Robert BOOZER, Appellant,
vs.
Darlene WILDER and Ian WILDER, Appellees,
AP06-002, 5 CTCR 1
**9 CCAR 1**

[Appellant represented by Peter Schweda, Spokane, WA.
Appellees represented by Wayne Svaren, Grand Coulee, WA.
Amicus filed by Jessica Lee-Domebo, Office of Reservation Attorney, Nespelem WA.
Trial Court Case Number CV-CD-2003-23220]

Before Chief Justice Anita Dupris, Justice Dennis L. Nelson and Justice Conrad Pascal.

Dupris, CJ

## SUMMARY

The Appellees, maternal grandparents of K.W.B.(Minor), a minor, filed a Guardianship Petition for Minor on June 4, 2003 upon the untimely death of Minor's mother, Mawe We-Ta-Lo Wilder-Boozer (Wilder-Boozer). At the time of her death, Wilder-Boozer and Appellant, Robert Boozer, (Appellant) had a pending dissolution proceeding before the Trial Court, including custody issues regarding Minor. Minor is, as was her mother, a member of the Colville Tribes. Appellant is a non-Indian resident of the State of Georgia.

Between June, 2003, when Appellees filed their Guardianship Petition, and March, 2006, when the Trial Court issued its final order, several hearings were held regarding the custody of Minor. Appellant, at one point, filed a Habeas Corpus proceeding in federal district court seeking the return of Minor. The Trial Court entered its final order March 31, 2006, which is the subject of this Appeal.

In its final Order the Trial Court found that Mr. Boozer, the father of Minor, was a fit parent and granted him custody, and dismissed the guardianship petition.[1] In the same order the Trial Judge entered orders, *inter alia*, restricting Appellant's ability to remove Minor from the Colville Reservation; granting grandparent visitation to Appellees; and directing Appellant to raise Minor as a Catholic. At the Initial Hearing, Appellant stipulated to all of the findings of fact. He appeals these last three (3) orders,

[1]. Appellees did not file an Appeal of the findings regarding Appellant's fitness as a parent and custody, nor the dismissal of their Guardianship Petition.

asserting the Trial Court lacked personal and subject matter jurisdiction to enter the orders, and violated Appellant's due process rights.[2]

The Colville Tribes, through its legal counsel, Office of Reservation Attorneys, moved to be allowed to file an amicus brief; the motion was granted. In its Brief of Amicus Curiae the Tribes takes the position that the Trial Judge applied the guardianship laws erroneously; the Tribes also takes the position the visitation orders regarding the grandparents/Appellees should be upheld. Appellant objects to those portions of the amicus brief addressing visitation rights of Appellees. Appellees assert, through analogy, that the intents and purposes of the Indian Child Welfare Act of 1978, 25 U.S.C. §§1901 *et seq*. (ICWA) apply to this case, and to prevent manifest injustice, the Trial Court orders challenged should stand.

We find the Trial Court, having proper personal jurisdiction over the parties, did exceed its subject matter jurisdiction. Based on the reasoning below we reverse those portions of the Trial Court's orders which exceed its jurisdiction, and remand for an order consistent with our rulings.

## FACTS

The relevant Findings of Fact[3] made by the Trial Court, of which none are disputed by the parties, are:

1. Appellant and Wilder-Boozer married in July, 1992 in Nespelem, Washington, on the Colville Reservation. (Findings of Fact #1)
2. Minor is the child of Appellant and Boozer-Wilder. (Findings of Fact #2)
3. Appellees are the maternal grandparents of Minor. (Findings of Fact

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[2]. In his Brief Appellant states he is "appealing most of the Findings of Fact and Provisions of the Order...." (Brief of Appellant at p2) His Notice of Appeal actually sets out an Appeal of most of the Conclusions of Law and provisions of the Order. His arguments support these arguments rather than an Appeal of the Findings of Fact, as he states in his brief.

[3]. The Trial Judge issued a thirty-five page "Order Dismissing Guardianship; Orders for Custody and Visitation and Affirming Colville Cultural Tradition" which includes 157 enumerated Findings of Fact. Number 157 is comprised of several paragraphs setting out summaries of testimonies of several health care professionals. The vast majority of Findings are not relevant to this Appeal and will not be set out in detail.

#3)

4. Appellant and Boozer-Wilder were going through dissolution proceedings starting in July, 2002, (Findings of Fact #4) when Boozer-Wilder passed away unexpectedly on June 3, 2003. (Finding of Fact #5)
5. There are no psychological or emotional problems that would preclude Appellant from being a parent. (Findings of Fact #24)
6. There are no direct findings of 'unfitness' as a father regarding Appellant. (Findings of Fact #39)
7. There is no reason why Minor could not live with her father. (Findings of Fact #41)
8. It is in Minor's best interests to have a positive relationship with Appellant. (Findings of Fact #80)
9. According to the Guardian-Ad-Litem Reinbold, there are no findings and no indication that Appellant would not be a fit parent. (Findings of Fact #87)

Because of the nature of some of the findings of the Trial Court, and the length, we would be remiss not to acknowledge them. The difficulty with the majority of the "Findings" of the Trial Court is their lack of relevancy to the legal conclusions. The Trial Judge set out all of the evidence received and reviewed in great detail, calling each one a "Finding of Fact." She did not assign what weight, if any, or the credibility thereof for the evidence set out in her findings.

It appears from the "Findings of Fact" that the Court took extensive testimony regarding the minor's role in a cultural setting, as well as Appellees' cultural roles as grandparents of the minor and Appellant's cultural role as the minor's father. None of these findings are contested by any of the parties.

There are extensive "Findings of Fact" regarding the behavior of both parties and their families between 2004 and 2006, none of which are contested by either party. Finally, there are extensive "Findings of Fact" setting out the opinions of several Guardians-Ad-Litem and health care professionals regarding the parties. None of these are contested by either party.

## ISSUE

Did the Trial Court, after finding Appellant a fit parent and dismissing the Guardianship Petition of Appellees, have jurisdiction under the Indian Child Welfare Act to enter the orders regarding grandparent visitation, placement and how the child should be reared?[4]

## STANDARD OF REVIEW

We review errors of law *de novo*. *Colville Confederated Tribes vs. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995); *Palmer v. Millard, et al,* 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024, (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998).

## DISCUSSION

The biggest problem underlying the Trial Court's actions in this case are caused by the Trial Judge not having an understanding of what type of proceeding was before her throughout the term of the case. It started out as a dissolution and custody between the parents. Personal and subject matter jurisdiction existed with the Trial Court for this action. Once the mother passed away, there was no legal basis for the dissolution and custody action.

At the mother's death, the maternal grandparents filed a Petition for Guardianship and sought a temporary order restricting the father from taking Minor into his custody. The temporary order was granted; it appears from the record that a hearing was never held on the underlying temporary orders.

Several hearings were held at the trial level. Sometimes the hearings looked like custody hearings; sometimes they looked like guardianship hearings; and sometimes they looked like dependency hearings. Testimony was taken on the fitness of the father; on the fitness of the maternal grandparents; on the conduct of family members from both families; and from experts on both the child's mental well-being and cultural factors of child-rearing. Throughout these

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[4]. Appellant raised another issue: "Did the Trial Court violate Appellant's "liberty" rights under the Tribes' Civil Rights statute, the Indian Civil Rights Act of 1968, and the 14th Amendment to the United States Constitution?" We find it unnecessary to answer this question because of our holding that the Trial Court exceeded its jurisdiction under the guardianship statute.

long, arduous proceedings the Trial Judge never articulated the legal standards she was applying regarding the placement of Minor in relation to either her father or her maternal grandparents.

Appellant asserts after the Trial Court found him to be a fit parent and dismissed the guardianship petition it lost jurisdiction over him. He is not a Colville member, and he resides off the Colville Reservation. (Brief of Appellant at p5). Appellees assert ICWA protects the best interests of the child, and, therefore, its standards should apply herein, including continuing jurisdiction to enter the orders appealed in this case. (Appellees' Response Brief at p4).

A review of the laws and facts support the Trial Court's finding of subject matter jurisdiction over the guardianship herein. *See* CTC §5-1-180(b). (Jurisdiction section)[5] The subject of the guardianship, Minor, is a member of the Tribes, and is a minor. The Guardianship Code is not clear regarding when one can seek a guardianship over a minor when there is a parent available. The Tribes maintains the Guardianship Code is "primarily designed to accommodate who have no parents available, either through unfitness, or other inability to care for the child, or through the death of the natural parents." (Amicus Brief at p4). The record shows the Trial Judge reviewed the evidence for fitness of the remaining parent, Appellant herein.

Guardianships are third-party actions affecting custody over a minor. The ICWA provides for exclusive jurisdiction to the Tribes in third-party custody actions over Indian children. As the federal court recognizes, our Courts have jurisdiction over this matter as long as there is a question of the "fitness" of Appellant as a parent, even when he is not a tribal member, nor a resident of the Reservation. *Boozer v. Wilder*, 381 F.3d 931, 937, ftnte 4 (2004). This is the extent to which the ICWA applies to this case.

The Tribes, in its Amicus Brief, reason the Guardianship Statute is not an appropriate when there is a fit parent. As a matter of law the Guardianship Statute does not preclude the Trial Court from considering a third-party petition for guardianship when there is a parent available, and basing its decision on whether the parent is "fit."[6] It was appropriate for the Trial Judge to

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[5]. "The Tribal Court shall have authority to appoint guardians when the person for whom the guardianship is sought is a member of the Colville Tribes or a child of a member of the Colville Tribes, whether or not he or she resides on the Reservation."

[6]. The Tribes, in its Amicus Brief, makes compelling arguments why the Guardianship Statute should not be used for custody actions when there is an available parent. However, our standard of review dictates not that we substitute our judgment for the Trial Court Judge, but whether we can find any reasonable support for her position. We have done so. If the statutes in this area need to be clarified, that is a job for the legislative branch.

do so in this case.

What was not appropriate for the Trial Court to do in this case was to treat it like a dependency, or an on-going custody case, once it made its decision on the fitness of Minor's only parent, Appellant herein. It went beyond the bounds of its authority when it did so.

It is important for the Trial Court to consider only those matters properly before it. In this case, the maternal grandparents stepped in after their daughter's death and sought guardianship of their granddaughter. The Guardianship Code directs the Trial Court to consider whether, in this case, Appellant was not a fit parent/guardian. It does not allow for grandparent visitation if the parent is found fit,[7] which Appellees could have filed a Petition for, but did not. It does not provide for a continuing jurisdiction over the way the fit parent raises his child, including what religious instruction must be given, or where the child can live.

We understand the cultural ramifications of our findings here. There is no question it can take Minor away from her Reservation and remaining Indian family. In our Courts we walk a fine line, however. It is not the role of the Judges or Justices to enter a judgment solely to protect a child's "Indianness." Minor has two parents, one Indian and one not. Nothing in our traditions and customs would support that one culture is better for a child than the other. She is a child of both. Nothing precludes Appellant from raising Minor to know of both her heritages. It is the role of a parent to make that decision, not the Court systems.[8] It appears from the record that the Trial Judge used "culture" as a super-factor in her analysis as the one factor that trumped a fit parent's right to child

The orders the Trial Judge made regarding imposing grandparent visitation without a Petition filed for it under the Code; restricting the fit parent from removing Minor from the Reservation area; and requiring Minor be raised in the Catholic faith show the Trial Court

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[7]. Any person may petition the Court for visitation rights of a minor, at any time, under CTC §5-1-113(a) ("A parent, grandparent, or any other person able to show the Court a traditional right or custom of child care, and not granted custody of the child may be granted reasonable visitation rights....."

[8]. The Trial Judge appeared to be quite conflicted on this issue. She added an unusual section to her opinion order entitled "On a Personal Note to the Parties." (Order Dismissing Guardianship; Orders for Custody and Visitation and Confirming Colville Culture and Traditions, March 31, 2006, at page 32) In this section she urges the parties to work together for the minor. It appears from this passage the Trial Judge became too involved in the personal issues of the case. Judges as a rule should not have "personal notes" in cases. It taints any appearance of objectivity. This section does not affect the ruling of the case, nor the appeal. We note for future reference for the Trial Bench to proceed cautiously with these types of notes in their written orders and opinions.

committed reversible error. For this reason the Trial Court's challenged orders should be reversed. We so hold.

It is ORDERED that the orders of the Trial Court imposing grandparent visitation, restricting Appellant from removing Minor from the Reservation area, and requiring Appellant to raise Minor in the Catholic faith are REVERSED, and this matter is REMANDED to the Trial Court for Orders consistent with this Opinion.

Tannis DOGSKIN, Appellant,
vs.
CHILDREN & FAMILY SERVICES, et al., Appellees,
AP07-001, 5 CTCR 02
**9 CCAR 7**

[Wayne Svaren, Spokesperson for Appellant;
Chad Marchand, Spokesperson for Appellee Children & Family Services;
Tom Wolfstone, Spokesperson for Appellee minor;
Tim Liesenfelder. Spokesperson for Appellee father; and
Mike Larsen, Spokesperson for Appellee father.
Trial Court Case Number MI-2006-26024]

Decided February 15, 2007.
Before Chief Justice Anita Dupris, Justice Dennis L. Nelson and Justice Theresa M. Pouley

Dupris, CJ

**SUMMARY**

This matter came before the Court of Appeals upon a Notice of Appeal filed by Tannis Dogskin on January 23, 2007. Prior to the Initial Hearing set for February 16, 2007, the Court of Appeals Panel met by telephone conference call to discuss the record in the Trial Court case and the Notice of Appeal. A review of the record and Notice of Appeal show us that the Order from which the appeal is taken is from a temporary custody hearing, which does not meet the criteria for a "final" order pursuant to Court Rule 5(b)[9]. Therefore, we find cause to dismiss the Notice of Appeal without further

[9] For purposes of filing an appeal with the COA, "final" orders and decisions set out in part (a) above are the written orders or decisions issued by the Trial or Administrative Court that dispose of the substantive issues and not the oral bench

hearing on the matter.

## RELEVANT FACTS

It appears a Petition for Minor-In-Need-of-Care (MINOC) was filed herein on July 16, 2006. On September 14, 2006 Colville Tribes' Children and Family Services (CFS) filed a Petition for Temporary Custody. The allegation in this Petition was verbatim with the Petition for MINOC filed in July.

On September 20, 2006, after a hearing on the temporary custody petition, the Court found it did not have subject matter jurisdiction because the children did not reside on the Reservation at the time the petition was filed. Appellant (mother) submitted a proposed order, which was signed by the judge. The proposed order stated the matter was dismissed with prejudice.

CFS objected to the dismissal with prejudice; after a hearing on the issue the judge amended the order to reflect a dismissal without prejudice finding there was no hearing on the merits yet. It is this Order from which the Appellant appeals.

## ISSUES

Appellant appeals the dismissal with prejudice because the petition was dismissed for lack of subject matter jurisdiction. Before we would address this issue, we must determine if the criteria for an appealable order is met. Our first question is: does an order which dismisses a temporary custody qualify as a "final" order for purposes of an appeal? We find it does not, based on the reasoning below.

## DISCUSSION

Court Rule 5(b) states that final orders for purposes of an appeal are the written orders or decisions issued by the Trial or Administrative Courts that "dispose of the substantive issues." A temporary order is not a "final" order for purposes of an appeal. *See Ortiz v. Pakootas*, 5 CCAR 50 (2001). The Order appealed herein is not from an adjudicatory hearing, which would be final for appeals purposes. CTC §5-2-202. *See, In Re Welfare of R./W./W.*, 1 CCAR 49 (1991).

The question of whether the Trial Court committed a procedural error by not

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orders entered in the matter to be appealed.

dismissing with prejudice when it lacked subject matter jurisdiction is anticipatory. There is nothing in the file to show that a new petition has been filed. We do not consider anticipatory appeals either. ***See*, *CCT v/ Rickard*, 6 CCAR 15 (2002).**

Based on the foregoing, we find this Appeal does not meet the requirement that the order being appealed is "final," and disposes of substantive issues. Therefore it does not raise an appealable issue. We so hold.

**ORDER**

Based on the foregoing we hereby DENY the Appeal and REMAND to the Trial Court for the appropriate actions.

The Initial Hearing for February 16, 2007 at 11:00 a.m. in Courthouse II, Agency Campus, Nespelem, Washington will be stricken from the docket.

COLVILLE TRIBAL CREDIT, Appellant,
vs.
Eldon WILSON, Appellee.
Case No. AP05-017, 5 CTCR 03
**9 CCAR 09**

[Dave Shaw for Appellant.
Eldon Wilson pro se.
Trial Court Case No. CV-CD-2003-23270]

Argued July 21, 2006. Decided April 2, 2007.
Before Justice Gary Bass, Presiding; Justice Dennis Nelson; and Justice Conrad Pascal

SUMMARY

Judgment was entered in favor of Appellant Colville Tribal Credit against Appellee Eldon Wilson on November 3, 2003 for an amount certain. The Trial Court issued an order on September 2, 2005, granting Appellee's post-judgment motion, ordering Appellant to reimburse certain per capita payments. The Trial Court did not establish the burden of proof on the motion, and did not place the burden of proof on Appellee as the moving party. Appellant timely appealed. The Appeals Court bifurcated the appeal, and one of the issues argued was whether the Trial Court had failed to establish

the burden of proof on Appellee's post-judgment motion, and had failed to place the burden of proof on Appellee. This opinion is based on that issue alone, and the other issues on appeal are not dealt with in this opinion.

