No. CA-15-004

Pascua Yaqui Court of Appeals

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Pascua Yaqui Tribe, Appellant,

vs.

Joel Martinez, Appellee,

Appeal of a Tribal Court Order in Case No. CR-15-144, the Honorable Cornelia Cruz presiding.

Allen Osburn, Office of the Prosecutor of the Pascua Yaqui Tribe, 7777 Camino Huivisim, Tucson, AZ for the Appellant.

Sara Dent, Pascua Yaqui Public Defender, 7474 S. Camino de Oeste, Tucson AZ 85757 for the Appellee.

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Opinion

Summary

There are two main issues before this Court. The first issue is whether the Tribal Court abused its discretion by ruling that the Tribe is responsible for disclosing prior convictions of its witnesses from other jurisdictions. This Court holds that it did not.

The second issue is whether the Tribal Court abused its discretion by imposing a sanction dismissing the case with prejudice. This Court holds that it did. The reasons for these holdings are explained below.

I. Background

Appellee, Joel Christopher Martinez, was charged by criminal complaint with threatening or intimidating, a violation of 4 PYTC § 1-255(A), for sending a threatening voicemail and/or text message to Jessica Burch, the victim and Appellant's witness. The

Pascua Yaqui Tribal Court dismissed the case with prejudice because of Appellant's failure to disclose Ms. Burch's prior felony convictions in Pima County Superior Court.

According to the Tribal Court's order, the Court found that Appellant failed to exercise due diligence, that Appellant had an obligation to provide continuing disclosure to defense counsel, and Appellant had sufficient time and resources to obtain Burch's prior criminal history. Appellant however, made no efforts to obtain the history until Appellee's motion was filed. Appellant asserts that dismissal with prejudice was a severe sanction imposed by the Tribal Court, and the matter should not have been dismissed with prejudice because no harm to Appellee was established. Appellant filed a Notice of Appeal with the Court of Appeals on November 18, 2015.

II. Disclosure of prior convictions

The scope of discovery is within the discretion of the lower court. We review the Tribal Court's discovery ruling for abuse of discretion. *U.S. v. Williams*, 791 F.2d 1383 (9th Cir. 1986)(citing *United States v. Clegg,* 740 F.2d 16, 18 (9th Cir. 1984); *United States v. Duncan,* 693 F.2d 971, 979 (9th Cir. 1982), *cert. denied*, 461 U.S. 961, 103 S.Ct. 2436, 77 L.Ed.2d 1321 (1983)). Although this is not the first time this Court has decided a discovery related topic, the issues at bar-are different than in past cases.[1]

There are three components of a *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and

[1] In *PYT v. Molina*, CA-04-002, the Tribe failed to disclose **any relevant materials** and information and subsequently failed to comply with the defendant's discovery request. (*Id*.)The appellate opinion notes that the prosecutor was given notice twice (pursuant to Rule 5.1 and via defendant's discovery motion) and failed to comply with discovery. In *Molina*, this Court concluded that the Tribal Court did not abuse its discretion when it dismissed the criminal complaint and held the prosecutor in contempt and fined him $50.00. The Court held that PY Rule 5.1 imposed "a duty on the Tribe's prosecutor to disclose to the defendant all the information and materials that are within the prosecutor's possession or control that would help the defendant prepare his/her defense. Rule 5.1 also requires that the disclosure be made within ten days of arraignment." (*Molina* ruling, p. 3) In this case, the allegation is that the Tribe/Appellant specifically failed to produce the criminal history of its witness, the victim in this case, which could have been used to impeach her testimony during trial. There was no indication that counsel did not produce "any" discovery at all.

prejudice must have ensued." *United States v. Price,* 566 F.3d 900, 907 (9th Cir. 2009) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). The Pascua Yaqui Rules of Criminal Procedure provide that no later than ten days after the arraignment, the prosecutor shall make available to the defendant for examination and reproduction "material or information that tends to mitigate or negate the defendant's guilt to the offense charged or which would tend to reduce his or her punishment therefore, including *all prior felony convictions of witnesses whom the prosecutor expects to call at trial*." *See* 3 PYTC §2-2-380(A)(6) (emphasis added). *Brady* not only requires the prosecution to disclose favorable evidence to the defendant, but to ensure that the defendant will not be denied access to evidence that would ensure him a fair trial. *See United States v. Bagley*, 473 U.S. 667, 675, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). *Brady* applies not only to the failure of the prosecution to disclose exculpatory evidence, it also applies to the prosecutor's failure to disclose evidence that could have been used for impeachment purposes. *Bagley***,** 473 U.S. at 676*; Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

1. **Evidence favorable to the accused:**

Brady encompasses suppression of impeachment evidence**.** *Bagley* provides:

> Such evidence is "evidence favorable to an accused," *Brady*, 373 U.S., at 87, 83 S.Ct., at 1196, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

Bagley, 473 U.S. at 676.

