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IN THE SUPREME COURT  
OF THE  
ROSEBUD SIOUX TRIBE

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ROSEBUD SIOUX TRIBE,  
Plaintiff/Appellee,

vs.

WES LUXON,  
Defendant/Appellant.

CA09-03  
MEMORANDUM OPINION  
AND ORDER  
(AMENDED)

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Per Curiam (Frank Pommersheim, Chief Justice and Associate Justices Leroy Greaves and Cheryl Three Stars Valandra)

I. Introduction

Wes Luxon, defendant/appellant, was arrested by tribal law enforcement officers on the evening of November 17, 2008. He was charged with the offenses of Driving Under the Influence (Rosebud Sioux Law and Order Code § 6-1-1(2) (Class B offense) and Possession of a Firearm While Intoxicated (Rosebud Sioux Law and Order Code § 5-11-7 (Class B offense)).<sup>1</sup>

After a series of continuances, Mr. Luxon, represented by a law-trained public defender, was tried at a bench trial before Judge Steve Emery. Judge Emery found the defendant guilty on both counts.<sup>2</sup> The defendant, represented by a capable lay advocate (who is a member in good standing of the Sicangu Oyate Bar Association), filed a timely Notice of Appeal. Oral argument was heard by this Court on September 11, 2009.

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<sup>1</sup> A third offense of Possession of a Firearm While Under the Influence of Marijuana was subsequently dismissed.

<sup>2</sup> Judge Emery imposed a sentence of 60 days (with 30 days suspended) and a \$500 fine on the DUI charges and 60 days (with 45 days suspended) and a \$500 fine on the DUI/Firearms charge sentence to run consecutively. Defendant was also to take a DUI class and write a letter of apology to the local newspaper.

## II. Issues

This appeal raises two issues, namely whether there was ineffective assistance of counsel by the public defender at the trial level in this matter, and whether the new amendment to the Tribal Constitution found at Sec. 1 (d) of Art. X (Bill of Rights) relative to *Miranda* warnings requires reversal of defendant's conviction.

Each issue will be discussed in turn.

## III. Discussion

### A. Ineffective Assistance of Counsel

This issue presents a matter of first impression and of significant importance before this Court. The initial question in this context is identifying the appropriate standard with which to determine whether defense counsel's representation was ineffective and if so, whether it was also prejudicial. The classic *federal constitutional* standard is articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), but it does not automatically apply in this Tribal court context. That is so because the right to counsel in the tribal court context derives from the Tribal Constitution and federal statute, not the United States Constitution. The relevant Tribal constitutional provision is to be found at Art. X, Sec. 1(f), which guarantees the defendant the right "to have the assistance of counsel for his or her defense, including the right to have counsel subject to income guidelines." The analogous federal statutory provision is contained in the Indian Civil Rights Act, 25 U.S.C. § 1302(6), and provides a defendant with the right "at his own expense to have the assistance of counsel for his defense."

In light of the strong affirmative language in the Tribe's Constitution and the Tribe's concomitant commitment to enhanced constitutional governance, this Court adopts the standard articulated in *Strickland v. Washington* as the proper measure to determine whether there has

been ineffective assistance by counsel in a criminal case tried before the Rosebud Sioux Tribal Court. This well-known test consists of two parts: “First the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defendant. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” 466 U.S. at 687. A defendant’s conviction may be set aside only if both parts of the test are satisfied.<sup>3</sup> *Id.*

Other tribal courts have consistently adopted the *Strickland* test as the appropriate standard for determining ineffective assistance of counsel claims. The Hopi Court of Appeals, for example, expressly adopted the *Strickland* standard as applicable to a non-law-trained by advocate in *Navasie v. Hopi Tribe*, No. 98AC000015 (Hopi Court of Appeals, 1998):

However, since the [*Strickland*] standard comes from a foreign jurisdiction, Hopi courts should consider whether it is suited to the Hopi community before adopting it. Representation by legal counsel has distinct advantages for Hopi litigants, including affordability and cultural familiarity that merit preservation. Nonetheless, legal counsel should not be permitted to practice without basic competency in law and procedure. The *Strickland* test, in assessing the effectiveness of counsel by what is reasonable under the circumstances, allows competency to be evaluated in light of Hopi norms. It strikes an appropriate balance between the need to protect defendants from inept counsel and the need to take into account the relevant cultural context, and thus can be applied to both lay advocates and attorneys. *Id.* at 38.

The Hopi Court of Appeals in *Navasie* wisely underscores the importance of cultural context insuring a just application of *Strickland* and this Court expressly endorses such contextual concern for Lakota cultural norms and values. *See also Taylor v. Hopi Tribe*, No.