ISSUE

Did the Trial Court err when it failed to establish a burden of proof and failed to place that burden on Appellee?

DISCUSSION

The Trial Court's order of September 2, 2005 is treated by this Court as a summary judgment motion, as that is what it most closely resembles. Therefore our standard of review is *de novo*, and we review the evidence and law as if we were the Trial Court making its own independent judgment. *Stone v. Colville Business Council*, AP98-009, 5 CCAR 16 (1999).

The burden of proof on a motion such as Appellee's is on the person making the motion, in this case the Appellee[10]. The burden of proof will be with the party asserting the truth of a proposition. "The general and elementary rule is that, as between two such parties, the burden of proof rests upon him who asserts the existence of facts, and not upon him who denies their existence. The former and not the latter, must finally satisfy the trier of truth of the facts asserted." *Fishel v. Motta,* 76 Conn. 197, 56 A. 558 (1903). The Trial Court did not establish a burden of proof which the Court must do. Appellee as the moving party had the burden of proof, and the Trial Court failed to place that burden on Appellee.

We REVERSE the Trial Court's order of September 2, 2005, and remand for a new hearing on the motion of Appellee to require Appellant to reimburse per capita payments. It is SO ORDERED.

Randy ZACHERLE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

[10] The moving party bears the burden of establishing sufficient grounds for disturbing the finality of the decree, and relief should be granted only in exceptional circumstances. *Follman v. Upper Valley Special Education Unit*, 200 ND 72, citing to *First National Bank of Crosby v. Bjorgen*, 389 N.W.2d 789, 794, 796 (N.D. 1986).

Case No. AP06-006, 5 CTCR 04

**9 CCAR 10**

[Steve Graham, Law Office of Steve Graham, for Appellant.
Jonnie Bray, Office of Prosecuting Attorney, for Appellee.
Trial Court Case No. CR-2006-29043]

Argued November 17, 2006. Decided April 11, 2007.
Before Chief Justice Anita Dupris, Justice David C. Bonga, and Justice Gary L. Bass, Presiding.

Dupris, CJ

SUMMARY

On February 23, 2006 Appellant was charged by an Amended Criminal Complaint for, *inter alia*, one count of Indecent Liberties, in violation of CCT §3-1-9.[11] The criminal actions alleged to have violated this statute occurred in July, 2004. On May 12, 2006 a jury found Appellant guilty of the charge of Indecent Liberties. It is this verdict which is the subject of this appeal.

Appellant makes two assignments of error: first, the trial judge erroneously overruled a ruling of a another judge, and thereby admitted evidence he should not have admitted. Second, the Tribes failed to prove an element of the offense, thereby mandating a dismissal of the charge. For reasons stated below we find neither ground for Appeal was supported by the law and evidence, and deny Appellant's request for a reversal.

FACTS

The jury found the Tribes proved Appellant committed the charge of Indecent Liberties beyond a reasonable doubt. The charging complaint stated that on July 24, 2004, on the Colville Reservation, Appellant did record images of a minor child, under the age of sixteen (16), while she slept, focusing on her groin area, and touching her in the vaginal area and buttocks. Further, he masturbated while touching the minor girl's groin area. The Court charged the jury with instructions regarding the elements of the offense of Indecent Liberties found in the statutes before they were amended in November, 2004. That is:

[11]. Appellant was also charged with Public Nuisance, in violation of CCT §3-1-194. This charge was subsequently dismissed before it went to Trial. It is not part of this Appeal.

3-1-9. **Indecent Liberties**

Any person who knowingly causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion, or when the other person is less than 16 years of age, or when the other person is mentally or physically incapable of consent, shall be guilty of Indecent Liberties. (*See* Jury Instruction 2).

In November, 2004, the statute was amended, making it a crime when, *inter alia*:

"(a) A person is guilty of Indecent Liberties when such person causes another person under the age of sixteen who is not his or her spouse to have sexual contact with him, her or another." (*Id*; emphasis added).

Part of the testimonial evidence came from Tammy Zacherle, who stated that in July, 2004 she was married to Appellant. There was no direct evidence the minor victim herein was not married to Appellant.

## ISSUES

1. Did the Trial Judge abuse his discretion by modifying the order of a prior judge without holding a hearing?
2. Is the verdict inconsistent with the evidence?[12]

## STANDARD OF REVIEW

We review findings of fact under the clearly erroneous standard, and errors of law *de novo*. *Colville Confederated Tribes vs. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995); *Palmer v. Millard, et al,* 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024, (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998). The issues raised herein are issues of law.

[12]. At the Initial Hearing Appellant also raised the issue "Did the Trial Judge abuse his discretion by alleged *ex parte* communication with the Spokesperson of one of the parties?" In his Opening Brief he waives this argument.

## DISCUSSION

**ISSUE 1: MODIFICATION OF COURT ORDER**

Appellant, in his brief states: "The record of the court hearings and the written orders reflects [*sic*] a broader intent to exclude evidence then [sic] Judge Aycock recognized." (Appellant's Opening Brief at p2). He cites some State cases to support his argument that Judge Aycock allowed evidence that was excluded under an order entered by Judge Johnston. We have a case on point for the proposition that one judge cannot interfere with an order of another judge. *See*, *Sonnenberg v. Fry*, 4 CCAR 3, 2 CTCR 36, 24 ILR 6172 (1997) . We do not need to consider the cited State cases.

From a review of the record it appears Judge Johnston's Order Regarding Suppression of Evidence, dated "Done in Court April 11, 2006 and signed this 11th day of May, 2006" [tab #6] is the order referred to by Appellant. There is no "Filed" stamp date on the order.[13] Judge Johnston states, in the relevant part: "The Court accepts the stipulation of the parties and suppresses still photos from the video and directs the Tribes to no longer attempt to obtain material from the video, no still photos from the video will be at trial in this matter."

It is not clear from the briefs or from the oral arguments of the parties what specific evidence should have been suppressed and was admitted. Appellant did not clarify this at the Oral Arguments, either. He did not indicate what evidence it was that should have been suppressed. He cited no legal authorities. Without sufficient argument on this issue it is denied.

**ISSUE 2: FAILURE TO PROVE AN ELEMENT OF THE OFFENSE**

This issue raises a preliminary issue: was Appellant charged with the correct statute? If he should have been charged with the amended statute, then we must address whether failure to specifically include the element that the minor victim was not his spouse defeats the conviction.

**A. The Amended Statute of November, 2004 Applies**

It is clear from the charging complaint and evidence that the acts constituting the crimes charged occurred July, 2004, four (4) months before the Indecent Liberties statute was amended in November, 2004. Neither party provided us with any arguments or authorities on this issue. It appears from the record Appellant did not object to the jury instruction which used the pre-

[13]. At Oral Arguments neither party seemed to be aware there was a written order; this may explain why there was no "Filed" stamp on it. It was found in the Trial Court's official file, but may have been filed without being processed.

November, 2004 statute. We have no cases on point regarding this issue. Our research finds no case on point in the federal cases, either. It is not an *ex post facto* issue because the law passed after the commission of the crime herein, *i.e.* "Indecent Liberties," was more specific than the one under which Appellant was charged.[14]

The purpose of a statute is to provide a defendant with " adequate notice of prohibited conduct under Tribal law." *Wiley et al. v. CCT*, 2 CCAR 60, 72, 2 CTCR 9, 22 ILR 6059 (1995). Jurisdiction attaches at the time the complaint is filed. *Simmons v. CCT*, 6 CCAR 30, 36, 3 CTCR 45, 29 ILR 6065 (2002). A complaint has to give sufficient notice of the specific acts that formed the basis of the crime charged. *Louie v. CCT,* 2 CCAR 47, 48, 2 CTCR 5, 21 ILR 6136 (1994). It is a natural progression, based on these tenets of law, that Appellant should have been tried under the more specific, later statute for "Indecent Liberties." It was the law in existence at the time the complaint was filed and the one which would have given Appellant constructive notice that his actions were a violation of tribal law. We so hold.

**B. Failure to Use the Language of the Amended Statute Does Not Defeat the Conviction**

Elements of an offense are those facts offered to prove a defendant committed specific acts at a specific place, time and date which constitute criminal behavior. *Seymour v. CCT*, 6 CCAR 5, at 8-9, 3 CTCR 40, 29 ILR 6009 (2001) , *See*, generally, *Pakootas v. CCT*, 1 CCAR 65, 1 CTCR 67 (1993); *Condon v. CCT*, 3 CCAR 48, 2 CTCR 20, 23 ILR 6327 (1994); *CCT v. Clark*, 4 CCAR 53, 2 CTCR 45, 25 ILR 6066 (1998); and *Amundson v. CCT*, 4 CCAR 62, 2 CTCR 68, 25 ILR 6178 (1998). Further, a defendant is denied due process when he is found guilty of all charges upon insufficient evidence that all elements of all the offenses had been proved beyond a reasonable doubt. *Thomas v. CCT*, 1 CCAR 35, 37, 1 CTCR 48, 18 ILR 1626 (1990) However, neither of these rules of law preclude us from upholding the jury's finding of guilt in this matter, even when the jury instruction did not include the language that the victim

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[14]. The *ex post facto* doctrine has its roots in English common law. It's widely accepted Anglo-court rules dictate four areas where a law has *ex post facto* applicability: "[1] Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. [2] Every law that aggravates a crime, or makes it greater than it was, when committed. [3]. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. [4] Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Calder v. Bull*, 3 Dall. 386, 390 (1798) (Chase, J.). The Tribes recognizes this anglo-based law in its Civil Rights Act. *See* §1-5-2(ii).

was not Appellant's spouse.

We are asked to overturn a jury verdict. As we stated in *Tonasket v. CCT*, 7 CCAR 40, 4 CTCR 13 (2004), "[j]ury trials are not tribally culturally-based; we have adopted them from the non-Indian judicial systems. As such we need to look to their origins in the non-Indian culture for guidance." Impeaching jury verdicts is frowned upon as a matter of public policy. In other criminal matters we are instructed to look to the federal system for guidance, in the absence of tribal law. For these reasons we will look to the federal law for guidance on this issue, which is one of first impression for this Court.

The U.S. Supreme Court acknowledges a distinction between trial errors that are of constitutional magnitude that render a trial fundamentally unfair and those errors that are harmless. *See, Neder v. U.S.*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).[15] The *Neder* Court found "[a]n instruction that omits an element of the offense differs markedly from the constitutional violations this Court has found to defy harmless-error review, for it does not necessarily render a trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Omitting an element can easily be analogized to improperly instructing the jury on the element, an error that is subject to harmless-error analysis...." (cite omitted).

We hereby adopt the *Neder* standard of harmless-error when reviewing cases in which an element of an offense is omitted as in this case. In doing so, we note the record supports evidence was given to the jury showing Appellant was married to Tammy Zacherle at the time of the crime. This was not disputed by Appellant at the trial. The jury had sufficient evidence before it to infer Appellant was not married to the minor victim at the time of the crime. His trial was not fundamentally unfair nor unreliable. The error was harmless. We so hold.

Based on the foregoing we AFFIRM the jury verdict of guilty, and REMAND this matter to the Trial Court for disposition consistent with this Order.

It is SO ORDERED.

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[15]. "A limited class of fundamental constitutional errors is so intrinsically harmful as to require automatic reversal without regard to their effect on a trial's outcome. Such errors infect the entire trial process and necessarily render a trial fundamentally unfair. For all other constitutional errors, reviewing courts must apply harmless-error analysis...." (cite omitted)

Shawn L. DESAUTEL, Appellant,

vs.

COLVILLE BUSINESS COUNCIL, Appellee.

Case No. AP06-009, 5 CTCR 5, 34 ILR 6057

**9 CCAR 15**

[No hearing. On filings only.
Trial Court Case No. CV-OC-2005-25353]

Decided May 15, 2007.
Before Chief Justice Anita Dupris, Justice David C. Bonga and Justice Dennis L. Nelson

PROCEDURAL HISTORY

On December 13, 2006 this Court of Appeals affirmed the Trial Court's decision to dismiss the underlying action herein found in Tribal Court Case Number CV-OC-2005-25353. Appellant requested the Trial Court to retroactively reopen and recognize his 1965 application for enrollment filed by his parents with the Colville Tribal Enrollment Department. Although Appellant debated at both the Trial Court and Court of Appeals levels whether this action was characterized as an "enrollment" action, it is plain the action began under the Colville Tribes' (Tribes) Enrollment Code, Title 8, Chapter 8-1. Subsequently, The Court of Appeals entered a Memorandum Opinion Affirming the Trial Court. Appellant then filed a Motion to Reconsider.

On February 27, 2007 we denied Appellant's Motion to Reconsider. On March 27, 2007 Appellee filed a Motion for Court Costs; Attorney Fees; and Judgment. Appellee asks for $13,480.83 in costs and fees to be assessed against Appellant based on CTC §8-1-207. Both parties have filed memos of authority on the issue. After a review of the applicable law, the arguments of both parties, and for reasons stated below, we deny this request.

DISCUSSION

CTC, Title 8, Chapter 8-1 sets out specific procedures and guidelines for processing enrollment appeals. An appellant who disagrees with the decision of the

Tribes' Enrollment Committee[16] makes an appeal to the Trial Court. The appeal is limited to persons to whom one of the following three (3) situations apply: (1) when a person has applied for and been denied enrollment by the Enrollment Committee; (2) when a person has been disenrolled by the Enrollment Committee; and (3) when there is a "finding of no substantial new evidence to open an enrollment has been made." No appeals are allowed for decisions regarding adoptions. CTC §8-1-200. There is a one (1) year statute of limitations on the filing of an appeal under this Chapter. CTC §8-1-202.

Unless otherwise specified in Chapter 8-1, the general rules for civil actions apply to appeals under this chapter. *Id*.. The Trial Court is to "strictly construe" the provisions of Chapter 8-1. CTC §8-1-206. When a party prevails at the Trial Court level, attorneys fees and court costs are allowed in certain circumstances.[17] CTC §8-1-207.

CTC Chapter 8-1 refers to appeals filed in the "Tribal Court" from decisions made by the Enrollment Committee. By giving strict construction to the statute, we find that the section mandating the award of attorney's fees and court costs does not apply to this Court, the Court of Appeals. CTC §8-1-207 refers to the "Court." "Court" is defined to mean the "Tribal Court." CTC §8-1-30(h). The Constitution of the Colville Tribes, Article VIII, establishes a separate judicial branch of the government. It refers to the "Tribal Court" and the "Court of Appeals" as separate courts.[18]

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[16]. The Enrollment Committee is comprised of members of the Colville Business Council (CBC), and is a standing committee of the CBC.

[17]. "Court Costs, Attorney Fees. If the Court rules against an appellant in any appeal under this Chapter, the appellant shall pay all court costs and the reasonable attorneys fees of the Tribes expended in defending against the appeal. If the Court rules for an appellee [*sic*] in any appeal under this section, each party shall bear his or her own expenses - unless there is a finding that the Tribes acted in bad faith in disenrolling or refusing to enroll."

It appears the word "appellee" above was a scrivener's error, and should say "appellant." Otherwise, it contradicts the first sentence which says the appellant is liable if he loses. To read it as stated, the second sentence then says the parties bear their own expenses if the appellee wins, which would be the case if the appellant lost.

[18]. "Article VIII — Judiciary Section — Separate Branch of the Government: There shall be established by the Business Council of the Confederated Tribes of the Colville Reservation a separate branch of government consisting of the Colville Tribal Court of Appeals , the Colville Tribal Court, and such additional Courts as the Business Council may determine appropriate... ."

Sections 2 and 3 set out the specific make-up of each the Court of Appeals and Tribal Court,

Appeals from the Trial Court (referred to as "Tribal Court") are made to the Court of Appeals under the general appeals sections of the statutes. *See* CTC §§ 1-1-180 to 1-1-290. There are no provisions within these sections that provide for mandatory awards of attorney's fees nor court costs. The Court of Appeals Court Rules do provide for awarding court costs, but such awards are not mandatory. *See* COACR 20.[19] Any decisions we make for an award of fees and costs are discretionary.

We have awarded attorney's fees twice in two separate enrollment cases[20] dealing with blood corrections under CTC § 8-1-249, which specifically provides for an award of attorney's fees and court costs.[21] This case is not an action brought under the "blood correction" portions of the statute. It was brought under the allegations in the Petition that "substantial new evidence" existed to open the enrollment application Appellant's parents filed in 1965.

For these reasons we assess whether the interests of justice support an award of fees and costs for the reasons stated for requesting fees and costs by Appellee. There is no question this case has been trying on both parties. It is hard to defend an appeal filed by a *pro se* appellant and it is hard for the *pro se* appellant to decipher all the various laws and rules used by the judicial system.

We look at the overall effect of assessing fees and costs in cases such as these: Appellee, the Tribes, is represented by an attorney at all times. Appellants are not always represented by a legally trained spokesperson. Membership issues and rights are fundamental to each tribal member. To award fees and costs against every

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respectively.

[19]. COSTS. COURT COSTS OF APPEAL: The Court of Appeals may impose such costs as the interests of justice dictate, which may include, but are not limited to, the actual costs of convening the Court of Appeals, mileage and similar costs. When considering the imposition of costs, the Court of Appeals shall consider the nature of the claim, the finances of the parties, and any other potential hardship such costs may impose on the litigants.

