Fort Mojave Indian Tribe, Plaintiff-Appellee,
vs.
Neil Jenkins, Defendant-Appellant.

SWITCA No. 96-001-A-FMTC
FMTC No. J-476-95.5; FMTC No. J-477-95.5;
FMTC No. J-484-95.5

SUMMARY

Appellant appealled his conviction as an adult of criminal charges on the grounds that improprieties were committed by the tribal court. The conviction is reversed and remanded for failure to comply with the Fort Mojave Indian Tribal Law and Order Code which requires that the appellant, a juvenile, be tried as a juvenile.

Appeal from the Tribal Court of the Fort Mojave Indian Reservation, Harrison Toclanny, Judge
Ms. Lena Jenkins, *pro se*, appearing on behalf of her son, Appellant Neil Jenkins
Alan Toledo, Tribal Prosecutor, appearing on behalf of Appellee, the Tribe

Appellate Panel: Rodgers, Flores and Lui-Frank

OPINION AND ORDER

INTRODUCTION

Appellant appeals his conviction on the following charges: obstruction of police; curfew violation; and possession and furnishing narcotics. Oral argument took place on June 2, 1996. In the petition for appeal appellant alleged as grounds for the appeal "irregularities or improprieties in the proceedings or by the tribal court, the jury, any witness, or any party substantially prejudicial to the rights of petitioner". (petition for appeal, page 1). After reviewing the entire record in the case below, pertinent law and after hearing the oral arguments of the parties, this Court concludes that the judgment of the tribal trial court should be reversed and remanded to the tribal court for further proceedings consistent with this opinion because appellant, a juvenile, was tried and convicted as an adult, contrary to the Fort Mojave Indian Tribe Law and Order Code.

The record in this case establishes that appellant was seventeen (17) years old when arraigned on violations of the juvenile code and the criminal law of the Tribe, and that these charges were docketed as juvenile court matters and retained these juvenile court docket numbers throughout this proceeding. (order accepting motion to appeal) While held by appellee pending arraignment he was placed in a juvenile facility. (See release order). As to the most serious charge, possession and furnishing of narcotics, appellant had an adult co-defendant. Without any reasons given in the court record, appellant was subjected to criminal trial before a jury and convicted. The sentence imposed by the tribal trial court included jail time and fines totaling three hundred (300) days in jail and eight hundred and fifty dollars ($850.00) in fines.

The Fort Mojave Indian Tribe Law and Order Code (hereafter referred to as "the code") defines a "child" as "a person under the age of eighteen (18) years who is a member of the Tribe".[1] *Code, Art. 4, §401(d).* For the purposes of Article IV, Children and Domestic Relations, "court" means the juvenile court. *Code, Art. 4, §401(b).* The juvenile court is a separate division of the tribal court with the following jurisdiction:

> Except as otherwise specifically provided by this Code, the Juvenile Court shall have exclusive original jurisdiction over dependent, neglected, or delinquent children or children accused of crime. *Code, Art. 4, §402, See also, Art. 4, §412.*

The juvenile court's jurisdiction differs dramatically from that of the general court in one crucial respect: it only exercises civil jurisdiction. *Code, Art. 4, §§420, 421.* A separate civil proceeding is set out to adjudicate juvenile matters, including those where a child is accused of conduct that, if committed by an adult, would constitute a crime. It is clear that a child cannot be convicted of a criminal offense in the juvenile court. *Code, Art. 4 §420.*

> An adjudication by the Juvenile Court shall not be deemed to be a conviction of a child for a criminal offense, nor shall a child be charged with or convicted of a crime in the Tribal Court, except if the Juvenile Court refuses to assume jurisdiction of the matter, which authority the Juvenile Court shall have. *Id.*

The consequences of violating tribal law for a child under the jurisdiction of the juvenile court are different from the consequences applicable to an adult's criminal violation in the general tribal court. If a child is found to be delinquent, the child, subject to the supervision of a counselor, can be committed to "a suitable school, institution, association or agency, public or private, authorized to care for children". *Code, Art. 4 §424.* A delinquent child can be sued for damages caused to any individual. *Code, Art. 4, §420.* Finally, driving privileges, if any, can be revoked. *Code, Art. 4 §429.*

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[1] There is no issue in this case concerning the appellant's tribal membership.

The code does allow the juvenile court to refuse to assume jurisdiction, thereby effectively creating a mechanism to try some juveniles as adults. *Code, Art. 4 §420.* Although not stated specifically in the code, where the circumstances at the time that a child committed a violation establish that it would not be in the best interests of the child or the community for the juvenile court to retain jurisdiction, the juvenile court can set out for the record in writing the facts which lead to this conclusion and decline to exercise its jurisdiction. Relevant factors could include, but not be limited to, the age and social maturity of the child, the nature of the violation allegedly committed by the child, the extent and nature of other instances when the child has violated the law, and the child's intellectual development and psychological maturity, the nature of past treatment efforts, if any, and the child's response to those efforts.

