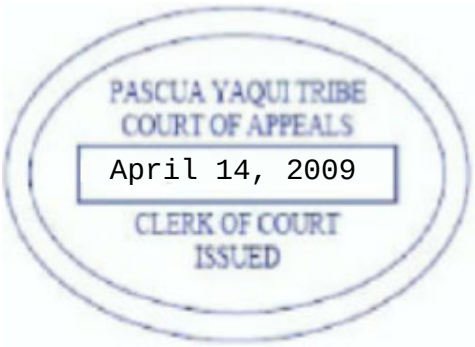


No. CA-06-021

Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Appellant

v.

Laura Grijalva, Appellee

OPINION

Appeal of order in Case No. CR-06-025, the Honorable Melvin Stoof presiding.

AFFIRMED

Micah Schmit, Esq. Pascua Yaqui Tribe Office of Prosecutor, Tucson, AZ, for the Plaintiff/Appellant.

Gilda M. Terrazas, Esq., Tucson, AZ, for the Defendant/Appellee.

I. STATEMENT OF THE CASE

This is an appeal of an order issued by Judge Stoof on August 21, 2005, dismissing a criminal count for lack of subject matter jurisdiction and rejecting a proposed plea agreement. The order stated that subject matter jurisdiction was lacking because the count was barred by the statute of limitations, and the plea agreement was rejected because it contained restitution derived from this count. (*PYT v. Grijalva*, Pascua Yaqui Trial Court Record, document 2, hereinafter "R.2")

II. STATEMENT OF THE FACTS

On October 31st, 2005, Plaintiff filed a fourteen count criminal complaint against Defendant in tribal court. Count one of this complaint concerned an allegedly fraudulent act committed on October 4th, 2004, more than one year before the complaint was filed (counts two through fourteen regarded allegations of criminal conduct within one year of the filing, and are not at issue in this appeal). (R.2)

The parties submitted a comprehensive plea agreement and were advised by the court's administrative attorney, Ben Casey, that the court would be disinclined to accept a plea that included the first count, which it viewed as barred by the statute of limitations. They then produced a new plea agreement nominally dropping the first count but leaving, by Appellant's admission, "restitution for count 1 largely in place." (Appellant's Opening Brief, 3, FN3 citing Transcript D at 1). On July 26th, 2006, at the change of plea hearing, Judge Stoof rejected this plea agreement, on the grounds that the court lacked subject matter jurisdiction to accept a plea containing restitution derived from a count that was barred by the statute of limitations. The parties agreed to bifurcate the case, separating the first count for independent consideration of the jurisdictional question. On August 21, 2006, the court dismissed count 1 of the complaint and rejected the plea agreement. (R.2).

III. STATEMENT OF THE ISSUES

1. Does the tribal court have discretionary authority to reject a mutually bargained plea agreement?
2. Was the court's rejection of the plea agreement in this case an abuse of that discretionary authority?

3. Did the court abuse its discretion by dismissing count 1 of the complaint on the grounds that it lacked subject matter jurisdiction to hear the count as the statute of limitations had run?
4. Does the statute of limitations for fraud based offenses toll until discovery of the fraudulent acts that give rise to them?

IV. ARGUMENT

1. Mutually bargained plea agreements may be accepted or rejected in the discretion of the Court.

However freely bargained or urged by the parties, the court is not a party to any plea agreement and may accept or reject such an agreement in its discretion. No legal authority exists to compel a trial court to accept the terms of such an agreement: it always retains the independent power to impose sentence.

Appellant would have this court impose such terms on the Tribal Court:

> the Tribe would first ask that this Court compel the trial court to not reject negotiated agreement, originally just before the July 26th, 2006 change of plea hearing and which included count 1. Alternatively, the tribe would ask that that lower court be compelled to accept the back-up plea which excised count 1, but still included a portion of restitution relating to count 1 (i.e., the plea that was actually submitted in court on July 26th). (Appellant's Opening Brief at 5).

Such relief may not be granted.

