

Aug 11, 2010

ISSUED  
CLERK OF COURT

CA-07-006

Pascua Yaqui Tribe Court of Appeals

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Pascua Yaqui Tribe, Plaintiff/Appellant

v.

Arturo Martin Flores, Defendant/Appellee

### ORDER

Appeal of a decision of the Pascua Yaqui Tribal Court in Case No. JD-05-113, the Honorable Melvin Stooft presiding.

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

Arturo Martin Flores, 7381 S. Tetaviecti, Tucson, AZ, 85757, pro se, Defendant/Appellee.

\*\*\*\*\*

On January 4, 2007 Appellant Pascua Yaqui Tribe filed a Notice of Appeal with the Pascua Yaqui Tribe Court of Appeals and then filed an Opening Brief on November 9, 2007. Appellee has not filed its Response Brief.

This court has jurisdiction to hear the appeal pursuant to 3 PYTC Sections 2-3 and in accordance holds that this appeal be considered and a decision made based on the filings before the court, pursuant to Rule 16 PYTRAP.

#### *Statement of the case.*

On December 6, 2006 the Pascua Yaqui Juvenile Court dismissed this matter due to defect in pleading. More specifically, the case was dismissed for lack of probable cause to charge the juvenile due to a defect of the probable cause affidavit. Further, the matter was dismissed without prejudice and in its final order the trial court stated that the juvenile offender petition is dismissed without prejudice to re-filing.

#### *Argument.*

Subsequent to the Appellants filing their appeal in the instant case, the Pascua Yaqui Tribe Court of Appeals issued an order controlling disputes involving misspelled and mistake-in-name errors in pleadings [Order in *Pascua Yaqui Tribe v. Julianna McAdams*, No. CR-06-183 (May 30, 2006)]. In *Julianna McAdams*, the appellate court denied and dismissed the appeal because, similar to the case at hand, the defendant's

name was misspelled in both pleadings. In *McAdams*, the appellate court further stated that:

*incorrectly spelled names should be corrected before the trial court to prevent waste of party and judicial resources. Here the Tribe has a remedy below – it can re-file the charges under the Defendant's/Appellee's correct name.*

*Final Order in PYT v. Julianna McAdams, CA-06-011, June 2007*

The Appellant subsequently filed a petition for reconsideration of the Court of Appeals' order in the *Julianna McAdams* case, arguing that the court had failed to address the issue at hand. The Court of Appeals subsequently denied and dismissed the petition for reconsideration because:

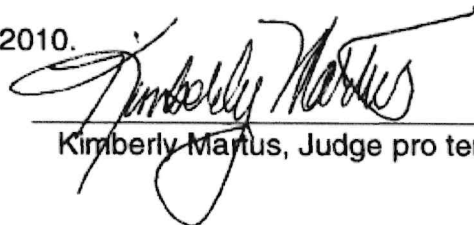
- 1) The June 21, 2007 order is a decision denying an appeal to this [appellate] Court because the Appellant had a remedy available in the trial court; and
- 2) The PYTRAP, Rule 19(D), does not permit a petition for reconsideration of a decision denying an appeal.

*Order.*

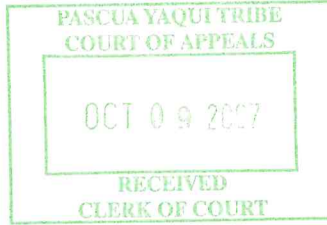
Just as in the *Julianna McAdams* case, misspelled and mistake-in-name errors in the pleadings should be corrected before the trial court to prevent unnecessary legal proceedings and waste of party and judicial resources, especially since the trial court dismissed the case without prejudice to re-filing, and the Appellant has a remedy below – it can re-file the charges under the juvenile's correct name. Accordingly, the decision of the Trial Court in JD-05-113 is affirmed and the appeal in the instant case is dismissed.

Additionally, considering that the Tribe failed to re-file this case in Trial Court pursuant to this courts' Order in *Julianna McAdams*, and instead filed an appeal, this case is now dismissed with prejudice. Acting otherwise would unduly prejudice the Defendant/Appellee.

So ORDERED this 10<sup>th</sup> day of August, 2010.

