IN THE HOOPA VALLEY TRIBAL COURT OF APPEALS
HOOPA VALLEY TRIBE
HOOPA, CALIFORNIA

Hoopa Valley Tribal Council,	**NO. A-12-002 {C-12-042}**
Petitioner/Appellee,	
v.	**OPINION**
Arthur Pliny Jones,	
Respondent/Appellant.	

Before: Lisa E. Brodoff, Chief Judge; Michelle Demmert, Judge; Matthew L.M. Fletcher, Judge.

Appearances: Clifford Lyle Marshall, Sr., spokesman for Appellant Arthur Jones; Rebecca McMahon, Attorney for Appellee Hoopa Valley Tribe.

Fletcher, J.:

We affirm the Order of Exclusion issued by the Hoopa Valley Tribal Court dated October 22, 2012, and remand to the trial court for further proceedings consistent with this opinion.

Introduction and Procedural History

In 1986, the Hoopa Valley Tribal Council enacted Ordinance No. 2-86, Exclusion of Persons from the Hoopa Valley Reservation, now codified as Title 5 of the Hoopa Valley Tribal Code (HVTC). Section 1 of the ordinance reads in pertinent part:

> Any person may be excluded from the Reservation and all areas under the jurisdiction of the Hoopa Valley Tribal Court for any of the following reasons:
>
> (1) Repeated commission of a crime or breach of peace as defined by Tribal, State or Federal laws.
>
> * * *
>
> (4) Unauthorized entry into Tribal or individual land for any purpose, including but not limited to camping, hunting, fishing, trapping, timber cutting (including Christmas trees), or other property of the Tribe or any resident of the Reservation.

5 HVTC §§ 1(1) and (4). More recently, in 2009, the Tribal Council enacted Resolution No. 09-180, Priority for the Exclusion of Individuals Who Distribute Illegal Drugs within the Exterior Boundaries of the Hoopa Valley Indian Reservation. The final clause of Resolution No. 09-180 states "The Hoopa Valley Tribal Council hereby declares that persons trafficking drugs within the exterior boundaries of the Hoopa Valley Indian Reservation have committed an unauthorized entry and they will be placed on a priority list for exclusion from the Hoopa Valley Indian Reservation."

On July 9, 2012, the Hoopa Valley Tribal Council petitioned the Tribal Court for an order to exclude Arthur Pliny Jones from the Hoopa Valley Indian Reservation under both sections 1 and 4 of the Hoopa Valley Tribal Exclusion Ordinance. The Tribal Council alleged that Jones was excludable because he had "repeated commission of a crime" and, in doing so, had committed an "unauthorized entry into tribal...lands," as follows: Jones was arrested on September 7, 2011 "within the Reservation boundaries for the possession of 7 pounds of processed marijuana, 5 1/2 ounces of methamphetamine, drug-related packing materials, a loaded semi-automatic handgun, and $43,100 cash." The Tribal Council alleged that Jones thereupon pled guilty in Humboldt County Superior Court to two felony violations: transportation of a controlled substance and possession of a controlled substance for sale. The Tribal Council also alleged that Jones had pled guilty in Humboldt County Superior Court in 1987 to a felony violation for possession of a controlled substance.

On October 22, 2012, after hearing held on October 18, 2012, the Tribal Court granted the petition to exclude Jones. Notably, the Court held that the Tribal Council's factual allegations were not disputed by Jones. The trial court also denied Jones's request for a jury trial and excluded character evidence as irrelevant and therefore inadmissible.

Standard of Review

The Hoopa Valley Tribal Code sets out the Appellate Court standard of review for appeals from trial court decisions in HVTC 2.6.18 – Standard of Appellate Review. The relevant portions are as follows:

> (a) De Novo review
> Questions of law will be decided with no deference granted to the tribal court decision.
>
> * * *
>
> (c)Abuse of discretion
> Where the lower court exercised its grant of discretion on an issue, the appellate court may only reverse the lower court if it finds the decision was arbitrary, capricious, or not in accordance with the law, or otherwise an abuse of discretion.

