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IN THE SUPREME COURT
OF THE
ROSEBUD SIOUX TRIBE

THE PEOPLE OF THE ROSEBUD SIOUX
TRIBE IN THE INTEREST OF R.K.,
minor child and concerning
M.K.,
Respondent.

2010-01
MEMORANDUM OPINION
AND ORDER

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

I. Introduction

On June 30, 2009, R.K., a minor child and member of the Rosebud Sioux Tribe, was charged with aggravated assault and the (illegal) purchase and possession of alcohol. Pursuant to a preliminary hearing on the same date and while being held at Wanbli Wiconi Tipi, the Tribe's juvenile detention center, the court services officer recommended that R.K. be sent to an alcohol treatment program. On or about August 7, 2009, R.K. left the treatment program without authorization and thus "escaped from custody." He subsequently turned himself in on or about December 9, 2009.

At the adjudicatory hearing on July 7, 2010, R.K. "pled" and admitted¹ to both the purchase and possession of alcohol and escape charges. He was sentenced to 60 days in the Tribe's juvenile detention center. The Tribe requested a continuance on the aggravated assault charge due to the state confinement of its sole eyewitness. Judge Steven Emery denied the motion and *sua sponte* dismissed the charge based on the failure to comply with the speedy trial requirement of Art. X § 1(f) of the Rosebud Sioux Tribe Constitution.²

¹ R.K. was represented by the Tribe's law-trained public defender.

² Article X § 1(f) of the Rosebud Sioux Tribe Constitution provides that:

This appeal followed. The sole issue briefed was whether the “speedy” trial guarantee of Art. X § 1(f) is tolled during the time a minor has “escaped from custody.” However, at oral argument before this Court on November 5, 2010, it quickly became clear that there was a more basic question, that is whether Art. X § 1(f) even applies in juvenile proceedings and if not, whether there are other pertinent timing provisions within the Tribal Juvenile Code. The Court subsequently ordered the parties to file supplemental briefs on these questions.

II. Issues

This appeal raises four issues, namely the original tolling issue as well as supplemental questions identified in the Court’s order of November 9, 2010:

- (1) Whether the “speedy” trial guarantee of Art. X §1(f) applies to juvenile proceedings;
- (2) If not, whether there are pertinent provisions of the Tribal Juvenile Code that address “speedy” trial concerns; and
- (3) If not, what rule, if any, should this Court adopt to provide judicial guidance in this matter.

Each issue will be discussed in turn.

III. Discussion

A. Tribal Constitution “Speedy” Trial Guarantee

The government of the Tribe including the community shall not . . . [d]eny to any person in a criminal or civil proceeding the right to a speedy and public trial which shall be initiated no more than six months from the time of criminal charges or a civil complaint and which shall be decided by the courts within one year, and in a criminal proceeding to be informed of the nature and cause of the accusation, to be presumed innocent until proven guilty, to be confronted with the witnesses against him or her, to have compulsory process for obtaining witnesses in his or her favor, to have the assistance of counsel for his or her defense including the right to have counsel provided subject to income guidelines; nor deprive any person of liberty or property without due process of law.

Both parties – as well as the Court itself – agree that the Tribal Constitution guarantee of a “speedy trial” set out in Art. X § 1(f) does not apply to juvenile proceedings. This is so as a matter of text, intention, and federal analogy.

The text of Art. X § 1(f) makes no mention whatsoever of juvenile proceedings, which creates a not unreasonable inference that the constitutional text cannot be made to say what it does not say. This is especially so in light of the complete absence of any Tribal constitutional reference to the rights of juveniles.

The text of Art. X § 1(f) also includes language that is directly antithetical to the rights of juveniles as delineated elsewhere in the Rosebud Sioux Tribe Law and Order Code. Art. X § 1(f) speaks to a “speedy and *public* trial” (emphasis added). Under Tribal law, juvenile proceedings (including trial-like adjudications) are not open to the public. Sec. 3-3-20(D) of the Tribal Law and Order Code expressly provides:

Hearings in children’s cases shall be before the Court without a jury and may be conducted in an informal manner. The general public shall be excluded and only such persons shall be admitted whom the Judge finds have a direct and legitimate interest in the case of work of the Court. The child or one of his parents may be separately interviewed at any time at the discretion of the Court. The hearings may be continued from time to time at a date specified by the Court.