The Pascua Yaqui Rules of Criminal Procedure are explicit:

After making such determinations, the court shall either accept or reject the tendered negotiated plea. The court shall not be bound by any provision of the plea agreement regarding the sentence or the term and conditions of probation to be imposed, if, after accepting the agreement and reviewing a pre-sentence report, it rejects the provision as inappropriate. 3 PYT R.Crim.P. Rule 27(d)

The Federal Rules similarly leave the decision to reject or accept such agreements to the discretion of the Court,

11(c)(1) If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement)...

11(c) (3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report. Fed. R. Crim. P. 11(c)(1, 3).

"If the plea agreement includes the dismissal of any charges, id. 11(e)(1)(A) (a type "A" plea agreement), or if the agreement includes a specific sentence, id. 11(e)(1)(C) (a type "C" plea agreement), the district court may accept or reject the plea agreement, or it may defer its decision regarding acceptance or rejection until it considers the presentence investigation report." *United States v. Bennett,* 990 F.2d 998, 1001-1002 (7th Cir. 1993). *See* extended discussion of these points in Ross, Jacqueline E., "SECTION V: CRIMINAL LAW AND PROCEDURE: The Entrenched Position of Plea Bargaining in United States Legal Practice" 54 *Am. J. Comp. L.* 717 2006.

Having no authority to compel the trial court to accept the terms of a plea agreement, however beneficial to the parties or independently bargained between them, I will not do so, absent a showing that rejection of such terms was an abuse of discretion.

2. The Court did not abuse its discretion by rejecting the plea agreement.

The plea agreement negotiated between the parties and submitted to the court on July 26th, 2006, by Appellant's admission nominally dropped count 1 but left "restitution for count 1 largely in place." (Appellant's Opening Brief at 3, FN3). It is irrelevant whether a court could have enforced such an agreement; the court chose to reject it.

Appellant wishes to reverse that decision and compel the court to impose the restitution amount contained within the parties' agreement, even though the court always retained the power to impose restitution as it saw fit, not merely accept the restitution amount decided upon by the parties. This amount, by their admission, derived from a count that had been dropped and which the court viewed as barred by the statute of limitations. The court thought that improper and rejected it; its exercise of discretion was reasoned, not abusive. *U.S. v. Maddox*, 48 F.3d 555

(D.C. Cir. 1995); *Sandy v. Fifth Judicial Dist. Court In and For the County of Nye*, 113 Nev. 435, 935 P.2d 1148 (1997).

3. The overwhelming force of persuasive authority at the United States federal and state level establishes that statutes of limitations are not bars to subject matter jurisdiction, but defenses which must be asserted at trial and which may be waived, explicitly or implicitly, by the defendant.

Federal courts have long held that "the statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases" *Biddinger v. Commissioner of* Police, 245 U.S. 128 at 135 citing *United States v. Cook*, 17 Wall. 168); "the statute of limitations here is a waivable affirmative defense and therefore does not affect a court's jurisdiction" *Acevedo-Ramos v. U.S.*, 961 F.2d 305 at 306, "every circuit that has addressed it has held that the statute of limitations is a waivable affirmative defense rather than a jurisdictional bar" *Id.* At 305 *citing United States v. Karlin,* 785 F.2d 90, 92 (3d Cir. 1986) (listing cases), cert. denied, 480 U.S. 907, 94 L. Ed. 2d 522, 107 S. Ct. 1351 (1987)*; United States v. Wild,* 179 App. D.C. 232, 551 F.2d 418, 421-25 (D.C. Cir.), cert. denied, 431 U.S. 916, 53 L. Ed. 2d 226, 97 S. Ct. 2178 (1977). Appellee does not contest this authority. (Appellee's Response Brief at 4, "Appellee concedes that the federal line of cases deems the statute of limitations as an affirmative defense that may be waived.").

