

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

CR 11-50073

Plaintiff,

vs.

MEMORANDUM OF LAW IN
SUPPORT OF DEFENDANT'S
MOTION TO DISMISS

FRANCISCO LOPEZ,
aka Francisca Lopez, Poncho Lopez,

Defendant.

COMES NOW Gary G. Colbath, Jr., Assistant Federal Public Defender, attorney for the above-named Defendant, Francisco Lopez, and submits this memorandum of law in support of Defendant's Motion to Dismiss, pursuant to Local Rule 7.2 of the United States District Court for the District of South Dakota.

STATEMENT OF FACTS

Francisco Lopez is a resident alien from Mexico. In the early 1990s, he was living in Rapid City, South Dakota, and working at Federal Beef Processors. He lived with his girlfriend at the time, Francine Joyce Guevara (Francine). In December 1993, the couple was not and never had been married.

On December 23, 1993, Francine's sister, Carla T. Kocer, gave birth to a male child (J.R.) in Rapid City. Apparently, Kocer had difficulties caring for other children of hers and the Department of Social Services had intervened in the custody of those children. Fearing that DSS would also take custody of J.R., Kocer convinced her sister Francine to adopt J.R. immediately after birth so the child remained with family instead of going into state custody. Francine agreed.

Francine asked Mr. Lopez if he would sign an adoption petition to help her “save” the baby from being taken by state authorities. She told him he would not be financially, or otherwise, responsible for the child, as she planned on raising the boy. Lopez agreed and signed a document presented to him by Francine. Lopez could not read English and did not have any real understanding of the petition other than what Francine told him.

On December 29, 1993, Francine and Lopez, along with J.R., traveled to Pine Ridge. They appeared in Tribal Court for an adoption hearing. At the time, neither Lopez nor J.R. were Tribal members. At no time prior to the hearing did a representative of DSS, LOWO, or the Tribal court meet with Lopez or Francine to inquire about their status or the details of the child’s familial situation.

During the hearing, the Tribal Judge merely inquired as to whether the couple wished to adopt the child and whether they had each signed the petition. He also confirmed that the biological mother had terminated her parental rights prior to the hearing. Although this fact was represented in the petition, no evidence exists that Kocer had done anything legally to terminate her rights. Moreover, there was no mention of the biological father of the child during the hearing, he was not present, he had not received notice of the adoption, and he had not waived his parental rights to the child. The Tribal Court made no finding with respect to the biological father nor did it terminate his rights. Finally, at no time did Mr. Lopez sign any consent to be bound by Tribal jurisdiction nor was that discussed or made part of the adoption petition or

proceeding. Similarly, no record exists of J.R.'s guardian or representative formally submitting the non-member child to the jurisdiction of the court.

The adoption was approved by the Tribal Court. (See Exhibit One attached hereto.) Thereafter, Francine and Lopez took the child home to Rapid City. Lopez assumed Francine now had legal custody of the child. The couple remained together for approximately two years during which time they cared for J.R. At no time during this period did anyone tell Lopez he was financially responsible for the child. He helped care for J.R. and several other of Francine's children while he lived with them.¹ Ultimately, the couple broke up about a year later and Lopez left Francine's residence. Since the couple was never married, no divorce proceeding occurred nor did any court proceeding regarding the custody of J.R. take place. The child simply stayed with Francine as Lopez did not believe he had any legal tie to the child.

Shortly after the couple's separation, Lopez was contacted by the South Dakota Office of Child Support Enforcement and child support proceedings began against him. Those have continued, all originating from the Tribal Court adoption order which first allegedly obligated Lopez to support J. R.

ARGUMENT AND AUTHORITIES

A. Collateral Attack on Jurisdiction is Warranted Here.

Few circuits have addressed the issue of whether a defendant charged with violating § 228 may challenge the personal jurisdiction of the state circuit court in issuing the underlying

¹Francine and Lopez had no biological children together.

child support order. The Court of Appeals for the Tenth and Seventh Circuits held a defendant may raise such a collateral attack. *See United States v. Bigford*, 365 F.3d 859 (10th Cir. 2004); *United States v. Kramer*, 225 F.3d 847 (7th Cir. 2000). The Court of Appeals for the Second Circuit, in ruling on a collateral challenge based on subject matter jurisdiction, expressed disagreement with the reasoning of the Tenth Circuit. *See United States v. Kerley*, 416 F.3d 176 (2d Cir. 2005). It does not appear the Court of Appeals for the Eighth Circuit has weighed in on the issue.