[20]. *Desautel, Descendants of...*, 4 CCAR 67, 3 CTCR 17, 26 ILR 6039 (10/26/1998); *Hoffman v. CCT*, 4 CCAR 4, 2 CTCR 37, 24 ILR 6163 (05-05-1997).

[21]. Appeals: Any party to an action to change a blood degree may appeal the judgement of the trial court pursuant to the Colville Tribal Code rules for civil appeals.... The prevailing party in an appeal of a judgment in a change of blood degree action shall be awarded costs of appeal and reasonable fees for representation.

appellant who makes it difficult to process a case just because the appellant is *pro se* could have a chilling effect on future actions. In this case, balancing the reasons Appellee has stated it wants to be awarded fees[22] and costs against the right of the *pro se* Appellant to seek review of the Trial Court's dismissal of his claim, the interests of justice dictate we should not award fees and costs herein. We so hold.

Based on the foregoing

It is ORDERED that Appellee's Motion for Attorney's fees and costs is hereby DENIED.

Landon RODRIGUEZ, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP06-010, 5 CTCR 06, 34 ILR 6123

**9 CCAR 19**

[Mike Larsen, Office of Public Defender, for Appellant;
Joe Caldwell and Joni Bray, Office of Prosecuting Attorney, for Appellee.
Trial Court Case Number CR-2005-28175]

Decided August 28, 2007.

Before Chief Justice Anita Dupris, Associate Justice Edythe Chenois and Associate Justice Theresa M. Pouley

DUPRIS, CJ

[22]. Appellee seeks a judgment for fees and costs in the amount of $13,480.83 (for which it has not submitted invoices to support the amount to date), stating it asks for fees and costs based, at least in part it appears, on Appellant's "vexatious and harassing behavior." (Appellee's Response to Appellant's Motion to Deny Appellee's Motion for Court Costs; Attorney Fees; and Judgment, April 11, 2007). Appellee goes on to describe instances in which it had to respond to the several, sometimes inconsistent trial strategies and arguments made by Appellant throughout the term of the case. Appellee's frustrations with the case are quite evident from its pleadings.

**Procedural History**

On July 5, 2005 the Tribes filed a criminal complaint against Appellant charging him with "Domestic Violence Battery" in violation of CTC §§ 3-1-4 (Battery) and 5-5-54 (b)(3) (Domestic Violence (DV) enhancement).

On February 9, 2006 Appellant was found guilty by jury trial of the charge of Battery with a Domestic Violence enhancement. The Trial Court did not allow Appellant to assert self-defense as a defense to the charge. It is from this ruling he appeals. For reasons stated below we reverse.

## ISSUE

Did the Trial Court err in denying Appellant the right to assert self-defense?

## STANDARD OF REVIEW:

The trial judge ruled that, as a matter of law, self-defense did not apply to this case. It is a question of law for which the standard of review is *de novo. See Colville Confederated Tribes vs. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995); *Palmer v. Millard, et al,* 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024, (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998). It is noted that the judge denied the defense based on her interpretation of the facts. This does not make the question a mixed fact and law question, however. We examine all the facts she had before her *de novo*, too.

## DISCUSSION

The non-deferential *de novo* review allows the Court of Appeals to examine the whole trial court record anew to determine if the record supports the trial judge's conclusions of law. In this case the trial judge found, as a matter of law, that Appellant could not plead self-defense. We disagree.

The evidence in the record is minimal, and consists only of: testimony of an officer who conducted an interview with the victim, S. Seymour (Seymour); Seymour's written statement; and the testimony of Appellant. The officer testified Seymour was distraught, and gave him a written statement. He stated he attempted twice to contact Appellant after he received a statement from Seymour. The rest of his testimony is not relevant to the issues herein.

Seymour did not testify. Her statement was admitted into evidence without objection from Appellant.[23] The record does not indicate if, in her analysis of the facts, the trial judge accepted Seymour's statements as truth of the matter asserted, *i.e*. that " [Appellant] pushed me down.... said he was going to beat my ass." The rest of the information on Seymour's written statement is not relevant to the charge against Appellant.

Appellant testified at length. He stated he borrowed Seymour's car keys and took his mother to breakfast. He was at his mother's apartment (Apartment D), two apartments from Seymour's apartment (Apartment B). Seymour went to Apartment D to get the car keys back from Appellant. According to Appellant's testimony, Seymour was the aggressor, yelling and trying to get into the apartment. He states he closed the door on her. Appellant testified further that he did not push Seymour down, nor threaten her. He states Seymour came back later, apologized, and asked him to go to the pow wow with her. This was the sum total of the relevant evidence on record.[24] The

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[23]. The Code allows the admittance of a victim's statement as an exception to the hearsay rule. *See* CTC §5-5-80 ("Victim's statements shall be admissible as probative evidence. The trier of fact may assign whatever weight to the statement it deems appropriate."). *See, also*, "Legislative History," March 2005 version of Chapter 5-5. The Code specifically allows the victim the right to refuse to testify. CTC §5-5-40(b)(2). The unasked question in this case is how to weigh this right of the victim against the defendant's right to confront his accuser as found in the Tribal Civil Rights Act, CTC §1-5-2(f) ([The Confederated Tribes of the Colville Reservation in exercising powers of self-government shall not:] ... Deny to any person in a criminal proceeding the right... to be confronted with the witnesses against him...)." Although such a question raises potential due process issues, because of our finding that Appellant has the right to raise self-defense mandates a reversal, we need not address the due process question *sua sponte*.

[24]. On cross-examination Appellant testified he had children in common with Seymour; he didn't stay at Seymour's apartment because he wanted to get some rest; and that their children were not in Seymour's apartment while the incidents leading to the criminal charges against him were occurring.

implication is that Appellant committed the battery when he closed the door on Seymour.[25]

The Law

Self-defense is an allowable defense to battery with a domestic violence enhancement. *See*, CTC §5-5-73.[26] When there is a doubt on whether to allow the defense, the Court should err on the side of the defendant because of the extraordinary impact of a conviction with a domestic violence (DV) enhancement. For example, if a defendant is convicted of an offense with a DV enhancement, his jail and fine are increased substantially.[27]

Another extraordinary impact of such a conviction is that it affects a defendant's right to his or her children. For example, it creates a rebuttable presumption that it is not in the best interests of a child to be placed in the sole or joint custody with a perpetrator of domestic violence. CTC §5-5-76. It creates a preference for the victim-parent's wishes over the convicted perpetrator of a DV crime on the issue of visitation with the child. CTC §5-5-77. A person convicted of a DV crime may not be allowed overnight visitation with his or her child. CTC §5-5-78. These consequences go beyond a normal sentence for a Class A offense such as "Battery."
CTC §3-1-4. Appellant and Seymour do have children in common, so these laws could affect his rights to his children.

In *Louie v. CCT*, 2 CCAR 47 (1994), we held that once the defendant introduced

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Such testimony is relevant to his custodial rights or visitation rights, as discussed in the main portion of this opinion, but are not relevant to the charge of battery with a domestic violence enhancement.

[25]. We had an initial concern regarding the sufficiency of the evidence on record to support, beyond a reasonable doubt, the charge against him, but since Appellant did not raise it as an issue, we do not address it at this time. The facts in the record are reviewed here only for the standard of review question.

[26]. "SPECIAL RULES OF COURT AND LAW APPLICABLE IN DOMESTIC VIOLENCE CASES, Self-Defense: Under this Chapter a defendant has the burden to prove self-defense by a preponderance of the evidence."

[27]. For all Class C offenses with a DV enhancement the maximum is that of a Class B offense, *i.e.* 180 days and/or $2,500 fine, with a mandatory minimum of 45 days in jail; for all Class B offenses with a DV enhancement, the maximum is that of a Class A offense, *i.e.* 360 days in jail and/or a $5,000 fine, with a mandatory minimum jail term of not less than 90 days; and for all Class A offenses with a DV enhancement, there is a mandatory minimum of six months in jail. CTC §5-5-54.

evidence of self-defense, it was the prosecutor's burden to show the absence of self-defense beyond a reasonable doubt. *Id* at 49. It is the law that self-defense "justifies an act done in reasonable belief of immediate danger, and if an injury was done by defendant in justifiable self-defense, he can never be punished criminally...." *Id*. The Colville Business Council (CBC) recognized these rules of law and specifically chose to change only the rule regarding burdens of proof.[28] It is now the rule of law that a defendant in a domestic violence charge must prove self-defense by a preponderance of the evidence; the burden never shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. CTC §5-5-73.

It was Appellant's burden to show he was justified in closing the door on Seymour based on a reasonable belief of immediate danger. He made a *prima facie* showing of this justification, and it should have been the jury's duty to weigh the facts in evidence and find whether Appellant proved this justification by a preponderance of the evidence.

In this case, Appellant testified he shut the door to avoid an escalation of the argument, and was attempting not to get into a fight with Seymour. The Tribes did not present evidence to dispute these allegations. The Trial Judge found that Appellant could not assert self-defense if it is his position he never committed an outward physical act against Seymour in the first place.[29] This is a self-defeating, circular

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[28]. "Consistent with its decision to favor prosecution, when considering claims of self-defense, the CBC carefully examined existing Colville Tribal case law and decided that a departure from prior precedent was warranted in cases involving domestic violence.... Under this chapter, the burden never shifts from defendant to prosecutor. In cases where the defendant is accused of a crime involving domestic violence and self-defense is claimed, the defendant has the burden of proving by a preponderance of the evidence that he or she was acting in self-defense. To protect against unjust results, the evidentiary threshold was lowered from beyond a reasonable doubt to a preponderance of the evidence. It should be noted that the underlying principle remains the same as always: 'The law of self-defense justifies an act done in the reasonable belief of immediate danger....' As in all cases, there are valid concerns that a defendant may be wrongly accused. However, the rule of evidence in Tribal Court should allow all defendants to present all relevant evidence available in support of self-defense...." "Legislative History," March 2005 version of Chapter 5-5.

[29]. The Trial Judge weighted the credibility of the evidence before the jury was allowed to do so. This could raise an issue of whether the judge overstepped her role in a jury trial. It is a jury's province to find the facts, not the judge's. We do not need explore this issue further because of our ruling based on

approach to the issue by the Trial Judge. If taken to its limits, a defendant who denies a charge cannot also, as an alternative, offer a defense to the charge. It is an all or nothing approach. This is not the law.[30] The evidence supports a theory of self-defense in this case and a self-defense instruction should have been offered to the jury, the finders of fact in a jury trial.

We find, as a matter of law, the judge should have allowed Appellant to assert self-defense. We REVERSE the guilty finding and REMAND for a new trial consistent with our ruling.

Julie R. SWAN, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP06-011, 5 CTCR 07

**9 CCAR 24**

[Steven Graham for Appellant.
Joni Bray for Appellee.
Trial Court Case Number CR-MD-2006-29075]

Decided October 5, 2007.
Before Justice Earl L. McGeoghegan, Justice Gary Bass, and Justice Howard E. Stewart.

Julie R. Swan appeals her criminal conviction because a search warrant was issued on insufficient information and that the evidence obtained by law enforcement using the warrant are "fruit of the forbidden tree", was stale, and should have been excluded from her Jury Trial. We agree that the search warrant should not have been issued. Her conviction is VACATED.

McGeoghegan, J.

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the issue raised by Appellant, however.

[30]. The Trial Judge did not make findings of fact and conclusions of law from which we can better understand her reasoning. We base our findings on the oral record of the Judge denying the jury instruction for self-defense.

## SUMMARY

A tribal police officer was approached by a private citizen and was informed that he had driven her sister to Julie Swan's residence, Swan's sister went in to Swan's residence and came back with cocaine. He then drove Swan's sister to his residence where she proceeded to "cook" the cocaine and then smoke it. The tribal officer drafted an Affidavit and approached a tribal court judge with his information and requested a search warrant. The judge reviewed the affidavit and approved the issuance of a search warrant. The warrant was executed on Julie Swan's residence where drugs were found and she was arrested. Before trial, she filed a Motion to Suppress the evidence seized as a result of the search warrant, alleging staleness and other grounds. The trial court denied the motion. A jury trial was held and Appellant was found guilty of possession of drugs.

## STANDARD OF REVIEW

The case before us involves a magistrate interpreting the law. The standard of review in a case concerning only questions of law is *e novo. In Re R.S.P.V.*, 4 CCAR 68, 3 CTCR 7, 26 ILR 6039 (11-05-1998). Although the Court of Appeals will defer to the Trial Court's findings of fact, we engage in *de novo* review of when the assignments of error involve issues of law. *Wiley, et al. v. CCT*, 2 CCAR 60, 2 CTCR 9, 22 ILR 6059 (03-27-1995). The issue before the Court is a question of law. There are no disputed material facts involved at this stage of the case. For those reasons our review is *de novo*. *Simmons v. CCT*, 6 CCAR 30, 3 CTCR 45, 29 ILR 6065 (04-15-2002).

## DISCUSSION

Swan's argument revolves around unreliable heresay and stale information. The informed citizen that approached the tribal police officer voluntarily described the details of an alleged drug buy by Appellant's sister. Appellant argues that the officer relied on information that was stale, and that there was no independent verification that either the informant was reliable or that potential drug activity was being conducted at Appellant's residence. Neighbors were not interviewed about any suspicious activity, a "sting" operation was not conducted by an undercover officer, nor did officers indicate that any additional investigation was done independent of the notification by the

private citizen. The Tribes argue that information provided by a known citizen should be given more weight in veracity than an unnamed informant.

The eradication of drugs on our Reservation is a high priority for both the Tribe and its community members. We seldom question a magistrate's judgment when substantive facts presented for a warrant is sought by law enforcement in pursuit of that effort. However, a higher priority is placed on the individual right to be secure in our homes from unreasonable searches and seizures. The Colville Tribal Civil Rights Act, Chapter 1-5 of the Colville Law and Order Code, states, in part:

> *The Confederated Tribes of the Colville Reservation in exercising powers of self-government shall not: ... (b) Violate the right of people within its jurisdiction to be secure in their persons, houses, papers, and effect against unreasonable search and seizures, nor issue 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.*

We have only limited material information before us in this matter. However, a close look at the affidavit and the search warrant that were issued reveals that neither meet minimum standards that should be used for the issuance of warrants on the Colville Indian Reservation.

I. Affidavits for Search Warrants

Privacy and the presumption of innocence is a right of the people and the use of a search warrant is a powerful weapon that must not be misused when dealing with the sanctity of people's homes.

To obtain a search warrant, an officer must provide sufficient information to a magistrate to make an independent determination that probable cause exists that the search will result in discovery and seizure in the warrant application. *Edenshaw v. MIC*, 5 NICS App. 156, 159 (1999), citing *llinois v. Gates*, 462 U.S. 213 (1983). The search warrant must be specific as to the place searched, and the items to be seized must be described with adequate precision so that the officer can recognize them. *Edenshaw,* id, citing *Maryland v. Garrison*, 480 U.S. 79 (1987).

There must be probable cause to enter a home and to seize evidence. In the

instant case, the Affidavit for Search Warrant consisted, in part, of two short paragraphs which described Appellant and the information by which the officer concluded that a violation of the laws had occurred. Paragraph 4(a) named Appellant, listed her date of birth and gave her residence address verified by H.U.D.

Paragraph 4(b) is a short narrative by the officer of being contacted by a citizen saying that he took the Appellant's sister to the Appellant's residence; that the Appellant's sister went into the residence and came out with cocaine that she had purchased from the Appellant. The citizen then returned with the Appellant's sister to his residence where she proceeded to "cook" the cocaine after asking for some specific materials (penny, soda powder, teaspoon and water).

A close look at the affidavit does not reveal any date or time given for when the alleged incident took place. It could have happened the day that the informant talked with the police officer or it could have happened any other day, possibly months before. There is no information that could give the independent magistrate any idea of the staleness of the information. The officer gives sufficient data as to his qualifications and knowledge, but does not remotely elaborate on any qualifications or experience of the informant citizen. The Court is left with too many unanswered questions. Has this informant been used before? Where did he obtain his knowledge of the "processing" of the alleged drugs? Was he a prior user? What was his relationship to either the sister or the Appellant? Could this voluntary information be based upon a potential grudge on the part of the informant against the Appellant? Police should not rely solely upon a citizen's allegations without some corroboration. The officer did corroborate that the residence was in the appellant's name, but apparently went no further with any additional investigation or independent corroboration of informant's information.

The final paragraph in the affidavit asks that the search warrant be issued because the officer submits that there is probable cause to believe a crime has been committed, that a search of the residence should be allowed so that the Appellant can be found. No where does the affidavit request that paraphernalia or drugs be included in the search and seizure.

The law requires that when searches are conducted, the warrant must specify, in detail, the areas to be searched. The precision of the search and seizure procedures were instituted so that "fishing expeditions" would not be conducted at the expense of

an individual's basic rights. It would follow then, that in order for the warrant to specify what and where to search, that the affidavit must also state, with specificity, what is to be searched for and where.

Moreover, the affidavit only requests that the officers be allowed to enter the specified residence to search for the Appellant. The warrant, however, expands the search to include the residence, attached sheds, out buildings or storage sheds and open places where a person could reasonably hide. The Officer's Affidavit mentions that a person could hide in various places[31], but the Affidavit does not ask to be allowed to search those places[32]. The warrant allows seizure of all illegal narcotics, paraphernalia and items related to manufacture and sale of the illegal narcotics. It also allows the seizure of "all persons involved in the sale, distribution and manufacture of said illegal narcotics."