Matters of discretion are those that are not controlled by statute. *See, e.g., In the Matter of E.M.*, 9 NICS App. 1, 6 (Hoopa Valley Tribal Court of Appeals 2009). The abuse of discretion standard is highly deferential to the lower court. *See, e.g., Hoopa Valley Tribal Court*

v. Taylor, 7 NICS App. 3, 5 (Hoopa Valley Tribal Court of Appeals 2005) ("Although the abuse of discretion standard can be defined in a number of ways, under that standard an appellate court will reverse a trial court only where it has 'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'") (citation omitted); *In the Matter of Robertson*, 4 NICS App. 111, 118 (Hoopa Valley Tribal Court of Appeals 1996) (holding that if "substantial evidence [is] in the file to support the trial judge's conclusion," the decision will be reversed as a "manifest abuse of discretion").

Here, with two exceptions, all of Jones's claims are matters of interpretation of the Hoopa Valley Tribal ordinances or constitution; therefore the error of law de novo standard applies to our review. Jones's claims that the trial court erred when it both denied him a jury trial and improperly excluded his character evidence are reviewed by this court under the abuse of discretion standard.

Discussion on the Merits

Jones brings several challenges to the exclusion order; to paraphrase: (1) the authority of the Hoopa Tribal Court to impose an exclusion order, which Jones alleges is a criminal penalty; (2) Jones's conviction does not meet the elements required for exclusion under the Exclusion Ordinance because he did not commit the exact same crime more than once; (3) the tribal court has no constitutional authority to exclude Jones from fee lands within the reservation; (4) the Exclusion Ordinance is unconstitutionally vague; (5) Resolution No. 09-180 is unlawful under the Legislative Procedures Act; (6) the trial court erred in both denying Jones a jury trial and excluding character evidence; and (7) the exclusion petition constitutes selective prosecution.

We address each of these challenges in turn.

1. Authority of the Hoopa Tribal Court

We reject Jones's claim that the Hoopa Tribal Court does not have jurisdiction to issue an exclusion order. As the Tribal Council points out, Jones did not raise this argument at the trial court level. However, lack of subject matter jurisdiction may be raised by the parties or the court at any time in the proceedings as it goes to the very authority of the court to hear the case. "Lack of subject matter jurisdiction is never waived and can be raised by any party or the court at any time." *Alire v. Jackson*, 65 F. Supp. 2d 1124, 1125 (D. Or. 1999) (citations omitted). Therefore, we go to the merits of the argument.

We hold that the Hoopa Valley Tribal Court does have jurisdiction to issue the exclusion order. Twice, the Hoopa Valley Tribal Council has legislated in this area, and never has the Council asserted that the Exclusion Ordinance is criminal in nature. The council easily could enact legislation utilizing exclusion as a criminal sanction, as other tribes have. *See* Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 113-18 (2007) (discussing several exclusion ordinances treating exclusion as a civil sanction, and several others treating exclusion as a criminal sanction). The Exclusion Ordinance does not require the Tribal Court to first determine that a crime against the People of the Hoopa Valley

Tribe has been committed before exclusion is authorized, only that an individual has a record of criminal activity under "Tribal, State or Federal laws." 5 HVTC § 1(1). Importantly, the Tribal Council's purpose in enacting the Exclusion Ordinance was not punishment, but public safety. *See* Ordinance No. 2-86 at 1 ("WHEREAS, It is the desire of the Hoopa Valley Business Council to enact an Ordinance governing exclusion of persons from the Hoopa Valley Indian Reservation for the purpose of enforcing laws to protect the territory and people within the jurisdiction of the Hoopa Valley Tribe...."). As the United States Supreme Court held in *Smith v. Doe*, 538 U.S. 84 (2003), "[an] Act's rational connection to a nonpunitive purpose is a '[m]ost significant factor in our determination that the statute's effects are not punitive." *Id.* at 102. The Tribal Council's desire to protect the people of the Hoopa Square is rationally connected to its decision to authorize the exclusion of persons with a record of repeated criminal activity.