The *Bigford* court identified an exception, applicable here, to a defendant's ability to mount a collateral attack on a court's personal jurisdiction. "[A] collateral attack on jurisdictional grounds is precluded in a subsequent proceeding where the jurisdictional issue was 'fully and fairly litigated and finally decided' in the prior proceeding." *Bigford*, 365 F.3d at 865. "[A]s long as a party had an opportunity to litigate the jurisdictional issue, it is not subject to collateral attack on that basis." *Id.*

In the case at bar, the issue of whether the OST court had jurisdiction to grant Lopez an adoption and thereby obligate him to support J.R. has never been litigated in either tribal or state court. No formal challenge to the Tribal Court's jurisdiction has ever been presented. Thus, the matter has never been "fully and fairly litigated" nor "finally decided" by any court. As such, the matter is ripe for consideration by this court as it is solely that adoption proceeding and order that forms the underlying basis for Lopez's support obligation and prosecution herein.

In this case, the Tribal Court's order and determination should not be given full faith and credit by this court because, first, the Tribal court had no jurisdiction, and second, Lopez had no meaningful opportunity, nor did he have a chance to knowledgeably litigate that issue in Tribal Court. Full faith and credit applies so long as the Tribal Court "had jurisdiction over the parties and the subject matter." *See Nevada v. Hall*, 440 U.S. 410, 421, 99 S. Ct. 1182, 1188, 59 L. Ed.2d 416 (1979). "[A] judgment is entitled to full faith and credit – even as to questions of jurisdiction – when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Durfee v. Duke*, 375 U.S. 106, 111, 84 S. Ct. 242, 245, 11 L. Ed.2d 186 (1963). *See also*, *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U.S. 522, 525-27, 51 S. Ct. 517, 518, 75 L. Ed. 1244 (1931); *Wells v. Wells*, 698 N.W.2d 504 (S.D. 2005) (in the context of a party contesting personal and subject matter jurisdiction of a State court in subsequent state court proceeding, this Court noted "[a]n even stronger preclusion applies to collateral challenges to personal jurisdiction.").

Under a full faith and credit review, the judgment may also be examined for fraud. *Kwongyuen Hangkee Co. v. Starr Fireworks, Inc.*, 634 N.W.2d 95, 96-97 (S.D. 2001) (quoting *Hilton v. Guyot*, 159 U.S. 113, 202-03, 16 S. Ct. 139, 158, 40 L. Ed. 95, 122 (1895)). Here, the evidence will show that fraudulent representations were made to Lopez by Francine and J.R.'s biological mother that induced him to sign a fraudulent petition for adoption that was presented to the Tribal Court. Then, without properly acquiring or having jurisdiction over Lopez, a non-

member, or J.R., a non-member, the Tribal Court acted on the fraudulent petition and entered an adoption order without evidentiary support and contrary to Tribal law.

Because the government here cannot show that the issue of Tribal Court jurisdiction to enter an adoption order which gave rise to Lopez's support obligation was ever fully and fairly litigated, he is entitled to collaterally attack that determination in this court and seek relief from the adoption order that was wrongfully entered.

B. No Jurisdiction Existed to Obligate Lopez to Pay Child Support.

The Oglala Sioux Tribal code contains specific and detailed provisions about how its courts obtain jurisdiction over non-members. Generally, Chapter 1, Section 1, of the code deals with "Jurisdiction over Persons." That section provides:

The Oglala Sioux Tribal Court of the Pine Ridge Reservation shall have jurisdiction over all offenses when committed by a member of the Tribe, by non-member Indians who are members of any recognized Tribe under Federal jurisdiction, or by any other person consenting to jurisdiction, as hereinafter provided.

The Juvenile Court of the Oglala Sioux Tribal Court is hereby designated the Youth and Family Division of the Oglala Sioux Tribal Court. The Youth and Family Division of the Oglala Sioux Tribal Court shall have the primary jurisdiction of enforcing the juvenile code of the Oglala Sioux Tribe and associated family matters.

Section 1.1 of the OST code deals with "Consent to Jurisdiction over all Individuals." It provides:

(a) All leases, permits, easements, or other official actions which authorize the residence of any person within the boundaries of the Pine Ridge Reservation or which authorize any person to do any business within the boundaries of the Pine Ridge Reservation, including all employment contracts with the Tribe or the United States, shall contain the following clause: "The undersigned hereby agrees to abide by the laws and ordinances of the Oglala Sioux Tribe and consents to the civil jurisdiction of the Oglala Sioux Tribal Courts.

(b) All leases, permits, or other contracts or grant agreements which authorize any person, including but not limited to, the Oglala Sioux Tribe and the United States, to employ employees for the performance of work within the boundaries of the Pine Ridge Reservation shall contain the following clause: "All contracts for employment to perform the work contemplated by this agreement shall contain the following clause: 'The undersigned employee hereby agrees to obey the laws and ordinances of the Oglala Sioux Tribe and consents to the civil jurisdiction of the Oglala Sioux Tribal Court.