There is a great difference between what was requested in the affidavit and what was included in the warrant. This is the very type of discrepancy that the judiciary must be wary of[33].

An independent magistrate must make every effort to make sure that the information on the affidavit matches what is contained in the warrant, and that both are as specific as necessary to ensure that both sides receive a fair and independent judicial decision.

II. Minimum requirements

What is the minimum information that should be contained in an affidavit? Each affidavit must be evaluated on a case-by-case basis, but there are some minimum standards that can apply to most affidavits.

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[31] Affidavit for Search Warrant, paragraph 3.

[32] Affidavit for Search Warrant, paragraph 6. "Based on the above-described information, I submit that there is probable cause to believe that ... contains evidence of the crime of ... I respectfully request that a search warrant be issued to enter the residence and search for the persons described herein."

[33] Police officers are usually the ones drafting the affidavits and proposed search warrants. When an officer is in a hurry, worried about potential disposal of key evidence, and then must draft an affidavit, it would be easy to possibly leave key information out. It is in your mind, but somehow doesn't quite make it to the paper. Many jurisdictions try to prevent this type of omission by having someone review the paperwork before it is submitted to the magistrate. This may take additional time, but may prevent potential problems down the road, such as having key evidence excluded from trial.

The magistrate must be assured that a criminal act has occurred or is going to occur very soon without intervention by the police. There must be a time and place indicated when the violation is to have occurred or will occur. There must be some independent verification of the violation, or the veracity of the informant must be specified in order that the magistrate can make an independent assessment of the truthfulness of his allegations. The standard "who, what, where, when, why and how" should be addressed in every affidavit or at lease a mention of why it is not included or doesn't apply before issuance of any type of warrant is issued. This should not mean that each affidavit will need to be a 10-page document. It just means that the magistrate should not have to "fill in the blanks" in order to determine that a warrant should be issued.

In the instant case, a simple explanation that the police had verified suspicious activity through their observation or interviews with neighbors would have bolstered their case. Also, information that the informant had a successful history as a drug informant or had other training that would qualify him as a drug expert, and that he had no malicious intent to point his finger at Appellant would have helped. What relationship the informant had with Appellant's sister and why she wanted him to take her to Appellant's residence might have supported the affidavit more.
The Appellee argues that the informant is reliable because he used drug terminology and lived in the area, therefore the magistrate should have been able to determine that the informant was knowledgeable and was being truthful. While, by itself, this might have not been an issue in another warrant, combined with the utter lack of supporting information in this affidavit, this argument fails.

III. Search Warrant vs. Arrest Warrant

Was the affidavit in question requesting a search warrant or an arrest warrant? If we look at the plain language of the affidavit, it appears that the police officer is only requesting to search a residence for a specific person, the Appellant. An arrest warrant would issue for a person who is accused of committing a crime, which appears to be the case here. Yet, the magistrate issued a search warrant and expanded the search beyond what was requested in the affidavit, that is, to the person, paraphernalia and other items related to the sale, distribution and possession of narcotics. Again, magistrates need to

be sensitive to not allowing law enforcement to go into people's homes and conduct unreasonable searches. Law enforcement must be specific in what they are looking for, where they want to look and it must all be reasonable to do so. If they want an arrest warrant to arrest a particular person, then that is what they must ask for. If they want to search a particular place for specific tools of a crime, then they must ask for that. If they want both, they need to ask for both. The Court should not authorize a search beyond what is requested in the affidavit unless there is a very good reason for it. If and when it does, there should be a sound basis for it along with a brief explanation in the search warrant or some other part of the record.

IV. Totality of the Circumstances

Appellee argues that this Court should look to *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984). The *Leon* case seems to excuse law enforcement when they "in good faith" rely on a warrant properly issued by a judge. We can distinguish this case from the *Leon* case. The difference between that case and this is the information contained in the affidavits. The affidavit in *Leon* was extensive in listing the investigation done prior to requesting a search warrant. Here, no investigation seems to have been done, except for verifying that the residence was in Appellant's name. Where an affidavit is so deficient in the basic information, a judge should not issue a warrant, and if the warrant is issued, law enforcement should not be able to hide behind a "good faith" argument. The evidence seized in such a manner must be excluded.

## CONCLUSION

The community loses when law enforcement fails to take even the simplest of steps when investigating and seeking a search warrant. As much as the Court dislikes vacating a conviction when all other procedures and trial are unquestioned, it cannot tolerate the ignorance or misuse of the safeguards that provide our members their Constitutional entitlement to be secure in their homes.

There is a right way and a wrong way for government to exercise its police powers. Law enforcement cannot act with less than minimal information in seeking a search of a person's home and the judiciary cannot act with less then objectivity in the issuance of a warrant notwithstanding personal knowledge of the same to the

community caused by drug use and activity. An unbiased judiciary is a key element of the Tribe's Constitutional guarantees to its members.

There were no exigent circumstances described in the affidavit which would allow deviation fro the basic requirements being met. Judges are well aware that drug activity is a constantly changing activity and what is here today may not be here tomorrow. However, that doesn't justify cutting corners when it comes to issuing search warrants that are not properly obtained and used in violation of a person's right to privacy and to be secure in his or her home.

DECISION

The evidence gathered by law enforcement under a warrant and submitted at Julie Swan's trial was not lawfully obtained. Appellant's conviction is VACATED and this matter is remanded to the court for proper action consistent with this Order.

It is SO ORDERED.

Gilbert LUCERO and Karen CONDON, Appellants,

vs.

ERB CORP, *et al.*, Appellees.

Case No. AP07-015, 5 CTCR 08

**9 CCAR 31**

[Appellants appeared pro se.

R. John Sloan Jr. appeared for Appellees.

Trial Court Case No. CV-OC-2006-26368]

Before Chief Justice Anita Dupris, Justice Gary Bass and Justice Conrad Pascal

Decided on November 15, 2007.

Dupris, C.J., for the Panel

This matter came before the Court of Appeals on a Notice of Appeal filed by Gilbert Lucero and Karen Condon, Appellants, against Erb Corporation, *et.al,* Appellees. Appellants are *pro se*; Appellees are represented by R. John Sloan, attorney and spokesman. Appellees have filed a Motion to Dismiss the Appeal based on the fact that Appellants have not perfected their appeal. After a review of the record and law, we find as a matter of law, Appellants have failed to perfect their appeal and this matter should be dismissed. We base our decision on the reasoning below.

DISCUSSION

The Court of Appeals is charged with the constitutional duty to interpret and enforce the laws of the Tribes. (Constitution of the Colville Reservation, Article VIII, Section 1, (hereinafter Constitution)). We do not write the statutory laws which, as relevant to this case, provide for appellate review of the trial court cases. This is the responsibility of the Colville Tribal Business Council (CBC). (Constitution, Article V)

CTC §1-1-283 requirements for filing an appeal are: (1) the appeal must be filed within ten (10) days of the entry of the judgment; (2) the appellant must post bond or otherwise give assurance that the payment of the judgment will be satisfied if the appellant does not prevail on the appeal; and (3) all other requirements of the statutes or Court Rules are met.

Additional requirements found in Court of Appeals Court Rules (COACR), Rule 6, include: (1) the judgment appealed from must be a final judgment; (2) the ten days do not include the day the judgment was entered, nor intervening weekends and holidays; and (3) "in all civil actions, the Appellant must attach an Order Setting or Waiving Bond from the Trial Court...."

COACR 6 concludes with section (e): "An appeal is perfected when all of the applicable elements of this rule are met." Appellants were provided the Court of Appeals' Court Rules with their appeals packet. The form "Notice of Appeal" states the requirement that Appellant has filed an Order Setting or Waiving Bond. It is the form Appellants used to file their appeal herein.

We have made exceptions to our procedural rules only in instances where *pro se* parties have failed to file briefs, (*Covington-Garry v. Sanchez*, 5 CCAR 20 (1999) (we may review a case for serious error even if the *pro se* appellants have failed to file a brief); *Gallaher v. Foster*, 6 CCAR 48 (2002) (This Court may make exceptions to procedural rules when the issues presented are of such a serious nature that [we] should reach a decision in spite of the procedural flaws."). In these cases, the appeals had already been perfected under the statutory laws and our Court Rules.

We have not made such an exception on procedural flaws which prevent the perfection of the appeal. On the contrary, we have consistently dismissed cases for lack of perfection. *See*, *Carden v. CCT*, 4 CCAR 47, 2 CTCR 40 (1997) (appeal not timely filed); *Peasley v. Holt*, 1 CCAR 28, 1 CTCR 40 (1989) (appeal dismissed because it was not timely filed); *Fry v. Fry*, 6 CCAR 16, 3 CTCR 43 (2002) (appeal dismissed because no bond or waiver of bond order provided by Appellant); *Justice v. CCT*, 5 CCAR 52, 3 CTCR 38 (2001) (appeal dismissed for lack of final order); and *Gallaher, et. al., v. CCT*, 1 CCAR 24, 1 CTCR 32 (1988) (appeal dismissed because it was not timely filed).

In this case, Appellants have not given us any legal authorities which create an exception to the statutory and procedural rules regarding perfection of an appeal. Ms. Condon filed a written response to Appellee's Motion to Dismiss first arguing she did not receive the written motion. There is proof in the official file that service was made.

She also argues that she did not have the legal wherewithal to understand what she needed to do for perfecting an appeal, and asks for an exception to the procedural requirements. The procedural requirements flow from the statutory laws. The procedural rules do not change what is required by law. There is nothing in the trial record showing serious due process flaws that would warrant our Court to create a new exception to the procedural rules regarding perfection of an appeal. It will have to be an exceptionally blatant violation of due process for us to even consider it.

According to the trial record, Appellants failed to appear at the hearing in which a Default Judgment was granted against them because Ms. Condon chose to travel as a

Councilwoman to off-reservation meetings, taking Mr. Lucero with her, instead of attending her scheduled court hearings. This argument does not support a finding of an exceptionally blatant violation of due process.

The facts herein, and the law, support a finding to grant Appellee's Motion to Dismiss this Appeal in that Appellants have failed to perfect the Appeal as required by law.

IT IS SO ORDERED.

This matter is dismissed, and the case is REMANDED to the Trial Court for further actions consistent with this Order.

Colville Tribal Credit, Appellant,

vs.

Mathew E. Pakootas and Lisa L. Ortiz, Appellees.

Case No. AP07-002, 5 CTCR 09, 35 ILR 6017

**9 CCAR 34**

[Appearances by David D. Shaw, Attorney for Appellant Colville Tribal Credit; Appellee Matthew E. PAKOOTAS, pro se; and Tim Liesenfelder for Appellee Lisa L. Ortiz.
Trial Court Case No. CV-CD-2005-25018]

Decided on the briefs, January 8, 2008.

Before Presiding Justice Theresa M. Pouley, Justice Dennis L. Nelson, and Justice Conrad Pascal.

Nelson, J., for the Panel.

## I. SUMMARY

On February 1, 1999, the marital community of appellees Matthew E. Pakootas

and Lisa L. Ortiz (formerly Lisa L. Pakootas) executed a promissory note in favor of Colville Tribal Credit (CTC) in the amount of $2868.20. In accordance with the provisions of the note, Mr. and Mrs. Pakootas were each jointly and severally liable for the debt.

They divorced on January 21, 2000. The Divorce Decree apportioned between them payment of the amount then owing to CTC ($1840.25) as follows: Matthew Pakootas to pay "up to $500.00" and Lisa Pakootas Ortiz to pay the balance of $1340.25.

Little or nothing was paid on the debt after the divorce which caused CTC to file a complaint to collect the balance due. On March 24, 2004, judgment was entered by the Colville Tribal Court against Matthew Pakootas and Liza Pakootas Ortiz in the amount of $8227.68[34]. The judgment represented $2,598.98 in principal, interests, and costs, and $5,628.70 for attorney's fees.

Mr. Pakootas subsequently filed a complaint[35] in the Colville Tribal Court in which he sought to make Liza Ortiz, formerly Lisa Pakootas, solely liable and to absolve him from the judgment obtained by CTC. He was awarded judgment against Lisa Ortiz in the amount of $8,227.68 plus costs. In addition, CTC was ordered to "cease and desist" from collecting on "Loan #27999 from the Tribal Dividend Payments of Matthew Pakootas….". CTC took exception to the order and subsequently moved for a limited appearance before the court to vacate or reconsider judgment. The motion was denied. We reverse.

## II. ISSUES

1. Where Colville Tribal Credit entered into a binding loan contract signed by both spouses to a marriage, and the spouses subsequently received a divorce decree providing that one spouse shall have primary responsibility for the loan payment, may Colville Tribal Credit continue to collect in full on its loan and judgment from both spouses?

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[34] *Colville Tribal Credit v. Pakootas and Ortiz,* CV-CD-2001-21151.

[35] *Pakootas v. Ortiz,* CV-CO-2005-25018. CTC was not a party to this action.

2. Where Colville Tribal Credit has entered into a binding contract providing payment and collection rights, and successfully adjudicated those rights through prior litigation, may the trial court subsequently modify those rights without providing Colville Tribal Credit notice and opportunity to present evidence and arguments?

3. Whether the trial court erred to the extent it found Colville Tribal Credit unhindered in its ability to collect on Lisa Ortiz's per capita payments.

## III. STANDARD OF REVIEW

The issues before us are solely questions of law. Therefore, we review the matter de novo. *Colville Confederated Tribes v. Naff* , 2 CCAR. 2 CTCR 08, 22 ILR 6032 (1995). The Colville Tribal Court of Appeals engages in *de novo* review in those cases which concern issues of law. *In Re the Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998).

## IV. DISCUSSION

The facts before us are undisputed. Briefly restated, they are: The appellees contracted a debt, jointly and severally, during the time they were married. They divorced. The divorce decree assigned primary responsibility of the debt to the wife. Little or nothing was paid on the debt following the divorce.

The creditor (CTC) subsequently sued both husband and wife for non-payment. A judgment found both liable for the unpaid debt.

The husband then filed a separate complaint seeking relief from the judgment. CTC was not a party to this action nor was it invited to intervene. The trial court, without notice to CTC, held the wife to be solely liable for the debt and ordered CTC to stop execution of its judgment against property of the husband.

1. Whether a creditor may collect a contracted, joint and several, debt from either spouse despite the fact that their subsequent divorce decree ordered primary liability to the wife.

Actions for divorce, by their very nature, are unique to the marital community.

The assets of the community are distributed and the community indebtedness is apportioned between the parties. Debts contracted jointly and severally by the spouses of the community, however, remain jointly and severally owed to the creditor. *Hanson v. Hanson*, 55 Wash.2d 884, 350 P.2d 859.

Divorce courts often order one spouse primarily liable on a community debt. That, however, does not relieve the other spouse of liability on the debt. "Such a decree can adjudicate only rights relating to debts and taxes as between the parties. This is because in a divorce action the court cannot adjudicate the rights of creditors who are not parties to the action. *Hanson* at 887. Emphasis in the original. Should a secondarily liable spouse pay down the debt or pay it off, he or she can apply to the divorce court for reimbursement from the primarily liable spouse. *Proff v. Maley,* 14 Wash.2d 287, 128 P.2d 330.

For the foregoing reasons, CCT may legally collect the community debt contracted during the marriage from either spouse subsequent to the marriage being dissolved.

2. Where Colville Tribal Credit has entered into a binding contract providing payment and collection rights, and successfully adjudicated those rights through prior litigation, may the trial court subsequently modify those rights without providing Colville Tribal Credit notice and opportunity to present evidence and arguments?

The payment and collection rights to the former spouses marital indebtedness was adjudicated against each of them and in favor of CCT. *Colville Tribal Credit v. Pakootas and Louie*, CV-CD 2001-21151. The record is not clear whether CCT executed its judgment against Mr. Pakootas's per capita distribution or whether it had simply indicated to him that such was its intention.

Nevertheless, Mr. Pakootas subsequently filed a complaint against Ms. Ortiz asking the court to find her solely liable for the indebtedness and judgment on the grounds that he was not primarily liable because of the divorce court's order apportioning the greater part of the indebtedness to Ms. Ortiz. The Court granted Mr.

Pakootas judgment to the extent that it found him not liable on the debt and ordered CTC to not execute its judgment against Mr. Pakootas's per capita distribution[36]. CTC was not a party to this action.

CTC, after receiving a copy of the Court's judgment, moved for a limited appearance to move to vacate or reconsider the judgment relieving Mr. Pakootas from liability on CTC's judgment against him. The Court denied the motion and entered its judgment on February 14, 2007.

In its judgment , the court wrote that it was "aware that Colville Tribal Credit did not have notice or full and fair opportunity to litigate the issue of its ability to collect debts in full from either party." This sentence was followed by a footnote that stated: "*Grogan v. Garner*, 378 U.S. 279.[37]" Nothing further was written about CTC's failure to receive notice of the action concerning its property or its lack of opportunity to participate in a hearing in which property was taken from it. We are at a loss to understand why the trial court specifically recognized a salient issue and then failed to address it in a meaningful manner.

