

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Case No. 21-CR-119 NEB/LIB

Plaintiff,

v.

DEFENDANT’S OBJECTIONS TO
MAGISTRATE JUDGE’S
REPORT AND
RECOMMENDATIONS

Descart Austin Begay, Jr.,

Defendant.

In Red Lake Tribal Court proceedings, Defendant Descart Begay never admitted sexually assaulting another person. Yet the Report and Recommendation recommends the Government be allowed to introduce at trial a Tribal conviction—obtained in violation of Begay’s due process rights—as an admission by Begay of his guilt.

Begay objects to the Magistrate Judge’s January 6, 2022 Report and Recommendation (“R&R”) recommending the Court deny Begay’s motions to suppress. (*See* Dkt. 26, 27.) The R&R misstates the factual record, misapplies the law, and presumes facts unsupported by the record. Among other errors, the R&R erroneously finds:

- Begay was required to “conclusively verify” the Tribal Court did not comply with the Red Lake Tribal Code (*see* Dkt. 81 at 32);
- Begay was represented by an attorney during his Tribal Court proceedings—he was not (*see id.* at 28-31, 33-34); and
- The Tribal Court record is incomplete and “missing” content would cure apparent due process violations (*see id.* at 31-33).

Because the R&R contains material errors of fact and law, this Court should sustain Begay's objection by suppressing all evidence related to the Tribal conviction and by suppressing his statement to law enforcement.¹

I. FACTUAL BACKGROUND

On July 3, 2020, Descart Begay was arrested by Red Lake law enforcement for an alleged assault on the Red Lake reservation. (Ex. D5.) Three days later, on July 6, 2020, FBI Special Agent Justin Montgomery interrogated Begay while in the custody of Red Lake law enforcement. (Ex. D1.) Begay is illiterate. (Gov. Ex. 1 at 1:05-1:08.)

The Indian Civil Rights Act of 1968 ("ICRA") requires that Tribal Courts "maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding." 25 U.S.C. § 1302(c)(5). The Red Lake Tribal Code mandates that the Tribal "Court . . . keep a record of all proceedings of the Court" Red Lake Tribal Code. Chapter 101.01, subd. 3. Prior to the evidentiary hearings and in response to a specific discovery request by Begay, the Government disclosed recordings and court documents, representing the disclosure was the entire record of Begay's proceedings in the Tribal Court. At the evidentiary hearings, the federal case agent testified in response to whether the Government had received all requested records: "I believe so." (Dkt. 67

¹ The Court should review Begay's objection *de novo*. See *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir. 2003) (finding "the District Court erred when it failed to conduct a *de novo* review of the magistrate judge's proposed findings regarding [the defendant]'s motion to suppress, insofar as [defendant] objected to those findings"); Fed. R. Crim. P. 59(b)(3) ("The district judge must consider *de novo* any objection to the magistrate judge's recommendation").

(“Hearing Tr., Vol. II”) at 142:20-23.) The Government offered no evidence that the recordings did not completely capture the Tribal Court proceedings.

On July 9, Begay appeared at an arraignment hearing in Tribal Court lasting four minutes during which Begay said nothing. (Gov. Ex. 5; Ex. D6.) On August 6, 2020, he appeared at a pre-trial proceeding that lasted two-and-a-half minutes. (Gov. Ex. 6; Ex. D8.) Again, Begay said nothing. (*See id.*) The Tribal Court did not advise Begay of his ICRA or Tribal Code rights during either proceeding. (*See id.*; Gov. Ex. 6; Ex. D8.) As required by the Tribal Code and ICRA, the Tribal Court recorded both proceedings. (*See id.*)

On February 12, 2021, after having been incarcerated for over seven months on misdemeanor charges, Begay attended a two-minute hearing that was also recorded. (Gov. Ex. 7; Ex. D11.) Begay uttered one word—made in response to a remark by the Tribal Court *after* the Court imposed sentence. (*Id.*) Again, the Tribal Court did not explain to Begay his ICRA or Tribal Code rights, made no inquiry as to whether Begay understood the proceedings or a “Proposed Plea Agreement,” did not ask whether any person had explained the proposed plea agreement to Begay, did not explain the proposed plea agreement to Begay, did not ask Begay to enter a plea, did not attempt to establish a factual basis, and did not find Begay guilty of the charged offense. (*See id.*) Instead, the Tribal Court proceeded immediately to sentencing and imposed the maximum sentence authorized under the Tribal Code and federal law. (*Id.*)

Begay was not represented by an attorney during the Tribal Court proceedings. (*See id.*; Gov. Ex. 5, Ex. D6; Gov. Ex. 6, Ex. D8; Gov. Ex. 4.)

