IN THE COURT OF APPEALS

FOR THE

ROSEBUD SIOUX TRIBE

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CA 89-04

ROSEBUD SIOUX TRIBE, Plaintiff/Appellee,

v.

ALVIN BETTELYOUN, Defendant/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 16th day of May, 1992.

BY THE COURT:

Ramon Roubideaux
Associate Justice

Attest:

Anita Marshall
(SEAL) Clerk

IN THE COURT OF APPEALS
OF THE
ROSEBUD SIOUX TRIBE

- - - - - - - - - - - - - - -

CA89-06

Rosebud Sioux Tribe, Plaintiff/Appellee	)	
v.	)	DECISION
Alvin Bettelyoun, Defendant/Appellant	)	

- - - - - - - - - - - - - - -

APPEAL FROM THE

ROSEBUD SIOUX TRIBAL COURT

- - - - - - - - - - - - - - -

HONORABLE SHERMAN J. MARSHALL

PRESIDING JUDGE

- - - - - - - - - - - - - - -

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BEFORE

JUSTICES GREY EAGLE, POMMERSHEIM, AND ROUBIDEAUX

OPINION FILED May 12, 1992 (am)

CASE NUMBER CA89-06

Roubideaux, Justice

I. PROCEDURAL HISTORY

The Tribe filed a Complaint in the Rosebud Sioux Tribal Court on August 6, 1989, charging Alvin Bettelyoun with Reckless Driving (in violation of Rosebud Sioux Tribe Law and Order Code (RSTLOC) § 6-2-1) and Driving Under the Influence of Alcoholic Beverages (in violation of RSTLOC § 6-1-1(1) and 6-1-1(2)).

Bettelyoun was arraigned, pleaded not guilty and had a court trial before the Honorable Sherman J. Marshall, Chief Tribal Court Judge on November 14, 1989, at the Rosebud Sioux Tribal Courthouse.

The Court granted Bettelyoun's motion for judgment of acquittal following the Tribe's case in chief and dismissed the charges of Reckless Driving (RSTLOC § 6-2-1) and Driving Under the Influence of Alcoholic Beverages (RSTLOC § 6-1-1(1). However, Bettelyoun's contemporaneous motion for judgment of acquittal on the RSTLOC § 6-1-1(2) violation was denied.

The Court found Bettelyoun guilty of Driving Under the Influence of Alcohol. At sentencing, the Court fined Bettelyoun two hundred fifty dollars ($250.00), assessed court costs of twenty-five dollars ($25.00), and prohibited him from operating a motor vehicle within the exterior boundaries of the Rosebud reservation for thirty (30) days. On appeal, Bettelyoun argues that the Tribe presented insufficient evidence to convict

Bettelyoun of Driving Under the Influence of Alcoholic Beverages in violation of RSTLOC § 6-1-1(2). We agree and reverse.

II. FACTS

Louis Moran, a police officer for the Bureau of Indian Affairs, testified that on August 6, 1989, at 6:12 a.m. he saw two cars parked and "it looked like they were going to race or were visiting or something." (Trial Transcript (TT) p. 6). He soon heard the revving of engines and the squealing of tires. (TT p. 7). Officer Moran then turned on his red lights and stopped one of the cars about a block later. (Id.) This stopped car had been driven by Bettelyoun.[1] (TT p. 9). The second car did not stop, so Moran's partner took Bettelyoun's car keys and told him to stay there. (TT p. 10). Moran and Moore then left in pursuit of the second car but never found it. (TT p. 8).

Fifteen minutes after Bettelyoun's stop, another BIA officer informed Moran (who was enroute to the scene of Bettelyoun's stop after giving up the chase of the second car) that although Bettelyoun's car had remained at the scene, Bettelyoun and his wife had left. (TT p. 11, 12, 29, 30). Another ten or fifteen minutes later, Bettelyoun and his wife

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1 During his block-long "chase", Bettelyoun did not weave or exhibit other careless driving (TT p. 26-27). No objective evidence exists that excessive speed was involved: Officer Moran did not use his radar, did not pace or otherwise clock Bettelyoun's car, and candidly admitted that he did not know how fast Bettelyoun was driving.

returned. (TT p. 29). Bettelyoun was not driving the car that brought him back to the scene. (TT p. 11, 12).

Officer Moran testified that he thought Bettelyoun smelled of alcohol. However, he did not know if, when or how much Bettelyoun had been drinking. (TT p. 38-39). Significantly, no questions of this nature were asked of Bettelyoun or Bettelyoun's wife.