CTC was and is entitled to collect its judgment from either Matthew Pakootas or Lisa Ortiz. The judgment is in the amount of $8,227.68 and is the property of CTC. One cannot be deprived of property without due process of law. *U.S. Constitution, Amendment XIV, Section 1*; *Indian Civil Rights Act*, 26 U.S.C. 1302; *Civil Rights Act of the Confederated Tribes of the Colville Indian Reservation*, Ch. 1-5-2(h). Due process of law mandates notice and an opportunity to be heard. *International Shoe Co. v. Washington*, 326 U.S. 310. CTC received neither in a meaningful manner.

CTC raised the issue of judicial estoppel in the Motion to Vacate or Reconsider. We are again at a loss to understand why the trial court did not address this issue.

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[36] *Pakootas v. Louie*, CV-CO-2005-25018 (2005).

[37] *Grogan v. Garner*, 378 U.S. 279, held that, in a complaint challenging the discharge of a fraudulent claim in bankruptcy, the standard of evidence was by a preponderance. The only similarity between Grogan and this matter is to what extent, and how, collateral (judicial) estoppel should apply to the issue before the court. The trial court did not address the issue of judicial estoppel although it was raised by CTC in its Motion to Vacate or to Reconsider.

Judicial estoppel "precludes relitigation of any issue, regardless of whether the second action is on the same claim as the first one, if that particular issue actually was contested and decided in the first action". *Kelly-Hansen v. Kelly-Hansen*, 87 Wash. App. 320, 328, 941 P.2d 1108.

Matthew Pakootas effectively relitigated the issue whether he was jointly or severally liable for the debt owed CTC[38] when he asked the trial court to find Lisa Ortiz solely liable. The issue of whether Matthew Pakootas owed CTC on the debt was "actually contested and decided in the first action"[39]. The trial court should have addressed the question of judicial preclusion and should have dismissed the claim on those grounds.

3. Whether the trial court erred to the extent it found Colville Tribal Credit unhindered in its ability to collect on Liza Ortiz's per capita payments.

Because of the reasoning set forth above, it is not necessary to decide this issue .

For the foregoing reasons, the judgment of the trial court is REVERSED and the matter REMANDED for proceedings consistent with this opinion.

James H. GALLAHER Jr., Appellant,

vs.

Cheryl D. SCHROCK, COLVILLE INDIAN HOUSING AUTHORITY, Appellees,

Case No. AP07-020, 5 CTCR 10

**9 CCAR 39**

[Appellant is pro se.

Appellees represented by Edmund Clay Goodman, Attorney, Portland OR.

Trial Court Case No. CV-OC-2007-27006]

Decided on the record, January 29, 2008.

Before Chief Justice Anita Dupris, Justice Earl L. McGeoghegan and Justice Theresa

[38] *Pakootas v. Louie*, CV-OC-2005-25018 (2005).

M. Pouley.

Dupris, CJ

## INTRODUCTION

This matter came before the Panel upon a review of the Notice of Appeal and Motions filed herein by the parties. After conferring on the pleadings filed, and based on the reasoning below, we find (1) the Appeal is timely filed, given the facts in this case; and (2) the issues raised by Appellant are not ripe for appeal at this time in that the Trial Court has not made substantive rulings on the issues yet.

## PROCEDURAL HISTORY

The relevant procedural history in this case is:

At the trial level Appellant filed the following pleadings, on the respective dates: (1) a Civil Complaint and Request for Preliminary Injunction on January 11, 2007 against Cheryl D. Schrock and Colville Indian Housing Authority (hereinafter Appellee), along with a request for a hearing on the Injunction; (2) a change of address from Spokane to Seattle on February 5, 2007; (3) a Response to Appellee's Motion to Dismiss on February 22, 2007; (4) a Reply to Appellee's Revised Report agreeing that jurisdiction needed to be decided and a new court date given, filed on May 5, 2007; (5) a Request for Clarification on Status of Case, filed on June 12, 2007, which specifically states he notified the Court verbally on May 21, 2007 of his new address, and noted his new address again, in writing. He asked for the Order Dismissing his case so he could file his appeal; and (6) another written request for a copy of the Court's order dismissing his case, filed November 26, 2007.

At the trial level Appellee filed the following pleadings, on the respective dates: (1) an Answer and Defenses, in opposition to the injunction, and a Motion to Dismiss

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[39] *Colville Tribal Credit v. Pakootas and Ortiz*, CV-CD-2001-21151.

based on a failure to state a claim, all on February 1, 2007; and (2) a Revised Report on Status of Case (correcting file number), asking for a new hearing date of either May 8, 2007 or May 16, 2007, filed May 3, 2007.

Although there is no "paper trail" to show how the Court dates were set, nor how the parties were notified of the Court dates, it appears the Court first set a status hearing on May 9, 2007, and then continued it to May 16, 2007. Appellant did not appear for the May 16, 2007 hearing. In his uncontroverted affidavit filed with this Court on January 8, 2008 Appellant states he was not allowed telephone privileges in the Seattle prison facility on May 16, 2007 because he was scheduled to be transferred to the Spokane County jail on May 18, 2007. He called the Tribal Court soon thereafter, on May 21, 2007.

An in-court record of the hearing on May 16, 2007 indicates the Trial Court Judge orally granted Appellee's Motion to Dismiss on that date. Appellee's attorney presented the Final Order and Judgment, which the Judge signed on June 15, 2007. The Trial Court record does not show that Appellant's notice of change of address, first verbally on May 21, 2007, then in writing on June 12, 2007, were noted in the Court's official records, nor does it indicate why.

Appellant finally received a copy of the Final Order and Judgment which dismissed his case when it was mailed on November 27, 2007. He filed a Notice of Appeal on December 5, 2007, within ten (10) days of the official actions of the Court to send him his Order. Upon review of the record, pleadings, and law, we find that, under the circumstances of this case, the Appeal is timely filed. We find further, based on the reasoning below, that the matter should be dismissed and remanded to the Trial Court for further actions.

ISSUE 1: WAS THE NOTICE OF APPEAL TIMELY FILED?

Appellee states the rule correctly: "A party shall initiate an appeal by filing a written Notice of Appeal (NOA) within ten (10) days from the entry of the final

judgment, sentence, or disposition order." COACR 6. The rules further state: "For purposes of filing an appeal with the [Court of Appeals], 'final' orders and decisions... are the written orders of decisions issued by the Trial or Administrative Court that disposes of the substantive issues and not the oral bench orders entered in the matter to be appealed." COACR 5(b). The issue raised by the facts herein is, when does the ten (10) days start when the Trial Court has failed to provide a party with a written order in a timely fashion?

We do not agree with Appellee that it is not the Court's duty to ensure Appellant gets his copy of the Order. The mistakes of the Trial Court in this instance go beyond harmless error. The Trial Court was informed by Appellant of his address change in a timely fashion; first he verbally gave the Clerk's Office the information on May 21, 2007, then he sent it in writing on June 12, 2007, at least three (3) days before the final order was signed by the Judge and six (6) days before it was sent out. He cannot be expected to act more diligently than he did. It is the Court's responsibility to make sure information is filed correctly and duly noted; this was not done. We could not have accepted an appeal from Appellant without a copy of the written order. *See*, COACR 5(b), *Leaf v. CIHA*, 6 CCAR 53, 3 CTCR 51 (2002). Appellant's constructive notice of an oral order dismissing the case on May 21, 2007 is not sufficient to proceed with an appeal.

The June 15, 2007 Final Order and Judgment was sent to Appellant's Seattle address, even though the Trial Court had two notices, one verbal and one in writing, to send it elsewhere. It is not Appellant's responsibility to question how long it takes for order to issue. It is not uncommon for orders to take a while to be sent out. To deny the Appeal because of the Trial Court's error would deny Appellant due process. We are not revising the time frame required; we are recognizing that due process mandates Appellant be given adequate time after receiving order under the facts of this case, and, therefore, find the Appeal was timely filed. We so hold.

ISSUE 2: ARE THE ISSUES IN THIS CASE RIPE FOR AN APPEAL?

We find they are not ripe for appeal. Appellant asks us to rule on substantive issues not yet ruled on by the Trial Court. That is: (1) another trial judge other than Judge Fry should be assigned to the case; (2) Appellee has violated Appellant's equal protection rights; and (3) the parties should be required to conduct settlement discussions; or, in the alternative, (4) Appellees are in technical default for putting the wrong trial case number on its pleadings, and, therefore, Appellant's complaint should be granted; (5) facts exist to require the case to go forward to a jury trial; and (6) Appellee has violated Appellant's rights to equal protection, and Appellant should be given a home, damages, and injunctive relief. These issues are not properly before the Court of Appeals at this juncture of the case.

The Trial Court has only made a ruling that Appellant failed to prosecute his case because he failed to appear on May 16, 2007. ("Based on Plaintiff's failure to appear or to make any arrangements to appear, the Court determined that Defendant's motion to dismiss be granted." Final Order and Judgment, signed by Judge Elizabeth Fry, dated June 15, 2007, and filed the same date.) This would be the only issue before us. The facts supporting this ruling are scant, and the Trial Court has not had an opportunity to hear Appellant's arguments why he does not feel he failed to prosecute the case. The undue length of time between the time of the ruling and the time Appellant has raised his arguments is attributable to Trial Court error. If Appellant had received the Order in a timely fashion he could have made the appropriate motions to the Trial Court, *eg.* to set aside the Order; to recuse the Judge; to request discovery, and other requests he prematurely makes to this Court.

For these reasons, we find the matter not ripe for appeal and dismiss the appeal. We remand to the Trial Court and direct the parties to make appropriate motions at the Trial Court level on the issues raised herein. The time between the entry of the Order and the time of remand shall not be considered when assessing timeliness of the motions filed because of the Trial Court's error in sending the final order to Appellant.

IT IS SO ORDERED.

Trudi TONASKET, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP07-009, 5 CTCR 11

**9 CCAR 44**

[Appellant appeared pro se.
Appellee represented by Juliana Repp.
Trial Court Case No. CV-TC-2001-21174.]

Argued December 14, 2007. Decided March 26, 2008.
Before Presiding Justice David Bonga,Justice Dennis Nelson and Justice Earl McGeoghegan

Bonga, J

After hearing oral arguments and review of the files the Appellate Panel holds that
Appellant's appeal is **DENIED.**

DISCUSSION

A long standing tenet of Indian law is that in the absence of express legislation by Congress to the contrary, an Indian tribe has complete authority to determine all questions of its own membership. It may thus by usage or written law, or by treaty with the United States or intertribal agreement, determine under what conditions persons shall be considered members of the Tribe. Felix S. Cohen, *Handbook of Federal Indian Law*, 1942 Edition, P.133.

This Panel finds that by and through the Colville Tribal Constitution and the Membership Code, only the Colville Business Council is empowered to enact legislation regarding membership in the Colville Confederated Tribes. Therefore it was wholly

within the purview of the Council to develop specific written rules governing the procedures to be used in determining membership and associated benefits.

The Council was specific and clear when it enacted Tribal Resolution C-5 in 1939 that has remained effective through the adoption of Constitutional Amendment IX and enactment of the Membership Code. The membership Code, Title 8, Enrollment, Referendums and Elections, Chapter 8-1 Membership, CTC 8-1-1,et seq. outlines criteria and procedures for applying for membership into the Colville Tribes and which also specifies if and when the Colville Business Council has authorized unpaid per capita payments for newly admitted tribal members. CTC 8-1-126 only permits unpaid per capita payments to persons obtaining membership into the tribes by enrollment, not adoption into membership. The Appellate Panel therefore finds that Appellant Trudi Tonasket who was adopted for membership in the Colville Tribes is not legally entitled to prospective pay of past per capita or tribal claims settlement payments.

As to Appellant's appeal for court costs and fees the Appellate Panel finds no harm or mistake as to the Trial judge's decision of the award of $85.00 for trial court costs. The Appellate Panel also agrees that the Trial Court is not in a position to know the costs or the reasonableness of any fees on appeal. This Court of Appeals finds no merit to the appellant's action to force the Trial court to award additional court costs and fees to cover the expenses of an appeal.

This Panel understands …the judiciary is to make decisions that…are considered fair and just by the Tribal membership. *Senator v CCT, AP95-002 (1996)*. This Panel also finds that the Appellate Court has a history of supporting the statement found in *Senator* as the Appellate Court has stated "greater latitude in providing the pro se defendant with…in-court advice in light of …the ramifications of the issue" is fair. *Thomas v CCT, APO90-1425 (1990).* The Panel finds that the Appellant did not correctly appeal the cost and fees for her blood correction case that we decided in 8 CCAR 109, as she attempted to recover her cost through the trial court on remand. We therefore invite the appellant to file an action with the office of the Clerk for the Court of Appeals for the Confederated Tribes of the Colville Reservation to recover the costs and fees that she may receive under CTC 8-1-249.

IT IS SO ORDERED.

Tamara STOUT, Appellant,

vs.

CHILDREN & FAMILY SERVICES, Tygeer CATHINGS Sr. & Minors, Appellees.

Case No. AP08-006, 5 CTCR 12

**9 CCAR 46**

[James Edmonds, Office of Legal Services, representing Appellant.
Office of Prosecuting Attorney representing CFS; Tim Liesenfelder, representing father; Appelles.
Trial Court Case No. MI- 2006-26048]

Decided April 22, 2008.
Before Anita Dupris, Chief Justice

This matter came before the Court of Appeals pursuant to a Petition for a Writ of Mandamus filed on April 21, 2008 by Appellant Tamara Stout. Petitioner asks this Court to issue a Writ of Mandamus commanding the Trial Court to set and hold a hearing immediately or return the two minors to their mother. Appellant is also requesting that the Court enjoin Children and Family Services from having *ex parte* contact with the Children's Court. For the reasons stated below the Petition is denied.

FACTS

1. A Petition for Minor-In-Need-Of-Care (MINOC) was filed in the Trial Court on December 26, 2006.

2. The minors were found to be MINOCs and a dispositional hearing held.

3. On March 11, 2008, an Order From Review Hearing was entered by the Trial Court. It was signed on April 7, 2008 and distributed to the parties on April 8, 2008.

4. On April 9, 2008, a letter to Judge Aycock was filed with the Court by a case workers for Children & Family Services (CFS). This letter advised Judge Aycock that the children were being placed out of the home.

5. Spokesperson for CFS moved the Trial Court on April 11, 2008, for a placement hearing, which was subsequently set for April 18, 2008.

6. At the hearing on April 18, 2008, Judge Aycock informed the parties that he was recusing himself because of an *ex parte* communication (voice-mail and e-mail) from the CFS program manager, Lou Stone, to Judge Aycock. The parties were also advised that there would be no judge to hear this matter any earlier than approximately May 5, 2008.

7. There was no written order executed by Judge Aycock.

8. Petitioner filed her request for a Writ of Mandamus on April 21, 2008 asking the Court of Appeals to compel the Trial Court to set and hold a hearing immediately and to enjoin CFS from having *ex parte* communication with the Trial Court.

DISCUSSION

1. The first relief that Appellant is requesting is for a Writ of Mandamus to compel the Trial Court to set and hold a placement hearing immediately. COACR 5, Jurisdiction, allows for petitions for writs of mandamus to be heard by the Chief Justice or his designee. A review of the record shows that the Trial Court has set a placement hearing for April 29, 2008.

> It is within the discretion of the Trial Court to grant or deny continuances. Unless there is a showing of clear abuse of discretion, this Court will not overturn a decision of the Trial Court. *Marchand v. CCT,* 8 CCAR 18, 4 CTCR 19 (05-20-2005).
>
> Writs of Mandamus are issued from courts to compel officials to perform acts that the law recognizes as an absolute duty, rather than acts that may be at the official's discretion. Ministerial acts are those which are performed according to explicit directions by a subordinate official, allowing for judgment or discretion on the part of that official. *Gallaher v. CCT*, 6 CCAR 47(2), 3 CTCR 49 (07-01-2002).
>
> The judiciary was also created by the Tribal Constitution in Amendment X to "interpret and enforce the laws of the Confederated Tribes..." (CCT Constitution), which this Panel understands to mean the judiciary is to make decisions that maintain law and order on the Reservation in a manner that is considered fair and just by the Tribal membership. *Senator v. CCT*, 3 CCAR 63, 2 CTCR 32 (07-24-1996).

The Trial Court currently only has two full-time judges, the Chief Judge and an associate judge. Scheduling of hearings is within the discretion of the Chief Judge. In this case, the matter has been scheduled for a date that is 11 days past the originally scheduled placement hearing which is not unreasonable. The Court of Appeals finds that the Writ for Mandamus is moot and denies the appeal.

2. The second relief that Appellant is requesting is for the Court of Appeals to enjoin CFS from contacting the Trial Court *ex parte.* Chapter 1-2, Rules of Court, § 1-2-4 states that no witness or party of any case shall attempt to discuss any case with any of the judges, except in open court in the course of regular court proceedings. While this Court does not wish to

condone such *ex parte* communication, this is not properly before this Court. The Court of Appeals has jurisdiction to hear and determine appeals from the Trial Court's final judgments, sentences, and disposition orders.

> If an issue hasn't been sufficiently developed at the trial level, the Court of Appeals will not address the issue at the appellate level. *Gorr/Stensgar v. CCT,* 6 CCAR 39, 3 CTCR 47 (06-28-2002).

The issue of *ex parte* communication should be addressed at the Trial Court level to allow the Trial Court to fully investigate and determine if sanctions or any other remedy is appropriate. Only then will the Court of Appeals assume jurisdiction to determine if the Trial Court acted within the law.

