

16 Am. Tribal Law 81, 15 CCAR 01, 8 CTCR 01  
Colville Tribal Court of Appeals.

Andre Pierre PICARD, Appellant,  
v.  
COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP18-016

Decided January 29, 2020

### Synopsis

**Background:** Defendant was convicted in the Tribal Court of disobedience of a lawful court order, attempt to commit disobedience of a lawful court order, battery, interfering with a 911 call, and theft, and sentenced 1,080 days in prison with 260 suspended and five years of probation. Defendant appealed.

**[Holding:]** The Court of Appeals, Pouley, J., held that Tribal Law and Order Act (TLOA) did not prohibit sentencing defendant in excess of 365 days.

Affirmed.

**Procedural Posture(s):** Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (12)

#### [1] Indians Indian civil rights laws

Whether a sentence of over 365 days violates the Indian Civil Rights Act as amended by the Tribal Law and Order Act (TLOA) is a question of law that is reviewed de novo. 25 U.S.C.A. § 1301 et seq.

#### [2] Indians Indian civil rights laws

##### Indians Sentence and Punishment

The Tribal Law and Order Act (TLOA) restricts the Colville Tribal Court from issuing a total sentence in one case stemming from multiple criminal law offenses to over 365 days in jail.

#### [3] Indians Indian civil rights laws

The Tribal Law and Order Act (TLOA) has no mechanism for approval of tribal judicial or legislative changes to their law; there is no provision in TLOA that states a tribal legislature must adopt the provisions. 25 U.S.C.A. §§ 1302(a), 1302(c).

#### [4] Indians Indian civil rights laws

The Tribal Law and Order Act (TLOA) does not have to be adopted; it is substantive law that tribal courts are to apply. 25 U.S.C.A. § 1302(a).

#### [5] Indians Indian civil rights laws

##### Indians Sentence and Punishment

The Tribal Law and Order Act (TLOA), as an amendment to the Indian Civil Right Act, is applicable to consecutive sentencing exceeding one year. 25 U.S.C.A. § 1301 et seq.

#### [6] Indians Government of Indian Country, Reservations, and Tribes in General

Both statutory and caselaw are an exercise of the Tribe's powers of self-government.

#### [7] Indians Indian civil rights laws

The Tribal Law and Order Act (TLOA) requirements are a tribal obligation, both a judicial and a legislative responsibility.

#### [8] Indians Sentence and Punishment

In a criminal case with consecutive sentencing that exceeds one year, the Colville Tribes can meet the Tribal Law and Order Act (TLOA) requirements.

[9] **Indians** 🔑 Sentence and Punishment

Tribes were able, under Tribal Law and Order Act (TLOA), to impose upon defendant convicted of multiple domestic violence offenses a consecutive sentence exceeding one year, specifically 1,080 days with 260 suspended and five years of probation; Tribes provided indigent criminal defense services, had multiple licensed judges with sufficient legal training to preside over criminal proceedings, made criminal laws, regulations, appellate decisions, evidentiary rules, criminal procedure rules, and rules for judge recusal publicly available, and maintained a record of all proceedings. 25 U.S.C.A. §§ 1302(a), 1302(c); CTC §§ 1-1-140, 1-1-143, 1-1-220, 1-1-221, 1-1-222, 1-1-223, 1-1-250, 1-1-322, 1-1-404, 1-2, 1-12-12, 2-1, 2-1-100.

[10] **Indians** 🔑 Indian civil rights laws

**Indians** 🔑 Criminal Prosecutions and Proceedings

The Tribal Law and Order Act (TLOA) does not require a particular format for rules of criminal procedure, criminal laws, recusal of judges or recording of proceedings; rather, as with Indian Civil Rights Act (ICRA), it allows the tribe to decide if those rules are adequate to meet the requirements. 25 U.S.C.A. § 1301 et seq.

[11] **Indians** 🔑 Preservation of error

Defendant convicted of multiple domestic violence offenses failed to preserve for appellate review his argument that Tribes' correctional facility was an insufficient long-term incarceration facility, where defendant raised issue for first time on appeal. 25 U.S.C.A. § 1302(d).

[12] **Indians** 🔑 Preservation of error

The appellate court will not and cannot determine a factual issue raised for the first time on appeal.

\*83 Trial Court Case No. CR-2018-41054

**Attorneys and Law Firms**

Michael Humiston, for Appellant.

