

IN THE CRIMINAL APPELLATE PANEL OF THE TRIBAL COURT OF THE
CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD
RESERVATION, PABLO, MONTANA 59855

ANTHONY CROSSGUNS,)	Cause No. AP-CR-239-92
Appellant,)	AP-CR-284-92
)	
vs.)	
)	OPINION
CONFEDERATED SALISH AND)	
KOOTENAI TRIBES,)	
Appellee.)	

An Appeal taken from the
Trial Court of the Confederated Salish
and Kootenai Tribes.

Cause No. CR-239-92, CR-284-92
Wm. Joseph Moran, Trial Judge.

Before Judges KALLOWAT, HALL, and GAUTHIER,
Criminal Appellate Panel

Argued January 27, 1995
Decided February 3, 1995

For Appellant: Roberta Hoe, Esq., Tribal Public Defender
Appellee: Thomas Myers, Esq., Tribal Prosecutor

INTRODUCTION AND STATEMENT OF THE CASE

Appellant, Anthony Crossguns, an Indian Person, was charged on September 14, 1992, with three counts of Domestic Abuse against the person of Mary Ann Mad Plume, his common law wife. The counts of Domestic Abuse were charged as Class 'C' offenses as specified in Chapter IV, Section E7(1)(a) of the *Law and Order*

Code of the Confederated Salish and Kootenai Tribes. On September 28, 1992, Appellant entered a plea of guilty on all three counts.

On October 14, 1992, the Court convened for sentencing after having reviewed the Presentence Report. The Court denied Appellant's motion to defer sentencing until a mental health evaluation had been performed. The Court imposed sentence of 366 days in Tribal jail for each offense to run consecutively.

The issue presented on appeal is whether the Trial Court abused its discretion by denying Appellant's motion to defer sentencing and by imposing three consecutive sentences, rather than two consecutive sentences and one concurrent sentence as recommended in the Presentence Report.

The Criminal Appellate Panel heard oral argument of counsel after having received timely briefing in the matter and is thoroughly advised of the law and facts surrounding this appeal.

ANALYSIS

It is a well established principle of criminal law that trial courts possess certain discretionary powers in sentencing criminal defendants. The limitations imposed are found in statutory authorities. In most cases, as here, a misdemeanor is sentenced from a statutory scheme wherein the trial court is provided with a minimum and a maximum sentence legislatively determined to fit a particular crime.

The Law and Order Code of the Confederated Salish and Kootenai Tribes, Chapter IV, Section E7, contains the following relevant provisions concerning the offense of Domestic Abuse:

1. A person commits the offense of domestic abuse by

knowingly or intentionally causing;

- a. Bodily injury to a family or household member;
4. A third or subsequent conviction for domestic abuse is a Class C offense.

The Law and Order Code of the Confederated Salish and Kootenai Tribes, Chapter IV, Section A10, provides guidelines for sentencing and states in relevant part:

1. A person deemed guilty of an offense may be sentenced as follows: . . .

- c. Under a Class C offense the offender may be sentenced to labor or jail for a period not to exceed 366 days, or a fine not to exceed \$5000, or both.

The Presentence Report submitted to the Court by the Tribes' Probation and Parole Department recognized that the Class C sentencing provisions applied. The Presentence Report recommended Appellant be sentenced to 366 days in jail for each of the three counts of domestic abuse with the last 366 day sentence to run concurrently with the second 366 day sentence. Additionally the report recommended that Appellant make restitution for medical bills incurred by the victim and that Appellant apologize to the victim for the pain and suffering she endured.

The Court sentenced Appellant to 366 days in Tribal jail for each offense with the sentences to run consecutively. The sentence imposed in this case is clearly within parameters of the Tribal Code sentencing provisions for Class C offenses. While the Court did not follow the recommendations in the Presentence

Report, it is under no obligation to do so. The Court bears the sole responsibility of determining and imposing sentence consistent with the Tribal Code. Here, the Court met that responsibility and exercised proper discretion in imposing sentences conforming to the Tribal Code. Further, the Court was under no obligation to grant Appellant's motion to defer sentencing. For the reasons stated, we find no error or abuse of discretion in the Court's sentencing of Appellant. Judgment is affirmed.

