

IN THE COURT OF APPEALS
FOR THE
ROSEBUD SIOUX TRIBE

- - - - -

CA 89-05

ROSEBUD SIOUX TRIBE,

Plaintiff and Appellee,

v.

EVERETT CROW GOOD VOICE,

Defendant and Appellant,

- - - - -

O R D E R

This case having received complete appellate review, oral argument having been waived, and the Court having issued an opinion and being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED, that the judgment of conviction of the Tribal Court be and the same is hereby, reversed.

Dated this 18th day of May, 1992.

BY THE COURT:

Frank Pommersheim

Frank Pommersheim
Chief Justice

ATTEST:

Deirdra N Marshall
(SEAL)

Clerk

CASE NUMBER CA 89-05

Pommersheim, Chief Justice

I. INTRODUCTION

On September 16, 1989, Everett Crow Good Voice, the Defendant/Appellant herein, was arrested and charged with Driving Under the Influence of Alcoholic Beverages in violation of Section 6-1-1 of the Rosebud Sioux Tribal Law and Order Code.

The arresting officer, Florentine Black Bear, was the sole witness called by the prosecution at the subsequent bench trial. Officer Black Bear testified that he observed the Defendant/Appellant behind the wheel of a car that was running, but stuck in a ditch alongside the road near Ghost Hawk Park.

The officer then went up to the car and had Defendant/Appellant get out of it. The Defendant/Appellant was able to get out of the vehicle and walk safely up to the highway without falling. The officer had the Defendant/Appellant perform four field sobriety tests and then placed him under arrest. The field sobriety tests included the balance test, the heel to toe test, the counting backwards test, and the finger count. No evidence of alcohol was found in the vehicle. No audio or video recording was made of any of the field sobriety tests. No breath or blood test was administered (Defendant refused to consent).

The Defendant was asked neither if he had been drinking nor what or how much he had to drink. The officer also failed to ask the Defendant whether he was tired or how much sleep he had that

day. The arresting officer failed to ask the defendant if there was any reason he could not do the tests and if he had any health problems.

No further investigation was undertaken by the arresting officer following the arrest in order to determine how the car left the road. In fact, there was no finding whether anyone was with the Defendant or even if Mr. Crow Good Voice was driving at the time.

The trial judge found the Defendant guilty of Driving While Intoxicated and sentenced him to a two hundred fifty dollar (\$250.00) fine and a thirty day suspension of his driver's license. A timely notice of appeal was subsequently filed. A motion for stay pending appeal was also granted.

II. ISSUES

This appeal raises two issues: They are:

A. Whether there was sufficient evidence presented by Rosebud Sioux Tribe to convict the Defendant of the crime of Driving Under the Influence in violation of Rosebud Sioux Tribe Law and Order Code § 6-1-1.

B. Whether the Rosebud Sioux Tribe must prove, as part of its case in chief, that the Defendant is a member of the Rosebud Sioux Tribe or otherwise an "Indian" in order to adequately demonstrate personal jurisdiction over the Defendant.

III. DISCUSSION

Each issue will be discussed in turn:

A. Sufficiency of the Evidence

In determining the sufficiency of the evidence in a (criminal) appeal, the question is whether there is evidence in the record which, if believed by a jury (or judge in a bench trial), is sufficient to sustain a finding of guilt beyond a reasonable doubt. In making such a determination, this Court must accept that evidence and such reasonable inferences that can be fairly drawn therefrom, which will support the verdict. A fact finder's verdict will be upheld if the evidence and reasonable inferences therefrom sustain a rational theory of guilt. Rosebud Sioux Tribe v. Schmidt (# CA 88-04). See also State v. Lien, 305 N.W.2d 388 (S.D. 1981).

The sole witness called by the tribe was a policeman of extremely limited experience (four months), who did nothing other than request the Defendant to perform four field sobriety tests before arriving (if not jumping) at the conclusion that the Defendant was under the influence of alcoholic beverages. According to the testimony of the arresting officer, the Defendant was able to hold his leg up for eleven (instead of thirty) seconds without losing his balance, did walk heel to toe (except for the ambiguous testimony about "going off the line"),

did count successfully backwards from seventeen after one modest false start and counted correctly, but did not touch his fingers in the finger exercise. The Defendant's speech was intelligible throughout.