Weston Meyring, for Appellee.

Before Chief Justice Anita Dupris, Justice Gary F. Bass, and Justice Theresa M. Pouley

**SUMMARY**

Pouley, J.

Appellant Andre P. Picard was charged with six counts of violation of the Colville Tribes' criminal laws. He was charged with Disobedience of a Lawful Court Order (Domestic Violence), Battery (Domestic Violence), Interfering with a 911 Call (Domestic Violence), Theft (Domestic Violence), and two counts of Attempt to Commit Disobedience of a Lawful Court Order (Domestic Violence). Defendant pled guilty to some counts and was found guilty on two counts. He was sentenced on August 29, 2018 for a total of 1080 days with 260 suspended. The Court imposed five years of probation. Appellant objected to the "stacked sentencing" in which consecutive sentencing for multiple offenses resulted in a sentence of over 365 days as a violation of the federal Tribal Law and Order Act. This appeal arises from the claim that the Indian Civil Rights Act as amended by the Tribal Law and Order Act does not allow sentencing for over one year. For the reasons stated in this opinion, the panel disagrees.

**STANDARD OF REVIEW**

[1] Whether a sentence of over 365 days violates the Indian Civil Rights Act as amended by the Tribal Law and Order Act (TLOA) is a question of law that is reviewed *de novo*.

*Desautel/Randall v. Colville Confederated Tribes*, 13 CCAR 03, 7 CTCR 5 (2016); *Frank v. Colville Confederated Tribes*, 13 CCAR 10, 7 CTCR 07 (2016); *Confederated Tribes v. Naff*, 2 CCAR 50 (1995).

**ISSUE**

Does the Indian Civil Rights Act as amended by the Tribal Law and Order Act of 2010 prohibit sentencing in excess of 365 days?

### DISCUSSION

[2] For the fifth time in three years this Court is faced with the question of whether the 2010 amendment to Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 *et seq.*, known as the Tribal Law and Order Act (TLOA), PL 111-211 (2010), restricts the Colville Tribal Court from issuing a total sentence in one case stemming from multiple criminal law offenses to over 365 days in jail. The plain language of TLOA, its legislative history and this Court's application of its principles answers this question.

The TLOA was passed in 2010 as an amendment to the Indian Civil Rights Act, to expand tribal authority in recognition of the fact that the best and most effective intervention to address disproportionate crime in Indian Country is by the Tribes themselves. The opening findings of the TLOA support this conclusion and state: “(a) Congress finds that ... (2) Congress and the President have acknowledged that (A) tribal law enforcement officers are often the first responders to crimes on Indian reservations; and (B) \*84 tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian Country.” 25 USC 2801(a)(2). The more sobering findings of the Act are contained in “5(A) domestic and sexual violence against American Indian and Alaska Native Women has reached epidemic proportions; (B) 34 percent of American Indian and Alaska Native women will be raped in their lifetimes; and (C) 39 percent of American Indian and Alaska Native women will be subject to domestic violence; ...”. 25 USC (a)(5)(A-C). As a result of these grave findings, Congress stated the purpose of TLOA was to empower and expand, not contract, tribal authority.

The purposes of TLOA are in section (b) and state: The purposes of this title are ... (3) to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country; (4) to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women; (5) to prevent drug trafficking and reduce rates of alcohol and drug addiction in Indian country; ...”. 25 USC 2801(b)(3-5). As a consequence of the findings and purpose of TLOA, tribal criminal authority was expanded from its previous limits. The authority of Tribes’ and Tribal Courts’ sentencing authority was expanded for each offense from 1 year in jail and a

\$5,000.00 fine to three years in jail (up to a maximum of 9 years) and a \$15,000 fine.

Although TLOA was intended to expand tribal authority it has had the undisputed effect of applying extra protections to criminal defendants in single cases with multiple offenses when combined sentencing (“stacked”) exceed 1 year. It certainly was unintended and, if section (b) which allows sentencing up to three years and section (c) are read together, that intent is evident. 25 USC 1302 (b) and (c). However, the plain language of section (c) certainly reads otherwise and our Court and other tribal courts (as well as most legal scholars) interpreting this section have read TLOA to require extra efforts to justify sentencing practices that were perfectly permissible prior to its enactment. This unintended effect has been the cause of many tribal court cases about whether sentences can exceed 1 year without the application of TLOA protections.