Dated this 10th day of February, 1995.



Leslie Kallowat

Leslie Kallowat, J.

Margaret Hall

Margaret Hall, J.

Robert Gauthier

Robert Gauthier, J.

IN THE CRIMINAL APPELLATE PANEL OF THE TRIBAL COURT OF THE
CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD
RESERVATION, PABLO, MONTANA

CONFEDERATED SALISH AND
Appellee,

vs.

ANTHONY CROSSGUNS,
Appellant.

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CAUSE NO. AP-CR-239-92
AP-CR-284-92

CERTIFICATE OF MAILING

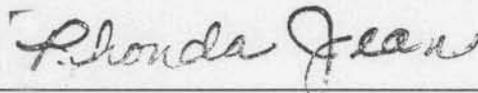
I, Rhonda Jean, Appellate Clerk, do hereby certify that I mailed true and correct copies of the OPINION to the persons first named therein at the addresses shown below by depositing same in the U. S. Mail, postage prepaid at Pablo, Montana, or hand delivered FEBRUARY 10, 1995.

THOMAS MYERS
TRIBAL PROSECUTOR

LAW & ORDER

ROBERTA HOE
PUBLIC DEFENDER

ADULT PROBATION



RHONDA JEAN
APPELLATE CLERK

IN THE TRIBAL APPELLATE COURT OF THE CONFEDERATED
SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION

THE CONFEDERATED SALISH) Cause Nos. AP-CR-239-93
AND KOOTENAI TRIBES,) AP-CR-284-92
)
Appellee/Plaintiff,)
)
-vs-)
) D I S S E N T I N G
) O P I N I O N
ANTHONY CROSSGUNS,)
)
Appellant/Defendant.)

Leslie J. Kallowat, Chief Appellate Judge: DISSENTING

I must respectfully dissent from the majority opinion in this case. It is this Judge's opinion that the majority Court has decided to let the conduct of the Tribal Council, although egregious to go unremedied.

I find anytime a government acts austensively within its authorized powers, that government act should be to benefit all those citizens served, is the case in front of the Court. The Tribal Council without authority from the people and without the intent to benefit numbers of Confederated Salish and Kootenai Tribal people, acted questionably and against the grain of our Tribal Constitution and Tribal Law and Order Code to override the judicial power vested in the Tribal Court by the Law and Order Code, Chapter III. Such acts done without authority and with out procedure can serve no one, let alone the people of, the Confederated Salish and

Kootenai Tribes. This disservice has rendered great harm to our once honorable and credible system of justice within the Flathead Nation. Our system of justice became credible to all professional counselors at law only with the efforts of many forward thinking and just individuals working the system of justice. For this Court to merely dismiss the egregious acts of our Tribal Council in releasing a jailed prisoner without authority in direct defiance of our system of justice and while this Appellate Court was still reviewing the matter, to consider such a matter of release is unforgiveable.

This dissent is predicated upon the acts of the Tribal Council and Tribal Managing Attorney, Daniel F. Decker, representing the Tribal Council as follows:

1. The Tribal Council intervened in a pending case before the Court on behalf of the jailed prisoner by issuing an Executive Order of Clemency. Attorney, Roberta Hoe, representing Anthony Crossguns had gone to Appellate Judge Hall's place of business and questioned her on decision of the Case. Ms. Hoe informed Tribal Council that Crossguns case was over with. The Tribal Council than acted on her word alone.

It is this Judge's opinion is that Tribal Council acted wrongly when allowing one party to discuss a case without the other side present as this case was a court case. In criminal cases both sides are always represented. The Tribal Council took the word of Ms. Hoe and issued and Executive

Order of Clemency without thinking to request to see a copy of the Court Order denying rehearing or to allow all interested parties a voice, prior to action. Ms. Hoe's actions are questionable as to her unethical conduct in this case.