Even if we assume, only for purposes of this argument, that exclusion orders under Title 5 are exclusively criminal penalties, Public Law 280, upon which Jones relies to suggest that the Hoopa courts have no criminal jurisdiction, does not divest tribal governments of their inherent authority to punish its own members for criminal activity. All authorities that have reviewed this question are in agreement. *See, e.g., Southern Ute Tribe v. Frost*, 19 Indian L. Rep. 6132, 6132 (Southern Ute Tribal Court 1992); *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990); *Hester v. Redwood County*, 885 F. Supp. 934, 939 (D. Minn. 2012); *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp. 2d 1195, 1197 (C.D. Cal. 1998); *State v. Schmuck*, 850 P.2d 1332, 1343 (Wash. 1993); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04[3][c], at 555-56 (2012 ed.). The Hoopa Constitution also appears to assume tribal authority to punish criminal violators, if the Tribal Council so chooses. *See* Constitution and Bylaws of the Hoopa Valley Tribe, Art. IX, § 1(k) (recognizing Tribal Council authority "[t]o promulgate and enforce ordinances governing the conduct of members and nonmembers of the Hoopa Valley Indian Tribe"). *Cf. Moore v. Nelson*, 270 F.3d 789, 792 (9th Cir. 2001) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.") (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978)). Moreover, the Hoopa Valley Tribe retains inherent authority to exclude persons from Hoopa lands. We agree with the foundational Indian law decisions that roundly affirm the authority of tribal governments to exclude individuals from tribal lands. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 176 (1982) (Stevens, J., dissenting) (quoting *Maxey v. Wright*, 54 S.W. 807, 809 (Indian Terr. 1900)); *Cf. Lopez v. Chehalis Tribe*, 4 NICS App. 8, 15 (Chehalis Tribal Court of Appeals 1995) ("[W]e are equally cognizant of the necessity of preserving the Tribe's sovereign powers, not the least important of which is the Tribe's power to exclude."); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) ("A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established."). Other tribes have imposed exclusion on tribal members for violations of tribal law, most notably for repeat drug offenses. *See* Mary Swift, *Banishing Habeas Jurisdiction: Why Federal Courts Lack Jurisdiction to Hear Tribal Banishment Actions*, 86 WASH. L. REV. 941, 943-44 (2011) ("In the past two decades, tribes have begun using banishment again to combat drug abuse and crime ravaging tribal communities. Until recently, tribes could only imprison individuals for up to one year, so often banishment has been used as a last resort against repeat offenders.") (footnotes omitted). *See also Bullcoming v. Cheyenne and Arapaho Tribes*, 9 Okla. Trib. 528 (Cheyenne and Arapaho Tribes Supreme Court 2006) ("The tribal embezzlement

statute authorizes banishment from tribal territory and association for up to ten years if the value of the embezzled property exceeds $1,000...."); Tulalip Tribal Code, Title 2, Chapter 2.40 ("Exclusion"). In any event, Hoopa law does not divest the Tribal Court of jurisdiction to enforce the Exclusion Ordinance.

2. Elements of Exclusion

We reject Jones's contention that Jones's 2012 conviction does not meet the elements required to comply with the Exclusion Ordinance. Any person may be excluded from the Hoopa reservation for "[r]epeated commission of a crime" under state, federal, or tribal law. 5 HVTC § 1(1). Jones argues that the language of the Ordinance ("a crime") implies that his convictions must therefore be of the *same* crime. We will not engage in such a cramped, formalistic reading of the statute, which on its face is sufficiently clear. The Tribal Council's statement of purpose in enacting Ordinance No. 2-86 – "enforcing laws to protect the territory and people within the jurisdiction of the Hoopa Valley Tribe" – would be severely undercut if we judicially limited the ordinance in the manner Jones suggests. Moreover, we find the argument disingenuous. Jones has pled guilty to three separate and extremely similar drug-related felonies. We hold that the exclusion ordinance does not require the repeat commission of the exact same crime to impose the exclusion penalty, and that under the undisputed facts of this case, Mr. Jones is excludable under 5 HVTC § 1(1).