  
\_\_\_\_\_  
Kimberly Martus, Judge pro tem

PASCUA YAQUI TRIBE  
OFFICE OF THE PROSECUTOR  
7474 S. Camino de Oeste  
Tucson, AZ 85757  
(520) 879-6251



PASCUA YAQUI TRIBAL COURT  
FILED DATE AND TIME

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DOCKET NO. CA-07-006

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Yancy A. Jencsok  
Interim Chief Prosecutor

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,	)	Trial Court Case No. JD-05-113
Plaintiff/Appellant,	)	
	)	Appeals Court Case No. CA-07-006
vs.	)	
	)	<b>TRIBE'S MOTION FOR SECOND</b>
ARTURO FLORES,	)	<b>EXTENSION OF TIME</b>
Minor/Defendant/Appellee.	)	<b>TO FILE BRIEF</b>
_____	)	

The Tribe motions the court for a second extension of time to file its opening brief pursuant to 3 PYTRAP Rule 5(B). The brief was due September 17, 2007. Counsel inadvertently missed the due date. The Tribe asks for an extension until November 9, 2007. No further extensions will be requested by the Tribe.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of October, 2007.

PASCUA YAQUI TRIBE  
OFFICE OF THE PROSECUTOR

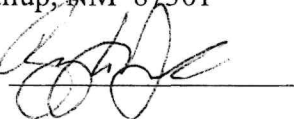
Yancy A. Jencsok  
Interim Chief Prosecutor

Copies delivered/mailed on October 5, 2007 to:

Antonia Flores – minor's mother  
7831 S. Camino Tetaviecti  
Tucson, AZ 85757

McKinley County Detention Center  
Inmate Arturo Flores #05-340  
225 S. Boardman Drive  
Gallup, NM 87301

By

A handwritten signature in black ink, appearing to be "Arturo Flores", written over a horizontal line.

No. CA-07-006

Pascua Yaqui Tribe Court of Appeals

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Pascua Yaqui Tribe

v.

Arturo Flores, a minor

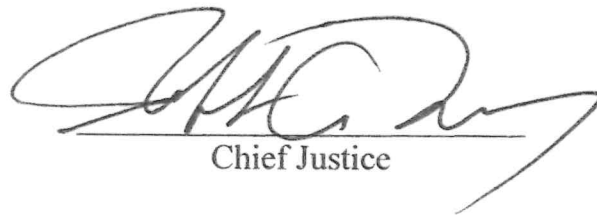
ORDER

Tribe's motion for extension of time to file brief; Trial Court Case No. JD-05-113; the Honorable Melvin R. Stoof presiding.

Mr. Yancy Jencsok, Esq., Pascua Yaqui Prosecutors Office, Tucson, Arizona, for the Tribe.

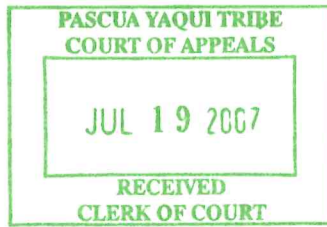
The court has received and reviewed the Appellant's motion for extension of time to file pursuant to PYTRAP Rule 5(B). The Court finds good cause for granting the motion. The Tribe has 60 days from July 19, 2007 to file its opening brief.

So ORDERED this 19<sup>th</sup> day of July, 2007



Chief Justice

PASCUA YAQUI TRIBE  
OFFICE OF THE PROSECUTOR  
7474 S. Camino de Oeste  
Tucson, AZ 85757  
(520) 879-6251



PASCUA YAQUI TRIBAL COURT  
FILED DATE AND TIME  
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Yancy A. Jencsok  
Deputy Prosecutor

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,	)	Trial Court Case No. JD-05-113
Plaintiff/Appellant,	)	
	)	Appeals Court Case No. CA-06-002 07-006
vs.	)	
	)	<b>TRIBE'S MOTION FOR EXTENSION</b>
ARTURO FLORES,	)	<b>OF TIME TO FILE BRIEF</b>
Minor/Defendant/Appellee.	)	(amended)
_____	)	

The Tribe motions the court for an extension of time to file its opening brief pursuant to 3 PYTRAP Rule 5(B). The tribal court recently transmitted the records for this and several other appeals altogether, causing a number of briefs to come due at once. The Tribe is unable to timely prepare the briefs that are due. The Tribe asks for a 60 day extension.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of July, 2007.

PASCUA YAQUI TRIBE  
OFFICE OF THE PROSECUTOR

\_\_\_\_\_  
Yancy A. Jencsok  
Deputy Prosecutor

Copies delivered/mailed to:

Antonia Flores – minor's mother  
7831 S. Camino Tetaviecti  
Tucson, AZ 85757

Yavapai County Detention Center  
Inmate Arturo Flores #05-356  
3505 W. Hwy. 260, Suite 105  
Camp Verde, AZ 86322

By

A handwritten signature in black ink, appearing to be 'Arturo Flores', written over a horizontal line.

