

IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

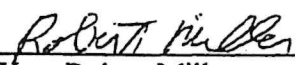
PASCUA YAQUI TRIBE,)	
)	
Appellant,)	Case No. CA-19-006
v.)	(CR-19-144)
)	
VICTOR GRACIA,)	ORDER
)	
Appellee.)	
_____)	

IT IS HEREBY ORDERED that the Notice of Interlocutory Appeal in the above entitled matter is **denied**.

IT IS FURTHER ORDERED that the Motion for Stay of the Lower Court Proceeding pending that Interlocutory Appeal is also **denied**.

This Court finds that the Tribe has not made appropriate claims to warrant an Interlocutory Appeal, i.e. Special Action, nor a Stay of the Lower Court Proceeding. *See PYT v. Stoof ex rel Lopez*, CA18-0001 (PYT Ct. App. Oct 2018). This Court would consider this issue, provided that the matter is properly raised and argued. *See* Rule 7(e), Ariz. R. P. Spec. Act. By denying this Interlocutory Appeal, this Court is making no findings on any underlying issues of law or fact.

SUBMITTED this 17th of May, 2019.



Hon. Robert Miller



Hon. Rebecca Plevel



Hon. Kendra A. Martinez

1 filed a motion to stay trial court proceedings to allow the parties to pursue interlocutory review.
2 On May 9, 2019, the trial court denied the motion to stay in a written motion. *See* “Order Denying
3 Tribe’s Motion for Stay of Trial Pending Interlocutory Appeal,” *PYT v. Gracia*, CR-19-144 (May
4 9, 2019).

5 The Pascua Yaqui Tribe has adopted the laws of the State of Arizona when it comes to
6 interlocutory appeals. *Lopez*, CA-18-001, at p.1-2. Interlocutory appeals, also known as “special
7 actions” are only allowed in situations “where no ‘equally plain, speedy, and adequate remedy is
8 available by appeal.’” *Id.* (quoting Rule 1(a), Ariz. R. P. Spec. Act. “[R]elief may only be granted
9 where: 1) the trial judge has failed to exercise discretion which he/she has a duty to exercise, or to
10 perform a duty required by law as to which he/she has no discretion; and 2) the trial judge has
11 proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority, and
12 3) the trial judge’s determination was arbitrary or capricious or an abuse of discretion.” *Id.* at 2
13 (citing Rule 3, Ariz. R. P. Spec. Act.).

14 Pursuant to the Pascua Yaqui Rules of Criminal Procedure, the Tribe does not have a right
15 of appeal following completion of a criminal case. *See* 3 PYTC § 2-3-90(G). In cases where the
16 Tribe requires reconsideration of a decision made by the trial court, the Tribe, should it seek a
17 remedy, may only do so pretrial, or prior to the termination of trial, through interlocutory review.
18 3 PYTC § 2-3-260(D).

19 At the pretrial conference, the trial court erred when it ruled that the prosecution was
20 required to prove the Defendant’s status as a non-Indian in criminal, domestic violence case where
21 the tribal court has jurisdiction pursuant to 25 U.S.C. § 1304 (Violence Against Women’s Act-
22 VAWA). In so ruling, the court adopted a defense proposed jury instruction which listed a

1 defendant's non-Indian status as a necessary element of domestic violence under the Pascua Yaqui
2 Tribal Code. *Id.* In so ruling, the court indicated that its ruling was consistent with this Court's
3 ruling in *PYT v. Jaimez*, CA-17-003/CA-17-005 (PYT Ct. App. Jul. 20, 2018). However, an
4 examination of this Court's opinion in that matter shows that this Court declined to address the
5 aforementioned issue on the grounds that the defendant's conviction at trial rendered the issue
6 moot. Accordingly, the trial court abused its discretion when it ruled that a defendant's non-Indian
7 status is a statutory element of his offense.

