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

Robert Taypayosatum, Appellant v. Fort Peck Tribes, Appellees.	CAUSE NO. AP # 804 ORDER

Appeal from the Fort Peck Tribal Court, Stacey Four Star, Presiding Judge.
Appellant Robert Taypayosatum, appearing with Advocate Terry Boyd.
Appellees Fort Peck Tribes, represented by Prosecutor David Mrgudich.
Before E. Shanley, Chief Justice; B. Desmond, Associate Justice; and B.J. Jones, Associate Justice.

BACKGROUND

¶ 1 This Matter comes before the Fort Peck Court of Appeals (FPCOA) on an appeal from the denial of a Petition for habeas corpus filed by the Appellant with the lower court.[1] The record below consists of the recording of the hearing before Chief Judge

[1] The Appellant actually filed an original application for a writ of habeas corpus with this Court, but in this Court's order of September 25, 2020 this Court noted that its jurisdiction extended over appeals from denials of habeas corpus and treated this appeal in that way. Because the Court is treating this as an appeal from the lower court's denial of the writ of habeas corpus, new evidence cannot be submitted to this Court at this time.

Fourstar on August 24, 2020 and her oral denial of the writ finding that the Appellant is an "Indian" for purposes of jurisdiction under the Indian Civil Rights Act, see 25 USC §1301(4). It should be noted that the Appellant was sentenced by the lower court, **pursuant to a plea of guilty,** on August 5, 2020 to a complaint charging him with Aggravated Driving under the Influence, Fleeing or Eluding Police, Hindering Law Enforcement and two counts of Protection of Governmental Officials. He was sentenced to a total of 470 days in custody and remains in detention pursuant to an order of the lower court. He has failed to file a motion to set aside his plea of guilty, but instead filed a writ of habeas corpus with the lower court claiming that the lower court lacked jurisdiction over him because he is not an "Indian" under 25 USC §1301(4).

¶ 2 The Appellant, through his counsel, Public Defender Terry Boyd, argues that the lower court erred in finding that the Appellant is Indian because he is an enrolled member of the Yellow Quill Ojibwa First Nation in Canada and this status precludes a finding that he is Indian for purposes of the lower court's criminal jurisdiction over him.[2] The lower court disagreed and used United States v. Bruce, 394 F.3d 1215 (9th Cir. 2005) and its progeny to find that the Appellant meets the definition of Indian under the ICRA. The lower court denied the writ on August 24, 2020 and this appeal ensued.

¶ 3 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

[2] The Tribes argued at hearing before the lower court that the Appellant has consented to jurisdiction under some discombobulated theory of "minimum contacts" which the lower court was correct in rejecting because it pertains to civil jurisdiction issues

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 US 535 (1974)(holding that disparate treatment of Indians is constitutional because of the unique political relationship Indian tribes have with the United States).

¶ 4 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. As Judge Fourstar noted below the Appellant in this case is indigenous, has been married to two Fort Peck tribal members whom he has children with and has lived in the Community much of his life. He has been prosecuted for other criminal activity by the Tribe and he receives the benefits of living in the Community and being indigenous. He is Indian

under tribal customary law, but because he is enrolled with a Canadian First Nation does that preclude a finding under federal law that he is Indian under the ICRA? Some federal court decisions suggest that it may, see United States v. Graham, 572 F.3d 954 (8th Cir. 2009)(finding that United States failed to allege and prove that a Canadian Indian indicted for murder of Anna Mae Aquash (also a Canadian Indian) was Indian under 18 USC §1153); United States v. Cruz, 554 US 8490(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.)

