

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHRISTOPHER H. FREEMONT,

Defendant.

8:17CR379

**GOVERNMENT'S RESPONSE
TO DEFENDANT'S MOTION
TO SUPPRESS STATEMENT**

On January 16, 2018, defendant filed a Motion to Suppress (ECF No. 24) and a brief in support thereof (ECF No. 25). The government filed its brief in opposition to the motion on January 22, 2018. (ECF No. 28). Defense counsel withdrew the motion to suppress on February 9, 2018 (subject to reassertion) when defendant failed to appear for the second time for the scheduled hearing. (ECF No. 35). The Court issued a warrant for defendant's arrest following defendant's failure to appear at the February 9, 2018 hearing, and defendant had an initial appearance in federal court on February 14, 2018 following his arrest on the bench warrant. (ECF No. 38). At the February 14, 2018 hearing, defendant requested this case be re-progressed, and the Court set a pretrial motion deadline of February 21, 2018. (ECF No. 40). On February 21, 2018, defendant filed an updated Motion to Suppress (ECF No. 44) and supporting brief (ECF No. 45). The Court has now scheduled an evidentiary hearing in this matter for April 5, 2018, at 10 a.m. The United States opposes defendant's motion, incorporates its earlier arguments (ECF No. 28), and submits the following brief in support of its resistance.¹

¹ The government intends to offer exhibits 1-4 under seal at the suppression hearing on April 5, 2018. The Court and counsel previously received courtesy copies of the exhibits with a letter from the undersigned dated January 23, 2018.

I. FEDERAL PROCEDURAL HISTORY

A federal grand jury returned a one-count indictment against defendant, charging him with domestic assault by an habitual offender in violation of 18 U.S.C. § 117. The indictment alleges that, on or about May 5, 2017, defendant committed a domestic assault against L.R., after having been previously convicted of assaults against an intimate partner/spouse on four separate occasions. (ECF No. 1). The indictment was filed on December 12, 2017. (ECF No. 1).

Following his arrest by the FBI on the federal warrant, defendant had an initial appearance and arraignment on the indictment on December 18, 2017. (ECF No. 10). The Court appointed the Office of the Federal Public Defender to represent defendant at the hearing on December 18, 2017. (ECF No. 10).

II. FACTUAL BACKGROUND & TRIBAL COURT PROCEEDINGS

In a tribal complaint dated May 12, 2017, case number CR17-05-056, defendant was charged with (1) Domestic Abuse, in violation of Omaha Tribal Code § 11-2-1(a); and (2) Aggravated Assault, in violation of Omaha Tribal Code § 5-4-5, in connection with an assault of L.R. that occurred on or about May 5, 2017. (Gov't Ex. 3). The tribal prosecutor requested an arrest warrant on the charges. Defendant was arraigned on the complaint in tribal court on May 22, 2017, at which time the tribal court appointed public defender Nate Merrick, a lay advocate.² (Gov't Ex. 4). The tribal court's arraignment order sets forth defendant's rights and states: "The Tribe is not required to provide an attorney for you, although the Tribe does provide a Public Defender." (Gov't Ex. 4).

² Nate Merrick serves as the Omaha Nation's "public defender" and assists clients in a non-attorney capacity with tribal court proceedings. He did not attend law school and is not a licensed attorney. He has a background in law enforcement, and does not have a college degree.

Court records reveal that, after his tribal court arraignment, defendant repeatedly failed to appear in tribal court, and the court issued additional warrants for his arrest. Specifically, defendant failed to appear for tribal court on August 9, 2017, and September 13, 2017, and the court subsequently issued arrests warrants in connection therewith on August 16, 2017 and September 13, 2017. When defendant appeared in tribal court on October 25, 2017, the court set a jury trial for December 27, 2017.

On October 1, 2017, Omaha Nation Law Enforcement Services informed Special Agent Jeffrey Howard of the May 5, 2017 assault of L.R., as well as a September 26, 2017 report to the Nebraska abuse and neglect hotline pertaining to defendant. Information provided to Special Agent Howard included a written child abuse/neglect intake worksheet (dated 09-26-2017), which documents a report from L.R. that defendant had been sexually abusing L.R., selling L.R. for sex, and further included L.R.'s suspicion that defendant kidnaps children from the Walthill area of the Omaha Reservation. Thereafter, the FBI began an investigation into possible violations of federal law. As part of the independent federal investigation, FBI Special Agent Howard interviewed defendant at the door of defendant's home on November 14, 2017. During the interview, defendant told Special Agent Howard that the tribal charges against him arising from the May 5, 2017 incident with L.R. were "dropped." (Gov't Ex. 1; Gov't Ex. 2 at 1). Defendant also made statements and admissions about the events of May 5, 2017.

