), and 11. Dismissal of an appeal for other reasons may be considered upon motion filed by a party, SWITCA Rules App., Rule 22, including dismissal for failure of appellant to file a timely brief, SWITCA Rules App., Rule 23, or by voluntary dismissal upon the filing of a stipulation by the parties or by motion of the appellant, SWITCA Rules App., Rule 33. The Court cannot consider appellant's argument for dismissal because the Court has no record of the lower court's proceedings which occurred after this appeal was taken[1] and because the actions of the tribe which allegedly occurred during the lower court's proceedings were not properly raised here as grounds for dismissal.

The Court will review the lower court's jurisdiction in reimposing appellant's suspended sentence, only.

BACKGROUND

The facts were taken from memoranda filed by the parties and the record proper, which includes the trial court's order and memorandum. A chronological history of the appellant's appearance before the court is the simplest method to relate the facts.

On July 26, 1989, the appellant, Dudley Weaver, was charged with disorderly conduct, assault, battery and disobedience of court orders. By order dated September 7, 1989, appellant was found guilty of disorderly conduct, and not guilty of assault and battery. The charge of disobedience of court orders was dismissed with prejudice. A pre-sentence report was ordered by the court.

On October 13, 1989, appellant was sentenced to sixty (60) days, with forty-five (45) days suspended on the condition that he obtain an alcohol assessment and follow all recommendations of the assessment, including an aftercare program. He was also ordered to refrain from using alcohol or being in or around establishments

[1] It may be helpful to note here that the lower court has authority under the Southern Ute Tribal Code, Appellate Code to consider whether a stay of judgment shall be granted to the Appellant, SUITC § 3-1-103 (1989), Southern Ute Indian Tribe v. Herrera, 3 SWITCA 17 (1992), and SWITCA Rules of Appellate Procedure consider stays of judgment, injunctions pending appeal, and applications for release to be within the authority of the lower court during the pendency of an appeal. SWITCA Rules of App. Proc., Rules 17 and 18.

serving alcohol, fined fifty ($50.00) dollars, and allowed participation in a work release program. The court order further stated "failure to comply with the terms of this order may result in revocation of any suspended sentence and a contempt of court charge being brought against you." (Sent. Order 1)[2].

On May 2, 1990, in Civil Cause No. 90-IC-06, the appellant was found in contempt of court for failing to obtain alcohol counseling and was ordered to six (6) months imprisonment. In this order, reference is made to appellant's knowledge that "he was required to obtain alcohol counseling *as part of his sentencing order* and pursuant to an involuntary commitment" (emphasis added). However, there is no clear indication whether the sentencing order referred to was the sentencing order of the criminal case on appeal here. The contempt order is issued only under Cause No. 90-IC-06, an involuntary commitment proceeding. (Contempt Order 1).

On June 21, 1990, in an order issued under both the involuntary commitment Cause No. 90-IC-06 and the criminal cause number of the case on appeal here Cause No. 90-CR-98, the court found that the appellant was not in contempt for failing to obtain alcohol counseling, due to his inability to afford alcohol treatment. The court then gave appellant until July 13, 1990, to make other arrangements to obtain the alcohol counseling. (Contempt Order 2).

On August 22, 1990, the tribe, represented by the prosecutor, filed a motion to revoke probation. Appellant failed to appear for the hearing on the motion and by order of the court dated September 13, 1990, was found to be in contempt for his failure to appear and was sentenced to ten (10) days incarceration and fined $100.00. (Contempt Order 3).

On September 24, 1990, the court held a hearing on the motion to revoke the appellant's probation. The court, without any reference to probation, ordered that the forty-five (45) days of the appellant' suspended sentence (Sent. Order 1) be reimposed. The court also ordered that the appellant obtain an alcohol evaluation within five (5) days and follow all recommendations arising from the evaluation. The court's order allowed appellant to move for limited release from custody to attend alcohol counseling, and allowed day for day credit against the imposed sentence for successful completion of an alcohol treatment program (Sent. Order 2).