2. Jerome J. Cate, Chief Prosecutor of the Tribes had filed a Motion to Strike the Tribal Council's Executive Order of Clemency and Motion for Shortening of Time of Notice. At the hearing on March 13, 1995, on Motion to Strike, Legal Department Managing Attorney, Daniel Decker, representing the Tribal Council requested a fifteen minute recess to speak with Mr. Cate. After the hearing reconvened, the Prosecutor stated on the record: "If it pleases the Court, I've been instructed by Mr. Decker to dismiss the petition that has been filed in the Court." The Court recessed again for meeting with Mr. Cate and Mr. Decker. Mr. Cate informed Appellate Judges again he had been instructed by Mr. Decker as representative of the Tribal Council he had to dismiss the motion to strike or suffer the consequences. When the Court reconvened, the Judge denied the Motion to Dismiss and rescheduled for an additional ten (10) days. Prior to the next hearing, Mr. Cate, Chief Prosecutor was no longer employed by the Tribes.

It is this Judge's opinion that the actions taken against the Chief Prosecutor by Daniel Decker and Tribal Council is in violation of the Tribal Constitution, Article VI (b) which

employ legal counsel for the protection and advancement of the rights of the Flathead Confederated Tribes and their members.

3. A hearing on March 23, 1995, which was continued from March 13, 1995 hearing was continued again due to no Prosecutor, and the Court would not go forward. The Court directed the Tribal Council to appoint a special prosecutor to the case and not anyone already employed due to the possibility of conflict and as a result, of what happened to the former Chief Prosecutor. The hearing was continued until such time as the people are represented. The Court ordered Mr. Decker thirty (30) days to brief several points on the issue of clemency.

4. That since the March 23, 1995 hearing, the Tribal Council appointed Daniel Decker, Managing Attorney, representing the Tribal Council in this case, where Tribal Council is a direct party, to serve as special prosecutor, to assume the role of Mr. Cate, former Chief Prosecutor, on the Motion to Strike Executive Order of Clemency issued by the Tribal Council.

Daniel Decker, Managing Attorney, representing the Tribal Council filed a Brief on executive clemency on April 24, 1995.

Daniel Decker, Special Prosecutor, filed a memorandum in Support of Motion to Withdraw the Motion to Strike Executive Order of Clemency, said Motion to Strike originally filed by former Chief Prosecutor, Jerome Cate, on April 24, 1995.

It is this Judge's opinion, that this is a great conflict of interest and possibly a violation of the ethical code of conduct for an attorney, as representing both sides of this action has prevented him of performing his sworn duty as an attorney to represent his client to the best of his ability (mainly the prosecution side). As clearly seen by his action of representing Tribal Council action. Tribal Council and Prosecutor have two distinct roles, and Tribal Council represents the people of the Reservation as a whole, has executive powers given to them by the Constitution and Bylaws of the Confederated Salish and Kootenai Tribes of the Flathead Nation to make and pass laws under Article II, (c).

a. Trial Court sentenced Mr. Crossguns in accordance with the Tribes' Law and Order Code. Sentence and sentencing procedure affirmed by the Criminal Appellate Panel.

b. Mr. Crossgun's sentence of three years in the Tribal jail was found not to be "cruel and unusual punishment" or in violation of ICRA or the Tribes' Bill of Rights (Article VII) by the Criminal Appellate Panel.

c. Tribal Council's order releasing Mr. Crossguns from custody is not authorized under the Tribes' Constitution, Bylaws, or Law and Order Code. See: Bylaws, [Article II, Sec.6: "Every ordinance and resolution shall contain a recital of the laws of the United States and the provisions of this Constitution under which authority for the said ordinance or resolution is found."] Therefore, the Tribal

Council's Order exceeds its constitutional authority and interferes with the formally vested judicial power of the Tribes in the Tribal Court. Law and Order Code, Chapter I, Section 1 (1), Establishment and Chapter I, Section 2 (1)(a) Jurisdiction ("over all offenses enumerated in the Code. . ."). See also, the Oath of Office administered to members of the Tribal Council found in the Tribes' Bylaws, Article I, Section 6, where Council members solemnly swear "to cooperate, promote, and protect the best interests of my Tribe, in accordance with this Consitution and Bylaws."

d. Under the Tribes' Constitution the Tribal Council may change sentencing provisions in the Law and Order Code by ordinance. Article VI, Section 1 (1) empowers the Tribal Council to promulgate and enforce ordinances governing the conduct of tribal members and providing for the maintenance of law and order and the administration of justice by establishing a Tribal Court and defining its powers and duties.

