

SUPREME COURT
OF THE
ROSEBUD SIOUX TRIBE

ISAIAH SWALLE, MISTY SWALLEY and
SHYRA SWALLEY, Minor Children, by and
through their mother and guardian, BERLINDA SWALLEY,
Plaintiff/Appellant,

SC2001-06

vs.

CERTIFICATE OF SERVICE

THE SOUTH DAKOTA DEPARTMENT OF SOCIAL
SERVICES, and SCOTT DUTT as SUPERVISOR,
Defendant/Appellee

SUPREME COURT
OF THE
ROSEBUD SIOUX TRIBE

ISAIAH SWALLE, MISTY SWALLEY and
SHYRA SWALLEY, Minor Children, by and
through their mother and guardian, BERLINDA SWALLEY,
Plaintiff/Appellant,

SC2001-06

vs.

NOTICE OF ENTRY

THE SOUTH DAKOTA DEPARTMENT OF SOCIAL
SERVICES, and SCOTT DUTT as SUPERVISOR,
Defendant/Appellee

TO: ALL INTERESTED PARTIES

PLEASE TAKE NOTICE that an ORDER was duly entered by the Supreme Court of the Rosebud Sioux Tribe, Todd County, State of South Dakota, the Honorable Patrick Lee, Honorable Leroy Greaves, and Honorable Frank Pommershiem, Associate Justices presiding in the above-entitled matter on the 24th day of May, 2002.



Supreme Court Clerk

CERTIFICATE OF MAILING

I, Carla A. Brave, Supreme Court Clerk of the Rosebud Sioux Tribe, hereby certifies that I mailed a certified copy of the ORDER in the above-entitled matter to the following:

Dana Hanna
Public Defender's Office
Rosebud Sioux Tribe
P.O. Box 129
Rosebud, SD 57570

Janel Y. Sully
Prosecutor's Office
Rosebud Sioux Tribe
P.O. Box 129
Rosebud, SD 57570

FILED
by first-class mail, postage prepaid on the 19th day of June, 2002.

ROSEBUD SIOUX TRIBAL COURT OF APPEALS

The undersigned Clerk of the Rosebud Sioux Tribal Court in
Appeals hereby certifies that the document was
entered on the docket in this case on the _____
on the _____ day of _____



Supreme Court Clerk

Clerk of Court

SUPREME COURT
OF THE
ROSEBUD SIOUX TRIBE

ISAIAH SWALLEY, MISTY SWALLEY and
SHRYA SWALLEY, Minor Children, by
and through their mother and guardian,
BERLINDA SWALLEY,
Appellant,

vs.

THE SOUTH DAKOTA DEPARTMENT OF
SOCIAL SERVICES, and SCOTT DUTT
as SUPERVISOR,
Appellee.

SC2001-06

ORDER

The above-named Swalley children, through their mother and guardian, Berlinda Swalley, appeal the denial of their application for a Writ of Habeas Corpus by the trial court.

FACTS

On March 6, 2001, the Swalley children, ages 12, 10, and 8 years, were removed from the custody of their mother, Berlinda Swalley, after tribal police officers went to the Berlinda Swalley residence to serve warrants and discovered two underage males to be intoxicated. The Swalley children were not home at the time but were out in the neighborhood. The following day, March 7, 2001, the tribal prosecutor filed an application for Temporary Emergency Custody of the Swalley children alleging that the children were exposed to a dangerous situation in the Berlinda Swalley home. The RST Children's

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Court granted the application and entered its Order For Temporary Emergency Custody And Notice of Hearing. The children were placed in the custody of South Dakota Department of Social Services with authority to place the children in a safe environment. A preliminary hearing was scheduled for April 10, 2001, which was more than thirty days later.

On March 13, 2001, Berlinda Swalley filed her Motion for Dismissal of Temporary Emergency Custody Order alleging that the preliminary hearing was scheduled for more than thirty days after removal and that she was being deprived of her rights to due process of law. Berlinda requested an emergency hearing within twenty-four hours as an alternative. The motion was summarily denied by the Children's Court Judge.

On March 21, 2001, Berlinda filed her Petition For Writ of Habeas Corpus alleging that the ex parte order for temporary custody entered on March 7, 2001, removed the children from her custody, that the hearing date of April 10, 2001, deprived her of custody of her children without due process of law and that her rights were violated under federal and tribal law. Berlinda cites the Indian Civil Rights Act of 1968 (25 U.S.C. 1302), the RST Constitution and the Law and Order Code, Chapter 4, Section 8-4-5.

On April 9, 2001, the tribal prosecutor filed a Petition For Minors In Need of Care. The Court convened for the preliminary hearing on April 10, 2001. Berlinda

denied the charges in the Petition For Minors In Need of Care and the Court scheduled an adjudication hearing for May 16, 2001. The tribal prosecutor asked that temporary custody of the children remain with SDDSS, and Berlinda asked that the children be returned to her custody pending the adjudication hearing. The Court denied Berlinda's Petition for Writ of Habeas Corpus on the basis of Lehman vs. Licoming County Children's Services, 458 U.S. 502 (1982). The Court decided to leave the children in the custody of SDDSS with authority to place the children in a safe environment including the home of Berlinda. Berlinda appeals the denial of her Petition for Writ of Habeas Corpus.¹

DISCUSSION

Berlinda and the children are represented by the Public Defender's Office. Mr. Dana Hanna filed his Appellant's Brief. Tribal Prosecutor Janel Sully represents Appellee, SDDSS. There is no Appellee's Brief on file². Both attorneys appeared for oral argument on January 18, 2002.

