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FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA

Sierra Jackson, Appellant v. Fort Peck Tribes, Appellees.	CAUSE NO. AP # 868 ORDER

Appeal from the Fort Peck Tribal Court, Lonnie Headdress, Presiding Judge.
Appellant Sierra Jackson, appearing with Advocate Terry Boyd.
Appellees Fort Peck Tribes, represented by Prosecutor David Mrgudich.
Before E. Shanley, Chief Justice; J. Grijalva, Associate Justice; and B.J. Jones, Associate Justice.

BACKGROUND

¶ 1 Once again, a criminal matter comes to this Court on the issue of whether the Tribes have sufficiently demonstrated that the Appellant is an "Indian" as that term is referenced at 18 U.S.C. §1153, and incorporated into the Indian Civil Rights Act, 25 U.S.C. §1301(4) and used in the CCOJ. In this appeal the Appellant entered a conditional plea of guilty to the charge of "Protection of Government Official" as part of a plea bargain

where she apparently dismissed a federal habeas corpus petition alleging that she was not an Indian for purposes of the lower court's jurisdiction. The Appellant pled guilty but preserved the right to appeal the lower court's jurisdiction over her contending that Judge Headdress erred in finding probable cause to believe that she was Indian for purposes of tribal criminal jurisdiction over her. She received a sentence of time-served and thus is no longer in tribal detention for purposes of habeas corpus.

¶ 2 This Court addressed this issue in a recent case, *Taypayosatum v. Fort Peck Tribes*, APP. 804 where a criminal defendant filed for habeas corpus after pleading guilty to criminal charges that contained, as factual predicates, that he was Indian under tribal and federal law. This Court tried to lay out the process for raising this issue at the trial level so this Court could address the issue, but obviously did not do a good job of doing so as this case is now before the Court along with another appeal where a criminal defendant sat through a criminal trial and never raised the issue at trial, but raises it for the first time on appeal claiming that the Tribes failed to demonstrate that he was Indian in its case in chief. *See Grant v. Fort Peck Tribes*, APP 871.

STATEMENT OF JURISDICTION

¶ 3 The Fort Peck Appellate Court reviews final orders from the Fort Peck Tribal Court. 2 CCOJ §202. The conditional plea preserving the probable cause determination of Indian status is a final order.

STANDARD OF REVIEW

¶ 4 This Court reviews de novo all determinations of the lower court on matters of law, but shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence. 2 CCOJ §202.

PRESERVATION OF THE ISSUE OF INDIAN STATUS FOR APPEAL

¶ 5 The Appellant raised the issue of her "Indian status" in a pre-trial motion and Judge Headdress ruled that she was Indian. As this Court noted in *Taypayosatum v. Tribes*, the issue of whether a criminal defendant is "Indian" is a factual element of most criminal offenses before the lower court except those premised upon the inherent tribal jurisdiction recognized by Congress in the Violence Against Women Act, See 25 U.S.C. §1304.[1] In those cases the Tribes need only charge that the Defendant is a person who committed the offense, not necessarily an Indian person. Being an Indian person is not a "legal" determination that a Judge makes prior to trial. It has to be proven "beyond a reasonable doubt" by the finder of fact—Judge or jury—at trial. This does not mean that a criminal defendant cannot raise the issue in a pre-trial challenge to the probable cause for the offense being charged. Every factual element of an offense has to be supported by probable cause in order for a criminal charge to proceed to trial and a criminal defendant can raise the Indian status challenge before trial in a probable cause determination. The Judge at that point only can address whether there is probable cause to believe that the criminal defendant is an "Indian", a burden much less than the beyond a reasonable doubt that has to be shown at trial. If a Defendant raises the issue in a pre-trial motion, as this Appellant did, and then proceeds to trial and is found guilty after sufficiently raising the issue at trial the Appellant can appeal to this Court arguing that there was insufficient evidence to prove her Indian status beyond a reasonable doubt.

¶ 6 That did not happen in this case however as the Appellant chose to conditionally plead guilty to an offense that required the Tribe to prove her Indian status

[1] It should be noted that under the most recent version of VAWA Congress recognized the inherent right of Indian Tribes to prosecute non-Indians for Obstruction of Justice under 25 U.S.C. §1304(a)(9). It does not appear that the Appellant was charged under this provision although the crime she pled guilty could possibly have been prosecutable under this section thus eliminating the requirement of demonstrating that she was Indian.

beyond a reasonable doubt. Conditional pleas are generally reserved for appeals of legal determinations made by the trial court, such as denials of motions to suppress evidence, and not for factual determinations. *See United States v. Peterson*, 995 F.3d 1061(9th Cir. 2021). For example, a Defendant who conditionally pleads guilty to assault cannot turn around and appeal arguing he did not commit an assault.

¶ 7 The only legal determination that Appellant can raise now that she has conditionally pled guilty to Protection of Government Officials is that the presiding Judge made an incorrect legal determination that probable cause existed to believe that she was Indian. She cannot argue that there was insufficient evidence that she was Indian because again that is a factual issue, not a legal one. The Judge cannot make that finding before trial even if the subsequent trial is before a Judge, not Jury.

THE LOWER COURT DID NOT ERR IN FINDING PROBABLE CAUSE TO BELIEVE THE APPELLANT IS INDIAN

¶ 8 Due to the procedural posture of this case when it arrived in this Court, the sole issue for this Court to decide is whether the trial court erred in finding probable cause to believe that the Appellant is "Indian." Probable cause in this context means that a reasonable person would believe the Appellant is Indian. It is less than a preponderance of the evidence (more likely than not) and much less stringent that "beyond a reasonable doubt", which would have been the standard for determining her Indian status had the Appellant proceeded to trial.