For guidance in applying of these factors, a judge can refer to *18 U.S.C.A. §5032* and cases applying that law. For example, in *United States v. Doe, 710 F.Supp. 958 (S.D.N.Y. 1989)* the court concluded that transfer of a juvenile for trial as an adult was not in the best interests of justice, even though the juvenile had sold cocaine near a school when he was almost eighteen. The facts which convinced the court to not try the defendant as an adult were: no prior record, a physician's testimony that the child lacked maturity and ability to accept responsibility, juvenile treatment programs were available and the prosecution had not established that the child would not benefit from them. Other cases that may be helpful are: *United States v. Gerald, 900 F.2d 189 (9th Cir. 1990) [AZ]; United States v. Dennison, 652 F.Supp. 211 (D.N.M. 1986); United States v. M.L., 811 F.Supp. 491 (C.D.CAL. 1992).* Where clear and convincing evidence on these issues establish that it is in the best interests of justice that the juvenile court not exercise jurisdiction, a prosecution could go forward under the general criminal law. This determination should be accomplished at a separate pre-trial hearing with notice to all parties.

In this case, however, there is no indication in the record that the juvenile court ever refused to assume jurisdiction of the case. Rather, given the treatment of appellant as a child in the arraignment, in the docketing of the case as a juvenile matter, in the housing of the child in a juvenile facility, there is every indication that the juvenile court did assume jurisdiction. In the total absence of any evidence that the juvenile court refused to assume jurisdiction, there is no lawful basis for the tribal trial court to have subjected appellant to a jury trial, the resulting criminal conviction, and sentencing. Therefore, this case must be reversed and remanded to the juvenile court.[2]

The tribal prosecutor's position in support of the procedure below was that the finances of the Tribe did not permit the hiring of youth counselors or the setting up of a separate court so as to give effect to Article 4 of the code. While this Court is very aware of the financial constraints on tribal governments, particularly on tribal courts, this cannot be a valid defense to failing to comply with the clear written law. The Court notes that nothing prevents any sitting judge from acting as a juvenile court judge under the Code. *Code, Art. 4 §403.* The code merely requires a different procedure and special treatment for court records. While hiring of a youth counselor would be of great assistance in carrying out article 4, there is nothing in the code which prevents either the tribal prosecutor or a tribal police officer from performing the duties of the youth counselor. In the section describing the duties of youth counselors, it explicitly states that "Youth Counselors shall have the same qualifications as members of the Tribal Police Department". *Code, Art. 4 §404.* It also gives a youth counselor the authority of a tribal police officer. *Id.* Similarly, the tribal prosecutor, could assist the tribal police in making sure that article 4 of the code is followed even if he did not assume the duties of youth counselor himself.

THEREFORE, IT IS THE ORDER OF THIS COURT THAT the order of the trial court should be and hereby is, REVERSED.

IT IS FURTHER ORDERED that this matter is remanded to the juvenile court for further proceedings consistent with this opinion.

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[2] The code appears to incorporate into the law of the Tribe the Constitution of the United States, and the individual rights that are part of that document. The lower court should note that since the juvenile court is a civil jurisdiction court, further juvenile court proceedings would not violate the constitutional principle of due process by subjecting appellant to double jeopardy. However, further criminal proceedings might be barred by this principle.

Fort Mojave Indian Tribe, Plaintiff-Appellee,
vs.
Adam Jenkins, Defendant-Appellant.

Switca No. 96-001-B-FMTC
FMTC No. Cr-95-571-5

SUMMARY

Appellant challenges his conviction for possession and furnishing narcotics because the use of confidential informants violated his rights and he was not able to cross-examine them; the trial court's failure to grant a continuance when appellant's counsel did not take part in jury selection; police failure to describe seized items in the search warrant; and, the jury verdict was contrary to the weight of the evidence. Overwhelming evidence independently corrobarated by police testimony supported the seizure of evidence, and hearsay testimony presented by police was harmless error. Failure of the trial court to grant a continuance when a party knows of the withdrawal by counsel for months and only obtains representation hours before trial is to begin is not an abuse of discretion. A conviction will stand if a rational trier of fact can find a defendant guilty beyond a reasonable doubt after viewing all evidence in a light most favorable to the prosecution and the evidence in this case supports the conviction..

