SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

COURT OF APPEALS

George Lewis v. People of the Sault Ste. Marie Tribe of Chippewa Indians

APP-12-03

Decided February 11, 2013

BEFORE: FINCH, HARPER, KRONK, JUSTIN, and NERTOLI Appellate Judges.

OPINION

Kronk, Appellate Judge, who is joined by Appellate Judges Finch, Harper, Justin and Nertoli.

Factual and Procedure Background

Appellant appeals from his May 17, 2012 sentencing. Before sentencing on May 17, 2012, Appellant pled guilty to four charges. An attorney was not present to represent Appellant at the May 17th sentencing. As to the specific sentences, in CR 10-19 (probation violation and contempt), Appellant was sentenced to 179 days. In CR 11-24 (abusing property), Appellant was sentenced to 60 days. In CR 11-30 (operating with a suspended license and contempt), Appellant was sentenced to 60 days. Appellant was also sentenced to 60 days in CR 11-31 (disobedience of a court order). Judge Fabry held that the time could run concurrent and, therefore, that appellant would serve 179 days in jail. Furthermore, Judge Fabry did not waive remaining restitution owed in CR 10-19, which was $126.

In June 2012, Appellant filed a Notice of Appeal with this Court. On November 30, 2012, this Court heard oral argument on the appeal. On December 19, 2012 and January 4, 2013, Appellant and Appellee, respectively, submitted supplemental briefs to this Court. As explained below, this Court affirms the tribal trial court's sentencing in this matter.

Jurisdiction and Standard of Review

This Court has exclusive jurisdiction in this matter, as it is reviewing the decision of the tribal trial court. Tribal Code Section 82.109. In matters involving a finding of fact by the tribal trial court, this Court will review to determine whether the trial court's determination was "clearly erroneous." Tribal Code Section 82.124(1). However, "[a] conclusion of law shall be reviewed by the Court of Appeals without deference to the Tribal Court's determination, i.e., review is *de novo*." Tribal Code Section 82.124(5). Given the present appeal raises questions of law, this Court applies the latter standard in reviewing the tribal trial court's decision.

DISCUSSION

This case presents important procedural and legal questions. The Court first addresses the procedural issue related to the United States Supreme Court's decision in *Anders v. California.* Second, the Court addresses the legal issues raised in this matter.

Application of Anders v. California *to Matters Before this Court*

Counsel for Appellant, Mr. Mark Dobias, raised an issue of first impression for this Court when he submitted an *Anders* brief requesting that he be excused from this case, as it was his opinion that no meritorious claims on appeal existed. For reasons fully explained in this Court's November 28, 2012 response to Mr. Dobias' motion, this Court rejected Mr. Dobias' motion. However, given that this is the first time that an *Anders* motion has been filed in this Court, it is appropriate to provide guidance for the procedure to be used in such circumstances in the future.

First, it is helpful to provide background information on what an *Anders* motion is. In 1967, the United States Supreme Court released its opinion in *Anders v. California*, 386 U.S. 738. The issue in *Anders* concerned the duty of a court-appointed appellate counsel when the attorney had determined that the appeal lacked merit. The attorney at issue in *Anders* notified the court that he was of the opinion that the appeal lacked merit, that he had communicated his belief to the petitioner and that the petitioner wished to submit a brief in the matter on his own behalf. The petitioner requested appointment of a new counsel and that request was denied by the court. The petitioner subsequently submitted a brief *pro se*. Ultimately, the court upheld the petitioner's conviction.

The United States Supreme Court in reviewing the procedure used held that the procedure "does not comport with fair procedure and lacks that equality that is required by the Fourteenth Amendment." *Id.* at 741. In reaching its determination, the Court explained that "[t]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to those of *amicus curiae*." *Id.* at 744. However, the Court went on to explain that "[o]f course, if counsel finds his cause to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." *Id.* Accordingly, the *Anders* Court apparently attempted to balance the petitioner's constitutionally-guaranteed right to counsel against the attorney's ethical obligations to the court.

To balance these concerns, the *Anders* Court went on to explain the procedure that should apply in such situations:

> That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court – not counsel – then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it

> so finds it may grant counsel's request to withdraw and dismiss the appeals insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Id. The *Anders* Court ultimately concluded that "[t]his procedure will assure penniless defendants the same rights and opportunities on appeal – as nearly as is practicable – as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." *Id.* at 745.