Finally, adoption of a child is covered by Chapter 3, Section 53, of the OST code. The specific provisions governing adoption are found at Sections 53.1 through 53.9. A portion of those sections provides:

SECTION 53.5 JURISDICTION.

The Oglala Sioux Tribal Court is vested with jurisdiction to hear, try and determine all matters arising under the provisions of this Chapter.

Hist: 1937 Code, Ch. 3, Sec. 29.

SECTION 53.6 APPROVAL BY COURT NECESSARY.

The person adopting a child and the child adopted, and the other persons whose consent is necessary, must appear before a Judge of the Oglala Sioux Tribal Court and the necessary consent must thereupon be signed, and an agreement executed by the person adopting, and filed with the Court, to the effect that the child shall be treated in all respects as his own lawful child should be treated. Provided, that all persons whose consent is necessary, may appear personally before the Court, and that this Section shall not apply to incorporated homes or societies for destitute children.

Hist: 1937 Code, Ch. 3, Sec. 29.

SECTION 53.7 EXAMINATIONS TO BE SEPARATE.

The Oglala Sioux Tribal Court must examine all persons appearing before the Court pursuant to the last Section, separately. If satisfied that the interests of the child will be promoted by the adoption, the Court must issue an order declaring that

the child shall henceforth be regarded and treated in all respects as the child of the person adopting.

Hist: 1937 Code, Ch. 3, Sec. 29.

In the present case, no evidence exists to show that Lopez consented to or somehow voluntarily subjected himself to jurisdiction of the OST court. He did not sign any written consent to be bound by Tribal jurisdiction, the adoption petition contained no affirmation or other consent to submit to jurisdiction. The Tribal Court, in its order granting the adoption, made no finding that it had jurisdiction over either Lopez or the child, both of whom were non-members.

Moreover, although the Tribal Order indicates otherwise, Lopez was never examined separately regarding his desire to adopt nor was he informed by the Tribal Court in any fashion about his rights and the legal consequences of such adoption should he choose to proceed. This would be a violation of Chapter 3, Section 53.7, of the Domestic Relations Code. Lopez appeared without representation and could not read any of the documents utilized by the court including the petition he was asked to sign. The petition and the court's order on their face contain false and inaccurate information. The court's order references "evidence" the court purportedly considered submitted through the report of a court appointed investigator. However, the name of the investigator is left blank and in reality no investigator was ever appointed by the court nor was any "evidence" submitted to the court for consideration.²

² A copy of the Tribal court adoption order is attached as Exhibit Two.

Based upon any showing that Lopez was properly and formally submitted to the jurisdiction of the Tribal court, the adoption order forming the basis of his support obligation is void and unenforceable. The same is true with respect to jurisdiction over the child, J.R. Even if jurisdiction was found to exist by this court, the adoption proceeding was clearly conducted in violation of Tribal law and is void and unenforceable in any event. The provisions of the Tribal Court regulating adoption proceedings were not complied with. Lopez was fraudulently and deceptively tricked into consenting to an adoption without any knowledge of his rights or the consequences thereof. In light of the misrepresentations made to him, the lack of individualized inquiry on the part of the court, and complete lack of proper investigation or other evidence to support the petition, Lopez's consent to the adoption was unknowing and involuntary and should not be upheld.

CONCLUSION

This prosecution is premised on a state child support order in which Lopez's support obligation derives solely from a Tribal Court adoption of the child involved, J.R. However, the Tribal Court did not have proper jurisdiction over either Lopez or J.R. so as to grant any adoption and thereby legally obligate Lopez to support the child. Moreover, even if jurisdiction was found to have existed, the adoption was granted in violation of Tribal law such that it should be declared void and invalid with respect to Lopez and his rights and obligations thereunder. Accordingly, Lopez urges this court to dismiss the indictment herein with prejudice.

Dated this 27th day of February, 2012.

Respectfully submitted,

NEIL FULTON
Federal Public Defender
By:

/s/ Gary G. Colbath, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2012, a true and correct copy of the foregoing Memorandum of Law in Support of Defendant's Motion to Dismiss was served upon the following person, by placing the same in the service indicated, addressed as follows:

Sarah B. Collins	<input type="checkbox"/>	U.S. Mail
Assistant U.S. Attorney	<input type="checkbox"/>	Hand Delivery
United States Courthouse	<input type="checkbox"/>	Facsimile
515 Ninth Street	<input type="checkbox"/>	Federal Express
Rapid City, SD 57701	<input checked="" type="checkbox"/>	Electronic Case Filing

/s/ Gary G. Colbath, Jr.

Gary G. Colbath, Jr., Assistant Federal Public Defender