Appeal from the Tribal Court of the Fort Mojave Indian Reservation, Harrison Toclanny, Judge
Ms. Lena Jenkins, *pro se*, appearing on behalf of her son, Appellant Adam Jenkins
Alan Toledo, Tribal Prosecutor, appearing on behalf of Appellee, the Tribe

Appellate Panel: Rodgers, Flores and Lui-Frank

OPINION AND ORDER

I. INTRODUCTION

Appellant appeals his conviction on the charge of possession and furnishing of narcotics. Oral argument took place on June 2, 1996. In the petition for appeal appellant alleged as grounds for the appeal "irregularities or improprieties in the proceedings or by the tribal court, the jury, any witness, or any party substantially prejudicial to the rights of petitioner". (petition for appeal, page 1). After reviewing the entire record in the case below, including transcripts of the trial, pertinent law and after hearing the oral arguments of the parties, this Court concludes that the judgment of the tribal trial court should be affirmed because, although errors were made in the course of the proceedings, these errors were harmless.

The record in this case establishes that appellant was arrested by tribal police officers after an investigation into allegations that he and his brother, a juvenile, were possessing and furnishing to others various narcotics in violation of tribal law, §354 of the Fort Mojave Law and Order Code. Appellant challenges his conviction on the following grounds:

1. the reliance of the police on confidential informants in the course of the investigation to establish probable cause for the issuance of a search warrant violated appellant's rights;

2. the refusal of the court to grant a continuance when counsel for appellant did not take part in jury selection violated appellant's rights;

3. the seizure of items by tribal police during execution of the search warrant violated appellant's rights because the items were not described in the search warrant;

4. the court's denial of appellant's objection to testimony by tribal police officers concerning confidential informants in the absence of any opportunity by appellant to cross-examine the confidential informants denied appellant's rights.

5. the verdict of the jury was contrary to the weight of the evidence.

II. BACKGROUND

The Fort Mojave Tribal Police Department received anonymous tips that appellant and his brother were in the business of selling narcotics in violation of tribal law, particularly marijuana and methamphetamine. The tribal police thereafter began an investigation using the services of confidential informants.[3] While under the observation of the tribal police, these confidential informants, with funds provided by the tribal police, entered appellant's residence and purchased drugs. It is not clear from the record that the police officers actually observed the purchases, however, the record discloses that the informants were subjected to a pat down search prior to entry. The informants were also subjected to a search upon leaving the residence, and in each case were then in

[3] Confidential informants were used rather than undercover police officers because the police force of the Fort Mojave Tribe is not large enough to have officers that would not be readily known by all residents of the reservation. (Transcript of Trial).

the possession of illegal drugs and less money than the informant had when he entered the residence.

Based upon these observations, the tribal police submitted an application for a search warrant for the appellant's residence and arrest warrants for appellant and his brother. The search warrant was issued by the tribal court after a finding of probable cause to believe that evidence of the crime of possessing and furnishing drugs could be obtained in a search of the residence. Arrest warrants were issued also. During the search, the tribal police seized the following objects in the bedrooms of Appellant and his brother:

a. baggie of marijuana on the nightstand shelf;
b. home-made bong on the lower shelf of the nightstand;
c. marijuana residue with seeds on t-shirt on top of nightstand;
d. scale with residue on top of glass pane on a stereo floor speaker;
e. blue baggie containing a powdery substance in a dresser drawer;
f. several baggies in the floor area of the bedroom;
g. two baggies of marijuana under the dresser;
h. a triple beam scale inside a bag in the bedroom closet;
i. a four gram rock of methamphetamine
j. two packages or bindles containing a combined total of 2.2 grams of methamphetamine.

Appellant was arrested and charged with possessing and furnishing narcotics.

Although the record below is not clear as to exactly who was representing the appellant at all times, what is clear is that at all crucial periods, he was represented by advocates permitted to represent individuals before the Fort Mojave Tribal Court. A criminal complaint was filed against defendant on May 31, 1995. Initially appellant was represented by tribal advocate Stephen Lopez. At arraignment appellant pled was not guilty. On June 8, 1995, Robert Church requested permission to enter his appearance for Appellant. On June 15, 1995, Mr. Lopez filed a motion to withdraw his appearance and the court granted permission for Mr. Church to represent appellant. Mr. Church filed a pre-trial motion to obtain discovery of all evidence the prosecution intended to use at trial against appellant in a timely manner and the trial court granted this motion, requiring production by June 23, 1995. Thereafter Mr. Church did not make any motion for the exclusion of any of the potential evidence made available to him. Originally jury selection for the case had been set for June 29, 1995, with the hearing set for June 30, 1995. The court continued the case. The record does reflect that Mr. Church withdrew from the case on July 18, 1995. Jury selection and trial was rescheduled for late October of 1995. Mr. Lopez entered his appearance for Appellant the day before trial. At no time between Mr. Church's withdrawal and the jury selection did appellant retain other counsel. After trial on the merits, the jury found that appellant was guilty as charged. The petition for leave to appeal was filed on appellant's behalf by Mr. Lopez, although he did not continue to represent appellant at the hearing on appeal.

