

LOWER ELWHA COURT OF APPEALS

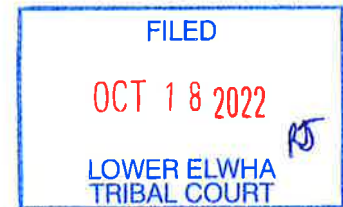
Robin Ryan,
Petitioner, Appellant

v.

Lower Elwha Klallam Tribe,
Respondent.

No. 2021-CR-0004

OPINION AND ORDER



Counsel for the Parties:

Stephanie Hyatt for Robin Ryan

Diane Cabrera for Lower Elwha Klallam Tribe

Opinion by Fletcher, C.J.

OPINION AND ORDER

This opinion concerns a restitution order issued under the Lower Elwha Judicial Code and Court Procedures ("JCC") § 6.27(2)(c). We VACATE the award and REMAND to the trial court for further proceedings consistent with this opinion.

Background

On June 16, 2022, the trial court sentenced the appellant to jail time and fines for various violations of the tribal criminal code,

primarily theft of tribal property and drug offenses. The court suspended the execution of those criminal penalties. As a consequence of the theft conviction, the trial court ordered restitution in the amount of \$349.00. The restitution award was not suspended.

After the appellant pled guilty, the trial court ordered a restitution hearing to be held on December 6, 2021. The government submitted a motion for restitution on December 2, 2021. Attached to the government's motion was an unsigned document titled "Summary of Robbery Equipment Lost and Replacement Costs." The author of the government's document did not appear at the restitution hearing. The court asked for additional briefing. The government submitted a signed document titled "Declaration of Property Loss in Support of the Tribe's Motion for a Restitution Order."

On February 22, 2022, the court issued the restitution order. The restitution order stated the amount of restitution but no other information about the restitution award.

Analysis

Appellant challenges the restitution order on several grounds. As this is apparently a case of first impression in this court, we begin with first principles.

I. Acknowledgment of Common Law Rules

We make several rulings involving this court's standard of review and the government's burden of proof in criminal restitution matters, applying the existing provisions of tribal law.

Except on the question of this court's standard of review, the government roundly objects to the creation of common law rules to fill the gaps in the applicable tribal code provisions. We respectfully disagree with the government. The questions presented in this appeal can be answered by looking to and applying tribal law.

The government points to code section 1.5, which prohibits the tribal judiciary from "[e]stablish[ing] any rule of court, other than procedural rules within the scope of the procedures set out in this title, which would have the effect of creating new substantive law or policy for the Tribe. . . ." JCC § 1.5(2)(b). The government contends that the judiciary may not adopt or apply any law that is not explicitly contained in the tribal code, notably law involving the burden of proof.

Even so, section 1.5 provides a general exception to the limits on the judiciary in order to enforce the rights of criminal defendants: "Nothing in this section shall prohibit the court from enforcing the rights of criminal defendants under article VII of the tribal Constitution or any provision of the Indian Civil Rights Act consistent with this title and other tribal law. . . ." JCC § 1.5(4).

We conclude that that tribal code authorizes the judiciary to apply tribal traditional law or the common law decisions of other jurisdictions in order to enforce the rights of criminal defendants and to apply the preponderance of evidence standard in civil restitution actions. We do not create new crimes. We do not create new rights. The standards of review, burdens of proof, and the like, are taken directly from the tribal code, which ensures predictability and fairness in criminal cases. The tribal legislature is free to modify these applicable rules or to fill any perceived gaps with positive law going forward, but the appellant is entitled to clarity on the law in this case.

II. Standard of Review

The tribal code is silent as to the proper standard of review the tribal appellate court must apply when reviewing the decisions of the trial court. See generally Rules of Appellate Procedure, JCC § 7.1-7.18. Following the American jurisdictions of which we are aware, we hold that the appellate standard of review for questions of law is the *de novo* standard of review. *E.g.*, *Johns v. Allen*, 6 NICS App. 196, 196-97 (Skokomish Tribal Ct. App. 2004) ("In the absence of any specified standard of review, we review issues of fact under the 'clearly erroneous' standard and issues of law *de novo*."); *Port Gamble S'Klallam Tribe v. Hjert*, 10 NICS App. 60, 62 (Port Gamble S'Klallam Tribal Ct. App. 2011) (applying *de novo* standard

for questions of law). Conversely, an appellate court's review of the trial court's findings of fact is limited, usually confined to determining whether the trial court abused its discretion in making a particular finding. *E.g.*, *Fern v. Torres*, 6 NICS App. 200, 201 (Chehalis Tribal Ct. App. 2004) ("We shall examine the lower court's findings [of fact] to determine whether the court abused its discretion in making a particular finding.").

