No. CA-13-001

Pascua Yaqui Court of Appeals

Maldonado, Rene, Appellant,

vs.

Pascua Yaqui Tribe, Appellee,

Appeal of a decision of the Pascua Yaqui Trial Court in Case No. CR-12-209, the Honorable Cornelia Cruz presiding.

Marisa A. Samuelson, Pascua Yaqui Public Defender, 7474 S. Camino de Oeste, Tucson AZ 85757 for the Appellant.

Alfred Urbina, Office of the Prosecutor of the Pascua Yaqui Tribe, 7777 Camino Huivisim, Tucson, AZ for the Appellee.

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I. Opinion

1. There are two issues before this court, the first is whether the Tribal Court erred in finding that there was evidence beyond a reasonable doubt that Appellant made an unreasonable noise in a public place in violation of 4 PYTC § 1-580(A)(3). This court holds that the Tribal Court did not err in its finding. The second issue is whether the residence where the altercation between the victim and defendant occurred is a "public place" for purposes of 4 PYTC § 1-580(A)(3). On this issue, having considered the prescribed statutory provisions and principles of statutory interpretation, this court finds that it is not.

II. Background

2. On August 2, 2012, Officer Dale Pascual responded to a domestic violence call at 7621 Yoem-Bo-Oh. The victim, Kimberly Farmer (Farmer) testified that she and Appellant Maldonado [hereinafter Appellant] got into an argument in the residence at 7621 Yoem-B-Oh.

She states that Appellant was yelling at her and was in her face, so she pushed his face away because of his yelling. The argument continued and got louder so that that the police were called. The Appellant, Farmer and Office Pascual testified that the argument occurred in the residential home.

3. Appellant was arrested and charged by criminal complaint with disorderly conduct domestic violence (count one), a violation of 4 PYTC § 1-580(A)(3), and assault (count two), a violation of 4 PYTC § 1-130(A)(2). After a bench trial, appellant was found guilty as charged on count one and sentenced to pay a fine of $200.00 and court costs of $100.00. The amount of $300.00 is to be paid in installments of $25.00 per month beginning January 31, 2013, until the balance is paid in full. Appellant was also ordered not to harm or harass the victim for a period of six months. Appellant was found not guilty on count two. Appellant appealed the Tribal Court's decision arguing that the Tribal Court erred in finding that there was evidence beyond a reasonable doubt that Appellant made unreasonable noise in violation of 4 PYTC §1-580(A)(3) and that the alleged disorderly conduct failed to constitute a crime against the public pursuant 4 PYTC § 1-580(A)(3). The Tribe did not file a response in this court.

IV. Unreasonable Noise

4. The first issue on appeal is whether the Tribal Court erred in finding there was evidence beyond a reasonable doubt that Appellant made unreasonable noise while in the residence.

5. With respect to the standard of review, appellate courts "review the sufficiency of the evidence to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *United States v. McNeil*, 320 F.3d 1034, 1035 (9th Cir. 2003), cert. denied, 540 U.S. 842 (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)). Interpretation of the elements of a criminal statute are reviewed de novo. *McNeil*, 320 F.3d at 1035.

6. Appellant argues that the record does not contain evidence that he yelled at Farmer and that Farmer testified that Appellant never threatened her. According to the transcript, Farmer

testified that when Appellant entered the room, he began questioning her, and the conversation turned into an argument. She testified that he was "yelling" at her and she moved to another area in the living room and their argument got louder (tr., p. 16). She then told him to calm down because their son was asleep and had to attend school the next morning (tr., p. 23).

7. With respect to the standard of review, it is not the function of the appellate court to reassess the testimony of the witnesses. As a rule, appellate courts give deference to the credibility findings of trial courts because of the trial court's ability to observe the demeanor and evaluate the credibility of witnesses. See *United States v. Hood*, 493 F.2d 677, 680 (9th Cir.) cert. denied, 419 U.S. 852, 42 L. Ed. 2d 84, 95 S. Ct. 94 (1974)). Accordingly, in light of the transcript evidence this court is not swayed by Appellant's argument that the Trial Court erred in finding the necessary elements to establish the offence of "unreasonable noise" within Section 580

V. Public Space

8. The second issue is whether the residence at 7621 S. Yoem Bo-Oh where the altercation between the victim and defendant occurred is a "public place" for purposes of 4 PYTC § 1-580(A)(3).

9. Appellant argues that the court's determination that 7621 South Yoem Bo-Oh is a public place is unsupported by the evidence. Appellant compares the Pascua Yaqui Criminal Code statutes 4 PYTC § 1-580 and 4 PYTC § 1-300 and draws attention to Section 580 which is included in "Crimes Against the Public" and as this court notes under Section 580 (B) is defined as a place that is not private property. Section 300 is under the "Property Crimes" section along with offenses such as burglary, cutting a fence, and breaking and entry. If authorities cannot satisfy the "public" offense requirement of Section 580, they can charge an offender pursuant to Section 300, which has no such requirement. It appears that the Tribe's inclusion of two separate classifications for disorderly conduct demonstrates the Tribal Council's intent to punish acts that occur in a public place separately from those occurring in a private residence.