While some federal courts have maintained that waiver of the statute of limitations must be explicit to be effective, pleas of guilt have been generally held sufficient in themselves to waive such a defense, particularly within the context, as here, of a negotiated plea agreement. *Acevedo-Ramos v. U.S.*, 961 F.2d 305 at 308-309, "Thus like other affirmative defenses, the statute of limitations is deemed waived when a defendant pleads guilty even if the defendant did

not make a knowing and express waiver of the defense;" further, "'decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty. Waiver in that sense is not required." *Id.* at 309 *citing United States v. Broce*, 488 U.S. 563, 573, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989), and "'if the limitations defense is not jurisdictional, . . . then it is difficult to conceive why it alone, of all the defendant's affirmative defenses, should not be waived if not asserted at trial.'" *Id. citing United States v. Arky*, 938 F.2d 579, 582 (5th Cir. 1991) (per curiam), cert. denied, 117 L. Ed. 2d 496, 60 U.S.L.W. 3598, 112 S. Ct. 1268 (U.S. March 2, 1992).

State law is similarly uniform and convincing. "In Florida, statutes of limitation on crimes are not jurisdictional and the defendant may waive the statute of limitations defense." *Morris v. State*, 909 So. 2D 428, 431 *citing Doyle v. State*, 783 So. 2d 295 (Fla. 1st DCA), rev. denied, 796 So. 2d 536 (Fla. 2001); *Mercer v. State*, 654 So. 2d 1221 (Fla. 5th DCA 1995); *Lowe v. State*, 501 So. 2d 79 (Fla. 5th DCA 1987). Similarly, in *Adams v. State*,, 81P.3d 394 (2003) at 404 "the statute of limitations is not jurisdictional and can be waived" *citing State v. Timoteo,* 87 Hawai'i 108, 114, 952 P.2d 865, 871 (1997), further "a no contest plea made knowingly and voluntarily precludes a defendant from later asserting any nonjurisdictional claims on appeal. *Id.* at 406-407 *citing Morin v. Morin*, 71 Haw. 159 at 162, 785 P.2d 1316 at 1318... *See also Acevedo-Ramos v. United States*, 961 F.2d 305, 307-09 (1st Cir. 1992) (statute of limitations is a waivable affirmative defense and does not affect a court's jurisdiction; 'like other affirmative defenses, the statute of limitations is deemed waived when a defendant pleads guilty even if the defendant did not make a knowing and express waiver of the defense'); *State v. Johnson*, 422 N.W.2d 14, 16 (Minn. Ct. App. 1988) ('[a] guilty plea by a counseled defendant operates as a waiver of all nonjurisdictional defects arising prior to the entry of the plea'; inasmuch as statute

of limitations is not jurisdictional, defendant waived right to appeal statute of limitations issue); *Longhibler v. State*, 832 S.W.2d 908, 911 (Mo. 1992) ('The statute of limitations is non-jurisdictional and can be waived. A voluntary plea of guilty waives all non-jurisdictional defects in the proceedings.'); *State v. Brown*, 43 Ohio App. 3d 39, 539 N.E.2d 1159, 1163-64 (Ohio Ct. App. 1988) (statute of limitations is not jurisdictional and can be voluntarily waived; claim of error based on statute of limitations was waived by defendant's guilty plea); *James v. Galetka*, 965 P.2d 567, 573 (Utah Ct. App. 1998) ('Criminal statute of limitations are not jurisdictional, but are a bar to prosecution which can be waived by a knowing and voluntary guilty plea. . . . Defendant's guilty plea . . . was sufficient for defendant to waive the statute of limitations bar to obtain the benefit of the plea bargain.'); cf. U*nited States v. Broce*, 488 U.S. 563, 573, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989) ('Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty. Waiver in that sense is not required.'). As stated in Timoteo, 'no express waiver through an on-the-record colloquy was necessary.' Timoteo, 87 Hawai'i at 116, 952 P.2d at 873.

Authority cited by Appellee in reference to her claim that there is a split of opinion on this question is not convincing. *People v. Ware*, 39 P.3d 1277 does hold that, in Colorado, "the statute of limitations in criminal matters operates as a jurisdictional bar to prosecution that cannot be waived." *Citing Bustamante v. District Court,* 138 Colo. 97, 329 P.2d 1013 (1958), overruled in part on other grounds by *County Court v. Ruth, 1*94 Colo. 352, 575 P.2d 1 (1977); *People v. Verbrugge,* 998 P.2d 43 (Colo. App. 1999). While this reflects the law in Colorado, Colorado is one of the few jurisdictions taking this approach, and the cited authority did not involve, as here, a bargained for plea agreement. *People v. Simon,* 25 Cal 4th 1082, 108 Cal.