III. THE VALIDITY OF THE SEARCH WARRANT, EXECUTION OF THE SEARCH WARRANT, AND USE OF CONFIDENTIAL INFORMANTS

Appellant challenges the use of confidential informants to establish probable cause for the issuance of the search warrant, and the resulting arrest. Appellant also challenged the validity of the execution of the search warrant because items were seized that did not fall within the description of the items sought through the use of the warrant.

While represented by counsel, appellants did not file any pre-trial motions to suppress the use of objects seized pursuant to the search warrant or the appellant's subsequent arrest. As a general rule, appellate courts do not review matters that were not first brought to the attention of the trial court. *Singleton v. Wolff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *Michael-Regan Co., Inc. v. Lindell*, 527 F32d 653 (9th Cir. 1975). The reason for this very sound practice is that appellate courts are not fact-finders and review only to determine if the judge made a mistake. If the issue wasn't presented, there is no judicial action to review. It is essential that the trial court determine any disputed issues of fact. The only exceptions to this rule are where a factual determination would act to deprive this Court of jurisdiction over a case or the parties to a case. Here, this appeal has no jurisdictional issue. Appellant challenges, as a matter of law, the use of confidential informants solely for the purpose of establishing probable cause for the issuance of a warrant.

The use of confidential informants to establish probable cause for issuance of a warrant is not, by itself, a violation of any right a person may have under the United States Constitution or other federal law against unreasonable search and seizure.[4] The Fourth

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[4] The Law and Order Code of the Fort Mojave Indian Reservation, Article III, Section 312 states:

Amendment to the United States Constitution requires only that:

1. warrants be issued by a neutral, detached magistrate;
2. that those seeking warrants demonstrate to magistrates probable cause to believe that the evidence sought will aid in a particular person's apprehension or conviction for a particular offense; and
3. and that the warrants particularly describe the things to be seized as well as the places to be searched.

Dalia v. United States, 441 U.S. 238, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979). The only issue in this case concerns the second requirement.[5] Since determination of probable cause is a judicial task requiring consideration of facts in the first instance, including the credibility of the officer making the sworn statements in support of the warrant, this Court must begin by presuming that the magistrate acted lawfully and that the warrant is valid. The only basis appellant raises for challenging the issuance of the search warrant is that it was based upon statements of confidential informants that they purchased various illegal substances from appellant.

There is no constitutional violation in the use of confidential informants to establish probable cause for the issuance of a warrant, even when the statements amount to hearsay as long as there is some independent corroboration or other indications of reliability. *United States v. Clark*, 31 F.3d 831, cert. denied ____ U.S. ____, 115 S.Ct. 920, 130 L.Ed.2d 800 (9th Cir. 1994). In this case, the facts that the confidential informants were first searched, then given funds to make a purchase, observed entering appellant's residence, and subsequently searched, can be independent corroboration to support the hearsay of the confidential informant that the illegal drugs were purchased from appellant.

The Court does consider it necessary, after reviewing the trial transcript to note that the trial court did allow the tribal police officer to present his informants' statements to the jury through the ruse of describing his investigation. Defense counsel did object to this as heresay, but the objection was overruled on the grounds that the police officer was merely describing the background investigation that led to the arrests.[6] Since, as the Court finds below, there was overwhelming evidence submitted for a reasonable jury to find defendants guilty without consideration of this evidence, this was harmless error. However, the Court cautions the trial court, the prosecutor, and tribal police officers against this use of this type of testimony in the future. Aside from any hearsay objections, a police officer's use of statements of confidential informants as evidence of a violation of the crime at trial violates a defendant's right of confrontation. *Cooper v. State of California*, 386 U.S. 300, 97 S.Ct.

> Insofar as they are not inconsistent within this Code or other Ordinances of the Tribal Council, (b)the lawful traditions or policies of the Tribe and the Courts of the Tribe, or (c) other governing or applicable law, the standards of (I) statutory interpretation, (ii) admissibility of evidence, and (iii) criminal judicial procedure, including determination of the elements of an offense, of the federal courts of the United States may be referred to by the Courts of the Tribe to aid in the interpretation and application of this Article III, and in the conduct of criminal procedures under this Code. Nothing contained in this section shall be deemed to deprive the Courts of the Tribe or the Tribal Council from establishing, by decision or enactment, such other or differing standards as they may deem appropriate, subject always to any limitations, restrictions or exceptions imposed by and under the authority of the Constitution or laws of the United States.

[5] Therefore, at a minimum, this Court can determine whether as a matter of law, use of a confidential informant would violate any limitation on governmental power found in the United States Constitution or other federal law. The Fourth Amendment to the United States Constitution establishes that no search or seizure warrant can be issued without probable cause. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Path or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). The Indian Civil Rights Act, 25 U.S.C. §1302 prohibits an Indian tribe, "in exercising the powers of self-government" from issuing "warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized".

