

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

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TRACEY CORDES, CLERK
U.S. DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
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Council
THE LAC VIEUX DESERT BAND OF LAKE
SUPERIOR CHIPPEWA INDIANS TRIBAL
COUNCIL, and the MEMBERS OF THE TRIBAL
COUNCIL, JAMES H. WILLIAMS JR.,
JOETTE PETE-BALDWIN, MICHELLE HAZEN
ALLEN, MISAABE MCGESHICK,
TRACY R. PETE, GIIWEGIIZHIGOOKWAY
MARTIN, ROBERTA L. IVEY, ~~TRYONE TYRONE~~
MCGESHICK, and SHASTA KLINGMAN,
Each an individual citizen of the Lac Vieux
Desert Band, a federally-recognized Indian
Tribe,

Case No. _____

Hon. _____

2:10-cv-223

R. Allan Edgar, US District Judge
Timothy P. Greeley, US Magistrate Judge

Petitioners,

v

LAC VIEUX BAND OF LAKE
SUPERIOR INDIANS TRIBAL COURT,
JUDGE BRADLEY DAKOTA, in his
individual capacity, THE LAC VIEUX
DESERT BAND TRIBAL POLICE, and
THE IRON COUNTY SHERIFF'S
DEPARTMENT,

Respondents.

**PETITION FOR WRIT OF HABEAS CORPUS UNDER 25 U.S.C § 1303 AND REQUEST
FOR EXPEDITED CONSIDERATION**

The Petitioners, the Tribal Council of the Lac Vieux Desert Band of Lake Superior Chippewa Indians (hereinafter "Petitioners" or "Tribal Council"), by and through their attorneys, Rosette & Associates, hereby moves the Court to issue a writ of habeas corpus pursuant to the Indian Civil Rights Act of 1968 (25 U.S.C. §1303), and for expedited consideration by this honorable Court, because the civil rights of the Tribal Council, as citizens of a federally

recognized Indian Tribe, have been violated during the course of an election dispute that has resulted in the Tribal Council's incarceration in the Iron County Jail. As demonstrated herein, the rights of the Tribal Council as tribal citizens afforded under both the Indian Civil Rights Act and memorialized by the Lac Vieux Band of Lake Superior Chippewa Indians' (hereinafter "LVD"), own Constitution have been patently and egregiously deprived of liberty without due process of law by an Order Denying the Application for Stay of Execution of the Opinion and Order Pending Appeal dated September 8, 2010, entered by the LVD Tribal Court by an unlawfully seated "LVD Special Court Judge Presiding by Appointment". The Court ordered the LVD Tribal Police to take "lawful custody" of the members of the Tribal Council made under the "General Contempt" provision of the LVD Tribal Code. The LVD Tribal Police acted on the order and to the best of our knowledge and belief, all nine (9) Tribal Council members have been lodged within the Iron County Jail Complex since approximately 2:00 p.m. (EST) on Wednesday, September 8, 2010.

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue a writ of habeas corpus under the Indian Civil Rights Act of 1968 (25 U.S.C. § 1303), which provides:

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

As is discussed in more detail in this Petition, it is well established that the appropriate remedy for violations of rights under the Indian Civil Rights Act in the course of rendering what amounts to a criminal sanction is to grant habeas relief and order release.

STATEMENT OF THE FACTS AND CASE

LVD tribal elections were held on June 26, 2010 that resulted in several challenges being filed with the election board, and subsequently the Tribal Court, regarding the validity of the results, specifically seeking a determination as to what constitutes a fifty (50) mile radius of the LVD reservation. On July 30, 2010 and August 2, 2010 at the LVD Tribal Court located in Watersmeet, Michigan the matter came before Judge Bradley Dakota (“sitting by special designation”). After considering the adduced evidence and argument of the participating parties, Judge Dakota issued a verbal order directing that a new election be conducted.

More than two weeks later, on August 19, 2010, after several actions were taken to implement the Judge Dakota’s verbal order, the Tribal Court released a written opinion which was formally entered on August 23, 2010. The written opinion varied markedly and was inconsistent with the verbal order issued on August 2, 2010. Most notably the written order required a partial new election to be conducted, as opposed to an entire new election as required by the verbal order. A copy of the August 19, 2010 Opinion is attached as Exhibit A.