PASCUA YAQUI TRIBE  
OFFICE OF THE PROSECUTOR  
7474 S. Camino de Oeste  
Tucson, AZ 85757  
(520) 879-6251

Yancy A. Jencsok  
Deputy Prosecutor

PASCUA YAQUI TRIBAL COURT  
FILED DATE AND TIME

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IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,	)	Trial Court Case No. JD-05-113
Plaintiff/Appellant,	)	
	)	Appeals Court Case No. CA-07-006
vs.	)	
	)	<b>CERTIFICATE OF SERVICE</b>
FLORES, Arturo Martin,	)	<b>(supplemental)</b>
Minor/Appellee.	)	
_____	)	

I, Yancy A. Jencsok, certify that I sent a copy of the *Notice of Appeal* to Appellee Arturo Flores by first class mail on January 4, 2007 at the following address: McKinley County Detention Center, Inmate Arturo Flores #05-356, 255 South Boardman Drive, Gallup, NM 87301.

Dated: 1/8/2007

  
\_\_\_\_\_  
Yancy A. Jencsok  
Deputy Prosecutor

PASCUA YAQUI TRIBE  
OFFICE OF THE PROSECUTOR  
7474 S. Camino de Oeste  
Tucson, AZ 85757  
(520) 879-6251

Yancy A. Jencsok  
Deputy Prosecutor

PASCUA YAQUI TRIBAL COURT  
FILED DATE AND TIME

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DOCKET NO. CA 07-006

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IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

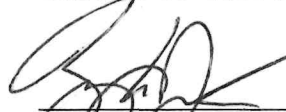
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,	)	Trial Court Case No. JD-05-113
Plaintiff/Appellant,	)	
	)	Appeals Court Case No.
vs.	)	
	)	<b>NOTICE OF APPEAL</b>
FLORES, Arturo Martin,	)	
Minor/Appellee.	)	
_____	)	

NOTICE IS HEREBY GIVEN that the Pascua Yaqui Tribe appeals from the *Order of Dismissal Due to Defect in Pleading* of the trial court dated December 6, 2006 (copy attached). The Tribe requests oral argument before a three Justice panel.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of January, 2007.

PASCUA YAQUI TRIBE  
OFFICE OF THE PROSECUTOR

  
\_\_\_\_\_

Yancy A. Jencsok  
Deputy Prosecutor

Original delivered to:

Clerk of Court, Pascua Yaqui Tribe Court of Appeals

Copies delivered/mailed to:

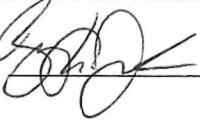
Pascua Yaqui Juvenile Court

Antonia Flores – minor’s mother  
7831 S. Camino Tetaviecti  
Tucson, AZ 85757

Pascua Yaqui Tribe  
Public Defenders Office

Pascua Yaqui Tribe  
Office of the Attorney General

By

  
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IN THE PASCUA YAQUI JUVENILE COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

IN THE MATTER OF: )  
 )  
FLORES, ARTURO MARTIN, )  
DOB: 09/01/87, )  
A Minor. )

Case No. JD-05-113

ORDER OF DISMISSAL  
DUE TO DEFECT IN PLEADING

This matter came before the court on December 6, 2006, for an initial hearing. The minor, in custody, appeared, with his legal counsel, Nicholas Fontana, along with the minor's parent, Antonia Flores, and Yancy Jencsok appeared for the Tribe. The Tribe made a motion for the Court to accept an amended probable cause affidavit, to which the minor's attorney objected.

The minor's attorney argues that it can raise the question of probable cause and jurisdiction at any time, including whether the juvenile offender petition and probable cause affidavit established that the minor may have committed the juvenile offense alleged. See for example, 3 PYT R.Juv.P. Rule 40(A). Purpose of Detention Hearing. Typically, where a minor is detained, and then brought before the court, it must make a finding of probable cause. 3 PYT R.Juv.P. Rule 40(A)(1). At the time of the detention hearing, a party may challenge probable cause, but failure to do so at that time, does not act as a waiver as to challenging probable cause. If a child has already been released to a parent, the Tribe may decide to file a juvenile offender petition and request issuance of a summons for a child and parent to appear. 3 PYT R.Juv.P Rule 50(A)(B).