[6] Defense counsel, inexplicably, did not object to this testimony on grounds of danger of unfair prejudice or confusion of the issues pursuant to Rule 403 of the Federal Rules of Evidence which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ***[.]

Here, where there was no direct testimony of any acquisition of illegal drugs from defendants, a detailed, heresay description of this portion of the underlying investigation for the offense of "possessing and furnishing" illegal drugs might mislead a jury.

1056, 18 L.Ed.2d. 62 (1967).[7] In future cases where the evidence supporting a conviction is less certain, this cavalier approach to informants' statements could easily result in reversal of a conviction.

IV. FAILURE TO GRANT A CONTINUANCE FOR APPELLANT TO BE REPRESENTED BY COUNSEL AT JURY SELECTION

Appellant also attacks his conviction alleging that he was denied assistance of counsel at the time of jury selection because the Court would not grant a continuance. The record below does not support appellant's contention. First, under the Indian Civil Rights Act, 25 U.S.C.A. §1301, *et seq.* the right to counsel is not absolute. The tribal court cannot deny a person assistance of counsel for his or her defense at his or her own expense. Absent such fundamental and plain error, a judge's refusal to grant a continuance will only require reversal of a conviction where it is an abuse of discretion. *United States v. Wynne*, 993 F.2d 760 (10th Cir. 1993).

It is undisputed in the record that defense counsel withdrew from representing these defendants on July 18, 1995, after a continuance had been granted. Jury selection and trial did not take place until October. That appellant did not obtain new counsel until several months later - literally hours before trial - is not the responsibility of the court. Several months passed in between Mr. Church's withdrawal from the case and Mr. Lopez's re-entry. Under appellant's argument, a defendant could forever be entitled to continuances just because he did not seek out a new attorney after a prior one withdrew. The failure of the court to grant a continuance under these circumstances does not constitute an abuse of discretion.

V. THE EVIDENCE PRESENTED TO THE COURT WAS SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION

An appellate court does not re-weigh the evidence presented to make a new determination as to the guilt or innocence of the appellant. First, there is a presumption that the conviction is valid which defendants must overcome. A conviction will stand if, after viewing the all evidence presented at trial, direct and circumstantial, in a light most favorable to the prosecution, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. *United States v. Robinson*, 978 F.2d 1554, cert. denied sub nom Jackson v. United States ____ U.S. ____, 113 S.Ct. 1855, 123 L.Ed.2d 478 (10th Cir. 1992).

The items seized upon execution of the search warrant on appellant's residence established that marijuana and other narcotics were in the possession of appellant, as well as items used for ingestion, such as a bong. Several items were seized that, based upon additional testimony given at trial, could be considered by the jury as items commonly associated with drug trafficking including various home-made pipes, small baggies in large numbers, and various scales. This evidence, alone, is sufficient for a rational juror to find appellant guilty. Furthermore, appellant did not present any evidence of any kind to cast doubt upon the validity of that presented by the prosecutor. Thus, in this particular case, it is very unlikely that any rational juror could have found appellant innocent.

THEREFORE, IT IS THE ORDER OF THIS COURT THAT the conviction of appellant should be and hereby is, AFFIRMED.

IT IS FURTHER ORDERED that the Clerk of the Court shall issue judgment consistent with this opinion.

In the Matter Of:

The K. Children, Matthew and Suann K., Appellants, vs. The Fort Mojave Indian Tribe, Appellee.

SWITCA No. 96-002-FMTC
FMTC No. J-509-95.8; FMTC No. J-572.95.9; FMTC No. J-433-94.10; FMTC No. J-443-94.12

SUMMARY

Appellants appealed this termination of parental rights case based on lack of jurisdiction over the parties, especially Mrs. K., a non-Indian; findings were not supported by substantial evidence; the validity of expert testimony; and, the lower court's order was insufficient to permit meaningful review. The order is vacated and the case is remanded for a statement of facts that support subject matter jurisdiction and personal jurisdiction over each party and for supplemental findings and conclusions

[7] The Sixth Amendment to the United States' Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to * * * be confronted with the witnesses against him * * * [.]" See also, 25 U.S.C.A. §1302(6). A defendant has the right to not only know the identity of the person making the statements, but to cross-examine them to challenge the truth of their statements.

of law to either support parental termination for a child or to support the determination that parental rights to a child should not be terminated. Appellants waived their right to object to the expert testimony because their attorney did not object to the expert testimony presented below, nor did appellants object to their attorney's failure to do so and they cannot then challenge it at appeal. While fundamental fairness requires a pragmatic examination of whether a waiver was knowingly given by a pro se party, the standard is much higher for a party represented by counsel.

Appeal from the Tribal Court of the Fort Mojave Indian Reservation, Jim D. James, Judge *pro tem*
Ms. SuAnn K., *pro se*, appearing on behalf of herself and her husband, Matthew K., Appellants Alan Toledo, Tribal Prosecutor, appearing on behalf of Appellee, the Tribe, with Marilyn J. Crelier, Guardian *ad litem* for the K. Children.