DECISION

Based on the foregoing, the Writ for Mandamus is denied.

Palmer GUNSHOWS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee,

Case No. AP07-003, 5 CTCR 13

**9 CCAR 48**

[Wayne Svaren, Attorney at Law, Grand Coulee, for Appellant.
Joseph Caldwell, Office of Prosecuting Attorney, for Appellee.
Trial Court Case No. CR-2005-28093]

Decided on June 30, 2008.
Before Dupris, C.J., Nelson, J., and Stewart, J.

Palmer Gunshows was convicted by a jury of Burglary and Attempted Rape. He appeals his conviction on the grounds that his trial attorney provided ineffective assistance by failing to offer a diminished capacity jury instruction; that substantial justice was not done because the trial court judge did not instruct the jury as to diminished capacity; and that the jury did not take enough time to deliberate. We affirm.

Nelson, J.

ISSUES ON APPEAL

The appellant's Amended Notice of Appeal contains three issues: 1) whether the jury deliberated an "appreciable" amount of time before returning its verdict; 2) whether the trial court erred by not offering the jury a diminished capacity instruction; and 3) whether the defendant's trial attorney was ineffective for failure to present a diminished capacity instruction to the Court for the jury to consider.

The appellant did not address in his brief the issue whether the jury deliberated an appreciable amount of time . Accordingly, that issue is considered waived. COACR 13(e)(2), *CCT v. Muesy* , 2 CTCR 54, 24 ILR 6248, 4 CCAR 37 (1997).

## STANDARD OF REVIEW

The remaining issue is a question of law. Questions of law are reviewed under the non-deferential, *de novo* standard. *CTC v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032.

## FACTS

The appellant was convicted of Burglary (CTC 3-1-41) and Attempted Rape (CTC 3-1-10 and CTC 3-1-233). There were five witnesses at trial: three for the prosecution and two for the defense, including the appellant.

None of the prosecution witnesses testified that, on the night in question, the appellant appeared to have been under the influence of alcohol. One officer thought he might have been "high" on something. Neither a field sobriety test or breathalyser test was given the appellant. The sole evidence of the use of alcohol playing a role in the crimes committed on the evening in question was the appellant's testimony that he was intoxicated. The record contains no evidence of the extent of his intoxication.

## ARGUMENT

Whether the appellant was entitled to a diminished capacity instruction?

The appellant's appellate counsel contends his trial counsel was ineffective because he failed to request the trial court judge to include a diminished capacity instruction to the jury. We first address whether the appellant was entitled to the instruction. [40]

A voluntary intoxication instruction "must be given, if requested, where the crime charged involved a particular mental state and there is substantial evidence that the defendant

[40] We look to Washington State common law in accordance with CTC 1-2-11 as there are no tribal laws or tribal case law applicable to the issues before us.

was in fact intoxicated at the time the crime was committed." *State v. Sandomingo*, 39 Wash. App. 709, 712, 695 P.2d 592, 595 (1985).

Both Burglary and Attempted Rape require *mens rea*. Burglary occurs when a person "enters or remains unlawfully in a building, structure, or vehicle with the purpose of committing an offense therein." CTC 3-1-41. Attempt occurs when a person acts with the specific intent to commit a crime "engages in conduct constituting a substantial step toward committing the offense...." CTC 3-1-233. A person who has "sexual intercourse with a child under sixteen years is guilty of rape." CTC 3-1-10. The victim in this case was fourteen years when the crimes occurred.

The fact that the appellant had been drinking at the time the offenses were committed is not enough to require a voluntary intoxication instruction. *State v. Gabryschak*, 83 Wn. App 243, 941 P.2d. 549 (1996). There must be substantial evidence of the effect of the alcohol on the defendant's mind or body. *Id* at 253.

A "court is required to give a voluntary intoxication instruction only in those cases in which the level of mental impairment caused by alcohol or drugs clearly affected the defendant's criminal responsibility by eliminating the necessary *mens rea*." *State v. Finley*, 97 Wn. App. 129, 135, 932 P. 2d 681 (1999).

The trial record contains scant evidence of the extent of the appellant's intoxication. No breathalyser test was administered nor was a field sobriety test conducted. Two of the five witnesses did not mention the appellant's use of alcohol or drugs. One of the police officers testified he saw no evidence of intoxication nor did the appellant smell of having used intoxicants. The second police officer thought the appellant may have been high on something. The appellant testified he was intoxicated.

There is evidence showing the appellant had been drinking. There was no evidence showing how his drinking affected his mind or his body. Thus, a rational person could not conclude there was substantial evidence of intoxication that may have affected the appellant's mind or body at the time the offenses were committed.

Accordingly, we hold the appellant was not entitled to a diminished capacity instruction.

## Moot Issues

Because the appellant was not entitled to a diminished capacity instruction, the issues of whether the appellant's trial counsel was ineffective for failing to request a diminished instruction and whether the trial court erred by not giving a diminished instruction *sua sponte* are moot.

CONCLUSION

A criminal defendant, charged with crimes requiring specific intent who shows evidence of intoxication at the time the alleged crimes were committed, is not entitled to a diminished capacity jury instruction unless he can show substantial evidence of the extent of his intoxication and how it affected his mind or body.

Accordingly, the Order of Dismissal is AFFIRMED. This matter is remanded to the trial court for action consistent with this Order.

IT IS SO ORDERED.

Shawn DESAUTEL, Appellant,

vs.

COLVILLE BUSINESS COUNCIL, Appellees.

Case No. AP07-017, 05 CTCR 14

**9 CCAR 51**

[Appellant appeared pro se.
Appellee represented by Juliana Repp, Attorney at Law.
Trial Court case number CV-OC-2005-25353]

Argued December 14, 2007. Decided September 13, 2008.
Before Chief Justice Anita Dupris, Justice David C. Bonga and Justice Dennis Nelson

Appeal of order awarding attorney's fees to Appellee. The award was based on the Trial Court finding Appellant statutorily liable for attorney's fees under the plain language of the Enrollment Code. We find Appellant has stated no appealable issues and deny the Appeal.

Dupris, C.J. for the panel.

## INTRODUCTION

Throughout the term of this case, both at the trial and appellate level, Appellant's pleadings and arguments have been aimed at orchestrating the language he wishes the parties and Judges and Justices to use. If the pleadings and rulings are not couched in the exact same words Appellant uses, he considers his questions not answered, the rulings not made. Appellant does not allow for any deviations or personal voices of those responding to his allegations, including from the Courts. This is not how the world works. One cannot presume, just because his exact words are not used, the issue he has raised has been ignored. We will not confine ourselves to Appellant's exact words in our rulings. We will review the case as a whole, in the context of the issues raised by Appellant and make our rulings without the constraints on language Appellant attempts to make.

Does the Notice of Appeal state any grounds for appeal?

Appellant has alleged six (6) grounds on appeal. They are:

1) "Misconduct of Chief Judge Aycock of the Tribal Court."

2) "Newly discovered evidence material to the party which could not have been discovered with reasonable diligence and produced at the trial, provided, however, the appellant has unsuccessfully made reasonable attempts to bring the matter back before the Trial Court by using appropriate motions."

3) "Accident or surprise."

4) "Irregularity in the proceedings of the Court, jury, or prosecution, or any order of the Court, or abuse of discretion, by which the party was prevented from having a fair trial."

5) "That the verdict or decision is contrary to law and the evidence."

6) "That substantial justice has not been done."

We will address each alleged ground of appeal, with its attendant arguments, separately. We note that (1) some of the arguments Appellant makes attempt to relitigate issues we have already ruled on in our Opinion Order dated December 13,

2006 (Appellant's Motion to Reconsider Denied by Order dated February 27, 2007); and (2) some of the arguments Appellant makes are not relevant. We will state so when this is the case.

Finally, as both parties were informed at the Initial Hearing on December 14, 2007, the only issue we are ruling on herein is whether Appellant has stated sufficient grounds to grant an Appeal. For reasons stated below, we find he has not stated sufficient grounds for an appeal, and deny the request.[41]

History of Case

This case has a long, drawn-out procedural history, much of which has already been set out in our previous order of December 13, 2006 denying Appellant's request to overturn the Trial Court's denial of his enrollment petition as untimely filed. *See, DesAutel v. Colville Business Council,* 8 CCAR 95, 4 CTCR 34, 34 ILR 6001 (2006). Relevant to our inquiry herein is another opinion order dated May 15, 2007, in which we denied Appellee's request for attorney's fees. We held that the section referring to attorney's fees, CTC §8-1-207[42], did not apply to the Court of Appeals, and we exercised our discretion to deny the award of attorney's fees. *See, DesAutel v. Colville Business Council,* 9 CCAR 15, 5 CTCR 5, 34 ILR 6057 (2007).

The initiation of the instant appeal is based on an order from the Trial Court granting the Appellee's attorneys fees. *See* Order Granting Respondent's Motion for Attorney's Fees dated September 12, 2007 (signed September 27, 2007). The appeal of this order was timely filed on October 10, 2007. The initial hearing was continued; it was held on December 14, 2007.

**ISSUE 1: MISCONDUCT OF CHIEF JUDGE AYCOCK OF THE TRIBAL COURT**

[41]. For the record, as author of this opinion I apologize for the inordinate amount of time it took to release the opinion; I take full responsibility. Personal matters regarding health have prevented me from devoting adequate time to my writing.

[42]. "If the Court rules against an appellant in any appeal under this Chapter, the appellant shall pay all court costs an the reasonable attorneys fees of the Tribes expended in defending against the appeal. If the Court rules for an appellee in any appeal under this sections, each party shall bear his or her own expenses - unless there is a finding that the Tribes acted in bad faith in disenrolling or refusing to enroll."

The gist of Appellant's argument under this section (pages 5-10 of the Notice of Appeal (NOA)) is that the Trial Court did not rule on the "lack of jurisdiction" arguments of Appellant, thereby prejudicing him. Appellant argues that the way the Judge ruled on procedural issues constituted misconduct (*egs.* Appellee allowed to submit an Answer after the 20-day time-frame; Appellee's response was not in compliance with the statutory provisions, but only motivated by Appellant's request for a Default Judgment; Appellee was not sanctioned for filing a late Answer; and failure of the Judge to rule on Appellant's several motions[43]).

The record shows the Judge did make rulings on the issues; Appellant is taking issue because he doesn't agree with the rulings. For example, at page 7 of the NOA Appellant offers the following motions to support his argument: (1) Petitioner's Motion to Deny Respondent's Motion for Costs and Attorney's Fees. The Trial Court ruled against Appellant (Petitioner) on this issue; (2) Petitioner's Motion to Deny Respondent's Request for Motion Hearing [on the issue of attorney's fees]. The Judge ruled against Appellant on the motion when he granted the hearing request; and (3) through (7) are similar motions before the Trial Judge to seek resolution of the attorney's fees issue.

Upon a review of the Trial Court record, the above-referenced arguments are unsupported. Appellant's arguments are semantical in nature. It appears because the Court did not use language that mirrored the words used by Appellant he feels the rulings were not made. All the challenges under this Grounds for Appeal are unsupported by the record and an Appeal cannot be had under this section.[44]

**ISSUE II: NEWLY DISCOVERED EVIDENCE**

[43]. The Motions alluded to in this section, found at page 6 of the Notice of Appeal, were addressed in our Order Denying Appeal dated December 13, 2006. This is an example of Appellant seeking a relitigation of settled issues.

[44]. As an example of the speciousness of Appellant's arguments, Appellant argues the Judge heard his case without establishing subject matter jurisdiction. (p 9 of NOA). He states the Judge did not have "standing" to enter his orders, thereby violating Appellant's Constitutional rights. In other words, his rights were violated because the Court heard a case he brought before it.

Appellant argues the "newly discovered evidence" ignored by the Trial Court is this Court's ruling in another enrollment case: *Tonasket v. CCT Enrollment*, 8 CCAR 109 (Concurring Opinion at 118), 4 CTCR 37, 34 ILR 6014 (2007). He states he attempted to bring motions before the Trial Court to reconsider his case in light of the *Tonasket* case. NOA at page 10. He presents no supporting arguments why the *Tonasket* case would change a ruling on his case.

In the instant case Appellant's position is that the 1965 enrollment application filed by his father on his behalf was still active in 2000 when his blood quantum amount was corrected. The application had been denied in 1965. He did not prevail on this argument at either the Trial Court or the Court of Appeals level. In the *Tonasket* case our Court held, *inter alia*, the Appellants were entitled to have their blood quantum corrected because the Colville Business Council had affirmed such a correction by Resolutions, which have the force of law. We see no nexus between the two rulings. Appellant has not shown us why the *Tonasket* case affects his claims, thereby failing to support this ground for appeal.[45]

**ISSUE III: ACCIDENT OR SURPRISE**

It appears the basis for this issue, found at pages 10-11 of the NOA, is the Trial Court's granting of Appellee's Motion to Dismiss, which was already addressed in Appellant's first appeal and cannot be relitigated herein. Appellant adds that he was "surprised" by a perceived prejudice the Judge had against him during the term of the case between May 4, 2007 to September 27, 2007. Making a statement that one is surprised about the perceived conduct of a Judge does not support a legal ground for an appeal in this case.

**ISSUE IV: IRREGULARITY IN PROCEEDING/ABUSE OF DISCRETION**

[45]. At page 17 of his NOA Appellant seeks to use the *Tonasket* case to support his appeal by referring to the following dicta: "This Order does not automatically confer Tribal membership on any Petitioner or party named herein/ however, in acting upon the application for Tribal membership of any Petitioner or party herein, the Tribes shall be bound by any blood degree increase ordered hereby." He does not cite where he gets this language. It is not part of the written Opinion of December 15, 2006 nor is it found in Justice Nelson's Concurring Opinion of December 28, 2006. Appellant argues his 1965 enrollment application should be given the same recognition. This argument presumes a recognition of his 2000 blood correction in 1965, which is legally unsupportable. There is no connection between the

The arguments found in this section of the NOA (pp11-12) are identical to the arguments in Issue III, and have already been addressed in our decision of December 12, 2006. As such they do not support an appeal herein.

**ISSUE IV: VERDICT CONTRARY TO LAW AND EVIDENCE**

Once again Appellant asks us to review legal issues already decided by this Court and no longer subject to litigation. NOA, pages 12-18. First he sets out at length statutory language regarding enrollment appeals. (NOA pp12-14) Next he interprets the statutory provisions for filing an enrollment appeal, in which he states the Trial Court failed to make a specific ruling regarding the nature of Appellant's case, and reiterates his position that his 1965 enrollment application was active in 2000. (NOA pp 14-18) This has been addressed by our Court in the first appeal and cannot be relitigated herein.[46]

**ISSUE V: SUBSTANTIAL JUSTICE HAS NOT BEEN DONE**

Appellant finally addresses the appeal of an assessment of attorney's fees against him in this portion of the NOA. (NOA, pp 19-20).( *See* Order Granting Respondent's Motion for Attorney's Fees) He relies on our ruling of May 15, 2007 in which we denied an award of attorney's fees to Appellee herein for the work done at the appellate level. The Trial Court found that CTC §8-1-207 applied to the request for attorney's fees. The relevant part states:

> If the Court rules against an appellant in any appeal under this Chapter, the appellant shall pay all court costs and the reasonable attorneys (*sic*) fees of the Tribes expended in defending against an appeal...."(emphasis added)

Referring to *res judicata* and collateral estoppel, Appellant argues our reasoning for denying attorney's fees as not being in the interest of justice should apply to the

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ruling in *Tonasket* and this case.

[46]. Appellant spends a lot of time assigning malicious and "malevolent" behavior to the Judge at the Trial Court. (*See* NOA, pp 5, 11, 17-19, & 21). We have reviewed the Orders of the Trial Judge, and reviewed the record of the case in detail, and have not seen such behavior from the Judge. It appears Appellant has been treated with extreme patience by everyone dealing with his case, including the Judge. Just because the Court makes an adverse ruling it does not mean the actions are malicious. It just means one party has prevailed on an issue and one has not. That is the nature of a court case.

Trial Court as well. In denying Appellee's request for attorney's fee, we held CTC §8-1-207 did not apply to the Court of Appeals, and we would exercise discretion when determining if attorney's fees should be awarded.

The Court of Appeals is a separate court from the Trial Court. *See* Constitution of the Confederated Tribes of the Colville Reservation, Amendment X (hereinafter Constitution). As such we are each responsible to interpret and enforce the laws of the Tribes. *Id*. The laws of the Tribes, unless proven to be unconstitutional or otherwise unenforceable, are our guides for our rulings. The Court of Appeals is not the "Court" referred to in CTC §8-1-207. We so held in our Opinion Order Denying Appellee's Request for Attorney's Fees. Therefore, we are not the "Court" mandated to award reasonable attorney's fees when the Tribes prevails, as directed by the law, *i.e.* CTC §8-1-207 . The "Court" referred to in CTC §8-1-207 is the Trial Court. As a matter of law the Trial Court made a correct ruling in assessing attorney's fees herein. A review of Appellant's NOA does not support an appeal as a matter of law on this issue.

For the reasons set out above, we find Appellant has not stated any grounds for Appeal and the Appeal should be denied. CTC §8-1-207 and remanded to the Trial Court for appropriate action. CTC §8-1-207

IT IS SO ORDERED.

Katherine GOUJON, Appellant,

vs.