In the instant case, the evidence at issue is favorable to the accused under *Brady* because Appellant's witness's undisclosed priors are admissible to impeach her testimony. The record indicates that Appellant had evidence of a June 2, 2008 indictment from Pima County Superior Court, which includes an indictment (No. CR-20082121) for four counts

of trafficking in stolen property, second degree, a class three felony, and theft by controlling stolen property, a class three felony (count 5). The record indicates that she pled guilty to theft by controlling stolen property under CR-20082121, a class six undesignated felony, on September 2, 2008. Appellant attached a receipt for $29.50 that was written to "Pascua Yaqui Prosecutors" concerning the aforementioned case. During the hearing on the request for sanctions, Appellant noted that this was the receipt for copies of Ms. Burch's criminal history that they acquired after Appellee told them about Ms. Burch's prior criminal history. Her criminal docket number from Pima County Superior Court was also written on the receipt. Burch's guilty plea for theft could have been used to show her propensity for dishonesty and to impeach her during Appellee's trial.

2. Suppression by the prosecution

Brady also requires suppression by the prosecution. "The term 'suppression' does not describe merely overt or purposeful acts on the part of the prosecutor; sins of omission are equally within *Brady's* scope." *Price*, 566 F.3d at 907 (citing *Benn v. Lambert*, 283 F.3d 1040, 1053 (9th Cir. 2002).

There is no indication that Burch's criminal history or priors were in Appellant's possession. Nonetheless, testimony during the hearing indicates that a simple phone call to the Pima County Superior Court could have led to the details of Ms. Burch's prior convictions. In addition, once Appellee informed Appellant about Ms. Burch's criminal history, Appellant personally obtained Ms. Burch's prior criminal history because the convictions were easily accessible.

Appellant should not have limited searching Ms. Burch's criminal background to the reservation because there is no indication from the record that Ms. Burch is a Tribal member. Therefore, a search for prior criminal history should have extended beyond the reservation. At the very least, Appellant should have conducted a search for any local criminal history.

3. Prejudice to the defense

In *Price*, the defendant did not know about the prosecution's witness's prior criminal history before trial and thus, could not use the information to impeach the prosecution's witness. Therefore, the failure to disclose the witness's criminal past was prejudicial. Here, although Appellant failed to do a simple search–to find Ms. Burch's criminal history, there appears to have been no prejudice to the defense. Appellee knew about Ms. Burch's criminal history and even brought it to the Appellant's attention; therefore, Appellee could have taken advantage of this information during trial.

Appellee would not have been ambushed at trial and was well aware of the necessary criminal history needed to impeach the Appellant's witness. This, however, is not an excuse or a "free pass" for Appellant as there have been allegations of Appellant withholding and/or failing to produce discovery in the past. Undoubtedly, there should have been a sanction or some type of punishment imposed for Appellant's failure to discover their witness's prior criminal history. A dismissal of the entire case with prejudice even after Appellee timely found the information concerning the witness's criminal history was severe (by *Brady* standards) because there was no prejudice to the defense. Appellant's failure to find their own witness's criminal history was unacceptable. This witness is not a Tribal member; therefore, it would have been logical to search outside of the Tribe's jurisdiction to determine whether the witness had a criminal history.

III. Sanctions for discovery violations

Discovery sanctions are generally reviewed for an abuse of discretion. *See United States v. Fernandez,* 231 F.3d 1240, 1245 (9th Cir. 2000). If a party fails to comply with the discovery provisions, the court may impose any sanction with which it finds just under the circumstances, *including, but not limited to* "[o]rdering disclosure of the information not previously disclosed; granting a continuance; holding a witness, party, or counsel in contempt of court; precluding a party from calling a witness, ordering evidence, or raising a defense not disclosed; and declaring a mistrial when necessary to prevent a miscarriage of justice. " *See* 3 PYTC §2-2-420 (A-E)(emphasis added).