Despite the FBI having not conducted any meaningful investigative activity in months, and despite Begay having already admitted to having consensual sex with the alleged victim, five days after Begay’s Tribal sentencing hearing FBI agents directed Red Lake law enforcement to obtain Begay’s Tribal criminal history. (*See* Ex. D12; Dkt. 66 (“Hearing Tr., Vol. I”) at 81:23-82:6, 86:19-2.) The lead FBI case agent admits the timing of this request was unusual. (Hearing Tr., Vol. II at 141:12-17.) Only *after* obtaining Begay’s Tribal judgment did the Government seek to indict Begay. (*See* Dkt. 1.) On May 20, 2021, the Grand Jury returned a two-count indictment. (*Id.*)

II. ARGUMENT

The R&R errs in refusing to recommend suppression of Begay’s Tribal conviction. It erroneously placed the burden on Begay to “conclusively verify” violations of rights guaranteed to him under ICRA, 25 U.S.C. § 1301 *et seq.* and the Red Lake Tribal Code. Moreover, the R&R heavily relies on the objectively false finding that Begay was represented by an attorney during the Tribal Court proceedings. The R&R then concludes that attorney representation cured the Tribal Court’s violations of Begay’s due process rights. Last, the R&R mistakenly presumes, contrary to the audio recordings of the proceedings, that the Tribal Court complied with ICRA and the Red Lake Tribal Code and provided Begay due process of law.

A. The R&R wrongly requires that Begay “conclusively verify” violations of his due process rights.

Congress enacted ICRA to ensure that Tribal Court defendants are provided due process of law. ICRA “accords a range of procedural safeguards to tribal-court

defendants similar . . . to those contained in the Bill of Rights and the Fourteenth Amendment.” *United States v. Bryant*, 579 U.S. 140 (2016) (quotation and citation omitted). ICRA states no Tribe shall “deny to any person the equal protection of its laws or deprive any person of liberty or property without due process of law.” 25 U.S.C. § 1302(a)(8); *see Bryant* 579 U.S. at 156 (“ICRA itself require tribes to ensure ‘due process of law’”). ICRA guarantees the right “to be informed of the nature and cause of the accusation,” “the right to a speedy and public trial,” and “the right to be confronted with the witnesses against him.” 25 U.S.C. § 1302(a)(6).

ICRA also requires that the Red Lake Tribal Court afford Begay due process by complying with Tribal law. *Id.* at (8). In contravention of this requirement, however, the Tribal Court denied Begay important procedural safeguards established by the Red Lake Tribal Code and, consequently, his conviction was obtained without due process of the Tribal laws. Specifically, at his arraignment, the Tribal Judge was required to inform Begay of the nature of the charge and “determine that the defendant understands the complaint and the section of the Tribal code which the defendant is charged with violating” Red Lake Tribal Code. Chapter 404.01, subd. 4. The Tribal Judge was also required to personally advise Begay of a number of specifically enumerated rights, including the right against compelled self-incrimination and the right to counsel. *See id.* The Tribal Code also establishes safeguards for change-of-plea hearings. Before accepting a guilty plea, a Tribal judge is required to “accept the plea only if he is satisfied that the plea is made voluntarily and the defendant understands the consequences of the plea.” *Id.* at subd. 8.