3. Access to Fee Land

Lacking a record on this question, we cannot adequately address Jones's assertions that the exclusion order unconstitutionally restricts his access to public and private property, and that the Tribal Court has no jurisdiction to exclude anyone from fee lands on the reservation.

We remand to the trial court for limited fact finding to determine whether Jones currently owns a property interest in on-reservation fee lands, when he acquired the property interest (if any), and whether the exclusion constitutes an unconstitutional taking of that property interest (if any). We hold, and therefore instruct the trial court, that if Jones is found to have acquired a property interest in fee lands *after* the issuance of the exclusion order, then it was for the purpose of attempting to undermine the enforcement of the exclusion order; therefore, no unconstitutional taking shall be found to have occurred in that circumstance. Assuming it is necessary, we instruct the trial court to determine in the first instance whether Jones's jurisdictional claim is affected by the decisions in *Bugenig v. Hoopa Valley Tribe*, 5 NICS App. 37 (Hoopa Valley Tribal Ct. App. 1998) and *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 927 (2002).

4. Vagueness

We disagree with Jones that the Exclusion Ordinance is unconstitutionally vague, though we find the question to be far from obvious. "A law is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability; it violates the first essential of due process of law and is void for vagueness."

Burns Paiute Indian Tribe v. Dick, 3 NICS App. 281, 284 (Burns Paiute Tribal Ct. App. 1994). *See also Dodge v. Hoopa Valley Gaming Commission*, 7 NICS App. 51, 60 (Hoopa Valley Tribal Ct. App. 2005) (holding that a tribal ordinance offering three different procedures to challenge a gaming license revocation action violated the due process rights of a gaming employee).

Jones attempts a wide variety of arguments in this vein, but the plainest and most persuasive claim relates to the alleged vagueness of the character of crimes that must be committed in order to justify exclusion. In Jones's words:

> [A] person can be convicted of a single count of murder, mayhem, rape, or child sexual assault and not fear being banished/excluded from the Reservation. But a person with multiple convictions for misdemeanor vagrancy, or drunk in public, or being under the influence of controlled substance [sic], or petty theft, or speeding, or jaywalking, could be subject to exclusion simply by a majority vote of the Tribal Council.

Appeal of Order of Exclusion, at 7.

There is some force to this argument, but not enough to persuade us that the Hoopa exclusion ordinance is unconstitutionally vague. In *Burns Paiute Indian Tribe v. Dick*, the Burns Paiute Tribal Court of Appeals held that a tribal exclusion ordinance that subjected persons to exclusion for "the violation or any tribal law or ordinance" or "the violation of any federal or state law" was void. *Dick*, 7 NICS App. at 282.[1] The court noted that "[u]nder its provisions a [person] could be excluded for committing a parking violation on the reservation or having committed an infraction in Florida." *Id.* at 284. There is relatively little difference between the Hoopa exclusion ordinance and the Burns Paiute ordinance, at least in relation to the provisions relating to violations of tribal, state, or federal law. That said, the Burns Paiute Tribal Court of Appeals' analysis belied its own test, which was that a person of common intelligence must guess at its meaning. The Burns Paiute statute, much like the Hoopa statute, was clear in that the violation of a tribal, state, or federal law justified exclusion. While it is possible, one supposes, that one could be excluded under the Hoopa ordinance for crimes as disparate as those listed by Jones in his brief, a person of common intelligence could easily discern that possibility. That is all that is required by a statute challenged for vagueness.