Prior to the issuance of the written opinion and order entered on August 23, 2010, Mr. Alan Shively (who received the highest number of votes for Tribal Chairman at the election held on June 26, 2010), wrote a letter to Mr. Gerald Parish on August 12, 2010 wherein Judge Dakota was carbon copied on the letter. A copy of the letter is attached as Exhibit B. The letter from Mr. Shively appears to be the only evidence to support the notion of a partial new election as none of the parties requested such relief.

On August 20, 2010, Petitioner James Williams Jr. filed a Motion for Stay of Execution with Judge Dakota.

On August 23, 2010, Mr. Shively, in pro per, filed a Motion to Enforce Court Order stating that the Executive Officers of the Tribal Court should be sworn in immediately.

On August 27, 2010, Judge Dakota issued an Order Denying the Motion for Stay of Execution and effectively granted the Motion to Enforce the Court Order submitted by Mr. Shively. Judge Dakota treated Mr. Shively's filing as a "petition" and ordered the Executive Officers to be sworn in on the second Tuesday of the month, mistakenly cited as September 7, 2010 to "avoid issues of contempt." The August 27, 2010 Order is attached as Exhibit C.

The Petitioners filed an Application of the Stay of Execution of the Opinion with Judge Dakota on August 30, 2010 that raised issues as to the overall validity of the orders issued by Judge Dakota in regard to his qualifications and the method used to appoint him to his "special designation", as well as questions arising under the LVD Constitution. Due to the aforementioned concerns regarding the eligibility of Judge Dakota to serve as a judge for LVD the Application of Stay was filed with the LVD Appellate Court in accordance with the LVD Tribal Court Rules of 2008. A copy of the Notice of Appeal is attached to this petition and marked as Exhibit D.

On September 8, 2010, without notice, hearing on the Tribal Council's August 30, 2010 Motion to Stay, or attempt by the Judge Dakota or the Tribal Court to inform the Tribal Council of impending incarceration, or to issue less severe penalties other than the ultimate penalty of loss of liberty, Judge Dakota entered an Order Denying the Application for Stay of Execution of the Opinion and Order Pending Appeal which provide that the LVD Tribal Police were to take "lawful custody" of the members of the Tribal Council under the "General Contempt" provision of the LVD Tribal Code. The September 8, 2010 Order further provided that that detention of the Tribal Council members is effective until the Council swears in the new Executive Officers:

Defendants are to remain in custody pending compliance with this Court's Order and will be assessed a fine of \$250 / day / person until a majority of the required quorum under the LVD Constitution carry out their Constitutional duty of swearing in Chairman Elect Alan Shively, Vice Chair Elect Joette Pete-Baldwin, Treasurer Elect Susan M. McGeshick and Secretary elect Michelle B. Hazen-Allen.

A copy of the September 8, 2010 Order is attached as Exhibit E.

On September 8, 2010, Petitioners filed an Emergency Application for Stay of Execution of the September 8, 2010 Order Pending Appeal and Notice of Appeal (hereinafter "Emergency Application") with the LVD Appellate Court. The Emergency Application again requested the Appellate Judge to stay all proceedings and action during the pendency of the appeal, requested the immediate release of the Petitioners from incarceration, and requested that any action taken by the Tribal Council be voided in light of the extreme duress of the situation. As of this moment, the Appellate Court has failed to issue a ruling on the matter and the Petitioners remain lodged in the Iron County Jail Complex. A copy of the Emergency Petition and Proposed Order is attached as Exhibit F.

In addition, Petitioner James Williams, Jr. and the Tribal Council have joined in an emergency Petition for Writ of Habeas Corpus to be filed with the LVD Tribal Court. To date, the attempted filing of the aforementioned document has been unsuccessful due to the inability to confirm its receipt with the LVD Tribal Court Clerk. It is also worth noting that all of the properly appointed Tribal Court Judges have recused themselves, leaving only Judge Dakota, the same Judge who issued the order for unlawful detainer, to hear the petition.

