

**SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS**

Catherine McDonald v. People of the Sault Ste. Marie Tribe of Chippewa Indians

APP-08-09

Decided August 31, 2009
(Available for Release September 10, 2009)

BEFORE: HARPER, KRONK, JUSTIN, MCKERCHIE, and WEISS, Appellate Judges.

ORDER AND OPINION

Kronk, Chief Appellate Judge, and Weiss, Appellate Judge, jointly, who are joined by Appellate Judges Harper, Justin and McKerchie.

Although it is not clear from the Notice of Appeal upon which section of the Tribal Code Appellant bases her appeal, she did state that her appeal was based on the "Prosecutor's failure to provide Defendant with copy of evidence to be used against her. Said evidence was pivotal in Defendant's conviction." Notice of Appeal, APP-08-09 (November 3, 2008). Appellant goes on to request that this Court reverse and remand the trial court's decision. *Id.* Based on the analysis below, this Court grants Appellant's request in part and modifies the trial court's sentence, as discussed in the Order below. The Court, however, denies Appellant's request to overturn Appellant's conviction or grant a new trial.

DISCUSSION

I. Factual and Procedural Background

The present matter is a criminal case and involves an appeal by Appellant, Catherine McDonald, from the trial court's conviction and sentence. It was alleged at trial that Appellant embezzled money, two fifty dollar bills, from the Sault Ste. Marie Tribe of Chippewa Indians (Tribe) while working for the tribal casino. Following a jury verdict finding Appellant guilty of embezzlement on August 21, 2008, Judge Farrell Elliott entered a sentencing order against Appellant ordering her to: 1) serve 120 days in jail, with 90 days held in abeyance, 2) pay costs amounting to \$1,015, 3) perform 60 hours of community service supervised by the probation department, 4) complete random PBT and drug tests, 5) complete 365 days of probation and 6) pay all fines, costs and restitution prior to the end of her probationary period. Appellant requested and was granted a Stay of Sentence pending her appeal to this Court. Order Granting Stay, CR-07-127 (October 16, 2008).

At issue in this appeal is footage of Appellant that depicts the actual embezzlement. There were two tapes presented a trial. One tape allegedly is muddled

and it is unclear what the tape shows other than Appellant working at a computer screen. However, the second tape, the tape in question, allegedly clearly shows Appellant taking money from the Tribe while at work for the casino. The former tape was shown to the Appellant's attorney and the latter tape was not.¹ "The tape allegedly not shown or provided to Defendant showed the actual perpetration of the crime ... whereas the tape shown or provided the Defendant shows Defendant punching numbers into a computer screen" Prosecutor's Brief of Appeal, APP-08-09, 2 (March 24, 2009).²

Prior to Appellant's trial, Appellant was presented with a plea agreement. Under the terms of the proposed plea agreement, the following would have applied:

- 1) The Defendant will plead guilty to an amended Count 1, Embezzlement and Theft from a Tribal Organization, Tribal Code § 71.808.
- 2) In exchange, the Prosecution will recommend that the Court impose the following sentence:
 - a. The Defendant be sentenced to 180 days incarceration, with 175 held in abeyance;
 - b. the Defendant be placed on probation for 6 months;
 - c. the Defendant must perform 80 hours of community services; and
 - d. the Defendant is subject to fines and costs in the Court's discretion.

Plea Agreement & Request for Plea Hearing, CR 07-127 (May 14, 2008). At oral argument, Appellant's attorney, Mr. Whyte, indicated that because he had only seen one tape that "shows the Defendant punching numbers into a computer screen" and that did not show Appellant actually perpetuating the crime he counseled his client not to accept the plea agreement. Based on the one tape Mr. Whyte viewed, he indicated during oral argument before this Court that he believed reasonable doubt could have been established and that the Appellant could have been found not guilty at trial.

¹ In an Affidavit from Jocelyn Fabry, the tribal Prosecutor at the time of discovery in this matter, submitted at oral argument to this Court, Ms. Fabry confirms that only one tape was produced to the Appellant's attorney, Mr. Whyte. Affidavit of Jocelyn K. Fabry (March 6, 2009). While this Court is normally precluded from considering information not in front of the trial court, fairness and efficiency require that the Court accept Ms. Fabry's Affidavit as true, thereby allowing this Court to focus on the legal question raised by this appeal rather than the factual question of whether the tape was actually turned over to the Appellant's counsel. Moreover, the Tribal Code allows this Court to consider an issue not presented below when "a miscarriage of justice would result" from failure to consider the issue. Tribal Code Section 82.125(1). It is in this Court's opinion that a potential miscarriage of justice would result if it were restricted from holding as true that both tapes were not turned over to Mr. Whyte. Furthermore, Ms. Fabry has no reason to misrepresent this fact to the Court, as her failure to produce both tapes to Appellant places Ms. Fabry in a bad light. Additionally, current counsel for Appellee, Mr. Blubaugh, neither in his brief nor at oral argument in this case, argued that the Appellant had received both tapes prior to her trial. This Court therefore accepts as true the fact that neither Appellant nor her counsel received a copy of the tape that "showed the actual perpetration of the crime" prior to Appellant's trial.

