
IN THE CROW COURT OF APPEALS

IN AND FOR THE CROW INDIAN RESERVATION

CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 00-117

**SYLVESTER GOES AHEAD,
ALEX LaFORGE, JR.,
ALVIN HOWE,
HAROLD HILL,
and GILBERT T. GLENN,
Plaintiffs/Appellees,**

vs.

**CLARA NOMEЕ, Tribal Chairperson,
Defendant/Appellant.**

Entered April 20, 2000

[Cite as 2000 CROW 5]

Before: Watt, J.

MEMORANDUM OPINION

¶1 This memorandum opinion is issued in support of this court's Order Granting Permission to Appeal and Dissolving Temporary Injunction entered April 19, 2000.

¶2 Defendant Clara Nomee and the Crow Tribe have petitioned this court for permission to appeal a Temporary Injunction and Order issued by the Crow Tribal Court on April 11, 2000 (Stewart, J.).

¶3 The Order, among other things: (a) declares that Ms. Nomee is immediately removed from the office of Tribal chairperson pursuant to Section 8-5-557 of the Crow Tribal

Code, (b) enjoins her from entering the Tribal offices, signing any documents on behalf of the Tribe, and using any Tribal property, (c) enjoins her from running as a candidate for any Tribal office in the Tribal election on May 10[sic], 2000, and (d) enjoins third parties from withdrawing any money from Tribal accounts or removing or destroying any Tribal Records on Ms. Nomee's behalf.

¶4 The Order also scheduled a hearing on the plaintiffs' motion for April 21, 2000. Subsequently, the Tribal Court rescheduled the hearing to April 20, 2000. Because of the extraordinary nature of the proceedings pending in the Tribal Court, it is in the interests of justice for a single judge of this court to grant the Petitions for Permission to Appeal and to rule on the merits of the appeal without further briefing or argument.

A. Appellate Jurisdiction

¶5 Although the Crow Court of Appeals jurisdiction is normally limited to reviewing final orders and judgments of the Tribal Court, Rule 4(a) of the Crow Rules of Appellate Procedure allows an interlocutory appeal from a temporary restraining order or preliminary injunction by filing a petition for permission to appeal within five days after the entry of the order.

¶6 This court construes the Order as a "temporary restraining order" within the meaning of Crow R. App. P. 4(a) and Rule 22 (b)(1) of the Crow Rules of Civil Procedure, because it was issued *ex parte* and without notice to the defendant. The Order was apparently entered on Tuesday, April 11, 2000, and the petitions for permission to appeal were filed on the following Monday, April 17, 2000. Because the fifth calendar day of the time for filing the petitions fell on a weekend, there can be no question that the Petitions were timely filed. The petitions being sufficient in all other respects, it is within this court's discretion to grant the petitions and assume appellate jurisdiction.

¶7 Considering the importance to Tribe of the matters presented, this court will exercise its discretion by granting the petitions for permission to appeal the Order.

B. Course of Proceedings

¶8 The record reflects that the plaintiffs, acting *pro se*, filed their Complaint for Declaratory Relief on April 11, 2000. It was signed by all of the named plaintiffs, and supported by the Declaration of Sylvester Goes Ahead signed under penalty of perjury. The plaintiffs also filed a Motion for Temporary/Permanent Injunction supported by a Memorandum, along with Exhibits from the Federal-court criminal proceedings against Ms. Nomee in *United States v. Nomee*, CR 97-89-BLG-JDS, Verdict (D. Mont., Sept. 16, 1998), *affirmed in part and remanded*, No. 99-30075 (9th Cir., April 5, 2000).

¶9 The plaintiffs' action in this case, and the Tribal Court's Order, are founded on Section 8-5-557 of the Crow Tribal Code ("official misconduct"), which was adopted as part of the Crow Criminal Code of 1978. Among other things, this Tribal criminal statute provides that a "public servant" who is convicted of performing an act in excess of her lawful authority with the purpose of obtaining advantage for herself or another shall, "upon final judgment of conviction . . . permanently forfeit [her] office." Crow Tribal Code § 8-5-557(1)(c) and (2).

¶10 In support of their complaint and motion, the plaintiffs relied on Ms. Nomee's conviction on September 16, 1998, for violating a Federal criminal statute, 18 U.S.C. § 1153

(knowingly converting to her own use or willfully misapplying Tribal assets, or allowing them to be misapplied). See Exhibit A to Plaintiffs' Motion for Temporary/Permanent Injunction. The plaintiffs argued that the memorandum opinion entered by the U.S. Court of Appeals for the Ninth Circuit on April 5, 2000 constitutes a "final judgment of conviction" within the meaning of Section 8-5-557, thus requiring Ms. Nomee to immediately forfeit her office by operation of law. The Tribal Court apparently adopted the plaintiffs' reasoning in issuing its Order on April 11.

¶11 The Tribal Court's Order was issued *ex parte* and without notice to the defendant. The Order, along with the Summons and Complaint, were served on Ms. Nomee the next day, April 12, 2000.

¶12 The Petitions for Permission to Appeal were filed on April 17, 2000. The Petitions also specifically requested this court to lift the TRO as soon as possible. The Tribe filed a supporting brief on April 18. That same day, Judge Stewart issued an Order Clarifying Hearing Date scheduling an oral argument/hearing on the temporary injunction and pending motions for April 20, 2000. A copy of the record of proceedings in the Tribal Court was transmitted to this court on an expedited basis on April 19.

C. Discussion

¶13 In its Petition and supporting brief, the Tribe has argued that there are a number of reasons why the Tribal Court's Order must be lifted: (1) the Complaint is defective for purposes of issuing an *ex parte* restraining order because it is not verified, and Mr. Goes Ahead's sworn declaration does not specifically state that it is intended to verify the allegations in the Complaint; (2) Ms. Nomee has never been charged with or convicted of violating Crow Tribal Code § 8-5-557, and a Federal criminal conviction does not automatically trigger the provision requiring forfeiture of office; (3) Section 8-5-557 may violate the Tribal Constitution as applied to an officer of the Tribal Council; (4) Ms. Nomee's Federal conviction is not yet final because she has not fully exhausted her remedies in the Federal courts; (5) plaintiffs failed to show irreparable harm as required by Rule 22(b)(1) of the Crow Rules of Civil Procedure; (6) plaintiffs failed to post a surety bond as required by Crow R. Civ. P. 22(d); (7) the Order was not properly certified by the Clerk of the Tribal Court; (8) no judge had been assigned to the case when the Order was issued; and (9) the Tribal Court lacked subject matter jurisdiction because the claims against Ms. Nomee are barred by sovereign immunity, consistent with a 1985 decision of the Crow Tribal Court.

¶14 The Tribe's arguments raise several weighty and complex issues of law that cannot be adequately considered by this court in the time allowed, and are better left for full consideration, in the first instance, by the Tribal Court in further proceedings. Because of the extraordinary relief granted by the Tribal Court without providing the opportunity for Ms. Nomee to appear and defend, this appeal may be decided on more straightforward procedural grounds.

1. *Immediate and Irreparable Harm*

¶15 Rule 22(b)(1) of the Crow Rules of Civil Procedure provides as follows (emphasis added):

A temporary restraining order may be granted without written or oral notice to the adverse party . . . *only* if the facts shown by the

applicant's verified complaint indicate that *immediate and irreparable injury*, loss damage or harm will result to the applicant *before the adverse party or his legal representative can be heard* in opposition.

¶16 The italicized language makes it clear that in order to grant a TRO in any civil proceeding, the Tribal Court's must determine that the potential harm cannot be "undone" by further orders of the court, and that the threat is so immediate that it will occur before the Tribal Court can convene a hearing with both sides present.

¶17 In this case, the only specific allegation of immediate, irreparable harm made in any of the papers filed by the plaintiffs is the following statement in their supporting memorandum:

To allow Nomee to continue in office, whatever her reason might be, would be to place the Crow Tribe, and Tribal members at risk and subject it and them to the possibility of irreparable harm, damage, injury, and danger. Upon information and belief, persons connected with the Crow Tribal Administration have stated that Nomee has recently said to them: "If I am defeated in the next election, during the month after my election, I will destroy all the Tribal Records."

Plaintiffs' Brief at 4. The plaintiffs also argued that the "election of Tribal Chairman is imminent." *Id.*

¶18 The plaintiffs' allegations that somebody said that Ms. Nomee said that she would destroy Tribal records more than a month in the future, *if* she does not get re-elected, does not describe a potential injury that could occur "before the adverse party . . . can be heard in opposition." Nor does plaintiffs' argument about the upcoming election. Plaintiffs' general allegations about the potential harm to the Tribe and its members of Ms. Nomee continuing in office, while very serious and not to be lightly dismissed, do not explain why this state of affairs suddenly rises to the level of immediate and irreparable harm when Ms. Nomee has continued to serve as Chairman since her conviction by the U.S. District Court almost 7 months ago.

2. *Posting of Security*

¶19 In addition to showing immediate, irreparable harm, Rule 22(d) of the Crow Rules of Civil Procedure requires a party to fulfill a further condition in order to obtain any TRO or preliminary injunction in a civil action:

No temporary restraining order or preliminary injunction shall issue except upon the posting of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by the party who is found to have been wrongfully restrained or enjoined.

Crow R. Civ. P. 22(d)(emphasis added).

¶20 In interpreting a similar provision of the Crow Rules of Civil Procedure, this court has stated that Rule 18(b), requiring the appellant to post a surety bond as a condition of obtaining a stay of judgment during an appeal, is mandatory. [Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad Co., Civ. App. Dkt. No. 94-31](#), opinion and order denying stay and waiver of bond at pp. 14-15 (April 23, 1996), 1996 CROW 3, ¶ 23. Thus, according to the Code, the Tribal Court does not have any discretion to waive the bond, and the full amount of the judgment must be secured by a bond or equivalent alternate form of security. *Id.*

¶21 There is no good reason to interpret the mandatory language of Rule 22(d) any differently. However, as opposed to the security for a fixed judgment amount under Rule 18 (b), the present case involves security for an uncertain amount of “damages as may be incurred or suffered by the party who is found to have been wrongfully restrained or enjoined.” Crow R. Civ. P. 22(d). In this regard, if the Tribal Court reaches the issue in its preliminary injunction proceedings, it should examine with a critical eye the Tribe’s argument that enjoining Ms. Nomee from continuing to serve would necessarily bring the Tribal government to a standstill (Tribe’s Brief at 9), or whether other officials (e.g., the Vice Chairman) would have authority to act in her stead without relying on a delegation of authority. Considering the difficulty in quantifying the security to be posted, it is particularly appropriate in this case that “[t]he Tribal Court’s ultimate determinations on the security arrangements will be treated with great deference by this Court.” [Estates of Red Wolf and Bull Tail, supra at 15, 1996 CROW 3, ¶ 23.](#)

3. *Disposition*

¶22 This court, acting through the undersigned judge, respectfully disagrees with the Honorable Judge Stewart, and holds that the Temporary Injunction and Order entered April 11, 2000, exceeded the Tribal Court’s discretion. There were no allegations of immediate and irreparable harm, or a statement describing the irreparable injury in the Order, sufficient to justify denying the Defendant the most basic due process right – the right to have her side of the story told. And the Order did not require any security at all. Therefore, the Temporary Injunction and Order must be dissolved and vacated.

D. Authority of Single Judge of Court of Appeals

¶23 In so holding, and in issuing the Order Granting Permission to Appeal and Dissolving Temporary Injunction yesterday, the undersigned recognizes that the Crow Tribal Code does not specifically authorize a single judge of the Court of Appeals to finally decide an appeal. These actions must themselves be justified by emergency or exigent circumstances, and by legal authorities and precedent.

¶24 As for the circumstances, this court’s failure to act promptly on the Ms. Nomee’s Petitions would effectively deprive her of her right to appeal a TRO under the Code. On the other hand, because the TRO may be extended by the Tribal Court for good cause shown, Crow R. Civ. P. 22(b)(3), the Order appealed from is not necessarily rendered moot by the

fact that the Tribal Court has scheduled a hearing for today. Thus, in order to give the Petitions meaningful consideration, it was necessary for this court to act within two days.

¶25 Furthermore, for various reasons, the Tribal Court judges who did not preside over the action being appealed are not available to form a three-judge panel. See Crow Tribal Code § 3-3-331 (Court of Appeals), *as amended by* Resolution No. 95-14. Chief Judge Glen Birdinground is on leave for a serious disability, and not immediately available to sit on this appeal, or to appoint other Tribal members with judicial experience to the panel within the time allowed. Judge Albert Gros-Ventre is listed as a candidate for the office of Tribal Chairman in the May 13th election, and Ms. Nomee's candidacy for that same office is enjoined by the Order being appealed from. Special Judge James Yellowtail, who has also served as Acting Chief Judge, has previously issued a procedural order in this case which involves a question (assignment of judge) that the Tribe has placed at issue (Tribe's Brief at 11). And it would appear that Special Judge Brad Stovall cannot serve on the Court of Appeals in this case in the absence of an appointment by the elected Chief Judge.

¶26 There is precedent in the previous decisions of the Court of Appeals for a single judge of this court to dispose of an interlocutory appeal in exceptional circumstances. In the *Red Wolf* case, *supra*, the court looked to Rule 8(a) of the Federal Rules of Appellate Procedure for persuasive authority to allow the undersigned to consider Burlington Northern's motion for stay and waiver of bond. [*Estates of Red Wolf and Bull Tail v. Burlington Northern, supra, at 3, 1996 CROW 3, ¶ 6.*](#) Fed. R. App. P. 8(a)(2)(D) provides that, "in an exceptional case in which time requirements make that procedure [consideration by a panel of the court] impracticable, the motion may be made to and considered by a single judge." In addition to stays of judgment and approval of bonds, the types of motions covered by this rule also include orders "suspending, modifying, restoring or granting and injunction while an appeal is pending." Fed. R. App. P. 8(a)(1)(C). This court's Order Dissolving Injunction has the same practical effect as this latter class of orders covered by the Federal rule.

¶27 Although the Federal rules are not, of their own force, binding on this court or the Tribal Court, they are strong persuasive authority. The Tribal Code has adopted the Federal rules in several other procedural areas. See, e.g., Crow R. Civ. P. 11(a) (adopting the Federal Rules of Evidence); Crow R. Civ. P. 11(b) (adopting Fed. R. Civ. P. 26 through 37 as the rules of discovery); and Crow R. Civ. P. 19(c) (adopting Fed. R. Civ. P. 50 as the applicable law for motions for judgment n.o.v.). The Federal rules are particularly useful as guidance where the Tribal rules are silent (e.g., emergency action by the Court of Appeals), because they are more detailed, and constantly tested and refined through nationwide litigation. However, there is no exact counterpart in the Federal rules to the situation presented here, because the Federal appeals courts generally lack jurisdiction to consider appeals from temporary restraining orders.

¶28 This court has also had the opportunity to consider the disposition of an appeal by a single judge of this court. In [*Lande v. Schwend, Civ. App. Dkt. No. 92-30, slip op. at 9 \(March 4, 1999\), 1999 CROW 1, ¶¶ 29-30,*](#) this court noted, without disapproving, the routine practice of the attorney-judge of the Court of Appeals to handle procedural orders in the interest of sound judicial administration. The court held, however, that Judge Arneson's order dismissing that appeal for failure to prosecute was reviewable by the full panel of the Court of Appeals, and that it was error to dismiss the appeal with prejudice and without warning. *Id.*

¶29 In view of our precedent for this court to act through a single judge in exceptional circumstances where the Federal rules would authorize a single appeals judge to grant similar relief, I do not believe that my Order of April 18th on behalf of the Court of Appeals was based on an unwarranted extension of Tribal law. In the end, though, the Order must

stand on its own merits, because it is probably reviewable by a full panel of this court (whenever such a panel can be duly constituted) if one of the parties so requests.

E. Conclusion

¶30 This court’s order dissolving the temporary injunction, and the foregoing memorandum, are not intended to express any opinion on the merits of the parties’ claims and defenses. Instead, the court’s decision is based solely on plaintiffs’ failure to justify an *ex parte* order and to post security as required by the Crow Rules of Civil Procedure.

¶31 In its further proceedings, the Honorable Tribal Court will be compelled to consider the important issues of law which this court has not addressed. Since the issue of jurisdiction has been raised by the defendant in her official capacity, the Tribal Court should first determine whether the plaintiffs’ claims for prospective relief against this Tribal officer are barred by the doctrine of sovereign immunity, *see, e.g., Burlington Northern v. Blackfeet Tribe*, 924 F.2d 899, 901-02 (9th Cir. 1991), and whether the court otherwise has subject matter jurisdiction of an action to remove a Tribal Council official. In this regard, the Tribal Court’s decision in *Stewart v. Real Bird*, Civ. Case Nos. 85-084, -086, and -104 (May 17, 1985), does not bind another Tribal Court judge in a different case. And Resolution No. 90-35 only adopts the conclusion of that case insofar as it stands for the proposition that the Crow Tribal Court “cannot . . . contradict or deny action *properly taken* at any Crow Tribal Council Meeting[.]” (emphasis added).

¶32 If the Tribal Court concludes that it has jurisdiction, then at a minimum the Tribal Court will have to consider whether the conviction of a Federal crime, which is similar to one of the grounds for official misconduct under the Tribal statute, automatically triggers the forfeiture of office required by Section 8-5-557(2), without a Tribal criminal prosecution and conviction for violating Section 8-5-557(1). If so, the Tribal Court will also have to consider whether Ms. Nomee’s federal conviction is “final” within the meaning of Section 8-5-557(2), in view of the Ninth Circuit’s partial affirmance and remand “to allow inspection of the records and then to permit Nomee to bring an appropriate motion if the inspection should reveal grounds upon which to challenge the jury’s selection.” *United States v. Nomee*, No. 99-30075, mem. op. at 2 (9th Cir., Apr. 5, 2000). Ultimately, the Tribal Court may reach the question, raised only generally by the Tribe in its Petition, of whether Section 8-5-557 violates the Tribal Constitution as it applies to the Tribal Chairperson.

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