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CASE DIGEST

United States v. Michael Bryant, Jr.

No. 12-30177

U.S. Court of Appeals for the Ninth Circuit

Opinion Filed September 30, 2014



INTRODUCTION

The recent Ninth Circuit decision in *United States v. Michael Bryant, Jr.* has raised concerns regarding the future use of tribal court convictions in federal proceedings. Due to the decision's potential impact on Indian Country, this case digest is being provided as an overview of the facts and key issues.

IN A NUTSHELL

Michael Bryant, Jr., an Indian from the Northern Cheyenne Tribe in Montana, was indicted for 'domestic assault by a habitual offender' under 18 U.S.C. 117(a), which is a federal recidivist statute that penalizes offenders that commit domestic assault and have at least two prior domestic assault convictions in federal, state, or tribal court. Bryant had two prior tribal court convictions for domestic violence in which he had pled guilty without being appointed counsel and had served some jail time. The legal issues boiled down to whether tribal court convictions obtained without appointed counsel may be used in a subsequent proceeding. If a tribal court does not provide an offender an equivalent Sixth Amendment right to counsel and the offender is convicted, may the tribal court conviction be used later in a federal prosecution? No, according to the Ninth Circuit, subject to an exception for federal statutes that "serve merely as enforcement mechanisms for civil disabilities".

The government had argued that because the Sixth Amendment does not apply to tribal court proceedings, tribal court convictions obtained without counsel are not *actually* in violation of the Constitution, and therefore Bryant's prior tribal court convictions may be used in

subsequent federal prosecutions. Bryant did not dispute that the tribal court convictions did not violate the Constitution. The crux of Bryant's argument however was that because his tribal court convictions *would have been* unconstitutional had they been obtained in state or federal court, they may not be used to prove his guilt in a subsequent federal prosecution. The Ninth Circuit sided with Bryant and dismissed the indictment.

BATTLE OF THE CIRCUITS



This decision pits the Ninth Circuit squarely at odds with the Eighth and Tenth Circuits. Both the Eighth and Tenth Circuits sided with the government's line of reasoning, holding that uncounseled tribal court convictions *can* be used in subsequent federal prosecutions. The Eighth Circuit in *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011) concluded that so long as a conviction does not violate the Constitution, it can be used in a subsequent proceeding. The Tenth Circuit in *United States v. Shavanaux*, 647 F.3D 993 (10th Cir. 2011) similarly reasoned that because the Sixth Amendment does not apply in tribal court, using an uncounseled tribal court conviction in a subsequent prosecution cannot violate the Sixth Amendment. As the Ninth Circuit noted, "the

Supreme Court has never addressed whether a conviction obtained in a forum not governed by the Constitution under procedures that do not comport with the Sixth Amendment right to counsel may be used in a subsequent prosecution.” Given the fact that there is now an obvious conflict between the circuits, which the Ninth Circuit expressly recognized in its decision, it should be only a matter of time before the Supreme Court weighs in.

SORNA IMPLICATIONS

The Ninth Circuit did recognize an exception for federal statutes that “serve merely as enforcement mechanisms for civil disabilities”. SORNA would most likely be found to fall under this exception. The criminal penalties imposed under SORNA for failure to register could serve merely as a means to enforce a civil disability: registration. The Ninth Circuit cited the Supreme Court case of *Lewis v. United States*, 445 U.S. 55 (1980), which carved out this exception. The defendant in *Lewis* was convicted under a statute that makes it illegal for a felon to possess a firearm. The defendant’s underlying uncounseled felony conviction was used to prove the element that the defendant was a felon. The Court concluded that the defendant’s prior uncounseled conviction may be used in a subsequent prosecution because the conviction was providing a basis for imposing only a firearms prohibition, which is an “essentially civil disability” that was “enforceable by a criminal sanction”. Similarly, in a failure to register prosecution a prior uncounseled tribal court sex offense conviction can arguably be used because the conviction is providing a basis for imposing only a registration requirement, an “essentially civil disability” that is “enforceable by a criminal sanction”.

POLICY CONSIDERATIONS

Given the split between the circuits, should tribes be encouraged to adopt tribal court procedures that comport with the Sixth Amendment right to counsel? Many tribal courts do afford the accused the right to counsel, albeit the right to hire counsel. This falls short however since the Sixth Amendment affords an indigent accused the right to an appointed counsel. Of course this opens up issues of not only a lack of funding and resources, but also respecting tribal sovereignty. Ironically, 18 U.S.C. 117(a) was enacted to help combat domestic violence in Indian Country by penalizing habitual domestic violence offenders. This decision however significantly undermines that effort by essentially foreclosing the use of tribal court convictions to prove the requisite predicate offenses. As the concurring Judge chided, the decision

seems to be “denigrating the integrity of tribal courts”. It isn’t really a question of reliability as uncounseled convictions in state and federal court can be used in certain situations. Ultimately, “the implication is that if the defendant lacks counsel, tribal court convictions are inherently suspect and unworthy of the federal courts’ respect.” Perhaps affording indigent suspects accused of particular crimes, such as domestic assault and sex offenses, with the right to an appointed counsel may prove to be more manageable. At a minimum, continuing to encourage a best practices for maintaining tribal court records is critical. After all, it was not even clear whether Bryant had served jail time for his prior tribal court convictions! As the Supreme Court has held, the Sixth Amendment right to counsel is only triggered when imprisonment is *actually* imposed. The government in oral arguments explained that they felt they had to concede this critical point because the tribal court records were unclear. This case would have had an entirely different outcome had it been shown that Bryant did not actually serve any jail time.