10. According to 4 PYTC § 1-580(A)(3), "Any person who commits any of the following shall be guilty of an offense: Causes any unreasonable noise in a public place." Section B provides, "A public place shall mean any place which is regularly held open to the public for the use of the general public, *is owned by the Tribe or Community*, is a public street *or is not private property*." (emphasis added). The plain meaning of this statute is clear: any place owned by the Tribe is considered a public place. This section, however, cannot be read in isolation so as to omit the lawful prescription that includes restrictions and covenants that the Tribe has turned its mind to in regulating the public domain.

11. In this particular situation, resolving the issue may have benefited from confirmation of the legal status of the residence - property that the Tribe unquestionably owns. There was only argument of counsel, and arguments of counsel cannot take the place of factually supported objective evidence. See *In re De Blauwe,* 736 F.2d 699, 705, (Fed. Cir. 1984).

12. As noted by counsel, 4 PYTC § 1-300 (disorderly conduct) provides that "a person commits disorderly conduct if with the intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person... makes unreasonable noise." See 4 PYTC § 1-300(B). This appears to be the correct statute under which Tribal Council expects an offender who makes "unreasonable noise" within the boundaries of his own home to be charged.

13. Delineating a disorderly conduct offence separate and apart from a regularly attended public place is consistent with the Tribe's assignment of communal property rights to individual tribal members; if a member of the Pascua Yaqui Tribe meets certain requirements pursuant the Code, a Tribal member may be eligible for a land assignment which allows the member the right to occupy and use a Parcel of land held by the Tribe. 8 PYTC § 4-1-110; 8 PYTC § 4-1-7 (B) (E) (F). When Tribal Council grants possession of a Land Assignment to a member, that member may apply for a Lease for purposes of obtaining a mortgage loan form a lender, they may construct or place improvements on a Parcel and they may transfer their rights in a Parcel to another person who meets the Code's eligibility requirements, many of the same rights of possession enjoyed by persons who have private property rights to any piece of land. 8 PYTC §§

4-1-240, 251, 270. The provisions in the Regulatory Code are likewise consistent with the principle that Tribal members who hold a Land Assignment or a Certificate of Use and Possession have a strong privacy interest in their residence. There is no indication in the Property and Regulatory Code that a person's residence is a public place or is open to the public.

14. With respect to the standard of review, this court refers to the principle of unreasonable results in response to situations where the application of a statute's plain meaning could not be what the legislators meant to accomplish. See *United States v. Brown*, 333 U.S. 18, 27, 68 S. Ct. 376, 92 L. Ed. 442 (1948); *F.B.I. v. Abramson*, 456 U.S. 615, 640, 102 S. Ct. 2054, 72 L. Ed. 2d 376 (1982); *Public Citizen v. United States Dept't. of Justice*, 491 U.S. 440, 470, 109 S. Ct. 2558; 105 L. Ed. 2d 377 (1989)(Kennedy, J., concurring, noting that unreasonable consequences allow the judiciary to avoid applying a statute's plain meaning.). In this instance, having regard to the foregoing principle and the availability of an offence for disorderly conduct under 4 PYTC § 1-300(B), it is unlikely that the Tribal Council intended a residence on the reservation be deemed a "public place".

15. In addition, counsel cites *United States v. Taylor*, 258 F.3d 1065 (9th Cir. 2001) in which the defendant's conviction for disorderly conduct was reversed for failure to establish the "public" element of the statute. This court finds the Ninth Circuit's reasoning persuasive since disorderly conduct required "a public component to the proscribed behavior." Likewise, in this case, Section 580(B) requires a public component to the proscribed behavior. The phrase "regularly held open to the public for the use of the general public" modifies whether the property is also owned by the Tribe or Community, is a public street, and not private property. The Appellant's conduct took place in his home and is therefore not public place under the statute.

16. Appellant also contends that he has a privacy interest in his residence. Although there was no search or seizure in Appellant's rented home, it should be noted that Article 1 § 1(b) of the Pascua Yaqui Constitution and the Fourth Amendment of the U.S. Constitution protect the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Pascua Yaqui Const. Art. 1 § 1(b); U.S. Const. amend. IV.

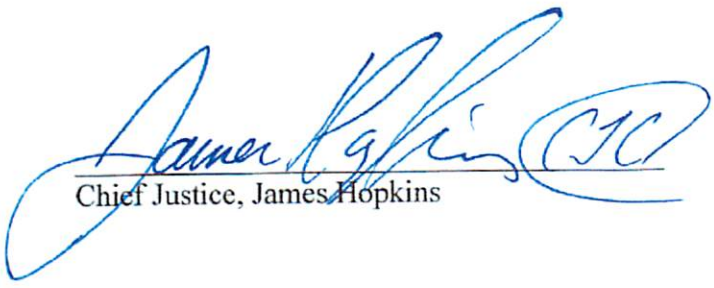
A defendant invoking the protection of the Fourth Amendment must demonstrate that he personally has a reasonable expectation of privacy in the place searched. See *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998). An individual can have a reasonable expectation of privacy in a rented room. See *McDonald et al. v. United States*, 335 U.S. 451, 454, 69 S. Ct. 191, 93 L. Ed. 153 (1948). Thus, the reasonable expectation of privacy can extend not only to a home that an individual owns, but it may also extend to rental property.

17. The altercation between Farmer and Appellant occurred in his private residence, which is not open to public use.

VI. Conclusion

18. For the foregoing reasons, Appellant's conviction and sentence are reversed.

So ordered on this 12th day of June 2013.



Chief Justice, James Hopkins