ARGUMENT

I. THE EXERCISE OF THE CONTEMPT AUTHORITY OF THE COURT AMOUNTED TO A CRIMINAL PENALTY FOR WHICH HABEAS RELIEF IS PROPER

The Indian Civil Rights Act of 1968 created body of substantive rights for Indians, patterned or modeled in part on Bill of Rights, to protect individual Indians from excesses of tribal authority. 25 U.S.C. §§1301-1303. Specifically, §1302 (8) of the ICRA provides that “[n]o Indian tribe in exercising powers of self-government shall...deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law[.]” In addition, Article X, Section 1(h) of the LVD Constitution, no tribal government (including the Courts) may “[d]eny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law” especially in a case where an indefinite jail term is issued. The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.” Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187 (1965). See Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914). In the instant case, no opportunity to be heard prior to deprivation was permitted let alone at a meaningful time and in a meaningful manner.

While federal courts possess only a limited mechanism for review of alleged violations of the ICRA, habeas corpus review is proper. 25 U.S.C. §1303, See also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 70 (1978) (A federal court has jurisdiction to hear an action under the Indian Civil Rights Act if it is a habeas action.). Moreover, section §1303 of the ICRA speaks of “detention” by order of an Indian tribe as the sole jurisdictional prerequisite for federal habeas review. Courts seem to struggle with whether the habeas powers of the federal courts can be applied to matters arising out of a civil action, where the penalties are such that they present “a

severe actual or potential restraint on liberty” habeas action is proper. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996) (noting that nothing in the ICRA or case law “suggest[s] that habeas jurisdiction is available *exclusively* as a vehicle for reviewing tribal criminal proceedings.”) Therefore, when a penalty is imposed that amounts to a criminal sanction, like an indefinite jail sentence, the habeas power of this Court should apply.

The Poodry decision provides further guidance in that “even if the dispute at hand is properly characterized as arising from a “civil” determination by a tribal government, that does not necessarily deprive a district court of subject matter jurisdiction to review tribal action under the substantive provisions of the ICRA if §1303 would otherwise confer it.” Id. at 887.

While there is little doubt that tribal courts, just like state and federal courts, have the authority and power of civil (and criminal) contempt, the power is not unlimited. This is not a case of criminal contempt, however criminal sanctions are clearly being applied that imposes a several actual limitation on liberty. Poodry, 85 F.3d at 874; see also Tracy v. Superior Court of Maricopa County, 810 P.2d 1030 (Ariz. 1991) (holding that a habeas action may be used to discharge an individual who is restrained under contempt order made by court in excess of its jurisdiction.) This action has been taken against the Tribal Court without notice, hearing, or a chance to be heard. Moreover, there is no record of hearing for any of the orders issued after August 19, 2010 and more specifically, the September 8, 2010 Order, in which the court exercised its contempt power to issue an essentially indefinite term of incarceration.

In this case, the September 8, 2010 Order proclaims that custody of members of the Tribal Council is permitted under the “General Contempt” provision of the LVD Tribal Code. Presumably Judge Dakota refers to Chapter 11, Rule 11.201 providing that the filing of an appeal does not stay enforcement of the decision or order of which review is sought unless agreed upon

by the Tribal Judge who heard the case and the Appellate Judge hearing the case. However, Chapter 2, Rule 2.702 of the LVD Court Rules of 2008, provides that “[a] party who fails to follow the decision of the court, **provided no pending appeal has been filed**, will be subject to contempt of court (emphasis added). Clearly, there is an appeal pending in this matter as evidenced by the exhibits and the facts stated above. The lower court should not have acted, and even if action was appropriate the issuance of criminal sanctions was extreme and excessive.

Moreover, the Petitioners have been and will continue to be denied due process and deprived of liberty for every moment they are made to remain in jail. They are faced with only one choice, lest they act in a manner in which they believe is clearly in violation of their Constitution and laws.

For the forgoing reasons, this court should exercise its habeas authority as being requested by the Petitioners and order their immediate release from incarceration.

II. THE SEPTEMBER 8, 2010 ORDER ISSUED BY BRADLEY DAKOTA AS A LVD SPECIAL COURT JUDGE IS VOID AS A MATTER OF LAW AND IN DIRECT VIOLATION OF THE DUE PROCESS RIGHTS AFFORDED THE PETITIONERS BY THE INDIAN CIVIL RIGHTS ACT AND THE LVD CONSITUTION.