On October 1, 1990, appellant was found in contempt of court for failing to appear to serve his forty-five (45) day jail sentence and was sentenced to six (6) months and fined five ($500.00) hundred dollars. (Contempt Order 4).

On March 11, 1991, appellant was again found in contempt of court, this time for failing to obtain an alcohol evaluation and follow the recommendations as ordered by the court on September 24, 1990 (Sent. Order 2). appellant was sentenced to six (6) months, with limited release from custody to attend an alcohol treatment program. Upon successful completion of an alcohol treatment program, appellant was to be given day for day credit against the sentence. (Contempt Order 5).

On June 27, 1991, the appellant was required to post a performance bond in the amount of $500.00 for the successful completion of the orders of March 11, 1991, (Contempt Order 5) and September 24, 1990 (Sent. Order 2), including but not limited to completion of an approved alcohol treatment program. The bond was required by the court due to appellant's request to attend a rehabilitation program in Prescott, Arizona outside the exterior boundaries of the Southern Ute Indian Reservation.

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[2] For clarity, the sentencing orders and contempt orders will be referred to by number.

On April 28, 1992, the trial court forfeited the performance bond upon finding that the appellant had breached the conditions of his performance bond by not completing an alcohol program due to his discharge from Peaceful Spirits, an alcohol treatment program in Colorado, and for failure to show good cause for not complying with the terms of the bond. Appellant was discharged from Peaceful Spirits for violation of rules and regulations related to his personal misconduct.

On May 13, 1992, appellant filed his appeal from the court's order of April 28, 1992, forfeiting his performance bond.

DISCUSSION

The appellant was originally placed under a condition of a suspended sentence "to obtain an alcohol assessment and follow all recommendations, including after-care" by the court on October 16, 1989 (Sent. Order 1). The lower court has acted in this case for over two and a half years through numerous contempt orders[3], and its last order of April 28, 1992, shows that it intended to maintain its jurisdiction beyond that date. Appellant challenges the court's ability to order him to obtain an alcohol assessment and follow its recommendation, as a part of his reimposed sentence. He argues that the court was limited to imposing only the forty-five (45) day suspended sentence originally imposed (Sent. Order 1). However, the overriding issue regarding the September 24, 1990 order (Sent. Order 2), is whether the lower court had jurisdiction to act when it reimposed the sentence. Where the appellant was under a suspended sentence, the court had a limited period of time to supervise the performance of conditions under the suspended sentence and to reimpose the suspended sentence for breach of these conditions. If the lower court acted at a time when it had lost the jurisdiction over the suspended sentence, it committed error and any subsequent order of the court related to reimposing the sentence was without authority.

It is clear from the original sentencing order of October 16, 1989, (Sent. Order 1) that the appellant was placed under a suspended sentence. Although the court could have placed the appellant on probation, it is not required to do so. SUITC §§4-1-124(3)iii and (11). The order shows that the appellant was not place on probation by the court. The filing of a motion to revoke probation by the prosecutor is puzzling, as is the court's action on the motion, but it does not change the fact that the appellant was not on probation.

The trial court's period of jurisdiction over the appellant to require performance of a condition of a suspended sentence is limited, in the same manner as a court's period of jurisdiction over an individual placed on probation is limited.[4] Generally, a suspended sentence may stand on its own, but it is normally a prerequisite to probation. But see, *Southern Ute Indian Tribe v. Ferguson*, 2 SWITCA 18 (probation imposed without a suspended sentence). The difference between a suspended sentence with probation and a suspended sentence with terms

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[3] Under the sentencing code, SUITC § 4-1-124(3)(e) (1989), it is clear that the court's authority to cite for contempt is independent of the court's sentencing authority. However, judicial restraint should be employed in the court's use of contempt. Contempt powers should be used as a last resort, with diligence on the part of the court to seek other alternatives before utilizing this judicial device. It appears that lack of close court supervision in this case has led to the numerous contempt citations in an effort to force compliance. Probation, swift action, and clear and specific direction from the court regarding its expectations, all may have proven to have been far more effective than contempt citations.