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<sup>3</sup> Since admission to practice before the Rosebud Sioux Tribal Court requires an individual – whether law-trained or not – to pass the Tribal bar examination, the *Strickland* standard will apply to all defense counsel, regardless of educational background. In addition, the *Strickland* standard shall apply in all cases when a defendant is sentenced to jail time, regardless of whether any of said jail time has been suspended, commuted, or otherwise served.

00AC000002 (Hopi Court of Appeals, 2000), expressly adopting the two part *Strickland* test of “deficient performance” and “prejudice.”

The Navajo Supreme Court has likewise adopted the basic *Strickland* standard as a necessary element of the right to counsel guaranteed by the Navajo Nation’s own Bill of Rights. The *Strickland* standard is further mandated by Navajo common law. In fact, the Court noted that “[t]his cultural standard is stricter than that required by the Indian Civil Rights Act.” *Navajo Nation v. Madonal*, No. A-CR-09-90 (Navajo Supreme Court, 1991). See also *Fort Peck Assiniboine and Sioux Tribes v. Clark* (Fort Peck Assiniboine and Sioux Tribes Court of Appeals, 1987) deriving the legitimacy of an ineffective assistance claim from the right to (optional) counsel contained in the Indian Civil Rights Act, 25 U.S.C. § 1302 (6).

#### 1. Deficient Performance

Deficient performance of defense counsel is to be measured by an “objective standard of reasonableness.” The reasonableness standard includes both an element of deference and flexibility relevant to the “prevailing norms of practice.” Yet the reasonableness inquiry must center on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690. A central component in this inquiry is defense counsel’s duty to investigate so as to make “strategic choices.”

The two primary grounds alleged to constitute deficient performance were the failure of defense counsel to file a pre-trial motion for a “probable cause and suppression” hearing and the failure to adequately cross-examine the law enforcement witnesses of the prosecution. Each ground will be examined separately.

a. Failure to Seek a Probable Cause and Suppression Hearing

The appellant consistently conjoins probable cause with suppression, but they are two quite different elements of criminal procedure. A probable cause hearing was determined to be constitutionally mandated (absent an arrest warrant) in the case of *Gerstein v. Pugh*, 420 U.S. 103 (1975). In the case at bar, the defendant was arrested without a warrant on November 17, 2008 and was released on a \$500 cash bond on November 19, 2008. This two day period of incarceration normally would not trigger the requirement of an immediate probable cause hearing under the constitutional principle of due process articulated in the case of *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

As noted above, such a constitutional principle does not apply against the tribes, *see Talton v. Mayes*, 163 U.S. 376 (1896), because the tribes are not subject to the strictures of the United States Constitution. Nevertheless, the tribes are subject to the Indian Civil Rights Act, including the due process provision at 25 U.S.C. § 1302(8), as well as its own constitutional provisions. The Rosebud Sioux Constitution contains a due process guarantee at Art. X, Sec. 1(f). This Court holds that the Tribal constitutional guarantee of due process requires a due process hearing within 72 hours if the defendant has not been released from custody. Such a due process hearing need not be adversarial and does not require that defendant have the right to call witnesses or cross-examine any witnesses of the prosecution. The requirement of a probable cause hearing, if otherwise timely, may be combined with the arraignment. In this case, the defendant was released on bond within 48 hours, promptly arraigned, and thus the issue is essentially moot.

As to the matter of suppression, this issue is more complicated. Certainly, there is a due process right to a suppression hearing. Both parties agree as to this core ingredient. It is also

true that the Tribe has the right to establish the procedural parameters for the exercise of that right. It is a uniform rule at the federal, state and Tribal level that suppression of evidence is essentially a pre-trial matter and absent the most extreme set of circumstances, it cannot be raised at trial. The trial judge was well within his discretion to deny the motion as untimely, when it was raised on the day of trial.

Defense counsel offered no explanation for his failure to raise the issue in a more timely manner. This failure clearly violated the Rosebud Sioux Tribal Rules of Criminal Procedure. *See*, for example, Rule Sec. 7, Art. IV(F) which provides:

1. The Court shall, upon motion of either party, or upon its own motion, hold a pretrial conference. The Court shall compel the attendance of the defendant and his counsel at the conference. The prosecution and defense may be required by the court to exchange discoverable information at the conference. *The Court shall at that time consider all pre-trial motions* and the Court may issue such orders as deemed proper to regulate the conduct of trial.