III. ARGUMENT

Defendant's statements to FBI Special Agent Howard should not be suppressed because no violation of defendant's Sixth Amendment right to counsel occurred.

A. No Sixth Amendment Violation Occurred

To the extent defendant alleges a violation of his Sixth Amendment rights, no such violation occurred. The Sixth Amendment provides, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.” Amend. VI. Pursuant to the Sixth Amendment, “a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’” *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). If the right to counsel has not attached, however, an interview without the presence of counsel, is not a violation of an individual’s Sixth Amendment rights. *United States v. Killeaney*, No. 07-30063-01-KES, 2007 WL 4459348, at *5 (D.S.D. Dec. 17, 2007) (citing *United States v. Edelmann*, 458 F.3d 791, 804 (8th Cir. 2006) (“[I]f the right to counsel has not attached, the defendant has no right to the effective assistance of counsel”). The Ninth Circuit has concluded that a tribal court arraignment is “irrelevant” with respect to a defendant’s Sixth Amendment right to counsel. *United States v. Charley*, 396 F.3d 1074, 1082 (9th Cir. 2005) (finding a defendant’s “Sixth Amendment right to counsel was not triggered until she had her initial appearance in federal court”); *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001) (“[T]he Sixth Amendment right to counsel does not apply in tribal court criminal proceedings.”).³

³ Courts have noted a circuit split as to the application of the dual sovereignty doctrine to the Sixth Amendment right to counsel. *United States v. Killeaney*, No. 07-30063-01-KES, 2007 WL 4459348, at *4 (D.S.D. Dec. 17, 2007) (citing *United States v. Alvarado*, 440 F.3d 191, 194 (4th Cir.2006) (holding that “federal and state crimes are necessarily separate offenses for the purposes of the Sixth Amendment, because they originate from autonomous sovereigns that each have the authority to define and prosecute criminal conduct”); *United States v. Coker*, 433 F.3d 39, 44 (1st Cir.2005) (stating that “the dual sovereignty doctrine applies for the purpose of defining what constitutes the same offense in the Sixth Amendment right to counsel context”); *United States v. Avants*, 278 F.3d 510, 517 (5th Cir.2002) (stating “[i]t is plain to see that the federal and state murder prosecutions against Avants are not the ‘same offense’ under the Sixth Amendment because each was initiated by a separate sovereign”); *United States v. Mills*, 412 F.3d 325, 327 (2d Cir.2005) (stating “the Sixth Amendment right of counsel extends to offenses considered to be the ‘same offense’ as those to which the right has already attached even when they are prosecuted by different

1. Defendant was not represented by legal counsel at the time of the interview.

Importantly, courts have drawn a clear distinction between licensed, legal counsel and lay advocates. *Killeaney*, No. 07-30063-01-KES, 2007 WL 4459348, at *5 (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988) (“The Sixth Amendment right to choose one’s own counsel is circumscribed in several important respects ... [r]egardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients ... in court.”). The Sixth Amendment does not bestow a right to representation by a non-attorney. *Pilla v. American Bar Ass’n*, 542 F.2d 56, 58–59 (8th Cir.1976); *United States v. Anderson*, 577 F.2d 258, 261 (5th Cir. 1978) (“[T]here is no sixth amendment right to be represented by a non-attorney”); *United States v. Scott*, 521 F.2d 1188, 1191–92 (9th Cir. 1975); *United States v. Grismore*, 546 F.2d 844, 847 (10th Cir. 1976) (“‘Counsel’ as referred to in the Sixth Amendment does not include a lay person, rather ‘counsel’ refers to a person authorized to the practice of law”); *United States v. Jordan*, 508 F.2d 750, 753 (7th Cir. 1975) (“The district court is not obligated to appoint counsel of defendant's choice where the chosen attorney is not admitted to practice”).