[4] Some tribes and states limit probationary periods by statute. See for example, Law and Order Code of the Pueblo of Taos, § 3-1-15, (probation limited to maximum sentence), § 31-20-5(A), NMSA (1985), (total period of probation for district court shall not exceed five years and for magistrate or metropolitan courts shall be no longer than maximum allowable incarceration time for the offense, or as otherwise provided by law). Colorado statutes, like the Southern Ute Indian Tribal Code, do not set forth a limit for probation. However, in People v. Knaub, 624 P.2d 922 (Colo. App., 1980) the Court ruled that language in the sentencing statute limited the duration of a period of probation to the maximum term of imprisonment specified for the offense in question, and that although the probation statute provided that probation was to be for such a period and upon such terms and conditions as the court deems best, the court did not have authority to extend terms of probation beyond the maximum term of imprisonment.

and conditions imposed, without probation, is one of supervision. Normally, probationers are subject to the supervision of the probation office, while those under a suspended sentence alone, are not. For purposes of jurisdiction over a suspended sentence, the court can have no greater jurisdiction over a defendant placed on a suspended sentence with condition imposed, than it has over a defendant placed on probation. Whether the lower court suspends a sentence and places a defendant on probation or forgoes probation, the lower court is limited in its period of supervision of the defendant. Where a defendant is placed on probation, the length of court supervision over that individual is usually set at sentencing. The court does not have an unlimited period of jurisdiction over defendant subject to suspended sentences.

The Southern Ute tribal code does not specify the maximum period of time over which the court may exercise jurisdiction over those placed under suspended sentences or on probation. However, the code does specify the maximum length of time a defendant may be incarcerated. In this case, the appellant was subject to a maximum sentence of six (6) months incarceration. Where the code does not provide for a specific period of time under which a defendant may be placed on a suspended sentence, this Court must be guided by the intent of the Council in enacting the sentencing code. SUITC §§1-1-120(3) and (4) (1989) state that it is to be presumed that in enacting any statute, "a just and reasonable result" and "a result feasible of execution" is intended. Although a defendant is not subject to the same loss of liberty when given a suspended sentence or probation, as he is when incarcerated, he is still "sentenced", SUITC §4-1-124(a)iii (1989). The maximum term the court can impose on an individual is the maximum period of incarceration allowed for an offense. While the code states that the court may sentence a person to suspension of sentence "on such terms and condition as the court may direct," this Court does not interpret this to mean for a term in excess of that which the lower court would be allowed to incarcerate an individual, particularly where there are two provisions in the sentencing code which stress that the minimum amount of custody or confinement should be utilized, SUITC §4-1-124(2) and that the court has "leeway" within the maximum term allowed when sentencing an individual to incarceration, SUITC §4-1-124(4) (1989). Absent a specific code provision, this Court must be guided by the maximum period of time the court can sentence an individual when determining the period of jurisdiction the lower court has over a suspended sentence. Utilizing the maximum sentence for a given offense insures fair, evenhanded treatment of defendants on suspended sentences, and assures the case will be acted on within a reasonable period of time. A maximum period of time for the court to supervise a condition also assures closer court attention to a defendant's compliance with it orders and timely action when compliance fails. Furthermore, it gives notice to the defendant of the period of time he is under supervision during which he may be subject to action of the court for his failure to comply. This allows both a just, reasonable result and a result feasible of execution.

There is no showing in the record that the court had grounds to delay action against the appellant, such as where a defendant deliberately flees the jurisdiction of the court. Absent a statute which would allow the court to exercise jurisdiction beyond the maximum period of incarceration, for purposes of supervising a condition of a suspended sentence, it is the Court's express finding that the lower court did not have longer than the maximum sentence, six (6) months, to supervise the appellant in the performance of the conditions imposed on him at sentencing.