The Tribal Court in Begay’s case did not comply with these unambiguous requirements of the Tribal Code. At Begay’s arraignment, which lasted just four minutes, the Court ignored the Tribal Code requirements that the Court inform Begay of the nature of the charged offense and his other Tribal Court rights. The Tribal Judge simply asked Begay if he understood his rights. (*See* Gov. Ex. 5, Ex. D6.) (“You understand? Okay. Alright.”) Such a “cursory, rudimentary colloquy” did not satisfy the Tribal Judge’s obligations under the Red Lake Tribal Code—or ICRA. *See United States v. Bundy*, 966 F. Supp. 2d 1175, 1180 (D.N.M. 2013) (“[i]nstead of the detailed enumeration of her trial rights contemplated by the Navajo Rules of Criminal Procedure, the page-and-a-half transcript shows a cursory, rudimentary colloquy”).

Similarly, at Begay’s sentencing hearing, which lasted two-and-a-half minutes, the Tribal Judge did not ask Begay if he was pleading guilty and did not explore whether that plea was knowing and voluntary. (Gov. Ex. 7; Ex. D11.) Indeed the Tribal Court did not conduct a change-of-plea hearing but proceeded immediately to sentencing. During this hearing, Begay spoke not a single word ***until after the Court imposed sentence***—the first time he spoke in the Tribal proceedings. (*See id.*; Gov. Ex. 5, Ex. D6; Gov. Ex. 6; Ex. D8.) The recording establishes the Tribal Judge paid no regard to Begay’s Tribal and ICRA procedural rights. (*See* Gov. Ex. 7; Ex. D11.) *See Bundy*, 966 F. Supp. 2d at 1180 (“It appears that this prerequisite to a valid guilty plea was entirely overlooked”).

Despite the undisputed requirements of the Red Lake Tribal Code and clear record evidencing violations thereof, the R&R brushed away those violations by relying on a combination of unsupported assumptions and verifiably false facts. At the outset,

however, the R&R appears to be premised on an analytical framework which itself constitutes an error of law. When discussing the evidence demonstrating violations of Begay’s rights under the Red Lake Tribal Code, the R&R erroneously states: “Defendant fails to provide affirmative evidence to *conclusively verify* that the tribal judge did not comply with these relevant tribal codes during the plea hearing.” (Dkt. 81 at 32 (emphasis added).) But Begay need only put forth some evidence (a preponderance) demonstrating that a prior conviction violated due process. (*See id.* at 32 n.23 (citing *United States v. Miller*, 2014 U.S. Dist. LEXIS 203811, at *10-11 (D.N.M. Apr. 11, 2014) (applying Tenth Circuit precedent)).) *See also United States v. Coppage*, 772 F.3d 557, 559 (8th Cir. 2014) (“A defendant bears the burden of proving the unconstitutionality of his convictions by a preponderance of the evidence” (quotation and citation omitted)).

Begay presented the complete Tribal Court record produced by the government in discovery. The FBI agent testified that he obtained from the Tribe all Tribal Court records, including the recordings of all proceedings. (Hearing Tr., Vol. II at 142:20-23, 144:1-4.) The Government presented no evidence—such as affidavits from Tribal Court personnel—that the recordings are incomplete. This evidence satisfies Defendant’s threshold burden of more likely than not. But instead of considering this evidence under the applicable standard of review, the R&R summarily concludes Begay failed to satisfy an elevated burden that bears no relation to extant jurisprudence. Because the R&R premised its analysis on an error of law, the Court should sustain Begay’s objections and reject the R&R.

The R&R additionally claims that “even if the Red Lake tribal court committed a procedural error during Defendant’s tribal proceeding under the tribal code . . . this Court does not have jurisdiction to challenge the Red Lake tribal court’s procedures in Defendant’s tribal prosecution.” (Dkt. 81 at 34.) This statement is also erroneous. Implicit in the R&R’s logic is that this Court must always permit evidence of a Tribal conviction, even if the conviction was unlawfully obtained, because to examine a Tribal conviction would violate principles of separate sovereignty. Such a conclusion has no support in the law, indeed, ICRA explicitly authorizes federal review of Tribal proceedings, *see, e.g., DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 513 (8th Cir. 1989); *see also Bundy*, 966 F. Supp. 2d at 1180 (suppressing Tribal conviction for due process violations).

