

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
Case No. 10-2617

FILED
SEP 01 2010
MICHAEL GANS
CLERK OF COURT

UNITED STATES OF AMERICA,
Appellee,

vs.

MILO BLAINE WHITETAIL,
Appellant.

On Appeal from the
United States District Court
for The District of North Dakota

Milo Blaine Whitetail

Reg 09961-059
FCI Pekin
P.O. BOX 5000
Pekin, IL 61555

Appellant, pro se.

OPENING BRIEF

RECEIVED

SEP 1 2010

**U.S. COURT OF APPEALS
EIGHTH CIRCUIT**

SUMMARY OF THE ISSUE ON APPEAL

Can the District Court modify Whitetail's criminal sentence to include garnishment of his family's receipt of Spirit Lake Tribal disbursements without notice to his counsel nor without providing Whitetail an opportunity to challenge the garnishment?

STATEMENT OF THE CASE

On September 24, 2008, Whitetail, a Native American and member of the Spirit Lake Tribe, pleaded guilty to Assault Resulting in Substantial Injury in violation of 18 USC §113(a)(6). On December 22, 2008, Whitetail was sentenced to seventy-one months imprisonment, three years supervised release, and ordered to pay \$127,634.25 in restitution. Interest would accrue at approximately \$361.00 per year.

On December 1, 2009, nearly a year later, the AUSA sought and the Clerk of the Court issued an order of garnishment seizing \$316.00 paid from the Lake Spirit Tribe, from pro rata funds, to Whitetail's family. Whitetail's counsel was not served, and Whitetail, who is uneducated and largely illiterate, was notified at a later date. Whitetail obtained assistance from a literate fellow-prisoner, who moved that the order of garnishment be set aside, and that the previously appointed Public Defender continue to represent Whitetail in these garnishment proceedings. That motion was denied and is appealed herewith.

JURISDICTIONAL STATEMENT.

The United States Court of Appeals for the Eighth Circuit has jurisdiction over this case pursuant to 28 USC §1291 which provides for relief from a final order subject to appeal. The final order of the district court was filed July 8, 2010, and a timely notice of appeal was filed.

ARGUMENT

DID THE DISTRICT COURT ERR BY ORDERING GARNISHMENT OF WHITETAIL'S FAMILY RECEIPT OF TRIBAL DISBURSEMENTS WITHOUT NOTICE TO HIS CRIMINAL COUNSEL, AND WITHOUT PROVIDING WHITETAIL A VIABLE OPPORTUNITY TO CHALLENGE THE GARNISHMENT?

Whitetail lived in, and was raised on the Spirit Lake Indian Reservation. He is largely unable to read, and does not understand legal terms or principles. In the criminal proceedings he was determined indigent and appointed assistance of counsel from the Federal Defenders Office. His counsel understood the legal proceedings and documents, and endeavored to protect Whitetail's due process rights. Counsel advocated for Whitetail's best options.

Upon the advice of counsel, Whitetail pleaded guilty under a negotiated plea agreement. He was sentenced on December 22, 2008. Nearly a year later, on December 1, 2009, the AUSA met with the Clerk of the Court, and the Clerk issued a Writ of Continuing Garnishment. (No prior order of garnishment existed.) Whitetail received a document he could not effectively read, and he did not comprehend. A packet of documents was sent to the Spirit Lake Tribe.

Whitetail and the Tribe believe Whitetail's family pro rata tribal disbursement is exempt from seizure for payment of debt. Neither the tribe nor Whitetail can afford a lawyer with which to consult. Whitetail filed a motion to set aside the garnishment

and appoint counsel so that his due process right of due process before being denied of his property--his money--would be protected.


The District Court decided that such a tribal disbursement could be garnished under the All Writs Act, but cited no applicable statute or precedent in support. The tribal funds are exempt.

The District Court further held that because Whitetail received notice **after** the garnishment was ordered and complete, that notice precepts were met. The Court did state notice requirements under 28 USC §3202(b) were met, but never decided if Whitetail's due process guarantees under the Fifth Amendment were satisfied.

The garnishment order served to change the terms of Whitetail's criminal sentence. He received no advance notice of the change, and was not provided the Sixth Amendment assistance of counsel for his defense.

This case is providently remanded to the District Court for proceedings to determine: 1) The viability of seizing Spirit Tribe family disbursements; 2) For Whitetail to avail the assistance of counsel; and 3) to provide Whitetail a forum in which to challenge seizure of his family's funds.

Respectfully submitted,


Milo Blaine Whitetail

Appellant-Prisoner, pro se.

CERTIFICATE OF SERVICE

I, Milo Blaine Whitetail, deposited this OPENING BRIEF in the FCI Pekin prison legal mail system, bearing the proper first-class postage prepaid, on August 30, 2010.

A copy was contemporaneously mailed to:

Shon Hastings, AUSA

United States Attorney's Office
655 1 Ave. N. Ste 250
Fargo, ND 58102

All statements herein are the truth, under penalty of perjury. 28 USC §1746.

Signed,


Milo Blaine Whitetail

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