Pursuant to Article V, Section 5(a) of the LVD Tribal Constitution, all Tribal Court Judges, whether trial, appellate, special, or otherwise must be an enrolled member of LVD over the age of twenty-five (25) years of age or be “*an attorney licensed to practice before the courts of a state in the United States*” (emphasis added). Although Judge Dakota is a well-respected jurist with considerable experience as a judge for the Keweenaw Bay Indian Community, the Petitioners understand that the Honorable Judge Dakota is neither a member of the LVD Band over twenty-five (25) years of age, nor is Judge Dakota an attorney licensed to practice before the courts of any state. As such, the hearing and any orders issued by Judge Dakota are void *ab*

initio as he is ineligible to sit as a tribal court judge with LVD due to the lack of eligibility to serve as an LVD judge in any capacity.

Although Judge Dakota may have been designated by a member of the LVD Tribal Court to preside over the case, the LVD Tribal Council did not “appoint” Judge Dakota as required by Article V, Section 4(a) of the LVD Constitution, which stated that all LVD judges “shall be appointed by an affirmative vote of six (6) of the eight (8) voting members of the Tribal Council for a term of six (6) years.”

Even if we assume that Judge Dakota is eligible to serve as a LVD Judge and was duly appointed by the Tribal Council, a contempt order amounting to an indefinite jail term centered on a conditional incarceration is still unwarranted and invalid because the Tribe’s own governing document and Court rules prevent this sort of action. Moreover, the Tribal Council has properly filed an appeal of the matter and did not intentionally violate the Order of the Court.

In light of the foregoing, the September 8, 2010 Order should be viewed as invalid due to the eligibility concerns of the Judge and the habeas petition of the Tribal Council granted.

III. FURTHER PURSUIT OF TRIBAL COURT REMEDIES IS FUTILE, THUS A PETITION FOR HABEAS RELIEF IN THIS COURT IS PROPER.

Courts have held that exhaustion of tribal remedies is not required prior to petitioning for habeas corpus to challenge jurisdiction of tribal court. Moreover, a member of Indian tribe who petitions for writ of habeas corpus in federal court need not go through motions of exhaustion if he or she proves that resort to remedies provided by tribe would be futile; if a tribal remedy and theory is nonexistent in fact or at best inadequate, it might not need to be exhausted. Wounded Knee v. Andera, 416 F.Supp. 1236 (D.C.S.D.1976).

Out of respect for the LVD Tribal Court and the tribal court exhaustion doctrine, the Petitioners have appealed the September 8, 2010 Order via an Emergency Petition for Writ of Habeas Corpus. Moreover, the Petitioners have filed an Emergency Application for Stay of Execution of the September 8, 2010 Order Pending Appeal and Notice of Appeal with the LVD Appellate Court. However two problems exist, the LVD Tribal Court Clerk continues to be unavailable in order to ensure that the papers have been filed accordingly; and it is likely that the same Judge who ordered the Petitioners be taken into “lawful custody” will be the Judge who decides the petition as all of the other LVD Tribal Court Judges have recused themselves. Like, Wounded Knee where the role and responsibility of tribal court judge and the prosecutor remained with one individual. The role and responsibilities to decide issue related to this case, aside from the Appellate Court Judge, appears to rest with one individual, Judge Bradley Dakota. The same judge who issued the criminal sanctions. The same judge whose eligibility to serve has been questioned. Therefore, one can deduce that any further attempts to exhaust tribal remedies would be futile and the only remedy is for this Court to exercise its habeas authority provided for in § 1303, grant the Petitioners habeas petition, and order the released from incarceration.

PRAYER FOR RELIEF

In light of the forgoing, the Petitioners respectfully requests that this Court:

1. Expedite consideration of this Petition in any Court of the Western District of Michigan;
2. Immediately released from incarceration in the Iron County Jail Complex or any other detention center, correctional facility, whether tribal, state or federal the following individuals:

JAMES H. WILLIAMS (2-26-1968)
JOETTE PETE-BALDWIN (7-7-1971)

MICHELLE HAZEN ALLEN (2-10-1973)
MISAABE MCGESHICK (2-9-1975)
TRACY R. PETE (6-19-1972)
GIIWEGIIZHIGOOKWAY MARTIN (6-12-1949)
REBERTA L. IVEY (11-10-1968)
TYRONE MCGESHICK (2-11-1969)
SHASTA KLINGMAN (6-11-1976)


and,

3. Direct the parties to file a proposed scheduling and briefing schedule in the above-captioned matter.

Respectfully submitted,

ROSETTE & ASSOCIATES, PC

Dated: SEPTEMBER 9, 2010

By: 
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