In the case at bar, Appellee's indictment was dismissed with prejudice. In *U.S. v. Chapman,* 524 F.3d 1073 (9th Cir. 2008), the court addressed the issue of whether the district court abused its discretion by dismissing Defendant's indictment based upon the prosecution's failure to disclose a witness's prior criminal history. Trial had actually begun at the time defense counsel and the court discovered the violations.

The Ninth Circuit stated that the district court may dismiss an indictment on the following grounds: (1) outrageous government conduct if the conduct amounts to a due process violation and (2) if the conduct does not rise to the level of a due process violation, the court may nonetheless dismiss under its supervisory powers. *Chapman***,** 524 F.3d at 1084 (citing *U.S. v. Barrera–Moreno,* 951 F.2d 1089, 1091 (9th Cir. 1991)). A district court may exercise its supervisory power in the following three areas, "to implement a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct." *Chapman,* 524 F.3d at 1085 (citing *U.S. v. Simpson*, 927 F.2d 1088, 1090-1091 (9th Cir. 1991)(overruled by *U.S. v. W.R. Grace,* 526 F.3d 499 (9th Cir. 2008), which expanded the federal courts' inherent powers beyond these three specific areas). However, because "[d]ismissing an indictment with prejudice encroaches on the prosecutor's charging authority," this sanction may be permitted only "in cases of flagrant prosecutorial misconduct." *Chapman,* 524 F.3d at 1085 (citing *Simpson*, 927 F.2d at 1091).

"[A]ccidental or merely negligent governmental conduct is insufficient to establish flagrant misbehavior." *Chapman*, 524 F.3d at 1085. Rather, "reckless disregard for the prosecution's constitutional obligations" satisfies the standard for dismissal. *Id.* A court may dismiss an indictment under its supervisory powers only when the defendant suffers "substantial prejudice," *Chapman,* 524 F.3d at 1087 (citing *United States v. Jacobs*, 855 F.2d 652, 655 (9th Cir. 1988)), and where "no lesser remedial action is available," *Chapman,* 524 F.3d at 1087 (citing *Barrera–Moreno*, 951 F.2d at 1092).

In *Chapman,* the Ninth Circuit found that the government's failure to produce documents and to record what had or had not been disclosed, along with "affirmative misrepresentations to the court of full compliance," supported the lower court's finding of

"'flagrant' prosecutorial misconduct even if the documents themselves were not intentionally withheld from the defense." *Chapman,* 524 F.3d at 1085.

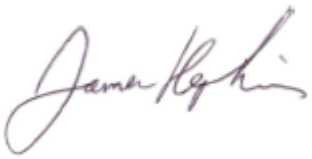
In *Chapman,* the government received several indications before and during trial that there were problems with discovery, but the government failed to ensure it had provided full disclosure until the trial court insisted it produce verification of disclosure after numerous complaints from the defense concerning disclosure. The Ninth Circuit noted that although there were hundreds of thousands of pages of discovery, the Assistant United States Attorney (AUSA) failed to keep a log indicating which materials had been disclosed or not disclosed. The AUSA repeatedly maintained that he had fully complied with *Brady* and *Giglio*, but could not verify these claims. When asked to produce verification of the required disclosures, the government "attempted to paper over his mistake, offering 'in an abundance of caution' to make new copies 'rather than find the record of what we turned over.'" When the court insisted that proof of disclosure be given, the AUSA then acknowledged that no record of compliance even existed. In addition, the dates on many of the documents that were subsequently disclosed post-dated the beginning of trial; therefore, the government had to concede that it failed to disclose material documents relevant to impeaching witnesses who had already testified. Additionally, the government's failure to disclose material documents to impeach a witness prior to the witness's testimony caused the defendant to suffer "substantial prejudice" and therefore justified the district court's dismissal with prejudice.

In the case at bar, the Tribal judge determined that dismissing the case with prejudice was the appropriate sanction for Appellant's failure to disclose their witness's prior criminal history. It is noted that Appellant's continual procedural errors are a source of frustration. However, the Appellant's conduct in failing to find the prior criminal history was neither sufficiently flagrant nor prejudicial to justify dismissal with prejudice, and lesser remedial action could and should have been utilized.

IV. Conclusion

For the foregoing reasons, the Tribal Court's order granting Appellee's request for dismissal of the indictment with prejudice is hereby reversed and this matter is remanded to the Tribal Court for further proceedings.

So **ORDERED** this _8th___day of __August_____, 2016.



Chief Justice Hopkins