8 In its May 9th ruling, the trial court indicated that it was relying on a ruling issued by this
9 Court in *Jaimez* on May 8, 2017, approximately two months before the ruling mentioned above.
10 In examining the record on appeal in CA-17-003, and CA-17-005, which appear to have been
11 consolidated on appeal, it is clear that the parties filed a petition to have the Court of Appeals
12 address the issue raised by this case. At the time, and despite a request that the case be handled
13 by a full tribunal, a single judge on the Court of Appeals held that the trial court did not abuse its
14 discretion in ruling that the prosecution must prove an individual's non-Indian status for
15 the purposes of VAWA. However, this Court also issued rulings specifically requesting the parties
16 brief three specific issues: 1) whether the Appellate Court had the authority to hear a special action
17 filed by the prosecution; 2) whether the trial court erred in issuing its VAWA instruction; and, 3)
18 whether the Appellate Court could consider the Attorney General's motion for *en banc* review
19 after a single appellate judge denied motions for review. *See* "Second Order Regarding Briefing
20 Schedule and Oral Argument," *PYT v. Jaimez*, CA-17-003/CA-17-005 (Apr. 10, 2018).¹

¹ The Tribe notes that, although this Court's order was dated April 10, 2018, it makes reference to pleadings and court events that occurred April 28, May 19, and June 21, 2018. The Tribe further notes that, while this Court's July 2018 ruling is available on the Court of Appeals' website, its May 8th ruling, is not.

1 Subsequent to that ruling, a full tribunal reviewed the records in the *Jaimez* matter and ruled as
2 follows:

3 “In this case, the tribal government appealed an order of the trial court that the
4 prosecutor had to plead and prove the non-Indian status of the real party in interest.
5 The prosecution proceeded and the real party in interest was convicted with the
6 prosecutor pleading and proving to the jury the non-Indian status of the real party
7 in interest. The conviction of the real party in interest renders this appeal moot.
8 The Tribe has suffered no injury for which this Court can grant any remedy. The
9 appeal is dismissed.”

10
11 “Opinion,” *PYT v. Jaimez ex. Rel Stoof*, CA-17-003/CA-17-005 (PYT Ct. App. Jul.
12 20, 2018).
13

14 At this time, the Tribe requests a stay as to the criminal matter so that the Interlocutory
15 Appeal may be fully litigated, both based on the trial court’s abuse of discretion but, more
16 importantly, on the fact that there is intra-jurisdictional confusion regarding what this Court’s
17 ruling in *Jaimez* was. The Defendant is currently in custody, and trial is scheduled for May 21,
18 2019. Undersigned counsel has contacted Defendant’s attorney, who has indicated an objection
19 to the motion for stay given the fact that the Defendant is currently in custody and has invoked his
20 speedy trial rights. However, the Tribe notes that, pursuant to local criminal procedure rules, an
21 in-custody defendant has the right to be tried within 120 days of his initial appearance, or within
22 90 days of the date of his arraignment, “whichever is lesser.” 3 PYTC § 2-2-330(B). The
23 Defendant in this case was arrested on March 28, 2019, and was arraigned on March 29, 2019. As
24 such, speedy trial limits are set to expire on June 27, 2019. Additionally, the trial court may
25 continue a trial, especially within the speedy trial window, “where good cause has been
26 established.” 3 PYTC § 2-2-330(E). Given the confusion as to what the rule is within the Pascua
27 Yaqui Tribe regarding this unique VAWA issue, the fact that it is an issue that has repeatedly

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1 arisen in this jurisdiction, and the fact that the prosecution will have no adequate remedy on appeal,
2 a stay is appropriate. Staying proceedings to allow the court of appeals to definitively rule on this
3 issue is in the interests of both parties and the state of legal precedent within the jurisdiction.

4 As noted above, defense counsel is objecting to a stay. However, in addition to the speedy
5 trial time limits discussed above, and a court's ability to waive speedy trial limits when justice
6 requires, it should be noted that a stay — by its very nature — serves to stop the speedy trial clock.
7 Additionally, the Tribe notes that a defendant may be released on bond, in the discretion of the
8 trial court, while an appeal is pending post sentencing. *See* 3 PYTC §2-2-490. While this case is,
9 admittedly, still in a pretrial status, the Pascua Yaqui Tribal Code also allows a party to move for
10 a modification of release conditions “based upon the existence of material facts not previously
11 presented to the court.” 3 PYTC § 2-2-210(A). The Tribal Code also allows the court, “on its own
12 initiative” to modify release conditions “after giving the parties an opportunity to respond to the
13 proposed modification.” 3 PYTC § 2-2-210(B).