² The Court is very much aware that Appellee's brief in this matter was submitted one day after the established deadline. Appellee is strongly encouraged not to make the same mistake again.

When the tape showing Appellant perpetrating the crime was first shown at trial, Mr. Whyte did object to its presentation.³ Transcript of Jury Trial, CR 07-127, 56-57 (August 21, 2008) (“MR. WHYTE: Objection, Your Honor, that tape was not furnished to the Defendant. We have a tape that showed, we were shown a tape that shows her actually punching in to a screen. That is not the tape we were provided with.”). Over Mr. Whyte’s objection, the trial court allowed the jury to view the tape. *Id.* at 57 (“THE COURT: Well, in the, video’s in now and I don’t think anyone here is in a position to go further. The, objection will be noted.”).

At oral argument before this Court, Mr. Whyte argued on behalf of Appellant that the combination of the failure to produce the tape showing the actual perpetration of the crime coupled with the trial court’s willingness to show the unproduced tape to the jury prejudiced the Appellant. Mr. Whyte asserted that given these errors he had no opportunity to review the tape and advise his client accordingly. He further asserted at oral argument that if he had seen the tape showing Appellant perpetrating the crime he would have advised her to accept the plea agreement offered. Because his ability to effectively counsel his client was so seriously eroded by the actions of the tribal prosecutor and trial court, he requested on behalf of Appellant that the trial court’s sentence be overturned and the matter remanded to trial court for a new hearing.

II. Standard of Review

This Court has exclusive jurisdiction in this matter, as it is reviewing the decision of the trial court. Tribal Code Section 82.109. Moreover, this Court has the authority to “increase or decrease any sentence in a criminal case.” Tribal Code Section 82.112(1). The central issue in this matter is whether the tape in question, the tape that was not presented to the Defense during discovery, should have been viewed by the jury at trial. This was a conclusion of law made by Judge Farrell during the trial when he allowed the tape to be shown to the jury. Accordingly, because a conclusion of law is at the heart of this matter, the standard of review applicable in this case is *de novo*. Tribal Code Section 82.124(5).

III. Relevant Caselaw of Other Sovereigns

The present matter raises an issue of the appropriate remedy when inculpatory evidence is withheld from the Defense. This is not an issue that this Court has had the opportunity to address in the past. Additionally, it is not an issue that the Tribal Code appears to address. It is an issue, however, that the courts of other sovereigns have

³ While Mr. Whyte objected to the showing of the second tape to the jury, he did not request a continuance following the trial court’s decision to allow the jury to view the tape. Typically, an attorney will request a continuance in such circumstances to allow him additional time to prepare to respond to unexpected material. This is the proper remedy in situations such as those presented in this case. The Court assumes that in the future all attorneys and parties confronted with a situation such as the one in this case will request a continuance. Moving forward, this Court will consider failure to request a continuance as evidence that the party in question is not unduly prejudiced by the trial court’s ruling.

considered. Accordingly, in reaching a decision in this matter, it is appropriate to consider the decisions of other sovereign's courts before reaching a decision. This conclusion is consistent with the Tribal Code, which provides that "[t]he Court shall apply the substantive law of the Tribe, as well as applicable federal law." Tribal Code Section 82.108(4). Given there does not appear to be tribal substantive law on this issue, it is appropriate to look to applicable federal law.

The United States Supreme Court has addressed the issue of the suppression by the prosecution of evidence favorable to an accused. *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the petitioner had been convicted of murder and sentenced to death. Following his conviction, the petitioner learned that the State had suppressed at trial that another person had admitted to the murder. The issue before the U.S. Supreme Court was whether the suppression of the exculpatory evidence violated the petitioner's due process rights. The U.S. Supreme Court ultimately affirmed the grant of a new trial on the issue of punishment, as the suppression of exculpatory evidence did violate the petitioner's due process rights.

The suppression by the prosecution of evidence *favorable* to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *See generally Brady v. Maryland*, 373 U.S. 83 (1963). This conclusion is consistent with the Tribe's Constitution, Article VII, which provides that "[n]o member shall be denied any of the rights or guarantees enjoyed by citizens under the Constitution of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or the redress of grievances, and due process of law." The principle established here is not punishment of the tribal community for misdeeds of a prosecutor, the police or other members of the Tribal executive, but avoidance of an unfair or unnecessary trial to the accused. Our communities win not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty, helps shape a trial and disadvantage a criminal defendant. *Id.* at 87-88.

A prosecutor is not a neutral, he is an advocate. The achievement of a victory at trial is not the Tribal Prosecutor's only role; the establishment and furtherance of justice is her paramount objective. To paraphrase federal judge Simon E. Sobeloff, the Tribe wins its point when justice is done in its courts. Judicial Conference of the Fourth Circuit (June 29, 1954).