It would indeed be a rather strained and implausible interpretation to push the Tribal Constitutional text beyond its legitimate parameters. Federal analogy is also instructive. The phrase “speedy and public trial” also appears in the Sixth Amendment to the United States Constitution. The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to *speedy and public trial*, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.³ (italics added)

Given this likely borrowing of textual language, it is significant to note that while the United States Supreme Court has directly held that the Constitutional guarantee of “due process”⁴ applies to juvenile hearings, it has never included the “speedy trial” guarantee within the doctrinal reach of due process in juvenile matters. In *In Re Gault*, 387 U.S. 1 (1967), the Supreme Court found due process to apply to matters of adequate notice, the right to counsel, and the protection against self-incrimination. *See also* the express holding of *In re Winship*, 397 U.S. 358 (1970) that constitutional due process does *not* provide a juvenile with the right to a jury trial in the adjudication of a delinquency matter.

Tribal court jurisprudence is uniform in its recognition of a speedy trial guarantee (for adults). The source of such a right comes most obviously and consistently from the plain text of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(6).⁵ In addition, it is often found in such

³ Note the additional similarities of other Sixth Amendment language such as “to be informed of the matter and case of the accusation,” “confronted with the witnesses against them,” “to have compulsory process for obtaining witnesses,” and “to have the assistance of counsel,” to language in the Rosebud Sioux Tribe Constitution at Article X § 1(f), *supra* note 2.

⁴ “Due process” appears in both the Fifth and Fourteenth Amendments to the United States Constitution.

The Fifth Amendment provides that

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment (Section 1) provides that

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of laws.

The due process guarantee also appears in the Indian Civil Rights Act of 25 U.S.C. § 1302(8): No Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

It also appears in the Rosebud Sioux Tribe Constitution at Article X § 1(f), *supra* note 2.

⁵ 25 U.S.C. § 1302 (6) provides:

No Indian tribe in exercising powers of self-government shall deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the

places as a Tribal constitution (such as the Rosebud Sioux Tribe), as well as the positive law enacted by various tribes. For example, both the Navajo Nation, at Navajo Nation Code, Title 1, § 1(7) and the Hopi Tribe, at Ordinance 21, § 2.8.5 have such guarantees.

The appellate courts of both these tribes have also adopted the multi-factor balancing test set out in *Barker v. Wingo*, 407 U.S. 514 (1972) to measure the reasonableness of delays in the context of the speedy trial guarantee. The factors to consider are essentially fourfold, namely: the length of delay, the reason for the delay, the timeliness of the defendant's assertion of the right to a speedy trial, and the potential prejudice to the defendant. *Barker v. Wingo*, 407 U.S. at 530-33. The Hopi case applying this standard is *Komalestewa v. Hopi Tribe* (No. AP-004-90) (Hopi Court of Appeals, 1996). The Navajo Nation cases include *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (1979) and *Yazzie v. Catron* (No. A-CV-13-91, 1992). See also *Fort Peck Assiniboine and Sioux Tribes v. Keiser* (No. 093, Fort Peck Court of Appeals) and *Coleman v. Colville Confederated Tribes*, 2 CCAR 1 (Colville Confederated Tribes Court of Appeals).

Only one tribal court case was found that even mentioned the speedy trial guarantee in the context of a juvenile delinquency proceeding. Though the issue was merely mentioned, but not resolved, the Hopi Court of Appeals noted in passing that the juvenile's counsel was waiving the *juvenile's* right to a speedy trial because he was seeking that the adjudicatory hearing be set in 45 days, instead of the 20 days set out in the Hopi Children's Code. *M.P. v. Hopi Children's Court* (No. DoAC000009, Hopi Court of Appeals, 2001).

B. The Rosebud Sioux Tribe Juvenile Code and Adjudicatory Time Limits

Both parties agree that the Rosebud Sioux Tribe Juvenile Code contains no time framework for the adjudication of juvenile delinquency matters. There are time guidelines for

accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense.

dependency and neglect matters, but they clearly do not apply to juvenile delinquency cases. *See e.g.* Rosebud Sioux Tribe Law and Order Code – The Minor Child in Need of Care/Child in Need of Supervision Petition at § IV(A) which provides:

The court will schedule an adjudication hearing to be held within thirty (30) days following the initial hearing. At the adjudication hearing, the Tribe will have the burden of proving by a preponderance of the evidence the allegations set forth in the petition. If the court finds that the Tribe has not proven the allegations in the petition, the petition will be dismissed and full legal and physical custody of the child will be returned to the parent. If the court finds that the Tribe has proven the allegations in the petition and rules that the child is a minor in need of care or a child in need of supervision, the court will schedule a disposition hearing. Pending the disposition hearing, the Court will enter appropriate orders concerning temporary custody of the child.