While, in certain, limited circumstances in the Eighth Circuit, a Sixth Amendment right to counsel may attach after a defendant has appeared in tribal court with a licensed attorney, such a right does not extend to a tribal lay advocate. *Compare United States v. Red Bird*, 287 F.3d 709, 714-16 (8th Cir. 2002) (finding Sixth Amendment attached at tribal proceeding where the tribe “provide[d] a licensed attorney to represent indigent defendants in tribal court,” tribal authorities had “worked in tandem” with the FBI to investigate the rape, and the elements of the

sovereigns”); *United States v. Red Bird*, 287 F.3d 709,715 (8th Cir.2002) (stating “the federal and tribal complaints charge the same offense for Sixth Amendment purposes”); and *United States v. Krueger*, 415 F.3d 766, 768 (7th Cir.2005) (determining that it did not have to reach the issue because the case could be decided on other grounds)).

tribal and federal charges were essentially the same), *with Killeaney*, No. 07-30063-01-KES, 2007 WL 4459348, at *6 (finding *Red Bird* distinguishable where the defendant “was not appointed a licensed attorney”). *See also United States v. Whitefeather*, No. CR-05-3881-DWF, 2006 WL 763204, at *2-3 (D. Minn. Mar. 24, 2006) (finding Sixth Amendment did not attach at tribal arraignment, where the defendant was represented by a lay advocate); *United States v. Perez*, No. CR 08–50033–KES, 2009 WL 363618, at *2 (D.S.D. Feb.12, 2009); *United States v. Cottier*, No. CR 08–50050–AWB, 2009 WL 473236, at *3 (D.S.D. Feb.24, 2009); *United States v. Tools*, No. CR 07–30109–KES, 2008 WL 2595249, at *6 (D.S.D. June 27, 2008); *United States v. Dupris*, 422 F.Supp.2d 1061, 1068 (D.S.D.2006); *United States v. Alone*, No. CR 11-50031-JLV, 2011 WL 2708732, at *4 (D.S.D. July 12, 2011) (“It has been a longstanding precedent in the District of South Dakota that a lay advocate does not constitute ‘counsel’ for Sixth Amendment purposes.”).

In this case, Nate Merrick, a non-lawyer, served defendant as lay counsel in tribal court proceedings. As such, he did not qualify as “counsel” for Sixth Amendment purposes and could not represent defendant in federal court. Defendant was not represented by an attorney until a United States Magistrate Judge appointed the Office of the Federal Public Defender to represent him in this matter on December 18, 2017. As such, Special Agent Howard’s November 14, 2017 interview with defendant did not violate defendant’s Sixth Amendment right to counsel.

2. Defendant was not charged with the same offense in tribal court.

Because defendant did not have a Sixth Amendment right to counsel at the time of the November 14, 2017 interview, this Court need not reach the issue of whether the tribal offenses with which he had been charged (domestic abuse and aggravated assault) constituted the same offense as the federal offense with which defendant is now charged (domestic assault by an

habitual offender).⁴ The government maintains, however, that the federal indictment and tribal complaint did not charge the same offense.

“The Sixth Amendment right to counsel is offense specific.” *United States v. Red Bird*, 287 F.3d 709, 714-15 (8th Cir. 2002). The Eighth Circuit has held that ““where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”” *Id.* at 715 (quoting *Texas v. Cobb*, 532 U.S. 162, 173 (2001)).

Defendant’s tribal domestic abuse and aggravated assault charges are separate and distinct from the federal domestic assault by an habitual offender charge; they do not share the same elements.

18 U.S.C. § 117 provides, in relevant part:

(a)In General.—Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault; . . .

shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

18 U.S.C. § 117(a).

The Omaha tribal complaint alleges that, on or about May 5, 2017, defendant committed:

(1) Domestic Abuse, in violation of Omaha Tribal Code § 11-2-1(a), by “purposefully, knowingly or recklessly caus[ing] bodily injury to a household or former household member

⁴ Moreover, defendant was not subject to custodial interrogation, and his statements to Special Agent Howard were voluntary.

[L.R.]”]; and (2) Aggravated Assault, in violation of Omaha Tribal Code § 5-4-5, by “purposely, knowingly or recklessly attempt[ing] to cause serious bodily injury to [L.R.]”