The period of time during which the court had jurisdiction to reimpose the sentence and supervise the appellant was the six (6) month period following October 13, 1989 (Sent. Order 1). The record shows the court did not begin to act on the appellant's failure to comply with the conditions of his suspended sentence until June 21, 1990, (Contempt Order 2) approximately eight (8) months later, when it held a contempt hearing. Approximately eleven (11) months after the appellant's suspended sentence was ordered, the prosecution acted to revoke probation, although the appellant was not on probation and on September 24, 1990, (Sent. Order 2), the court reimposed the appellant's suspended sentence of 45 days for his failure to comply with the conditions set forth in its original sentencing order and its order of June 21, 1990, (Contempt Order 2) requiring to make arrangements to obtain alcohol therapy before July 13, 1990.

The time to take action to enforce the performance of the conditions of a suspended sentence or to impose the suspended sentence is during the period of time the court has jurisdiction over the suspended sentence. The prosecution had a six (6) month period to bring to the court's attention the appellant's noncompliance with the conditions of the sentence and to request imposition of the suspended sentence. Upon the conclusion of that period of time the appellant was free from both the prosecution's and the court's ability to enforce the condition of the suspended sentence or to impose the suspended sentence. The court cannot wait until after that time has expired to require performance of the condition of the suspended sentence or to impose the suspended sentence. The appellant had a reasonable expectation that his criminal case would conclude. Instead, he found himself in a revolving door. It is this Court's opinion that, by the time the court sought to find the appellant in contempt of court for not complying with a condition of his suspended sentence (Contempt Order 2), the court had lost its jurisdiction to supervise the defendant's performance of the condition of the suspended sentence and the later imposition of the suspended sentence was in error (Sent. Order 2). The Court makes no ruling on other errors cited and briefed by appellant because they occurred after the lower court lost jurisdiction over the suspended sentence. Appellant's performance bond was imposed after the lower court lost jurisdiction over the suspended sentence; therefore, the full performance bond must be returned to appellant.

This Court recognizes the attempt of the lower court to address the impact of alcohol on appellant's criminal behavior. However, when addressing this serious issue, the court must be careful in the methods used to accomplish its objective. The SUITC has a protective custody code, SUITC §8-3-101, et. seq. (1989), which is intended to supplement the restricted ability of a court to act within the context of a criminal case. The criminal court can do only what is within its power and no more. It cannot strain the judicial system or compromise its integrity to address the pain and suffering of alcohol in a criminal proceeding. The court cannot resolve the problems of individual dependency on alcohol where that will lead to the loss of individual rights. The court can only assist as provided within the code's parameters. The Tribe's legitimate concern for those whose alcohol dependency brings them within its criminal jurisdiction should prompt a critical look at the adequacy of the court's power to address such concerns within its sentencing provisions and at the sufficiency of support services available to assist the court in enforcement of its orders addressing the alcohol rehabilitation needs of defendants.

CONCLUSION

The lower court's action in regard to the performance bond occurred after the court lost jurisdiction over the appellant's suspended sentence; therefore, its decision to forfeit appellant's performance bond was without authority. This matter is remanded to the lower court with instructions to return the appellant's performance bond and to release the appellant from the orders of the court related to the reimposition of the suspended sentence, in accordance with this decision.

IT IS SO ORDERED.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE UTE MOUNTAIN UTE INDIAN TRIBE

Chloann S. LANER,
Petitioner,

v.

No. 93-004-UMUCIO
(Filed Aug. 24, 1993)

Captain James PARISIEN,
BUREAU OF INDIAN AFFAIRS
DETENTION FACILITY,
Towaoc, Colorado
Respondent.

LUI-FRANK, Judge

JURISDICTIONAL ORDER OF DISMISSAL

This matter having come before the Southwest Intertribal Court of Appeals on **CHOLANN S. LANER's** petition for writ of habeas corpus, and the Court having determined that it is without jurisdictional authority based on Ute Mountain Ute constitutional or legislative authority, or resolution to review this matter, hereby dismisses the petition for writ of habeas corpus as unreviewable by this Court under Rule 3, SWITCA Rules of Appellate Procedure.

IT IS SO ORDERED.