Rptr. 2D 385 (2001) is wrongly cited, (Appellee's Response Brief at 4), as it dealt with venue, not the statute of limitations, which was only referenced by distinction in a footnote *Id.* at FN 15.

I find the statute of limitations an affirmative defense that may be waived by a defendant at trial, not a bar to jurisdiction.

I also find that such a waiver need not have been explicit to be effective; it is sufficient that it be, as here, knowing and intelligent. The bargain entered into by the parties in the instant case was mutually beneficial and considered; it exempted Appellee from any possible incarceration and included only two of the fourteen counts initial charges, all of which could have potentially resulted in separate one year sentences of imprisonment after conviction at trial. While the court was not bound to accept this agreement, the statute did not bar such an acceptance, or prevent the court from enforcing terms based directly or indirectly upon a count for which the defendant might have asserted it as a defense.

The court did not err by rejecting the plea agreement, which it had wide latitude to accept, reject, or modify. Further, while the grounds asserted by the court to dismiss the count were spurious, as it did have subject matter jurisdiction over the charge, the dismissal itself was harmless, because the statute of limitations defense was available to the defendant, and would have prevailed had it been raised. The court needn't have raised that defense itself, but I find that doing so would have been within its proper sphere of discretion.

Accordingly, the court's order is affirmed.

4. The statute of limitations contains no provision tolling it until discovery

The statute of limitations requires that all actions be brought within one year of the date of the alleged offense:

> No criminal prosecution shall be maintained under this chapter unless the action shall have been commenced within one year after the commission of the offense. The one year time limit does not include time spent outside of the jurisdiction of the Tribal Courts for the purpose of avoiding prosecution. The burden of proving the reason for absence from jurisdiction shall be upon the accused. 4 PYTC § 1-40.

It contains one tolling exception: time spent outside of the Court's jurisdiction for purposes of avoiding sentence.

Appellant cites the rule in *U.S. v. Dandy*, 998 F.2d 1344 6th Cir. (1993) at 1355, namely that for crimes of deceit, or at least tax fraud, the statute of limitations should begin to run "at the last affirmative act of evasion in furtherance of the crime."

While the Council could have written this "discovery" theory into the statute for certain offenses, such as those involving fraud, it chose not to, unlike the Arizona legislature. A.R.S. Sec. 13-107. Policy questions in the Yaqui Constitutional structure are decided by the legislative branch, not the Court of Appeals, and I will not reverse a decision by the Yaqui legislature and insert a rule into a statute the Council chose to omit.

I find that the statute began to run, as stated in 4 PYTC § 1-40, at the time Appellee committed the act of fraud alleged in count 1 of the charges against her, October 4, 2004, not when that fraud was discovered by the tribe. As count 1 was not filed against Appellee until October 31, 2005, Appellee could have successfully asserted the defense that it was barred by the statute of limitations at trial.

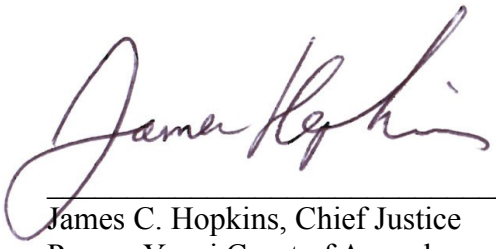
V. CONCLUSION

The court had discretionary authority to accept or reject the plea bargain submitted to it by the parties. While the court's basis for rejection was faulty, as it had subject matter

jurisdiction to hear count 1 and could have enforced an agreement whose terms were based in part upon it, such rejection was within the court's discretion and will not be overturned. Further, though the court needn't have dismissed the claim, the dismissal was harmless, as the court could have properly asserted the available defense of the statute of limitations, *sua sponte*.

Judgment affirmed.

Filed this 14th day of **April**, 2008.



James C. Hopkins, Chief Justice
Pascua Yaqui Court of Appeals