

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	CASE NO. 8:17CR379
Plaintiff,)	
)	DEFENDANT’S STATEMENT
v.)	OF OBJECTION TO
)	MAGISTRATE JUDGE’S
CHRISTOPHER H. FREEMONT,)	FINDINGS AND
Defendant.)	RECOMMENDATION [58]

Defendant Christopher H. Freemont objects to the magistrate judge’s recommendation [58] that his motion to suppress [44] be denied. He offers the following objections:

1. Mr. Freemont objects to the recommendation that the motion be denied. Specifically, Mr. Freemont asserts that the magistrate judge’s analysis places undue emphasis upon one of three factors listed in *United States v. Red Bird*, 287 F.3d 709 (8th Cir. 2002). In *Red Bird*, the Eighth Circuit differentiated that case from *United States v. Doherty*, 126 F.3d 769 (6th Cir. 1997), in which the Sixth Circuit held that the post-tribal-indictment questioning of a defendant did not violate the Sixth Amendment. The *Red Bird* Court, finding a Sixth Amendment violation, cited three differentiating factors: 1) *Red Bird*’s having underwent a full arraignment proceeding (unlike *Doherty*); 2) *Doherty*’s lack of a tribal right to an attorney; and 3) “most importantly,” *Doherty*’s assumption “that the proceedings in the Hannahville Tribal Court were non-adversarial in nature.” 287 F.3d at 715 (emphasis added).

The magistrate judge in this case, following the lead of a handful of non-binding district courts, treats the Omaha Tribal Code’s failure to provide a licensed

attorney to its defendants as a dispositive fact under *Red Bird* and, in doing so, ignores *Red Bird's* holding that “adversary judicial criminal proceedings” are what trigger the Sixth Amendment. *Id.* at 715-16; *see also Kirby v. Illinois*, 406 U.S. 682, 688 (1972) and *United States v. Gouveia*, 467 U.S. 180, 188 (1984). To be sure, the *Red Bird* Court held that the appointment of a licensed attorney is one factor in deciding whether the arraignment was an adversarial proceeding. But the Court placed equal emphasis upon the use of a formal criminal complaint, the requirement of an entry of a plea, and the exposure to imprisonment of up to one year. *Id.* at 716. The proceedings in Omaha Tribal Court, which commence with a criminal complaint, require the entry of a plea, and, in the case of Class A offenses, expose the defendant to up to one year of imprisonment, were adversarial judicial proceedings and certainly “do not operate as family gatherings and counseling sessions.” *See id.* at 715-16 (*Cf. Doherty*, 126 F.3d at 780.)

2. Mr. Freemont objects to the magistrate judge’s failure to find the following facts, which were adduced at the hearing on the motion to suppress:

a. On November 14, 2017, SA Howard *only* spoke to Mr. Freemont about the allegation of a May 5, 2017 assault upon L.R.

b. The office of the public defender for the Omaha Tribal Court is a paid, full-time position that Mr. Nate Merrick occupies as his career. TR. at 14. The Omaha tribe refers to the holder of that office as its “defense attorney.” TR at 15. Section 1-5-1(a) of the Omaha Tribal Code (2013) establishes the “right to be represented by a lay counselor (not a professional attorney) and to have such person

assist in the preparation and presentation of his case.” Section 1-5-1(c) imposes upon these counselors “the same ethical obligations of honesty and confidentiality toward his client and the court as would a professional attorney, and the attorney-client testimonial privilege shall apply in appropriate circumstances.” Subsection (d) establishes these counselors as officers of the Court and subject to the Court’s disciplinary authority. Section 1-5-5(b) of the tribal code affords the Chief Judge the authority to establish rules and sanctions for both attorneys and counselors. Section 1-5-5(c) provides lay counselors facing disciplinary action with the same due process as attorneys. Section 1-5-6(a) requires lay counselors and professional attorneys alike to adhere to the Code of Professional Responsibility as adopted by the American Bar Association. Subsection (b) of 1-5-6 imposes identical *pro bono* obligations upon lay counselors and professional attorneys. The title of Section 1-5-7 (“Oath of Attorneys and Counselors”) suggests that attorneys and lay counsel take the same oath.