Each charge requires different proof, and the elements for each charge are unique; most obviously, a federal habitual offender conviction under 18 U.S.C. § 117 requires proof that a defendant has been convicted of predicate offenses, i.e. a criminal history of two or more intimate partner assaults (or other qualifying convictions). Neither a tribal domestic abuse charge nor a tribal aggravated assault charge has such a requirement. Because the tribal offenses do not share the same elements with the federal offense, there can be no violation of the Sixth Amendment (regardless of whether defendant was represented by counsel in tribal court). *See United States v. Moccasin*, No. CR 13-30010-RAL, 2013 WL 5424852, at *3 (D.S.D. Sept. 26, 2013) (also noting that “tribal officials had no participation in the federal investigation after August 15, 2011” in finding no Sixth Amendment violation). *See also United States v. Plumman*, 409 F.3d 919, 926–27 (8th Cir. 2005) (finding no Sixth Amendment violation where FBI interviewed the defendant on the same day tribal charges were filed).

3. Federal and tribal authorities did not work “in tandem” to investigate defendant in the fall of 2017.

Defendant now argues that the FBI and Omaha Nation Law Enforcement Services (ONLES) worked “in tandem” thus requiring suppression of defendant’s statements. (ECF 45 at 6, 7). As discussed above, defendant’s Sixth Amendment right to counsel had not attached at the time of the November 14, 2017 interview, therefore any collaboration between federal and tribal authorities is irrelevant. Nevertheless, the FBI and ONLES did not work “in tandem” to investigate defendant in the fall of 2017 as defendant asserts. On the contrary, Special Agent Howard interviewed defendant alone, without any ONLES presence. This interview occurred well after the incident on May 5, 2017. Importantly, when ONLES informed Special Agent

Howard about defendant on October 1, 2017, not only did that include information about the May 5, 2017 assault, but also a September 26, 2017 report of possible sexual abuse, child abuse, kidnapping, and human trafficking. Thus, the information relayed went beyond the scope of one isolated incident of domestic violence, and included recent allegations of additional violations of law that clearly fell within federal jurisdiction. Turning over such information to federal law enforcement to allow for the initiation of a federal investigation does not amount to working “in tandem” to investigate such offenses. Nor did tribal law enforcement participate in the FBI’s investigation of defendant in the fall of 2017; Special Agent Howard interviewed witnesses by himself, without the involvement of tribal authorities. As such, the investigation in this case is clearly distinguishable from that conducted in *Red Bird*, 287 F.3d at 712, 714 (finding in that case that “two sovereigns worked together to investigate conduct that violates the laws of both” where a tribal investigator and FBI agent interviewed the suspect together to obtain a single statement).

IV. CONCLUSION

Defendant’s Sixth Amendment right to counsel did not attach until December 18, 2017, when he made his initial appearance in federal court. *Dupris*, 422 F.Supp.2d at 1068 (finding the “[d]efendant’s Sixth Amendment right to counsel was not triggered until he made his initial appearance in federal court” and, “[s]tated another way, [d]efendant’s right to counsel did not attach because he never appeared in tribal court with ‘counsel’ or a ‘lawyer’ prior to the ... interrogation.”); *Killeaney*, No. 07-30063-01-KES, 2007 WL 4459348, at *8 (“[D]efendant was never represented by ‘counsel’ under the Sixth Amendment in the tribal court proceedings.”). No violation of defendant’s Sixth Amendment right to counsel occurred.

For all of the foregoing reasons, the United States respectfully asks this Court to deny Defendant's Motion to Suppress Statement on all grounds.

Respectfully submitted,

UNITED STATES OF AMERICA,
Plaintiff

ROBERT C. STUART
Acting United States Attorney

By: s/ Erin R. Eldridge
ERIN R. ELDRIDGE, MN #0389793
Special Assistant U.S. Attorney
1620 Dodge Street, Suite 1400
Omaha, NE 68102-1506
Tel: (402) 661-3700
Fax: (402) 661-3084
E-mail: Erin.Eldridge@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following: **Richard H. McWilliams**, Assistant Federal Public Defender, and also hereby certify that a copy of the same has been served by regular mail, postage prepaid, to the following non-CM/ECF participants: NONE

s/ Erin R. Eldridge
Special Assistant U.S. Attorney