The problems with the administration of the field sobriety test are several fold. First, the arresting officer's testimony establishes no context for evaluating the Defendant's performance. The Defendant was not asked whether he had been drinking, he was not asked if he was tired (it was 3:00 a.m. in the morning), he was not asked about any possible health problems, or any reason why he might not be able to perform the tests. Second, there is no testimony in the record to establish a benchmark (or standard) to evaluate whether the Defendant passed or failed the field sobriety tests. There is no reference to the arresting officer's training in this regard. There is only the raw conclusion of the arresting officer, but no reference to any objective standard or process with which to measure the Defendant's performance on the field sobriety tests. All of this is exacerbated by the absence of any audio or video tape or corroborating testimony of other law enforcement personnel.

In light of these cumulative problems and deficiencies, this Court cannot conclude that there is sufficient evidence (including rational inferences therefrom) in the record to sustain a finding of guilt.

B. Personal Jurisdiction

Despite the fact that the Court's analysis of the previous issue requires a reversal of the trial court's decision, it is nevertheless appropriate for purposes of future clarification to discuss the issue of personal jurisdiction. The Defendant/Appellant claims that the Rosebud Sioux Tribe must affirmatively prove as part of its case in chief that the Defendant is a member of the Rosebud Sioux Tribe and that the failure to do so would result in the absence of personal jurisdiction over the Defendant. The Defendant/Appellant cites Duro v. Reina, 495 U.S. 676 (1990) for this proposition. This is manifestly incorrect. Duro does not stand for this alleged rule, but rather only that tribes as a general matter lack criminal jurisdiction over non-member Indians. In any event, the rule of Duro has been permanently suspended by Congress. See e.g. Pub. L. No. 102-137, 105 Stat. 646(1991).

More broadly, the Rosebud Sioux Tribal Court is not a court of limited jurisdiction, but rather a court of general jurisdiction. It is therefore presumed that the tribal court has personal (as well as subject matter) jurisdiction over all controversies brought before it. See e.g. Sec. 4-2-6 of the Rosebud Sioux Tribal Law and Order Code, which asserts civil jurisdiction over all persons within its territorial jurisdiction consistent with applicable federal law. As a result of this tribal statutory scheme, any alleged (personal) jurisdictional

defect must be raised by the Defendant, and is not an affirmative element of the prosecution's case. The issue once raised properly by the Defendant will, of course, be fully adjudicated by the trial court and if appealed, reviewed by this Court.

Lastly, there is one additional item the Court must address. This appeal - along within the appeals in the collateral cases of Rosebud Sioux Tribe v. Bettlyoun (#89-96) and Rosebud Sioux Tribe v. Burnette (#89-97) - have not been prosecuted in a timely and professional manner. The Defendant/Appellant's brief was oft delayed with little, if any, justifiable excuse. This court will not be so tolerant in the future for justice delayed is (often) justice denied. Of even greater concern than the Defendant's slothful delay is the Tribal Prosecutor's failure to submit any brief whatsoever, much less object to the Defendant's inordinate delay.

It is hard to understand how the Tribe's interests can be adequately protected, when they are not even presented to this Court. This is particularly egregious in a criminal case, where the Tribe sought to prosecute the Defendant in the first instance.

In light of these facts, the Court reminds all members of the Rosebud Sioux Tribal Bar, who practice before this Court, that it will not hesitate in the future to impose the sanctions available under Rule 8 of the Rules of Procedure of the Rosebud Sioux Tribal Court of Appeals. These sanctions include subjecting the appeal to summary dismissal for appellant

misconduct or in the case of appellee misconduct, barring participation in oral argument before this Court. Individual attorneys may be subject to additional sanctions in their professional capacity.

Based on the forgoing, the conviction of the Defendant is hereby reversed.

IT IS SO ORDERED.

Justices Grey Eagle and Roubideaux concur.

A handwritten signature in cursive script, reading "Frank Pommersheim", written over a horizontal line.

Frank Pommersheim
Chief Justice

Dated May 8, 1992