These timelines – specifically drawn and textually narrow – are clearly not meant to apply to juvenile delinquency proceedings and neither the Tribe nor the Public Defender’s office argues to the contrary.

C. Other Legal Sources for an Appropriate “Speedy” Trial Rule for Juvenile Delinquency Proceedings

Both sides – as well as the Court itself – agree that some speedy trial like guarantee for juveniles is appropriate both as a matter of due process,⁶ fairness and essential Lakota respect for the dignity of all individuals, including juveniles. Potential sources identified include existing common practice within the Rosebud Juvenile Justice system, the Federal Juvenile Justice statute, 18 U.S.C. § 5036, with guidance from the analytical balancing test set out in the seminal case of *Barker v. Wingo*, 407 U.S. 514 (1972).

The public defender’s office asserts that it is “customary” practice within the juvenile offender proceedings to apply 180 day speedy trial guarantee and that such practice does not distinguish between detained and non-detained juveniles.

⁶ Due process guarantees are recognized in both the Indian Civil Rights Act of 1968 at 25 U.S.C. § 1302 (8), *supra* note 4 and the Rosebud Sioux Tribe Constitution at Article X § 1(f), *supra* note 2.

The Tribe's brief makes no reference to this alleged "customary" practice, but instead argues for a thirty day speedy trial guarantee for detained juveniles in accordance with the (federal) Juvenile Delinquency Act, 18 U.S.C. § 5036, which provides:

If an alleged delinquent who is in detention pending trial is not brought to trial within thirty days from the date upon which such detention was begun, the information shall be dismissed on motion of the alleged delinquent or at the direction of the court, unless the Attorney General shows that additional delay was caused by the juvenile or his counsel, or consented to by the juvenile and his counsel, or would be in the interest of justice in the particular case. Delays attributable solely to court calendar congestion may not be considered in the interest of justice. Except in extraordinary circumstances, an information dismissed under this section may not be reinstated.

The Tribe further argues for a seventy day speedy trial guarantee for non-detained juveniles, based on the basic federal speedy trial guarantee for adults set out in the Speedy Trial Act at 18 U.S.C. § 3161.

While it is somewhat unusual for the prosecution to seek shorter time frames for implementation of a speedy trial than the public defender, the Court recognizes that both sides are advancing suggested rules that are within the recognized and legitimate sources of Rosebud Sioux Tribal law, which at § 4-2-8,⁷ provides that in the absence of direct Tribal law on point, the Court may look to such sources as federal law and/or the custom and practices of the Rosebud Sioux Tribe.

Within this Tribally-established framework and seeking to balance the rights and dignity of the juvenile and legitimate interests of the Tribe, the Court adopts the following rule. A detained juvenile shall be brought to trial within 45 days of detention and a non-detained juvenile

⁷ Rosebud Law and Order Code § 4-2-8 provides:

The Tribal Court shall apply the applicable laws of the Rosebud Sioux Tribe and the United States in actions before it. Any matter not covered by applicable tribal or federal laws shall be decided according to the customs and usages of the Tribe. Where doubt arises as to customs and usages of the Tribe, the Court may request the advise of persons generally recognized in the community as being familiar with such customs and usages. In any matter in which the rule of law is not supplied by any of the above, the Tribal Court may look to the law of any tribe or state which is consistent with the policies underlying tribal law, custom and usages.

within 70 days of filing the information. Any failure to comply with these deadlines shall be evaluated within the analytical balancing test set out in *Barker v. Wingo*, 407 U.S. 514 (1972). This balancing test includes four factors, namely length of delay, reason for the delay, the juvenile's assertion of the right, and prejudice to the juvenile. *Id.* at 530.

In sum, the Court finds that there is a speedy trial guarantee for juveniles charged with acts of delinquency. Such right is grounded in the due process guarantee of the Rosebud Sioux Tribe Constitution and Lakota tradition and custom. The specific time frame for the guarantee is 45 days if the juvenile is detained and 70 days if the juvenile is not detained. All delay beyond these time limits shall be evaluated in accordance with the four part test set out in *Barker v. Wingo*. "Escape from custody," unless there are extenuating circumstances, tolls the running of these time limits.

IV. Conclusion

For all the above-stated reasons, the case is reversed and remanded to consider the delay in the adjudication of the "assault" charge in accordance with the above-stated principles.

IT IS SO ORDERED.

Dated this 11th day of February, 2011.

FOR THE COURT:



Frank Pommersheim
Chief Justice