When a tribe exercises sentencing authority beyond one year, TLOA requires the tribe to meet a variety of requirements. A tribal court can subject a defendant to a term of imprisonment greater than 1 year if the defendant is provided: (1) the right of effective assistance of counsel; (2) indigent defense by a bar licensed attorney; (3) a presiding judge to be licensed by any jurisdiction and to have sufficient training in presiding over criminal proceedings; (4) publicly available criminal laws, rules of evidence, rules of criminal procedure, and rules governing the recusal of judges; and (5) the court maintains a record of proceedings. 25 USC 1302(c)(1-5). Significantly, the tribal courts hearing cases of consecutive sentencing totaling over one year consistently apply the TLOA protections even though the Tribe itself has not “adopted” the three-year sentencing (up to nine years) under tribal statutory law.

[3] [4] TLOA itself has no mechanism for “approval” of tribal judicial or legislative changes to their law. There is no provision in TLOA that states a tribal legislature must “adopt” the provisions. Rather, TLOA is an amendment to the Indian Civil Rights Act that is applicable to any “Indian tribe in exercising powers of self-government”. 25 USC 1302(a). This general applicability is reiterated in section \*85 (c) which states: “in a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year ...”. 25 USC 1302(c). The plain language of the statute and decades of opinions on the Indian Civil Rights Act in our tribal courts

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means that those provisions are applicable to the Tribes. TLOA does not have to be adopted, it is “substantive law” that tribal courts are to apply.

As early as 1984 this Court established that ICRA, and by necessity its amendments, are applicable in tribal criminal proceedings. The Court said:

The Colville Tribal Court has long recognized the rights guaranteed in the ICRA in its criminal cases. To disregard all the other civil rights guaranteed in the ICRA would defeat its dual purposes. “Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.” The “substantial and intended effect” of the ICRA on tribal courts is to change the laws we apply in assessing important personal and property rights of individual members vis-à-vis their tribe and, at the same time, furthering the Tribes' self-government.

*Stone v. Someday*, 1 CCAR 9, 1 CTCR 14 (1984). The Court reiterated this principle in *Desautel/Randall* and said: “It has been long-recognized by this Court that the ICRA is applicable to the Tribes. It is a federal mandate to all tribal governments, incorporating the basic principles of due process and equal protection in the several tribal courts of the nation. We have noted in our cases, too, that tradition and custom mandate a deference to due process standards. *See, e.g. CCT v. Meusy*, 10 CCAR 62 (2011).

Tribal courts have consistently demonstrated they are up to the challenge of interpreting federal law and balancing the rights of tribal criminal defendants properly. This Court in *Davisson v. Colville Confederated Tribes*, 11 CCAR 13, 6 CTCR 04 (2012)(*en banc*) said: “Colville tribal law, with respect to due process and equal protection, right of criminal defendants, has always been protective as, if not more protective, than the federal Indian Civil Rights Act.” The Colville Tribal Court of Appeals particularly has been protective of the rights outlined in the TLOA amendments to the Indian Civil Rights Act.

[5] [6] [7] Our Court has made several important rulings on the applicability of TLOA to Colville proceedings and the requirements that must be met. In *Desautel/Randall v. Colville Confederated Tribes*, 13 CCAR 03, 7 CTCR 5 (2016) the court acknowledged the applicability of TLOA to consecutive sentences for over one year and adopted

the Federal Rules of Evidence to comply with TLOA's requirement that there be publicly available evidence rules. The Court went on to overrule a previous case on consecutive sentencing to the extent it was contrary to that decision. In *Frank v. Colville Confederated Tribes*, 13 CCAR 10, 7 CTCR 07 (2016), the Court applied the *Desautel/Randall* requirements to vacate a judgment without the benefit of the evidence rules. In *Martinez v. Colville Confederated Tribes*, 13 CCAR 12, 13 CTCR 08 (2016), the court applied the *Desautel/Randall* rule and ruled as moot the issue of the sufficiency of the judge's qualifications because the evidence rules used were not then available. In *Carson v. Colville Confederated Tribes*, 13 CCAR 25, 7 CTCR 12 (2017), the court found that the rules of evidence were properly available and thus the requirement of TLOA were met. This line of cases demonstrates clearly that TLOA, as \*86 an amendment to the Indian Civil Right Act, is applicable to consecutive sentencing exceeding one year. The cases also declare that the provisions of TLOA can and are being met through either tribal statutory law or by tribal court caselaw. Both statutory and caselaw are an exercise of the Tribes powers of self-government. TLOA requirements are a tribal obligation, both a judicial and a legislative responsibility.