2. *Defenses of objections that are capable of determination other than at trial must be raised at the pretrial conference.* (emphasis added)

This error of counsel is particularly egregious in light of the fact that one of the charges, possession of a firearm while intoxicated, relied exclusively on physical evidence (*i.e.*, the firearms) seized without the benefit of either a search or arrest warrant. In addition, at the time of this occurrence, there existed no Tribal exceptions – statutory or decisional – that permitted the seizure of evidence without a warrant of some kind. In the case at bar, the Tribe did obtain a search warrant to seize evidence relative to whether the defendant was in possession of a firearm while under the “influence of marijuana.” Indeed, defense counsel himself appeared to realized the necessity to deal with the issue of suppression by making a motion for suppression, even if it was done too late and in an untimely manner. The inescapable conclusion is that of attorney error.

b. Failure to Adequately Cross-Examine

Defendant/appellant also asserts that his attorney's cross-examination of the two law enforcement officers who testified at trial was deficient as a matter of law.<sup>4</sup> Officer Robert Sedlmayer was the first witness called by the Tribe. Officer Sedlmayer was the arresting officer and his direct testimony related largely to his observations of defendant's driving, which led him to conclude that there was probable cause to make a traffic stop, his concern (pursuant to a departmental dispatch) about the potential presence of firearms, his questions to the suspect about the presence of firearms, the perception of the smell of alcohol, the 'staggering' of the defendant, the subsequent administering of field sobriety tests to the defendant, and his ultimate conclusion that there was probable cause to arrest the defendant for DUI and the illegal possession of firearms.<sup>5</sup>

Defense counsel's cross-examination of Officer Sedlmayer focused largely on the training and competency of officers to administer and interpret the results of field sobriety tests, as well as whether Officer Sedlmayer at any point apprised the defendant of his *Miranda* rights. There was no cross-examination concerning probable cause or the seizure of the evidence.

The prosecution then called Officer Delta Anderson. The essence of Officer Anderson's testimony was directed to his observation of Officer Sedlmayer in possession of the weapons taken from the defendant's vehicle at the scene, his own subsequent securing and marking the evidence, and his role in the chain of custody in presenting the physical evidence to the Court as the lead-up to its offer in evidence. There was minimal cross-examination, relating to the chain of custody. The defense then rested and did not call any witnesses.

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<sup>4</sup> This assertion was not discussed in defendant/appellant's brief, but was presented for the first time in oral argument before this Court. Since there was no objection by counsel for the Tribe, any possible objection is deemed to have been waived.

<sup>5</sup> Defense counsel did assert a number of objections – largely related to hearsay – to parts of this direct testimony.

While defense counsel's cross-examination of two law enforcement officers was not particularly probing, it was not deficient as a matter of law. Defense counsel did establish the failure to give *Miranda* warnings and did raise some essential questions relative to the field sobriety tests.

## 2. Prejudice

Given our finding that there was deficient performance relative to the failure to timely request a suppression hearing, the question becomes whether such failure was prejudicial in the context of *Strickland v. Washington*. The standard for prejudice is such that:

The Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. 466 U.S. at 674.

In the context of suppression, the key inquiry revolves around the seizure of firearms, which was an absolute predicate to the conviction of the charge of possession of a firearm while intoxicated.<sup>6</sup> While there is no Tribal precedent on point, it is reasonable to conclude that the seizure of the firearms was *constitutionally* permissible under the (federal) plain-view, public safety, and automobile exceptions to the search warrant requirement. *See, e.g. Coolidge v. New Hampshire*, 405 U.S. 443 (1971); *New York v. Quarles*, 467 U.S. 649 (1984); and *Chambers v. Maroney*, 399 U.S. 42 (1970).

These exceptions also appear appropriate within the context of both the Indian Civil Rights Act of 1968 and the Rosebud Sioux Tribal Constitution. Since there is nothing in the record to suggest that plain view ought to be viewed differently in the Tribal context or that public safety is of a lesser concern or that automobiles should be considered differently, the

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<sup>6</sup> The DUI conviction involves no suppression issues. Field sobriety tests involve no seizure of tangible or testimonial evidence, but, at best, evidence relative to the physiological impairment to the physical movement, including the ability to speak understandably. *See, e.g. Pennsylvania v. Muniz*, 496 U.S. 582 (1990).



Court adopts these exceptions to the United States Constitution search warrant requirement as permissible exceptions to the warrant requirement of both the Indian Civil Rights Act of 1968 and the Rosebud Sioux Tribal Constitution. Having adopted these exceptions, it is clear that seized firearms would have been admissible at trial and hence there was no prejudice that resulted from the failure of defense counsel to timely file a suppression motion.

B. *Miranda* Warnings

While it is clear that there was no *Miranda* violation in the federal constitutional sense because there was no “custodial interrogation,” *Miranda v. Arizona*, 384 U.S. 436 (1966), a recent amendment to the Rosebud Sioux Tribal Constitution raises the question whether the new amendment is more exacting than the federal standard.

The place to begin is with the text of the new amendment to the Tribal Constitution. It reads in full that the Tribe shall not:

Search or arrest any person without informing them of their right to remain silent, to have access to an attorney, to be informed that anything they say can be held against them in a court of law, to have their rights explained at the time of the search and arrest, and to ask them if they understand these rights. Art. X, Sec. 1(d).