The issue before this Court is whether to adopt the procedure outlined by the United States Supreme Court in *Anders v. California* for the Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals. First, it must be noted that such procedures only apply in the criminal context. Second, it must also be noted that this Court is not bound by the decisions of the United States Supreme Court in this context. As this Court explained on November 28, 2012:

> This is because, as separate sovereigns, tribes predate the formation of the U.S. Constitution and are extra constitutional entities. *See generally Talton v. Mayes*, 163 U.S. 376 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Moreover, unless a state is a Public Law 280 state, state law is generally held inapplicable to tribal court adjudications. *See generally Worcester v. Georgia*, 31 U.S. 515 (1832); *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2004). Accordingly, while federal and state law may be persuasive to this Court, such laws are not binding on this forum.

George Lewis v. The People of the Sault Ste. Marie Tribe of Chippewa Indians, Response to Motion to Withdraw as Counsel for Appellant (APP-12-03).

Even though the United States Supreme Court's decision in *Anders* does not bind this Court, the Court believes that guidance as to the appropriate procedure in such circumstances would be helpful. Sault Ste. Marie Tribe of Chippewa Indians Tribal Code 82.120 provides a briefing timeline for parties wishing to submit appellate briefs to this Court. It is expected that by the deadline established at Tribal Code 82.120 court-appointed appellate counsel will submit either a brief on the merits of the appeal or a brief similar to what was required by the United States Supreme Court in *Anders v. California*.[1] Specifically, the attorney should submit a brief to this Court identifying her belief that an appeal would be frivolous. The attorney's brief to this Court should also be accompanied by a reference to anything in the record that might arguably support

[1] Notably, Tribal Code 82.120 does not require the submission of a brief. However, if a court-appointed counsel determines that an appeal would be frivolous, this Court expects that an *Anders* type brief will be submitted to this Court by the deadline established in Tribal Code 82.120.

the appeal. A copy of the brief must be served on both the attorney's client and opposing counsel.

If such a brief is submitted to this Court, oral argument on the brief will be scheduled. In the order scheduling oral argument on the *Anders*-style motion and brief, the defendant should be notified that she can appear before this Court and make arguments to the Court independent of those raised by her court-appointed counsel. This is consistent with what this Court understands to be the Tribe's customs and traditions. Before imposition of an Anglo-styled legal system, the Tribe allowed for individuals to orally present their grievances to the Tribe. Given the important rights at issue in criminal matters, such an opportunity to orally present grievances to this Court is appropriate.

Following oral argument on the *Anders*-styled motion and brief, this Court will determine the merits of the motion and brief. If the motion is denied, the Court may move forward with scheduling and ordering briefing on the merits of the case.

It is expected that *Anders*-styled motions and briefs to this Court will be exceptionally rare and will be used in limited circumstances. Given the historical and traditional importance to the Tribe of allowing individuals to publically address grievances, this Court will apply a high threshold in determining the merits of an *Anders*-style motion and brief.

Application of* Boykin v. Alabama *to the Present Matter

In June 2012, the Appellant submitted a Notice of Appeal to this Court. Appellant's Notice of Appeal requested relief from Judge Fabry's May 17, 2012 sentencing of Appellant. Specifically, Appellant requested relief under Tribal Code 82.117, which provides that "[a]n appellant may request that the Tribal Court issue a stay of civil judgment or order pending an appeal." No further information was provided to this Court as to the basis of Appellant's appeal from Judge Fabry's sentencing in his Notice of Appeal.

In his December 19, 2012 supplemental brief to this Court, Appellant's counsel raised two arguments on appeal. First, Appellant's counsel asserts that the pleas entered and subsequent sentence imposed by the tribal trial court were procedurally infirm and should therefore be vacated. Specifically, counsel argued that "Appellant was not advised by the Trial court, that by pleading guilty, Appellant would be giving up his right against self-incrimination as required by *Boykin v. Alabama*, 395 U.S. 238 (1969) and the Indian Civil Rights Act, 25 U.S.C. § 1302 (a)(4)." Supplemental Brief of Appellant in *George Lewis v. The People of the Sault Ste. Marie Tribe of Chippewa Indians*, APP-12-03, 2 (Dec. 19, 2012). Accordingly, this Court will consider whether *Boykin v. Alabama* and the Indian Civil Rights Act, 25 U.S.C. §1302(a)(4) should apply in the present matter, resulting in the tribal trial court's sentencing to be vacated.

First, the application of *Boykin v. Alabama* to the present matter is considered. In *Boykin*, a man pleaded guilty to five indictments for common law robbery and a jury sentenced the man to death. Notably, the Court indicated that "[s]o far as the record shows, the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court." *Boykin*,

395 U.S. at 239. The Court ultimately reversed the sentencing based on the pleas, as there was no record to demonstrate that the man voluntarily and knowingly made his pleas to the court.