¶ 5 What makes this case even more difficult to assess is that it came before the lower court and now this Court on appeal after the Defendant pled guilty and never raised the issue of lack of jurisdiction. The United States Court of Appeals for the 9th Circuit, as well as other Circuit Courts, have held that the issue of Indian status of an offender or victim in an Indian country prosecution is an issue of fact that must be found by the fact finder beyond a reasonable doubt. United States v. Cruz, 554 F.3d 840 (9th Cir. 2009). In United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009) the Court held

that the Indian status of an offender in a federal court prosecution is actually an element of the offense which has to be submitted to a jury for determination. It is not a legal determination according to these Courts. When a Defendant knowingly and intelligently pleads guilty to an offense he admits the elements of the offense and the factual bases for the criminal complaint. In general, he is subsequently barred from bringing a habeas corpus action challenging an element of the offense. See Tollett v. Henderson, 411 U.S. 258 (1973). This Court notes that the Appellant in this case is not alleging that he was provided ineffective assistance of counsel or that his plea was not knowingly and intelligently entered. He has also not asked the lower court to permit him to withdraw his plea of guilty. He merely argues he is beyond the jurisdiction of the Tribal Court because he is Canadian First Nations, yet by pleading guilty he admitted an essential element of the offense that he is Indian under 18 USC §1153. This Court is not finding that a person can consent to jurisdiction that a sovereign otherwise does not have, but in a case such as this where a Defendant has admitted his Indian status by pleading guilty he should not be able to then turn around and challenge that conviction without proving that his plea was not voluntarily given. It would be tantamount to a defendant pleading to an offense and then turning around and filing a habeas petition alleging the offense did not take place in the territory of the sovereign.

STATEMENT OF JURISDICTION

¶ 6 The Fort Peck Appellate Court reviews final orders from the Fort Peck Tribal Court. 2 CCOJ §202. The oral order denying the writ of habeas corpus is a final order subject to this Court's review

STANDARD OF REVIEW

¶ 7 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.

ISSUE

Whether the lower court erred in denying the Appellant a writ of habeas corpus on his claim that as a Canadian Indian he is beyond the criminal jurisdiction of the Fort Peck Tribal Court after he pleaded guilty to several charges that had as elements of the offense that he is an Indian under 18 USC §1153

DISCUSSION

¶8 For the reasons stated above this Court finds that the lower court did not err in denying the writ of habeas corpus. The Appellant has not attempted to withdraw his plea of guilty in which he admitted he is Indian under the ICRA and has not alleged ineffective assistance of counsel. [3]The lower court applied the correct analysis in United States v. Bruce to determine the issues of whether the Appellant has Indian blood and is considered by his Community as an Indian even though he admitted his Indian status by pleading guilty.

ORDER

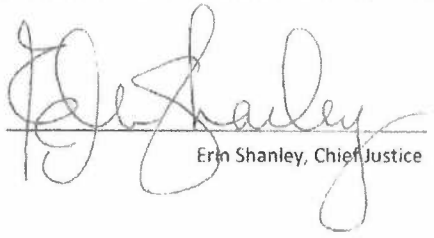
¶9 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Tribal Court's denial of the writ of habeas corpus is hereby AFFIRMED without prejudice to the

[3] Should the Appellant file a motion to withdraw his plea of guilty the lower court must address whether he is indigent and if so whether he is entitled to court-appointed counsel under 25 USC 1302(c) since the Appellant was charged with two felony-type offenses. This Court acknowledges that he did not receive sentences in excess of one year on each of those offenses but as this Court indicates in Tribe v. Michaelson the lower court needs to be careful to ensure adequate provision of rights to criminal defendants who are facing possibly felony-type sentences.

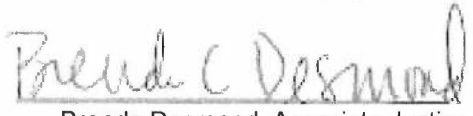
right of the Appellant to file an appropriate motion with the lower court to set aside his plea of guilty and raise the issues he attempts to raise in his habeas petition.

SO ORDERED the 2nd day of December 2020.

FORT PECK COURT OF APPEALS



Erin Shanley, Chief Justice



Brenda Desmond, Associate Justice

Associate Justice