14 Appellate proceedings in this jurisdiction are governed by the Pascua Yaqui Tribal Code
15 Rules of Appellate Procedure. *See generally* 3 PYTC § 2-3-30, *et seq.* The rules allow this Court,
16 “upon motion for good cause shown,” to “suspend the requirements or provisions of any” of the
17 appellate procedural rules “in a particular case.” 3 PYTC § 2-3-50. This includes shortening or
18 extending the deadline for the filing of appellate briefs. 3 PYTC § 2-3-70(B). In the event that
19 any normal rules of procedure are suspended, this Court “may order proceedings in accordance
20 with its discretion.” *Id.* Further, and in the spirit of the Pascua Yaqui Tribal Code and Rules, the
21 rules of appellate procedure “shall be construed to do justice.” *Id.* The Tribe further notes that
22 this Court has the power to stay proceedings. *See e.g. Jaimez*, CA-17-005 at p. 1-3 (staying appeal

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1 to allow proceedings in a related appeal to go forward).

2 Staying the proceedings in this matter to allow the interlocutory appeal to be fully litigated
3 would be within the interests of justice as it will streamline issues for trial, allows the Tribe to
4 exercise its pretrial right to seek interlocutory review, and allows the parties an opportunity to seek
5 definitive local case law on the unique issue involved in this case, thereby, limiting the need for
6 such review in the future. Accordingly, the Tribe asks that its motion for stay to be granted,
7 especially in light of the fact that trial is set to commence in thirteen days.

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9 **RESPECTFULLY** submitted this 10 day of May, 2019.

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Oscar J. Flores
Chief Prosecutor



Coleen Thoene
Deputy Prosecutor

18 **ORIGINAL of the forgoing filed**
19 **this 10 day of May, 2019.**

20 Clerk of the Court
21 Pascua Yaqui Tribal Court

22 **Copy of the foregoing**
23 **delivered/mailed/provided to:**

24 Annamarie Valdivia, Melissa Acosta
25 Public Defender
26 *Attorney for Defendant*

27
28 By: _____

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI RESERVATION, ARIZONA

THE PASCUA YAQUI TRIBE,

Plaintiff,

vs.

VICTOR GRACIA

Defendant

CA-19-006 (lower court case number
CR-19-144)

NOTICE OF INTERLOCUTORY APPEAL

Notice is hereby given that the Pascua Yaqui Tribe appeals to the Appellate Court of the Pascua Yaqui Tribe from the judgment entered in this action by the Pascua Yaqui Tribal Court on May 6, 2019, by order of the Honorable Judge Melvin Stoof. *See* Attachment A.

At the pretrial conference, the trial court erred when it ruled that the prosecution was required to prove the Defendant's status as a non-Indian in criminal, domestic violence case where the tribal court has jurisdiction pursuant to 25 U.S.C. § 1304 (Violence Against Women's Act). In so ruling, the court adopted a defense proposed jury instruction which listed a defendant's non-Indian status as a necessary element of domestic violence under the Pascua Yaqui Tribal Code. *Id.* In so ruling, the court indicated that its ruling was consistent with this Court's ruling in *PYT v. Jaimez*, CA-17-005 (PYT Ct. App. Jul. 20, 2018). However, an examination of this Court's opinion in that matter shows that this Court declined to address the aforementioned issue on the grounds that the defendant's conviction at trial rendered the issue moot. Accordingly, the trial court abused its discretion when it ruled that a defendant's non-Indian status is a statutory element of his offense.

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1 Pursuant to the Pascua Yaqui Rules of Criminal Procedure, the Tribe does not have a right
2 of appeal following completion of a criminal case. *See* 3 PYTC § 2-3-90(G). In cases where the
3 Tribe requires reconsideration of a decision made by the trial court, the Tribe, should it seek a
4 remedy, may only do so pretrial, or prior to the termination of trial. 3 PYTC § 2-3-260(D). *See*
5 *also* *PYT v. Stoof ex rel Lopez*, CA-18-001, p.1-2 (PYT Ct. App. Oct. 2018) (discussing the ability
6 of the prosecution to pursue “special action” relief).

7 The Tribe appeals the Court’s decision for the aforementioned reasons. The Pascua Yaqui
8 Tribe respectfully requests oral argument and a three-justice appellate proceeding. The Tribe
9 further requests an order for the Tribal Court to prepare and submit the record to the Court of
10 Appeals.

11 **RESPECTFULLY** submitted this 8 day of May, 2019.