Normally, the standard of review for this appellate court to apply when reviewing the trial court's restitution award is the abuse of discretion standard. *Cf.*, *e.g.*, *Phair v. Tulalip Tribes*, 18 NICS App. 38, 44 (Tulalip Tribal Ct. App. 2020) (rulings in criminal cases within the discretion of the trial judge are reviewed under the abuse of discretion standard). Most restitution award appeals involve fact-intensive review. The government contends that this is the proper standard of review for this case. We disagree. The appellant's appeal here concerns the proper standard of review and the interpretation of JCC § 6.27(2)(c). Those are questions of law. Moreover, other than a bare dollar figure, there were no findings of fact.

Given that the appellant's claims are purely questions of law, we therefore review the trial court's restitution order under the *de novo* standard.

III. Evidentiary Burdens and Criminal Restitution

The relevant tribal code provision states that, when a criminal sentence is suspended, the court may order the guilty party to "[p]lay restitution to any person who incurred costs or damages as a result of the crime to compensate such person in whole or part for damages or costs that may include medical or mental health care and replacement or repair of property." JCC § 6.27(2) (c).

A. Burden of Proof

We first hold that the burden of proof in a civil restitution hearing flowing from a criminal case belongs to the government. In American jurisdictions of which we are aware, the court in a criminal case must find that the government has proven that the defendant's conduct has caused injury before issuing an award of restitution. For example, in *Hendrix v. Yurok Tribe*, 6 NICS App. 4 (Yurok Tribal Ct. App. 2000), the court reversed a restitution award where there was "no evidence to substantiate the . . . penalty. . . ." *Id.* at 12. We are aware that the defendant in this case confessed guilt as part of a plea agreement, but that does not allow the government to name a figure of its choosing or to presume that all of the government's damages were the fault of the appellant. The government brought this matter and has the duty to prove it.

B. Preponderance of the Evidence Standard

As discussed above, the preponderance-of-the-evidence standard applies to restitution orders. Placing the burden of proof on the government is meaningless unless there is a standard to assess whether the government met its burden. In addition to JCC 5.10(2), in the American jurisdictions of which we are familiar, the burden of proof imposed on the government in criminal restitution cases is the preponderance standard. See generally 6 LAFAVE, ISRAEL, KING, AND KERR, CRIM. PROC. § 26.6(c) (4th ed.) (collecting cases). *E.g.*, *State v. Bush*, 659 P.2d 1127, 1129 (Wash. Ct. App. 1983). The restitution order did arise from a criminal conviction, but the cases show that restitution is a civil remedy. It is worth noting that restitution under JCC § 6.27(2)(c) is available only when all or some of the criminal penalty is suspended.

We conclude that JCC § 5.10(2) is controlling here. It provides: "Unless otherwise provided in an applicable ordinance, a party shall be considered to have met the burden of proof if most of the evidence presented tends to prove that party's claim, this standard is also referred to as the preponderance of the evidence."

C. Judicial Findings of Fact and Conclusions of Law

We additionally hold that the court must support a restitution award with findings of

fact and conclusions of law. Fairness requires that the court make findings of fact. The appellate court must also be made aware of the reasoning of the trial court in order to conduct a review. Here, we import the provision in the tribal code that requires the judge to make those findings and conclusions in civil suits. See JCC § 5.13(1) ("No contested judgment is final until it is entered with findings of fact and conclusions of law in the written court record. . . ."). Other than a dollar figure the trial court stated was owed by the appellant, we noted no findings of fact or conclusions of the law in the record.

D. Application

After reviewing the record, we vacate the restitution award. The trial court did not make findings of fact or conclusions of law supporting the restitution award. The government's witness on the question of monetary damages did not testify before the court, which would have allowed the appellant the opportunity of cross-examination. *Cf.* JCC § 6.22(b) (guaranteeing criminal defendants the right of cross-examination in the main criminal trial). Without those findings and conclusions, we do not know if the court imposed the burden of proof on the government or applied the correct standard if it did.

REMAND

We order a remand for the trial court to conduct an evidentiary hearing on the question of restitution. The government bears the burden of proof by a preponderance of the evidence showing that the appellant caused an injury that can be remedied, at least in part, by a restitution order. The trial court then must make a determination whether the evidence presented is sufficient to justify a restitution award, and if so, the amount of the award. More specifically, in this case, the court must determine whether the restitution award, if any, arises from "damages or costs" incurred from "replacement or repair of property." JCC § 6.27(2)(c).

Matthew L.M. Fletcher, Chief Justice

Matthew Fletcher, approved via email-RJ
Concurring: 10/18/22

Philip E. Katzen, Justice

Alan C. Stay, Justice

Dated: September 1, 2022