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The Pascua Yaqui Tribe
7474 S. Camino de Oeste
Tucson, AZ 85746

Michael Ehlerman
Deputy Prosecutor
AZ SBN 016471

THE PASCUA YAQUI APPELLATE COURT
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

OCHOA, REYNALDO)
Appellant.)
v.)
PASCUA YAQUI TRIBE)
Appellee.)

NO. CA-97-03

**MOTION TO DISMISS APPEAL AND
EXECUTE JUDGMENT**

Pursuant to Rule 7.5(E) of the Pascua Yaqui Rules of Criminal Procedure, appellee moves this Court to enter its order (1) dismissing the appeal in the above-entitled cause for want of prosecution by the appellant and (2) imposing the previously suspended sentence. This motion is based upon the following memorandum of points and authorities and the Court's files in CR-96-047.

STATEMENT OF THE CASE

On May 30, 1996, the defendant was convicted in Tribal Court of battering Emilio Trujillo. (May 30, 1996 Judgment Order in CR-96-047.)

The Court found that the evidence proved beyond a reasonable doubt the Defendant did commit a battery, and that the testimony did *not* support the Defendant's claim of self-defense.

1 Witnesses at trial testified that (1) the Defendant initiated the conflict by directing
2 repeated racial epithets at one of the men present at the scene, (2) the Defendant was the
3 first to strike a blow, and (3) when the victim retreated after the initial confrontation, the
4 Defendant then pursued him out into the street and struck him again.
5

6 Although Defense witnesses claimed the victim was holding a digging bar that he
7 was using to help construct a ramada for the Defendant's wedding, the witnesses also
8 testified that the victim dropped the bar before the Defendant struck him. The testimony
9 also indicated the victim was completely empty-handed when the Defendant pursued him
10 into the street and began beating him a second time.
11

12 On June 24, 1996, the Defendant was sentenced to thirty days in jail suspended for
13 six months probation. (June 24, 1996 Judgment Order.) Execution of sentence was
14 stayed pending appeal. (June 25, 1996 Minute Entry RE: Implementation of Probation
15 Period Pending Appeal.)
16

17 On November 22, 1996, the Appellate Court Issued its Notice of Briefing Schedule.
18 The Appellant's brief was due December 17, 1996.
19

20 As of December 20, 1996, no brief was filed.
21

22 LAW

23 **1 P.Y.R.Crim.Pro. Rule 7.5 APPEAL BOND**

24 E. Failure of the defendant to prosecute the appeal shall result in revocation of
25 release and execution of the sentence.

26 ARGUMENT

27 **I. WHEN THE APPELLANT FAILS TO FILE AND SERVE AN OPENING**
28 **BRIEF WITHIN THE TWENTY-FIVE DAY TIME LIMIT SET BY THE COURT, HIS**

1 **APPEAL SHOULD BE DISMISSED AND THE SENTENCE EXECUTED.**

2 An appellant's failure to prosecute an appeal "*shall* result in revocation of release
3 and execution of the sentence." P.Y.R.Crim.Pro. Rule 7.5(E). (emphasis supplied)
4

5 In this case, the Defendant was convicted of battering and injuring victim Emilio
6 Trujillo after the Defendant attacked Mr. Trujillo twice on the night of November 3, 1995.
7 At the conclusion of his trial, the Defendant-Appellant here-noticed the Court he would
8 appeal his conviction to the Pascua Yaqui Appellate Court. Sentence was then stayed and
9 the Defendant was released on his own recognizance pending the outcome of his appeal.
10

11 On November 22, 1996, the Court set the briefing schedule and gave the Appellant
12 twenty-five days, until December 17, 1996, to file his opening brief. The Appellant
13 therefore had nearly six months from the time the Notice of Appeal was filed to prepare his
14 brief. He did not do so. As of December 23, 1996, no brief has been filed.¹
15

16 Although the Tribal Codes do not set out appellate briefing schedules, they do
17 provide a rule when the appellant fails to prosecute the appeal once a schedule is set.
18 Failure to prosecute "*shall*" result in dismissal of the appeal and revocation of release.
19 Rule 7.5(E).
20

21 ¹ No motion to withdraw has been filed in the instant action. Nor has Four
22 Rivers contacted the Tribe to request a stipulation extending the briefing
23 deadlines.

24 Although the FRILS Director did contact the Tribe on December 16, 1996
25 to ask for stipulations to continuances on several other matters, no request was
26 made regarding this case. Even if Ms. Ricks were *personally* unable to file on
27 the Appellant's behalf, Four Rivers would have been responsible for following up
28 on her cases. FRILS has regularly provided other attorneys or lay advocates to
cover for Ms. Ricks in the past when she has been on leave or otherwise unable
to appear.

1 Because the Defendant/Appellant is released on his own recognizance pending
2 appeal and is subject to probation rather than detention, the Appellant's failure to
3 prosecute his appeal should result in dismissal of this appeal and imposition of the
4 suspended probation.
5

6 The Appellant has simply not presented his case within the timelines set by the
7 Court. His appeal should therefore be dismissed and the trial court's sentence imposed.
8

9 **CONCLUSION**

10 Appellee therefore requests that this Court enter its order dismissing the appeal in
11 the above-entitled cause for want of prosecution by the Appellant.

12 Appellee further requests that the suspended sentence be imposed immediately.
13 Such an order would be consistent with Associate Judge Aguilar's ruling that, the
14 Defendant's probation "shall begin on the day the decision is handed down by the
15 Appellate Court if the decision is in the Tribe's favor." (June 25, 1996 Minute Entry in CR-
16 96-047.)
17

18 Finally, because the Tribe has not yet adopt a rule governing motion practice, the
19 Tribe respectfully requests the Court give the Appellant five (5) days to file a response to
20 this motion and the Appellee three (3) days to file a reply.
21

22 Respectfully submitted this 23rd day of DECEMBER, 1996.

23 
24 _____
25 Michael Ehlerman, Deputy Prosecutor
26 Counsel for Appellee
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Copy mailed this date to:

Sydney Ricks
Counsel for Defendant/Appellant
Four Rivers Indian Legal Services
Pascua Yaqui Tribal Court FRILS In-box

By: *Patricia Castro*