Further, the R&R misconstrues Begay’s motion as requesting the Court intercede in Tribal Court proceedings. Not so. Begay’s motion to suppress does not seek to attack his Tribal conviction. Rather, he seeks to suppress evidence of his Tribal conviction because its use in *this* Court violates his rights under the Constitution and laws of the United States. Thus, to the extent this premise informed the R&R’s analysis, it constitutes error and the Court should reject the resulting conclusions.

B. Begay was not represented by an attorney in Tribal Court.

The Court should also sustain Begay’s objection because the R&R relies heavily on the incorrect presumption that Begay was represented by an “attorney” in the Tribal proceedings, and finds that Begay’s Tribal conviction was “counseled.” (*See, e.g.,* Dkt. 81 at 28 (“The record presently before the Court indicates that . . . Defendant

appeared [for arraignment] with his defense attorney”), 29 (“Defendant subsequently appeared for a pre-trial hearing . . . with his defense attorney”), 33 (“Defendant had the assistance of counsel throughout his tribal proceedings”), 34 (“any error committed in the tribal court proceedings were cured by the assistance and advice of counsel”).) These statements constitute error because Begay was not represented by an attorney during his Tribal proceedings.

Although the record does show that Begay was represented by “counsel” during some, but not all, of the Tribal proceedings, there is no evidentiary basis for the R&R’s assumption that Begay’s “counsel” is an attorney. The evidence shows he is not. Begay’s Tribal counsel is a lay advocate named Denfield “Sonny” Johnson. (*See* Gov. Ex. 7, Ex. D11; Gov. Ex. 4.) Another Court in this district noted:

[W]e are aware that that the Red Lake Tribe has licensed a number of ‘lay advocates’ to practice before the Tribal Court . . . in [] prior cases, we have been presented with Exhibits which list Denfield ‘Sonny’ Johnson as a lay advocate As we have noted, after affording the opportunity to inform the Court on [Johnson]’s status, counsel for the Defendant has advised that [he] is a lay advocate.

United States v. Whitefeather, 2006 U.S. Dist. LEXIS 17239 at *6 n.4 (D. Minn. Jan. 17, 2006) (internal quotation omitted).² Whether or not Begay possessed “counsel” or “representation” as those terms are used in the colloquial, it is objectively incorrect to say Begay was represented by an attorney—as noted in *Whitefeather*, Mr. Johnson is a non-licensed “lay advocate.” Any significance attributed to Begay’s having been

² Defense counsel has also reviewed official attorney licensing databases and there is no individual named “Denfield Johnson” or “Sonny Johnson” licensed to practice law in either Minnesota or the District of Minnesota.

“represented”—insofar as that term invokes a term of art and implicates assumptions only appropriate for an attorney—is similarly erroneous and the Court should sustain Begay’s objections accordingly. *See United States v. Gillette*, 2018 U.S. Dist. LEXIS 47968, at *17-18 (D.S.D. Mar. 23, 2018) (denying motion to suppress tribal guilty plea when defendant was represented by a “licensed attorney”).

Even if a lay advocate could cleanse these clear due process violations, the record establishes Mr. Johnson did *not* counsel Begay. The Proposed Plea Agreement (Gov. Ex. 4)—evidence the Government wishes to introduce at trial—suggests Mr. Johnson was supposed to sign the agreement, but instead, the agreement contains two signatures purportedly by Begay, including in the place reserved for his “counsel” to sign. And there is no evidence that Johnson “counseled” Begay (who is illiterate) about the meaning and effect of the Proposed Plea Agreement.

C. There is no evidence Begay’s Tribal record is incomplete.

The R&R erroneously concluded the record of Begay’s Tribal proceedings was incomplete because “a review of the audio recording of Defendant’s plea hearing reveals that the recording begins well into the proceeding on the record,” finding “while the audio spans two minutes and four seconds, it is apparent that the hearing lasted longer in duration.” (Dkt. 81 at 31.) The R&R then concludes “this technical deficiency was, at most, harmless error.” (*Id.*) For the R&R to reach this conclusion, without any evidence, is unsupported speculation.