As previously explained in the above consideration of *Anders*, the United States Supreme Court's decision in *Boykin v. Alabama* is not binding on this Court. However, this Court may consider such precedent for its persuasive value on the question presented. Appellant's counsel argues that this Court should apply *Boykin*, and, as a result, invalidate the pleas entered by Mr. Lewis as Mr. Lewis arguably did not have notice that he would be giving up his right against self-incrimination.

In evaluating the persuasiveness of this argument, it is helpful to consider the record in this case. After being informed that Mr. Lewis wished to enter a plea and be sentenced on the same day, presiding tribal trial judge, Judge Fabry, advised Mr. Lewis as follows:

> THE COURT: And Mr. Lewis you understand that if the Court accepts your guilty pleas [sic] to those counts that you are giving up your rights that you would have at trial because there in fact would not be a trial with regard to those charges. So specifically you're giving up the right to a jury trial.
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> THE DEFENDANT [MR. LEWIS]: Yes.
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> THE COURT: The right to be represented by an attorney at that trial. The right to call witnesses to testify on your behalf. The right to cross-examine any witnesses called by the Prosecutor. And the right to have the Prosecutor held to the burden of establishing those – the elements of those crimes beyond a reasonable doubt.
>
> THE DEFENDANT [MR. LEWIS]: Yes, ma'am.

Transcript in *The People of the Sault Ste. Marie Tribe of Chippewa Indians v. George Lewis*, File No. CR 10-19, CR 11-24, CR 11-30, CR 11-31, p. 9 (May 17, 2012). Judge Fabry also established through her questions to the Appellant that he was voluntarily pleading guilty and requesting sentencing in the various matters. Accordingly, unlike in *Boykin* where the trial judge failed to ascertain whether the defendant was knowingly and intelligently waiving his rights and pleading to the charges, here there is ample record that Judge Fabry instructed the Appellant as to his rights, that he agreed to the waiver of his rights and that he did so knowingly. Therefore, this case is distinguishable from the material facts at issue in *Boykin v. Alabama.*

Admittedly, Judge Fabry did not specifically appear to instruct Appellant on his right against self-incrimination. However, this Court is unfamiliar with any law requiring that a defendant specifically be notified of this right at the time that he enters a guilty plea. Also, it is notable that Judge Fabry generally advised the Appellant that by submitting his guilty plea he would be relinquishing his right to a trial, which theoretically includes the right against self-incrimination.

Appellant's counsel's argument that *Boykin v. Alabama* should be applied to invalidate the pleas entered is therefore rejected.

Indian Civil Rights Act Section 1302 (a)(4)

Appellant's counsel also argued that the Indian Civil Rights Act section 1302(a)(4) obviates in favor of Appellant's guilty pleas being invalidated. Unlike *Boykin v. Alabama*, the Indian Civil Rights Act does bind this Court. *See generally Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Section 1302 (a)(4) of the Indian Civil Rights Act provides that "[n]o Indian tribe in exercising powers of self-government shall compel any person in any criminal case to be a witness against himself." In relevant part, Appellant's counsel argues that "Appellant did not waive his privilege against self-incrimination as mandated by the Indian Civil Rights Act." Supplemental Brief of Appellant in *George Lewis v. The People of the Sault Ste. Marie Tribe of Chippewa Indians*, APP-12-03, 4 (Dec. 19, 2012). However, it appears that Appellant's counsel is reading into the Indian Civil Rights Act a requirement that is not included in section 1302 (a)(4). The Indian Civil Rights Act does not require that a defendant waive the right against self-incrimination before voluntarily entering a guilty plea. Moreover, counsel does not direct this Court to evidence that Appellant was forced to testify against himself without giving consent. Accordingly, the argument with regard to the Indian Civil Rights Act is rejected.

Availability of Stand-by Counsel

Finally, Appellant's counsel asserts that Appellant should have been provided "a form plea agreement with a checklist format that provides an advice of rights and waiver of rights which is executed contemporaneously with a plea in open court … In addition, duty counsel can be available at the time pleas are taken to consult with a criminal defendant." Supplemental Brief of Appellant in *George Lewis v. The People of the Sault Ste. Marie Tribe of Chippewa Indians*, APP-12-03, 4 (Dec. 19, 2012). In response, Appellee explains that "Appellant fails to cite [sic] any authority which requires that stand-by counsel be available." Appellee's Brief on Appeal in *George Lewis v. People of the Sault Ste. Marie Tribe of Chippewa Indians*, APP-12-03, 4 (Jan. 4, 2013). This Court agrees with Appellee. While Appellant's counsel may raise a valid policy consideration, there is no legal authority binding on the tribal trial court that would have required the use of a form plea or duty counsel in this matter.

ORDER

For the foregoing reasons, sentencing entered against Appellant on May 17, 2012 is affirmed.

It is SO ORDERED.