12 **RESPECTFULLY** submitted this 6th day of May, 2019.

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16
17 Oscar J. Flores
18 Chief Prosecutor

17 Coleen Thoene
18 Deputy Prosecutor

19
20 **ORIGINAL of the forgoing filed**
21 **this 8 day of May, 2019.**

22 Clerk of the Court
23 Pascua Yaqui Tribal Court

24 **Copy of the foregoing**
25 **delivered/mailed/provided to:**

26 Annamarie Valdivia, Melissa Acosta
27 Public Defender
28 *Attorney for Defendant*
29

30 By: _____

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ATTACHMENT A

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE)
Plaintiff,)
Vs.)
GRACIA, JR., VICTOR MANUEL)
Defendant.)

CASE NO. CR-19-144

PRE-TRIAL HEARING ORDER
AND ORDER SETTING JURY TRIAL

On May 6, 2019, the defendant, Victor Manuel Gracia, Jr., in custody, appeared with his attorney, Annamarie Valdivia, for a pre-trial conference and Coleen Thoene appeared for the Tribe.

The parties provided all proposed jury instructions, proposed questions for voir dire, and both sides designated the witnesses who are likely to appear for trial. The court should order that the Tribe advise the defendant, and that the defendant also advise the Tribe at least 24 hours prior to the Jury Trial date, of all witnesses whom they intend to call and those they intend not to call. The matter should be maintained on the jury trial docket for May 21, 2019 at 9:00 a.m., and it is anticipated to last three days.

The court should adopt the Tribe's proposed juror questionnaire in its entirety, and the Tribe should draft the questionnaire for the court.

As to the jury empanelment script, the court adopts the Defendant's # 3 to include "3 days" and #7, which includes the names of both Ms. Valdivia and Ms. Hollie C. Holguin. The Tribes # 27 should be adopted to include reference to crime victim. On The Tribe's page 15, the sixth paragraph should read "three days" as to anticipated trial length. The Tribe should draft changes

The court adopts the defendant's proposed jury instructions, and will reserve on defendant's # 23, Self Defense, #25 Non-Justification for Threat or Use of Physical Forces, and # 26, Lost, Destroyed or Unpreserved Evidence, (Willetts), dependent on testimony supporting the instruction. The court adopts defendant's # 18, and 19, and #18 shall be changed from "Has" to "had" in reference to the relationship in the last paragraph. The court adopts the defendant's instruction no. 20 as to element which include the defendant's status as

1 a non-Indian and the alleged victim's status as an Indian, consistent with the Pascua Yaqui
2 Court of Appeals' ruling in Case No. CA-17-003, PYT V. Frank Jaimez, Trial cased no. CR-
3 16-236. The defendant's counsel shall make such changes to the instructions.

4 The court finds that the defendant's motion in limine should be granted for allegations
5 1 through 3, and as to 4 exclusion of witnesses, the court will post its standard exclusion of
6 witness notice to be place on the courtroom door immediately prior to trial. The court should
7 order that both parties provide a list of those witnesses they intend to call and who will not be
8 called as a witness to be delivered no later than May 20, 2019 at 8:00 a.m..

9 The court should adopt the Tribe's Verdict form, to add in Question One "is or was,"
10 instead of only is.

11 The parties have also stipulated that the Tribe's prosecutor should advise the
12 defendant as to which "priors" of defendant may be used by the Tribe. The Tribe will file its
13 response by 5:00 p.m. on May 8, 2019, as to which priors may be used and for what purposes.

14 The court should grant the stipulation to deliver Mr. Gracia, Jr.'s civilian clothes on
15 May 20, 2019 by 5:00 p.m., so that he may come to court without prison garb, shackles, or
16 restraints when the jurors convene.

17 **IT IS ORDERED** that the defendant's request for a jury trial is granted, for good
18 cause shown, and **the case shall be maintained for a jury trial on May 21, 2019, at 9:00**
19 **a.m..**

20 **IT IS FURTHER ORDERED** the court adopts all findings above by reference and
21 makes them part of its order. The defendant shall be released on all prior release conditions.

22 **THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.**

23 **SO ORDERED THIS 6th DAY OF MAY, 2019.**

24 Cc: Date: 05-06-19
25 Tribe Defendant Counsel
26 [Signature]
27 Clerk