Appellate Panel: Rodgers, Flores and Lui-Frank

OPINION AND ORDER

INTRODUCTION

This case involves the termination of appellants' parental rights to four of their six children by the trial court's order entered on March 18, 1996. Foster care placement with the maternal grandmother and great-grandmother was continued for the fifth child. The youngest child remains with appellants. (court order of March 18, 1996). The trial court found that termination was appropriate under Section 436 of the Fort Mojave Indian Tribe Law and Order Code.

Appellants filed a timely notice of appeal. The Tribe moved to dismiss the appeal, and Mrs. K. responded at a hearing on the tribe's motion. Mrs. K. challenged the trial court's finding that it had jurisdiction over the parties, particularly Mrs. K. who is not a member of any Indian tribe. She also raised the argument that the trial court's findings were not supported by substantial evidence; she challenged the validity of expert testimony submitted to the trial court. Appellants also challenged the trial court's findings because the findings were not sufficiently adequate to understand the trial court's reasoning. While appellants acting *pro se* did not state that the trial court's order was so insufficient as to permit meaningful review, that was the appellate panel's interpretation of this last basis for appeal. This Court determined that it should accept jurisdiction of the appeal pursuant to Article IV, Section 408 and Article II, Section 211 of the Fort Mojave Indian Tribe Law and Order Code.

JURISDICTION OVER THE PARTIES AND SUBJECT MATTER JURISDICTION

The trial court found that it had jurisdiction over the parties and subject matter herein. A finding of subject matter jurisdiction, is, at best, an ultimate fact, and more properly considered a legal conclusion. *Gerritsen v. De La Madrid Hurtado*, 819 F.2d 1511, 1515 (9th Cir. 1987); *Atkinson v. United States*, 825 F.2d 202, 204 (9th Cir. 1987) *cert. denied*, 485 U.S. 987 (1988). As for personal jurisdiction, the determination that the basic facts establish the existence of jurisdiction over the parties is a legal conclusion. *Peterson v. Kennedy* 771 F.2d 1244 (9th Cir. 1985) *cert. denied*, 475 U.S. 1122 (1986).

The trial court's order does not set out the facts which led it to conclude that it had jurisdiction in this case or over the parties. A review of the entire case file suggests that Mrs. K. raised the question of the trial court's power to terminate her parental rights, those of a non-member, to several persons. In appellants' brief-in-chief, this was raised again, with appellants noting that Mrs. K. is "not a tribal member nor . . . [a] Native American". Furthermore, when the petition was filed and at the time of oral argument, appellants asserted they "do not live within tribal jurisdiction".

Without knowing what the trial court relied upon to make its determination of personal and subject matter jurisdiction, this Court cannot engage in any meaningful review of these issues. It is not appropriate for the appellate panel to speculate as to the basic facts which led the trial court to its conclusions on jurisdiction. *Hydrospace-Challenger, Inc. v. Tracor/Mas, Inc.*, 520 F.2d 1030 (5th Cir. 1975). It would violate the integrity of the fact-finding process in the trial court for this Court to pick through this voluminous record to determine for the first time facts supporting the trial court's jurisdiction. *Barber v. United States*, 711 F.2d 128 (9th Cir. 1983).

Therefore, as to this particular issue, we conclude that the absence of any statement of facts to support the finding that the Court had subject matter jurisdiction over the petition and jurisdiction over each of the parties, as well as the law applied to make that determination requires us to vacate the trial court's order and remand this case to the trial court for further findings of fact and conclusions of law on these issues.

TERMINATION OF PARENTAL RIGHTS

As noted above, appellants also attack both the sufficiency of the evidence, as well as the sufficiency of the trial court's findings and conclusions on this issue.

These issues are not the same and will be discussed separately.

The Right of Cross-Examination

The question of the sufficiency of the evidence, from appellants' brief-in-chief, appears to target the testimony of a psychologist and the tribal social worker. Appellants state that they were denied the right to cross-examine these witnesses, and if the witnesses had been cross-examined, their testimony would have lacked credibility. Appellants assert that the psychologist did not spend sufficient time with them to conduct a fair and impartial evaluation. The tribal social worker, they assert, has no credentials to be a social worker.