The issue here however is whether *inculpatory*⁴ evidence, which is to say evidence that solidifies, supports, or strengthens the tribal prosecutor's case, when withheld by the prosecutor, creates a violation of a defendant's substantive due process rights? We hold that it does not, as discussed below. As reasoned above, the suppression

⁴ The evidence at issue in this case is inculpatory because the video tape withheld from the Defense at trial apparently showed the Appellant committing the crime of which she was accused.

of *exculpatory* evidence raises due process concerns because such suppression negatively affects an individual's ability to obtain a fair trial. However, similar concerns are not raised by the suppression of *inculpatory* evidence. But such withholding of trial evidence when that evidence is used in the trial and is material to the conviction of the defendant is contrary to the ends of justice. As argued before this Court by the Appellant, the evidence as disclosed by the prosecutor gave counsel the firm belief that there was reasonable doubt sufficient to justify the rejection of a plea offer thereby permitting the matter to proceed to a jury. It is argued that had the undisclosed video evidence been disclosed, defense counsel would have not believed that reasonable doubt in the proper quantum was present, would have recommended that his client accept the proffered plea offer, the trial would have been avoided, the members of the jury would not have been inconvenienced, and the Tribe would have been spared the attendant expenses.

IV. Remedy

Notably, neither Appellant nor Appellee seriously appeared to assert at oral argument that Appellant is innocent of embezzlement. Appellant bases her argument for a new trial and reversal of her sentence not on the fact that she is innocent, but because of procedural errors in the trial below. This Court therefore is not presented with a situation where the Appellant is innocent, but, rather where there are procedural errors that perhaps resulted in a harsher sentence than the Appellant would have faced absent the procedural errors. As explained in Section I above, Mr. Whyte's primary argument at oral argument was that Appellant should be granted a new trial because the Prosecution's failure to turn over both tapes affected his ability to effectively advise his client. Because Mr. Whyte had not seen the tape showing Appellant perpetrating the crime, he advised her not to take the proposed plea agreement, which would have resulted in a lesser sentence for the Appellant than the one she received.

As explained above in Section III, the U.S. Supreme Court held in *Brady v. Maryland* that the suppression of *exculpatory* evidence at trial raises due process concerns, as such suppression negatively affects an individual's ability to obtain a fair trial. 373 U.S. 83 (1963). However, as also explained above, although there are issues raised about the trial process in general, the same due process concerns are not present when *inculpatory* evidence is suppressed at trial. Therefore, this Court rejects Appellant's request for a new trial.

This decision is not only consistent with the law of other sovereigns that this Court finds persuasive, as discussed above, but the decision also takes into consideration the tribal community's concerns. It is appropriate for this Court to take into consideration the needs of our tribal community. First, it would be inappropriate for this Court to order a new trial when all parties seem to agree that Appellant is guilty of embezzlement. Such a new trial would be a waste of valuable tribal resources. Second, it is not in the best interest of our tribal community to allow Appellant to potentially be found not guilty of this crime. Again, no one seems to seriously assert that she is innocent. Additionally, if she is not punished for this crime, there is the possibility that the Appellant could once again work for the tribal casino, which was the victim of her

crime. It is important that Appellant never be able to work for the tribal casino again for many reasons. Her crime against the casino is a crime against the entire tribal community, which strongly relies on the success and revenue from the tribal casino. Moreover, her crime is a crime against all of Indian Country, as it perpetuates the stereotype that Native people are not capable of regulating themselves or their casinos. Therefore, given both the strong legal and community reasons for not granting the Appellant a new trial, her request for a new trial is rejected.

The question therefore becomes whether Appellant's sentence should be modified. While this Court is not persuaded that Appellant should receive a new trial, this Court is not blind to the fact that mistakes were made in this matter that likely affected the Appellant's sentence. The Court is persuaded by Mr. Whyte's argument at oral argument that if he had seen the tape showing Appellant perpetrating the crime he would have counseled her to accept the plea agreement presented before the trial. Accordingly, to address this injustice to Appellant, this Court modifies the sentence entered in this case on May 14, 2008 to reflect the plea agreement. Appellant's sentence is therefore modified in the following manner: 1) Appellant be sentenced to 120 days incarceration, with 115 held in abeyance; 2) Appellant be placed on probation for 6 months; 3) Appellant must perform 60 hours of community service; and 4) Appellant is subject to fines and costs in the amount of \$1015.⁵

CONCLUSION AND ORDER

For the reasons articulated above, Appellant's request for a new trial is rejected. However, per this Court's authority under Tribal Code Section 82.112, the trial court's sentence is modified to reflect the following: 1) Appellant be sentenced to 120 days incarceration, with 115 held in abeyance; 2) Appellant be placed on probation for 6 months; 3) Appellant must perform 60 hours of community service; and 4) Appellant is subject to fines and costs in the amount of \$1015.

This matter is therefore remanded to the trial court for resolution consistent with this Order.

It is SO ORDERED.

⁵ Appellant was not convicted of a crime related to substance abuse. Additionally, "[t]he Probation Department after hearing the facts of her Substance Abuse history agrees that Catherine does not have a Substance Abuse Problem either." Ed McKelvie, Probation Department, *PreSentence Report*, 4 (October 7, 2008). Given her crime is not related to substance abuse and the Probation Department reports that she does not have a substance abuse problem, the Court does not believe that random drug testing is appropriate at this time. Additionally, random drug testing was not part of the original plea agreement offered to the Appellant.