First, there is no independent evidence that any part of the hearing occurred but was not captured. (*See* Hearing Tr., Vol. II at 141:22-144:17 (FBI received all Tribal

records requested).) The only inference cited by the R&R is the fact that the audio doesn't include the calling of the case or the announcement of the hearing. (Dkt. 81 at 31.) However there is no record evidence and the R&R offers no basis to support the presumption that either of those immaterial formalities normally occur in a Red Lake Tribal Court change-of-plea or sentencing hearing. The R&R does not posit that other events occurred but were not recorded, such as the entry of a plea, inquiry into a factual basis, or colloquy with Begay regarding the voluntariness of his plea. The R&R's only contention on this point is that Begay's counsel would have made "appropriate objections" to any violations of his rights. (*Id.* at 34.) But of course, Begay was not represented by an attorney. *See* Section II(B), *supra*.

By contrast, and as discussed further in Section II(A), *supra*, the actual recordings of Begay's Tribal Court proceedings are affirmative evidence—their contents speak for themselves and support Begay's contention his rights were violated. Although the R&R accuses Begay of relying on "ambiguity or silence in the record" (Dkt. 81 at 32), the opposite is true. It is the R&R which speculates as to evidence not in the record.

The R&R's finding is further undermined by the context of Begay's Tribal proceedings. The sentencing hearing—the only proceeding which the R&R contends is missing any content—lasted two minutes and four seconds and contained only a "cursory, rudimentary colloquy." *See Bundy*, 966 F. Supp. 2d at 1180. This duration and procedure entirely follows the other two proceedings. (*See* Gov. Ex. 5, Ex. D6 (hearing lasting four minutes); Gov. Ex. 6, Ex. D8 (hearing lasting two minutes and thirty seconds).) The R&R's hypothesis that the only occasion where the Tribal Court fulfilled

its obligation to protect Begay's rights was also the only portion of Begay's Tribal proceedings not recorded is highly implausible and controverted by the record evidence.

Because the record evidence clearly establishes the Tribal Court did not afford Begay rights guaranteed under ICRA and Tribal law, the Court should sustain Begay's objection and suppress the Tribal conviction.

D. The R&R does not address evidence of improper coordination between the Government and the Red Lake Tribe.

Begay further objects to the R&R's finding of no due process violation for improper coordination between the Government and Red Lake Tribal law enforcement. The R&R does not address (or even acknowledge) evidence regarding such impermissible coordination—the otherwise inexplicable activation of the FBI's previously dormant investigation. Rather, the R&R accepts the passive receipt of three pending DNA reports as establishing “that the FBI's investigation was [always] very much active.” (Dkt. 81 at 35.) However, as explained in Begay's initial memoranda, this argument does withstand scrutiny as the DNA reports provided no evidence beyond what was already established by Begay's admission to consensual sex when initially questioned. (*See* Dkt. 71 at 9-12; Dkt. 78 at 5-6.) Thus, the Government cannot be said to have been credibly waiting on the results of any DNA testing as they had possessed the relevant evidence since July 2020.

E. The R&R erred in denying Begay's Motion to Suppress Statements.

Last, Begay objects to the R&R's findings regarding his motion to suppress statements made while under custodial interrogation. As explained in greater detail in his

initial memorandum, the Government cannot establish Begay's statements were made knowingly and voluntarily. (*See* Dkt. 70 at 3-5.) Begay possesses diminished intellectual capacities, cannot read, and did not possess a full awareness of the consequences of his *Miranda* waiver. (*See id.*) Accordingly, *Miranda* waiver was not knowing and voluntary and his statements made to FBI Special Agent Justin Montgomery should be suppressed. The R&R erred in finding otherwise.

CONCLUSION

Defendant respectfully requests the Court reject the conclusions in the R&R and grant his motions to suppress all evidence related to his Tribal Court conviction and statements to law enforcement.

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Respectfully submitted,

By s/ John Marti

John R. Marti (#0388393)

marti.john@dorsey.com

Michael E. Rowe (#0392598)

rowe.michael@dorsey.com

50 South Sixth Street, Suite 1500

Minneapolis, MN 55402

Telephone: (612) 340-2600

Facsimile: (612) 340-2868

Attorneys for Defendant