It is beyond question that fundamental fairness requires parties to a case be able to question the credibility of the evidence presented against them at trial. Fundamental fairness is the hallmark of due process, guaranteed to all persons in the Indian Civil Rights Act, *25 U.S.C.A. Section 1302*. However, a corollary to the existence of this individual right is that the right can be waived by the individual. Appellants were represented by law-trained counsel in the trial court. The trial court record explicitly shows that appellants' counsel stipulated to the submission of deposition testimony of these individuals and expert reports to shorten the length of the hearing. Appellants did not challenge their attorney at that time. Even if this were a criminal proceeding where the right of confrontation and cross-examination is much stronger, these facts would be sufficient to constitute waiver of that right. *Carr v. State*, 829 S.W.2d 101 (Mo.App. 1992). (Although record did not show that defendant specifically agreed when defense counsel stipulated to use of deposition testimony, thus waiving defendant's right to cross examination, where defendant voiced no objection to the waiver, there was a waiver of the right).

An additional ground exists for affirming the trial court on this issue. It is a basic premise that absent an objection below, the admission of evidence cannot be challenged on appeal. *Glenn v. Cessna Aircraft Co.*, 32 F.3d 1462 (10th Cir. 1994). This is particularly true where counsel for a party actually concurs in the admission of the evidence. *Robinson v. Maruffi*, 895 F.2d 649 (10th Cir. 1990) (Civil rights defendants could not complain on appeal that they were never allowed to cross-examine witness who was temporarily dismissed during her direct examination inasmuch as they made no objection to temporary excusal and later agreed to permanent excusal). This Court is mindful that when *pro se* parties are up against law-trained attorneys fundamental fairness requires a pragmatic examination of whether a waiver was knowingly and voluntarily given. The same cannot be said where the complaining party was represented by counsel, as were appellants in the trial court. Their counsel stipulated to admission of deposition testimony, expert reports and other documents. Appellants did not object then and cannot do so now.

Adequacy of Findings

The second challenge to the trial court's findings was made at oral argument. Mrs. K. stated that she could not determine the basis for the trial court's decision to terminate her parental rights. A review of the trial court's order, in light of Fort Mojave Law governing termination of parental rights, supports this challenge to the adequacy of trial court's order.

Under Fort Mojave law, parental rights can only be terminated for very specific statutory grounds. Grounds to support termination of parental rights are stated in Section 436 of the Fort Mojave Indian Tribe Law and Order Code:

> The rights of the parents may be terminated if the court finds:
> a. The parent or parents are unfit and incompetent by reason of conduct or condition seriously detrimental to the child; or
> b. That the parent or parents have abandoned the child[,] * * *; or
> c. That for a period of time, during which the child was kept in his own home under protective supervision, or during which the child was allowed to live in his own home, the parent or parents substantially and continuously refused or failed to give the child proper parental care and protection, or to exercise appropriate control of the child. *Fort Mojave Tribe Law and Order Code, Art. IV, Section 436.*

The trial court's findings and conclusions of law do not state which of these three grounds was the basis for its decision. At oral argument, counsel for the tribe took the position that the court's findings supported termination under any of the three grounds. The tribe's position is not supported by the trial court's findings or the record in this case.

The trial court found that:

- since 1988, when the first petitions were filed against appellants for neglect of their children, the Fort Mojave Tribal Social Services has been involved with the K. family;

- on several occasions appellants have been ordered by the court to participate in many different forms of counseling, including, but not limited to substance abuse counseling, anger management counseling, and parenting skills counseling.

- despite continued court intervention and orders requiring counseling, appellants failed to make any meaningful progress in their capability to properly care for and maintain their children's health and welfare and continue to abuse alcohol and engage in domestic violence.

- the Fort Mojave Tribal Social Services, despite extended contact with the natural parents, had also failed in its responsibility to the health, welfare and stability of the minor children by not developing any permanency plans for the care of maintenance of the older minor children who have been in temporary custodial placements for a very long time.

- despite repeated attempts at reuniting the minor children with their natural parents, it is in the best interests of the above-named minor children that they remain in foster-care placement, and that permanency plans be developed for the above-named minor children.

None of these findings suggest that these children were abandoned by their parents. Furthermore, we reviewed every single document in the record in this case, going back to 1988. These documents do not show abandonment by any stretch of the imagination which would support termination of parental rights. Rather, it appears that appellants have attempted to maintain contact with all of their children, even when it might not have been in the best interests of the children from the perspective of treating professionals, and even when the children were placed in treatment facilities several hundred miles away. Thus, abandonment cannot be the basis for termination.

As to the remaining grounds for termination, it is unclear to this panel, exactly which section was the basis for the trial court's conclusion that appellants' parental rights should be terminated. Under the first basis set out in the law, a court must find that the parents "are unfit and incompetent by reason of conduct or condition seriously detrimental to the child". There is no finding that the parents are unfit and incompetent. There is no finding that the parents' conduct is detrimental to each child for whom parental rights were terminated. In fact, there is no finding that termination of appellants' parental relationship with each child is in the best interests of the child. There is only the finding that foster care placement and permanency plans are in the best interests of the minor children. This could just as easily support a permanent guardianship for each child with no termination of appellants' parental relationship with their children. Based on this finding the court concluded as to one child that placement of the child with the maternal grandmother and great-grandmother, without termination of parental rights, was in the best interests of that child. Finally, as to the youngest child, no findings were made at all as to the ability of the parents to provide for and take care of the child. Absent some basis for distinguishing these children from all the others, we can see why appellants might not understand exactly why termination of parental rights was necessary for some, but not all of the children. The findings are equally unclear as to the remaining statutory basis for termination. Therefore, the findings do not support termination under the statutory grounds.