[8] A general review of the requirements of TLOA demonstrates that the Colville Tribes in a criminal case with consecutive sentencing that exceeds one year can meet the TLOA requirements. The Colville Tribes provides indigent criminal defense services in CTC 2-1-100. The presiding judge was not challenged, but the Colville Tribal Court has several licensed judges that meet the legal requirement of sufficient legal training to preside over criminal proceedings. There are publicly available criminal laws and regulations. CTC 1-1-322 requires copies of the law be publicly available and the Tribes' laws are available online through the Colville Tribes official website. Similarly, Colville Court of Appeals decisions are publicly available in person or through the Colville Court of Appeals website. *Desautel/Randall* adopted the Federal Rules of Evidence which are publicly available<sup>1</sup>. Rules of criminal procedure are available in CTC 1-2 (Rules of Court) and CTC 2-1 (Rules of Procedure for criminal actions). In addition, the Tribes correctly points out these rules are supplemented in many other areas of tribal law including CTC 1-1-140 (Sessions of Court), CTC 1-1-220 to 223 (relating to jurors), CTC 1-1-250 (Subpoenas) and CTC 1-1-404 (Contempt procedures). There are also rules for recusal of the judge in CTC 1-1-143 which is supplemented by Colville caselaw. *See, Peone v. Colville*



*Confederated Tribes*, 13 CCAR 27, 7 CTCR 13 (2017). The final requirement of a record of proceedings is met by CTC 1-12-12 and the longtime practice of Colville tribal courts.

[9] [10] TLOA does not require a particular format for rules of criminal procedure, criminal laws, recusal of judges or recording of proceedings. Rather, as with ICRA, it allows the tribe to decide if those rules are adequate to meet the requirements. This case is not the same as *Desautel/Randall* where as early as 2002, the Court noted a lack evidence rules. Here there is a complete set of criminal procedure rules entitled that in CTC 2-1. Furthermore, Appellant does not challenge a particular criminal procedure rule or the absence of a rule as was argued in *Desautel/Randall*. Appellant does not give even a hint of what criminal procedure rule might be missing. This issue was not raised at the trial court. On its face the rules of criminal procedure and other applicable court rules are sufficient to constitute “publicly available rules of criminal procedure” as required by TLOA.

[11] [12] Appellant makes one final argument. Appellant argues that, without evidence or raising the issue before the trial court, that the Colville Correctional Facility is an insufficient long-term incarceration facility. Although not specified by Appellant, section (d) of TLOA does address sentences. 25 USC 1302(d). Under this section it says a tribal court “may” require a defendant to serve in one of 4 types of facilities. 25 USC 1302(d)(1)(A-D). It also

says the court “may” require the defendant to serve another alternative form of punishment as determined by the tribal court judge. 25 USC 1302(d)(2). Because the Appellant raises this issue for the first \*87 time on appeal, there are insufficient facts to determine the nature of his objection to the facility. This Court will not and cannot determine this factual issue raised for the first time on appeal. (*Williams v. CCT*, 5 CCAR 22, 3 CTCR 22 (1999) “We cannot, nor should be attempt to, address issues that have not been fully developed before the Trial Court.”; *Leaf v. CIHA*, 6 CCAR 53, 3 CTCR 51 (2002) “It is clear that before an Appellant can bring a matter before the Court of Appeals it must be fully litigated at the Trial Court.”; *Finley-Justus v. CCT*, 7 CCAR 11 (2003) “As a general rule issues may not be raised for the first time on appeal.”; and *Wilson v. Gilliland*, 8 CCAR 64, 4 CTCR 29 (2006) “The Tribe moved to strike the argument as an issue improperly raised for the first time on appeal. The Court agreed and entered an order striking the opening brief on September 29, 2004.”

### CONCLUSION

The Appellant's Judgment and Sentence entered on 08-29-2018 is AFFIRMED and this matter is remanded to the Tribal Court for action consistent with this opinion.

### All Citations

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### Footnotes

- 1 Subsequent to this case, the Tribes adopted their own Rules of Evidence on July 18, 2019. It is found at CTLOC Chapter 1-9. Resolution 2019-422. Codified on July 23, 2019.