c. On May 22, 2017, Christopher Freemont appeared alongside his public defender in tribal court at his arraignment on a criminal complaint, charging crimes that exposed him to up to two years imprisonment, and that this arraignment was an adversarial judicial proceeding. At this adversarial proceeding, Mr. Freemont was required to enter a plea to each count and was advised of his rights, among others, to: a fair, speedy, and public trial by judge or jury; the presumption of innocence until and unless the Tribe met its burden of proving him guilty beyond a reasonable doubt; remain silent; use the Court’s subpoena power; bond; apply for a

writ of habeas corpus; and appeal. He was also advised that the tribe appoints a public defender. He was released on bond and the matter was set for a pretrial conference.

d. The charges that Christopher Freemont faced in tribal court on November 14, 2017 were punishable by imprisonment of up to one year. TR at 15; G.E. 3; and DE 102.

e. SA Howard collaborates frequently with the tribal police and the Bureau of Indian Affairs. TR. at 11, 16. Had Chief Tyndall (of the Omaha Nation Law Enforcement Services) or the tribal prosecutor requested copies of SA Howard's reports he probably would have provided them. TR. at 16. SA Howard has free access to the reports and resources of the Omaha Nation Law Enforcement Services. TR. at 16.

3. Mr. Freemont objects to the magistrate judge's conclusion that the FBI and tribal authorities were not working in tandem. F&R at 4. In the instant case, SA Howard received a report from the chief of the Omaha Nation Law Enforcement Services in person while at the local ONLES police station. TR. at 10. The Chief told SA Howard, "[H]ey, Jeff, I have something for you." *Id.* As noted above in paragraph 2(e), these entities collaborate frequently and SA Howard has free access to the resources of the tribal police department – the same police department that had already arrested Mr Freemont for the alleged May 5, 2017 assault.

4. Mr. Freemont objects to the magistrate judge's conclusion that the charges he faced in tribal court and the charge he now faces in federal court are

distinct. *See* F&R at 5. The magistrate judge only points out that the federal offense contains one element (prior offenses) that the tribal charges do not; the magistrate judge does not, however, find an element in either of the tribal charges that is not part of the federal offenses. Notably, the only information in the record regarding the elements of either of the tribal offenses is D.E. 103, which articulates the elements of aggravated assault. (There is nothing in the record establishing the elements of the second tribal charge – domestic abuse). The magistrate judge does not articulate an element of that offense that is absent in the federal offense. Indeed, the gravamen of all of these offenses is the alleged May 5, 2017 assault of L.R.

5. Lastly, Mr. Freemont objects to the magistrate judge's failure to reconcile (or even address his argument) that the protections of the Sixth Amendment should not turn upon whether an accused is indigent or not. Mr. Freemont, as an indigent person to whom a lay counselor was appointed, could not choose to have a professional attorney represent him. Given the collaboration between the FBI and tribal authorities and between tribal prosecutors and federal prosecutors, to leave an entire population (indigent members of certain Native American tribes) unprotected by the Sixth Amendment during their tribal cases (while being screened for indictment) is an abomination and renders 25 U.S.C. § 1302(a)(6) of the Indian Civil Rights Act unconstitutional under the Due Process and Equal Protection Clauses.

CONCLUSION

United States v. Red Bird, 287 F.3d 709 (8th Cir. 2002) does indeed govern the facts of this case. Under *Red Bird* (and the Supreme Court precedent that guide it), the Sixth Amendment is triggered by adversarial judicial proceedings. The tribal case against Christopher Freemont was adversarial. SA Howard, working with the tribal authorities who had investigated the alleged assault for which Mr. Freemont stood accused in tribal court, questioned Mr. Freemont while he was being represented by a lay public defender about the very allegations he faced in tribal court then and federal court now. The Sixth Amendment binds SA Howard. The contents of this November 14, 2017 interview should be suppressed as a violation of Mr. Freemont's Sixth Amendment right to counsel.

A brief in support of this objection will not be filed. Pursuant to NECrimR 59.2(a), Mr. Freemont relies upon his previously filed brief [45] in support of his motion to dismiss and these objections and incorporates it herein.

CHRISTOPHER H. FREEMONT, Defendant,

By s/ Richard H. McWilliams

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 16, 2018, I electronically filed the foregoing with the Clerk of Court, using the CM/ECF system, which sent notification of such filing to counsel of record.

s/ Richard H. McWilliams