Appellant (Berlinda) argues that the Rosebud Sioux Tribe's Habeas Corpus ordinance provides a remedy to a parent who seeks

¹It came before us at oral argument that the children have been returned to the custody of Petitioner/Appellant Berlinda Swalley. Normally this would render the case moot, but given the important issue at stake, we will address the critical issue concerning the potential habeas corpus relief in such matters.

²The Tribal Prosecutor's failure to file a brief in this matter, despite being given two extensions by the Court, is cause for serious concern. Such a practice in the future will certainly result in the imposition of appropriate sanctions. Essential fairness and the pursuit of justice require no less.

release of her children from State custody. Berlinda also argues that her constitutional rights to due process of law were violated by the Court's denial of her application for a Writ of Habeas Corpus. At issue is the application of RST Law and Order Code Section 8-4-1 which provides as follows:

"When any person shall be committed or detained, imprisoned or restrained of his or her liberty, under color of pretense whatever, civil or criminal, he or she may apply to the Court for a Writ of Habeas Corpus."

The Children's Court Judge denied the writ on the basis of Lehman v. Lycoming County Children's Services Agency, 458 U.S. 502, 102 S. Ct. 3231, 73 L. Ed.2d 928 (1982). The issue in Lehman involved the question of whether the federal habeas corpus statute authorized a collateral attack on a State Court judgment order in federal court. The instant case simply raises the question of whether tribal law authorizes a tribal member to seek habeas corpus relief in a child custody case. The tribal law, Section 8-4-1, can be and should be addressed directly by the tribal court independently. Lehman involved a federal law (28 U.S.C. 2254 (a)) that is far more restrictive than RST Ordinance 8-4-1. Section 8-4-1 applies to "any person" who is "detained, imprisoned or restrained" of liberty whether it be "civil or criminal".

The broad language of Section 8-4-1 is inclusive of children who are restrained of their liberty or freedom to associate with their family members. The U.S. District, Western Division of South Dakota ruled that habeas corpus

relief under 25 U.S.C 1303 is available to a parent who was involved in a child custody dispute in tribal court and that the federal court had jurisdiction to "test the legality of detention by order of an Indian tribe." Dement v. Oglala Sioux Tribe (cite ommitted). Dement was a child custody case, it was civil in nature, and the proceeding was subject to review through habeas corpus proceedings. The Swalley children in this case were taken into custody by tribal police officers, were removed from their home, and were detained in a governmental facility--Spotted Tail Crisis Center, and review of the matter was denied until more than thirty days had lapsed. Section 8-4-5 of the relevant ordinance states that . . .

"The court or judge to whom the application for a writ of habeas corpus is made shall forthwith (emphasis ours) award the writ, unless it shall appear from the application itself or from any document annexed thereto, that the applicant can neither be discharged nor admitted to bail, nor in any other manner relieved."

We believe that Section 8-4-5 is a mandate to the Court to whom an application for writ of habeas corpus is made, to conduct an expedited hearing on the application when it appears that the applicant is not charged with a serious criminal offense for which bail has been set or in other exigent circumstances. In this case the children were removed from their home by order of the tribal court without a hearing. Emergency removal of children from their home can be and often is justified in cases involving their safety. Section 8-4-5 requires the court to award the writ "forthwith",

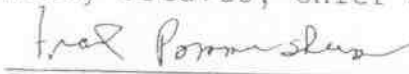
meaning that the court should hold an expedited hearing to determine at least probable cause for the initial removal of the children and whether the temporary order should stand pending adjudication. An expedited hearing to be meaningful should be provided within a few days of the application. Thirty days or more is excessive. Some tribal jurisdictions require a preliminary hearing to be held within forty-eight hours after the emergency removal of children from their home. Due process of law under Section 8-4-5 mandates an immediate hearing on a parent's application for Writ of Habeas Corpus on behalf of her children.

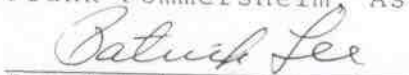
Based on this analysis, it is our decision to reverse the trial court's denial of habeas corpus relief in child custody proceedings. Potential habeas relief shall only apply, as noted, when there has not been a preliminary hearing within a reasonable amount of time, 48 to 72 hours, supported by a finding of probable cause for the removal of the minors when it is clear that the parent-petitioner is not a danger to the minor children.

Done this 24 day of May, 2002.

BY THE COURT:


Lefoy Greaves, Chief Justice


Frank Pommersheim, Associate J.


Patrick Lee, Associate J.

FILED
In the

ROSEBUD SIOUX TRIBAL COURT OF APPEALS

The undersigned Clerk of the Rosebud Sioux Tribal Court of Appeals hereby certifies that this document was received and entered on the docket in the above entitled action by this Court on the 24 day of May, 2002.

Attest:



(SEAL)