¶ 9 Congress amended the Indian Civil Rights Act to define Indian status for purposes of tribal court criminal jurisdiction in order to address the United States Supreme Court decision in *Duro v. Reina*, 495 U.S. 676 (1990). In Duro, the SCOTUS held that Indian tribes lack inherent criminal jurisdiction over non-member Indians. Congress disagreed and passed federal legislation amending the Indian Civil Rights Act to

recognize tribal inherent authority over all Indians who commit criminal offenses in Indian country. Unfortunately, for Indian tribes, Congress referred to the definition of Indian under the Major Crimes Act, 18 USC §1153, in amending the ICRA. However, there is no definition of Indian under 18 USC §1153 and the federal courts have generally used a federal common-law definition of Indian, first enunciated in *United States v. Rogers*, 45 US 567, 572 (1846), to establish Indian status for purposes of federal court Indian country jurisdiction. This has created a whole host of problems in the federal courts, see Skibine, Indians, Race and Criminal Jurisdiction in Indian Country, 10 Alb. Govt. L. Rev. 49 (2017). As Professor Skibine notes in this excellent article, the federal courts, especially the 9th Circuit Court of Appeals, are perplexed by this whole issue of Indian status for purposes of Indian country jurisdiction and have struggled with whether the definition is a race-based one, that could potentially run afoul of the 5th amendment, or is sufficiently tied to tribal status to survive scrutiny under *Morton v. Mancari*, 417 U.S. 535 (1974) (holding that disparate treatment of Indians is constitutional because of the unique political relationship Indian tribes have with the United States).

¶ 10 Tribal Courts are being dragged into this whole mess, apparently, because of the *Duro* fix and its reference to the Major Crimes Act. Whereas Indian tribes historically know who is and who is not Indian under tribal customary and common law, those customary practices may not be countenanced any longer under federal law. The United States Court of Appeals for the Ninth Circuit has been making itself a pretzel over this common-law definition that is the standard under the MCA and the ICRA. See e.g. *United States v. Cruz*, 554 US 840 (9th Cir. 2009). However, other federal court decisions recognize that the first prong of the *United States v. Rogers* test for determining whether a person has some degree of Indian blood may be met by that person having native blood

from a non-federally-recognized Tribe, *See United States v. Maggi*, 598 F.3d 1073 (9th Cir. 2010(en banc) (reversing panel decision finding that an Indian from the state-recognized Little Shell Band of Pembina Indians did not meet the definition of Indian under *United States v. Bruce*, 394 F.3d 1215, 1227 (9th Cir. 2005)) provided the person meets the second prong of the Rogers test for affiliating with a federally-recognized Tribe). *See also State v. Daniels*, 16 P.3d 650, 654 (2001) (having Canadian Indian blood meets the first prong of Rogers, but Court finds second prong was not met thus the Defendant was non-Indian and subject to state court jurisdiction).

¶ 11 This case presents a different situation as the Appellant argues that although she has held out a Fort Peck member, Michael Jackson, as her father for most of her life and goes by his surname she claims that biologically she is the progeny of two non-Indians and although she has lived on the Fort Peck reservation and been a member of the Community her entire life, thus satisfying the second prong of the Rogers test, she lacks any blood from an indigenous person and thus Judge Headdress erred in finding that a reasonable person would find her to be "Indian." Without addressing Judge Headdress's finding that she has "consented to jurisdiction" by holding herself out as an Indian person almost her entire life[2], the Court finds that a reasonable person considering the Appellant's situation would consider her "Indian." She claimed a tribal member as her father and has certainly been a part of the tribal community most of her life. Had she proceeded to trial and offered some proof that another individual with no degree of Indian blood was her real father, the Tribes may have been hard pressed to rebut that beyond a reasonable doubt at trial. She did not do that, however, and because the probable cause

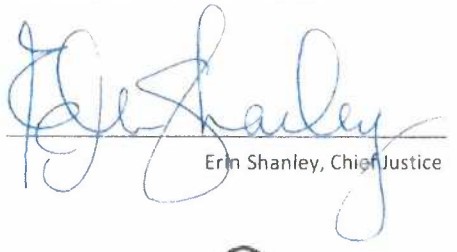
[2] Some Courts have recognized this notion of a person being estopped from claiming Indian or non-Indian status based upon his prior conduct, see State v. St. Cloud, 465 N.W.2d 177 (1991) (Defendant estopped from claiming he is Indian based upon his prior claims that he was non-Indian in federal court), this Court need not address whether a non-Indian "consents" to tribal criminal jurisdiction based upon her prior conduct and claims.

standard is so low this Court must find that the lower court did not err in finding the Appellant to be "Indian" under a reasonable person standard.

ORDER

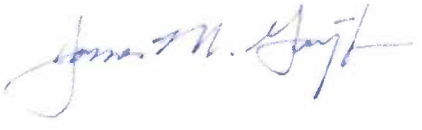
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Tribal Court's denial of the pre-trial motion to dismiss the criminal charge of Protection of Government Officials is AFFIRMED.

FORT PECK COURT OF APPEALS



Erin Shanley, Chief Justice

Associate Justice



James Grijalva, Associate Justice