STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARRY BUSTER BOWEN,

Defendant-Appellant.

UNPUBLISHED
October 11, 1996

Nos. 185415; 189441
LC No. 94-6024-FC

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

PER CURIAM.

Defendant pleaded guilty to third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and was sentenced to six to fifteen years' imprisonment. Defendant appeals as of right. The only question presented on appeal is whether the trial court erroneously concluded that defendant is not an "Indian" for the purposes of 18 USC 1153. We conclude that the court did err and, therefore, that the State of Michigan lacked jurisdiction to prosecute defendant for the instant sexual assault.

We review jurisdictional rulings de novo. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995).

Defendant argues that the jurisdiction to prosecute him for the instant sexual assault lies exclusively with the federal government, pursuant to 18 USC 1153, which provided at the time of the commission of the offense as follows:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [18 USCS §§ 2241 et seq], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons

* Circuit judge, sitting on the Court of Appeals by assignment.

committing any of the above offenses, within the exclusive jurisdiction of the United States.

This statute is to be afforded a broad construction and should be construed to favor Native Americans. *St Cloud v United States*, 702 F Supp 1456, 1462 (D SD, 1988).

In order to prosecute under 18 USC 1153, it must be established, as a jurisdictional requisite, that an "Indian" committed one of the enumerated crimes against another Indian, or any person, within Indian country. *United States v Torres*, 733 F2d 449, 453-454 (CA 7, 1984). The United States Congress has not defined the term "Indian" for purposes of establishing criminal jurisdiction. *St Cloud*, *supra*, 702 F Supp at 1460. Nevertheless, the courts have developed a two-part test to determine whether a person is an Indian for purposes of federal criminal jurisdiction. The first part of the test is whether the person has some Indian blood; the second part looks to whether the person is recognized as an Indian by a tribe or the federal government. *United States v Driver*, 755 F Supp 885, 888 (D SD, 1991), aff'd 945 F2d 1410 (CA 8, 1992); *St Cloud*, *supra*, 702 F Supp at 1460, 1461. The second part of the test involves the evaluation of four factors. The first factor is whether the person is enrolled in a tribe. This is the most important factor, *Driver*, *supra*, 755 F Supp at 888; *St Cloud*, *supra*, 702 F Supp at 1461, but it is not necessarily determinative, *Driver*, *supra*, n 7; *St Cloud*, *supra*. The second factor is whether the government has, either formally or informally, provided the person with assistance reserved only to Indians. The third factor is whether the person enjoys the benefits of tribal affiliation. The fourth factor is whether the person is socially recognized as an Indian through living on a reservation and participating in Indian social life. *Driver*, *supra*, 888-889; *St Cloud*, *supra*.

Defendant satisfied the first prong of the test. The evidence established that defendant is one-half Ottawa Indian. Accordingly, defendant has Indian blood.

With regard to the second prong, the first question to be answered is whether defendant is enrolled in a tribe. This question must be answered in the negative. The evidence established that defendant was not a member of a federally-recognized tribe at any time pertinent to a jurisdiction determination.

With regard to whether the government has provided defendant with assistance reserved only to Indians, the evidence established that defendant received some assistance from various governmental entities, including schooling on the Bay Mills Indian Community Reservation, placement in Indian foster care homes licensed through the Michigan Indian Child Welfare Agency (MICWA), adoption through the Keeweenaw Bay Indian Community tribal court, and the provision of services through the Tribal Social Services Department. However, the evidence does not establish how much, if any, of this assistance had federal origins. Moreover, the circumstances under which defendant left an Indian boarding school suggests that he was denied some degree of federal assistance because he was not recognized as an Indian by the federal government.

With regard to the third factor, a person is shown to enjoy the benefits of tribal affiliation where it is shown that he or she benefited from various programs offered through the Indian tribe, such as a

tribal alcohol abuse treatment and counseling program and a tribally-administered employment program. *St Cloud*, *supra*, 702 F Supp at 1462. The evidence established that defendant attended school on the reservation, that defendant's adoption was handled by a tribal court, that defendant was involved with the tribal courts and the Tribal Social Services Department as a result of the commission of criminal offenses as a juvenile and that defendant was placed in several licensed foster homes through MICWA.

With regard to whether defendant enjoyed social recognition as an Indian, the evidence established that defendant enjoyed such recognition as reflected by the fact that he lived on a reservation, attended school on the reservation and participated in a variety of social and cultural activities with members of defendant's adoptive father's tribe.

The four factors analyzed above lead us to the conclusion that while defendant failed to establish that he was recognized as an Indian by the federal government, he did establish that he was recognized as an Indian by a tribe. *Driver*, *supra*, 755 F Supp at 888; *S. Cloud*, *supra*, 702 F Supp at 1460, 1461. The evidence demonstrated that defendant's adoptive father's tribe informally recognized defendant as an Indian and invited his participation in social and cultural aspects of tribal life. Defendant's lack of membership in a federally-recognized tribe is not fatal. *St Cloud*, *supra*, 702 F Supp at 1461. Accordingly, we find that defendant satisfied the second prong of the two-pronged test.

We conclude, therefore, that defendant is an Indian within the meaning of 18 USC 1153(a). For that reason, the State of Michigan lacks jurisdiction to prosecute defendant for the instant sexual assault. Any prosecution must be brought by the federal government, which has exclusive criminal jurisdiction in this matter. Defendant's conviction must be reversed and his sentence vacated.

Reversed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak