

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CRIM. APP. DKT. NO. 00-479/480/481

CROW TRIBE OF INDIANS,
Plaintiff/Appellee,

vs.

GERILYN BULL TAIL,
Defendant/Appellant.

Decision entered October 12, 2000

[Cite as 2000 CROW 8]

Before Stewart, C.J., Gros-Ventre, J., and Watt, J.

OPINION

¶1 Defendant/Appellant Gerilyn Bull Tail appealed her convictions by the Tribal Court (Stovall, Special Judge) on March 22, 2000, for violating Crow Tribal Code Section 8-5-556 (possession of intoxicants), Section 8-5-517 (giving intoxicating substances to a minor), Section 8-5-556 (criminal contempt for probation violation). Ms. Bull Tail was sentenced a total of 20 days in jail, with credit for 9 days served and 1 day suspended, for the first two offenses. On the criminal contempt conviction, she was sentenced to 180 days, which was suspended subject to supervised probation and a substance abuse evaluation.

¶2 For the reasons stated below, we affirm the first two convictions, but reverse and vacate the conviction for criminal contempt.

A. Course of Appeal Proceedings

¶3 Mr. Bull Tail's notices of appeal were filed on March 24, 2000. In response to a request by the Tribal public defender, this court gave Ms. Bull Tail a 30-day extension of time for filing her brief or statement in support of her appeal, to June 13, 2000. As that deadline approached, the public defender moved for leave to withdraw the appeal, because, he stated, Ms. Bull Tail was not cooperating with him in preparing her appeal. Rather than dismissing at that time, this court issued an order on June 15, 2000 for Ms. Bull Tail to show cause why her appeal should not be dismissed.

¶4 On June 27, Ms. Bull Tail timely filed a written response, stating that she had been delayed in obtaining affidavits from two witnesses because they were incarcerated, and that there had been several recent deaths in her family. Ms. Bull Tail requested that court proceeding be delayed until after a funeral on June 29.

¶5 Because Ms. Bull Tail's response indicated that she was still interested in pursuing her appeal, and had made some effort to do so, the court allowed her appeal to proceed and extended the time for filing her brief or statement in support of her appeal until July 21. The court's order also advised Ms. Bull Tail that if she failed to cooperate with her counsel in order to file her brief by that time, her appeal would be subject to immediate dismissal. A copy of that order, like the order to show cause, was mailed to Ms. Bull Tail personally.

¶6 In the meantime, however, the person serving as Tribal public defender changed when the new Tribal administration took office. Thus, when the deadline for filing Ms. Bull Tail's appellate brief was missed again, the docket judge consulted with the new Tribal defender and the prosecutor before setting another briefing deadline. On August 3, with the public defender's concurrence, the court issued a revised scheduling order giving Ms. Bull Tail until August 25, 200 to file her appellate brief.

¶7 More than a month later, no brief or statement has been filed in support of Ms. Bull Tail's appeal, nor has the public defender or Ms. Bull Tail contacted this court to request a further extension.

B. Criminal Appeal Rights

¶8 Rather than simply dismissing this appeal, as we would in these same circumstances in a civil case, it is first necessary to review the scope of Ms. Bull Tail's criminal appeal rights under Tribal law and the Indian Civil Rights Act (the "ICRA"). This is a question of first impression.

¶9 The protections granted to Tribal criminal defendants by the due process clause of the ICRA, 25 U.S.C. § 1302(8), are similar (although not necessarily identical) to those in the U. S. Constitution. *See Crow Tribe v. Big Man*, Crim. App. Docket No. 00-410, slip op. at pp. 5-8 (Oct. 12, 2000), 2000 CROW 7, ¶¶ _____. Under federal criminal law, the Supreme Court has long held that "there is no constitutional right to an appeal." *Abney v. United States*, 431 U.S. 651, 656 (1977). Therefore, the ICRA does not directly grant a convicted criminal defendant the right to any appeal.

¶10 Although there is no inherent right to appeal a criminal conviction, it is also well-established that when a right to appeal is provided under the law of the prosecuting government, then "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U. S. 387, 393 (1985)(Kentucky appeals court's dismissal for counsel's failure to file "statement of appeal" violated Fourteenth Amendment); *see also, id.* at 393-94 (citing other Supreme Court cases that recognized the rights of indigent appellants to effective assistance of counsel in one appeal, to waivers of appeal filing fees, and to free trial transcripts).

¶11 Thus, the Ninth Circuit has stated that when a Tribe decides to grant appeal rights, and its appeal procedures are Anglo-American in origin, then "federal constitutional standards are employed in determining whether the challenged procedure violates the [Indian Civil Rights] Act." *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988). In *Randall*, the Tribal appeals court dismissed a criminal appeal because the \$60 filing fee was not paid within 10 days after entry of judgment. Ms. Randall had filed a

motion with the Tribal court to waive the fee because she was no longer employed, but the Tribal court failed to act on it within the time allowed for perfecting the appeal. The Ninth Circuit held that the dismissal of Ms. Randall's appeal due to the neglect of the Tribal court violated her due process rights under the ICRA, as determined by the federal constitutional standards which guarantee indigent criminal defendants access to the appeal process without paying a filing fee. *Randall*, 841 F.2d at 901-02.

¶12 Under Crow Tribal Code, "a defendant has the right to appeal to the Crow Court of Appeals . . . a final judgment of conviction." Rule 22(a)(1), Crow Rules of Criminal Procedure (Title 6, Crow Tribal Code). The Crow Rules of Appellate Procedure (Title 7 of the Crow Tribal Code) govern criminal as well as civil appeals. Crow R. App. P. 1; Crow R. Crim P. 22(f).

¶13 Under the Crow Rules of Appellate Procedure, as interpreted and applied by this court, there are none of the typical procedural barriers to pursuing an appeal that have been held to violate criminal appellants' due process rights in federal constitutional rights cases. First, there is no fee for filing an appeal. Second, we have not required criminal defendants to pay for a trial transcript, because this court has accepted the videotapes of the proceedings as the record on appeal. Third, as the present case indicates, this court does not dismiss appeals based on minor procedural defects, because of our "traditional concern for justice and fairness, and in the interest . . . of deciding important cases on their merits rather than on mere technicalities." *Sage v. Lodge Grass School District*, 1986 CROW 1, ¶ 64.

¶14 It is the responsibility of the Appellant and her counsel to pursue an appeal. See Crow R. App. P. 8(a) and 10 (appellant responsible for seeing that record on appeal is transmitted by clerk, and for filing brief in support of appeal within 20 days thereafter). Applying these rules in civil cases, this court has reversed the dismissal of an appeal for failure to timely file an opening brief, when the dismissal came without any warning. *Lande v. Schwend*, 1999 CROW 1, ¶ 30. On the other hand, we have approved dismissal of a civil appeal by the docket judge when the appellant missed the initial briefing deadline established by scheduling order, missed an extended deadline, and failed to respond to an order to show cause why the appeal should not be dismissed. *Id.*, ¶ 29.

¶15 In the present case, Ms. Bull Tail's brief was originally due on or about May 13, 2000. This court has granted no less than three extensions, and has twice put Ms. Bull Tail personally on notice about the importance of filing her brief. Despite these warnings, no brief or statement in support of her appeal has been filed. In these circumstances, and because of the difficulty in deciding a case on its merits when the appellant and her counsel have not even told this court what they are appealing, this court could properly exercise its inherent authority to dismiss this appeal without infringing on Ms. Bull Tail's rights to due process and equal protection under the ICRA.

¶16 In a criminal appeal such as this, there is one more consideration that must be addressed – the criminal appellant's right to appointed counsel under Tribal law. Under federal constitutional law, which does not apply here,¹¹ the Supreme Court has held that the due process clause guarantees an indigent criminal defendant the right to effective assistance of appointed counsel in her first appeal. *Evitts, supra*, 469 U.S. at 396.

¶17 This right of "effective assistance of counsel" means that the attorney appointed to represent the defendant on appeal must act as an "active advocate" and, at the very least, file a brief "referring to anything in the record that might arguably support the appeal." *Anders v. California*, 386 U.S. 738, 744 (1967). Then, after allowing the defendant an opportunity to raise any points he chooses, and after the appeals court has reviewed the proceedings, it may dismiss the appeal if it is "wholly frivolous." *Id.* at 744. However, if the appeals court finds that there are "legal points arguable on their merits," the appointed

counsel must argue the appeal. *Id.* This approach assures indigent defendants, “as nearly as is practicable,” the same rights on appeal as defendants who can afford to hire their own attorney, and greatly assists the court in conducting its own review. *Id.* at 745.

¶18 This same approach would be desirable (both from defendants’ and this court’s standpoints) for Tribal criminal appeals, but it may not be practical at the present time.

¶19 Although not required by the ICRA, the Crow Tribe has established the position of Tribal public defender to “represent all indigent persons brought before the Crow Court in criminal actions.” Crow Tribal Code § 3-6-601(1). The public defender must be either a licensed attorney, or “have a minimum of two years experience as an active lay advocate in the courts of a state or an Indian tribe.” Section 3-6-601(3).

¶20 From the brief position description quoted above, it is not clear how far the Tribal Council intended for the public defender’s duties to extend to handling criminal appeals. This court also takes judicial notice that the public defender’s office has been staffed by a single lay advocate, and that well over 100 criminal complaints are filed each month with the Tribal Court. This means that any substantial time the public defender devotes to appeals may come at some expense to his representation of defendants at the trial level. In any event, neither the defendant nor this court will receive the benefit of the additional expertise of a professional attorney in briefing the legal issues at the appellate level.^[2] Therefore, until this question is clarified by the Tribal Council, and/or additional resources are provided for the public defender’s office, we do not believe that criminal appellants are entitled under Tribal law to the same effective assistance of counsel as required by *Anders* in state and federal prosecutions.

¶21 Rather, this court holds that an indigent criminal defendant’s right to counsel on appeal in the present circumstances are as follows:

(1) the public defender is responsible for timely filing a notice of appeal if the defendant so requests;^[3]

(2) the appellant is responsible for staying in contact and cooperating with the public defender throughout the appeal process;

(3) if the public defender notifies this court that he finds no merit in the appeal, or that he has not received sufficient cooperation from the defendant, he may be excused from having to file a brief, and this court will give the appellant an opportunity to file a brief *pro se*; and

(4) in a criminal appeal, rather than dismissing for appellant’s failure to file a brief, this court will conduct a full examination of the trial proceedings and review the conviction for clear error.

¶22 This process will provide indigent criminal appellants with rights under Tribal law that are similar to those enjoyed by persons who can afford an attorney – as nearly as is practicable – within the fiscal constraints under which the Tribal public defender’s office must currently operate. Because this is essentially the same process that has been followed in this appeal, we proceed to review Mr. Bull Tail’s convictions on their merits.

C. Merits of Appeal

¶23 Ms. Bull Tail was represented by the public defender at trial. She testified in her own defense. There is no indication in the trial proceedings or in the Tribal Court file that Ms. Bull Tail was denied the right to bring other witnesses on her behalf.

¶24 Special Judge Stovall found Ms. Bull Tail guilty of two new offenses: possession of an intoxicating substance within the boundaries of the Crow Reservation under Crow Tribal Code § 8-5-572, and giving an intoxicant to a minor under Section 8-5-517.

¶25 Under the Code, “possession” is defined as “knowing control of anything for a sufficient time to be able to terminate control.” Crow Tribal Code § 8-2-201(44); see also Section 8-2-202 (defining “voluntary act” of possession in the same terms). In this case, there was ample evidence that Ms. Bull Tail had direct control of at least one bottle of beer for a period of time sufficient to terminate her control, by getting rid of it or by getting out of the vehicle when it arrived in Crow Agency. There was also evidence that she had been drinking.

¶26 There was no direct evidence that Ms. Bull Tail actually gave any alcohol to a minor. However, from the evidence showing that two juveniles were riding in the back seat where officers found several cans of beer, and statements made by the juveniles at the time of the arrest, the Tribal Court could have inferred that Ms. Bull Tail actually or constructively gave intoxicants to minors. In her testimony, Ms. Bull Tail never explained where the beer came from. In reviewing for clear error, this court will not second-guess the Tribal Court judge’s determinations as to the credibility of witnesses, provided that there is some evidence in the record to support the conviction. The evidence also supports a conviction for “*encouraging* the use of intoxicating substances by a child” under Crow Tribal Code § 8-5-515(2)(a) (endangering the welfare of children), which carries the same penalties.

¶27 Ms. Bull Tail was also charged with criminal contempt for violating the terms of her probation from a previous conviction. Although her probation agreement was not entered into evidence, Judge Stovall took judicial notice that one of its conditions was to obey all laws, and her conviction for the other offenses described above therefore constituted a violation of her probation agreement. Based on those conclusions, Judge Stovall found Ms. Bull Tail guilty of criminal contempt, sentenced her to an additional 180 days, and suspended the sentence subject to supervised probation.

¶28 Although we do not question that Ms. Bull Tail’s convictions on the two offenses described above constituted a violation of her probation terms, this court is unable to find any authority for convicting her of the new, separate offense of criminal contempt.

¶29 Section 8-5-556(c) of the Crow Criminal Code establishes the offense of criminal contempt for “purposely disobeying or refusing any lawful process or other mandate of a court[.]” Arguably, the requirement in her probation agreement, to “obey all laws,” could be interpreted as a “mandate of a court” that Ms. Bull Tail disobeyed, thus triggering a violation of the criminal contempt statute. However, such an interpretation misconstrues the nature of a probation agreement, and the remedy for violation, which may be described as follows:

When a court extends clemency by way of probation, the relationship is essentially contractual, in that the court and the defendant agree that probation will be extended if the defendant keeps and performs certain requirements and conditions, the violation of which will authorize revocation of the probation.

Revocation of probation is the means of enforcement of the conditions of probation.

21A Am.Jur.2d, *Criminal Law*, §§ 907 and 913 (1998). Thus, under general principles of law, probation terms are not a “mandate of a court” punishable by contempt, but rather a contractual condition for suspending the sentence that is enforceable by revoking that suspension.

¶30 The Tribal Code does not contain any provisions relating to probation, so there is no Tribal law indicating that the Tribe has decided to depart from these general principles.^[4] The standard “Probation Agreement” advises probationers that failure to abide by the conditions of the agreement may result in arrest, revocation of probation and incarceration, and/or additional conditions of probation being imposed. No mention is made punishment by criminal contempt if the probationer violates the terms of the agreement. Therefore, this court holds that Ms. Bull Tail’s violation of her probation terms was not punishable by the new offense of criminal contempt, and her conviction of that crime must be stricken.

¶31 This holding is consistent with the Supreme Court’s interpretation of the federal Probation Act, 18 U.S.C. §§ 724, et seq., to which this court will look for guidance in the absence of any Tribal Code provisions governing revocation of probation. In *Roberts v. United States*, 320 U.S. 264 (1943), the Court held that the Act did not impliedly grant the power, in revoking probation, to set aside the original sentence and to impose a new, longer sentence. The Court has also held that due process requires notice of the alleged violation, and a revocation hearing in which the probationer has the opportunity to be heard and to present witnesses and evidence on her own behalf. See, e.g., *Black v. Romano*, 471 U.S. 606, 611-612 (1985).

¶32 In the present case, there can be no question that Ms. Bull Tail received a fair hearing on her alleged probation violation as part of her trial. However, upon concluding that she had violated the terms of her probation, the Tribal Court’s powers were limited to either (1) imposing additional terms of probation, or (2) revoking her probation, revoking the suspension of the sentence on her previous conviction, and executing the remainder of her original sentence (e.g., by incarcerating her for the remainder of its original term).

¶33 According to the Tribal prosecutor, Ms. Bull Tail’s original 90-day suspended sentence on the previous conviction expired on June 6, 2000. The Tribal Court erred by sentencing Ms. Bull Tail to an additional 180 days on the criminal contempt charge which (even though it was also suspended subject supervised probation) extended her liability for imprisonment by more than three months, to September of 2000.

D. Conclusion

¶34 This court holds that Ms. Bull Tail’s rights to due process under the ICRA and Tribal law were satisfied by the appellate procedures described above.

¶35 There was sufficient evidence to support Ms. Bull Tail’s convictions of the offenses of possessing intoxicating substances and giving intoxicating substances to minors in Case Nos. 00-479 and 00-480, and these convictions are **AFFIRMED**.

¶36 Violations of the terms of probation are not punishable by criminal contempt under

the Tribal Code. Therefore, the Tribal Court’s judgment of conviction on the offense of criminal contempt in Case No. 00-481 is **REVERSED**, and that case is **REMANDED** to the Tribal Court with direction to VACATE the conviction and any subsequent orders related thereto, and DISMISS the charge with prejudice. To avoid any further prejudice to Ms. Bull Tail, this court’s mandate shall issue immediately.

¶5	¶10	¶15	¶20	¶25	¶30	¶35	Endnotes
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Endnotes

[1] The due process clause of ICRA does not guarantee any right to appointed (free) counsel at any stage of a criminal proceeding in Tribal court. *Tom v. Sutton*, 533 F.2d 1101 (9th Cir. 1976). Under the ICRA, a defendant is only entitled to the assistance of counsel “at his own expense.” 25 U.S.C. § 1302(6).

[2] It should be noted that the Tribal prosecutor’s office is also staffed by a single lay advocate.

[3] Filing the notice of appeal within the time allowed by Crow R. App. P. 3 is critical. The requirement for filing the notice of appeal within 10 days after judgment (plus a 30-day extension for good cause shown) is jurisdictional – if it is not filed within that time, this court has no jurisdiction under Tribal law to decide the appeal, and it must be dismissed.

[4] This case, involving the violation of probation terms after conviction, is different from a case involving the defendant’s failure to appear after she has been released on bail prior to trial. In the latter case, the court’s order to appear is a “mandate of a court.” The bail-jumping statute, Section 8-5-555, makes it a new offense for failure to appear, and specifically recognizes the court’s additional power to hold the defendant in contempt.

¶5	¶10	¶15	¶20	¶25	¶30	¶35	Endnotes
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