Nonetheless, Officer Moran decided to conduct four field sobriety tests on Bettelyoun. No audio or visual recording tape was made of these tests and although Moran testified he took notes memorializng the results of the tests, he no longer knew where they were or if they even existed. (TT p. 31-32). According to Moran, Bettelyoun failed the fingercounting test. But Moran could not say why or in what fashion Bettelyoun's performance was unsatisfactory, only that it was. (TT p. 34). Moran also stated that Bettelyoun failed the heel-to-toe test. Evidently, Moran had asked Bettelyoun to walk out a number of steps heel-to-toe, turn left and walk back. Bettelyoun then walked out the requisite number of steps, but did not turn "about face" for his walk back; instead, he did as instructed and "turned left." His return thus resulted in some sort of complicated, sideways, cross-over walk -- much more difficult than was requested. Bettelyoun didn't fall walking in that manner and Officer Moran testified that Bettelyoun's performance was not at all indicative of a drunk driver. Bettelyoun apparently failed the other two tests by missing two letters in the alphabet recitation and by teetering

while standing on one leg.

Bettelyoun was then arrested and taken to the Rosebud jail.

III. DECISION

Bettelyoun argues that the Tribe presented evidence insufficient to establish, beyond a reasonable doubt, that he operated a vehicle under the influence of alcoholic beverages in violation of RSTLOC § 6-1-1(2). Thus, Bettelyoun argues, the Tribal court erred in denying his motion for a judgment of acquittal.

Appellate review of motions for judgment of acquittal is governed by a standard well-established in both federal and state courts. This Court hereby adopts that standard, recently pronounced in State v. Corder, 460 N.W. 2d 733 (S.D. 1990), which stated:

> In reviewing a motion for judgment of acquittal, the trial court must view the evidence in a light most favorable to the nonmovant. A motion for judgment of acquittal is properly denied if the State has introduced evidence which, if believed by the jury, they (sic) may reasonably find the defendant guilty of the crime charged. The state, in proving all the elements of the crime may rely on circumstantial evidence.

Id., at 738-739 (citations omitted): See also Rosebud Sioux Tribe v. Roberta Schmidt, (# CA 88-04). Here, the Tribe was the nonmovant. As such, the evidence, circumstantial or not, must be deemed "believed by the jury" and viewed in a light most favorable to the Tribe with all reasonable inferences from that evidence likewise resolved in the Tribe's favor.

Bettelyoun was convicted of violating RSTLOC § 6-1-1(2), which states, with emphasis provided:

> A person may not drive or be in actual physical control of any vehicle while:
>
> (1) * * *
>
> (2) Under the influence of an alcoholic beverage[.]

Even with the evidence construed most favorably to the Tribe, there is no question the evidence was insufficient to support Bettelyoun's conviction under RSTLOC § 6-1-1(2). From the evidence presented, a jury (or the court as fact finder) could indeed conclude that Bettelyoun drove the car and that he smelled of alcohol. Conceivably, a fact finder could further conclude that despite the officer's failure to make an audio or visual recording or produce field notes regarding the sobriety tests (a failure we strongly discourage), Bettelyoun had failed every field sobriety test. In sum, the finder of fact could (only theoretically) conclude, based on the officer's unsubstantiated, subjective opinion, that Bettelyoun was intoxicated -- when he returned to the scene some fifteen to thirty minutes after he was stopped.

It is not a crime to drive after drinking; it is a crime to drive while under the influence. Nothing established in this case proves, beyond a reasonable doubt, that Bettelyoun was under the influence while driving the car. The officers failed to protect their evidence. When Officer Moran first stopped Bettelyoun, no intoxilizer or sobriety tests were administered, and no meaningful observations were made at that

time. Because the officers did not significantly secure the scene, they effectively allowed Bettelyoun -- and their evidence -- to disappear. Only upon Bettelyoun's return were sobriety tests administered, but these came too late and thus revealed nothing regarding Bettelyoun's sobriety at the time he was driving. According to BLACKS LAW DICTIONARY (3rd ed.) "inference" is defined as a "deduction made from the facts proved." The "facts proved" here may give rise to deductions stemming only from the time of Bettelyoun's return. The same facts give rise to no relevant deductions stemming from the time Bettelyoun drove the car. There is thus no evidence whatsoever that Bettelyoun operated a motor vehicle while intoxicated, and this Court will not legitimize non sequiturs by holding otherwise.

We are mindful of the menace drunken drivers pose. But the judicial objectives of deterrence and punishment cannot be triggered until there is proof that he or she indeed drove under the influence. Careful and thorough police work may well have proven that Bettelyoun drove under the influence of alcohol, and a thoughtful brief from the Tribe may well have provided grounds to sustain Bettelyoun's conviction. However, the policework here was anything but careful and thorough. And the Tribe did not bother to submit a brief.[2]

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[2] The failure of counsel to submit briefs will not again be tolerated by this Court. Our position in this regard allow for the impositon of sanctions, as set forth by Chief Justice Pommersheim in the companion case of Rosebud Sioux Tribe v. Crow Good Voice, CA 89-05 (1992).

Bettelyoun's conviction is hereby reversed based on the grounds set forth above and there addressed in Appellant's well reasoned brief.

IT IS SO ORDERED.

Justices Grey Eagle and Pommersheim concur.

Ramon Roubideaux
Associate Justice