We conclude that, as with the jurisdictional issues, the trial court's order must be vacated and this case must be remanded to the trial court for supplemental findings and conclusions of law on the grounds for termination of parental rights as to each child, as well as findings supporting the determination that parental rights as to any child should not be terminated.

We are mindful of the need for resolution in the lives of these children. At oral argument the guardian *ad litem* for the children urged us not to ignore the children's need for permanency for the sake of the parents' rights. That position of course ignores the fact that parental rights is legal shorthand for the rights of the children and as well as that of the parents to some form of relationship. The rights at issue are of value to both the children and the parents. For the Tribe to permanently sever these rights, it is essential that the facts show severance to be in

accordance with the Tribe's law, no matter how strongly a case may tug at the heart. The trial court's order does not do that. Due to our extensive review of the record in this case, we note that there may be no need for the trial court to conduct any further hearings in this matter. There may well be facts in the voluminous record to support all aspects of its order. The need of any such supplemental hearing should be determined by the trial court in the first instance.

The Court Clerk is directed to enter an order in this case remanding this case to the trial court for further findings and conclusions of law on the issues of personal and subject matter jurisdiction over each person and termination of parental rights as to each child.

IT IS SO ORDERED.

In the Southwest Intertribal Court of Appeals for the Southern Ute Tribe

La Plata County Department of Social Services, Petitioner-Appellant v. Natalie Richards, Defendant-Appellee

No. 96-005 SUTC; 96-CV-120, 96-CV-03

SUMMARY

This appeal is dismissed for failure to comply with the statutorily-required deadline because meeting the required date for filing a notice of appeal is a jurisdictional prerequisite after which the appellate court is without jurisdiction to proceed.

Appeal from the Southern Ute Tribal Court, Elaine Newton, Judge.
Linda Boulder, Esq. For Petitioner-Appellant.
Natalie Richards, *pro se.*

Evelyn Juan, Chief Judge, Southwest Intertribal Court of Appeals

OPINION AND ORDER

This is an appeal from an order dismissing the case below because plaintiff-appellant La Plata County Department of Social Services (DSS), failed to appear at a scheduled hearing. The order to dismiss was signed and filed on October 3, 1996. On October 10, 1996, plaintiff filed a motion to set aside the dismissal which was denied on October 15, 1996. The appellant filed its notice of appeal on October 30, 1996 in the Southern Ute Tribal Court which was then sent to the Southwest Intertribal Court of Appeals pursuant to resolution 90-86 adopted by the Southern Ute Tribal Council.

The Southern Ute appellate code provides that an appeal is to be filed within fifteen days after the entry of a final judgment, section 3-1-104 (1). This Court has been faced with this issue before, *Gould v. Southern Ute Tribe*, 4 SWITCA REP. 4, (1993), *Baker v.Southern Ute Indian Tribe,* 5 SWITCA REP. 1, (1993) and determined that complying with a statutory date for filing a notice of appeal is a jurisdictional prerequisite. That is, if the tribal appellate code's mandated filing date is not met, the appeal fails for lack of jurisdiction.

If the appellant had not filed its motion to set aside the dismissal, without question the statutorily mandated filing time would not have been met by the October 30th filing date. Did the motion and order denying the motion to set aside the dismissal impact section 3-1-104 (1) in any way? The answer is no. The order denying the motion is not the equivalent of a final judgment so that the statutorily-required time limit is expanded. While the appellate code does not contain specific language regarding this issue, the Court will look to language in the code which can guide its decision. Section 3-1-104(2) of the Tribe's appellate code states that a motion for a new trial may also be a notice of appeal if it contains the proper language that would allow the motion to be

considered a notice of appeal and, thus, a separate notice is not required. While the motion referred to in this subsection is one for a new trial, it provides direction to this Court regarding the intent of the Tribe regarding its appellate procedure. Thus, the Tribe has made it clear that a notice of appeal must be filed notwithstanding the fact that a post-hearing or post-judgement motion is made, whether that notice is included in the motion or made separately and the language must be clear as to its intent. Further, there is no language in the appellate code allowing a post-hearing or post-judgment motion to enlarge the statutory time limit. This is within the province of the tribal council to remedy.

The appellant's notice of appeal was not filed within the time allowed by the Southern Ute Tribe's appellate code and this Court is without jurisdiction to proceed. This appeal is dismissed.

IT IS SO ORDERED.