Perhaps the Hoopa Exclusion Ordinance is too broad, but the ordinance is not vague. The breadth of the Exclusion Ordinance is a policy question left to the policymaking branch of government.

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[1] The court noted that a separate provision of the Burns Paiute exclusion ordinance allowed for exclusion in the event a person engaged in "any other act that harms the health, welfare, safety, morals, image, cultural traditions, or spirit of the Burns Paiute Tribe." *See Dick*, 7 NICS App. at 285. Hoopa's exclusion ordinance has no similar provision.

5. Lawfulness of Resolution No. 09-180

Because we hold that the trial court was authorized to exclude Jones under 5 HVTC § 1(1) for the "repeated commission of a crime," we have no need to interpret or pass on the lawfulness of Resolution No. 09-180 under the Legislative Procedures Act, 6 HVTC § 6.1 et seq.[2]

6. Denial of Jury Trial and Exclusion of Character Evidence

We reject Jones's claims that the trial court improperly denied him the right to a jury trial and further denied him the right to introduce character evidence during his hearing. As we held above, the exclusion order is civil in nature. Rule 51(b) of Title 3 of the Code grants a jury trial as of right upon request only to "persons accused of an offense punishable by confinement." Under 3 HVTC Rule 51(b) the trial court had discretion to allow a jury trial. The Hoopa Exclusion Ordinance is largely ministerial – if the fact finder determines that the person subject to the exclusion order engaged in the "repeated commission of a crime," then exclusion is authorized. 5 HVTC § 1(1). We find no abuse of discretion in this context.

Similarly, the trial court's decision to exclude Mr. Jones's character evidence is also a discretionary ruling. *See* 2 HVTC § 2.5.01 (providing that "evidence which is not relevant is not admissible"). The central issue in this case is whether or not Mr. Jones was excludable under the ordinance because he had "repeated commission of a crime." Jones's good character has no direct relevance to these grounds for exclusion.

We hold that, for both the jury trial denial and exclusion of character evidence, the trial court reasonably interpreted the law and did not abuse its discretion in making these rulings.

7. Selective Prosecution or Enforcement

We reject Jones's claim that the enforcement order constitutes selective prosecution or selective enforcement in violation of tribal law. Other than alleging without proof that others on the Reservation have committed offenses that may justify exclusion, Jones has made no factual representations suggesting that the Tribal Council "deliberate[ly] or purposeful[ly] discriminat[ed against him] on an unjustifiable standard such as race, religion, or other arbitrary classification." *Davisson v. Colville Confederated Tribes*, 10 Am. Tribal Law 403, 409 (Colville Tribal Court of Appeals 2012). *See also Nelson v. Yurok Tribe*, 5 NICS App. 119, 128 (Yurok Tribal Court of Appeals 1999) ("The only evidence on this point is Appellant's repeated statements at his various court appearances that he is not the only one who violates the tribe's fishing ordinances. Even if this is true, a claim of selective enforcement requires far more than a showing that others break the law and do not get caught. There was neither selective enforcement nor a substantive due process violation in this case.").

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[2] We note that the code itself instructs us to defer, at least to some extent, to the Tribal Council's interpretation of "major action." 6 HVTC § 6.1 ("The definition of the term 'major action' as used in this Act should be left to the reasonable interpretation of the Tribal Council and Tribal Court.").

Conclusion

We affirm the trial court's ruling, and remand to the trial court for further proceedings consistent with this opinion.

It is so ordered, this 30th day of July, 2013.

For the Panel:

Lisa E. Brodoff, Chief Judge
Michelle Demmert, Judge
Matthew L.M. Fletcher, Judge

I CERTIFY THAT ON JUL 1 3 2013
I PROPERLY MAILED A COPY OF THIS DOCUMENT ADDRESSED TO EACH OF THE FOLLOWING NAMED PERSONS, AT THE ADDRESSES LISTED BELOW.

SUPAHA McCOVEY — 07-30-13

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