This provision, while not identical, is very similar to the classic language that constitutes the *Miranda* warning established in the case with the same name:

Prior to any questioning, the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. 384 U.S. at 444.

The Fifth Amendment-like protections of *Miranda* are triggered by circumstances “stemming from custodial interrogations.”<sup>7</sup> The remedy for the violation of *Miranda*

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<sup>7</sup> “By custodial interrogations, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444.

requirements is the exclusion of the tainted statements, *Id.*, and any attendant fruit of the poisonous tree. *See, e.g., Wong Sun v. United States*, 371 U.S. 471 (1963).

The basic question before this Court, as indicated, is therefore whether the Tribal constitutional amendment reflects a basic Tribal intent to adopt *Miranda in toto* or to add additional requirements, or perhaps even subtract requirements. Despite the slight variation in text between the *Miranda* opinion and the Tribal constitutional amendment, no evidence was presented to suggest that there was any Tribal constitutional intent to have its amendment extend beyond *Miranda*. In the absence of such evidence, it is reasonable to conclude that Tribal intent was to adopt *Miranda* as its constitutional standard.

There are several other reasons that support such a reading. Given the sanction limitation of one year in jail or a \$5000 fine or both in the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(1) and the Rosebud Sioux Law and Order Code, it would appear unlikely (especially with no evidence to the contrary) that the intent of the amendment was to exceed the federal contours of *Miranda*, where there is no sanction limitation whatsoever.

It is further true that relevant portion of the Tribal constitutional amendment mentions no express remedy whatsoever and this provides some additional support for our position. Such a view is bolstered by the section that precedes Art. X, Sec. 1(d). Sec. 1(c) largely mirrors the text of the Fourth Amendment<sup>8</sup> and the relevant section of the Indian Civil Rights Act,<sup>9</sup> but in a crucial way exceeds both by enumerating a *specific* remedy, which is not mentioned in either the

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<sup>8</sup> The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>9</sup> The Indian Civil Rights Act states:

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describe the place to be searched and the person or thing to be seized. 1302(2).

Fourth Amendment or the Indian Civil Rights Act. Sec. 1(d) reads in whole that the government of the Tribe, including the community shall not:

Violate the right of the people to be secure in the privacy of their persons, houses, papers, vehicles, and effects against unreasonable searches and seizures, nor issue warrants but upon probable cause, supported by oath or affirmation signed by a judge, and particularly describing the place, person, house, papers, vehicles, or effects to be searched, the object and scope of such search, and the person or thing to be seized, and *any search or seizure taken in violation of this provision shall be excluded.* (emphasis added)

An express remedy in the search and seizure context of Sec. 1(c) and no express remedy in the *Miranda* context of the very next section of 1(d) potentially suggests the lack of any intent to provide a remedy. While we do not accept such a reading, it does support the Court's basic conclusion that Sec. 1(d) does not exceed the core federal boundaries of *Miranda*.

In sum, the Court finds that Sec. 1(d) is the Tribal constitutional equivalent to the federal constitutional standard of *Miranda*.<sup>10</sup> And as a result, no exclusion of evidence is required, because there was no "custodial interrogation" that would trigger the *Miranda* remedy to suppress. Further, *Miranda* does not apply to roadside questioning of motorists detained pursuant to a routine traffic stop. *Berkemer v. McCarty*, 486 U.S. 420 (1984).

#### IV. Conclusion

For all the above-stated reasons, the conviction of the defendant is hereby affirmed. Despite upholding the conviction, it is important to restate the decision of the Court to adopt the standard articulated in *Strickland v. Washington*,<sup>11</sup> 466 U.S. 668 (1984), to determine whether there is ineffective assistance of counsel as a matter of Tribal constitutional law, as well as the determination that Sec. 1(d) of Art. X (Bill of Rights) of the Tribal Constitution is to be

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<sup>10</sup> *Miranda* is a constitutional rule rather than some kind of a judicially created remedy. Indeed, *Miranda* warnings "have become part of our national culture." *Dickinson v. United States*, 530 U.S. 428, 430 (2000).

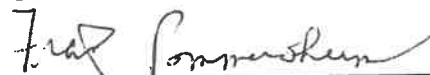
<sup>11</sup> This includes the rule that extrinsic factors such as an extensive caseload do not dilute or revise downward the standard of effectiveness to which defense counsel is to be held. See, e.g. *United States v. Cronin*, 466 U.S. 648 (1984).

understood as identical to the rule(s) of *Miranda v. Arizona*, 384 U.S. 436 (1966) and its progeny.

IT IS SO ORDERED.

Dated this 30<sup>th</sup> day of October, 2009.

FOR THE COURT:



Frank Pommersheim  
Chief Justice

As amended February 11, 2011.

FOR THE COURT:



Frank Pommersheim  
Chief Justice