COLVILLE TRIBAL ENTERPRISE CORPORATION, Appellee.

Case No. AP07-011, 5 CTCR 15

**9 CCAR 57**

[Appellant appeared in person and without counsel.
Appellee appeared through counsel Andrea George.
Trial Court Case No. AD-2006-26005]

Decided September 19, 2008.

Before Chief Justice Anita Dupris, Justice David C. Bonga and Justice Edythe Chenois

Dupris, CJ

## SUMMARY

On September 27, 2007, an Initial Hearing was held in this case. The parties were ordered to submit briefs on the issue of whether the Trial Court erred in determining that five (5) months was an unreasonable amount of time to file a motion to vacate and that there was no good cause shown for the delay. Oral arguments were reserved pending the filing of the briefs.

Briefing was completed December 7, 2007. After review of the briefs and the record, the Court of Appeals has determined that oral arguments will not be necessary and will not be scheduled. The case will be decided upon the written record.

The Court of Appeals grants the appeal, reverses and remands to the Trial Court to conduct a hearing on the merits of the dismissal based on the reasoning set out below.

## ISSUE

Did the Court err in determining that five (5) months was an unreasonable amount of time to file a motion to vacate and that there was no good cause for the delay?

## FACTS

1. Appellant was terminated from her position with the Colville Tribal Enterprise Corporation (CTEC). She exhausted her administrative remedies through the proper channels and her termination was upheld at all administrative levels.

2. On July 12, 2006, Appellant filed a Tribal Employments Rights Office (TERO) complaint regarding similar work issues.

3. Appellant's appeal, dated August 31, 2006, in the Trial Court, sitting as administrative court for CTEC, was timely received by the Clerk's office on September 6, 2006. On September 8, 2006, the Clerk mailed a Notice of the Hearing set for September 12, 2006 by regular mail, to Appellant's post office box.

4. Appellant was traveling to Illinois, to attend an unrelated court hearing, beginning the first part of September. On September 12, 2006, Appellant was in Minnesota.

5. Appellant contacted the Tribal Court and talked to a Clerk about appearing telephonically or through her mother. She was given instructions to file a motion to continue and fax it to the Court. According to Appellant she had no means to do so and expected to be called by the Court and appear telephonically. None of this happened.

6. Appellant's case was dismissed on September 12, 2006 because she did not appear.

7. Appellant actively pursued her complaint with TERO. She obtained legal assistance on February 1, 2007 and was advised that TERO would not be able to grant the relief she was seeking.

8. On February 13, 2007 Appellant then moved the Court to vacate its judgment of September 12, 2006. Appellant states she did not file sooner because she was not aware of what the rules were to do so.

10. After a hearing on May 8, 2007 the Court ruled on August 8, 2007 that five (5) months was an unreasonable amount of time to file a motion to vacate and that Appellant did not state good cause for the delay. It denied the request.[47]

12. Appellant timely filed her Notice of Appeal of this last order.

## DISCUSSION

### Standard of Review

In deciding the reasonableness of this Motion to Vacate and the existence of good cause, the judge has to evaluate the facts before him and well as what the law is. This is a mixed question of law and facts. We review for abuse of discretion if the administration of justice favors the trial court or *de novo* if it favors the court of appeals. We find that a *de novo* review better serves the interests of judicial review in this case in that there questions regarding when a litigant is to know what trial court procedure to follow in the absence of written procedures.

### Procedural Due Process

Appellant alleges that the reason that she failed to timely file her Motion to

[47]. The Court also denied Appellee's request to use the Tribal Administrative Procedures Act, CTC §2-4-18. Appellee did not appeal this decision.

Vacate was because she did not know what the rules are. It is settled law that minimum due process requires the litigant be given adequate notice of what laws apply as well as an opportunity to present his or her case in a timely fashion. *See, eg, R.L. & B.J. v. CCT CFS,* 6 CCAR 1, 3 CTCR 39 (2001), *George v. George*, 1 CCAR 52, 1 CTCR 53 (1991), and *Gallaher v. Foster*, 6 CCAR 48, 3 CTCR 50 (2002).

The Colville Tribal Law and Order Code (CTLOC) § 1-1-142, Rules of the Court, Procedures, directs the judges of the Court to make recommendations to the Council for enactment or amendment of Court rules[48]. Currently there are only a limited amount of written Rules of Court in the CTLOC. There is nothing written in the rules about administrative cases.

Further, the statutory rules do not give parties much guidance on filing procedures for filing motions, including a Motion to Continue or a Motion to Vacate. The only reference to motions in the statutory rules is CTLOC § 1-2-10, Timely Filing of Motions, which directs that a motion must be filed "no later than five (5) days prior to the time specified for the hearing, unless a different period is fixed by these rules, by order of the Court or for good cause shown." This sparse direction on motion practice does not give a *pro se* litigant adequate notice of the prevailing court practices of filing motions. Appellant was not given any written instructions from the Court what was acceptable practice.

The only written rules for the Trial Court sitting as the Administrative Court for the Tribal enterprises, may be enumerated in specific Plans of Operation, which may or may not be accessible by employees. Asking the parties to look at other deadlines in the Code and guess at what rules may apply is not adequate for due process rights. We found in *Finley v. CTSC*, 8 CCAR 38, 4 CTCR 25 (03-06-05) that continued employment is a protected property right. As such, the employee must be protected from due process violations in termination proceedings.

Rules of Court give everyone notice of what is expected of them in most situations and what may occur if the rules aren't followed. While the Trial Court judges

[48] The time and place of court sessions, and all other details of judicial procedure not prescribed by the regulations of this Code shall be governed by Rules of Court promulgated as herein provided. **It shall be the duty of judges of the Court to make recommendations to the Council for enactment or amendment of such Rules of Court as they believes to be in the interests of improved judicial procedures**. Rules of Court, enacted, or amended in the above manner, will be made a part of this Code,

may not have the time or inclination to develop their own rules, they need to at least give parties before them notice of what rules they are going to apply in each case. Adoption of either State, Federal or some tribal rules should be decided upon initially in each case and announced to the parties. This will give parties notice of what is to be expected in processing their case. This should also give more consistency in making employment decisions.

In the instant case the Trial Court found Appellant did not make her Motion to Vacate in a reasonable amount of time after Judgment entered on September 12, 2007. There are no findings in the Order of Dismissal setting out the standards, the legal authorities the Trial Court followed in assessing what was a reasonable amount of time.

Without adequate notice of what criteria to evaluate and argue to the Court regarding reasonableness, Appellant was denied due process. It is incumbent on both our Courts to provide adequate direction to all litigants, including *pro se* litigants, on what are acceptable practices and standards to follow when appearing before us. It is a litigant's responsibility to know what the laws are, but one cannot guess what the common practices are in court procedure without guidance from the Court. The error of the Trial Court is reversible error.

Based on the foregoing this matter is REVERSED and REMANDED to the Trial Court for a hearing on the merits of "reasonableness" of time of Appellant's Motion to Vacate.

It is so ORDERED.

Cathy COVINGTON, Appellant,

vs.

Selena ADRIAN, Appellee.

Case No. AP08-003, 5 CTCR 16

**9 CCAR 61**

{Richard Kayne, Attorney, for Appellant.
Appellee appeared pro se.
Trial Court No. CV-OC-2007-27095]

Decided November 26, 2008

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but failure to so codify them shall not affect their validity. (Emphasis added)

Before Justice Earl L. McGeoghegan, Justice Dennis Nelson and Justice Theresa M. Pouley
McGeoghegan, J

## SUMMARY

Action for return of designer perfumes and designer blue jeans. The Trial Court, Confederated Colville Tribal Court, Elizabeth Fry, J., entered judgment for return of designer perfumes of one thousand dollars ($50 per bottle for 20 bottles)by applying the law of bailment. Respondent appealed. The Colville Court of Appeals, McGeoghegan, J., held that respondent was a gratuitous bailee with a special relationship to the plaintiff where temporary residency in the respondent's home as a renter was uncertain. Judgment for plaintiff affirmed.

## STANDARD OF REVIEW

The issue presented herein is a question of law. Issues of law are reviewed *de novo.* The issue before the Court is a question of law. There are no disputed material facts involved at this stage of the case. For those reasons our review is *de novo. Simmons v. CCT*, 6 CCAR 30, 3 CTCR 45, 29 ILR 6065 (2002). The standard of review for questions of law is non-deferential to findings and conclusions of the trial court and is *de novo. Hoover v. CCT*, 6 CCAR 16(2), 3 CTCR 44, 29 ILR 6035 (2002). The standard of review in a case concerning only questions of law is *de novo. In Re Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 7, 26 ILR 6039 (1998).

## ISSUE

Did the Trial Court commit error of law by finding that a bailment existed between Ms. Adrian and Ms. Covington?

## PROCEEDINGS

The plaintiff-appellee, Adrian, was residing with her friend, daughter of the appellant, in Appellant's home within the Colville Confederated Tribes Reservation for a period of about two months while Appellant was temporarily living in Arizona. When Appellant returned early from Arizona, she told her daughter and Appellee to immediately leave the residence. Appellee alleges that she left behind blue jeans and designer perfumes because of the lack of space and that she forgot the perfume in the bathroom drawer. The subsequent disposition of the blue jeans and designer perfumes is not known and is considered a loss to Appellee. There is uncertainty as to whether there was a landlord/tenant relationship between Appellee and Appellant.

## DISCUSSION

Covington owes a responsibility toward the property of the appellee. That responsibility falls well within the definition of **bailment**. Black's Law Dictionary (4th) defines **Bailment** as:

> "A delivery of goods or personal property, by one person to another, in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust. *Fulcher v. State*, 32 Tex.Cr.R. 621, 25 S.W. 625."

Applied to the facts of the case at hand, delivery was implied, in that possession was in the hands of Covington, the bailee.

> "When possession of personal property of another is acquired and held under circumstances where the recipient, upon principles of justice, ought to keep it safely and restore or deliver it to the owner, as, for example, where possession has been acquired accidentally, gratuitously, through mistake, or by agreement, since terminated for some other purpose than **bailment**, the law, irrespective of any actual meeting of the minds, any voluntary undertaking, or any reasonable basis for implying a mutual benefit, imposes upon the recipient the duties and obligations of a bailee. Such bailments are known as **constructive** and involuntary bailments, and ordinarily the party in possession of the property is regarded as a gratuitous bailee, * * *." 8 Am. Jur.2d, Bailments, § 52 at p. 958.

The phrase of gratuitous bailee is synonymous with a **bailment** for the sole benefit of the bailor. As derived from the civil law and the common law, gratuitous bailments or bailments for the sole benefit of the bailor were classified as deposits. These deposits were a naked **bailment** of goods to be kept without recompense and returned when the bailor required it. Story on Bailments, 7th Edition (1863), § 4, p. 8. This is incorporated into later writings which accepted the basic classifications of Story. Schouler, in his treatise on bailments, stated:

> "Now the mutual rights and liabilities of bailor and bailee, at our law, turn essentially, we shall find, upon the contemplation of recompense or no recompense. The fundamental idea of our whole subject is that one whose pains are to go wholly unrewarded ought to be the most lightly bound; a maxim which, however distasteful to the strict moralist, is thoroughly consonant with the teachings of the common law. And since no nice gradation by the amount of recompense is here attempted, bailments at common law may well be grouped

> under these three heads, as Judge Story himself has admitted: (1) Those for the sole benefit of the party on the bailor's side, or, at least, without benefit to the bailee; (2) Those for the sole benefit of the party on the bailee's side; (3) Those for the benefit of both parties. * * *" Schouler's Bailments and Carriers, Third Edition, 1897, § 14 at p. 15.

The liability of a gratuitous bailee or a bailee under a **bailment** for the sole benefit of the bailor is generally recognized as one arising only for gross negligence. *Armored Car Service, Inc. v. First National Bank of Miami*, 114 So.2d 431 (Fla.App. 1959); *Maddock v. Riggs*, 106 Kan. 808, 190 P. 12, 12 A.L.R. 216 (1920); *Boyd v. Harrison State Bank*, 102 Mont. 94, 56 P.2d 724 (1936); *Maitlen v. Hazen*, 9 Wash.2d 113, 113 P.2d 1008 (1941); *Corwin v. Grays Harbor Washingtonian*, 159 Wash. 92, 292 P. 412 (1930); Story on Bailments, 7th Edition, § 23 at p. 25 (1863). These cases speak in the situations of damage to the bailed goods or loss of those goods while operating within the limits of the **bailment**.

FINDINGS AND CONCLUSIONS

The ultimate question in this case does depend upon the loss of the bailed goods and upon any injury arising from the **bailment**. The question also arises out of a claim for compensation by the bailor for the loss of the goods bailed, this claim being for a reasonable value. Covington concedes that the property was in the possession of the appellee, but left behind in her residence at the time of Appellee’s hasty departure. Responsibility for the property bailed depends upon the factual circumstances of the **bailment**.

The question as to the rights and responsibilities of the bailee to the property becomes a question of law upon a given state of facts, without reference to any actual assent of the owner, in fact.

Covington considered Adrian as being in her home at the pleasure of her daughter and without Covington’s permission. When Covington ordered Adrian out with attending confrontation causing Adrian to depart without her property, Covington is expected to use due care and without negligence that could lead to a loss of Adrian’s property.

The court properly applied the special circumstantial facts to the law and found the relationship of Adrian-Covington is that of bailor-bailee. The judgment of the Trial Court is therefore AFFIRMED.

It is SO ORDERED.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Steve MARCHAND, Appellee.

Case No. AP07-014, 5 CTCR 17

**9 CCAR 65**

[Appearances by Joseph Caldwell, Office of the Prosecuting Attorney, for Appellant.
Leoni Reinbold, Spokesperson, for Appellee.
Trial Court Case No. CR-2008-28170]

Before Chief Justice Anita Dupris, Justice Gary Bass and Justice Howard E. Stewart.

Dupris, CJ

PROCEDURAL HISTORY

Marchand was arraigned on July 5, 2005 on three charges, each with a Domestic Violence enhancement: battery, assault, and reckless endangerment. A trial was set for August 18, 2005, and an Omnibus Hearing was set for July 25, 2005. Since the first trial and omnibus hearing dates, this case has been set for trial on four (4) other times.[49] It was set for a Change of Plea Hearing twice.[50] It has been delayed for five (5) months for an Interlocutory Appeal filed by Marchand on December 9, 2005, decided on April 26, 2006,[51] and reset for a Status Hearing on May 19, 2006. All continuances were at the request of Marchand. He did enter at least one waiver of the speedy trial, and at one time a waiver of his right to a jury trial. All requests for continuances came within a few days of the hearing dates set.

There have been several motions to recuse the various judges assigned to this case, with at least three (3) of the requests made by Marchand. The first was just before the Change of Plea Hearing set for November 18, 2005. Marchand moved to recuse Judge Abbott; she was recused on November 18, 2005. Marchand moved to recuse Judge Johnston; this motion was granted by

[49]. September 15, 2005, February 16, 2006, August 10, 2006, and August 24, 2006.

[50]. November 18, 2005 and December 2, 2005.

[51]. Marchand appealed an interlocutory order of the Trial Court denying his request for an Elder's Panel on the issue of whether the Prosecutor should be required, as a matter of custom and tradition, to go forward with a change of plea agreement the prosecutor withdrew before it was entered before a judge. By Order dated April 26, 2006, The Court of Appeals denied the interlocutory appeal and remanded the case to go forward at the trial level.

Judge Cleveland. The Tribes moved to recuse Judge Cleveland; Judge Gabourie set the motion for a hearing, then Marchand moved to recuse Judge Gabourie from ruling on the Tribes' motion to recuse Judge Cleveland. Judge Gabourie set a hearing on the motion to recuse Judge Cleveland, then Judge Somday granted the motion to recuse Judge Gabourie from deciding the motion against Judge Cleveland. Meanwhile Judge Cleveland entered an oral order recusing herself from the case.

All the requests for recusal were filed just a few days before the next scheduled hearing. The time taken for all the recusal motions and rulings took from July 28, 2006, when the first motion was filed, to January 18, 2007, when Judge Somday vacated his Order Recusing Judge Gabourie from the case. It does not appear, from a review of the record, that Judge Somday's Order Vacating the Recusal of Judge Gabourie was distributed to the parties by the Clerk's Office. Marchand alleges in his brief that he received the January Order by Judge Somday on June 28, 2007, almost a month after the May 29, 2007 status hearing. There is no court action in the record from the entry of Judge Somday's last order until the status hearing before Judge Gabourie.

The end result, it appears, is that Judge Gabourie was the presiding *pro tem* on the case. He set a status hearing on May 29, 2007. At the hearing Marchand moved to dismiss, alleging a violation of his speedy trial rights. Judge Gabourie asked Marchand to file the motion in writing, which was done on June 22, 2007. After briefs and a hearing on the motion, Judge Gabourie dismissed the case with prejudice on August 27, 2007. The Tribes filed the appeal herein. The total time between the arraignment of July 5, 2005 and the May 29, 2007 at which Marchand moved to dismiss was 693 days, or 1.9 years.