Where there has been no detention hearing for a minor, and therefore no preliminary finding of probable cause by the court, such a probable cause finding may be addressed at the minor's initial hearing. Although not expressly provided for in the juvenile statute entitled "Initial Hearing," 3 PYT R.Juv.P. Rule 80, a finding of probable cause is necessary for the court to determine whether it may allow the Tribe to continue to prosecute a case against a minor. The juvenile code provides that "the procedures of the Juvenile Code shall be governed by the rules of procedure of the Tribal Court which are not in conflict with this chapter." 3 PYT R.Juv.P. Rule 10(C). The rule of criminal procedure provides that at an initial appearance, the court shall first determine "whether or not probable cause exists to continue to detain and prosecute the accused and if not, shall order the accused released from custody." 3 PYT R.Crim.P. Rule 18. The court must make its determination as to probable cause to continue to detain and prosecute the accused, which finding may be evidenced either through an officer's sworn statement in open court, where no complaint has been filed, 3 PYT R.Crim.P. Rule 18 (A), or by a probable cause affidavit signed by the arresting officer, notarized and attached to the complaint. 3 PYT R.Crim.P Rule 9(C).



1 A minor's counsel may challenge probable cause at the time of an initial hearing,  
2 where the child has not been detained, but rather, has been summoned to appear for a hearing.  
3 3 PYT R.Juv.P Rule 50(A)(B). This follows the generally accepted federal rule of criminal  
4 procedure that a motion alleging a defect in instituting the prosecution, or alleging a defect in  
5 an indictment or information may be made "at any time while the case is pending" and that a  
6 court "may hear a claim that the indictment or information fails to invoke the court's  
7 jurisdiction or to state an offense." See Fed.R.Crim.Pro. 12(3)(A)&(B). The Tribe argues that  
8 the minor waived the jurisdictional argument, as it did not raise it when the matter was on  
9 appeal. The court believes that there is no waiver of challenges to defects to pleadings, as  
10 long as they are made timely, as in this case, at the time of an initial hearing.

11 In this case, the Tribe could have filed an amended juvenile offender petition and  
12 could have attached its amended probable cause affidavit to the amended petition. This would  
13 have followed the generally accepted procedures of state and federal courts, that when a party  
14 seeks to amend a petition or complaint, the party makes a motion for leave to amend, and it  
15 attaches as part of its motion a proposed amended complaint or petition, and the pleading's  
16 contents shall be filed and shall follow the same procedure and the same requisite formalities  
17 as the originally filed pleading. The court does not find the Tribe's argument that it is not  
18 amending the petition, but rather only amending the affidavit, persuasive, and such action  
19 begs the question, why is the amended probable cause affidavit not attached to an amended  
20 juvenile offender petition? The court agrees with the minor's counsel, that when a matter is  
21 amended and a new petition filed, the court must make a determination of probable cause  
22 based on the new amended petition and its amended attachments, that is, based on the  
23 amended pleading and amended probable cause affidavit attached thereto taken together in  
24 their entirety. The court cannot take a piece of one petition and allow amendment to another  
25 portion without combining the documents together, just as the original petition and probable  
26 cause affidavit were combined and served on the minor, so as to afford the respondent minor  
27 and his attorney an opportunity to review such a proposed amended petition and probable  
28 cause affidavit in its entirety as an amended pleading.

19 The court should grant the minor's motion to dismiss the original petition, based on  
20 lack of probable cause, because of a defect in the original probable cause affidavit due to an  
21 obvious blank in the document. Additionally, when a petition is amended, it must contain the  
22 same requisite formalities as the original petition. In this case, the Tribe could have easily  
23 amended the defective affidavit by attaching a corrected affidavit to an amended juvenile  
24 offender petition. Instead, it chose not to do so. Had the court received a proposed amended  
25 juvenile offender petition with a properly notarized affidavit attached thereto, it could have  
26 likely granted liberal leave to amend such a juvenile petition with a corrected affidavit  
27 attached.

25 The minor moved to dismiss the original petition due to defect in the original probable  
26 cause affidavit, and that the original probable cause affidavit is defective because it contains  
27 an obvious blank, yet was signed by both the notary and by the officer. As a general rule, an  
28 "incomplete document" is one which contains "obvious blanks." See A.R.S. § 41-311(5), and  
a notary shall not perform a jurat on a document that is incomplete, A.R.S. § 41-328, because

1 such could result in the suspension of a notary's commission. A.R.S. "If a notary public is  
2 presented with a document that the notary knows from experience to be incomplete or if the  
3 document on its face is incomplete the notary public shall refuse to perform the jurat." A.R.S.  
4 § 41-328. The court should grant the dismissal based on a blank in the original affidavit, that  
5 is, an absence of a date on which the officer signed the affidavit. Such a blank space is a  
6 fundamental defect in the affidavit. A dismissal based on a defect in the pleadings is  
7 generally one granted without prejudice to re-filing. The court should dismiss the juvenile  
8 offender petition without prejudice to re-filing.