5. Under the Tribes' Constitution the Tribal Council may adopt a constitutional amendment or bylaw granting the Tribal Council the power to issue executive clemency orders. Article VI, Section 4, provides that the Tribal Council may exercise unenumerated pre-constitutional powers through the adoption of a constitutional amendment or bylaw.

Therefore, Tribal Council should not have power to sit in judgment of criminal acts. The prosecution role is to

represent the People on an individual basis for prosecution of an individual accused of committing a crime, - for determination of probable cause, and to see that punishment is carried out for the seriousness of the crime and for the protection of the victim and the people of this Reservation. The interest of Tribal Council and Prosecution are totally separate in that Tribal Council is prejudicially influenced by taking action on behalf of an habitual offender of domestic abuse by releasing him from incarceration which he was sentenced to within the allowable time provided in the Tribal Law and Order Code - drafted by the Tribal Legal Department - and passed by Tribal Council. The authority of the Judges is not given for the sake of the Judge, but for the sake of the person being judged, and the protection of the people under jurisdiction served.

This Judge's opinion is that the Tribal Council has violated Section 8 of the Indian Civil Rights Act. . . .The right to a fair hearing has been denied. By the fact that the Chief Prosecutor was fired prior to hearing, and the appointment of the Tribal Council's Managing Attorney to represent both sides of the issue to prevent any opposition to the case, to eliminate any opposition.

Tribal Council representing the Tribes' best interest of Tribal membership is the only one who has authority to approve and employ a competent attorney, not already employed by the Tribes, well knowledgable in Indian law, to replace the Chief Prosecutor in this action, for ensuring a fair

trial in the interest of justice. If Tribal Council refuses to bring in an outside attorney to represent an action against Tribal Council, it ends there - that's what happened. The majority vote of Appellate Judges Gauthier and Hall was filed on May 11, 1995. The Court could have ordered Mr. Decker to brief issues of conflict of interest and others - but the issue won't go anywhere with one side without opposition.

This case and by Tribal actions states to the People they represent that they as Tribal Council have the authority to do anything they want, whenever they want, to who they want, for whatever reason, because of who they are, and if anyone (especially persons employed by the Tribe) questions their authority for whatever reason will be reprimanded or terminated from employment, as evidenced in this case. A Councilperson should never be appointed for their own benefit, but for the benefit of the People. By judicial interference, Tribal Council at the request of Crossgun's attorney, Roberta Hoe, whose representation and conduct in this case is highly questionable and unprofessional; went forward and acted in questionable conduct throughout the case.

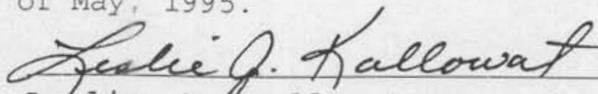
The actions in this case did a great disservice to the dedicated Tribal people that worked many hard years to make our Tribal Court system one of the best in Indian Country. Our Tribal Court system was considered one of the very best

courts in Indian Country, and was looked at and used many times as a model system of a fair, equitable, and free from judicial interference, Tribal system. Many of our Judges were asked to sit on cases in other jurisdictions because of this, and many of our Tribal Representatives were asked to travel to other jurisdictions to assist. The damage has been done to our credibility as a top notch Tribal Court system, due to the actions in this case.

The people who trusted in this Court system for relief and justice will now be doubtful in bringing action through Tribal Court. Especially harmed are the victims of abuse situations, many of which will go unreported for fear of release, as in this case. By interference of the Tribal Council, by attacking the credibility of the Tribal Court system, as evidenced in this case, it will be a long road to remedy this action by Tribal Council. Only the people of this Reservation, whom the Tribal Council serves will suffer. That as a result that this portion of the case is concluded, the People of this Reservation are the only ones who have the power now to remedy the action of the Tribal Council.

For the reasons stated, this Judge cannot agree with the majority Appellate Opinion in dismissing this action. Therefore, I DISSENT.

Witness my hand and seal this 19th day of May, 1995.


Leslie J. Kallowat,
Chief Appellate Judge



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