STANDARD OF REVIEW

The question of whether the judge applied the correct legal standard for dismissing a case with prejudice is a question of law. The question of whether the judge correctly evaluated the facts upon which to apply the law involves questions of fact. That is, does the record support the findings of fact? The issue before us is a mixed question of law and fact.[52] The standard for such issues is enunciated in *CCT v. Naff*, 2 CCAR 50, 51, 2 CTCR 08, 22 ILR 6032 (1995), adopting the standard in *U.S. v. McConney*, 728 F.2d 1195 (1984), *cert. den.* 105 S.Ct 100:

[52]. Neither party discussed the mixed fact-law standard of review. We note that Appellee's spokesman did not use complete citations throughout her brief. We had to look up them up for each case she cited. This is not standard practice and all practitioner's before this Court are encouraged to file professional briefs as a matter of courtesy to the Court and the other parties.

> "...[W]hen the concerns of judicial administration favor the trial judge, his determination should be subject to clearly erroneous review, and when the concerns of judicial administration favor the appellate court, the district judges determination should be subject to *de novo* review."

What are the "concerns of judicial administration" in this case? Some of the concerns can be: case management at the trial level; public interests in prosecuting criminal offenders; prosecutorial discretion; and providing for a fair, consistent system of criminal justice for the whole reservation. The Trial Court has the most concern for judicial administration in providing adequate case management. Both Courts have interest in protecting public interests, prosecutorial discretion, and providing a fair, consistent criminal justice system. The Court of Appeals' interests also include providing a review of Trial Court interpretation of legal standards set out as guidelines for the Trial Court, such as those found in *Stoneroad-Wolf v. CCT*, 8 CCAR 84, 4 CTCR 32 (2006) and *Stensgar v. CCT*, 2 CCAR 20, 1 CTCR 76, 20 ILR 6151 (1993).

The issue raised herein regarding the Trial Court's application of our enunciated guidelines for dismissal is a continuation of a series of cases on similar issues. After *Stensgar* and *Stoneroad-Wolf*, *supra*, we reviewed the question in *CCT v. Jack*, 7 CCAR 33, 4 CTCR 11 (2003), *CCT v. Swan*, 7 CCAR 38, 4 CTCR 12 (2003), and *CCT v. Campbell,* 8 CCAR 28. 4 CTCR 22 (2006). The issue herein also raises once again how long of a delay between the start and end of a case is a reasonable amount. We addressed this issue in *Stensgar, supra*, and *Stoneroad-Wolf*, *supra*, also. We have yet to discuss a delay of such magnitude as herein, *i.e.* 1.9 years. For all these reasons we hold that judicial administration favors the Court of Appeals and apply the *de novo* standard.

ISSUE

Given the fact that the statute of limitations on the charges had not run, and that the matter had not been heard by the Trial Court on the merits, did the Trial Court err by entering an Order of Dismissal with Prejudice?

RELEVANT FACTS

The Findings entered by the Trial Court on August 24, 2007 contains both factual findings and legal conclusions. *See*, Order of Dismissal With Prejudice, signed by Judge Gabourie. The facts found therein include:

a) Two (2) years and twenty-three (23) days have lapsed between the time of arraignment and the date the Order of Dismissal with Prejudice was signed.

b) There has been a gap in the continuity of the judicial process which is the fault of

neither party.

c) Marchand did sign a waiver of speedy trial.[53]

d) Witnesses' have lapse in memory and changes in their memory over a period of time.[54]

e) There is tremendous anxiety to both Marchand and his children because of the delay.[55]

f) Marchand will continue to suffer anxiety if the matter is not dismissed with prejudice.

Relevant facts we find from a review of the record, some of them already set out in the procedural history, *supra*, include:

1) It has been 1.9 years from the time of the arraignment to the time Marchand moved to dismiss the charges before Judge Gabourie.

2) All the requests to continue the several trial dates set herein have been at the request of Marchand, or necessitated by his motions to (a) change his plea; or (b) recuse several judges.

3) Marchand filed an Interlocutory Appeal on December 9, 2005. He also filed a motion for a stay of the matter, which was granted by the Trial Court. The time from the filing of the interlocutory appeal (which was denied by the Court of Appeals on April 26, 2006), and the Status Hearing set thereafter at the Trial level was one hundred and sixty-one (161) days, or just over five (5) months.

4) The majority of the motions to continue the trial and to recuse the different judges were filed by Marchand within a few days of the next scheduled hearing, necessitating a change in the date for the trial.

5) CCT did file one of the motions to recuse (against Judge Cleveland), which necessitated a review by Judge Gabourie.

6) Before Judge Gabourie could issue a ruling on the motion to recuse Judge Cleveland, Marchand filed a motion to recuse Judge Gabourie from deciding the Tribes' motion to recuse

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[53]. The Judge included a legal conclusion in this finding that the waiver was good for only a reasonable amount of time, and that time had lapsed. There is no other discussion how he concluded what "reasonableness" was in the context of the case. Another legal conclusion he made, in the same statement, that does not affect our decision is that it was not the responsibility of either party to foresee the length of the delay.

[54]. The Judge included the legal conclusion in this finding that there is prejudice, we assume towards Marchand, because of the lapse of memory of the witnesses.

[55]. Again a legal conclusion is incorporated in this finding: that the anxiety caused is unfair to Marchand's family.

Judge Cleveland.

7) Judge Somday ruled twice on the motion to recuse Judge Gabourie from deciding the motion to recuse Judge Cleveland. The first order granted the recusal. The second order vacated the order recusing and apparently was received by the parties after the May 29, 2007 status hearing scheduled before Judge Gabourie.

8) The delay of time between January 18, 2007 ruling of Judge Somday to recuse Judge Gabourie to the status hearing on May 29, 2007 (101 days) can be attributed directly to the Trial Court.

DISCUSSION

It is the statutory law of the Tribes that unless a defendant is being held without bail, his case shall be set for trial within ninety (90) days of his arraignment. CTC §2-1-102. Exception to this time limit is made for (a) good cause or (b) *at the request of the defendant*. *Id*. (Emphasis added). This is commonly referred to as the speedy trial right, which is recognized in our Tribal Civil Rights Act. CTC §1-5-2(f).

Our Court has discussed what constitutes a violation of the speedy trial rule in several cases. The first was actually in a discussion of the right to a speedy sentencing hearing within the sixty (60) days mandated by the Code in CTC §§ 2-1-103 and 2-1-176. In *Stensgar*, *supra*, we held that extensions beyond the required sixty (60) days was not favored, but allowed after weighing certain factors. These factors were adopted from *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972). They are: (1) length of delay; (2) reason for the delay; (3) whether the defendant asserted his right to a speedy trial; (4) whether there was prejudice to the defendant, including a) prevention of oppressive pre-trial incarceration; b) minimization of the defendant's anxiety; and c) possible impairment of the defendant's defense. *Stensgar* at 24.

The factors adopted from *Barker*, *supra*, were not to be weighed at the exclusion of the tribal interests, however. "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. Its secures rights to a defendant. It does not preclude the rights of public justice." *Stensgar* at 23, citing *Barker*, *supra*.

We held the Trial Court erred, as a matter of law, by entering an order of dismissal with prejudice, *sua sponte*. Such orders are normally granted after a full hearing on the merits of the case or after jeopardy attaches. The exceptions are when a party acts in bad faith or files a frivolous case. *CCT v.* Jack, 7 CCAR 33, 36, 4 CTCR 11 (2003). *CCT v. Swan*, 7 CCAR 38, 4 CTCR 12 (2003), *CCT v. Campbell,* 8 CCAR 28. 4 CTCR 22 (2006), and *Stoneroad-Wolf*, *supra.* There are no allegations of bad faith or frivolous filings against the Appellants herein.

A review of the Trial Judge's Order of Dismissal with Prejudice, August 24, 2007, shows

Judge Gabourie found, *inter alia*, reasons to dismiss with prejudice to be: the lapse of witnesses' memories over a period of time, and the defendant's (Appellee herein) anxiety. The Order also states no one is fully to blame for the inordinate delays in this case. These findings go to the fourth prong of the *Wingo* test adopted in *Stensgar*, *supra (i.e.* whether there was prejudice to the defendant).

This was not an easy case to review. The official trial record consists of over seventy (70) official pleadings and orders. There were no written orders on several issues. For example, there was no order indicating recusal of Chief Judge Aycock. Several "Orders" were in the file indicating a change in hearing dates, but none of them were signed by a judge, and they lacked a date.

It is a matter of fact the delay was long. We first review the reasons for the delays. From what we were able to glean from a review of the record, it appears, first, that the Trial Court was over-taxed by requests to change judges. The statute, CTC §1-1-143, provides for only one change of a judge. In this case it appears every judge and pro-tem judge of the Trial Court was asked to step down from the case. The requests were made by Appellee, with the exception of one motion made by the Tribes, causing major delays in the case. A further delay by Appellee was caused by his request for an Interlocutory Appeal. We hold, as a matter of fact, most of the reasons for the delays are attributed to Appellee, and the Trial Court erred in finding otherwise.

The next prong of the test is whether the defendant waived his right to a speedy trial. Yes, he did. He signed two waivers during the term of the case. He first raised a violation of his speed trial right almost two (2) years from the inception of the case, after causing the majority of the delays. We have held where a defendant does not timely assert his right to a speedy trial, he has not preserved that right. *Stensgar*, *supra* at pp24-25. Based on a review of the record we find, as a matter of law, Appellee's right to a speedy trial is not violated by proceeding with this case.

Finally, we review for prejudice to Appellee. It is this prong of the *WIngo* test upon which the Trial Court found cause to dismiss with prejudice. The Judge's finding of fact that the witnesses' memories have lapsed is not supported by the record. The finding of fact that Appellee suffers anxiety from the delay is supported by an affidavit of Appellee in which he states he is experiencing anxiety. Although whether one is anxious about something is subjective in nature, to support a finding of fact it should be supported by more than a self-serving affidavit. Otherwise it would make this prong of the test meaningless. We find, as a matter of law, the judge erred in finding Appellee met the fourth prong of the test.

## CONCLUSIONS

We reviewed the factual and legal findings of the Trial Court *de novo*. We find the facts

show there were long delays in this case, the majority of which are attributable to Appellee's actions. We find Appellee did file waivers of his speedy trial rights, and conclude there were no violations of his rights in that he caused the delays and did not assert a violation in a timely manner. Finally, we find the facts in the record do not support the Trial Court's finding of prejudice against Appellee if the case were allowed to proceed.

We hold the Order to Dismiss With Prejudice should be reversed and remanded.

It is so ORDERED.

Tobias FINLEY, Appellant,

vs.

COLVILLE TRIBAL SERVICES CORPORATION, Appellee.

Case No. AP07-010, 5 CTCR 18

**9 CCAR 71**

[David Shaw, Attorney for Colville Tribal Services Corporation, Appellee.
John Sloan, Attorney, for the Appellant, Tobias Finley.
Trial Court Case No. AD-2005-25004]

Argued June 20, 2008. Decided November 21, 2008.
Before: Presiding Justice David Bonga, Justice Dennis Nelson, and Justice Gary Bass.

Bonga, J., for the panel.

PROCEDURAL HISTORY

This matter originated as an employment appeal from the Tribal Administrative Court on February 13, 2007 and continued until March 20-21, 2007. A final decision in favor of Appellees was signed on July 12, 2007 and stated that Colville Tribal Services Corporation (hereinafter CTSC) operated in many ways as a subsidiary of the Colville Tribal Economic Corporation (hereinafter CTEC) and that the CTEC manual would guide the court's due process analysis...*Finley v. Colville Tribal Services Corporation*, AD-2005-25004 p.1,2.

STATEMENT OF RELEVANT FACTS

Appellant, a Colville Tribal member, was assigned to a project on the Tulalip reservation (Tulalip Project) starting in January 2005 and ending with his termination on April 20, 2005. Prior to working on the Tulalip Project, Appellant had worked numerous different positions for

CTSC. Mr. Finley was brought on to the Tulalip Project as a CTSC employee in the position of journeyman carpenter. A written warning for safety violations was provided to Mr. Finley on April 19, 2005. On April 20, 2005 representatives of CTSC, who were Mr. Finley's supervisors, met with Mr. Finley and informed him that he was being demoted to laborer. Mr. Finley refused the demotion and was subsequently terminated at the meeting of April 20, 2005. A written performance evaluation citing areas of "needs improvement" was received by Mr. Finley two weeks following his termination.

ISSUES ON APPEAL

1. What is the standard of review for a challenge to the sufficiency of the evidence in an appeal of an administrative employment matter under the CTEC manual?

2. Does the record support factual grounds for the termination?

3. Was the court correct in determining that CTEC had legal grounds for the termination?

DISSCUSSION

A. **What is the standard of review for a challenge to the sufficiency of the evidence in an appeal of an administrative employment matter under the CTEC manual?**

This matter concerns issues of law and fact. Combined questions of law and fact are reviewed under the non-deferential de novo standard. *CTC v. Naff*, 2 CCR 50, 2 CTCR 08, 22 ILR 6032 (1995). In this matter the trial court viewed CTSC as an ancillary entity of CTEC and that past court decisions had indicated CTEC employees, that this Court views as including CTSC employees, had a property interest protected by due process. *Finley v CTSC*, CTC AP05-008. The Appellate Court will generally accord great deference to the lower court in reviewing factual issues, but the Appellate Court will review the factual findings to determine if they are supported by substantial evidence. *Appellee Brief*, p7. Substantial evidence is evidence sufficient to persuade a fair minded person of the truth of the declared premise. *Appellant Brief*, p6.

B. **Does the record support factual grounds for the termination?**

Colville Tribal Enterprise Corporation (CTEC), a wholly owned Company of the Confederated Tribes of the Colville Reservation was incorporated in 1984 to carry out essential governmental activities including the development of tribal resources…and to provide employment to tribal members. *CTEC Employee Policy Manual*, p.01, 2002
CTEC Corporation was incorporated under Title 25 by the Colville Business Council. Because

of the history and the developments leading to its creation, CTEC Corporation holds a special relationship with its owners based on their collective heritage and unique ownership of the Corporation. *Colville Tribal Enterprise Corporation, Code of Conduct,* Effective Date January 1, 2002.

One must not forget the culture of the Tribes involves a practical, big-picture approach to discipline and employee relationships that is not wedded to mere technical compliance with written and procedural minutia. These cultural elements both shape the intent and interpretation of the manual (particularly with regard to discipline), and form a material portion of the relevant employment relationship. *Def's Trial Brief* p.5 Therefore, this Code of Conduct, in addition to the ordinary fiduciary relationship between officers and directors and the Tribes, reflects the special relationship between CTEC employees, officer, and directors and Colville Tribal members. *Colville Tribal Enterprise Corporation, Code of Conduct,* Effective Date January 1, 2002.

The factual record does not support the trial court's determination that there were grounds for Finley's termination. The Court did recognize events and treatment of Mr. Finley that questioned CTSC's actions. For instance, the trial court did find that there were no written warnings or suspensions issued to Mr. Finley prior to April 19th-20th , 2005 despite testimony regarding a multitude of prior instances of poor performance and repeated communication with Mr. Finley about these issues. *Final Order*, p.3. The trial court further stated, "The Court holds that documentation of written warnings must be submitted into the record in order to have the existence of a written warning considered as grounds for termination in an administrative employment appeal." Mr. Finley never received a written warning for the violations cited as the basis for discipline

In addition to the above the Petitioner's Exhibits 4 and 5 establish that prior performance evaluations of Mr. Finley were good evaluations. The record indicated that Mr. Finley had worked approximately 2 years for CTSC prior to termination of employment. This work was in the construction industry, without a history of work-related problems.

When Mr. Finley came to the meeting on April 20, 2005, there was nothing in his file by way of written warnings or other documentation to support termination. Appellant Brief p.7. The trial court further stated that consideration was to be given to "all of the grounds for separation listed in the April 20, 2005 Separation Notice" sent to Finley that was received by Finley subsequent to the April 20, 2005 meeting. The factual record therefore does not support the grounds for the April 20, 2005 termination.

C. **Was the court correct in determining that CTEC had legal grounds for the termination?**

The Court was not correct in making its determination that CTEC had legal grounds for termination. CTEC did not follow the policy manual, which the Tribal Court announced at the beginning would be the law of the case. The plain language of the Manual provides that a "written warning and a corrective action plan outlining performance goals to be achieved will be presented to the employee in cases of unsatisfactory work performance. It is undisputed that Mr. Finley received no written warning and or corrective action plan prior to his summary termination for alleged inadequate work performance.

Judge Aycock's finding that certain actions to correct employee performance as a construction norm or the fact that CTSC had done it in the past, did not relieve CTSC from following the Manual. The final order of the Trial Court stated, "The mere fact that this is how it is done in the construction industry or by CTSC in the past does not relieve CTSC from following the manual as previously stated." CTSC was therefore bound to follow basic rights protection in the Manual.

The Court of Appeals has already held that Finley had a reasonable expectation of continued employment – a protected property right that is subject to due process. *Finley v.Colville Tribal Services Corp*, Memorandum Opinion at P5. Basic principles of due process include notice and the opportunity be heard. Mr. Finley was denied due process by the trial court when the court proceeded to rule that it would consider "…all grounds for separation listed in the April 20, 2005 Separation Notice," a notice that was not received by Mr. Finley until after the April 20, 2005 termination hearing. Mr. Finley was therefore unaware and unprepared to address issues that would lead to his termination. Those actions by the trial court were arbitrary and capricious that prevented Mr. Finley from receiving a fair and impartial initial hearing whose decision of termination was upheld by the trial court.

For the reasons stated this matter is REVERSED and REMANDED.