9 The original petition alleged that juvenile offenses were committed on June 19, 2005.  
10 The tribal code provides that "no criminal prosecution shall be maintained. . . unless the  
11 action shall have been commenced within one year after the commission of the offense." 4  
12 PYTC §1-40. The statute of limitations runs one year after the date of an alleged offense for  
13 adult criminal cases. The Juvenile Code is silent as to when the juvenile offender petition  
14 must be filed, but based on the juvenile court rule that adopts the adult criminal code  
15 provisions, so long as they are consistent with the juvenile code provisions. If the court were  
16 to follow the statute of limitations provision, then the time for the Tribe to re-file would be  
17 June 19, 2006. It is now December 6, 2006, or 5 ½ months past such a date.

18 The Pascua Yaqui Tribal statutes do not define when a new pleading may be filed  
19 where a case, such as this one, has been pending appeal during a period when a statute of  
20 limitations is running, or how to measure the time running in order to re-file the petition  
21 which is dismissed after a statute of limitations has run. See for example Fed.R.Civ. Pro R.  
22 15(C), Amended and Supplemental Pleadings, Relation Back of Amendment ("An  
23 amendment of a pleading relates back to the date of the original pleading when relation back  
24 is permitted by the law that provides the statute of limitations applicable to the action,") or see  
25 also Federal Rules of Criminal Procedure, which permits a re-filing of a dismissed criminal  
26 action within 60 days of the dismissal where the statute of limitations has run at the time of  
27 the dismissal. 18 U.S.C. Sec. 3288, Indictments and Information Dismissed after Periods of  
28 Limitations. There is no comparable Pascua Yaqui Juvenile Code Provision as to when the  
Tribe may re-file a juvenile offender petition that is dismissed after a period of limitations has  
run. Under the Juvenile Court rules, 3 PYT R.Juv.P. Rule 10(C), the court must follow the  
rules of the tribal court where there is no juvenile court rule provision, and so long as the  
tribal court rules are not in conflict with the juvenile court rules. The only tolling of statutes  
provision can be found at the criminal code provisions related to the Speedy Trial Act.  
Pursuant to 3 PYT R.Crim.P. Rule 33(E), where a delay is caused by a defendant, the time for  
a statute of limitations and the speedy trial act provisions are tolled. There is no comparable  
provision in the Tribal code or Juvenile Court Code that sets forth guidance for the Juvenile  
Court to determine when the Tribe may re-file a juvenile offender petition after a dismissal  
when the statute of limitations for filing an original petition has passed.

The court often must rule based on equitable principles, in the absence of a specific  
Tribal code provision. "The jurisdiction of the courts shall extend to all cases in law and  
equity. . . ." PYT CONST. Art. VIII, Sec. 2.. Because the matter was on appeal, such a status  
is the same as though the minor were absent from the jurisdiction of the court, because an

1 appeal stays or holds in abeyance all proceedings of the lower court, and therefore the statute  
2 of limitations should not include such delays in the juvenile court proceedings caused by the  
3 action pending on appeal. Because the matter was on appeal, the calculations of time limits to  
4 file actions should not include, as a matter of equity, the time frame during which the matter  
was pending before the Court of Appeals, for purposes of any possible re-filing of charges by  
the Tribe.

5 **IT IS ORDERED** that the court grants the defendant's motion to dismiss this matter  
6 due to lack of probable cause, based on a defect of the probable cause affidavit, and the  
juvenile offender petition is dismissed without prejudice to re-filing.

7 **IT IS FURTHER ORDERED** that due to the status of the minor's case being on  
8 appeal, such a time frame during which the matter was pending before the Court of Appeals  
9 shall not be included in calculating any time limitations for re-filing of any juvenile offender  
petition.

10 SO ORDERED THIS 6<sup>th</sup> DAY OF DECEMBER, 2006.

11  
12  
13 *Melvin R. Wood*  
Judge, Pascua Yaqui Juvenile Court

14 CC: Date 12/07/06  
15  Tribe  Minor/Guardian  Counsel  
16 Clerk *[Signature]*